WORKSHOP

The Legal Protection of Underwater Cultural Heritage

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FINAL REPORT

MARITIME INSTITUTE – GHENT UNIVERSITY
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1. Biography Guest Speakers

OLE VARMER (United States)

Ole Varmer started his legal career in 1981 working as a legal assistant at several law firms. In 1987, he graduated from Yeshiva University's Benjamin Cardozo School of Law. After that, he joined the Department of Commerce, Office of General Counsel. In 1990, he moved to NOAA's Office of General Counsel, where he became lead attorney in establishing a number of National Estuarine Research Reserves and National Marine Sanctuaries. He has been serving in his current position in the NOAA GC International Section since 1998. As an attorney-advisor, he works on a variety of international issues and is primarily responsible for providing advice on the subject areas involving heritage resources, marine spatial planning, marine protected areas, jurisdiction and maritime zones.

PROF. DR. SARAH DROMGOOLE (United Kingdom)

Sarah Dromgoole is Professor of Maritime Law at the School of Law, University of Nottingham. She teaches a range of subjects including the International Law of the Sea. Sarah first became interested in the field of law and underwater cultural heritage in the mid-1980s when she wrote an undergraduate dissertation on the topic, which was later published in the *International Journal of Marine and Coastal Law*. Her PhD, awarded by the University of Southampton in 1993, built on her undergraduate work by looking in detail at the UK's legislative framework for underwater cultural heritage and making proposals for its reform. In the years since then, Sarah has published extensively in the field and has increasingly focused on comparative and international law aspects. She has edited two well-known collections of national perspectives on the subject and has authored a substantial monograph on *Underwater Cultural Heritage and International Law*. Sarah is a member of Historic England's Historic Wrecks Panel, the British Academy/Honor Frost Foundation Steering Committee on Underwater Cultural Heritage and the Joint Nautical Archaeology Policy Committee. In 2014, Sarah was elected to the Society of Antiquaries of London, an ancient learned society, in recognition of her contribution to the field of underwater cultural heritage protection.

PROF. DR. MARIANO J. AZNAR GOMEZ (Spain)

Mariano Aznar has been a Professor in the field of Public International Law at the University Jaume I of Castellón in Spain since 2008. Before this, he worked as a Professor at the University of Valencia. He wrote his doctoral thesis on the verification of disarmament treaties (1994). Dr. Aznar Gómez has been a visiting Professor in the University of the Balearic Islands (1995), the University of Naples "Parthénope" (2004), the Université de Paris II–Panthéon Assas (2005) and in the University of Rome "Tor Vergata" (2007). He has also been a visiting scholar at the Lauterpacht Research Centre for International Law of the University of Cambridge (2000). He was a founder member of the European Society of International Law (ESIL) and served on the board from 2004 until 2012. Since 2013, he has been Editor-in-Chief of the *Spanish Yearbook of International Law*. Dr. Aznar Gómez's main research focuses are international responsibility of States, disarmament, maintenance of international peace and the security and protection of underwater cultural heritage. He has published four monographs and au-

thored numerous scientific articles. He contributed to the Commentary on the UN Charter, the Commentary on the ICJ Statute and the Commentary on the Vienna Convention on the Law of Treaties. As co-author of the *Green Book* for the *Protection* of the *Spanish Underwater Cultural Heritage* (2010), he is a legal expert on the protection of underwater cultural heritage, acting both for the Spanish government and for UNESCO. He is an advocate and counsel of the Kingdom of Spain before the International Tribunal for the Law of the Sea. During the Meeting of States Parties of the UNESCO Convention on the Protection of the Underwater Cultural Heritage, he represented Spain and participated in the drafting of the Operational Guidelines of this Convention and the new Spanish Law on Maritime Navigation. He is also a patron of the National Museum of Underwater Archaeology.

DR. BIRGITTA RINGBECK (Germany)

Birgitta Ringbeck graduated in history of art, archaeology and ethnology in Muenster, Bonn and Rome. Her doctoral thesis was on the Baroque architect, Giovanni Battista Soria, from Rome. From 1988 to 1990, she worked on a research project at the Regional Association of Westphalia-Lippe. From 1990 to 1997, she was Head of Department of Preservation of Regional Traditions and Culture at the NRW-Stiftung, a foundation for the protection of nature, regional traditions and culture in Dusseldorf, Germany. Between 1997 and 2012, she was the director of the Supreme Authority for the Protection and Conservation of Monuments at the Ministry of Construction and Transport in North Rhine-Westphalia and between 2002-2011, she was the delegate of the Standing Conference of the Ministers of Education and Cultural Affairs of the Länder in the Federal Republic of Germany at the UNESCO World Heritage Committee. Since January 2012, she has been the cultural expert in the German Delegation to UNESCO´s World Heritage Committee. Additionally, Ms. Ringbeck is a member of the World Heritage Committee, as well as of the Council of ICCROM and the German Commission for UNESCO, the German World Heritage Foundation, ICOMOS, ICOM and TICCIH. Her publications include papers on architecture history, monument conservation and the UNESCO World Heritage Convention.

ANDREA KLOMP (The Netherlands)

Andrea Klomp studied archaeology of the Roman era at the University of Amsterdam from 1988 until 1992. Since finishing her master's degree, she has worked for the Cultural Heritage Agency in different functions. Since 2002, she has been working as a senior policy advisor. In that capacity, she has been involved in heritage policies and legislation for underwater cultural heritage. Andrea represents the Ministry of Culture, Education and Science in the Interdepartmental Committee on Dutch Shipwrecks Abroad, which deals with shipwrecks of the Dutch East India Company all over the world. Currently, she is participating in a working group that is investigating whether the Netherlands should ratify the UNESCO Convention on the Protection of the Underwater Cultural Heritage.

THARY DERUDDER (Belgium)

Thary Derudder obtained her master's degree in Law at the University of Ghent in 2012. During her studies, she did a one-month internship at the Flemish-European Liaison Agency in Brussels. In 2013, she obtained the diploma 'Advanced Master of Laws in International and European Law' at the Free University of Brussels. Since July 2013, she has been working on her PhD at the Department of European, Public and International Law under the guidance of her promoter, Prof. Dr. Frank Maes. Her research deals with the legal protection of underwater cultural heritage in the North Sea. She is also participating in an IWT-research project, the so-called SeArch project. This project aims to develop an efficient assessment methodology and approach towards a sustainable management policy and legal framework in Belgium for the archaeological heritage in the North Sea.

2. Presentation Session

Ole Varmer provided a brief overview of the international and US law developed to address the threat to underwater cultural heritage (UCH) from treasure hunters using the law of finds and salvage. After highlighting the duty to protect UCH and to cooperate for that purpose under article 303(1) of the Law of the Sea Convention (LOSC), he provided several examples of US practice in protecting UCH and cooperating with the foreign flag States in order to protect sunken warship heritage. In addition, he discussed a study on filling the gaps in protecting UCH on the outer continental shelf in a manner consistent with the LOSC. Ole Varmer also referred to a database on UCH, named Ocean Law Search, which can be found at http://coast.noaa.gov/oceanlawsearch/#/ search that contains US Statutes, legislative histories and select cases relied upon in the UCH law study.

While the US has not yet ratified the LOSC, nor the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage (The UNESCO Convention), the US practice has been to comply with these conventions in protecting natural and cultural heritage. The law of finds and the law of salvage have been applied in US case law. The trend over the past couple of decades has been in favour of protecting UCH consistent with federal laws protecting natural and cultural heritage, particularly in sanctuaries and parks. The practice of NOAA and the Department of Interior has been to follow the LOSC duty to protect UCH and to cooperate for that purpose in a manner consistent with the *in situ* preservation policy, and to only authorize recovery consistent with professional scientific standards. This was the case, for example, for the CSS *Alabama*, which lies off the coast of France, and for the French *Labelle*, which lies off the coast of Texas. In both cases the UCH was protected through cooperation between the flag State and the coastal State. Ole Varmer mentioned Annex I of the UNESCO Convention, which generally bans the application of the law of finds and salvage, except when the application implements the Convention as a whole. The US uses its laws protecting natural and cultural heritage to protect UCH in all maritime zones in a manner consistent with the jurisdiction recognized under the LOSC.

Ole Varmer also spoke of the US efforts to protect RMS *Titanic* in cooperation with the UK, France and Canada. *Titanic* being a British flagged vessel, that lies in the High Seas on the extended continental shelf of Canada, that was co-discovered by citizens of France and the United States. The International Agreement on RMS *Titanic* was drafted around the same time as the UNESCO Convention. As a result, the provisions of these two instruments are nearly identical. Ole Varmer emphasized how the cooperation between these countries fulfilled the duty under the LOSC in a manner consistent with jurisdiction under the LOSC, including the coastal State and the flag State jurisdiction. He also mentioned the use of jurisdiction within the territory for trafficking of artefacts taken unlawfully from outside of the territory even in the high seas, such as the *Titanic* site.

Ole Varmer stressed the potential protection of shipwrecks through laws protecting natural heritage, such as through laws protecting the environment that include shipwrecks as a sanctuary or park, (cf. Florida Keys). He also stressed that shipwrecks sometimes can be protected by linking the wreck to a coastal State's duty to protect natural heritage on the continental shelf

and in the Exclusive Economic Zone (EEZ). For example, if a shipwreck is also acting as an artificial reef, as is often the case, then the coastal State could provide notice that the UCH may be protected even against foreign salvors, because the coastal State jurisdiction over artificial reefs extends throughout the entire continental shelf. As an artificial reef, article 303(2) that would normally limit coastal State jurisdiction over activities directed at UCH to the 24 nm contiguous zone, does not apply in that case. Additionally, he believes that UCH can be protected by means of marine spatial planning that would help address threats from activities that may inadvertently harm UCH, such as bottom trawling and the laying of cables and pipelines. Furthermore, the designation of traffic lanes, anchorage areas and no anchorage areas can protect UCH .

Ole Varmer discussed the different United States' acts that can be applied to UCH. He indicated the gaps by stating that the protection of UCH in the EEZ and on the outer continental shelf (OCS) is a patchwork of a few laws protecting natural and cultural heritage and that comprehensive protection is pretty much limited to national marine sanctuaries and monuments. While there have not yet been any trafficking cases involving UCH to date, article 6(c) of the Archaeological Resources Protection Act (1979) may be an important tool for use in the future, particularly if no new laws are enacted. He explained that while the idea of applying US trafficking laws to protect UCH would be limited to artefacts being trafficked in US territory, it could, nonetheless, be one of the enforcement tools that would apply to UCH in the EEZ as well as in the high seas to UCH like *Titanic*. The FBI official that has worked on other trafficking cases using this authority agreed on this and stated that they are now waiting for a UCH case. Ole Varmer finished his presentation by indicating a couple of other ways in which to move forward, i.e., amend the National Marine Sanctuaries Act so it applies to UCH outside of sanctuaries and/or amend the Antiquities Act regulations to clarify that the Antiquities Act applies to UCH on the OCS.

After the presentation of Ole Varmer, there was some discussion on the sovereign immunity of State vessels. Ole Varmer stated that sovereign immunity applies to the wreck, as well as the cargo, even if the cargo is privately owned. This was, for example, the case with the *Mercedes*. There is a benefit to distinguishing the property rights of a ship and sovereign immunity over a ship. Property rights remain with the owner after the vessel has sunk, unless expressly abandoned. As the vessel is a public vessel, it maintains sovereign immunity after it has sunk unless there is a waiver of sovereign immunity. When, for instance, an airplane crashes and the black box falls in the ocean, this box will be entitled to sovereign immunity. Even though the rights and immunities are very similar, a distinction between the two might need to be made when a treasure salvor tries to apply the law of salvage and finds. In this case the *in rem* action against the wreck starts with the fictional arrest of the vessel, often through salvage of an artefact which is then brought into the territorial jurisdiction of the court sitting in admiralty jurisdiction. Under the law of salvage, the owner has the right to deny salvage but may still be responsible to pay a reward for the salvaged artefact. On the other hand, under the principle of sovereign immunity, the wreck is immune from arrest. The case should, therefore, be dismissed, the artefact returned to the owner, and there is no possibility of a reward for salvage. The *Mercedes* case is a good example of how this works in practice: the case was dismissed and the artefacts returned to Spain. Not only was there no reward for salvage, but the plaintiffs were subject to a fine of over one million dollars to help pay the legal fees of Spain.

Sarah Dromgoole gave a good overview of the UK legislation that is applicable for UCH. She mentioned that from 1 April, 2015 onwards "English Heritage" would be named "Historic England".

Unlike many other States, the United Kingdom uses a selective approach to heritage protection. This means that, under UK legislation, not all shipwrecks are preserved as cultural heritage but a number are selected for protection. There are five statutes that relate to the protection of UCH. Under the Merchant Shipping Act (1995), a find must be reported to the receiver, after which the owner will be sought. Under the Protection of Wrecks Act (1973), 64 sites have been designated for protection, dating from the Bronze Age until the 20th century. The third act that was discussed was the Ancient Monuments and Archaeological Areas Act (1979).

Sarah Dromgoole mentioned that, when a heritage is expected to bring valuable tourism revenues with it, it is better to protect it under the 1979 Act than under the 1973 Act. By protecting the heritage under the Ancient Monuments Act, public access on a "look but do not touch" approach is permitted, unlike under the 1973 Act where a licence to 'visit' would be required. The 1979 Act can protect sites in inland waters and in the territorial sea. The fourth act that was discussed was the Protection of Military Remains Act (1986), which allows vessels that were in military service (the term warship is not used) to be designated as a protected place or controlled site. Since the beginning of the millennium, there have been 78 designations. The criteria to designate a vessel include, among others, whether lives were lost, whether the site is being disturbed and whether diving on the site generates criticism from the public. In 2006, there was a case before the Court of Appeal on the merchant ship, SS *Storaa*. In this case, the court was asked to give an interpretation of the notion 'in military service'. Consequently, the SS *Storaa*, an armed merchantman travelling in convoy, was protected under the Protection of Military Remains Act in 2008. The SS *Mendi*, another merchant vessel, in use as a troopship when she sank, was designated in 2009. The final act that Sarah Dromgoole spoke of was the Marine and Coastal Access Act (2009) and its potential to protect UCH. In principle, under this act, among other things the removal of any substance or object from the seabed requires a licence. A list that contains the exemptions to this licence requirement is currently being prepared, which will take into account the legitimate interests of underwater archaeologists and divers. Activities that "incidentally affect" UCH are regulated as well. Finally, Sarah Dromgoole mentioned the Marine (Scotland) Act (2010), which is the Scottish equivalent of the Marine and Coastal Access Act. Under this act, the protection of UCH is linked to the creation of Historic Marine Protected Areas.

Mariano Aznar explained the Spanish legislation and practice concerning UCH. Law 14/2014 of General Navigation includes one article that deals with the rights and duties during navigation with regard to UCH. Under this act, the law of salvage cannot be applied to UCH. Finally, this law also deals with the protection of State vessels that have immunity in Spanish waters, as well as outside of these waters. The sovereign immunity of foreign State vessels that lie in Spanish waters is also recognized. In Andalucía, there is a regional decree on archaeological activities, which has introduced "archaeological preservation zones" to protect UCH. These zones can exist on several levels, the highest being a zone that contains an object of heritage interest.

Mariano Aznar spoke of a number of interesting cases. The first was the *Juno* and *La Galga* case (1997-2000), which differentiates abandonment in the case of commercial vessels and State owned vessels. This case established that wrecks of State vessels enjoy sovereign immunity and can only be abandoned by an express act. He further discussed the *Mercedes* case (2007-2013). This is an interesting case due to the fact that the wreck was situated on the continental shelf of Portugal. Where the US admiralty court used to be a friendly place for salvors, this changed after the above-mentioned case law. The third case that was mentioned was the *Louisa* case, which came before The International Tribunal for the Law of the Sea (2010-2013). Finally, Mariano Aznar spoke of the *San José* case (Panama, 2015), where a salvage agreement was renewed after Panama ratified the UNESCO Convention.

Spain has concluded a number of Memoranda of Understanding (MoU) with other States. The first that was mentioned was the 2010 MoU between Spain and the US. The principles in this agreement are very similar to the ones in the annex to the UNESCO Convention. This is a good way to spread the principles that are embedded in the annex and to link non-party States to the Convention. In 2014, Spain concluded a MoU with Mexico.

Mariano Aznar ended his presentation by stressing the importance of education and outreach.

Birgitta Ringbeck presented on the German legislation on UCH and explained that the German government is planning on ratifying the UNESCO Convention. She mentioned that, in Germany, the 16 Länder are responsible for the protection of cultural heritage, even in the EEZ. In each of the Länder, there is a monuments register that contains data on archaeological heritage and information on buildings and movable heritage. Each of the 16 Länder has legislation on the protection and pres-

ervation of monuments. These laws are very similar to each other. Birgitta Ringbeck stressed certain important elements that are contained in these legislations. These include the lack of a time criterion for the protection of heritage, the duty for owners to maintain the heritage, the application of the cost-by-cause principle, the use of the treasure shelf and the tax reduction for owners of monuments.

As for the ratification of the UNESCO Convention, the current issue is who is responsible for making the lists and which agency is the national focal point. The German government wants the first draft of the law ratifying the UNESCO Convention before the summer. At first, the Legal Department had its reservations but these were overcome after a discussion between experts took place. Now, there is a political interest to ratify.

Andrea Klomp gave an overview of the Dutch legislation on archaeological heritage - starting from the first Monuments Act (1961) and then the second Monuments Act (1988). In the 1988 Monuments Act, there used to be a 50-year time criterion but this was abolished in 2013. Before this abolition, it was clear for divers which wrecks were protected under the Monuments Act. Now, this is no longer the case. The 1988 Monuments Act offers a blanket protection for heritage in the territorial sea and, since 2007, in the contiguous zone. This means that all archaeological finds must be reported and a licence is required to excavate. There are strict requirements in order for someone to obtain a licence for underwater excavation. Such a licence is valid for two years and is not location-bound.

The notion of ownership is strongly embedded in Dutch legislation, entailing that the property rights of archaeological finds will only go to the appropriate government (municipal, provincial or national) if no owner has been found.

The implementation of the Valletta Convention in 2007 gave more responsibilities to the local governments in the field of UCH management. In 2011, there was an inquiry among the municipalities. This demonstrated that only a small number of municipalities have a policy in the field of UCH protection. The maritime programme was created to change this. This programme runs until the end of 2016 and improvement can already be seen. For the sea area, the national government has the responsibility for UCH. In theory, UCH should be easier to regulate than heritage on land, since there is no spatial planning system for the sea. However, the freedom of the seas is deeply embedded. There are a number of sectorial acts that regulate the issuing of permits for certain activities, for example, the Sand Extraction Act. Currently the Sand Extraction Act is, however, the only act where the obligation to make an archaeological assessment can be imposed. Fortunately, under all the acts, there is a duty to carry out an environmental impact assessment.

A new heritage law is being drafted in the Netherlands, which combines six legislative acts and gives a new definition to the term 'excavation'. Under the new legislation, this term will include the removal of UCH from the seabed. Before, 'excavation' was defined as the disturbance of the subsoil (which is not always the case when removing UCH). An excavation licence certificate will be necessary to excavate UCH. Other issues will have to be dealt with when ratifying the UNESCO Convention. It is uncertain whether the UNESCO Convention will be ratified by the Netherlands anytime soon because some people argue that there is an inconsistency with the LOSC.

Thary Derudder explained the Belgian legislation regarding the protection of UCH. She spoke of the new law on the Protection of Underwater Cultural Heritage of 2014, which implemented the UNESCO Convention. She indicated that one of the reasons why legislation on this topic was only made last year is the specific Belgian competence division between the federal government and the governments of the Communities and Regions. She discussed how UCH is being protected under the 2014 law and stated that, at that time, three wrecks were already designated as UCH. Thary Derudder further clarified in what way and to what extent this legislation implements the provisions of the UNESCO Convention and indicated where improvement still is possible. Finally, the protection of UCH under the 2014 Marine Spatial Planning Royal Decree was discussed.

3. Discussion Session

The Accidental Discovery of Objects with a Cultural, Historical or Archaeological Value During Works at Sea

The first question that was raised during the discussion was related to the Marine and Coastal Access Act of the United Kingdom. In this act, provisions on dredging can be found. The question posed in the discussion was what would happen if there were a controversy between dredging activities and the protection of an object of cultural/ historical value that is lying at the location where the dredging must take place. Sarah Dromgoole replied that there is a close relationship between the dredging companies and the archaeologists. A protocol has been made between these two groups, which would allow them to come to a decision in such circumstances. As for who would have to give in in the end, Sarah Dromgoole answered that it would be an archaeology matter and that the dredging companies do take the archaeologists seriously. Eduard Somers asked who would pay the costs for that. Andrea Klomp explained that in the Netherlands, the polluter pays principle is used. If a shipwreck with a historic value is threatened by spatial developments and an excavation needs to take place, it is the initiator of a project who has to pay for the costs under the polluter pays principle. This is, of course, a very good incentive to try to go around the wreck, since this would save the initiator a lot of money. This obligation is directly imposed by the public authorities on the dredgers. On the other hand, when nothing was found during the preliminary assessment and a discovery is made during the project, the disturber will not have to pay for this. He does have the obligation to report this discovery.

Andrea Klomp further clarified that, in the Netherlands, the same legislation applies to both the dredging of shipping lanes and other dredging activities.

Ole Varmer and Birgitta Ringbeck explained that the polluter pays principle in the United States and Germany applies as well if you find an object of cultural importance during dredging activities. The dredger then has the responsibility to remove it and bear those extra expenses.

Ole Varmer subsequently clarified how this generally works in the permit, lease or authorization process (see below). Marnix Pieters asked whether it is the dredger himself who pays for the costs or the authority that ordered the dredging work. Andrea Klomp answered that it is the applicant for the permit who must cover the additional costs. This can be the dredger but not necessarily. If the port authority of Rotterdam wants to have a channel dredged, there will be a dredger doing the work but the port authorities are the ones that will apply for the permit. Thus, the person who is initiating (and funding) the project. Sarah Dromgoole added that it is possible to shift the allocation of these costs in the contract that is concluded between the parties.

Mariano Aznar stressed the importance of a heritage impact report. If you have a sound knowledge in advance of what you will most probably find in the area that you are dredging in, you can adjust the costs. In Spain, certain problems were experienced in relation to this. For example, the heritage impact reports were being made by archaeological enterprises that are accustomed to working on land and not under water. As

a result, they often come to the simple conclusion that no objects can be found in the area that is meant for dredging. However, if then, suddenly, a Venetian wreck is found that must be removed, that will not be the responsibility of the State but of the person that said that no heritage could be found in that area. Mariano Aznar further clarified the situation in Spain. If you want to conduct an activity, for example, build a windmill in the Spanish territorial sea, you will first need to have a look at the spatial planning to see in which maritime zones your activity can be allowed. Then, you must submit an environmental impact assessment, as well as a heritage impact report, to the Spanish authorities. In the case that, during the installation process, an object is found, there cannot be a discussion about who must bear the costs. The company that gave the impact report to the authorities, convincing them that no heritage can be found in that particular zone, will be held responsible.

Frank Maes pointed out that, when drafting an environmental impact assessment, you can only assess what you know and not what you do not know. There are always situations that you cannot foresee and these will not be mentioned in your environmental impact assessment. Mariano Aznar agreed with this and added that the limits of your know-how need to be assessed. It is possible that you draft a good heritage impact report and that an object is, nevertheless, found. In most cases, however, the idea of making a good heritage impact report to avoid unexpected finds will work in favour of the person who is working in the assessed area.

Frank Maes added another aspect to the discussion by asking who bears the costs in case the work must be interrupted for a couple of months because an object of interest is found that the authorities wish to further investigate? Who will pay for the additional costs, such as a loss of income and costs for research? Jeroen Vermeersch pointed out that there was an interesting example of this in the harbour extension project of Rotterdam. He indicated that archaeologists have been working together with the port authorities in this project. This demonstrates a willingness from the port authorities to take UCH into account. Frank Maes replied that willingness is not the issue that he is talking about but rather, the problem of how to enforce it and what the consequences are, once a decision has been made. He asked whether, in the case of the Maasvlakte II, the agreements were dealing with habitat protection as well or merely with UCH. Andrea Klomp replied that the agreement concluded with the port authorities was based purely on heritage and that the environmental impact assessment and the sand extraction permit that the harbour needed, formed the legal basis. It was determined that archaeological research had to be carried out. In the Netherlands, preliminary research must be executed based on the permit that is given. In this permit, additional demands can be included on what kind of archaeological research you want the applicant of the permit to do. If unexpected objects are found that were not mentioned in the permit, the dredger will not be obliged to do additional work. In this case, it will be a matter of negotiations. Jeroen Vermeersch asked whether paleontological finds were also included in the agreement with the port authorities. Andrea Klomp replied that these types of finds were not included in the beginning but in the end, they were taken into account. The reason for this was that the developer was convinced that taking archaeological and palaeontological finds into account can entail good publicity. A port authority with a social responsibility is very sensitive to this argument and wants to convey the message that it is an organization that takes care of the environment and heritage. There may be other developers that do not have the same attitude. Nevertheless, it is important that we try to convince potential disturbers to handle the archaeological heritage in a responsible way, not only by walking the legal track but also the social responsibility track, and make them realise that you can get very good publicity from archaeological research.

Eduard Somers gave a critical remark, stating that postponing access to the port of Rotterdam for big containerships would cost them millions. Therefore, it is very likely that, when a find is discovered, the port authorities will keep it a secret and destroy the find. Andrea Klomp disagreed with this and explained that the Dutch Cultural Heritage Agency has invested in its relationship with the port authorities for many years. If an object is found, they inform the Heritage Agency of this, in the knowledge that a reasonable solution will

be found that does justice to both the heritage interest and the interest of the Port authorities. Andrea Klomp mentioned an example from the Yangtze harbour where a number of interesting sites were found. One of them was right in front of one of the busiest container terminals of Europe. Through negotiations, it was then decided that research was not to be conducted on that site but on another one that would cause less hinder for shipping. So, in this case, the solution was that one object was lost but another one was gained.

Birgitta Ringbeck mentioned that if a company in Germany, for example, wants to build a windmill in the EEZ it will find a requirement in its permit that states that it has to pay for scientific research, for instance, with regard to marine archaeology. In Westfalen, this is limited to 2% of the whole budget. Mariano Aznar added that it is a question of cost-efficiency. It is important to convince companies to make a very accurate impact assessment, rather than to do the minimum - see what happens when something is discovered and then try to convince their government or regional agencies to share the costs. Generally speaking, in Europe, nobody thinks about doing anything in the sea without a very accurate and sound environmental report. Let us do the same for heritage.

Frank Maes stated that, up until that point in the discussion, the experts had mainly spoken of port extension, which falls under land regulations. On land, there is no problem. However, imagine that you are at sea and a dredging company that is working for a future offshore windfarm makes a discovery and the works must be stopped. Since the dredging company would have to pay for this, the concern of Frank Maes is that the dredging company will not report anything. They will want to avoid the costs. From a law perspective, how can we accommodate this? Can we expect that the authorities will pay for this?

Mariano Aznar addressed this concern and explained that, under Spanish legislation, a permit is not simply given but that there is an ongoing investigation. In all phases of the project, the company must submit archaeological reports. On top of this, it is possible that an inspector from the heritage authorities is on board of the vessel that is conducting the works. In every single phase of the project, the heritage aspect must be reviewed, as is also the case on land. Frank Maes stated that it is easier to control this on land. He asked whether there is someone with expertise in UCH on board of the vessel continuously. Andrea Klomp and Mariano Aznar replied that this is not the case as it would nearly be impossible. Frank Maes pointed out that, under the Belgian legislation, the duty to monitor exists but that there are no provisions on the potential discovery of UCH in the legislation. Ole Varmer explained that, in the United States, the environmental impact assessment is supposed to address the potential impact that an activity might have on natural and cultural heritage. This may be based on surveys that should reveal potential sites for UCH. The permit or authorization will generally provide that the permittee has the responsibility to report unexpected finds. It then has the duty to cease its operations in case of an unexpected find and enter into negotiations on what to do with the find. There is periodic monitoring and if a company does not report such an unexpected find, it can be prosecuted, sanctioned and would not be able to get another contract with the government ever again. Therefore, if a company destroys heritage that it comes across, and evidence of this is found during the periodic monitoring of the site, the company owners risk losing their entire business. This is a good incentive for companies to comply with their reporting duty.

Marnix Pieters mentioned that all of this remains a difficult issue and that, therefore, in Belgium, a lot of money is being invested in developing a good methodology to evaluate the seabed. The more one knows beforehand, the better the heritage assessment will be. Ole Varmer illustrated this by giving the example of the Bureau of Energy Management in the United States that gets a lot of money and royalties from the oil and gas industry. Part of this money is used for research on maritime cultural landscapes, so that better information on the region and whether it might contain Native American resources and shipwrecks is available. This offers a good baseline for making heritage assessments and furthers the collection of information that should help avoid or minimize accidental finds.

Eduard Somers pointed to an inconsistency between contract law in general and what has been discussed.

Under contract law, if there is an unintended cost, you will be able to avoid bearing this cost. However, in the examples that were discussed earlier, this does not seem to be the case. Ole Varmer replied that he would not call the agreements that were discussed above contracts but rather, they are licences or lease agreements. We are not talking about two mutual parties that conclude an agreement. A company will not obtain access to oil, gas or wind energy development unless it agrees to the terms and conditions that are set forth in the licence. These terms and conditions include that any accidental finds must be reported and they clarify who bears the burden in the case of such a find. Eduard Somers agreed but stated that this is the case under a lease system. Under a simple contract, for instance, for a dredger to dredge the Schelde, if a medieval ship is found and this is not in your budget, the dredger will be bankrupt. Andrea Klomp gave the example of how this issue was dealt with for the harbour extension of Rotterdam. On the one hand, they had a public permit in which the archaeological preconditions were mentioned and on the other hand, the port authority had a private contract with the dredger, which stated that if the dredger came across anything of archaeological value, he would have to report this. If the dredger did this, the additional costs would be borne by the port authorities. However, if he did not report this and the heritage agency found out, the costs should have been borne by the dredger. This could be monitored because dredging vessels have black boxes on board that register any object that comes into the dredging machines, causing the vessel to stop. Afterwards, these boxes are checked and the dredger must explain any irregularities that took place. Frank Maes stated that, in Belgium, the system of black boxes also exists but it took three years to convince the authorities to check them. Marnix Pieters added that there is a person on board of Belgian dredgers 24 hours a day. This is someone of the Flemish authorities. Whether this is also the case with big dredgers, such as Jan De Nul, who dredge all over the world, Marnix Pieters could not say with certainty. Frank Maes clarified that the task of this person is to make sure that dredgers correctly record the volume that they have dredged. This is another form of inspection.

MAIN CONCLUSIONS:

- It is important to gain as much knowledge as possible of the seabed, so that a proper heritage impact report can be made, before granting a licence to do works at sea.
- It is important to draft a good heritage impact report before starting works to avoid additional costs and delays in the work.
- Even though, for example, under Spanish legislation, an archaeological report must be submitted in all phases of the project, it remains difficult to control whether a company abides with the rules concerning the protection of UCH.
- In a number of States, such as the United States and Germany, the rule is that, when an object is found unexpectedly, the permit holder and the company that provided the heritage impact report will be responsible for all costs.
- It is important for heritage agencies to maintain a good relationship with port authorities when, for instance, dredging works are being conducted. When an object of cultural importance is found, negotiations should be conducted on how to proceed. It is important to realise that not all heritage that is found near ports can be researched and protected, due to the high costs.
- An interesting idea is that, when a dredging company informs the authorities of a find, the authorities will be responsible for delays and payments. When the company does not inform the authorities of this, it will be responsible for all costs and delays itself. Additionally, the idea that, if a company wants to obtain a permit, it will have to prove good conduct in relation to UCH, deserves to be mentioned.
- A good incentive for companies to report finds at sea during works is to actively prosecute and sanction them when they do not comply with their reporting duty. When, during the periodic control, proof is found of a heritage site that has been destroyed or has not been reported, the company risks never getting another contract with the government again and perhaps even losing its entire business. This system is being used in the United States.

Archaeological Preservation Zones

Eduard Somers asked Mariano Aznar whether the archaeological preservation zones, which can be created through regional decrees in Spain, could only be created in the territorial sea or in other maritime zones as well. Mariano Aznar answered that this can only be done in the territorial sea. He also referred to the possibilities that the Barcelona Convention on the Protection of the Mediterranean Sea; the 1995 protocol on specially protected areas; and the Madrid protocol on coastal integrated zone, offer to implement such kinds of preservation zones, even beyond the territorial sea. The issue is the integration of other States in this system, such as France, Monaco and Italy. As an example, the *Titanic* agreement was mentioned, where representatives of four States indicated a willingness to adopt an agreement to which other States can join as well. This agreement governs an important part of the high seas and, perhaps, in the near future, an important part of the extended Canadian continental shelf. Ole Varmer added that parties to the UNESCO Convention, like Belgium, now have an obligation to protect the *Titanic*, even if they are not parties to the agreement. The *Titanic* is a historic wreck that has been under water for over 100 years and, therefore, falls within the scope of the UNESCO Convention. Eduard Somers asked what use this agreement has today. Ole Varmer replied that, even though the agreement has not yet entered into force, the United States and the United Kingdom, for example, which are not parties to the UNESCO Convention, should act consistent with this agreement when issuing guidelines, including the NOAA guidelines. The Federal court, sitting in admiralty jurisdiction, has also cited the Agreement and NOAA guidelines as basis for the orders that apply to *Titanic* and the collection of artefacts salvaged from the wreck site.

Mariano Aznar felt that it is important to see whether an objective regime can be established through such an agreement. The idea, which was defended by Mariano Aznar in the case of the *Titanic*, was to see whether it is possible for an agreement between a number of State parties to create an objective regime that affects third States as well, taking into account domestic legislations and perhaps even customary law. Ole Varmer added that the UNESCO Convention encourages the conclusion of regional agreements. He cannot think of a more appropriate regional agreement than the *Titanic* agreement.

Frank Maes had more questions on the archaeological preservation zones. Before establishing an archaeological preservation zone, there must be a presumption of archaeological value. So, his first question was 'what are these presumptions' and 'are they purely science based or are there limits to identify those zones?' Secondly, Frank Maes also wondered what kind of protection is given in these preservation zones. 'Does it start with a temporary protection? If these zones are protected, from whom and from what are they protected? What about, for instance, shipping or fisheries?' Mariano Aznar replied to these questions. The preservation zones are perfectly delimitated for the sake of legal security. It is an ongoing protection, in the sense that there is a strong presumption that UCH is probably present in that zone. Research within these zones must continue so that, when an archaeological site or an object of cultural interest is found, it can be protected to a higher extent. The protection in these zones entails limitations on, for example, certain methods of fishing because they disturb the seabed. Additionally, if you want to file an application to do mining, the requirements for the impact report will be even stricter. In fact, there are three levels of protection: 1. the no-protection zone, where all activities are allowed, as they would be outside of a preservation zone; 2. a zone with stricter requirements, such as submitting a greater number of impact reports, and where certain activities are prohibited or limited to mitigate damage to the heritage that is probably located in this zone; and 3. a zone where an archaeological site has been discovered and where you need special licences or permits for diving or other activities. In principle, this only applies in the territorial sea. These preservation zones are an interesting tool because stakeholders already know in advance which activities are prohibited in a certain zone, without wasting any valuable time.

Frank Maes found this to be an interesting idea but stated that Belgium cannot do this because a number of neighbouring States have historical fishing rights in the Belgian territorial sea. Therefore, Belgium cannot

simply prohibit certain types of fishing in a preservation zone. Thomas Verleye wondered whether this would not be possible in Belgium, since in the Belgian sea there are also two preservation zones where trawling is forbidden. Frank Maes replied that these measures do not apply to professional fisheries, since this is a competence of the European Union. In Belgium, we have made a distinction between professional and recreational fisheries - of which the latter do not fall under EU competence. Additionally, applying these measures to professional fisheries will take some time. In the past, France tried to restrict fisheries in certain areas but they were only able to impose these restrictions on their own fishermen. Dutch and Belgian fishermen could still fish in those zones, which led to a lot of frustration. For the first time, the Netherlands now have, within a certain time frame, successfully limited fisheries in a certain area. They were able to do this because they have the EU Commission's consent. Marnix Pieters expressed his concern regarding a measure that was advised to protect the West-Hinder, which is on the Belgian continental shelf. It was advised to prohibit fishery trawling in a zone of 50 metres around the wreck. Frank Maes stated that this is not a problem as it can be seen as a safety zone.

Marnix Pieters also mentioned the fact that, under Belgian legislation, the competent federal minister can recognize an object as heritage in which case the advice of the Advisory Committee of the Marine Spatial Planning Law of 1999 must be sought. This Committee approves whether a site has acquired heritage status and in what way it can be protected. The Committee can give a green light for imposing measures, such as the prohibition of fishing and trawling, to protect this site.

Frank Maes mentioned that it is always interesting to combine the protection of certain zones with habitat protection. Consequently, you can also use the whole protective scale that is offered under nature conservation or habitat protection. Ole Varmer gave an example from the United States that links the protection of UCH to habitat and nature protection, namely the Florida Keys National Marine Sanctuary. This sanctuary is so big that it was not possible to prohibit fishing in the entire sanctuary. Therefore, a zone was created within the sanctuary around the coral reef that is not only a non-fishing zone but also, a no exploitation zone. By using this term, it was made clear that, in that zone, bottom trawling is not desirable because of its destructive effects on the natural habitat. On top of this, recovering shipwrecks cannot take place in such a no-exploitation zone, since the shipwrecks are believed to be tightly connected to the coral reef and sea grass beds. Any disruption beyond *in situ* preservation would also disrupt the natural heritage. This is an example of how to use measures of nature and habitat protection to protect shipwrecks. Ole Varmer also demonstrated the opposite. He mentioned a case whereby natural resources were recognized as cultural heritage. The Papahānaumokuākea world national monument is on the mixed world heritage list. When trying to get this monument recognized as world heritage, NOAA argued that the coral reef is a cultural resource to the native Hawaiians. They believe that all life sprang from coral reef and all life goes back there. They have ceremonies, cemeteries and funeral processions wherein these coral reefs play an important role. In this way, a natural resource was protected as a cultural one.

Marnix Pieters noted that UNESCO still considers shipwrecks to be movable objects, even when they are completely embedded in seabed. Ole Varmer agreed that this idea is somewhat outdated because, in many cases, shipwrecks are no longer movable, while, for example, buildings that are considered to be immovable can, in fact, be moved. Marnix Pieters added that, since the World Heritage Convention only deals with immovable cultural heritage, shipwrecks cannot be listed as world heritage. Mariano Aznar stated that classifying shipwrecks as movable objects is a *contradictio in terminis* because the idea of *in situ* preservation supposes that the shipwreck becomes immovable.

Mariano Aznar felt that it must be explored how the tools that are offered for marine spatial planning and integrated marine coastal zone management can be used for the protection of UCH. The 2008 Madrid protocol to the Barcelona Convention explicitly addresses the question of UCH.

Finally, Ole Varmer mentioned something on the territorial application of the World Heritage Convention. If you follow a strict interpretation of the World Heritage Convention, its territorial scope is limited to the territory of a state and its territorial sea. However, the Papahānaumokuākea monument extends to 50 nautical miles on the continental shelf. The World Heritage Committee recognized it as world heritage, despite some arguments that it might be pushing the envelope a little bit. Ole Varmer believes that this is a good thing because the alternative was to go back and amend the World Heritage Convention in order to include sites that are now beyond the territorial sea.

MAIN CONCLUSIONS:

- It is interesting to see whether the *Titanic* agreement can establish an objective regime for the protection of the *Titanic*. Since *Titanic* falls under the scope of UNESCO Convention, all of the parties to this Convention must apply its rules to the *Titanic* as well.
- The idea of archaeological preservation zones is very interesting. This is, however, difficult to establish in Belgium. This is because, in order to limit professional fisheries from the neighbouring countries, consent from the EU Commission is necessary.
- When possible, the protection of UCH should be linked to the protection of natural heritage. This allows States to protect cultural heritage by means of nature conservation legislation. Therefore, qualifying a shipwreck as part of a natural habitat can offer an additional range of measures for States to protect this cultural heritage.
- The idea that shipwrecks are movable heritage, as is put forward by UNESCO, is outdated and even incorrect in cases where a shipwreck is embedded in the seabed and has become part of the natural environment. Additionally, this idea is hard to reconcile with the notion of *in situ* preservation, which is promoted under the UNESCO Convention. This notion implies that the heritage becomes immovable.

The Competences and Responsibilities of Central Governments and Regional Governments

The third theme that was discussed concerned the relationship between the central governments and the regional governments in protecting UCH. Mariano Aznar stated that, contrary to what is the case in the United States - where the federal government is the main actor in the field of UCH protection - in Europe, among others in Germany, Belgium and Spain, there is a problem concerning the competence division. Birgitta Ringbeck mentioned that, in Germany, it is felt that the Länder are responsible for the cultural heritage that is found in the German EEZ. Mariano Aznar replied that this is an administrative problem, since all communication must be done through diplomatic channels, as is stated in the operational guidelines of the UNESCO Convention. He asked Birgitta Ringbeck about the national focal point. Birtgitta Ringbeck replied that there is no federal Ministry of Culture, so there is no focal point. She believes that this is the reason why she is based in the federal foreign office, while, in other countries, an expert like herself, would probably be based in the Ministry of Culture. The Länder refuse to give up their competence in this field. They directly contact the foreign office for culture-related issues, for instance, for nominations of cultural world heritage sites. This is different for nominations of natural world heritage sites. The responsibility to do this lies with the Ministry for Environment. This distinction can be dated back to World War II. Since World War II, there has been a federal law on natural heritage. Hence, the competence for natural heritage is situated at the federal level. For cultural affairs this is not the case. After World War II, the allies, for instance Great Britain, France and the United States, insisted that the competence for culture was transferred to the level of the Länder, contrary to the former regime. This is why the Länder are competent for this today.

The official channel for cultural nominations of world heritage on land in Germany, runs from the standing conference of the ministers, who are responsible for culture, directly to the federal foreign office. Aside from the federal foreign office, there is no focal point. In Germany, they have the German Archaeological

Institute. This has been a body of the federal foreign office since the end of the 19th century. Certain responsibilities can be given to this institute, such as the listing of shipwrecks and finds, as well as conducting research. The reason for this is that this institute is on the payroll of the federal foreign office.

MAIN CONCLUSIONS:

- A number of European States, including Belgium, Spain and Germany, have to deal with the issue of competence division between the federal and the regional level, concerning the protection of UCH.
- In Germany, the competence for cultural heritage has been transferred to the level of the Länder. At the federal level, there is no ministry for culture, resulting in the federal foreign office being the national focal point responsible for communicating with UNESCO.

The Legal Notion of Abandonment

Eduard Somers asked about the legal meaning of the term 'abandonment'. In France, the system of abandon exists. This is a system of transferring ownership rights to the insurance company in return for payment of the insurance costs when the vessel is lost. What is the notion of abandonment from a legal point of view? Sarah Dromgoole answered that abandonment in insurance law has a different meaning than abandonment of ownership rights. For state vessels, an explicit abandonment is required, while, for private vessels, an implied abandonment is more likely. Sarah Dromgoole raised the question of the notion of abandonment under the American Abandoned Shipwreck Act. Ole Varmer replied that at the time of its drafting, the Abandoned Shipwrecked Act relied on case law. The legislator did not define the notion 'abandoned shipwreck', which ended up being a big mistake. Salvors started to use this legal gap to claim that a shipwreck has not been abandoned, meaning that the law of salvage must be applied instead of the law of finds. Under the Abandoned Shipwrecked Act, it is still the federal admiralty court that decides whether a shipwreck has been abandoned or not. This case law has evolved over time so that now there is a presumption of non-abandonment for private vessels, as is the case for warships. Salvors, if they have a contract with an insurance company, may be able to convince the court that a shipwreck has been abandoned. However, this is a very difficult issue. Thus, at the very first UNESCO meeting, it was decided that the UNESCO Convention would not deal with the issue of ownership. Instead, the negotiators focused on the historic preservation and on the responsibilities that States have to protect cultural heritage, regardless of whether the heritage is owned by a State, the original owner or an insurance company. You do not need to know who owns the heritage in order to do the right thing with regard to its preservation. Frank Maes asked who must prove abandonment in a case before the court. Ole Varmer responded that whoever wants the wreck to be abandoned has the burden to prove that it is abandoned. He illustrated this with the example of a case of the US State of Virginia, where a Spanish vessel was believed to have been abandoned and a contract for its salvage was concluded. Finally, Spain intervened in the case and claimed that the wreck was not abandoned.

Mariano Aznar pointed to another important aspect, namely the dissimilarities between common law and civil law in certain aspects of maritime law. Even the concept of salvage law within the Anglo-Saxon legal culture is different from the notion of sauvetage in France, salvamento in Spain or salvataggio in Italy. These differences create a number of gaps and problems.

Eduard Somers referred back to Ole Varmer's earlier point, where he stated that the issue of ownership is not important. Somers, however, felt that this is an issue in case ownership raises liability. Ole Varmer replied that liability would be addressed under other conventions. In the United States this would be dealt with under environmental legislation. Under United States law, it is possible to abandon your property but not your liability. If a shipwreck pollutes the marine environment, the original owner will be part of the suit and will be held responsible for the clean-up. This can apply to vessels which have sunk before the

statute entered into force. The statute was enacted in 1970 but the polluting sites date back to the 1930s and 1940s. The action that triggers the mechanism of liability is not the moment when the site became polluted but the fact that the site is still polluting the marine environment now, anno 2015. This allows for the competent authorities to investigate what is the source of that pollution and who is responsible for it. The notion 'persons responsible' is conceived rather broadly. It can include the persons that currently own the site, the persons who previously owned the site, contractors and even persons that were not the owners but had certain responsibilities, for example, the dredger. A dredger can be held responsible if he was dredging at a shipwreck site and accidentally caused pollution, resulting in a multimillion-dollar clean-up.

Mariano Aznar feels that it is important to defend sunken State vessels in unity. This unity gives states title and ownership, as well as the responsibility to take care of the vessel. This has an interesting effect. For example, if a 16th century Spanish galleon, which is loaded with mercury, is found in the Colombian territorial sea and Spain claims to be the owner of the vessel, Spain can be held responsible for cleaning up the mercury from the Colombian waters in case the wreck is polluting.

At this point of the discussion, Eduard Somers wanted to know how this environmental system relates to the Abandoned Shipwreck Act, which has a system of abandonment? Ole Varmer answered that the Abandoned Shipwreck Act is just a property statute and not really a historic preservation statute. This Act transfers titles to the State but does not require the State to apply historic preservation laws. The coastal State can manage the wreck as they see fit. This is why, if the United States decides to become a party to the UNESCO Convention, the competent authorities would have to go from State to State to make sure that all states would accept such a responsibility.

Frank Maes spoke of the system that exists in Belgium for the abandonment of a vessel that poses a potential risk for the environment. In Belgium, you need a permit to abandon such a wreck, even in the EEZ. In first instance, the owner has to clean the vessel. However, since the wreck lies on the sea bottom and such a clean-up can be very expensive, the authorities can conduct operations to avoid future pollution by the ship at the expense of the owner. After all the risks for polluting the environment have been eliminated, the vessel can formally be abandoned.

Ole Varmer stated that, in the United States, when a vessel is polluting on the continental shelf or in the EEZ, even outside of the contiguous zone, this falls under the United States' natural resource jurisdiction and gives the authority the responsibility to intervene and clean up the pollution. It also gives the authority the right to apply United States laws containing the polluter pays principle to foreign flagged vessels. It has been said that this would be inconsistent with the law of the sea. However, NOAA disagreed and pointed to the Ocean Dumping Act as a supporting act under which the United States authorities can address pollution of foreign vessels in their EEZ and on their continental shelf. Frank Maes replied that the Ocean Dumping Act deals with intentional pollution and not with unintentional pollution. The sinking of the vessel was not an intentional act but was part of a marine peril or accident. Ole Varmer addressed this remark by referring to a case about a container ship that entered into a port and, due to a storm, accidentally dumped its containers in the Monterey Bay National Marine Sanctuary, which is outside of the 24 miles zone. Those who were responsible were sued for liability and damages to the sanctuary under the National Marine Sanctuaries Act. The lawyers representing the container ship replied that these containers were not intentionally dumped. However, Ole Varmer replied that, since it was known that those containers were there and they left them intentionally, that can be considered as intentional dumping. In addition, under the LOSC a coastal State has the authority to protect the marine environment within its EEZ from such activities. The case was finally settled, which may be an indication that the lawyers representing the container ship company recognized that they were in a bit of a grey zone in which the US law may be applied to them.

MAIN CONCLUSIONS:

- Under the Abandoned Shipwrecked Act, there is no definition of abandonment. It is the federal admiralty court that decides whether a shipwreck has been abandoned or not. There is an evolution towards a presumption of non-abandonment for private vessels, as is the case for warships. The person who claims that a shipwreck is abandoned is the one that must prove this.
- Under the United States legislation, an owner can abandon its property rights but not its liability. In cases where a shipwreck site causes pollution, a large number of people can be held responsible, such as the current owner, the previous owner or the dredger who caused damage to the site. In Belgium, a shipwreck must be cleaned before it can be abandoned.
- When claiming ownership or title over a shipwreck, the owner also has to accept the responsibilities of the shipwreck. This can lead to an interesting scenario. A State that owns a vessel that pollutes the marine environment in another State's waters can be held responsible to clean up this pollution.
- In the United States, it is possible, in certain cases, to impose the polluter pays principle on foreign flagships that have accidentally dumped something in a national marine sanctuary in the EEZ of the United States.

The Interpretation of Article 58 LOSC Concerning the Exploration and Exploitation of Natural Resources on the Seabed

Frank Maes wondered what interpretation the United States gives to article 58 LOSC, which concerns the exploration of natural resources on the seabed in the EEZ. Ole Varmer replied that a State has the authority to preserve its natural resources and to set up marine protected areas. The United States asserted that it has the authority to enforce its sanctuary rules against foreign flagged vessels in the EEZ, as long as can be demonstrated that the activity that is prosecuted triggers natural resource jurisdiction. In cases where no potential damage can be demonstrated, NOAA has not generally proceeded with the case. The containers that were mentioned earlier were crushing natural resources. As they were left to go to waste, the abandonment was tantamount to polluting the marine environment. Even though NOAA did not have evidence of how many creatures or features were being destroyed, the fact that the company left all the containers to go to waste in a national marine sanctuary was sufficient evidence to take the case to court. The United States is not a party to the LOSC but they consider it to be international customary law and, therefore, the US can apply the provisions that are embedded in this Convention.

MAIN CONCLUSION:

- The United States can enforce its sanctuary rules against foreign flag vessels in the EEZ, as long as it can be demonstrated that the activity being prosecuted triggers natural resource jurisdiction or other jurisdiction recognized under international customary law.

The Ratification of the UNESCO Convention

Sarah Dromgoole had a question: Andrea Klomp mentioned that she is not very hopeful that the Netherlands are going to ratify the UNESCO Convention shortly, because it is felt that the UNESCO Convention is not compatible with the Law of the Sea Convention. Did the report of the Dutch government's independent advisory committee not put an end to this problem? Andrea Klomp answered that unfortunately the report of the advisory committee did not take away the worries about incompatibility with the LOSC completely. So probably the only way out of this deadlock situation is a political decision about what is more important: the protection of UCH or the putative risks, such as creeping coastal jurisdiction. The route towards such a decision, however, turns out to be a long one.

MAIN CONCLUSION:

- The Netherlands are still in the process towards a decision about the UNESCO Convention. Things, however, are moving slowly and the outcome is hard to predict. The current aim is to come to a decision in the second half of 2015.

The 2007 Belgian 'Wreck Law'

Eduard Somers wanted to know why the 2007 Wreck Law never entered into force. Marnix Pieters explained that this Act was made shortly before the national elections and at the end of the tenure of Minister Landuyt, who helped draft it. It was a question of finance. There was a discussion between Flanders and the federal government on who should pay for the costs linked to heritage protection.

Transfer of Ownership Rights Under the Belgian Law for the Protection of Cultural Heritage Underwater

Eduard Somers asked Thary Derudder whether, under Belgian legislation, it is compulsory for the identified owners to transfer the property rights to a museum, when this is asked. Thary Derudder answered that this is not the case. If both the original owner and a museum wish to become the owner of the cultural heritage in question, the museum can only become the owner if it comes to an agreement on the value of the cultural heritage with the original owner and pays that amount to the original owner. When the original owner choses to retain his property rights, he has the obligation to preserve and protect the heritage with a view of long-term preservation. Preserving UCH for the long-term can entail that the heritage should be preserved under water under very specific conditions. Simply displaying the heritage in your house will not always be sufficient. Therefore, it seems likely that most owners will refuse the property rights, especially because the owner also has to reimburse all of the costs that were already made by the government up until that moment for the preservation of the cultural heritage. When a museum is willing to take over the property rights of the heritage and pay the original owner for this, it might be an option that the owner wishes to use. Mariano Aznar added to this that, in Europe, and especially in the continental part, something is missing that is very typical in the United States. In the United States, a lot of people who have huge collections of very important pieces of heritage donate them to a museum. Such pieces receive a label that states who they were donated by. This occurs a lot less in Europe, even though sometimes, an object is so delicate that it would be better off in a museum.

Another way in which to share cultural heritage with the public is to let the owner keep it in his house but to impose the duty on the owner to lend the heritage to an exhibition every five years or to oblige him to welcome researchers, who are conducting research on the heritage, into his house. Thary Derudder felt that this fits the idea that is put forward in the UNESCO Convention to preserve heritage for the benefit of mankind.

MAIN CONCLUSIONS:

- The obligation for owners, that is imposed under the Belgian Law on the Protection of Cultural Heritage Underwater, to preserve and protect heritage with a view of long-term preservation, combined with the duty to reimburse the costs that have already been made for the preservation of that heritage, can lead to the owners being willing to transfer their property rights to, for example, a museum.
- The idea of donating a piece of heritage to a museum in exchange for an explicit mention of the donator of the heritage should be promoted.

Ecological Value of a Shipwreck

Eduard Somers wanted to know more about the ecological value of shipwrecks. Thary Derudder replied to him that a Belgian study has shown that a number of shipwrecks are nurseries for certain types of fish. As animals and plants are on the wrecks, they obtain ecological value. Frank Maes added that a ship in itself has no ecological importance. It obtains ecological value once it has been underwater for a longer period, creating a habitat for certain species. Additionally, Mariano Aznar pointed to the importance of considering other heritage aside from shipwrecks, such as old harbours and caves with their natural context.

Eduard Somers wondered whether the 'Paardenmarkt' in front of the Belgian coast, which was used as a dumping area for ammunition, could be considered as cultural heritage. Ole Varmer pointed out that this is the problem with the blanket protection approach. Under article 1 of the UNESCO Convention, millions of objects can be protected as UCH. Mariano Aznar pointed out that this is a meta-judicial question. In this case, input from archaeologists must be received, indicating which vessels are worth protecting and which ones are not. Eduard Somers asked whether a bottle of Coca Cola that is thrown overboard could be a historical object after 100 years. Everyone answered that this could be the case. In the United States, NOAA is currently doing a lot of work with the Navy to map all of the objects that were dumped in the sea after World War II. They recognize that some objects may have national significance and need to be preserved.

MAIN CONCLUSIONS:

- Shipwrecks as such do not have any ecological value. However, when they have been on the seabed long enough, they become part of the marine environment by forming a habitat for animals and plants. This may result in a shipwreck becoming ecologically valuable.
- Any type of object can become cultural heritage in the future, depending on its context and importance. Even dumping sites from World War II can be seen to have a historical value and can potentially be protected.

The European Union as an Active Player in the Protection of Underwater Cultural Heritage

The question was asked: 'why has the European Union not taken a lead role in the protection of UCH?' Marnix Pieters replied that a project to harmonize legislations and the way in which the UNESCO Convention is being implemented was submitted to the European Union. However, it was refused.

Frank Maes offered some clarification on the competences of the European Union. It depends whether one is talking about UCH at sea or heritage in inland waters and on land. This makes a difference in which procedure must be used and how a directive can be adopted. When looking back at the directive for marine spatial planning, there was some resistance from member States. In particular, the Netherlands and the United Kingdom had issues with this. Spatial planning or town planning is a sensitive issue on which cultural heritage protection also has an effect. In this case, a directive must be adopted in the Council by unanimity. This renders it, of course, more difficult, since one State can block the decision. Mariano Aznar indicated another problem, namely that he has no clear idea of the extent of the competences of the European Union on cultural heritage in general, and on UCH in particular. Nevertheless, Mariano Aznar felt that the EU must take the lead in this matter. It is, however, important not to send a complicated message to the former colonies. Spain is very cautious not to make the colonies feel like it is coming to take their properties. Mariano Aznar confirmed that this was one of the reasons why Spain ratified the UNESCO Convention. For the Netherlands, this is also a very strong argument.

MAIN CONCLUSION:

- The European Union should take the lead in harmonizing the legislation concerning the protection of UCH and the way in which the UNESCO Convention is implemented. However, this is not an easy task, among others because of the decision-making procedures at the European level.

The Legal Protection of War Graves

The final topic that was discussed dealt with war graves. Marnix Pieters asked how war graves are defined under the legislation in the United Kingdom. Sarah Dromgoole replied that there is no such definition. In short, if there is any loss of human life and the remains are still present on a wreck that was in military service when it sank, the wreck may be afforded protection as a war grave. Thus, it is more a grave with people in it who were under military service than an actual war grave. Marnix Pieters wanted to know where that leaves civilians who were torpedoed during wartime. Sarah Dromgoole explained that this is a hard line to draw. This is why, in the United Kingdom, issues arose with the SS *Storaa* and other merchant ships that were, in one way or another, involved in the war effort. Mariano Aznar pointed out that, under the law in the United States, it is not necessary that the remains still exist in the wreck in order for it to be protected as a war grave. As for the *Mercedes*, it is not known whether the remains of the 250 people who died in battle in the bay of Santa Maria are still 1000 metres below water. However, it is still a war grave. Ole Varmer explained that, for the USS *Arizona*, it is not sure whether human remains are still present in the wreck but that does not mean that it will not be protected as a war grave. On top of this, he does not believe that the respect that is afforded to war graves should be limited to them. Under the *Titanic* agreement, the *Titanic* is also respected as a gravesite. This started out as being the reason for not disturbing the two large hull portions of the wreck and to limit the recovery of artefacts in the debris field. During the last expedition to *Titanic*, a picture was taken of two boots. You cannot see any human remains but the placement of the boots clearly indicates that it is the last resting place of a person, a child. Therefore, the recovery of the wreck and the remains should be discouraged, giving preference to *in situ* preservation. If one day, however, someone says that those are his grandmother's boots and he would like to see them recovered and reinterred, perhaps there should be some flexibility. Nevertheless, until that moment, the wreck should be protected *in situ,* similar to how this is being done in archaeology to protect gravesites, regardless of whether it is a war grave or a civilian one. Mariano Aznar indicated another point, namely that it is a typical western cultural concept to focus on objects. A wreck can be a war grave if human remains are present. If you look at Latin-America, Africa or Asia, it becomes clear that they focus on the sanctity of places, rather than on the actual presence of human remains. They may designate wrecks as war graves without any possibility whatsoever of having human remains in it because these remains were burnt in ceremonies. Andrea Klomp argued that you can find this in the Western culture as well. For example, when you look at the crosses on the side of the road, commemorating those who have died there in a car accident.

According to Sarah Dromgoole, the reason why the United Kingdom's Protection of Military Remains Act focuses on the presence of human remains in the wreck, lies with an incident leading up to the Act in the first place. In the early 1980s, divers were reported in the press to have put chemical candles in skulls that were present in a sunken British warship. This report caused a public outcry. Sarah Dromgoole believes that this is the reason why the focus lies on human remains, rather than on the sanctity of places.

Ole Varmer indicated that respect for war graves can differ case-by-case, according to cultures and people. For the preservation of the Japanese midget submarines, which are located in United States' waters, the Japanese government made it very clear that they wanted these submarines to be protected *in situ*. A couple of years later, a Japanese film crew wanted to explore the possibility of recovering these submarines and bringing them back to Japan because that would be the appropriate thing to do, according to their culture. This was refused, since they did not have the consent of the Japanese government to do so. Thary Derudder pointed out that she has received a paper from a professor in Japan that states the exact opposite, namely that the Japanese government has a policy of bringing the human remains of their Japanese soldiers back to Japan as much as possible. Ole Varmer indicated that it is possible that there are different cultures that are associated with different religions, proclaiming different views. In subsequent communication, it was clarified that if the Government of Japan wanted to recover the human remains from the Japanese submarines, then the US would cooperate.

Ole Varmer expressed his interest in the different ways that human remains are treated. The first, second and third generation after a ship has sunk often want to see the human remains be undisturbed but, after that, this can change. Human remains are displayed at many of the public museums. It is interesting to see that the way in which human remains are treated, differs depending on where the human remains came from, how old they are, where they are being displayed and who is displaying them. This issue must be handled on a case-by-case basis and a good public process must be carried out so that no culture gets upset.

Marnix Pieters pointed at the large number of war graves in the Belgian part of the North Sea. Here, 140 warships have been inventoried and between 80 and 90 of them are known to contain human remains. Furthermore, 65% of them are considered to be war graves.

Ole Varmer mentioned that, even though the USS *Arizona* is leaking oil, the veterans oppose to an environmental clean-up. Some of the veterans even ask to be buried in the wreck, together with their war comrades. This demonstrates how important *in situ* preservation is for the veterans.

Thary Derudder wondered what the additional protection is that is afforded to war graves. Ole Varmer replied that it is not so much about additional protection as it is about respectful treatment. As an example, he spoke of the USS *Monitor*, where, against all expectations, two skulls were discovered during the recovery. The works were immediately stopped and the Navy was informed of this. It was decided not to make the skulls part of the public display of the USS *Monitor*. An attempt was made to reconstruct the faces and the families related to the USS *monitor* were informed of this. Finally, the two skulls were placed in the memorial cemetery where President Kennedy lies and a plaque was placed on their grave. Once the deceased have been identified, their names will be added.

Mariano Aznar stated that a war grave must be respected, which does not necessarily mean from all activities. If there are no human remains present, some archaeological research can be carried out with the utmost care, but even if there are still human remains present, which must be treated respectfully, these can be moved with the permission of the heirs and families. It is not because a wreck is a war grave that it becomes untouchable.

Finally, Thary Derudder asked about the difference between respecting cultural heritage in general and respecting a war grave. Is there an additional form of respect? Sarah Dromgoole answered that, for example, the Protection of Military Remains Act is a strict, consent regime. The consent for interference will be given in fewer circumstances then under the Protection of Wrecks Act, which simply protects wrecks with a historical interest. Thus, more licences are necessary. Ole Varmer stated that you have to do a public interest determination in order to conduct intrusive research or recover a wreck. This is the same as would be the case for a wreck that is not a war grave. However, the balancing is more sensitive when human remains are present. Andrea Klomp mentioned that for every cultural, historical or archaeological site, an individual weighing of interests must be done and that one of those interests can be that the site is considered as a war grave. The decision to move a wreck will depend on the meaning of the archaeological complex. If there is a very strong bond with the place where the wreck lies (the context gives you archaeological information), then the decision to move it to another place will not be taken lightly. Meanwhile, for other sites, this might be a good decision. You cannot set the rules beforehand and determine in general what you are going to do with, for instance, a war grave. Sarah Dromgoole added that it all depends on the significance of the site, for example, if it is a rare site or an early site, it will be treated differently from a later site, where there are already a number of comparable sites.

MAIN CONCLUSIONS:

- It is felt that war graves and civilian graves deserve the same kind of respect. As an example, the *Titanic* can be mentioned, which is protected as a gravesite under the *Titanic* agreement.
- In Western culture, there is a tendency to protect a wreck as a war grave because of the

human remains that are located in the wreck, while in other cultures, such as under the African or Asian culture, a wreck can be protected as a war grave because of the sanctity of that place, even when there is no possibility of human remains being found.

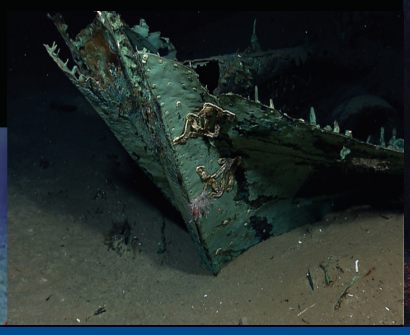
- What respect for war graves exactly entails differs from case-to-case and between cultures.
- The way in which to properly treat human remains depends on many factors, such as how old the human remains are, where they are being displayed and who is displaying them.
- A war grave is not untouchable. This means that it is possible to conduct activities that are directed at the war grave or to move it, as long as this is carried out with the utmost respect.
- When allowing researchers to conduct research on a wreck or when giving a permit for the excavation of a wreck, all of the interests must be taken into account and balanced. The presence of human remains can be an additional reason as to why a wreck should not be excavated.

4. Annex: Presentations

OLE VARMER (United States)

The legal framework, policy and practice on the protection of underwater cultural heritage in the United States

Ole Varmer

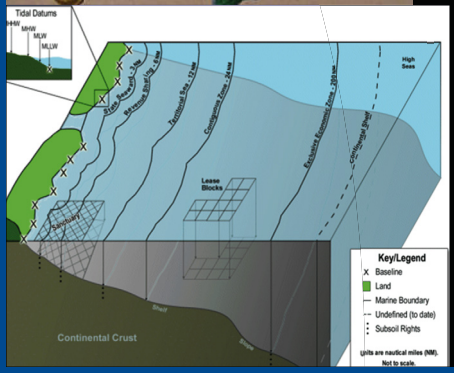


Overview

- International Legal Framework Protecting UCH
  - Law of Sea Convention
  - 2001 UNESCO Convention on Protection of UCH
- U.S. Law and Policies Protecting UCH
  - Terrestrial based law applied to UCH, i.e., AA
  - Law enacted to protect UCH
    - NMSA, ASA, Titanic, SMCA
    - NHPA and NEPA

International & Maritime Law

- Maritime Law of Salvage
- Common Law of Finds



Law of the Sea Convention

- Legal Framework for activities at sea
- Coastal State v Flag State Jurisdiction

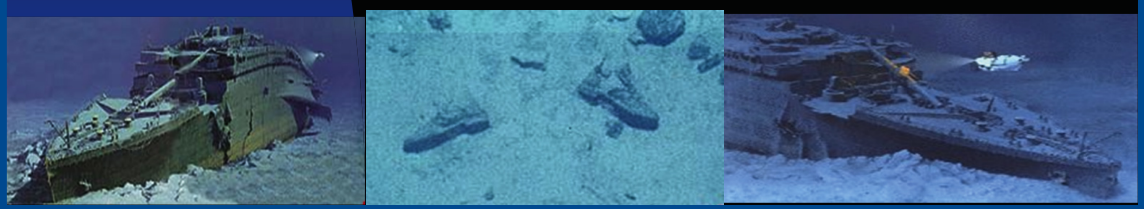
2001 UNESCO Convention

LOSC Articles on UCH

- Article 149 UCH Found in the Area
  - Preserve or dispose of UCH for the benefit of mankind as a whole
  - Particular Regard to Preferential Rights of State or country of origin, cultural origin, or historical and archaeological origin
- Article 303 UCH Found at Sea
  - Duty to Protect & Cooperate on UCH found at Sea
  - Coastal State Jurisdiction over UCH to Outer Limit of 24 Nautical Mile Contiguous Zone from Baseline/Coastline
  - Savings clause for the rights of identifiable owners, the maritime law of salvage, etc.
  - No prejudice to other international agreements

UNESCO Convention on the Protection of the Underwater Cultural Heritage

- Preferred Policy to Preserve UCH *In Situ*
- Scientific Rules for Research & Recovery
  - When Remaining In Situ Not Best for UCH
- No Commercial Exploitation
  - Treated more like Endangered Species than Oil/Gas
- Ban on Law of Finds & Salvage
- Measures on Trafficking
- Perceived gap in protecting UCH on CS & EEZ filled by coastal nation until the Owner/Flag State identified



Who Protect UCH in US

- Federal Agencies
  - Dept. of Interior National Park Service (NPS) and BOEM
  - National Oceanic Atmospheric Administration (NOAA)
  - Navy, and other agencies
- State and local government
  - NHPA 106 requires consultation with State HPO
- Private Institutions
  - Non-Governmental Organizations
  - Non-Profit Organizations [LCCHP & National Trust]

Where doe the US Protect UCH

- Along coast ASA 3nm
- EEZ – Contiental Shelf
  - Sanctuaries out to 200 nm limit
  - USS Monitor first sanctuary
- SMCA wherever located
- High Seas
  - Titanic and others
  - International cooperation

US Cooperating with other nations in Protecting Sunken Warship Heritage

- Past is Prologue and Legal Precedent
  - France
  - Spain
  - United Kingdom
  - Japan
  - Germany
  - Australia

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France

US - CSS Alabama sunk off coast of France by USS Kearsarge






French Labelle off coast of US (Texas)



Spain

- Juno and LaGalga off coast US (Virginia)

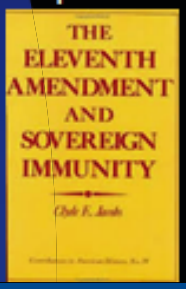



- Mercedes off coast of Portugal and Spain (Fla D. Ct)





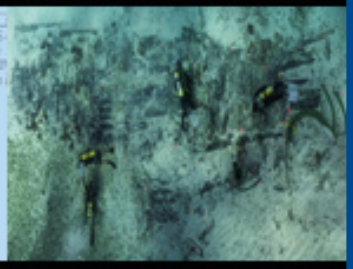
- US Courts Respect Spain's Ownership & Sovereign Immunity – scope extends to private property



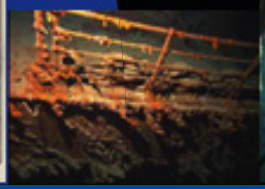
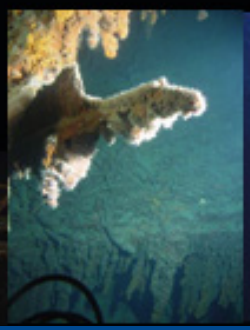
United Kingdom

- HMS Fowey – Biscayne National Park



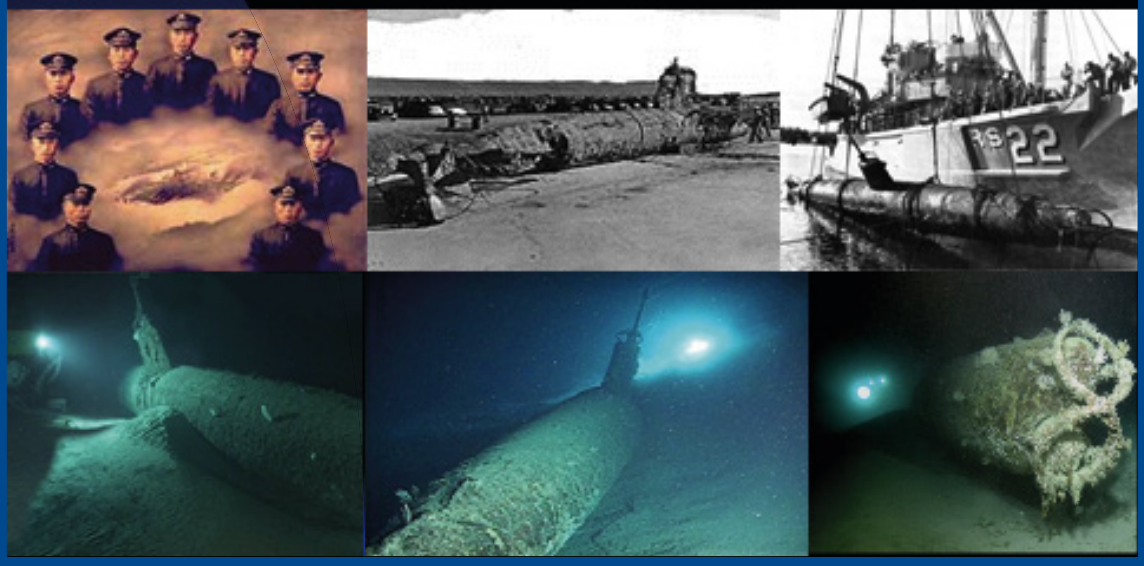



- Titanic


Japan

Japanese Midget Submarines off Pearl Harbor



Germany

U Boats off coast of North Carolina – Battle of the Atlantic\

U 701 in Gulf of Mexico

12

Underwater Cultural Heritage Law Study: Closing the Gaps in the Law Consistent with the 2001 UNESCO Convention

Ole Varmer
International Section
NOAA Office of General Counsel

Brian Jordan
Federal Preservation Officer
Headquarters Archaeologist
Tribal Liaison Officer

The bow of an early 19th-Century copper clad vessel found on OCS in ultra-deep waters of the Gulf of Mexico during oil and gas surveys.

Purpose of UCH Law Study

- The exploration and exploitation of the OCS results in the discovery of UCH that needs protection from looting & unwanted salvage
- Thanks to Brian Jordan, BOEM and DOC/NOAA) have produced an Underwater Cultural Heritage Law Study that identifies laws to protect UCH and gaps in protection using the 2001 UNESCO Convention on the Protection of UCH as the benchmark to meet for protection
- The primary purpose of the study is to make recommendations on how to close the gaps in U.S. statutes in order to protect UCH on the OCS to identify existing laws to protect such UCH, identify the gaps in protection and make recommendations to fill those gaps.

UCH Law Study

- Section 1 overview of the organization of the study along the lines of how the 2001 UNESCO Convention is organized to address threats to UCH from activities direced at UCH as well as the threats from activities that may inadvertently harm UCH such as from exploitation of energy development and fishing
- Section 2 summarizes the maritime law and admiralty jurisdiction that have been used by treasure hunters to exploit UCH. As the application of these laws to UCH has been the catalyst for a number of the UCH statutes and salvors continue to try and apply them, they are part of the problem and proposed solutions in preservation of UCH.

UCH Law Study - continued

- Section 3 summarizes the international laws developed to address these threats to UCH from treasure salvage, including the Law of the Sea
- LOS recognizes that nations have a duty to protect UCH and to cooperate for that purpose.
- While this framework convention provides little or no detail on how to implement this duty to protect UCH it does contemplate more specific international agreements like the 2001 UNESCO Convention.

UCH Law Study Section 4 International Law

- Section 4 summarizes the agreement contemplated under the LOSC - the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage which is considered by many in the preservation community as the model law for the protection of UCH.

UCH Law Study Sect 5

- Section 5 summarizes the U.S. statutes that control of activities directed at UCH like looting, salvage and archaeological research, including an analysis of the
  - Antiquities Act,
  - the National Marine Sanctuaries Act and
  - the Archaeological Resources Protection Act.

UCH Law Study Section 6

- Section 6 summaries the U.S. statutes that address threats to UCH from activities that are not directed at UCH but may still inadvertently have an adverse effect on UCH, such as
  - the National Historic Preservation Act and
  - the National Environmental Policy Act.

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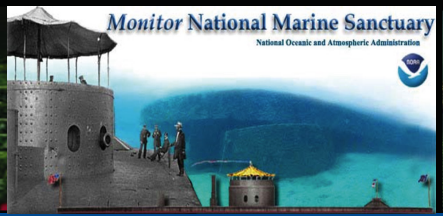
United States Law Protecting UCH

- Antiquities Act of 1906
- National Historic Preservation Act of 1966
- National Marine Sanctuaries (1972)
- Archaeological Resources Protection Act of 1979
- RMS Titanic Maritime Memorial Act of 1986
- Abandoned Shipwreck Act of 1987
- President's Statement on Sunken Warships 2001
- Sunken Military Craft Act of 2004



Protecting UCH in EEZ/CS

- Antiquities Act Marine National Monuments
- National Marine Sanctuaries Act (NMSA)
- Sunken Military Craft Act 2004
- National Historic Preservation Act
- National Environmental Policy Act

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Gaps in US Law Protecting UCH

- EEZ/OCS no laws currently applied to prohibit looting or unwanted salvage unless
  - in a national marine sanctuary or monument or
  - US government owned wrecks or
  - foreign warship within 24 nm contiguous zone
- No trafficking cases
  - ARPA 6(c) available for trafficking of artifacts looted outside public lands including abroad

Gerber & Vatican Papers Cases

- Gerber case involved enforcement of trafficking provision under ARPA 6 c) for an archaeological resource looted from private property
- Vatican Papers case involved enforcement of ARPA 6 c) against Prof. Anthony Melnikas -- Ohio State U. for manuscripts stolen from Vatican and several other from cathedral libraries in Tortosa, Spain.
- DOJ agrees may be applicable to UCH like *Titanic*

WAYS FORWARD

- Use of ARPA 6 c) for trafficking of UCH
- Revive use of Antiquities Act permit requirements on OCS outside Marine National Monuments
- Amend National Marine Sanctuaries Act
  - Prohibit looting & salvage of UCH outside sanctuaries
  - Require permits consistent with Annex Rules for any research or recovery of any UCH or other wrecks identified by the USCH as being a potential threat to the marine environment

PROF. DR. SARAH DROMGOOLE (United Kingdom)

United Kingdom: The Legal Framework, Policy and Practice on the Protection of UCH

Sarah Dromgoole
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Sarah.Dromgoole@nottingham.ac.uk

SeArch/Ghent University Workshop, Ghent, 23 April 2015

The University of Nottingham

Introduction

- Selective approach to protection, based on significance
- Since devolution in 1999, legal framework as between individual home countries (England, Wales, Scotland, Northern Ireland) somewhat 'patchy'
- Island nation with strong maritime tradition – coastal waters rich in shipwrecks and wrecks with which UK has a 'verifiable link' located in waters around the world

Statutes

- Merchant Shipping Act 1995
- Protection of Wrecks Act 1973
- Ancient Monuments and Archaeological Areas Act 1979
- Protection of Military Remains Act 1986
- Marine and Coastal Access Act 2009

Merchant Shipping Act 1995

- Implements International Salvage Convention 1989
- Makes provision for reporting, handling and disposal of 'wreck', which includes material of all ages
- Administered by the Receiver of Wreck, Maritime and Coastguard Agency (executive agency of the Department for Transport)
- Statute provide for sale of material and payment of reward to finder but administered sympathetically where UCH involved

Protection of Wrecks Act 1973

- Sites of 'vessels' may be designated on grounds of 'historical, archaeological or artistic importance'
- Current number of designated sites: 64
- No age criterion
- In England, administered by 'Historic England' on behalf of Department for Culture, Media and Sport
- Four types of licence: to visit; to survey; to recover surface items; to excavate

Ancient Monuments and Archaeological Areas Act 1979

- Administered by national heritage agencies on behalf of Department for Culture, Media and Sport
- Provides for scheduling of 'monuments' on the grounds of 'national importance'
- 'Monument' defined widely; no age criterion
- Sites in inland waters and in the territorial sea can be scheduled, as well as those on land
- Public access on 'look but don't touch' basis permitted – German High Seas fleet in Scapa Flow

Protection of Military Remains Act 1986 [A]

- Administered by Ministry of Defence (MOD)
- Protects sunken military vessels and aircraft from deliberate interference - to protect sanctity of sites containing human remains
- Applies to any crash site of military aircraft
- Sunken military vessels may be protected by designation:
- Named vessel can be designated as 'protected place' – diving on 'look but don't touch' basis permitted
- Specific co-ordinates can be designated as 'controlled site' – no diving without authorisation

Protection of Military Remains Act 1986 [B]

- Vessels may be designated in the UK territorial sea or in international waters (in international waters offences may be committed only by someone on board a British-controlled ship, or by a British national)
- Vessels in the military service of foreign States may be designated if in UK territorial sea
- Ongoing assessment programme – 78 designations to date (including 6 German U-boats)

Protection of Military Remains Act 1986 [C]

- What does it mean to be 'in military service'?
- Considered by Court of Appeal in 2006 in relation to SS *Storaa*, a merchantman carrying war supplies in convoy when she sank (1943)
- Concluded that words 'in military service' should be given wide meaning (contrary to view of MOD):
  - SS *Storaa* designated 2008
- One other merchantman designated (2009):
  - SS *Mendi* – operating as troopship (1917)

Marine and Coastal Access Act 2009 [A]

- Establishes a new non-departmental public body, the Marine Management Organisation (MMO)
- Relevant government department: Department for Environment, Food and Rural Affairs (DEFRA)
- Establishes a new marine planning and licensing regime
- New regime applies in UK marine area (including EEZ and UK sector of continental shelf)

Marine and Coastal Access Act 2009 [B]

- Licensable activities:
  - Construction, alteration or improvement of any works
  - Dredging, including using any device to move material from one part of the seabed to another part
  - Deposit of any substance or object either in the sea, or under the seabed, from a vehicle or vessel
  - Removal of any substance or object from the seabed using a vehicle or vessel

Marine and Coastal Access Act 2009 [C]

- Impacts on UCH:
  - Provides basis for systematic scheme to ensure that activities "incidentally affecting" UCH are regulated (taking into account non-designated, as well as designated, sites)
  - Activities that are "directed at" UCH may require a licence under this statute in some cases
- Provision for establishment of Marine Conservation Zones – may incidentally protect UCH

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Marine (Scotland) Act 2010

- Scottish equivalent of Marine and Coastal Access Act
- Creates new UCH-specific designation: Historic Marine Protected Area (HMPA) –
  - Replace designation under PWA 1973
  - Applicable in Scottish territorial sea only
  - Protect 'marine historic assets' of national importance
  - Such assets include: a vehicle, vessel or aircraft; a building or other structure; a cave or excavation; a deposit or artefact or any other thing which evidences previous human activity

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Concluding remarks

- UK has not yet ratified 2001 UNESCO Convention
- Has adopted UNESCO Annex as 'best practice' in management of sites and artefacts
- Questions arise over government's interpretation of Rule 2 on commercial exploitation
  - HMS *Sussex* (1649), HMS *Victory* (1744)
  - SS *Gairsoppa* (1941), SS *Mantola* (1917), SS *Cairo* (1942)

PROF. DR. MARIANO J. AZNAR GOMEZ (SPAIN)

The Legal Protection of Underwater Cultural Heritage

SPAIN

SeARCH / UNIVERSITEIT GENT 23 APRIL 2015

MARIANO J. AZNAR | UJI

Legal framework

Policy

Education & outreach

Legal framework

Ratification of the UNESCO Convention

6 June 2005 (domestic into force: 5 March 2009)

Revisiting domestic legislation

Law 16/1985 on the Spanish Cultural Heritage ?

Modifying domestic legislation

Law 14/2014 of General Navigation:

- Clarifying rights and duties during navigation with regard UCH
- Non application of salvage law to UCH
- Protecting State vessels

Regional Decree on Archaeological Activities in Andalucía (archaeological preservation zones)

Concluding interdepartamental agreements

State level: Culture / Foreign Affairs / Homeland / Defence

Regional level: different agreements with central Gov't

Legal framework

Policy

Education & outreach

Policy

Fostering cooperation and information sharing

Financing regional Workshops (St. Kitts & Nevis 2013), Meetings (Peru 2013 / Nigeria 2013 / Bahamas 2014 / Uruguay 2014), STAB meetings (2009) and Scientific Conferences (Spain 2014)

Litigating (when necessary) and advising

Juno and *La Galga* (1997-2000) and *Mercedes* case before US Admiralty Courts (2007-2013)

Louisa case before ITLOS (2010-2013)

San José before Panama (2015)

Concluding soft agreements

MoU with the United States (NOAA) in 2010

MoU with Mexico in 2014

Legal framework

Policy

Education & outreach

Education & outreach

Creating post-graduates courses

MA on Underwater Archaeology (Universidad del Mar, Cádiz, 2016)

Cooperative excavation projects

Bajo de la Campana with INA (from 2009)
Trafalgar Site with France (from 2007)
Nuestra Sra. del Juncal with Mexico (2013-2014)
Cervera Fleet with Cuba (2015)
Mercedes with Portugal & France (?)

Reinforcing the outreach

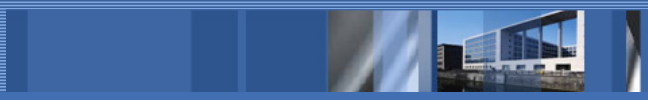
ARQVA (Cartagena, 2002)
Exhibitions (MAN, Naval Museum, MARQ, Cádiz)
Films (*Triunfante*) and visits to UCH (*Vila-Joiosa)*

Challenges ahead

- Administrative and financial problems
- Territorial structure
- Application of the Annex to inland waters?
- Looting cases around the world
- Ready for litigating again?
- Cooperation with other States parties and non-State parties
- Education improvements
- Dissemination

THANK YOU

Auswärtiges Amt



The legal framework, policy and practise on the protection of underwater cultural heritage in Germany

Dr. Birgitta Ringbeck
Federal Foreign Office, Germany

Gent, 23 April 2015

Conservation Authorities of Germany's 16 States

address: www.denkmalpflege-forum.de

- Baden-Württemberg
- Bavaria
- Berlin
- Brandenburg
- Bremen
- Hamburg
- Hesse
- Mecklenburg-Vorpommern
- Lower Saxony
- North Rhine-Westphalia
- Rhineland-Palatinate
- Saarland
- Saxony
- Saxony-Anhalt
- Schleswig-Holstein
- Thuringia

Scientific Forum:
Association of State Conservators
Association of State Archaeologists
in the federal Republic of Germany
(VLA & VdL)

Coordination:
Standing Conference of Ministers
of Education and Cultural Affairs
(KMK)

Umbrella at federal level for heritage conservation activities:
German Cultural Committee
(DNK)

Auswärtiges Amt

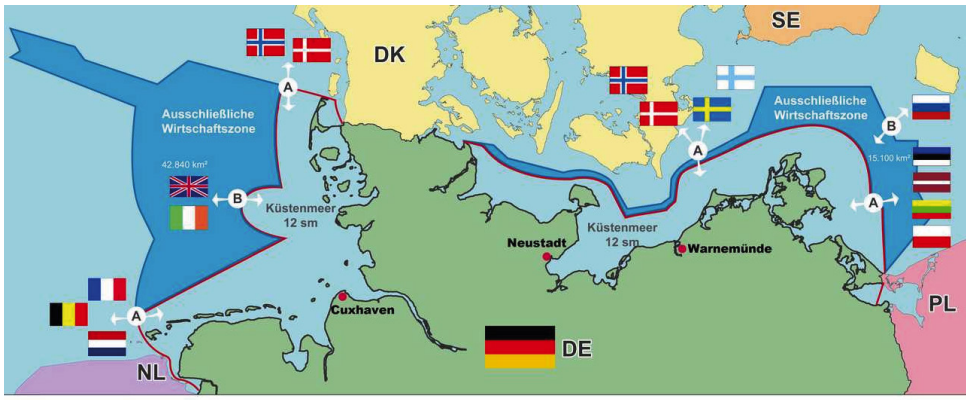
Content of the 16 laws of the Länder on the protection and preservation of monuments:

- Definition of cultural heritage (no age criterion)
- Protected excavation sites
- Monument protection authorities
- List of monuments
- Research and preservation principles (preference for in-situ conservation)
- Maintenance duty
- Measures requiring approval
- Costs-by-cause principle
- Finds of monuments
- Treasure shelf
- Access to monuments
- Financial allowances
- Certificate for financial purposes
- etc.

Research Institutes, Agencies and NGO´s involved in the protection of Underwater Cultural Heritage

- Federal Agency for Maritime Shipping and the Oceans (Listing of ship wracks)
- Regional Offices for the Preservation of Monuments (Landesdenkmalämter)
- German Archaeological Institute
- Maritime Museum Bremerhaven (Mapping of ship wracks in the North Sea 2011-14)
- German Society for Underwater Archaeology (DEGUWA)

Auswärtiges Amt

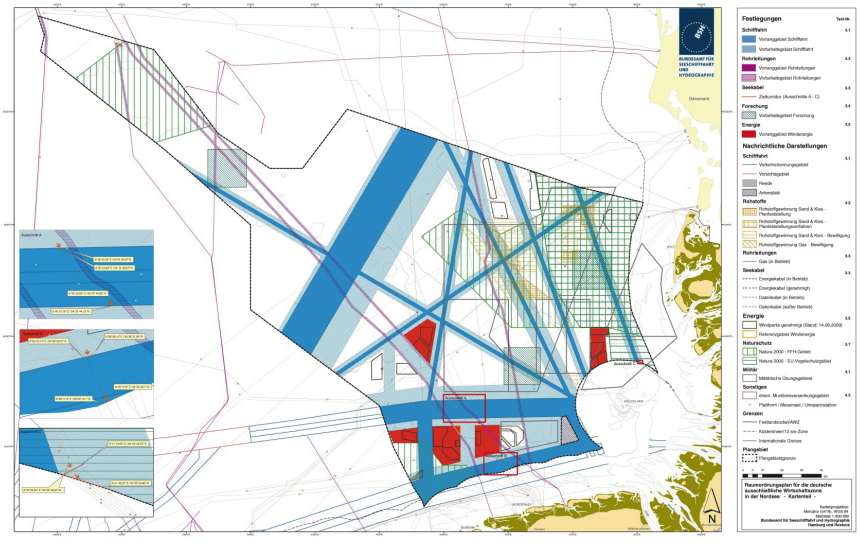


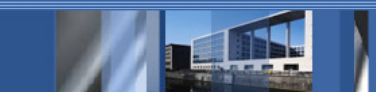
Ausschließliche Wirtschaftszone | Küstenmeer | Schengen-Außengrenze

A Reiseerleichterung für Sportschifffahrt zwischen den Schengenstaaten
B Kontrollpflicht bei Schengen-Außenverkehr

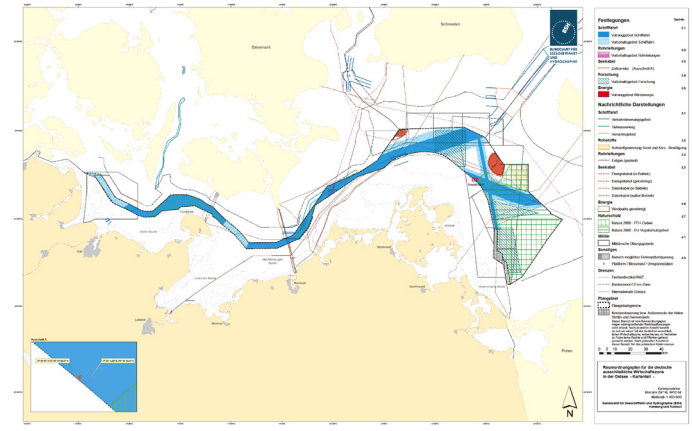
Auswärtiges Amt

Raumordnungsplan für die deutsche ausschließliche Wirtschaftszone in der Nordsee - Kartenteil -

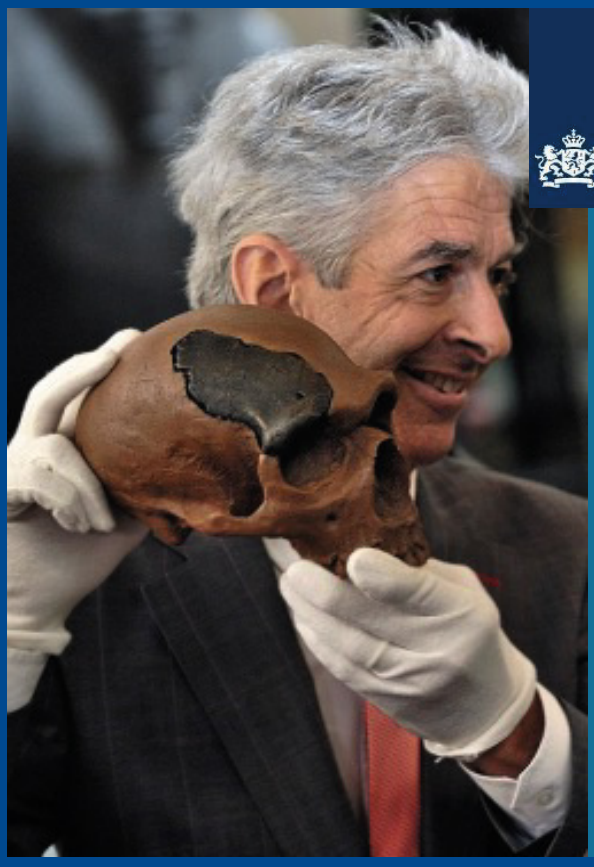




Raumordnungsplan für die deutsche ausschließliche Wirtschaftszone in der Ostsee - Kartenteil -



ANDREA KLOMP (THE NETHERLANDS)



Rijksdienst voor het Cultureel Erfgoed
Ministerie van Onderwijs, Cultuur en Wetenschap

The Legal framework on the protection of the Underwater Cultural Heritage in the Netherlands

Andrea Klomp
Senior policy officer maritime heritage

The first heritage regulation in the Netherlands

Monuments Act 1988

Article 1
Definitions

1.Monuments: all man made objects with a common interest because of their beauty, scientific meaning or their cultural historic value

2.Archeological monuments: areas that contain the objects, mentioned under 1;

Scheduling of Monuments

Articles 3 and 11

Scheduling of Monuments by minister of Education, Culture and Science

All activities that might change the protected monument in any way require a permit by the Minister Culture, Education and Science

Monuments Act 1988: blanket protection

- All archaeological excavations require a license
- Obligation to report archaeological finds

Prohibition to excavate without a license

Article 45
Prohibition to excavate

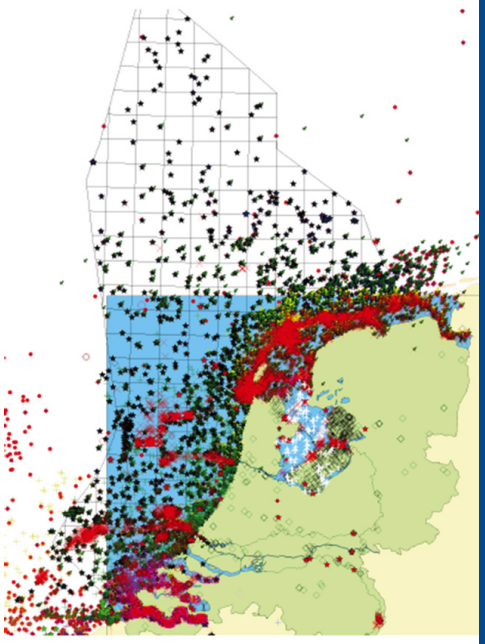
- It is forbidden to excavate ***without a license*** from the minister of Culture, Education and Science

Definition of excavating: disturbing the soil in search for monuments

Obligation to report finds

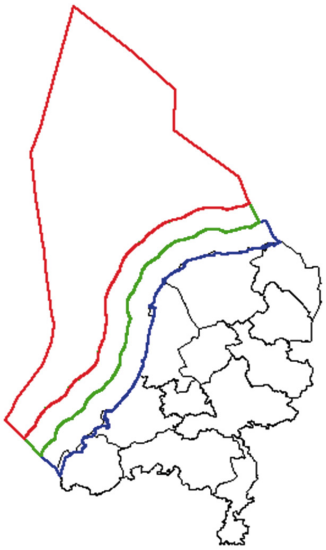
Article 53
Reporting finds

Anyone who finds an object whereof can be reasonable argued that it concerns a monument, has to report this monument to the Minister of Education, Culture and Science



Monuments Act 1988: contiguous zone

- Blanket protection has been extended over the contiguous zone
- licenses for excavations are issued for individual projects



Ownership of finds

Objects that have been found during excavations, the owner thereof being unknown, are owned by:

a. The Province where they have been found, or

b. The Municipality where they have been found, in the case that municipality has a repository for archaeological finds, or

c. The State, in case the objects are found outside the boundaries of any municipality

Ownership of finds: Dutch Civil Code

Dutch Civil Code, Book 5, article 13

1. A treasure becomes property of both the finder and the owner of the land where the treasure has been found, in equal parts.

2. A treasure is an object of value that has been hidden for such a long time that no owner can be traced

Activities incidentally affecting the UCH

2007: Implementation of the Valletta Convention in Dutch legislation

→ government decentralization

→ more involvement of civil society

Implementation of the Valletta Convention

- Local authorities are obliged to take the cultural historic values into account in their development plans
- Before issuing permit, the authorities can require that the applicant of the permit does preliminary archaeological work, based on which the authority will decide to give the permit or not
- The authorities can decide to refuse the permit, or issue the permit with certain conditions, such as:
    - To leave certain sites within the area that is going to be developed undisturbed
    - To do an excavation
    - Watching brief

Quality Control Mechanisms

1. Quality Demands by public authorities

⇩

implemented in the project design

2. Dutch Archaeology Quality Standard (KNA)

⇩

Supervised by the Cultural Heritage Inspectorate

Maritime Program

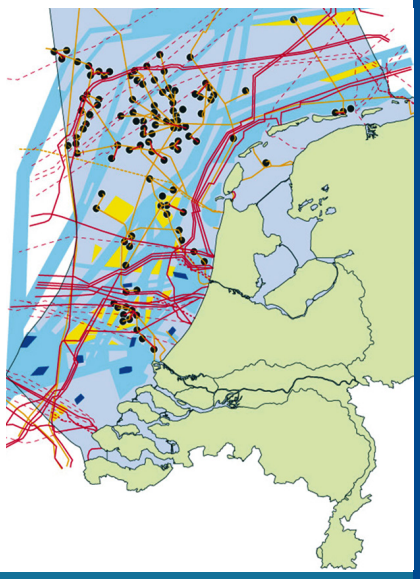
Activities incidentally affecting the UCH at sea

Activities are regulated by the national authorities, based on sectoral legislation (Mining Act, Sand Extraction Act, Water Act)

Both in Territorial waters and EEZ

Sand extraction Act has provision to obligate disturbers to do archaeological work

Most activities at sea require an Environmental Impact Assessment



Legislative issues in regard to the UNESCO 2001 Convention

- Definition of excavation
- General excavation license
- Implementation of the Valetta convention at sea

Erfgoedwet

New legislation for heritage (bringing together a number of smaller legislation on heritage (museum, collections, illegal trade)

New regulations for excavations of the Underwater Cultural Heritage:

disturbing, removing or displacing cultural heritage under water will be forbidden

.

When will the Netherlands ratify

Rijksdienst voor het Cultureel Erfgoed
Ministerie van Onderwijs, Cultuur en Wetenschap

Meer informatie:

www.maritiemprogramma.nl
www.cultureelerfgoed.nl
www.machuproject.eu
www.sikb.nl
www.unesco.org
www.wetten.nl

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www.cultureelerfgoed.nl

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Vestiging Lelystad:

Oostvaardersdijk 01-04
8244 PA LELYSTAD
tel: 0320-269700

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www.cultureelerfgoed.nl

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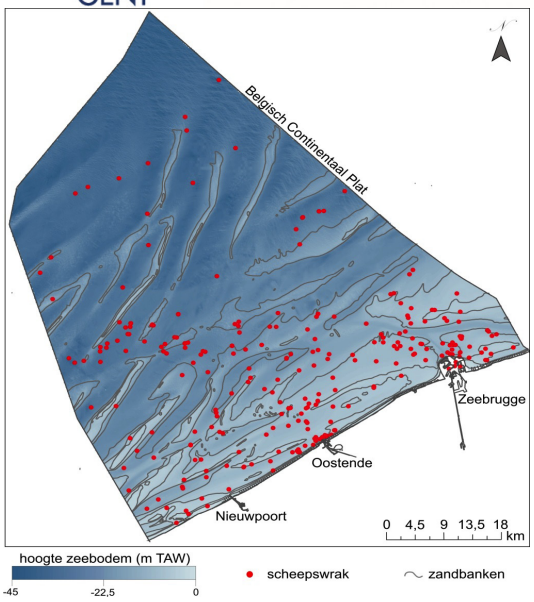
The Protection of Underwater Cultural Heritage:

An Analysis of the Belgian Legal Framework

Thary Derudder
Department of Public International Law & Maritime Institute
Ghent University



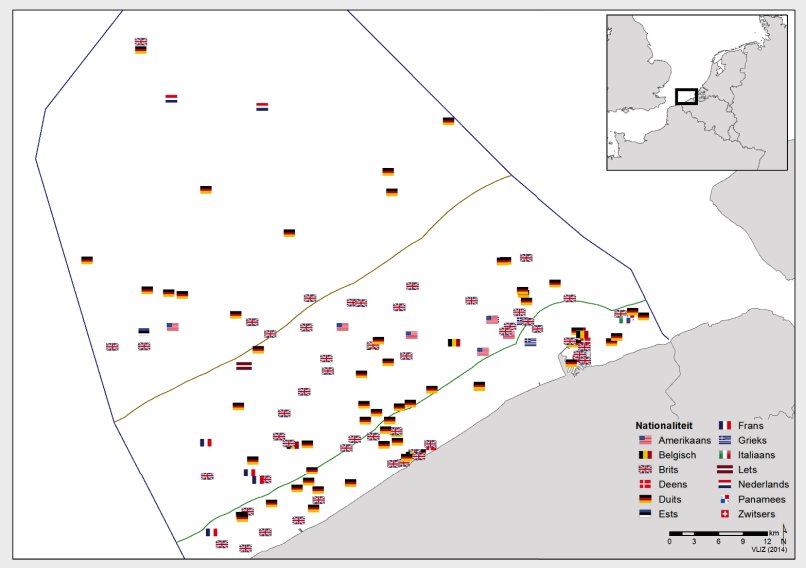
2

How old are these 228 identified shipwrecks?

16th century: 1
17th century: 1
18th century: 4
19th century: 10
20th century: 212 (>90%)

(Source presentation Sven van Haelst SeArch study day)

3



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The Belgian competence division

Belgium has three Regions and three Communities
=> competent for cultural heritage

The federal level
=> competent for the North Sea

What has been done in the past?

Cooperation agreement 2004 => no legal value

"Wreck Law" 2007=> never entered into force

Law on the Protection of UCH 2014

Implementation of UNESCO Convention on the Protection of UCH 2001

Belgium ratified UNESCO 2001 on 5 August 2013 and implemented it in the law on the protection of Cultural Heritage Under Water of 4 April 2014 + Royal Decree of 25 April 2014. They entered into force on 1 June 2014.

What qualifies as UCH?

Finds:

All traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously

Time cut-off of 100 years in the Belgian EEZ or on the Belgian continental shelf

No time cut-off in the Belgian territorial sea

What happens when finding an object?

Forbidden to bring the find above water!

Report to the receiver of UCH => the governor of the province West-Flanders

⇒ Protocol with the Flemish Heritage Agency
⇒ Creates a publicly accessible register and makes a report for the competent federal minister

What happens when finding an object?

Minister decides whether or not the objects qualify as heritage:

no => finder becomes owner (exception: state vessels)

yes => *in situ* preservation
=> not *in situ* => determining who is the owner

Ownership rights

1) The original owner
2) Organ of public governance, an institution of public interest or an official museum
3) If no one else claims the ownership rights: the finder can become the owner

The owner must store, preserve and protect the heritage with a view on long term preservation.

What is protected?

Three shipwrecks have been officially recognized as cultural heritage under water:

- HMS Wakeful
- West-Hinder
- 19th century wooden sailing ship

Which measures will be taken to protect these wrecks is not officially determined yet.

Implementation of the UNESCO 2001 Convention in the Belgian legislation?

Implementation of UNESCO Convention?

- Protect the underwater cultural heritage
- Protect with the view on long term preservation
- *In situ* preservation
- Prohibition of commercial exploitation
- The law of salvage and finds
- Protection of human remains

Implementation of UNESCO Convention?

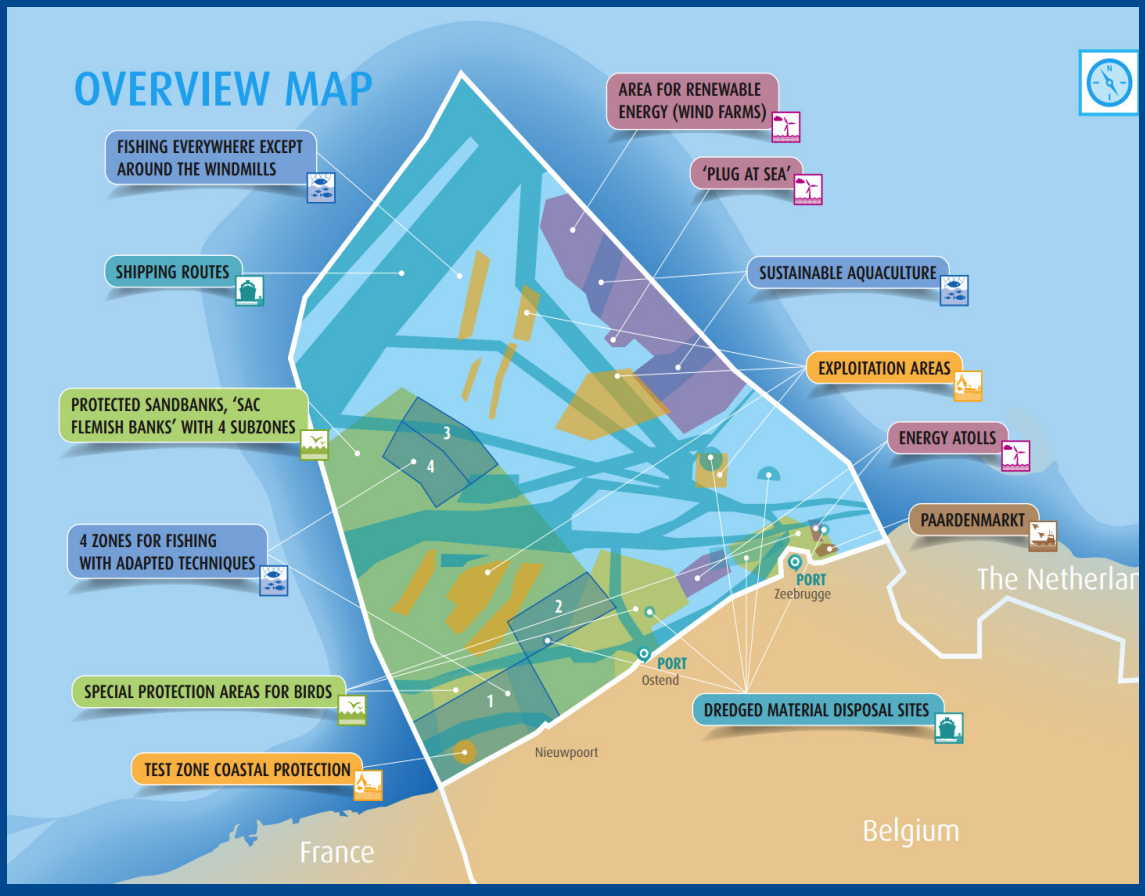
Most important principles are implemented, but:

- Nothing on activities incidentally affecting UCH.

- No obligation to report finds in other state's EEZ or continental shelf or from the Area.

- Consultation and cooperation with other states not completely clear.

Marine Spatial Planning:
Royal Decree of 20 March 2014



Marine Spatial Planning

The protection of cultural heritage under water:

No specific mention is made of protection of cultural heritage under water in the Royal Decree itself

Annex 2:

⇒ no separate areas for UCH protection => multiple use of space

⇒ ecological value of shipwrecks: protect them as nature reserves/ habitat.

Conclusion

The Belgian legislation on the protection of cultural heritage under water is very recent…

How will this work out in practice?

Only time can tell.