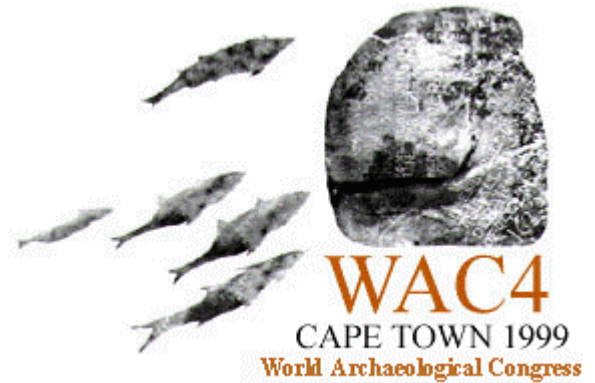


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New Laws for the Millennium - Archaeology AND Salvage?

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Introduction

As we enter a new millennium, the question arises as to how we should manage the relics of past millennia. In particular, how the world community should manage underwater cultural heritage which lies beyond the territorial jurisdiction of nation States. New technology has allowed mankind to reach the deepest parts of the ocean and recover almost any object from its depths. An historic shipwreck found at these depths is a valuable resource; it may provide material evidence to support previous hypothesis about our history, it may contain intrinsically valuable cargo still capable of entering the stream of commerce, it may provide entertainment for those interested in the past, or in the adventure and technical expertise needed to recover objects from such depths, it may harbour sea life of interest to biologists, it may be a breeding or gathering ground for fish stock which may be harvested or it may in fact be a hindrance to those who wish to utilise the seabed beneath the shipwreck¹ State governments and international organisation, such as UNESCO also have an interest in this resource. State government may have an interest in protecting evidence of their national culture, while UNESCO and other international and non-governmental organisation have an international cultural protection perspective, and aim to protect evidence of the cultures of all nations as they make up the common heritage of mankind.

Historic shipwrecks have many users and many uses, some of which may conflict².. Resolving these conflicts is a task that needs to be taken up by the Cultural Heritage

¹ The oil and gas industry and pipe-laying industry for example.

² For a discussion of the various uses of historic wreck, and the possible values that could be attached

Committee of the United Nations Educational, Scientific and Cultural Organisation (UNESCO) while drafting the Convention for the Protection of the Underwater Cultural Heritage in International waters. This paper will consider the process of resolving the perceived conflict between two of the user groups in historic shipwrecks; the maritime archaeological community and the treasure salvage community.

*The principle users of this resource*³

The user groups most commonly involved in the debate concerning the management of this resource are the archaeological community, the treasure salvage community and, to a lesser extent, the sport diving community. At present all three user groups legally utilise this resource, and have a legitimate expectation to continue doing so. The way in which each group utilises this resource, however, is perceived to differ dramatically, and it is the task of the political decision making process to establish a regime in which the conflicts between these user groups is minimised.

The ability of each group to participate effectively in the political decision-making process depends as to a large extent on the nature of the group. Properties such as the group size, duration of individual membership, formalisation, the extent of social differentiation or cohesion within the group will all affect the impact the group will have in the political arena.

The maritime archaeological community would appear to have a relatively strong formal structure, with lifelong duration of membership and a high degree of social cohesion with common professional norms and values.⁴ Members generally belong to a professional organisation, such as the Society for Professional Archaeologists (US), which requires qualifying criteria for membership.⁵ A failure to conform to the formalised structure or accepted norms of the group will result in sanctions being applied. This might include expulsion from a society, blacklisting or the prevention of an individual from presenting papers or publication of his work.⁶ This formalisation has prevented the archaeological community from interacting with the treasure salvage community. As the majority of archaeologists are employed in institutions with strong formal structures, such as state bureaucracies or educational institutions, the internalised formalisation of group norms is strengthened. The archaeological

to each use, see Kaoru, Y & Hoagland, P "The Value of Historic Shipwrecks: Conflict and Management" (1994) 22 *Coastal management* pp. 195 - 213

³ See Giesecke A.G *Historic shipwreck resources and state law: A developmental perspective* (PhD Thesis) 1992 Catholic University of America p.34 for a discussion of the user groups.

⁴ Giesecke *op.cit* p. 27

⁵ Other Societies include the Society for Historical Archaeology (US), the Nautical Archaeological Society (UK) and Society for American Archaeology. These do not, however, have qualifying membership criteria, and both qualified archaeologists, treasure salvors and sport divers may be members. See Giesecke *op.cit* p.52

⁶ It would appear that the Society for Historical Archaeology regularly prevent members from delivering papers at Society meetings if they consider the presenter to have breached the Society's ethics code. See Giesecke *op.cit* p.54. This would have appeared to have occurred in 1997 when Greg Stemm, a salvor, was prevented from presenting a paper together with Edward Mahoney and Michele Malarney entitled "Sustainable Commercial Recovery of Deep Water Shipwrecks: Opportunities and Issues for Professional Archaeologists" as the Society considered co-operation between archaeologists and salvors to be contrary to the Societies Code of Ethics.

community has therefore been able to exert a considerable amount of influence in the political arena as a strong uniform body.

The treasure salvage community, however, has traditionally lacked this solidarity. In 1991, Anne Giesecke, the drafter of the US Abandoned Shipwreck Act, stated that “Salvors have never acted together as a group and should not be expected to act together as a group because they have minimal common interests”⁷. Although salvors generally know of one another, and may have some contact, often through diving conferences and meetings, little information is passed between treasure salvors as the industry is highly competitive and by its very nature, highly secretive. The lack of formalisation and social cohesion has undermined this interest group’s effectiveness in the political arena. Its power base has traditionally been based on the huge financial resources and technical capabilities which it is able to exert. However, as we enter the new millennium, so the nature of the treasure salvage community is changing. It has had to adapt in order to participate in the political decision making process, and participate on an equal footing to that of the archaeological community.

The conflict

What then is the conflict between these two user groups? The generalised view is that “archaeologists value shipwrecks as a means to study past cultures. Sports divers value shipwrecks for their potential as recreational sites and treasure salvors value shipwrecks for economic profit”⁸. Although this is an over generalisation, it certainly underpins many of the arguments which reject the notion of the multiple-use potential of historic wreck. Although it is beyond the scope of this note to fully discuss the arguments articulated by the different user groups, a brief review of the main points of contention is appropriate.⁹

Firstly, the archaeological community has argued that artefacts recovered from historic wreck should never be sold, and should not belong in private collections. This is, arguably, the main point of contention between the archaeological community and the treasure salvage community, and it has been the policy of many of the archaeological societies to oppose the commercial recovery of historic shipwrecks. Related to this argument, the archaeological community also argue that as commercial recovery operations necessitate a sale of the recovered artefacts, this will result in a splitting up of a collection which should be kept together for further

⁷ Giesecke *op.cit* pp.65 - 66

⁸ Giesecke.*op.cit* p.3; Also see Roach.J.A “Shipwrecks: Reconciling Salvage and Underwater Archaeology” *Proceedings of the Thirty First Annual Law of the Sea Institute*, 30 March 1998, University of Miami, Florida p.8

⁹ For a more detailed discussion of the arguments for/ against commercial recovery of historic wreck, see Sweeney. J.P “The American Law of Treasure Salvage” & Varmer. O “Should there be such a thing as Treasure Salvage” Papers presented at the 1998 Maritime Law Symposium: *Sunken Treasure: Law, Technology and Ethics*. Roger Williams University, Bristol, Rhode Island 13 - 15 August 1998, See also, Cockrell. W.A “The trouble with treasure - a preservationist view of the controversy” (1980) 45 *American Antiquity* pp.333 - 339; Stemm. G “Protection of our Underwater Cultural Heritage: Thoughts on the Future of Historic Shipwrecks” *Proceedings of the Thirty First Annual Law of the Sea Institute*, 30 March 1998, University of Miami, Florida; Brice .G “Salvage and the Underwater cultural heritage” (1996) 20 *Marine Policy* pp.337 - 342; Clement. E “Development of an international convention on the protection of the underwater cultural heritage” *Proceedings of the Thirty First Annual Law of the Sea Institute*, 30 March 1998, University of Miami, Florida; Roach *op.cit*.pp. 1 - 12

scientific study¹⁰. Treasure salvors will argue that a difference needs to be made between cultural artefacts with little economic value though high cultural value, and trade goods of high economic value but often low cultural value as they normally are found in large numbers with little to differentiate each item, such as coins, bullion and porcelain. A representative sample could be kept of these trade items while the remainder may be separated from the collection.¹¹ It is argued that the collection of redundant multiple artefacts and data is “neither good science nor a cost effective use of funds and resources, whether they be public or private”¹² and that to prohibit the recovery of all historic wrecks, or to prohibit the sale of all trade goods that are found in large numbers is an unbalanced public policy. Treasure salvors would also be quick to point out that other cultural items, such as paintings, coins, stamps, antiques and fossils are susceptible to both private ownership and continued economic utilisation, and that there is therefore no reason to differentiate between underwater cultural heritage items and their terrestrial counterparts. It is also argued that commercial recovery operations do not necessarily need to sell artefacts to raise funds. Increasingly, profits are being generated through media rights, such as films, books and exhibitions of recovered artefact as well as the sale of replicas of these artefacts.¹³

Secondly, the archaeological community has argued that commercial recovery operations do not produce good archaeology. The conduct of many salvage operation have in the past not only produced very poor archaeology, but in many cases, no archaeology at all¹⁴. It is self evident that historic wreck have an important archaeological role to play which must be protected from those who do not view this resource as capable of a multiple-utilisation and wish to exploit it solely for their personal financial gain. However, just because salvage operations have not produced good archaeology in the past does not necessarily mean that they cannot produce good archaeology in the future. Conversely, treasure salvors would argue that just because a recovery operation is commercial, it will not necessarily mean that it will not produce scientific and historical information, and that they can and do undertake recovery operations in accordance with accepted professional archaeological standards. Many treasure salvors will also argue that it is in their own best interest to excavate a shipwreck in an appropriate archaeological manner. It may, for example, give the recovered artefacts a pedigree and heightened value

Thirdly, the archaeological community has argued that the application of traditional admiralty salvage law to historic shipwrecks is inappropriate. Traditional salvage law rewards a salvor who rescues property from marine peril and returns it to the stream of commerce. Archaeologists have claimed that not only should the recovered artefacts not be returned to the stream of commerce, but that historic shipwrecks which will have reached a stage of equilibrium with their marine environment are not in marine peril. It is therefore the policy of most archaeological societies to promote

¹⁰ Varmer *op.cit* p.2

¹¹ Stemm *op.cit* p.4

¹² Roach, *op.cit* p.9

¹³ The huge success of the Titanic exhibition in Greenwich, UK and St. Petersburg Florida bears testimony to the possible success of a salvage operation which does not rely on the sale of recovered artefacts.

¹⁴ Hutchinson. G “ Threats to underwater cultural heritage. The problems of unprotected archaeological and historical sites and objects found at sea” (1996) 20 *Marine Policy*. 287 - 290

preservation *in situ* and to encourage non-intrusive investigation. Actual excavation and recovery should only occur if the historic shipwreck is under threat.

Treasure salvors have argued that this is a generalisation, and that many historic wrecks are still subject to marine peril. The distinction between these two user groups turn on the meaning of ‘marine peril’. The treasure salvage community have argued that not only are historic wreck susceptible to marine peril from fisheries activities, construction and pollution, but that to leave *in situ* items of high economic value capable of re-entering the stream of commerce, in itself constitutes marine peril. This definition would, however, ignore the multiple-use nature of this resource. Although a detailed discussion of traditional salvage law is beyond the scope of this paper, it has been argued that salvage law can protect the archaeological and historic integrity of a wreck¹⁵. United States Admiralty courts have increasingly held salvors to a duty to protect the archaeological and historical integrity of historic wreck.

Many in the archaeological community have suggested that treasure salvors are a major threat to historic wreck and should be eliminated as a user group¹⁶. Treasure salvors, however, maintain that as a user of this resource, they have less impact than any other user. This is primarily due to the fact that in international waters, a number of factors exist which significantly affect the number of shipwrecks which are viable for commercial excavation, such as depth, high costs of technology, and the low percentage of wrecks which carried cargo of high economic value. One commercial treasure salvage company estimates that there are at most 20 or 30 shipwrecks which are economically viable to excavate.¹⁷

¹⁵ Traditional admiralty law of salvage is not a rigid system of law. It is capable of adapting to new situations, and certainly in the United States, admiralty courts have begun to take into account preservation and historic values when applying traditional admiralty law of salvage. In *Cobb Coin., Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel*, 549 F.Supp. 540 (S.D.Fla, 1982), “the court suggested that federal admiralty principles, as applied to the salvage of historic shipwrecks, could be fashioned to safeguard the artefacts and invaluable archaeological information associated with the shipwreck, and the public’s interest in the shipwreck could be accommodated through a proper award of a portion of the artefacts to the state of Florida”. Bederman, D.J. “Historic Salvage and the Law of the Sea” *Proceedings of the Thirty First Annual Law of the Sea Institute*, 30 March 1998, University of Miami, Florida. p7. In *MDM Salvage* 631 F.Supp. 308, 310 - 311 (S.D.Fla.1986), the Federal District Court denied the applications of two different sets of commercial salvors to recover property from a Spanish galleon as neither firm had attempted to preserve the ‘archaeological integrity’ of the wreck. The court noted that “Archaeological preservation, onsite photography, and the marking of sites are particularly important ... as the public interest is compelling in circumstances in which a treasure ship, constituting a window in time provides a unique opportunity to create a historical record of an earlier era. These factors constitute a significant element of entitlement to be considered when exclusive salvage rights are sought.” (at 310) Similarly, in *Columbus-America Discovery Group v. Atlantic Mutual Insurance Ins. Co.* 974 F.2d 450, at 468, *Deep Sea Research v. The Brother Jonathan* 883 F.Supp 1343, at 1362, and *RMS Titanic Inc. v. Wreck* 1996 AMC 2481, 2493 (E.D.Va. 1996), the ability of the salvor to preserve the archaeological integrity of the wreck was taken into account when granting exclusive salvage rights and in determining the salvage award. However, in *Platoro Ltd. v. The Unidentified Remains of a Vessel* 518 F.Supp 816, 822 (W.D.Texas 1981), the Court for the Western District of Texas specifically declined to hold the salvors to the standards required of marine archaeology, as the state had urged. (See also *Moyer v. The Andrea Doria*, 836 F.Supp.1099, 1107 (D.N.J.1993). See also Brice *op.cit* p.337 - 342. Brice is opposed to any treaty specifically excluding the law of salvage, as admiralty law is in the process of making this accommodation

¹⁶ Clément *op.cit* p.1

¹⁷ Stemm *op.cit* p.7: Other estimates put the number of economically viable wrecks as approximately 100 to 200, which would yield a salvage value of more than US\$10 million each. *UNESCO Report of*

The conflict between the archaeological community and the treasure salvage community has been fuelled and maintained by the popular media. In the US during the 1980's, much of the litigation involving wrecks such as the *Atosha*, concerned jurisdictional wrangles between States and the Federal Admiralty courts, yet were eventually portrayed by the media as archaeologist versus salvor disputes. The media has consistently highlighted the extremes in both points of view, and this perceived conflict has been used to exaggerate the danger, romance and adventure associated with shipwreck discovery and recovery. The impression is given that there is an abundance of treasure beneath the sea which offer the finder vast and quick fortunes. This has enabled unscrupulous salvage companies to profit from the sale of shares through the media hype in projects that have little, if any, chance of success.¹⁸

Whatever the merits of each side's arguments, it is obvious that fundamental differences exist, and that in the decision-making process, these differences will have to be addressed and a compromise reached. In order to create a multiple-use management structure that will accommodate all these interests, compromises will have to be made. This may, however, be difficult if the user groups continue to cling to the same old arguments in favour of or opposing the commercial recovery of historic wreck

Why should historic wreck be a multiple-use resource?

The importance of historic wreck as an archaeological resource is undeniable and, as a non-renewable time-capsule, the information that can be obtained from it is culturally invaluable. As such, the archaeological community has a legitimate priority in protecting the archaeological and historical integrity of an historic wreck. This, however, needs to be incorporated into a multiple-use management regime. Increasingly, western governments have recognised the economic utilisation of cultural property. This is particularly evident in the use of the architectural heritage and cultural tourism. Similarly, the economic utilisation of public natural resources by private enterprise has been sanctioned, particularly in the timber trade. It is an increasing norm, even in social democratic countries, for the state to expect private finance to collaborate with public institutions. The shrinking budgets of western governments have relegated archaeology to the bottom of the list of priorities and without the input of private finance the archaeological community will simply not be able to finance deep water excavations.

The increasing criticism of some salvage operation from the archaeological community, and the influence which the archaeological community may have over national governments, may be a threat to the continuing operations of the salvage community. The salvage community has therefore had to take cognisance of the archaeological importance of historic wreck. However, it is recognised that enforcing any prohibition of salvage would be unworkable, and would simply be ignored by

the Meeting of Experts for the Protection of Underwater Cultural Heritage, 22- 24 May 1996, CLT-96/CONF.605/6. p.12

¹⁸ In 1980 Cockrell has suggested that the "the introduction of the potential for great profits through pyramidal stock manipulations has become the most significant factor in the current legal and media attack on our endangered past." Cockrell. *op.cit* p.334. It would appear that little has changed over the past 18 years, and the sale of shares in recovery operations continue.

unscrupulous salvage companies who have the ability to evade coastal state jurisdiction. It is therefore only through a collaborative effort, that the archaeological community and the salvage community will be able to achieve their objectives.

Failure by UNESCO to create a model for conflict resolution

The perceived threat to the underwater cultural heritage by the activities of treasure salvors and sport divers was a major impetus for the International Law Association's Cultural Heritage Committee to prepare a draft convention on the Protection of the Underwater Cultural Heritage in International Waters. As UNESCO had been engaged in the preparation of international conventions protecting cultural heritage since its inception, the ILA considered UNESCO the appropriate body to take further action, and transmitted the draft to UNESCO for consideration in 1994.

From the beginning of the ILA drafting process, the relative power of the user groups being discussed was disproportionate. The archaeological community was to a large extent the driving force behind the ILA proposals, and its interest was often sought and accommodated during the process. However, it would appear that no treasure salvor was ever consulted by the committee, primarily because some viewed the very existence of the treasure salvage community as a reason for drafting the convention. In the official comment to the draft, the ILA committee, under the heading "The need for a Convention" began by stating that "the need for the committee's initiative is highly evident throughout the world, especially in the Caribbean, Europe and the Pacific and Indian oceans. Within the Turkish territorial sea, all known historic wrecks have been plundered, while in the Indian Ocean salvors are approaching governments to allow them to survey and commercially exploit local waters for historic wreck. Massively financed and poorly regulated private salvage of historical shipwrecks off the Southeast coast of the United State continues unabated."

The drafting committee was, however, aware of the multiple-use of this resource, and conceded in 1991 that provision had to be made for the interests of divers and salvors¹⁹. However, these interests, it was said should not be acceded to altogether²⁰. The ILA official comments stated that "it was imperative to identify and take account of all relevant interest to create a conventional regime that would be effective" However, it then went on to state that "it became questionable whether the convention should attempt to incorporate all these and possibly other values, at the risk of diluting the chief effort to conserve the cultural heritage."²¹ The archaeological perspective dominated the agenda, and it is therefore not surprising that in the preamble to the ILA draft, the commercialisation of efforts to recover historic wreck is regarded as a growing threat to the underwater cultural heritage. It is not the 'unregulated', or 'irresponsibly' commercial recovery operations that the ILA considered a threat to

¹⁹ The ILA committee took notice of the multiple-use guidelines applied in the United State in the Abandoned Shipwreck Act (Pub. L. No. 100-298, 102 Stat. 432 (1988), section 5) which required the secretary of the Interior to publish guidelines which would (1) maximise the enhancement of cultural resources; (2) foster a partnership among sport divers, fishermen, archaeologists, salvors, and other interests to manage shipwreck resources of the States and the United State; (3) facilitate access and utilisation by recreational interests; and which would (4) recognise the interests of individuals and groups engaged in shipwreck discovery and salvage

²⁰ O'Keefe.P.J & Nafziger.J.A.R "The Draft Convention on the Protection of the Underwater Cultural Heritage" (1994) 25 *Ocean Development and International Law* p.392

²¹ O'Keefe & Nafziger *op.cit* p.394

the underwater cultural heritage, but the commercialisation *per se*. Article 4 therefore states that “Underwater cultural heritage to which this Convention applies shall not be subject to the law of salvage”. It is therefore surprising to find, in the preamble a call for co-operation with salvors. The preamble states that “determining that the underwater cultural heritage may be threatened by irresponsible activity and that therefore co-operation among States, salvors, divers, their organisations, marine archaeologists, museums and other scientific institutions is essential for the protection of the underwater cultural heritage.” With the exclusion of salvage law applicable to historic wreck, there will be no incentive for the treasure salvage community to co-operate as none of their interests in this resource has been recognised, yet alone accommodated.

Having excluded the application of salvage law to historic wreck, the ILA draft then introduces the Charter on the Protection and Management of Underwater Cultural Heritage produced by the International Council of Monuments and Sites (ICOMOS Charter)²². The preamble states that "considering that exploitation, excavation, and protection of the underwater cultural heritage necessitates the application of special scientific methods and the use of suitable techniques and equipment as well as a high degree of professional specialisation, all of which indicates a need for uniform governing criteria." This Charter therefore sets a benchmark against which all excavations should be conducted. It concerns matters such as project design, project time-tabling, qualification, responsibility and experience requirements of project members, documentation, site management requirements, reporting, curation and information dissemination. But instead of producing a Charter to deal solely with the actual excavation standards, ICOMOS entered the political arena by claiming that "commercial exploitation of underwater cultural heritage for trade or speculation is fundamentally incompatible with the protection and management of the heritage." Whether a commercial recovery operation could undertake an excavation to the same standards as a professional archaeological excavation would be irrelevant. The mere fact that the excavation is for commercial gain contravened the Charter. This is emphasised in article 3 which states that "project funding must not require the sale of underwater cultural heritage or the use of any strategy that will cause underwater cultural heritage and supporting documentation to be irretrievably dispersed."

The UNESCO proposals

Although the ILA draft failed to address the multiple-user interest in this resource, it was a first step in a process which should be able to incorporate negotiation and take into account the views expressed by other all user groups²³. The ongoing drafting process at UNESCO has, however, failed to redress the imbalance in the user groups interest in this resource. In early 1998, UNESCO produced a new draft of the convention. The preamble included the following paragraph; “Aware further of increasing commercialisation of efforts to recover underwater cultural heritage and availability of advanced technology that enhances identification of and access to wrecks”. This represents a slight shift in the attitude evident in the ILA draft, as the commercialisation of historic wreck recovery is not directly stated to be a threat to the underwater cultural heritage, only a factor which raises concern. This may be a first

²²Ratified on 9 October 1996 in Sofia, Bulgaria

²³ See *UNESCO Report of the Meeting of Experts for the Protection of Underwater Cultural Heritage*, 22- 24 May 1996, CLT-96/CONF.605/6. p.13

step in obtaining co-operation with treasure salvors, which is again called for in the UNESCO draft, stating that “co-operation among states, marine archaeologists, museums and other scientific institutions, salvors, divers and their organisations is essential for the protection of underwater cultural heritage”

However, article 12(2) of The UNESCO draft states that “State Parties shall provide for the non-application of any internal law or regulation having the effect of providing commercial incentives for the excavation and removal of underwater cultural heritage.”

This article, which replaces article 4 of the ILA draft, does not specifically mention the exclusion of salvage law, but rather a wider group of laws, which would include not only salvage law, but also the law of finds, so controversial in the United States. Its effect is similar to that of article 4 of the ILA draft in that it effectively eradicates the commercial recovery of historic shipwrecks, and therefore alienates the treasure salvage community which would, for obvious reasons, no longer have any incentive to co-operate with archaeologists or any other user group.

Some commentators on this convention have suggested that co-operation with salvors and divers is not realistically achievable. As most underwater archaeological sites are found by amateur divers or salvors, co-operation would appear to be essential. Failure to co-operate with salvors and divers, or consider their interests in this resources, will only result in finds going unreported and illicit excavations. Ultimately, this approach will damage the very interests which the convention purports to serve.

How do we resolve this conflict?

The UNESCO draft convention has done little to resolve the conflict between the archaeological community and treasure salvage community. If anything, it has exacerbated it by polarising the user groups. The inability of UNESCO to consider this resource as susceptible to multiple-use and to negotiate or consult the other user groups has led them to question its appropriateness as a suitable forum for conflict resolution. The perception is that States have exercised an organisational power over other interest groups by ensuring that the allocation of this resource takes place in an arena in which these interest groups are excluded. The negotiation process is conducted by State representatives, who ordinarily will have been briefed by the state archaeologist or those archaeologists who invariably work within State bureaucracies²⁴. The treasure salvage community has had no representation. The inability of the treasure salvage community to act as a unified user group has exacerbated this imbalance of power within the negotiation process. At the UNESCO meeting of experts, convened to discuss this draft in July 1998, only one delegation, the United States, had a representative of the treasure salvage community as a member of their delegation.²⁵ The inclusion of a representative of this user group in a

²⁴ The Paris meeting of experts was attended by over fifty national delegations. Each delegation typically comprised a permanent UNESCO delegate from that state together with either an international lawyer with expertise in the Law of the Sea or a cultural resource manager, often from the state’s national museum.

²⁵ Mr Greg Stemm, of Odyssey Marine Exploration, Tampa Bay, Florida was a delegate in the United States delegation. The remaining members of the delegation were federal administrators, including an archaeologist from the National Park Service.

national delegation is, however, symptomatic of the changes currently taking place within the treasure salvage community.

ProSEA

The US treasure salvage community is arguably the largest, most technically advanced and best funded in the world. Its history, however, is plagued with examples of confrontations with the archaeological community, and accusations of looting, destruction cultural heritage items with low economic value and loss of archaeological data. Many of these criticisms are well founded, and the treasure salvage community has begun to take cognisance of the archaeological and historical importance of historic wreck. As the technology to recover historic wreck in deep waters developed and became more cost effective, so more treasure salvors began moving into international waters. This coincided with the growing awareness of the archaeological importance of historic wreck and many of the deepwater recovery operations began to undertake their operations in accordance with acceptable archaeological standards. In 1996, a number of these companies established the Deep Shipwreck Explorer's Association to promote responsible and professional recovery of deep sea historic wreck. The association established a code of ethics, which required members to -

- conduct themselves in a spirit of fairness and justice in dealings with all other user groups of historic wreck
- acknowledge that all archaeological and historical knowledge derived from any recovery operation belonged to the public.
- undertake recovery operation in such a way that as much scientific, historical and archaeological data as practically possible is gleaned from the site of the shipwreck
- make all archaeological information available to the scientific, historical and archaeological community as well as the public and to allow the study of artefacts for a reasonable time after their recovery and conservation
- use the most advanced technologies available in undertaking the archaeological fieldwork in conjunction with recovery
- employ a project archaeologist who is to be included in all aspects of planning and execution of an excavation
- ensure that prior to excavation, a thorough plan for the excavation and ultimate conservation and disposition of artefacts is drafted and to ensure that no artefacts deemed to be of archaeological or historical significance are ever recovered from any shipwreck unless funds have been budgeted and made available for their conservation, cataloguing and storage
- hold out for sale only those artefacts which have been subjected to thorough study and investigation by the project archaeologist. Those items that are deemed to be of irreplaceable archaeological and historical value, and which cannot be photographed, moulded or replicated in a manner that allow future study and analysis, should be kept together in a collection which is available for study by anyone that is interested in conducting legitimate research.

Although many of these points may not be entirely satisfactory to the archaeological community, these ethics certainly indicate an awareness of the archaeological and historical importance of historic wreck among some sectors of the treasure salvage community, and serve as a minimum standard upon which future negotiations in allocating this multiple-use resource can be conducted.

The creation of this association enabled the treasure salvage community to unify its voice within the political decision making process in the United States, and ensured that the US representatives to UNESCO were briefed by all user groups. However, the United States is only one delegation amongst many, and the treasure salvage community felt that it not only needed representation within national delegations, but also as a distinct international user group. The UNESCO negotiating procedure allows for the representation of special status NGO's, and it was with this as one of its aims, that the Professional Shipwreck Explorers Association (ProSEA) was established in 1998²⁶. Its membership, however does not consist solely of treasure salvors, but of members of all other user groups who advocate a multiple-use management strategy for historic wreck.

Two of the Board members of ProSEA²⁷ have drafted an alternative convention to that of UNESCO, which purports to take into account all user groups interests. The need for co-operation between all user groups is entrenched in the preamble, which states that "co-operation among all constituencies and users are necessary for the successful multiple use management, conservation and utilisation of Historic Wreck resources" and that "it is in the best interests of all constituencies and users of Historic Wrecks to develop a standard for the disposition and allocation of Historic Wreck artefacts which encourage co-operation between the archaeological, commercial and scientific communities." This is a similar sentiment to that expressed in the UNESCO draft, and it would appear that all constituencies have at least agreed in principle that co-operation is necessary. Whether co-operation is practically possible, however, will depend on the extent to which each user group is willing to compromise. The UNESCO draft has clearly outlined the archaeological community's standards, which includes the exclusion of salvage law to historic wreck, while the ProSea draft appears to be the standard upon which a majority of the Deep treasure salvage community considers a consensus can be reached. However, the ProSea draft takes a diametrically opposite view to UNESCO in proposing the continued application of salvage law to historic wreck. The preamble to the ProSEA proposals states that "responsible and professional commercial exploration of Historic Wrecks is compatible with, and complimentary to, the fundamental goals and intentions of the scientific, archaeological, anthropological and historical communities".

The application of salvage law to historic wreck is introduced in article 1, which proposes that the exploration and recovery of all historic wrecks, airplanes and any other man-made modes of transportation lost at sea are governed by the terms of the 1989 International Salvage Convention²⁸. However, article 30 of the Salvage

²⁶ ProSea is an amalgamation of the Deep Shipwreck Explorers Association (DEEPSEA) and the Historic Shipwreck Salvors group. The latter consists of maritime lawyers, divers, salvors and academics with an interest in historic wreck. ProSea is incorporated under the existing DEEPSEA legal structure as a non-profit trade association under the laws of the State of Florida.

²⁷ Professor David Bederman (Emory University) and Greg Stemm (Odyssey Marine Exploration) proposed *The Draft International Convention on the Exploration and Protection of Submerged Historic Wrecks*

²⁸ IMO Doc. LEG/CONF.7/27 (May 2, 1989). See also Gaskell.N.J "The International Salvage Convention of 1989" (1989) 4 *International Journal of Estuarine and Coastal Law* p.268; Brice. G *Maritime Law of Salvage* 2nd Ed. (1993) Sweet & Maxwell; Gaskell.N.J "The 1989 Salvage Convention and the Lloyd's Open Form Salvage Agreements" (1990) 16 *Tulane Maritime Law* pp. 1 - 103; Shaw. R "The 1989 Salvage Convention and English Law" (1996) 2 *Lloyd's Maritime and*

Convention allows states to enter a reservation “not to apply the provisions of the convention ... when the property involved is maritime cultural property or prehistoric, archaeological or historic interest and is situated on the sea-bed.” Of the 25 parties to the convention, 8 have entered such a reservation²⁹. This does not necessarily mean, however, that these States will not apply salvage law to historic wreck, only that the Salvage Convention will not apply. Some States may, however, have entered such a reservation in order not to apply salvage law to historic wreck.³⁰ As this would be incompatible with the ProSEA draft, article 20(2) stipulates that all reservations made by contracting parties pursuant to article 30 of the Salvage Convention will be terminated upon entry into force of the ProSea convention.

The ProSea convention differentiates between abandoned and non-abandoned wrecks. Article 7 of the draft concerns the conditions and criteria for a salvage award for non-abandoned wrecks. It states that, together with the traditional standards required of a salvor, as determined in article 13 of the 1989 Salvage Convention³¹, a liberal salvage award would take into account the extent to which the archaeological and historical integrity of the wreck is preserved. Article 6 stipulates a number of duties which a salvor should comply with in order to preserve the archaeological integrity of an historic wreck, which includes; considering whether *in situ* preservation is the most reasonable use of the shipwreck taking into account other user groups interests; developing a thorough excavation plan which includes provision for funding the conservation of recovered artefacts; supervision by a professional archaeologist, mapping of the wreck site and related debris field, recording of all observations, location data and description in accordance with contemporary archaeological recording standards; stabilisation and conservation of recovered artefacts and the preservation, publication and dissemination of all relevant information consistent with contemporary archaeological reporting standards.

Article 13 concerns abandoned wrecks, and entitles the finder to a decree granted by a maritime or admiralty court or any other tribunal of competent jurisdiction to title in objects recovered from the wreck. This entitlement is dependent on the same criteria required for a salvage award, as specified in article 6.

Before any artefacts recovered from an historic wreck are to be sold, either to recover a salvage award, or as the finders rights of ownership under article 13, a number of

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²⁹ UNESCO Doc. CLT-96/CONF.605/6 p.12

³⁰ e.g. Spain Law 16 of 25 June 1985 Spanish Historical Heritage article 40.1

³¹ Article 13 of the 1989 International Salvage Convention is headed ‘Criteria for fixing the reward’, and states that;

1. The reward shall be fixed with a view to encouraging salvage operations, taking into account the following criteria without regard to the order in which they are presented below:

- (a) the salvaged value of the vessel and other property;
- (b) the skill and efforts of the salvors in preventing or minimising damage to the environment;
- (c) the measure of success obtained by the salvor;
- (d) the nature and degree of the danger;
- (e) the skill and efforts of the salvors in salvaging the vessel, other property and life;
- (f) the time used and expenses and losses incurred by the salvors;
- (g) the risk of liability and other risks run by the salvors or their equipment;
- (h) the promptness of the services rendered;
- (i) the availability and use of vessels or other equipment intended for salvage operations;
- (j) the state of readiness and efficiency of the salvor’s equipment and the value thereof

pre-conditions for sale must be met. This includes holding out for sale only those artefacts which have been subjected to reasonable scholarly study and analysis, or which have been documented, photographed, moulded or replicated in a manner that allow future study and analysis, and making reasonable accommodation for keeping a representative sample of archaeologically significant artefacts together as a collection which is available for study by anyone that is interested in conducting legitimate research. Article 6(9)(a) binds the salvor or finder to offer preferential rights to purchase artefacts deemed to be of irreplaceable archaeological value to a contracting state, a state of origin, a state of cultural origin, or a state of historical or archaeological origin to that state at a price to be determined by mutual agreement between the (salvor or finder) and the state, based on a fair market value appraisal. The right to sell underwater cultural heritage is therefore the crux of the ProSEA draft convention, and a *sine qua non* for the continued existence of the treasure salvage community.

The ProSEA draft would suggest that an archaeological excavation and a treasure salvage excavation may be almost identical. Both, it is suggested, may conduct an excavation to exactly the same standards, conserve the artefacts to the same standards, publish the results to the same standard, and both may, possibly, even display the artefacts in publicly accessible institutions. However, ownership or control of the disposition of the recovered artefacts would appear to be that which distinguishes the treasure salvor from the professional archaeologist and which opens clear water between the UNESCO draft convention and the ProSea draft convention

Although the ProSEA draft evidences some laudable objectives, it is uncertain whether these really do satisfy the standards required of a professional archaeological excavation. The use of terms such as “as practically possible”, and particularly the word “reasonable” as in “reasonable time”, “reasonable scholarly study” and “reasonable accommodation” would appear to reserve certain judgements for the salvors rather than the archaeologists. This can only create a new round of arguments as to what is “reasonable”.

Conclusion

The creation of ProSea is unique in the long history of treasure salvage. For the first time the industry may be able to assert its interest as a unified voice and participate in the political decision-making process regarding the allocation of this valuable resource. With the introduction of a code of ethics, and proposed standards in the ProSEA draft, the industry has attempted to overcome some of the criticisms levied by the archaeological community. Whether these have gone far enough and are acceptable to the archaeological community remains to be seen. What is important though, is that the treasure salvage community are determined to have their say, and must be taken into account in the political decision making process. Whatever the merits or demerits of the ProSEA proposals, the importance lies in the extent to which the archaeological community will view these as a basis upon which negotiation and compromises can be reached.

The future of historic shipwrecks lies in the hands of those negotiating the UNESCO draft convention for the Protection of the Underwater Cultural Heritage in international waters. UNESCO will hold a second meeting of experts to consider this

draft in April 1999. Cognisant of the lack of participation of all user groups in the negotiation process, the US State Department has offered to cover the cost of this meeting of governmental experts if UNESCO agree to allow the full participation of any interest group with a *bona fide* interest in this resource. As yet, UNESCO have not responded to this offer. In view of the practical problems of policing underwater archaeological sites, and the power of the US treasure salvage community, UNESCO must take cognisance of ProSEA. It is hoped that UNESCO will accept this invitation, for if agreement is to be reached and historic shipwrecks are to survive the new millennia, recognition must be made of the multiple-use nature of this resource and the political decision making process must allow for full participation of all user groups of historic shipwrecks.³²

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³² Roach *op.cit* p.10