The Law of the Sea Convention and Underwater Cultural Heritage

Tullio Scovazzi
Professor of International Law, University of Milano-Bicocca, Milan, Italy

Abstract
As far as underwater cultural heritage is concerned, the regime of the Law of the Sea Convention (LOSC) is fragmentary, insufficient and even counterproductive. The English text of Art. 303, para. 3, can be interpreted as an invitation to the looting of the heritage under a first-come-first-served, or “freedom-of-fishing,” criterion. Only Art. 149, which applies only to “the Area”, takes into consideration the need to use the heritage for the benefit of mankind and the preferential rights of some States. The 2001 UNESCO Convention for the Protection of the Underwater Cultural Heritage tries to bring a remedy to the disastrous aspects of the LOSC regime. In short, even the LOSC can be bad, albeit in very rare instances, and the case of underwater cultural heritage is the most notable one.

Keywords
Law of the Sea Convention (LOSC); cultural heritage; freedom of the sea; admiralty law; salvage law

An Inconsistent and even Counterproductive Regime

The United Nations Convention on the Law of the Sea (LOSC; Montego Bay, 1982; 1833 UNTS 396) is a cornerstone in the field of codification of international law and is rightly described as a “constitution for the oceans.” However, it is inevitable that in such a legal monument a few weak, dubious and even bad provisions may be found. The worst among such provisions probably is Art. 303, para. 3, which is included in the Article devoted to “archaeological and historical objects found at sea”.

1 Yet the LOSC regime for underwater cultural heritage is fragmentary, being composed of only two provisions included in different parts of the Convention, namely Art. 149 (in Part XI—The Area) and Art. 303 (in Part XVI—General Provisions).

Moreover, the

1 For explanations see infra, under the heading, “The Overarching Status of Admiralty Law”.

two provisions are in a conceptual contradiction one with the other and the latter can be interpreted as a covert invitation to the looting of the underwater cultural heritage. The fact that the subject of underwater cultural heritage was taken into consideration only in the last phase of the negotiations cannot be a justification for such a disastrous regime.

The UNCLOS III Negotiations

In 1980 a proposal was made in the Third UN Conference on the Law of the Sea (UNCLOS III) by Cape Verde, Greece, Italy, Malta, Portugal, Tunisia and Yugoslavia to include in the future Convention a provision that extended the jurisdiction of the coastal State to the underwater cultural heritage found on the continental shelf.\(^3\) A different regime was proposed in an anonymous draft that granted to the coastal State some limited rights within the 24-nautical-mile contiguous zone.\(^4\) This was based on the assumption that granting coastal States rights over archaeological or historical objects over the whole continental shelf or the 200-nautical-mile exclusive economic zone (EEZ) was unnecessary, because most of such objects are found close to the coast, and also questionable, because it would alter the already established balance between the rights and obligations attributed to the coastal State and to other States within the EEZ.\(^5\) This proposal was considered “closer to a compromise than any of the others”\(^6\) and corresponds, with minor drafting changes, to the present LOSC Art. 303, paras. 1–3.

\(^3\) “The Coastal State may exercise jurisdiction, while respecting the rights of identifiable owners, over any objects of an archaeological and historical nature on or under its continental shelf for the purpose of research, recovery and protection. However, particular regard shall be paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin, in case of sale or any other disposal, resulting in the removal of such objects out of the Coastal State”: Doc. C.2/Informal Meeting/43/Rev. 3 of 27 March 1980, in R. Platzöder (ed.), *Third United Nations Conference on the Law of the Sea* (vol. V, Oceana Publications, Dobbs Ferry, 1984) at 51.

\(^4\) “1. States have the duty to protect archaeological objects and objects of historical origin found at sea, and shall cooperate for this purpose. 2. In order to control traffic in such objects, the coastal State may, in applying article 33, presume that their removal from the sea-bed in the area referred to in that article without the approval of the coastal State would result in an infringement in its territory or territorial sea of the regulations of the coastal State referred to in that article. 3. Nothing in this article affects the law of salvage or other rules of admiralty, or laws and practices with respect to cultural exchanges” (Doc. GP/11 of 19 August 1980, *ibidem*, vol. XII, 303).
