UNIVERSITY OF SOUTHAMPTON

LAW AND THE UNDERWATER CULTURAL HERITAGE: A Legal Framework for the Protection of the Underwater Cultural Heritage of the United Kingdom

[Volume One of Two]

by

Sarah Dromgoole

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ABSTRACT

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LAW AND THE UNDERWATER CULTURAL HERITAGE: A LEGAL FRAMEWORK FOR THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE OF THE UNITED KINGDOM

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The purpose of this thesis is to consider the protection currently afforded by the United Kingdom to its underwater cultural heritage, to examine the need for reform, and to analyse the nature that any reforms should take. The work is in three parts.

Part I documents the history and current state of UK law relating to historic shipwrecks and argues that it is seriously defective in the protection it affords to this important aspect of the cultural heritage. Chapter One examines the various proprietary and possessory interests which exist in wreck and concludes that such interests tend to be given precedence over broader cultural interests. Chapters Two and Three outline the present statutory framework relating to wreck, examine the practices of its administrators and conclude with an assessment of its impact on the underwater cultural heritage. The conclusion reached is that there are serious defects in the statutory framework, some of which could be remedied by changes of administrative practice, but others only by legislative amendment.

Part II considers the reform initiatives that have taken place on a national, and supra-national level. Chapter Four examines the initiatives taken at European and international level. It considers how far the UK's present legal system accords with, or departs from, these initiatives and how much the UK can learn from them in framing new protective measures. Chapter Five analyses developments which have taken place in the UK in the sphere of legal reform, closely documents a recent reform movement and concludes with an assessment of the position of underwater archaeology in the UK in 1992.

Part III identifies and analyses the issues that must be taken into account in a review of the system of protection for the underwater heritage and concludes with proposals for reform. Chapter Six examines in detail the theoretical issues arising out of the current legal framework and draws analogies between the treatment of these issues in UK law and their treatment elsewhere. Chapter Seven takes a wider perspective, examining the protective regime afforded by the UK government to the terrestrial archaeological heritage, both directly, and indirectly through the planning and environmental protection systems. It shows that land-based archaeological remains receive a substantial degree of protection, both directly and indirectly, and emphasises the wide divergence between the treatment of underwater archaeology and its counterpart on land. The chapter concludes that many of the processes involved in protecting land archaeology would be of equal application to underwater archaeology and that an integrated framework would be feasible and desirable. Chapter Eight proposes two alternative reform schemes. The first relies mainly on policy and administrative changes, and would require little legislative amendment or extra public funding. It should only be considered if it became clear that the government was determined not to institute comprehensive reform. The second scheme comprises an extensive overhaul of the legislation and represents the writer's preferred option. In the Final Conclusions, attention is drawn to the fact that the position of underwater cultural property beyond strict territorial limits will also need to be addressed, on a national or supra-national level, in the near future.

CONTENTS

LIST OF APPENDICES

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TABLE OF ABBREVIATIONS

AAI	Area of Archaeological Importance
ADU	Archaeological Diving Unit
AMA 1979	Ancient Monuments and Archaeological Areas Act 1979
ANCODS	Australia Netherlands Committee on Dutch Shipwrecks
DNH	Department of National Heritage
DOE	Department of Environment
DTI	Department of Trade and Industry
DTp	Department of Transport
EC	European Community
FCO	Foreign and Commonwealth Office
ICNT	Informal Composite Negotiating Text
ILA	International Law Association
ISNT	Informal Single Negotiating Text
JNAPC	Joint Nautical Archaeology Policy Committee
MAFF	Ministry of Agriculture, Fisheries and Food
MOD	Ministry of Defence
MSA 1894	Merchant Shipping Act 1894
PMRA 1986	Protection of Military Remains Act 1986
PPG 16	Planning Policy Guidance Note 16: Planning and Archaeology
PPG 20	Planning Policy Guidance Note 20: Coastal Planning
PWA 1973	Protection of Wrecks Act 1973
RCHME	Royal Commission on the Historic Monuments of England
RCHMs	Royal Commissions on the Historic Monuments of England, Scotland and Wales
RSNT	Revised Single Negotiating Text
SMR	Sites and Monuments Records (county level)
UK	United Kingdom
UNCLOS III	United Nations Third Conference on the Law of the Sea
US	United States of America

CORRECTIONS

3-43 The reference after f.n. 234 to "protected places" should be to "controlled sites".

4-5 Under (v), references to (b) and (d) should be to (ii) and (iv).

4-5 Under (vii), 6 lines down, substitute "which" for "who".

4-13 Six lines from the bottom, substitute "an" for "any".

4-38 Sixteen lines from the bottom, substitute "give" for "given".

4-42 Second para., 4 lines down, substitute "Yugoslavia" for "Yugosalvia".

4-42 Second to last line of quote, substitute "origin" for "orgin".

4-49 Para. beginning "At a Working Session", second line down, substitute "Rapporteur" for "Raporteur".

Chap. 5, f.n. 89 Should say "See Chapter Three, E., above."

6-43 Para. beginning "Until very recently", first line, substitute "had" for "has".

6-55 First para., second to last line, substitute "he" for "be".

7-20 Second para., delete line: "In some cases, the wreck site may simply contain...fragments of the hull." Insert the next two sentences earlier in the para. after "in which case there is a need for rescue archaeology."

7-31 First para., second to last line, substitute "targeted" for "targetted".

8-11 Second line down, substitute "transferred" for "transfered".

2/6/93

INTRODUCTION

The long,[1] often treacherous nature of the coasts of the United Kingdom (UK), together with their geographical location at the sea approaches to Northern Europe, mean that the coastal waters are particularly rich in shipwrecks.[2] Among these wrecks are likely to be a large number which are of historical or archaeological interest and value.[3] Some have already been identified as such, for example two very recent discoveries are a sunken seventeenth century warship found off the coast of Scotland and believed to have been part of a royalist invasion fleet during the English Civil War,[4] and possibly the first Viking shipwreck to be discovered in UK waters.[5] There is little doubt that many other important wrecks await to be discovered and, if properly investigated, would add greatly to our knowledge of history and civilisation. For example, well preserved vessels and cargoes from the prehistoric, Roman and Early Medieval periods have yet to be found in UK waters[6] and there are numerous ship types, including those from later periods, which are known, as yet, only from documentary sources.[7]

A shipwreck is in nature virtually unique[8] as it has the ability to capture a moment in history, effectively providing a "time capsule" of valuable information[9] on social, military, economic and technological systems of the past. This quality of shipwrecks, together with the remarkable preservative effect of constant submersion in water,[10] means that archaeologically their value can be far greater than that of land sites where often all that remains are discarded items unconnected in space or time.

Although shipwrecks form the vast bulk of the underwater cultural heritage,[11] there are other forms of archaeological remains in the marine zone. For example, many remains have become submerged as a

result of changes in sea-level, for example there have been finds below high-water mark at Birchington in Kent of round-house timbers and hurdle structures and at Jaywick Sands, Clacton, there are submerged Neolithic pits and their contents.[12] There are also submerged historic landscapes, such as along the south coast and in the North Sea, which were once dry land. For example, the Isle of Wight was once connected to the mainland and the seabed beneath the Solent is likely to hold remains from the palaeolithic and Mesolithic periods.[13] It also appears that at one time approximately two-thirds of the North Sea was dry land and populated by Stone Age peoples.[14] Apart from submergence through sea-level change, some settlements have become submerged through erosion. One well known example is Dunwich in Suffolk.[15] A few other marine archaeological remains were actually built in the water, a prime and very recent example being the massive complex of ancient fish-traps found in September 1992 in the Blackwater estuary, 15 miles south of Colchester.[16]

Since the early 1960s and the development of sub-aqua equipment,[17] shipwrecks in particular have been subject to interference and looting by divers and salvage enterprises, and this still remains a problem. However, the focus of attention is now turning to threats from other sources. All submerged archaeological remains are becoming increasingly vulnerable to damage or destruction by, for example, human activities such as marina and other construction developments, dredging, and mineral extraction; and environmental factors such as sandbank movements and microbial growth.[18]

An illustration of human activity directly affecting remains is provided by the Goodwin Sands where there has been a lot of evidence of interference with archaeological remains by dredging and fishing. For example, in 1976 quite a large number of East India Company trading tokens were lifted by a bucket dredger and in 1981 an obstruction found

by fishermen was discovered to be a well preserved ship, later identified as the Admiral Gardner[19] (from which it is likely that the tokens derived).[20] In 1979 a section of a wooden clinker hull structure, possibly of medieval origin, was caught up in a trawl and dumped before a proper examination could take place. In 1988 a rare iron gun was trawled up and left on a wall at Ramsgate harbour. Only by chance did it find its way to the Royal Armouries. A further example of interference caused by human activities relates to the royalist warship recently found off the Scottish coast, which is in danger from the wash created by large new ferries which have been put into operation nearby. The erosion caused by the wash resulted in the site being discovered, but is now threatening to undermine the wreck.[21]

How far does the UK afford legal protection to its underwater cultural heritage? Is there a need for reform of the law in this field and, if so, what form should any changes take? The purpose of this thesis is to answer these questions. Part I documents the history and current state of UK law relating to underwater archaeological remains. In practice this part applies exclusively to sunken ships, rather than to any other form of underwater cultural heritage. This is because, with one exception,[22] there has been no recognition in UK law of the other forms of underwater heritage. Part II examines developments which have taken place on the national, European and international planes in the field of the legal protection of the underwater cultural heritage and considers their potential impact on UK law. Part III analyses the issues which need to be taken into account in any review of the current system of protection, undertakes comparisons with other jurisdictions and with the legal protection afforded in the UK to land-based archaeological remains and, finally, proposes two alternative schemes for reform.[23]

For pragmatic reasons comparative material comes primarily from other English-speaking jurisdictions and it needs to be viewed in context. That from jurisdictions close to the UK, for example Ireland and Guernsey, is particularly interesting for two reasons. First, each of these jurisdictions has recently introduced new statutory protective measures and, secondly, their coastal waters and diving conditions are of a similar nature to those of the UK. By contrast, the waters around the coast of Australia and parts of the United States (US) are very much warmer and more inviting to divers and this has created a situation needing greater controls than that in the UK. Furthermore, Australia and the US differ in that they both have federal and state laws regulating the underwater heritage. Nonetheless, these jurisdictions offer valuable examples of the type of sophisticated protective measures that can be utilised.

It is not part of the remit of this thesis to consider in detail the position of the underwater cultural heritage in international waters since the thesis is concerned with the territorial waters of the UK. However, Chapter Four will touch on this subject in order to make clear recent international developments and it will be referred to again briefly in the Final Conclusions.

Material in this thesis was, to the writer's best knowledge, up-to-date on 30 November 1992.

Note: Parts of Chapter One, along with other material not included in this thesis, have been published as Chapter 13 in N. Palmer (ed.), Interests in Goods (1993), jointly with N. Gaskell.

NOTES

1. The UK coast is over 6,500 miles long: H. Sheldon, "Crisis in Maritime Archaeology" (1988) 45 Rescue News 1.

2. There are also some aircraft wrecks of historical interest off the UK coast, for example the wreck of a World War II Hampden bomber lying, apparently perfectly preserved, at the bottom of the North Sea: The Times, 12 March 1990. For further discussion of aircraft wreck, see Chapter Three, E., and F., below.

3. How old something must be in order to be of historical or archaeological interest and value is debatable. This point is discussed in Chapter Six, A.1., below.

4. Discovered near Duart Castle on the Isle of Mull: The Independent, 17 August 1992. This wreck was designated under the Protection of Wrecks Act 1973 (PWA 1973) (see Chapter Three) in May 1992.

5. Found off the south-west coast of Wales: The Independent, 4 November 1991. This wreck is known as Smalls Wreck and was designated under the PWA 1973 (see Chapter Three) in December 1991.

6. See further, Chapter Six, A.4., below.

7. V. Fenwick, "Submerged Landscapes and Historic Wreck Sites", Marine Forum for Environmental Issues, North Sea Report (1990), p.131.

8. Cf. communities, e.g. Pompeii and Thera, which have been engulfed in lava; and Port Royal in Jamaica, which was plunged into the sea instantaneously on 7 June 1692 by a huge earthquake followed by tidal waves: L. Van Meurs, "Legal Aspects of Marine Archaeological Research", Special Publication of the Institute of Marine Law, University of Cape Town, No.1 (1985), p.9.

9. Known by archaeologists as a "closed group", or "closed assemblage".

10. Organic materials such as wood, leather and hair are rarely found on land sites except in carbonised form: D. Blackman, "Archaeological Aspects", Appendix I to Council of Europe, Parliamentary Assembly, The Underwater Cultural Heritage, Report of the Committee on Culture and Education, Rapporteur: J. Roper, Doc.4200-E (1978) (hereinafter referred to as the Roper Report), p.30. See also Joint Nautical Archaeology Policy Committee (JNAPC), Heritage at Sea: Proposals for the better protection of archaeological sites underwater (1989), p.8.

11. This thesis concentrates on archaeological remains in the marine zone because UK law has treated these separately from land-based remains, including those found in inland waters. Nonetheless, reference is made to the legal protection of archaeological remains in inland waters, for example, in Chapter Six, A.1(a) below and Chapter Seven, A.1(a) below.

12. D. Tomalin, "County Archaeological Policies in the Inter-tidal Zone and Beyond", paper delivered to the Association of County Archaeologists (undated). For an interesting account of submerged land surfaces, see A. McKee, History Under the Sea (1968), Part Six.

13. For further details, see Isle of Wight Trust for Maritime Archaeology, The Story Beneath the Solent (1991). For the south-east coast, see P. Marsden, The Historic Shipwrecks of South-East England (1987), pp.18-19.

14. The evidence consists of isolated finds, e.g. mammoth bones and stone tools dredged up from the seabed: Fenwick, op. cit., p.131.

15. This settlement was once the most important city in East Anglia, large enough to contain 20 churches, but now it is a tiny village with just a few hundred inhabitants: see C. Bacon, "Underwater exploration at Dunwich, Suffolk" (1974) 3 IJNA 314.

16. The Independent, 29 September 1992.

17. See further, Chapter Three, A., below.

18. See further, Chapter Six, A.4., below.

19. An East India Company vessel, lost in 1809. It was designated under the PWA 1973 in 1990.

20. M. Redknap, "Surveying for Underwater Archaeological Sites: Signs in the Sands" (1990) 58 Hydrographic Jnl 11 at p.12. For further discussion of the threats to underwater archaeology, see Chapter Six, A.4(a) below.

21. Ferries are known to have destabilised other sites too: see Fenwick, op. cit., p.132.

22. Ancient Monuments and Archaeological Areas Act 1979, s.53, discussed in Chapter Seven, A.1(a) below.

23. See Chapter Eight, below.

PART I: THE PRESENT LEGAL FRAMEWORK

CHAPTER ONE: INTERESTS IN HISTORIC WRECK

INTRODUCTION

In order to provide effective legal protection for the cultural heritage, it is necessary to know who has what rights to, or interests in, material of cultural value. The largest part of the underwater cultural heritage - wrecks and wreckage - is subject to some very special rules in this regard. This chapter will therefore examine the various proprietary and other interests which exist in wreck, along with some of the restrictions or limitations imposed on them.[1] These interests and restrictions have been established and developed in the UK by Admiralty and common law over many centuries and - since the nineteenth century - have to some extent been recognised and protected by statute. Most of the law has developed to deal with commercial interests, although an increasing focus is being placed on the interests of those concerned for the cultural heritage.

Interest in wreck law has grown along with the dramatic increases in technology that have enabled the discovery of ships long thought lost, such as the Titanic. In addition to the interest generated by sport divers, commercial recovery enterprises have flourished, particularly off the US coasts. As well as Spanish treasure ships, there are hundreds of private merchant ships which were sunk during World Wars I and II of no commercial worth in themselves but with non-perishable cargoes of considerable value. Cargoes which are sought after include nickel, copper, aluminium, platinum, tin and lead. There are also more mundane cargoes, such as coal, jute and teak, which are proving attractive to commercial divers. Since some nineteenth and twentieth century vessels may be considered of historical importance,[2]

it is clear that situations of conflict may emerge between those interested in the commercial value of the vessel's cargo, and those interested in the historical value of the vessel itself and its contents.[3]

The term "wreck" has many different meanings. In common parlance it tends to mean a vessel washed up on the coast, or a sunken vessel.[4] In legal commentaries it may refer to either wreccum maris, i.e. material washed ashore after shipwreck, or to adventurae maris, i.e. material still at sea; or to both.[5] There are also many statutory definitions. The term "wreck" for the purposes of Part IX of the Merchant Shipping Act 1894 (MSA 1894) - which deals with wreck and salvage - includes jetsam, flotsam, lagan[6] and derelict[7] found in or on the shores of the sea or any tidal water.[8] This definition is much wider than that at Admiralty law which defines wreck as property cast ashore within the ebb and flow of the tide after shipwreck, i.e. wreccum maris.[9] In fact, the Act seems to have been intended to include under one term prerogative rights pertaining to land, i.e. the right to wreccum maris,[10] and those constituting droits of admiralty, i.e. the right to adventurae maris.[11] The term also encompasses aircraft[12] and hovercraft.[13] By contrast, the New Zealand Shipping and Seamen Act 1952 defines "wreck" to include: "[a]ny ship or aircraft which is abandoned, stranded or in distress at sea or in any river or lake or other inland water, or any equipments or cargo or other articles belonging to or separated from any such ship or aircraft which is lost at sea or in any river or lake or other inland water".[14] As Davies points out,[15] this is a less restricted and complex definition than the corresponding UK provision. The US Abandoned Shipwrecks Act of 1987 defines "shipwreck" very simply as meaning "a vessel or wreck, its cargo and other contents".[16] This chapter will consider wreck in a similarly wide sense, so as to encompass all property cast ashore or remaining at sea after a marine casualty, including the hull of the vessel, together with its fixtures

and fittings and the contents of the vessel, including cargo and personal possessions of passengers and crew.

A. PROPRIETARY INTERESTS

A variety of persons including insurers might acquire ownership rights over a wreck, but the most difficult issue is often to decide when, if at all, they may have abandoned their rights.[17] The possessory rights of salvors and claims by finders present particular problems and will be considered separately.[18]

1. Ownership

(a) Methods of acquiring ownership

As with all other forms of property, there are many ways of acquiring ownership of wreck. The obvious means is through succession, either personally, for example a descendant of a passenger on board a Dutch East Indiaman has claimed their personal possessions; or corporately, for example the Dutch Ministry of Finance is heir to the Dutch East India Company.[19] The purchase of ownership rights is another obvious method, an interesting example being that of a vessel which lies in the mud flats of the River Hamble in Hampshire. She is believed to be the Grace Dieu, the biggest ship ever built in England at the time of her construction in 1416,[20] although her identity has not been proved beyond doubt. If she is the Grace Dieu, then she would have been one of the most important vessels in Henry V's navy and therefore a Crown vessel. If this is the case, ownership may have remained with the Crown. In light of this possibility, in 1970 the Ministry of Defence (MOD), acting on behalf of the Crown, transferred all

such right, title or interest as the Crown may have had in the wreck to the University of Southampton, acting on behalf of the Society for Nautical Research, for the nominal sum of £5.[21] Other methods of acquisition are through subrogation, for example Lloyd's paid out in full for the loss of the £1 million cargo of specie on board the Lutine;[22] and through donation, for example the Tudor warship Mary Rose[23] was donated by the MOD to the Mary Rose Trust.[24] Salvors may acquire property in lieu of a salvage award, or in some jurisdictions through the law of finding.[25] The Crown obtains ownership rights to unclaimed wreck[26] and states may acquire property through confiscatory provisions, for example all German property in Norway as at 9 May 1945 was taken over by the Norwegian government, including wrecked German warships and merchant ships off the Norwegian coast.[27] Another, more theoretical, method of acquisition might be through accretion. A number of ancient wrecks have been found on land which was once part of the seabed or a river floor.[28]

(b) Establishing owner's identity

Prima facie, the strongest interest in wreck is the proprietary right of the owner, however that right may have been acquired. In order to establish an ownership claim, it is necessary, first, to discover the identity of the original owner (and possibly a chain of successors in title) and, secondly, to establish that the ownership rights have not in some way been lost. Claims to vessels and their contents which were wrecked since the middle of the nineteenth century are likely to be made quite frequently and established with greater ease than claims to earlier wrecks. There are two reasons for this. First, a great part of this period is within living memory and, secondly, the Salvage Association[29] maintains records dating back to 1860 of vessels lost and claims made. When a potential salvor expresses an interest in salving a wreck, the Salvage Association will endeavour to

discover the existence of any commercial (particularly insurance) interests. For example, many vessels lost during the two World Wars may have been insured or reinsured for war risks by the government. There is an office in the DTp which liaises with the Salvage Association and the war risks insurers and handles inquiries about the sale of government-owned wrecks and cargoes.[30] There are thirty volumes of World War I "Shipping Losses" and detailed files containing information about World War II settlements.[31]

It is not impossible under UK law for the lawful successors of an original owner to claim their property centuries later and the hulls of several historic wrecks in UK territorial waters have been claimed by foreign governments. For example, the ownership of the Dutch East Indiamen, the Geldermalsen,[32] the Amsterdam[33] and the de Leifde[34] has been legally established by the Dutch Ministry of Finance, as heir to the Dutch East India Company.[35] In theory, the same principle applies to the cargo and personal possessions on board a wreck, but in practice the original owners of such items can rarely be identified so there are far fewer claims by modern descendants to this property. This distinction between the hull of a vessel, and the cargo and personal possessions on board is illustrated by the case of the passenger liner Lusitania. In 1982 items of general cargo and personal property were raised from this liner which had been torpedoed by the German Navy in 1915. She had sunk 12 miles off the Irish coast and outside British or Irish territorial waters. Nonetheless, the items raised were brought ashore in the UK. Ownership of the vessel herself, and her fixtures and fittings, was not disputed.[36] The cargo and personal possessions were a different matter owing to the number of interests involved and the difficulty of proving ownership. For these reasons, following the one year claim period provided by the MSA 1894,[37] these items remained unclaimed by the original owners or their successors.[38] If such difficulties are found in establishing ownership of property lost in 1915,

clearly the position with respect to earlier wreck must be even more uncertain. However, claims to such wreck are known, for example that of Baron Bentinck of Gorssel, descendant of a passenger on board the Dutch East Indiaman Hollandia which sank in 1743, who declared his interest in a copper-gilt shoe buckle and silver cutlery bearing his family arms.[39]

(c) Government ownership

Governments, like any other body or individual, acquire property rights in a variety of ways, for example through "inheritance", subrogation of rights through reinsurance, and confiscatory provisions. As far as "inheritance" is concerned, in the UK the MOD exercises - on behalf of the Crown - rights of title over all British warships and other ships on non-commercial service wherever they lie until such time as a public announcement is made.[40] A number of important historic wrecks are included in this category, for example the Mary Rose. Before the Mary Rose rescue project began in 1979, the MOD regularly and readily sold its rights to historic wrecks to anyone who applied.[41] In general, even today the policy is much the same. The decision on whether or not a wreck is sold or licensed is made on a case-by-case basis, depending on the value of the wreck or its cargo, both financially and historically, and on the motives of the intending purchaser. If the wreck or cargo are to be sold for financial gain, the MOD will charge a flat fee plus a percentage of the proceeds. If the purchaser's interest is historical or archaeological only, then the MOD will simply charge a flat fee.[42] In the case of the Mary Rose, and one or two other important historic vessels, the MOD has been persuaded to give the vessel by Deed of Transfer to a reputable archaeological group to hold on trust for the general public.[43] The English warship Anne, which sank in 1690 off East Sussex is one such vessel. The Deed of Transfer, dated 10 June 1983, transferred to a charitable trust called the

Nautical Museums Trust Ltd. every part of the vessel and all that had since 1974 been raised from her and all that was situated in her immediate vicinity (save personal effects not belonging to the Crown). The transfer took place "upon trust to raise in whole or in part (so far as the Trust may in its absolute discretion determine) to preserve and to display same for all time in a museum or museums for the education and benefit of the public". Material subject to the trust may only be disposed of with the consent of the Secretary of State, although the Trust is given power to make loans of such items for any period not exceeding five years.[44]

The government also has interests in about 5,000 vessels lost during the two World Wars, mainly through paying out on war risk insurance. Except where there has been loss of life, these wrecks are available for sale from the DTp. Such purchase entitles the owner to dive on the wreck, but it may be a term of the contract of sale that the cargo must be left undisturbed.[45]

Some East Indiamen are reputed to have great value, such as the wreck of the Grosvenor, lost off South Africa in 1782.[46] The Government of India Act 1858 s.39 (since repealed) vested in the Crown the "monies, stores, goods, chattels and other...personal estate" of the East India Company "to be applied and disposed of...for the purposes of the government of India". Section 40 gave the Secretary of State in Council power to dispose of the property. The precise effect of the wording has given rise to some doubt, as it is unclear whether it applied to all the Company's wrecks, or only to those in UK waters. Further, the Crown almost seems to have been impressed with a statutory trust, as the proceeds of any finds would have to be used for the benefit of India. Following the Indian Independence Act 1947, the property rights and interests of the former colony were divided between India and Pakistan. It appears that the governments of India

and Pakistan - amongst others - dispute British title. So far, the Foreign and Commonwealth Office (FCO) has been reluctant to claim property in the Company's wrecks partly, perhaps, in order to avoid international friction. Nevertheless, it seems to be the government view that some property in the UK did remain with the Crown after independence, such as the India Office Library, and that wreck rights, if they exist, would probably be subject to the administrative control of a relevant Department such as Environment, or National Heritage.[47]

Difficulties may arise where a vessel is located in the territorial waters of a coastal state, which may assert that the wreck has been abandoned. Certainly, it appears that the MOD would claim ownership of all sunken British warships anywhere in the world unless they had been disposed of by the MOD's Director of Sales (Disposals). The Secretary of State would hope for the co-operation of foreign governments in respect of wrecks lying in their territorial waters and in return would provide protection for the wrecks of foreign naval ships lying in UK waters.[48] The FCO are involved "in protecting UK rights and interests in the wrecks of British vessels and their contents in the territorial waters of other countries".[49] However, there is a British ship sunk in Bombay during World War II with lend-lease gold, part of which was British, part American. The government wanted to arrange for salvage operations in which the gold was returned to its original owners, but the Indian authorities are apparently claiming an interest.

The US too faced difficulties when it attempted to assert title to the CSS Alabama, a Confederate raider, which sank seven miles off the Normandy coast in 1864 and was discovered in 1984. The US government based its claim to the ship on two grounds. First, by right of capture because the captain of the Alabama had surrendered his vessel to the USS Kearsage, which then took constructive possession of the Alabama before she sank.[50] Secondly, by virtue of the fact that the US is

successor to all the rights and property of the Confederate government.[51] The French government initially questioned the US government's assertion of ownership, claiming that the vessel and its contents were French property because they were located in French territorial waters.[52] However, in 1989, the French government conceded that the US had title to the vessel and its contents.[53]

In 1986 the stern section of the British warship HMS Birkenhead was the subject of salvage operations in the territorial waters of South Africa. The Birkenhead was carrying troops when she sank in 1852 and there was speculation that she had on board a large number of gold sovereigns for the purpose of paying the troops.[54] The vessel is of special historical and sentimental value to the British because of the action of the soldiers in standing to attention on the sinking vessel in order to allow all the women and children on board to be saved in the lifeboats.[55]

In 1983 the South African National Monuments Council issued a permit to a salvage syndicate and at the same time declared the Birkenhead a national monument.[56] It was the syndicate who found the missing stern section in 1984. Its discovery led to an exchange of correspondence between the British and South African governments disputing ownership of the wreck. Both were plainly interested in the gold reputedly on board, but the British government was also concerned to ensure that any human remains were left undisturbed.[57] Despite some newspaper reports that the Admiralty had sold the hull by public auction soon after the disaster, the British government claimed ownership of the wreck on the ground that it was the practice of the UK to maintain its rights and interest in British warships wherever they may lie until such time as abandonment is announced by the British government. The South African government, on the other hand, refused to recognise the British assertion, claiming that there were no

international conventions or agreements - to which South Africa was a party - which provided for the claims of foreign states to wrecks in other states' territorial waters. The South African government therefore itself claimed ownership of the wreck. It also claimed that the MOD could neither authorise nor deny salvage rights on South African National Monuments, nor could it restrict diving in South African waters. The dispute was eventually resolved by an exchange of notes in 1989.[58] The terms of the agreement resulting from the exchange of notes included that the South African government should seek to ensure that the salvors treat with respect human remains discovered at the site and that the gold (after deduction of salvage) would be shared equally between the British and South African governments. A number of gold sovereigns were found during the 1986 salvage attempts, but the operations were hampered by bad weather and dangerous conditions and, by the time of the agreement in 1989, had been suspended.[59]

As well as claiming ownership of Dutch East Indiamen, the Dutch have also claimed ownership of the Lutine (whose bell now hangs at Lloyd's). She was a 32-gun frigate which had originally belonged to the French, but had been captured by the English and claimed as a prize of war. While sailing under the English flag with specie valued at £1 million, she was wrecked off the Netherlands in 1799 and again claimed as a prize, this time by the Dutch. The specie was insured at Lloyd's, which paid out in full on the claim. The conflict which arose between Lloyd's and the Dutch government as to who was the rightful owner of the specie was resolved in 1857 when they came to an arrangement whereby Lloyd's received half of the amount recovered.[60]

In contrast to the Dutch, the Spanish have been more reserved about stating their claims to ancient wrecks of Spanish origin. In the case of the Armada galleon Gironia, which was discovered in 1967 off the Northern Irish Coast, the vessel had been engaged at war with the

British when it sank and was therefore considered a prize. For this reason, the Spanish did not make a claim. In May 1985, another vessel thought to be part of the Spanish Armada was found, this time off the coast of the Republic of Ireland.[61] Although rights to material brought ashore have still to be settled, it appears that the Spanish, although ~~again~~ showing an interest, have not made a claim.[62] In the case of Spanish vessels found off the US coast, for example the Nuestra Senora Atocha and other galleons wrecked off Florida, the Spanish government has also made no claim: instead the US federal government, states and salvors fought for rights to the wrecks.[63]

Some states become owners of wreck by virtue of legislation that gives them confiscatory or residuary powers. In most cases that legislation will have been enacted for the purpose of protecting historically important wrecks. For example, in Spain a statute dated 24 December 1962,[64] provides that the State of Spain acquires ownership of any vessel which is sunk, salved or found when its owner does not exercise his or her right within three years of the vessel sinking. The Abandoned Wreck Law of the Cayman Islands provides that wreck which has "remained continuously upon the sea bed within the limits of the islands for a period of 50 years and upwards before being brought to shore" belongs to the state.[65] The legislation establishes two useful presumptions:-

> "All wreck found in the possession of any person within the islands shall be deemed to be abandoned wreck until the contrary is proved to the satisfaction of a Magistrate or the Commissioner of Wreck and any person found in possession of abandoned wreck shall be presumed to have brought it ashore unless he has some satisfactory explanation of the manner in which it came into his possession."[66]

In Finland a 1963 Act on historic relics provides that the State has title to all movable property on board wrecks over 100 years old.[67] The Danish Law Concerning the Protection of Historic Wreckage dated 31 May 1963 provides for state ownership of wrecks over 150 years old

where no owner can be found.[68] The US Abandoned Shipwreck Act of 1987 vests title in the federal government to any abandoned shipwreck found in or on public lands of the US, e.g. underwater national parks. It also asserts US title to certain classes of abandoned shipwrecks in state waters and transfers such title to the states within whose waters they lie.[69] Such confiscatory measures may cause legal problems. For example, they may conflict with constitutional protections against interference with rights of private property and there may also be a problem where a state tries to divest a foreigner of ownership.[70]

(d) Personal possessions and human remains

When a vessel sinks, there is often great loss of life. It will follow that the estates of the deceased will be entitled to exercise rights of ownership over their personal possessions. Human remains can exceptionally be found several hundred years after a sinking, depending on the site of a wreck, for example human remains are present on the recently discovered seventeenth century Duart Point site.[71] In the case of more recent remains, relatives are naturally sensitive about the remains of their loved ones and may often be alarmed at salvage operations which might bé destructive. It does not appear that the relatives or the personal representatives have clearly recognised rights at common law to require that a wreck and its human contents be raised, or to restrict or prohibit salvage operations. The question of the existence of rights over the bodies themselves presents even more difficult problems.

It is often said that the law recognises no property in a dead body.[72] However, this assumption has been questioned, both in law and principle,[73] although not in the context of wreck law. If there is property in human remains a number of consequences would follow. First, a finder (or, possibly, a landowner in whose soil the body is affixed[74])

could become the effective owner of an abandoned unidentifiable body[75] and would be able to sell the remains. Secondly, it would be assumed that the personal representatives of the deceased would normally become the owners and entitled to bring actions for trespass, claiming an injunction to stop diving operations which interfered with the body[76] and, perhaps, damages for emotional stress.[77] It is submitted that the personal representatives should have a right of action to prevent an unreasonable interference with bodies by salvors, but there would be formidable problems (i) over identification, (ii) where some personal representatives consented to diving operations, (iii) where any interference by salvors would be incidental to the removal of cargo. A court could refuse an injunction, and give nominal damages, where the salvage operations were to be conducted carefully and with respect. It would certainly be more satisfactory for the matter to be dealt with by legislation.[78]

2. Abandonment of Rights

Once the identity of the original owner is established, the next question that must be asked is: has the owner abandoned its ownership rights? The ordinary, plain meaning of the word "abandonment" is to give up control or possession of, in this case, a vessel, epitomised by the cry "Abandon ship!" In giving this order, the master usually intends simply to abandon possession in the face of imminent peril, rather than to abandon the ownership rights in the vessel. The legal term "derelict" used in salvage law[79] is usually taken to mean that the vessel has been abandoned at sea by the master and crew, without intention of returning to her (sine animo revertendi) or hope of recovery (sine spe recuperandi). It does not necessarily involve the loss of the owner's property in the vessel.[80] It is now regarded as axiomatic that title to a vessel and its contents remains intact if the crew has been compelled

to abandon the vessel, or has died as a result of a shipwreck.[81] The fact that a vessel is a legal derelict does not necessarily make her res nullius, i.e. ownerless.[82] It is clear that physical abandonment alone is not enough for the owner to lose its property rights in the vessel and there must be some form of positive intention, or animus derelinquendi, on its part to relinquish rights of ownership.[83]

There seems to be no legal reason why persons cannot voluntarily divest themselves of their rights in wreck,[84] as opposed to their liabilities, but there seems to be little advantage to be gained by so doing. According to Goode,[85] the "holder of an indefeasible title cannot shuffle it off by abandonment, as the law does not recognise a situation in which property can be without an owner". It is submitted, with respect that, so far as wreck law is concerned, there is no reason why an express abandonment should not be effective, except in so far as it seeks to avoid liabilities.[88] The real problem concerns "implied abandonment" and how far an intention to abandon can be inferred from inaction. It would simply be unrealistic to suppose that long lost wrecks with no identifiable owner, or those whose owners (such as states) had asserted no rights for centuries, should not be considered as res nullius. It might seem to be a matter of common sense to assume that property in a 2,000 year old boat, even if not abandoned when first left, had for centuries been lost or barred.[87]

So, there appear to be two requirements for the abandonment of property rights: first, the physical relinquishment of possession or control over the vessel and, secondly, an intention to relinquish the rights of ownership. The second element is obviously far more difficult to ascertain and proof of such intention must usually be inferred from the surrounding circumstances. For example, where a wreck is lying neglected on a beach, after the lapse of a certain period of time it may be possible to conclude that ownership rights have been abandoned.

However, where a ship is sunk in deep water and salvage has been impossible or commercially unviable, and perhaps too the exact position of the wreck is unknown, the owner has no choice in the matter and - unless there has been an express declaration - it is difficult to argue that there is a positive intention to relinquish rights.[88]

Although there is some academic support for the suggestion that the owner's title is not perpetual and will diminish with time and eventually lapse altogether,[89] there appears to be no direct English authority to support this view. In The Tubantia,[90] Sir Henry Duke P. found that there was "no proof or presumption sufficient to convince me that the owners of the vessel, or the cargo in question, have lost whatever rights they originally had", where the vessel had sunk only eight years previously. Apart from indicating that such a short period of time will not result in abandonment, the judge surely inferred that such proof could in theory have been brought. Certainly the view of many insurers seems to be that title to a wreck never lapses through mere inactivity, even where hope of recovery had been given up.[91] However, in The Lusitania[92] Sheen J. appeared to lend some support to the idea that rights could be lost through effluxion of time: "So far as the owners of the contents are concerned, it is a necessary inference from the agreed facts and from the lapse of 67 years before any attempt was made to salve the contents that the owners of the contents abandoned their property."[93] However, there was also a lapse of 67 years before any attempt was made to salve the vessel and yet the court accepted that the underwriters had acquired legal title to it after paying out for the actual loss and that they remained the owners at the time the case was heard. Therefore, the time lapse, of itself, could not be a conclusive factor in determining whether the property had been abandoned. What in fact was probably conclusive here was that the owners of the vessel had appeared before the court to claim their property, while the owners of the cargo and personal possessions had

not done so.[94] The lapse of time was therefore a factor, but not the only one, taken into account in deciding that the owners had intended to abandon their property.

In Simon v. Taylor,[95] although the effluxion of time issue was not raised by counsel or mentioned in the judgment, the Singapore High Court recognised the German Federal Republic as owner of a U-boat which had sunk 28 years earlier.[96] However, in Robinson v. Western Australian Museum,[97] Stephen J., appeared to accept that in some circumstances it was possible that the mere passing of time without any attempt to assert possession may be treated as the abandonment of title, although it is significant that he was not prepared to find that this was the necessary result on the facts of the case before him, which involved the Gilt Dragon, wrecked in 1656. He found that, had it not been for legislation divesting the owner of rights, it would have belonged to the successor in title of the Dutch East India Company.[98] In another case concerning a German U-boat, which came before the Norwegian Supreme Court in 1970,[99] Eckhoff J. stated:-

> "It is possible that an owner's inactivity over a long period, taking into account the circumstances, can be a sufficient reason for considering that the proprietary right to a wrecked vessel has been relinquished. If so, this must depend on a total evaluation of the circumstances after the shipwreck, and a balancing of the owner's interest, on the one hand, against a potential appropriator's interest, on the other. I agree...that inactivity over a certain number of years cannot in itself be conclusive."

When the Confederate raider, CSS Alabama, was located by French divers off the coast of Cherbourg in 1984, the US - claiming as successor to the Confederate States of America - asserted title. In doing so, it followed "its longstanding position that title to warships is not lost in the absence of capture or abandonment, and that abandonment could not be implied merely by the long passage of time".[100] A finding that the US had not abandoned the Alabama or its appurtenances was also the basis of the decision in US v. Steinmetz[101]

that the US had title to the ship's bell rather than an antique dealer who had bought the bell in Britain.

It is submitted that it is entirely realistic to conclude from all the evidence, including the passage of time, that ownership has been abandoned. However, a court should be careful not to look to inactivity alone and should take into account all the circumstances. The length of time would be relevant, as would the identity of the original owner. A state owner of a warship or commercial vessel might be expected to retain an interest longer than a private owner, if only because it is more likely to have the physical, financial and political means to assert rights.[102] A corporate owner might be more likely to retain an interest than an individual owner, if only because its reason to exist will usually be financial and also it might be easier in the future for it to trace a line of succession than an individual, where proof of succession might be difficult after a couple of generations. The position of the wreck may be relevant. If it is situated in an easily accessible position and nothing is done, it may be easier to imply an abandonment than if it was lost in the middle of the oceans. It is submitted that there is an urgent need for a statutory code or presumption to be established setting precise periods after which property is deemed to be abandoned.[103]

It is interesting to note the method used by the US in its Abandoned Shipwreck Act of 1987. Under the Act the US asserts title to certain abandoned shipwrecks and then transfers that title to the State in or on whose submerged lands the shipwreck is located.[104] The word "abandoned" is not specifically defined in the Act, but Sec.2 provides that States have responsibility for management of certain abandoned shipwrecks "which have been deserted and to which the owner has relinquished ownership rights with no retention". The legislative history apparently notes that, with the exception of warships and other public

vessels, abandonment may be implied or inferred in those instances when an owner has not made a claim of possession or any control over the wreck.[105] Abandonment of warships and other public vessels requires an affirmative act of abandonment on the part of the sovereign nation holding title.[106]

3. Insurers' Interests[107]

(a) Notice of abandonment

Under marine insurance law there may be a question as to whether an owner "abandons" its rights in a wreck to its insurers, but care must be taken as to the use made of the expression in the insurance context. In the case of an actual total loss, the underwriters - by paying out for a total loss - are thereby subrogated to all the rights and remedies of the assured in the vessel or other insured property.[108] On settlement, they become entitled to take over the interest of the shipowner in whatever may remain of the vessel, for example the benefit of any salvage or the proceeds of sale of any wreck.[109] There is a clear inference from the wording of s.79 of the Marine Insurance Act 1906, which states that the underwriters are "entitled" to take over the rights of ownership, that unless the underwriters elect to exercise their rights, they are not forced to accept them.

Where the total loss of a vessel appears unavoidable, or where it is not commercially viable to preserve a vessel from total loss, the owners may "abandon" the vessel to the underwriter, treat the loss as if it were an actual total loss[110] and thereby be indemnified in full. To be able to claim for a "constructive" total loss a "notice of abandonment" is necessary,[111] whereby the owners voluntarily cede their entire interest in the vessel to the underwriter. Under the Marine

Insurance Act 1906, "[w]here there is a valid abandonment the insurer is entitled to take over the interest of the assured in whatever may remain of the subject-matter insured, and all proprietary rights incidental thereto."[112]

However, the insurer, although entitled to take over the interest of the assured, is under no obligation to do so and in practice it is usual for hull underwriters not to accept notice of abandonment, because the hull may be of little commercial value and liabilities, for example, for oil pollution and obstruction to navigation, are unpredictable. Where there is a valuable cargo, insurers are more keen to exercise rights. If underwriters take over abandoned property, for example, a sunken cargo of gold bullion, it does not become res nullius simply because it is at the bottom of the sea. In one case it was said that: "[s]o long as the underwriters had not abandoned [the bullion] I think it was their property and remained their property even though it was not actually accessible to them at the time."[113] However, this was a case where the Salvage Association had signed a salvage contract only ten months after the sinking and the cargo raising operations started within four years of the casualty. Nonetheless, underwriters were still exercising claims over the gold from the Lutine 139 years after she sank.

The acceptance of an abandonment by the insurer may be either express, or implied from conduct. The mere silence of the insurer after notice is not an acceptance.[114] In order for acceptance to be implied from conduct, it is necessary for the underwriters to do certain acts which are consistent only with the exercise of rights of ownership. It is unclear what conduct is sufficient, but certainly it would seem that the sale of lifeboats or other items brought ashore would be enough.[115] It is also unclear how soon after the loss ownership must be asserted before it "lapses", or how often in a given period of time ownership

must be asserted. However, once there has been the necessary conduct, even if the insurers did not in fact intend to accept the abandonment, they will be estopped from denying acceptance.[116]

What if, as is the usual practice, the underwriter does not accept the notice of abandonment? In other words, what is the real meaning of "abandonment" in this context? Does the property become res nullius, or does the owner retain his rights? In Boston Corporation v. France, Fenwick and Co.,[117] Bailhache J. inclined to the former view.[118] However, Atkinson J. has said that:-

> "...by a notice of abandonment the assured merely makes an offer, which remains executory unless and until it is accepted."[119]

The better view is that an unaccepted notice of abandonment does not deprive the owner of property and that abandonment by notice is not necessarily abandonment "to all the world".[120] It is submitted that notice of abandonment is some evidence of abandonment of ownership,[121] but it is in no way decisive: by itself, it may not be enough, but it may be if combined with another factor such as the passage of time. A shipowner may show an intention not to abandon even after giving notice of abandonment.[122]

(b) Title of underwriter to sue

It is clear that underwriters would have to prove title and show that they had exercised their rights before they could make a claim. In the Columbus-America case,[123] the Superintendent of Insurance for the State of New York and the Salvage Association attempted to assert a claim to gold in an 1857 wreck on behalf of a number of insurance companies that no longer existed. News reports at the time listed Lloyd's as an insurer and the Salvage Association also claimed to act as successor to the individual Lloyd's underwriters. However, the court

was not presented with what it considered as proper documents assigning the claims and appears, in respect of the Salvage Association, to have denied its title to sue.[124]

Presumably, most company members of the Institute of London Underwriters can trace their succession from corporate forerunners who accepted a line on a slip 100 years ago. The Charter of the Salvage Association allows it to act on behalf of unknown commercial interests, but it is not clear on whose behalf any proceeds may be held. More difficult is the position of Lloyd's underwriters. The general theory of insurance at Lloyd's is that each individual underwriter, i.e. each name on a slip, is entitled to exercise the rights given in the Marine Insurance Act 1906. After the death of an underwriter, or for example after 100 years when they are all dead, who is entitled to sue and claim rights of ownership? Is it technically the heirs of the individuals, or can Lloyd's act in some way as agent? The difficulty is if none, or only some, of the underwriters can be traced. Inquiries at Lloyd's indicate that there may be no simple answer to this point, as most attention has been focussed on the continuing liabilities of underwriters, rather than their rights.

The famous case of the Lutine[125] would seem to provide some answers. She sank in 1799 off Holland with over £1 million in specie insured at Lloyd's. Some recovery work was undertaken at the time before siltation prevented further work. In 1815, after the end of the Napoleonic Wars, a Dutch salvor worked on the wreck for 40 years. Between 1857 and 1861 arrangements were made between Lloyd's and the Dutch government whereby Lloyd's would receive half of the amounts recovered. According to Lay, "as the individual underwriters to whom the salvage properly belonged were by this time all dead, a Special Act of Parliament was passed allowing the Society of Lloyd's as distinct from individual members, to take possession of any goods on condition

that the Society should pay any proved claims that might be put forward by persons entitled to a share in the property."[126] The relevant provision, still in force, is s.35 of the Lloyd's Act 1871, which allows Lloyd's to join in the salving of the Lutine and "hold, receive and apply for that purpose so much of the money to be received by means of salving therefrom...and the net money produced thereby...shall be applied for purposes connected with shipping or marine insurance" (emphasis added) according to a scheme to be confirmed by Order in Council "after or subject to such public notice to claimants of any part of the money as aforesaid to come in, and such investigation of claims...and such reservation of rights (if any), as the Board of Trade think fit". The fact that such a provision was thought necessary indicates that Lloyd's would probably not have any right to claim on behalf of such untraceable underwriters in the absence of an equivalent statutory sanction.[127] It would seem to follow that, in the absence of some other agreement or assignment, the rights over the insured property could only be exercised by the heirs of the individual names. If that is right, the tracing problems could be horrendous.

As the number of individual names increased,[128] it became more convenient for them not to underwrite their own risks, but to appoint agents to act on their behalf. This arrangement often took the form of an underwriter acting for a syndicate of names. In respect of syndicate underwriting, the individual names still retain full liabilities under the policy, but it will be necessary to analyse the agency agreement between the members and the agents involved. The current Members' Agent's Agreement[129] has detailed provisions dealing with death and bankruptcy of a member. Clause 14.2 of Schedule 3 (the Managing Agent's Agreement) states that in such cases, the profit or loss of a given year shall be apportioned proportionately amongst the other members of the syndicate. It would seem that such a provision might entitle the other members of the syndicate to claim the benefit of

Lutine type recoveries, but there might still be problems in proving succession from syndicates existing 100 years ago.

In the case of old wrecks, proof that the insurers have asserted ownership rights by conduct may also be very difficult. One example of the problems which may arise concerns the liner Titanic which sank in 1912 and whose location on the seabed was discovered in 1985. The hull, fixtures and fittings were insured for £1 million and the insurance claim made by White Star Line, the registered owner of the liner,[130] for the actual total loss was met in full. There were 70 signatories on the Lloyd's slip underwriting the risk of loss, some of which represented several underwriters. A few of the signatures are indecipherable and most of the interests represented are apparently unidentifiable. Indemnity Marine Insurance, now the Commercial Union, was the main underwriter of the vessel's hull, even though it was liable for only 7.5% of the total insured.[131] It is unclear whether or not Indemnity Marine or Commercial Union ever asserted their rights over the Titanic.[132] In any event, ownership may still vest, wholly or partly, in the original owner, White Star, or its successors in title.[133]

Another famous liner, the Lusitania, was the subject of a salvage operation leading to High Court litigation in 1985.[134] As far as the hull, machinery, fittings and other goods originally owned by Cunard were concerned, it was agreed that the war risks insurer, which had paid out for a total loss, "thereby acquired legal title to the ship".[135] It must be assumed that the insurer (or reinsurer)[136] had asserted its rights of ownership over the vessel, although the point was not in issue.

(c) Loss of right to take over property

Where an underwriter has taken over the insured property, the issue of express or implied abandonment is the same for it as for any

owner. However, it is not quite clear in what circumstances, if at all, the insurer loses its right to take over the wreck under ss. 63(1) and 79(1) of the Marine Insurance Act 1906. Can the insurer waive this right, expressly or by implication, or by the effluxion of time? Is there a time limit within which the right must be exercised? The point appears to be open, but it is submitted that there is no reason why the insurer should not be able to make a clear election, for example in writing to the assured, that it declines irrevocably to exercise the right. On ordinary principles, such an unequivocal election should be binding.[137] The Act lays down no time limit in which the insurer must exercise the option, although it might seem surprising if this could be done many years after the casualty. Nevertheless, it is submitted that there is nothing in the Act to prevent the insurer so doing provided, first, the assured still has an "interest" to take over and, secondly, there is no conduct of the insurer that could be deemed as a waiver of its rights.

An insurer that wanted to have the best of both worlds might seek expressly to reserve its rights to take over the wreck. It could then avoid the liabilities of an owner, for example for wreck-raising, while waiting to see whether the wreck increased in value or became salvable. Such action would certainly be evidence that would rebut an immediate intention to waive rights under the Act, but it is difficult to argue that it would have the effect of preserving the insurer's rights under the Act indefinitely. It is submitted that the rights may still be subject to the principle of waiver by conduct, although it would be more difficult to prove such a waiver than in cases where there was no express reservation.

B. CROWN RIGHTS TO UNCLAIMED WRECK

In addition to cases where a state has an ordinary proprietary interest to a wreck, for example to a warship, it may also have a prerogative right to wreck.

1. History and Development

Early maritime law appeared to have been more concerned with issues of general average, contribution and the jettison of goods, than issues of ownership of, and other interests in, sunken wrecks, or those washed up on the shore. Nevertheless, it seemed to be the case under early Roman law that goods cast ashore after shipwreck were still considered to belong to their original owner and were not considered to be res nullius.[138] It appears that the state did not claim a wrecked ship, or anything cast ashore after shipwreck, but instead restored such property to its owner.[139] Any other person taking such goods was considered to be a thief.[140]

Later, with the onset of the Dark Ages, the rights of the owner were subjugated to those of the local feudal lord and it became the custom of such lords to seize the wreckage of ships washed ashore. It seems likely that the lords claimed to themselves coastal rights originally claimed by the common people: in ancient seafaring tradition there was a belief that the coastal population had a legal right to wreck washed ashore.[141] In any event, the "feudal right of shipwreck"[142] appears to have flourished during the Middle Ages. This situation seems to have been the case all over Europe because it appears that "the Church, Emperor, Kings and Republics" all made efforts to suppress the custom.[143] These efforts included the Crown jealously claiming for itself the rights of the feudal lord and, in time, these rights became a

royal prerogative.

As already noted,[144] the statutory definition of the word "wreck" covers two different types of property under Admiralty and common law. Maritime property cast upon the land after shipwreck was classed as "wreccum maris", while such property remaining at sea after shipwreck was known as "adventurae maris". The Crown had a right to wreccum maris as part of its land jurisdiction. Adventurae maris, on the other hand, passed to the Crown as a droit of admiralty. The distinction was expressed by Sir John Nichol in R v. Forty-nine Casks of Brandy[145]:-

> "'Wreccum maris' is not such in legal acceptation, until it comes ashore, until it is within the land jurisdiction; whilst at sea, it belongs to the King in his office of Admiralty, as derelict, flotsam, jetsam, or ligan...if the article be floating, it belongs to the sea; it is not 'wreccum maris' but 'flotsam'; if it become fixed to the land, though there may be some tide remaining round it, it may be considered as 'wreccum maris' but it having merely touched the ground, and being again floating about, its character will depend upon its state at the time it was seized and secured into possession; whether, for instance, the person who seized it, as a salvor, was in a boat, or wading, or swimming."

Adventurae maris originally appeared to have belonged to the finder, rather than the Crown, if the owner could not be found;[146] wreccum maris was taken to belong to the Crown at an earlier stage. Initially, the Crown was entitled to all wrecks which came to shore,[147] but in 1236 Henry III laid down a rule, the influence of which - according to Sanborn - was felt for over 500 years. This rule was enacted in 1275 by Edward I. The Statute of Westminster I,[148] provides:-

> "Concerning Wreck of the Sea, it is agreed, that where a Man, a Dog, or a Cat escape alive out of the Ship, that such Ship nor Barge, or any Thing within them, shall not adjudged Wreck; but the Goods shall be saved and kept...so that if any sue for those Goods, and can prove that they were his...within a Year and a Day, they shall be restored to him...".[149]

This rule restored some of the rights of the owner, but had unfortunate consequences for some crewmen and ship's pets! Nonetheless, as

Braekhus points out,[150] the rule had a rational basis in that, for many centuries, the owners of the ship and the cargo would usually accompany the vessel on its voyages. Therefore, if they did not survive the wreck, there was no-one to claim it. Presumably, the rights of successors in title were not taken into account because they may have been in far off lands. The period of a year and a day ran from the time of seizure.[151]

When the right to adventurae maris did fall to the Crown, there still appears to have been a distinction in the treatment of the two types of property. According to Hale,[152] the property of the owner of adventurae maris was, once seized by the King's officer, wholly divested;[153] there was no period - such as that laid down in the Statute of Westminster I for wreccum maris - in which the owner could claim the property.

The rule laid down by Edward I, or at least its common interpretation, was not finally challenged until 1771 when Lord Mansfield held[154] that even though no living thing escaped from the wreck, the property in the goods continued to remain in the owner. Lord Mansfield's interpretation of the provision in the Statute of Westminster appears to have been governed by policy reasons. He stated that:-

> "...no case is produced, either at common law, or on the construction of [the Statute of Westminster] to prove that the goods were forfeited, because no dog, or cat or other animal came alive to shore. I will therefore presume, that there never was any such determination; and that no case could have been determined so contrary to the principles of law, justice, and humanity. The very idea of it is shocking."

He stated that the Statute was made in favour of the owner and should not be construed otherwise. Also, its provision was negatively, rather than positively phrased and meant that the escape of a dog or cat, or other animal was a medium of proof, whereby the ownership of the goods

may be known. He felt that it did not contain the contrary, positive, provision "that if neither man, dog, or cat, etc. escape alive, [the wreck] shall belong to the King". His rationale was that "[i]f the owner of the dog or cat, or other animal was known, the presumption of the goods belonging to the same person, would be equally strong, whether the animal was alive or dead." Only if, after a reasonable time had been allowed, no owner could be discovered, would the goods belong to the King. Various charters and statutes[155] then restricted the right of the Crown to both wreccum maris and adventurae maris to which no owner had established legal title within a period of a year.[156]

Initially the Crown did not concede any of its rights to the finder. By the reign of Edward I, however, when it was realised that valuable finds were being concealed, the Crown conceded one-half of the find to the finder as an encouragement to declare finds.[157] According to Marsden[158] "sometimes [the finder] paid into court half the appraised value; sometimes he kept half of the nets, casks, or other goods, where they were divisible, and delivered the other half to the officer of the Crown". By 1836, the right of the finder had been reduced to one-third.[159]

2. Statutory Basis

More recently, the Crown's rights to unclaimed wreck have been placed on a statutory footing by the MSA 1894.[160] Section 523 provides that all unclaimed wreck found in "Her Majesty's dominions" belongs to the Crown, except where it is found in places where the right to wreck has been granted to other persons. The grant of rights to wreck by the Crown - which occurred before it was provided for by statute - was used as a means of bestowing favours and these manorial and other rights still survive.[161] For example, a past monarch ceded the Crown's

rights in the Whitstable area on the Thames estuary to a local manorial lord and his successors are now entitled to personal possessions on board the "Pudding Pan" wreck, a Roman ship known to be lying in the area.[162] Where no owner claims wreck in the possession of the receiver within one year and no other claim has been made to it by a person entitled through royal grant, s.525 provides that the receiver shall sell the wreck and - after deducting his fees, expenses, and salvage - pay the proceeds for the benefit of the Crown.[163]

The question before the Admiralty Court in The Lusitania[164] was whether or not the Crown had a right to unclaimed wreck found in international waters. As noted earlier, the Lusitania sank 12 miles off the Irish coast, outside British or Irish territorial waters. In 1982 various items of general cargo and personal property of passengers and crew were salved from the wreck and brought ashore in the UK. After the expiry of the one year statutory claim period, they remained unclaimed by the original owners or their successors. Sheen J. had to determine whether the salvors or the Crown had a better title to these unclaimed items. The duty to report wreck found in the MSA 1894 s.518 had originally applied only to wreck found or taken possession of within UK territorial limits,[165] but s.72 of the Merchant Shipping Act 1906 extended this provision to apply to wreck found or taken possession of outside UK limits but later brought within those limits. Therefore, under the extended MSA 1894, it was only when such wreck had been brought within UK limits, that there was a duty on the person in possession to deliver it to the nearest receiver. As there was no duty upon salvors of wreck in international waters actually to bring such wreck within UK limits, Sheen J. held that the Crown could have no right to such wreck under the Act.

Whether the Crown has never had a right to such wreck is arguable. Towards the end of the seventeenth century, Hale stated:

"The right of flotson, jetson, and lagon, and other sea-estrayes, if they are taken up in the wide ocean, they belong to the taker of them, if the owner cannot be known. But if they be taken up within the narrow seas,...they do belong...to the king,...".[166] However, Marsden[167] stated that there was "no trace" of the distinction suggested by Hale and that it had never been recognised by the Admiralty.[168] According to Nash too,[169] before 1854 a droit of admiralty was recognised in respect of all wreck, wherever found. An authority for this view is R v. Property Derelict[170] in which the Crown's claim to property found derelict near Madeira was upheld.[171] Indeed, Sheen J. in The Lusitania believed that this case supported an alleged droit outside UK dominions.[172] However, he also concluded that:-

> "There can be no doubt that before 1894 the Crown was entitled to unclaimed wreck found in the territorial sea of the United Kingdom as a droit of Admiralty. It is at least doubtful whether such a droit was recognised in respect of wreck found elsewhere."[173]

There may have been doubts, but the balance of authority seems to point to the existence of such rights. Sheen J., however, was forced to the conclusion that a consolidating statute had removed any such pre-existing Crown rights. It is submitted that his decision on the interpretation of the extended Act is, at best, unfortunate and is still very much open for the higher courts to reverse. The wording was capable of the meaning asserted by the Crown and it would have been better to allow the Crown to exercise rights over such property and to reward the finder accordingly under salvage rules. In this way, where the wreck consisted of historically or archaeologically important artefacts, the state could exercise control so as to ensure appropriate conservation and disposal.

The practical effect of Sheen J.'s decision, if correct, is that recoverers of wreck found in international waters and brought within the UK will have title to it which is good against all but the true

owner. The wreck will be held by the receiver for a period of one year: if no valid claims are made to it during that period it will be returned to the salvor. In other words, the maxim "finders keepers" will apply. The decision should encourage recoverers undertaking operations in international waters to bring wreck ashore in the UK, but it should be emphasised that the salvor will only be entitled to that part of the wreck which remains unclaimed. This will not normally include the hull, machinery and other property which belonged to the vessel's owner because such owners will often be readily identifiable. Therefore, although greater incentive is provided by the decision for salvors to bring wreck found in international waters into the UK, the legal position in other countries may still be more favourable to salvors.[174]

C. SALVORS' RIGHTS

Having considered the rights of the original owners of wrecks, their successors in title and the Crown, it is necessary to consider the legal interests of salvors in respect of wrecked property which they have endeavoured to save.

1. Salvage Principles

A maritime salvage service is capable of creating rights in the property salved in a way that could not happen on land. Although it may be possible to argue that there should be a restitutionary remedy for saving land-based property,[175] the general view has been that the land "salvor" obtains neither a personal cause of action against the owner of property saved, nor any rights over the property itself.[176] Where there have been all the elements of a successful maritime salvage the salvor has an action in personam against the owner of the salved

property[177] but, more importantly, is also entitled to a maritime lien over it.

A salvage reward can be claimed where a salvor voluntarily succeeds in saving maritime property[178] which is in danger on the high seas or in tidal waters.[179] The reward, calculated by taking into account a large number of factors, is available on a "no cure - no pay" basis and can never exceed the value of the property saved. The reward is payable by each interest salved according to the proportion its salved value bears to the whole. Thus, a salvor of a wrecked ship (having a salved value of $100,000) along with its cargo (having a salved value of $900,000) will be able to claim 90% of any reward directly from the cargo interests.

The right to a reward is not dependent on contract.[180] It arises out of the jurisdiction exercised by the Admiralty Court and operates as an independent principle of maritime law,[181] now recognised by international conventions.[182] The underlying public policy factor that has influenced the development of the law has been the desire to encourage salvors to assist others whose lives or property are in distress. For this reason salvors have been granted rights which are extensive both in relation to the owner of the salved property and other claimants who might wish to enforce debts in respect of the property. Evidently, this policy factor would have less force in respect of wrecks at the bottom of the sea, where no lives were at risk, although it is still arguable that the property is at risk in the sense of being permanently lost to its owners.

2. The Salvors' Maritime Lien

The principal weapon available to the salvor is the maritime lien.[183] This is an inchoate privileged right granted over the salved

property[184] which may be perfected by an action in rem in the Admiralty Court of the Queen's Bench Division of the High Court.[185] The salved property can be arrested and ultimately sold in order to provide security for the salvor's claim. A maritime lien does not depend on possession, but will travel with the salved property even into the hands of a bona fide purchaser for value.[186] The preponderant opinion, at least academically, is that a maritime lien is a substantive right, rather than a procedural means of asserting a claim,[187] although there is a controversial 3-2 decision of the Privy Council to the contrary.[188]

Most legal systems would accord a maritime lien the highest priority over other claims.[189] A salvage maritime lien will normally take priority over pre-existing liens, as the actions of the salvor will have preserved the property which would otherwise have been unavailable to any preferred creditors.[190] One consequence of this justification is that a later salvage lien will take priority over an earlier salvage lien - a reversal of the normal principle that liens of the same kind usually rank in the order in which they arose. The salvors' rights will be extinguished two years after the services were rendered.[191]

It is difficult to consider the maritime lien separately from the action in rem, but the rights that the lien gives to a salvor (which are not necessarily created by agreement) can be very effective.

3. Salvors' Possessory Interests

In addition to the rights granted by having a maritime lien, a salvor may independently be able to exercise rights of possession over a wreck.[192] In Cossman v. West[193] the Privy Council emphasised the distinction between the case where a ship was technically a "derelict" - where it was abandoned by its master and crew without hope of recovery

or intention to return to it[194] - and that where it was still in the control of its master. In the latter case, the master remains in possession of the ship and can make decisions as to its operation, for example whether to accept the services of other salvors. Where the master has temporarily left the ship, the salvors "are bound on the master's returning and claiming charge of the vessel to give it up to him".[195] In the former case, the salvors who first take possession of the ship "have the entire and absolute possession and control of the vessel, and no one can interfere with them except in the case of manifest incompetence".[196] The issue may be important in the context of subsequent attempts by the owner to exercise rights to control the salvage operations[197] and where there are contests between competing salvors.[198]

(a) Possession against owner

The assumption in Cossman v. West[199] is that a salvor of a derelict has exclusive possession until paid, even against the owner. The decision actually concerns the question of when a vessel becomes a total loss under an insurance policy and the issue of whether the owner would be entitled to possession was not directly raised. It is submitted that the decision ought not to be considered as binding on this point.[200] Braekhus was of the opinion that the owner's right to make decisions about salvage should be the same whether the vessel was abandoned or not.[201]

The position is easier where there has been misconduct of the salvor. The UK has never specifically enacted Article 3 of the 1910 Salvage Convention which removes the right to salvage remuneration where there has been an express and reasonable prohibition "on the part of the vessel".[202] The article does not make it clear whether it would apply in the case of a derelict. Article 19 of the 1989 Salvage

Convention is similarly worded but in slightly wider terms, referring to such a prohibition coming from the owner of the salved property (presumably whether the vessel is technically derelict or not). It may be that there is a "reasonable prohibition" by an owner out of possession even where there is no "manifest incompetence". Indeed, the expression "manifest incompetence", as used in Cossman v. West, is usually applied in the context of a competition between salvors, rather than as a limitation on the rights of an owner. The difficult question is where an owner wants to resume possession in circumstances where there is no real criticism of the salvor, as to do so might seem to undermine the salvor's security where it is not possible to perfect it through an action in rem.[203] It is submitted that the best approach is to allow the owner to resume possession, by itself or through its agents, but to preserve any salvage claims of the first salvor.[204]

(b) Competing salvors

Where there are salvors competing over a derelict, the first salvor is entitled to protect its possessory rights by using the normal civil law remedies, for example by seeking damages or an injunction. The effectiveness of an injunction, in particular, will depend on the extent to which the second salvor is legally or practically amenable to the control of the court. The High Court has been held to have jurisdiction in respect of injurious acts on the high seas, for example where one salvor dispossesses another.[205] The crucial question is often to establish whether the nature and extent of the acts of the first salvor in relation to the wreck are sufficient to constitute possession. This is a question of fact and degree in each case. In order to establish that they are in possession of a derelict the salvors must show "firstly, that they have animus possidendi, and secondly, that they have exercised such use and occupation as is reasonably practicable having regard to the subject matter of the derelict, its location, and the

practice of salvors".[206]

A leading case is The Tubantia.[207] A Dutch vessel, rumoured to contain over £2 million in gold, sank in 1916 in international waters in the North Sea[208] to a depth of about 120 feet. The first salvors found the wreck and in the 1922 and 1923 diving seasons began operations. These involved keeping divers and vessels at the scene, the mooring of buoys over the wreck and the positioning of plant and equipment around the vessel which was likely to be swept away. Holes were cut in the ship and obstructions removed. The weather allowed only about eight minutes per day in the holds and only 25 days were available in 1923. The second salvors arrived in July 1923 and claimed the right to join in the salvage operation and interfered in the work of the first salvors. The latter claimed a declaration as to their possessory rights, an injunction to restrain interference by the second salvors and damages.

The judge relied on Pollock and Wright's Possession in the Common Law to make a number of inquiries in order to establish possession. These included the following: "what are the kinds of physical control and use of which the things in question were practically capable? Could physical control be applied to the res as a whole? Was there a complete taking? Was the [first salvor's] occupation sufficient for practical purposes to exclude strangers from interfering with the property? Was there the animus possidendi?"[209] Taking the evidence as a whole, the judge concluded that the first salvors were in possession at the relevant time and it is interesting to consider some of his reasons. The first salvors did with the wreck what a purchaser would prudently have done and, if the owners themselves had put themselves in the same position as the first salvors, the owners would have been held to be in actual possession. The big difficulty with the first salvors' case was proving possession of something that was at the bottom of the

sea and which could only be entered in fine weather and for short periods of time. It might have been possible to argue that the vessel was incapable of possession for these reasons, or that it was only possessed for short periods of time. However, the judge was reluctant to come to such a conclusion as this would have discouraged enterprise. Instead, he was prepared to find that the first salvors were in effective control of the whole wreck and in a position to prevent useful work by newcomers. The court was influenced by the conduct of the second salvors, who had merely taken advantage of the enterprise of the first salvors in finding the wreck. It was important that the first salvors could demonstrate that they were taking such steps as were possible to exploit the wreck. It would have been different if there had been manifest incompetence by the first salvors and it seems clear that - where the first salvors cannot demonstrate possession - there is no salvage remedy to protect them from a competing salvor using their knowledge of the location of the wreck. The remedy of injunction was available for a high-handed and deliberate trespass and damages were recoverable (if proved) for the wilful prevention of the completion of an enterprise capable of producing profit. The court was unwilling to grant a declaration of possessory rights, partly because such rights are necessarily "of a limited and perhaps transitory kind".

In 1924, with huge numbers of ships still on the seabed after World War I sinkings, it is easy to see that the court would want to encourage "bold and costly work...of great public importance".[210] The same policy considerations might not apply in the 1990s where salvors were competing over a wreck which had historical or archaeological significance.[211] Although there may be little to choose between two treasure hunters, it may be that a second salvor could demonstrate that it was more likely to carry out operations which would preserve the archaelogical value of the wreck. It is submitted that if the first salvor was using "smash and grab" techniques, a court would be entitled

to award possession to the second salvor, either because it could require a high degree of proof of possession by the first salvor, or because the first salvor would be guilty of "manifest incompetence", taken at its widest.

Nevertheless, the principles in The Tubantia have been followed more recently in The Association and The Romney,[212] where the MOD granted separate diving rights to two persons in respect of four naval vessels which sank off the Scilly Isles in 1707. A third person claimed to salve the wrecks and denied any possessory title. At the interlocutory stage the first person was able to satisfy the court as to possession, which consisted of continuous buoying in 1967-69 and work during every possible day in the diving seasons. However, an interlocutory injunction was refused on a balance of convenience[213] as the third person claimed that it was an associate of the second person and entitled under the MOD agreement to work on the wreck. There were difficult questions of contractual interpretation and of fact: moreover, damages would have been an adequate remedy.[214]

The first salvors in The Tubantia and The Association and The Romney had done all they could to exercise possession. It may be that as diving techniques develop, so may the nature of the activities necessary to constitute possession. The latest remotely operated vehicles (ROVs) and submersibles are capable of mapping, marking out and attaching buoys. In a recent US case,[215] a judge has been prepared to find that in the deep ocean, "exercise of effective control is achieved not through physical presence of a human being at the ocean bottom", but instead through a combination of four factors: (i) locating the object searched for, (ii) real time imaging of the object, (iii) placement or the capability to place teleoperated or robotic manipulators on or near the object (capable of manipulating it as directed by human beings exercising control from the surface), (iv) present intent to control

(including deliberately not disturbing) the location of the object. The latter he described as "telepresence" and "telepossession".[216] While the law must develop, it might be thought that such an approach comes close to giving protection for discovering the location of the wreck, rather than for exercising possession. The better view is that mere discovery does not give a right to possession.[217] It should not be forgotten that the discoverer might claim a generous salvage reward for assisting in the saving of the property. Possession by remote control should be possible, but there must be more than the mere capacity or intention to possess.[218]

4. Interests under Salvage or Raising Contracts

Although salvage operations to a vessel may be performed consensually, it is the performance of successful services that gives rise to the salvage reward rather than the fact of agreement. However, it is legally possible, and commercially normal, to agree a salvage contract,[219] although the fact that the owner agrees to the operations does not necessarily result in a contract.[220]

It may be that the owners of the property engage a contractor to raise a wreck under an ordinary contract for work and labour, i.e. not a "no cure-no pay" contract but one for a lump sum, or at a daily rate. In such circumstances the contractor is not a salvor and has no maritime lien over the raised property, unless, perhaps, it has exceeded what was required under the contract and thereby become a salvor.[221] Nor will there be a possessory lien at common law[222] or a right against non-parties to the contract.[223]

When owners or underwriters grant permission for diving operations to take place to raise valuable cargoes, it is usual for percentages to

be agreed in advance. In these percentage deals the precise circumstances of the contract must still be examined to see if it is on a "no cure-no pay" basis. If so, there could be a salvage service. In the period immediately after World War II, it was common for the government to agree with contractors that valuable cargoes would be split 20% for the contractor and 80% for the government. Today, it is more likely that the contractors will make an offer that will vary according to the difficulty and expense of the intended operation. They may be required to pay, say £1000 for diving rights for two years, with a percentage of finds to be agreed after competitive tender. For general commercial cargoes, other than bullion, a contractor might be expected to pay the insurer 5-10% of the net proceeds, after the deduction of all costs.[224] It should not be ignored that it is enormously expensive, and risky, to set up a recovery operation. The agreement for salving the 431 gold bars, worth over £40 million, recovered from HMS Edinburgh was that 37.2% went to the USSR, 17.8% to Britain and 45% to the salvor.[225]

Where a contractor does have a wreck-raising contract from the owner, there may be difficult questions as to whether it can supersede a salvor who was first in possession. The rights may depend upon whether the owner itself could have dispossessed the salvor. The difficulty for the latter is in knowing whether the contractor, or the owner, does have the legal right to regain possession. The issue might have to be settled in court to avoid conflict at the site.[226]

5. Salvage Conventions and Wreck

It has been important at various times internationally to distinguish between the saving of a vessel which was manned, one which had been left by its crew and one which had sunk to the bottom of the

sea.[227] Continental systems of law, such as those in France and Italy, distinguished between salvage and assistance, the former applying to services to a vessel which had been left by the crew. The distinctions were often important in deciding the entitlement of the salvor in respect of the property recovered. Fixed proportions of one-third, or eight-tenths, of the things salved could be claimed, depending on the categorisation. In England, the concept of derelict was important in deciding the residual rights of the Crown.[228] Where no owner appeared the property passed to the Crown, but it was apparently the settled practice of the Court of Admiralty to give a moiety to the finders as salvors.[229] Later the amount became discretionary and English law ceased to make a formal distinction between the salvage of vessels, floating, manned or wrecked.

The Salvage Convention 1910, Article 1 abolished internationally any distinction between salvage and assistance and adopted the broad English notion of salvage. It has generally been assumed in English law that a ship and its cargo at the bottom of the sea are still subject to danger, one of the prerequisites of a salvage service.[230] In other systems it may be argued that vessels lose their character of being maritime property once they have sunk so that salvage rules cease to apply.[231] The Salvage Convention 1989 unfortunately[232] makes no mention of sunken vessels or their cargoes in its Article 1 definitions of "vessel" or "property" which can be salved. It is submitted that there is no doubt on the wording of Article 1, taking into account the travaux preparatoires, that salvage can be claimed under the Convention whether services are performed to floating or sunken vessels or cargo.[233] It is likely that the UK will ratify the 1989 Convention, but it still leaves national courts to decide whether property on the seabed is in danger.[234] If there is no danger, the recoverer will presumably only be entitled to bring a claim based in contract.[235]

6. Salvage and Finding

Two basic approaches may be found when dealing with an abandoned wreck. Under the "English Rule" title goes to the state with the finder/salvor being paid a reward. In contrast, under the "American Rule" title goes to the finder.[236]

The assumption of the 1989 Salvage Convention is that, unless states exercise a reservation in respect of "maritime cultural property", it will be normal to apply the salvage rules to wreck, including the giving of a maritime lien to the salvor.[237] Salvage law presupposes that the salvor does not become the owner of salved property, but has an interest in it secured by a maritime lien. The salvage remuneration is calculated according to many factors,[238] but can never exceed the salved value. The salvor will be awarded a proportion of the salved value and the owner will be entitled to the remainder (for example where the property has been sold). In some cases, national legislation will make the state the owner of abandoned property, but the notions of salvage will still prevail.[239] However, if there is no known owner, or if an identifiable owner has abandoned ownership, expressly or impliedly, the recoverer of wreck may be able to claim as a finder.[240]

At first glance, it may seem uncontentious that a discoverer should be entitled to claim property not claimed by anyone else. The well-known finding cases,[241] such as Parker v. British Airways Board,[242] recognise that a number of persons might have a right to claim an interest in lost goods, including the occupier of land, although the finder may have a greater interest than all but the true owner. However, cases such as The Lusitania[243] can only encourage treasure hunters. At one time this activity may have been thought of as a worthwhile endeavour by entrepreneurs, but today there is much greater

recognition of the need in many cases for properly conducted archaeological survey and excavation. The problem over the application of the law of finding or the law of salvage has been particularly prominent in litigation in the US over ships containing vast amounts of bullion which were wrecked off US coasts. The legal issues can only be outlined here,[244] but two cases are particularly illustrative: Treasure Salvors Inc v. The Unidentified, Wrecked And Abandoned Sailing Vessel[245] and Columbus-America Discovery Group v. The Unidentified, Wrecked And Abandoned Sailing Vessel.[246] There appears to have been a division of opinion between the courts and the leading American author, Norris.[247] Norris was very reluctant to apply the law of finds in the context of wreck, preferring to rely on the rules of salvage.[248] By contrast, the courts have been prepared to reject the theory that title to such property can never be lost and have applied the law of finds.[249] In Treasure Salvors it was accepted that "in extraordinary cases, such as this one, where the property has been lost or abandoned for a very long period...the maritime law of finds supplements the possessory interest normally granted to a salvor and vests title by occupancy in one who discovers such abandoned property and reduces it into possession".[250] In Columbus-America, abandonment was held, at first instance, to be a question of fact, a voluntary relinquishment of a right, consideration being given to "the property, the time, place and circumstances, the actions and conduct of the parties, the opportunity or expectancy of recovery, and all other facts and circumstances."[251]

In the Treasure Salvors case, the Nuestra Senora de Attocha, a Spanish galleon, was en route for Spain, with a cargo of bullion (worth perhaps $250 million) exploited from the mines of the New World, when she sank in 1622 in a hurricane off Florida, on the continental shelf but outside US territorial waters. After an expenditure of some $2 million and much trouble, the plaintiffs retrieved gold, silver, artefacts and armaments valued at $6 million and claimed these as finders. The US

intervened and claimed ownership of the vessel, but lost. The court applied the law of finds rather than the law of salvage. The Court of Appeals (5 Cir) affirmed the judgment, but refused to hold that the plaintiffs had exclusive title as against other claimants who were not before the court.[252] It did, however, consider it to stretch a "fiction to absurd lengths" to treat a wrecked vessel whose very location had been lost for centuries as though its owner existed. The court also rejected the claim of the US government based on an alleged inheritance of the English prerogative power which was apparently assumed to exist[253] over unclaimed wreck found on the high seas.

The decision on finding is perhaps unsurprising, given that there was no claim by the original owner Spain or any South American country. However, it can be inferred that the court would have rejected such a claim on the abandonment ground. If it is legally possible to abandon property,[254] then this case - with a 350 year period of inactivity - would be one of the strongest.[255] The difficulty is whether to apply the finding principle to more modern wrecks.

In Columbus-America Discovery Group v. The Unidentified, Wrecked And Abandoned Sailing Vessel,[256] the steamer SS Central America, reputedly carrying gold miners with a fortune in gold, sank in 1857 after encountering a hurricane 160 miles east of Charleston. The plaintiffs were a company that had spent 13 years of study and over $10 million in finding the wreck and its cargo. In 1987 they applied to the court, claiming ownership as finders or a liberal salvage reward, and an injunction to prevent others interfering in recovery. Various other claimants joined suit, including (i) the trustees of Columbia University (who claimed the plaintiffs had used information belonging to them, such as sonar records) and (ii) a list of 38 insurance companies in the UK and US (which claimed they had paid out on cargo insurance policies). The claim of the trustees (presumably for salvage) was dismissed as

they had failed to prove that any information was used, or that it helped to locate the wreck.[257] The claim of the insurance companies is far more important. The problem for the companies was that there were no copies of any insurance policies, invoices for shipments, bills of lading, bills of exchange, proofs of loss, amounts paid, or other records. The insurance companies instead had to rely on contemporary newspaper articles to show that some gold was insured by them, but it seems that there were many conflicts in the various reports. The judge at first instance, Kellam D.J., apparently held (i) that not all the insurance claimants could even prove that they had title to sue, as some of the companies were now defunct,[258] (ii) that the insurers could not prove exactly which cargo had been insured, (iii) that the insurers had in any event abandoned any claim they might have had. On appeal, it seems to have been assumed by the majority that the trial judge had decided that the insurers had proved a prima facie case of ownership and that the only relevant issue was abandonment. The reasoning of the first instance decision is not always easy to follow, but the additional grounds, given above, do seem to have been taken into account.[259]

The factors that Kellam D.J. found to be important, particularly in showing abandonment by the insurers, were (a) the absence of any documentation, (b) the failure of insurers to retain any records, given the practice of destroying documents only if a subrogated claim was not expected, and the absence of any evidence that documents were accidentally destroyed, (c) that evidence existed that some insurers had kept some records for over 100 years, (d) the contemporary evidence that some passengers carrying considerable quantities of gold were uninsured, (e) the fact that locating and recovering the wreck were beyond any known abilities in 1857 and for some 100 years thereafter, (f) the failure of any insurer or the Salvage Association to attempt to locate or recover the wreck in the last 20 years when techniques became available, (g) the length of time that had elapsed, (h) the absence

of any of the gold being listed as an asset of the insurance companies for taxation purposes.

The reasons need to be examined closely. Kellam D.J. disregarded the contentions of the insurers that they had never signed documents abandoning rights, never publicly abandoned them and had always claimed to own the gold. Although the judge dismissed the insurers' assertion that they would be unlikely ever to renounce title to so valuable a non-perishable cargo, it is submitted with respect that it does have force. With a cargo of gold the insurer would have no reason whatsoever to want to abandon ownership. The position might be different in respect of cargoes or hulls which could cause liabilities. The absence of documentation (a)-(c) is at best equivocal, given the passage of time and does not necessarily point to abandonment alone.[260] On appeal, the majority of the court found that Kellam D.J. had been wrong in concluding that the documentation had been deliberately destroyed and that this was a crucial factor in deciding that there had been deliberate abandonment. He had inferred from the present practice of destroying stale documents that the absence of documentation in the case must point to an intention to abandon title at some time in the past. The majority decision on appeal is surely right in refusing to draw such a conclusion, as the evidence would certainly be equivocal.

Likewise, a failure to undertake salvage operations (e)-(f) would point simply to a calculation that the efforts might not succeed.[261] The point about company accounts would need precise evidence as to the practice of insurers but it seems unlikely that such remote prospects of recovery would have been included in accounts, given the state of knowledge and technology at the time. Indeed, to include might well have been misleading to shareholders.[262] The lapse of time (g) is certainly relevant, but will always be arbitrary, in the absence of a statutory definition. The fact that so much endeavour was displayed by the

finders is a reason for giving them an exceptionally generous salvage reward, but a court is not necessarily forced to conclude that the insurers' wariness of exercising similar endeavour is evidence of abandonment. It does not appear that Kellam D.J., or the Fourth Circuit Court of Appeals, addressed the issue as to whether the insurers had ever taken over the cargo under marine insurance law or whether these rights had been waived.[263]

It is submitted that there is no reason why the insurers' claims could not have succeeded, provided they could produce clear documentary evidence that (i) they had title to sue and (ii) that the policies precisely covered the goods recovered. The real problem for the insurers was the weakness of their case on these two points. The absence of the documentary evidence, coupled with the fact that some portion of the cargo was certainly uninsured, must have presented enormous difficulties to the claim unless the courts are prepared to adopt some principle of apportionment of proceeds rateably amongst the various insurers of admixed cargo. The findings, both on abandonment and on the documentary evidence, would have been a severe blow to attempts by insurers to assert rights over wreck. The decision on appeal is to be welcomed, in so far as it indicates a reluctance to hold that insurers have abandoned title (and thereby to apply the law of finds) except with the clearest evidence. However, a Petition for Rehearing en banc, seeking to reargue the case before all nine Judges of the Circuit, was filed in September 1992.

The US cases disclose a professional finding industry (with a thriving market in assignable rights, interests and information) which the US courts have been willing to favour, at least until the recent appeal decision in Columbus-America. "The law acts to afford protection to persons who actually endeavour to return lost or abandoned goods as an incentive to undertake such expensive and risky ventures".[264] The

robust view taken by the US courts does have the merit of providing comparatively simple solutions to complex cases, for the fewer ownership claims that are recognised, the easier it is to arrange recovery operations and to distribute the proceeds. However, it must be seriously questioned whether the comparatively unrestrained endeavours of such an industry is the most desirable system to allow. The existence, and recognition, of a wider underlying state or public right would have the merit of enabling material of archaeological or historical interest to be made available for research and public education and enjoyment.[265] Indeed, in the Abandoned Shipwreck Act of 1987 the US has recognised such wider educational and historical interests by declaring ownership of certain abandoned wrecks in or on the submerged lands of a State and then transferring these to the relevant state.[266] The laws of salvage and finds are disapplied in these waters in respect of such wrecks, but will still be applicable to some shipwrecks on those lands[267] and to most wrecks beyond the three mile limit. It is interesting to note that rejected drafts would have extended the scope of the Act to the continental shelf and would have specified wrecks over 100 years old.

CONCLUSION

This chapter outlines the legal interests which exist in wrecks and wreckage. What is already clear is that there are some very entrenched vested interests in the legal status quo. At present the commercial interests of salvors, treasure seekers and insurers are treated as paramount and little recognition is given to broader cultural interests. It is also clear that if a vessel - no matter how old - contains material of significant monetary value, it will be said to be of commercial interest by anyone with a potential legal interest. It will therefore be difficult to draw a neat division between wrecks of

"commercial" interest and those of "historical or archaeological" interest: the Central America is a very good example of the type of vessel which will cause a conflict between these interests. In the UK there are powerful salvage and insurance lobbies whose concerns will need to be assuaged if any attempt is made to interfere with their existing rights. However, where possible a clear distinction should be made between wrecks which have only commercial value and those which have cultural value. In the case of the latter, the public interest in such wrecks may well be best served by not applying the law of finding, but by allowing the state to claim ownership wherever possible.[268] It would then be necessary to decide whether or not to reward strangers who "save" property from the wreck, either by virtue of salvage law, or through some form of statutory reward system.[269]

According to the American jurist Roscoe Pound, the interests - legal and non-legal - being asserted within a society provide a guide for the legislator.[270] As well as the legal interests outlined above, there are, of course, many non-legal interests - for example, those of archaeologists, museums and amateur divers - which need to be taken into account in deciding on the best approach to the protection of culturally important material. These interests will be considered in detail in Chapter Six.

NOTES

1. State rights of intervention, for example to prevent obstruction to navigation or oil pollution, are outside the scope of this work, but see S. Dromgoole, N. Gaskell, "Interests in Wreck", in N. Palmer (ed.), Interests in Goods (1993), Chapter 13.

2. The latest vessel designated under the Protection of Wrecks Act 1973 (PWA 1973) on account of its "historical, archaeological or artistic importance" (see further, Chapter Three below) is the Iona II, a passenger ferry lost in 1864. Under the Australian Commonwealth Historic Shipwrecks Act 1976 a number of twentieth century wrecks have been declared "historic" (see further, Chapter Six, A.1., below). See also the Columbus-America case, C.6., below.

3. In 1985, in an interview with the writer, the then General Manager of the Salvage Association (see further A.1(b) below), Arthur Prince, expressed the view that such conflicts were looming.

4. "A vessel broken, ruined, or totally disabled by being driven on rocks, cast ashore, or stranded; a wrecked or helpless ship; the ruins or hulk of such": Oxford English Dictionary (2nd edn., 1989).

5. For further discussion of these terms, see B.1., below.

6. In Cargo ex Schiller [1877] 2 PD 145 it was held, citing Att. Gen. v. Sir Henry Constable [1601] 5 Co Rep 106, that "flotsam, is when a ship is sunk or otherwise perished, and the goods float on the sea. Jetsam, is when the ship is in danger of being sunk, and to lighten the ship the goods are cast into the sea, and afterwards, notwithstanding, the ship perish. Lagan...is when the goods which are so cast into the sea, and afterwards the ship perishes, and such goods are so heavy that they sink to the bottom...".

7. For the meaning of "derelict", see A.2., below.

8. MSA 1894, s.510(1). The origin of this section was the Merchant Shipping Act 1854 s.2. The 1854 Act was a consolidating statute. The earlier Wreck and Salvage Act 1846 had no definition of wreck. The breadth of the area covered is unclear from the statutory wording. What exactly does "found in or on the shores of the sea" mean? Does it mean "found in the sea, or on the shores of the sea", or "found in the shores of the sea, or on the shores of the sea"? The two interpretations would lead to quite different results. In practice the phrase has been taken to mean the former, i.e. property found in territorial waters or on the foreshore.

9. For example, see Att. Gen. v. Sir Henry Constable [1601] 5 Co Rep 106, "if any [flotsam, lagan or jetsam] by the sea be put upon the land, then they shall be said wreck". See also R. v. Forty-nine Casks of Brandy (1836) 3 Hagg Adm 257, in which Sir John Nicholl cites Blackstone: "It is to be observed...that in order to constitute a legal wreck, the goods must come to land; if they continue at sea, the law distinguishes them by the uncouth appellations of jetsam, flotsam, and ligan. These three are, therefore, accounted so far a distinct thing from the former, that by the King's grant to a man of wrecks, things jetsam, flotsam, and ligan will not pass" (Bl. Com. vol. i, 290, 292).

10. See further B.1., below. See also S. Lillington, "Wreck or Wreccum Maris? The Lusitania" [1987] LMCLQ 267.

11. See B.1., below for further details. See also Halsbury's Laws (4th

edn.), Vol. 43, para. 1008 and R. Marsden, "Admiralty Droits and Salvage - Gas Float Whitton, No.II" (1899) LX LQR 353, at p.354. Droits also included sea-marker buoys, and wines and spirits anchored for safe-keeping to the bottom of the sea by smugglers.

12. Aircraft (Wrecks and Salvage) Order 1938 (S R & O 1938, No.136), Art.2(b).

13. Hovercraft (Application of Enactments) Order 1972 (SI 1972, No. 971), Art.8(1).

14. New Zealand Shipping and Seamen Act 1952, s.348(2).

15. P. Davies, "Wrecks on the New Zealand Coast" [1983] NZLJ 202 at p.205.

16. The term "wreck" itself is not defined.

17. See A.2., below.

18. See C., below.

19. Vereenigde Oostindische Compagnie (VOC). See A.1(b) below.

20. She appears to have been ten metres longer than HMS Victory: P. Marsden, The Historic Shipwrecks of South-East England, op. cit., pp.12-13.

21. Source: file on the wreck belonging to the Archaeology Department, University of Southampton.

22. See A.1(c) below.

23. Henry VIII's flagship which sank in the Solent in 1545 and was raised in 1982.

24. For details of another similar donation, see A.1(c) below.

25. See C., below.

26. See B., below.

27. S. Braekhus, "Salvage of Wrecks and Wreckage: Legal Issues arising from the Runde Find" [1976] Scandinavian Studies in Law 39 at p.53.

28. For example, in September 1992 a wooden ship possibly dating from the Stone Age was found 23 ft below street level during road construction work in Dover: The Independent, 17 October 1992. Archaeologists believe that it was left at the edge of a river estuary that once flowed through the area: The Independent, 12 October 1992.

29. Established in 1856 as "The Association for the Protection of Commercial Interests as respects Wrecked and Damaged Property" and incorporated by Royal Charter in 1867. In practice, it operates within Lloyd's and the Institute of London Underwriters, but is available to any person whose interests are affected by perils of the sea.

30. It is evident from the DTp files that attempts have been made to list all potentially valuable cargoes, so there may not be as much "treasure" to be discovered as is sometimes thought.

31. Another source is the World War I and World War II records of losses recorded in the five volumes of War Loss Books of Lloyd's, see e.g. Lloyd's War Losses - the Second World War (1989) Vol. 1.

32. See The Times, 19 and 29 April 1986.

33. Wrecked on the beach three miles from Hastings in 1749.

34. Wrecked off the Outer Skerries in 1711. For further details, see Van Meurs, op. cit., p.42.

35. The Dutch government took over the assets and liabilities of the Dutch East India Company when it was liquidated in 1798. See Van Meurs, op. cit., pp.41-42 for details.

36. See B.2., below.

37. See further, Chapter Two, A.3., below.

38. See The Lusitania [1986] QB 384, where the question before the court was: who had better title to these unclaimed contents, the salvors or the Crown? See B.2., below.

39. P. Marsden, The Wreck of the Amsterdam (1974).

40. Prior to 1964 it was the Admiralty which administered these rights.

41. For example, in the case of the Grace Dieu, see A.1(a) above.

42. Letter to N. Gaskell, University of Southampton, from R. Thirkettle, Directorate of Sales (Disposals), MOD, 6 August 1992. For the policy regarding wrecks known to contain human remains, see H.C. Debates, Vol.90, Cols.1230-1231 (1985-86). As to the latest statement of government policy regarding MOD wrecks, see Chapter Five, C.4., below.

43. In a letter dated 12 July 1988 from C.S. Callcut, Secretariat (Naval Staff), MOD, to the Isle of Wight County Archaeological Officer, it was stated that: "the Ministry of Defence is willing to consider gifting ownership of historic wrecks to reputable archaeological groups free of charge... This has been done on numerous occasions in the past and we will continue to pursue such a policy in the future."

44. Material recovered must be reported to the Secretary of State for Defence within 12 months and the reporting requirement under the MSA 1894 must be abided by. A copy of the Deed of Transfer was kindly provided by P. Marsden, Director of the Shipwreck Heritage Centre, Hastings, East Sussex and is reproduced in Appendix 8.

45. If someone wants to purchase a cargo, in order to salve it, the Salvage Association is asked to recommend a price: "For sale, 5,000 desirable wrecks", The Observer, 18 September 1988. A senior Executive Officer involved in the sales was reported as saying: "If someone wants a wreck to dive off, we ask them to suggest their own price and hope they will be embarrassed into offering something substantial."

46. Other examples of East Indiamen include the Earl of Abergavenny sunk off Weymouth in 1805; the Admiral Gardner, sunk in the Goodwin Sands in 1809; and the Hindostan, which sank off Margate in 1803.

47. The FCO has no practical means of exercising any rights which the Crown may have over such wrecks: letter to A. Firth, University of Southampton, from P. Williams, Aviation and Maritime Department, FCO, dated 3 March 1992. For the latest statement of government policy regarding these wrecks, see Chapter Five, C.4., below.

48. Letter to N. Gaskell, University of Southampton, from R. Hayward, Secretariat (Naval Staff), MOD, dated 10 September 1992.

49. Letter from P. Williams, Aviation and Maritime Department, FCO to A. Firth, University of Southampton, dated 3 March 1992.

50. See US v Steinmetz [1991] AMC 2099 at p.2106. "Kearsage was in constructive possession of Alabama, positioned across Alabama's bow thwarting escape and able to deliver unanswerable raking fire", according to Debevoise D.J., at p.2106.

51. US v Steinmetz [1991] AMC 2099 at p.2106. See further, A.2., below.

52. Although, at the time of sinking, the vessel was on the high seas since the French only established a 12 mile territorial limit in 1971: Law No.71-1060 (Dec.24, 1971). See J. Ashley Roach, "France Concedes United States Has Title to CSS Alabama" (1991) 85 AJIL 381.

53. In the same year an agreement was signed by the two governments relating to the protection and study of the wreck and its artefacts. For further details, see J. Ashley Roach, op. cit., and Chapter Six, C.1., below.

54. Earlier salvage operations on the forward and midship sections led to the recovery of various items, but the gold was never found and therefore thought to be in the stern section.

55. Giving rise to the tradition "Women and children first", known as the "Birkenhead drill": The Times, 14 March 1986.

56. Under the War Graves and National Monuments Act 1969 (South Africa), as amended. The permit required the salvors to take proper account of the archaeological, historical and cultural aspects of the wreck. The salvors were entitled to half of the material as salvage and were required to give the other half to the Monuments Council which would give most of it to the South African Cultural History Museum and a selection to the relevant regiments (apparently at the request of the salvors). For details of recent measures to improve the permit system, see B. Werz, "A preliminary step to protect South Africa's undersea heritage" (1990) 19 IJNA 4 and see also Chapter Six, C.2., below.

57. As to human remains, see further A.1(d) below and Chapter Three, E., below.

58. HMS Birkenhead: Exchange of Notes, Cm 906, Treaty Series No.3 (1990): see Appendix 9.

59. Information on the Birkenhead was kindly supplied by J. Horrocks and H. Staniland.

60. Between 1857 and 1861 bullion valued at about £40,000 was recovered. For further details, see A.3(b) below.

61. In Streedagh Bay, Co. Sligo: The Irish Times, 22 May 1985.

62. Personal communication with Nessa O'Connor, Assistant Keeper, National Museum of Ireland, 30 September 1992. Furthermore, the Spanish showed an interest in, but did not make a claim to, the Sante Maria de la Rosa which was found off the Irish coast in 1969: A. Korthals Altes, "Sunken Spanish Treasures in Anglo-American Law", in M.J. Palaez, Derecho Comercial Comparado Trabajos en homenaje a Ferran Valls, Taberner, Vol. XI (1989) pp. 3130-3135.

63. See the Treasure Salvors, Cobb Coin and Platoro cases, C.6., below. See also, A. Korthals Altes, op. cit., pp.3137-3145.

64. Estatuto nr. 60/62, 24 December 1962.

65. International Law Association Queensland Conference, Committee on Cultural Heritage Law, First Report (1990), p.4.

66. Ibid. As to abandonment, see further, A.2., below.

67. See J. Gronhagen, "Marine Archaeology in Finnish Waters" in P. Forstyhe (ed.), Proceedings of the Sixteenth Conference on Underwater Archaeology (1985).

68. Prott and O'Keefe, Law and the Cultural Heritage, Vol.1 (1984), p.192.

69. As to the meaning of "abandoned shipwreck" for the purposes of this Act, see A.2., below.

70. See further, Prott and O'Keefe, Law and the Cultural Heritage, Vol.1, op. cit., pp.192-3 and Law and the Cultural Heritage, Vol. 3, p.440 et seq. A potential conflict of this nature was the reason for the Agreement Between Australia and The Netherlands Concerning Old Dutch Shipwrecks, see further, Chapter Six C.2., below.

71. C. Martin, Institute of Maritime Studies, St. Andrews, in a presentation at the Advisory Committee on Historic Wreck Sites' meeting with licensees, Royal Armouries, 25 November 1992. See further, thesis Introduction.

72. Halsbury's Laws of England (4th edn.), Vol.10 para. 1019. For detailed discussions, see P. Skegg, "Human Corpses, Medical Specimens and the Law of Property" (1975) 4 Anglo-American LR 412, P. Matthews, "Whose Body? People as Property" [1983] CLP 193.

73. Skegg, and Matthews, op. cit.

74. See Elwes v. Brigg Gas Company (1888) 33 Ch D 562.

75. See C.6., below.

76. The law of salvage does not apply to live humans and there is no reason to extend it to bodies, e.g. so as to recognise possessory rights of the salvor: see C.3., below. The removal of bodies for scientific research may be covered by the Human Tissue Act 1961.

77. Although success in the damages claim seems unlikely, given the present state of the authorities: cf. Alcock v. Chief Constable of the South Yorkshire Police [1991] 4 All ER 907.

78. For example, by extending the Protection of Military Remains Act 1986 (PMRA 1986), which restricts interference with military wrecks. For details, see Chapter Three, E., below.

79. The distinction in salvage law between a vessel which is derelict, and a vessel which is not, is explained at C.3., below.

80. See, for example, The Aquila (1798) I C Rob 36, 165 ER 87 per Sir W. Scott at pp.88,89; HMS Thetis (1835) 3 Hagg Adm 229, 166 ER 390 per Sir John Nicholl at 393; Cossman v. West (1887) 13 App Cas 160 at pp.180,181; Bradley v. Newsom [1919] AC 16 (H.L.) per Lord Finlay L.C. at pp.27,28.

81. This has not always been the case: see B.1., below.

82. In civil law systems the term "dereliction" is used to denote abandonment or relinquishment of the right of ownership: see Braekhus, "Salvage of Wrecks and Wreckage", op. cit., p.47. See also The Lusitania [1986] QB 384 per Sheen J. at pp.388-9 where it seems that the learned judge may have conflated the two meanings of the notion of derelict.

83. See, in particular, Braekhus, "Salvage of Wrecks and Wreckage", op. cit., for an excellent discussion on this point. See also, e.g. The Tubantia [1924] P 78, at p.87 on intention, where Sir Henry Duke P. referred to the Roman law origins of the principle.

84. See R. Lanier, "Abandon Ship? The Utility of Abandonment" (1977-78) 9 JMLC 131, and K. Roberts, "Sinking, Salvage and Abandonment" (1977) 51 Tul L Rev 1196, 1199. See also the sources cited in N. Palmer, Bailment (2nd edn., 1991) p.1432 (f.n. 64).

85. R. Goode, Commercial Law (1982), p.58 (f.n. 41).

86. See R. Grime, "Abandonment: Some Theoretical Problems", in Problems of the Shatt al Arab (Institute of Maritime Law, Faculty of Law, University of Southampton, 1983) pp.33-34. A. Bell, Modern Law of Personal Property in England and Ireland (1989), mentions abandonment in passing only (at pp.40,68) but seems to assume it is possible.

87. See Elwes v. Brigg Gas Co. (1886) 33 Ch D 562, per Chitty J. at 568-9.

88. Robinson v. Western Australian Museum (1977) 51 ALJR 806, per Stephen J. at pp.820-21.

89. Braekhus, "Salvage of Wrecks and Wreckage", op. cit., pp.51-52 has suggested that this view is supported by the doctrine of laches. Cf. Grime, op. cit., Palmer, op. cit., pp.1431-1432, f.n. 64. Palmer asserts that no lapse of time, however great, will by itself extinguish title, but later seems to accept that express abandonment may be possible in the case of wrecks, leaving open the issue of abandonment implied through lapse of time.

90. [1924] P 78, at p.87.

91. See e.g. the decision in The Egypt (1932) 44 Ll L Rep 21. The Lutine, A.3., below, is an example where Lloyd's underwriters were maintaining a claim some 60 years after a ship was lost. US and UK insurers have also asserted a claim to the gold on board the SS Central America which sank in 1857, see C.6., below for details.

92. [1986] 1 QB 384.

93. Ibid., p.389 (emphasis added).

94. See R. Olsen, "The salvor's rights and duties in relation to property recovered", in Proceedings of the International Marine Salvage Conference, London (1988), p.6. A court must, presumably, decide on the evidence before it.

95. [1975] 2 Lloyd's Rep 338.

96. There was also a difficult question as to whether East or West Germany was the lawful successor in title. Such problems will increase with the break up of Eastern European states such as Yugoslavia and the Soviet Union.

97. (1977) 51 ALJR 806, at pp.820-821.

98. Jacobs J. (p.829) agreed. Cf. I. Shearer (ed.), O'Connell, The International Law of the Sea (1984) p.318.

99. N. Rt. 346 (1970 N.D. 107). See Braekhus, "Salvage of Wrecks and Wreckage", op. cit., p.54.

100. J. Ashley Roach, op. cit., p.381, citing the 1980 Digest of United States Practice in International Law 999-1066, and US Navy, The Commander's Handbook on the Law of Naval Operations, para.2.1.2.2. (NWP9 (Rev A)/FMFM 1-10, 1989).

101. [1991] AMC 2099. On 24 August 1992, the US Court of Appeals for the 3rd Judicial Circuit rendered an opinion in favour of the US but apparently avoided several of the important issues which had been argued on behalf of Steinmetz. Therefore, in September 1992 Steinmetz filed a Petition for Rehearing.

102. See O'Connell, op. cit., p.912. US courts have nevertheless been prepared to apply the abandonment theory to states, see Platoro Ltd Inc v. The Unidentified Remains of a Vessel (1981) 518 F Supp 816, C.6. below.

103. Cf. the various time limits set out in the Protection of Military Remains Act 1986: see Chapter Three, E., below. See also, Chapter Six, C.1., below and Chapter Eight, B.1(c) below.

104. Mel Fisher, President of Treasure Salvors, Inc., in referring to the federal legislation's title provisions, stated that "I think what this boils down to really is nationalising the salvage industry. I think it goes against all free enterprise and American ideas...": A. Giesecke, "Shipwrecks: The Past in the Present" [1987] Coastal Management 179 at p.193.

105. U.S. Department of the Interior, National Park Service, Abandoned Shipwreck Act Guidelines (1989).

106. Ibid.

107. For a discussion of reinsurance and war risks, see S. Dromgoole, N. Gaskell, "Interests in Wreck", op. cit.

108. Marine Insurance Act 1906 s.79(1).

109. Ibid. In the case of an actual total loss there is no need for a notice of abandonment (s.62(7)), but in practice a shipowner wishing to claim for a total loss will give notice, leaving it to be later determined whether the loss was actual or constructive. See M. Mustill, J. Gilman (eds.), Arnould's Law of Marine Insurance and Average (16th edn., 1981), Chap. 30.

110. Marine Insurance Act 1906 s.61.

111. Marine Insurance Act 1906 s.57(2).

112. Marine Insurance Act 1906 s.63(1).

113. Per Langton J. (obiter) in The Egypt (1932) 44 Ll L Rep 21, at p.39.

114. Marine Insurance Act 1906 s.62(5).

115. See Arnould, op. cit., p.1061.

116. See Arnould, op. cit., pp.1060-1061 on the relevance of the "waiver clause", whereby the insurer is said not to waive or accept abandonment by acts of recovering property.

117. (1923) 28 Com Cas 367.

118. This is the view apparently supported by Arnould, op. cit., p.1070.

119. Pesquerias y Secaderos de Bacalao de Espana SA v. Beer [1946] 79 Ll L R 417.

120. This view appears to be supported by Greer J. in Oceanic Co v. Evans (1934) 40 Com Cas 108 at p.111 and Cohen L.J. in Blane SS Co v. Minister of Transport [1951] 2 KB 965 at pp.990-1. See also R. Lambeth, Templeman on Marine Insurance (6th edn., 1986), pp.452-3.

121. Cf. The Crystal [1894] AC 504.

122. See Ocean St Nav Co Ltd v. Evans (1934) 40 Com Cas 108, at p.111.

123. Columbus-America Discovery Group v. The Unidentified, Wrecked and Abandoned Sailing Vessel [1990] AMC 2409 (reversed on appeal, (1992) 337 LMLN 1).

124. p.2440. On appeal, it seems to have been accepted that the court below had prima facie recognised the rights of the insurers, and the main issue was whether these rights had then been abandoned. See further, C.6., below.

125. See R. Flowers, M. Wynn Jones, Lloyd's of London: An Illustrated History (1974), pp.114-118; H. Lay, A Textbook of the History of Marine Insurance (1925), p.58.

126. Ibid.

127. It would also seem that the provision was not designed to enable the proceeds to be spread amongst existing members, but to further more general, if not charitable, aims.

128. In 1875 there were 710 members and in 1924 only 1243 underwriting members, see Lay, op. cit., p.57. Today, there are almost 30,000 members grouped into about 370 syndicates (source: Lloyd's).

129. 10/91, shortly to be replaced.

130. At the time, the White Star Line was a British company (as required under the MSA 1894), although its shareholding had been acquired in 1902 by the American corporation, International Mercantile Marine: B. Allen, "Coastal State control over historic wrecks situated on the continental shelf as defined in Article 76 of the Law of the Sea Convention 1982", Special Publication of the Institute of Marine Law, University of Cape Town, No.14, (1991), p.15.

131. M. Nash, "The Lusitania and Its Consequences", NLJ, 4 April 1986.

132. In an article in The Times on 14 December 1985, Marcel Berlins stated that the underwriters, in paying out the insurance claim, became owners of the wreck. With respect, it seems that he was wrong in saying this because the underwriters do not become the owner automatically; they have a choice.

133. White Star, original owners of the Titanic, merged with the Cunard Steamship Company in 1934 and Cunard later became part of Trafalgar House.

134. The Lusitania [1986] QB 384.

135. Per Sheen J. at p.386.

136. It appears that the government was a reinsurer from the Liverpool and London War Risks Association for some 80%. In 1962, the government apparently sold its title to the wreck to "a businessman": The Times, 14

November 1985.

137. Arnould, op. cit., pp.1071-1072, cites with apparent approval the US decision of White Star SS Co v. North British and Mercantile Ins Co Ltd [1943] AMC 399, where an insurer appeared to have made such an election by declining to pay for wreck removal. In those circumstances, it was not entitled to proceeds from the wreck.

138. Dig. XLI, I, 58; 2,21,1, as quoted in F. Sanborn, Origins of the Early English Maritime and Commercial Law (1930, reprinted 1989).

139. Cod. XI, 6, I, as cited in Sanborn, op. cit., p.16.

140. Dig. XLVII, 9, 3 pr., as cited in Sanborn, op. cit., p.16.

141. Such rights were known as "foreshore rights" or "wreckers' rights". See Braekhus, "Salvage of Wrecks and Wreckage", op. cit., p.43. See also K. Goddard, "Is there a right to wreck?" [1983] LMCLQ 625. In the US the term "wreckers" is applied to legitimate and illegitimate salvors of wreck: see Benedict on Admiralty (1992), Vol.3A, s.133.

142. As Sanborn calls it, op. cit., p.115.

143. Ibid.

144. See Chapter One, Introduction.

145. [1836] 3 Hagg Adm 257.

146. According to Sanborn, op. cit., p.315.

147. Halsbury's Laws (4th edn.), Vol. 8, para. 1506, f.n. 1.

148. 3 Edw. I, c.4.

149. Cited in Braekhus, "Salvage of Wrecks and Wreckage", op. cit., at p.44. This rule was originally laid down by Henry III in 1236, but the Statute of Westminster extended the time for claiming the shipwrecked goods to a year and a day (rather than the original three months). See Sanborn, op. cit., p.316; T. Twiss (ed.), The Black Book of the Admiralty, Vol.1 (reprinted 1985), p.85. In fact, according to S. Moore, History of the Foreshore (3rd edn., 1888) p.68, by the reign of Edward I the franchise of wreck had been granted out by the Crown over the greater part of the coasts of the Kingdom and there was little left for the Crown. See further, B.2., below.

150. Braekhus, "Salvage of Wrecks and Wreckage", op. cit., p.44.

151. Hale, De Jure Maris, as cited in Moore, op. cit., p.408. The whole of Hale's De Jure Maris, as edited by Hargrave, is cited in Moore, op. cit., pp.370-413.

152. As cited in Moore, op. cit., p.408. See also R. Marsden, op. cit., at p.355.

153. This is confirmed by R. Marsden, who states (op. cit., p.361) that - in respect of droits - not much regard seems to have been paid to the claims of the owners of such property.

154. Hamilton v. Davis 5 Burr 2732, 98 ER 433.

155. See e.g. 6 & 7 Will. IV, c.60, s.7 (1836) and 8 & 9 Vict. c.86, s.54 (1845). See also D. Steel, F. Rose, Kennedy's Law of Salvage (5th edn., 1985), p.41 and The Aquila (1798) I C Rob 36, 165 ER at 89.

156. See Twiss, op. cit. See also Sanborn, op. cit., p.117. Now see the MSA 1894 s.521. See further, Chapter Two, A.3., below.

157. "Likewise the admiral shall have and take by virtue of his office one moiety of every manner of flotsam found on the sea, whether it be casks of wine, bundles of cloth, sacks of wool, or any other thing, and the takers and seisors of the same the other moiety." "Likewise the admiral shall have and take by virtue of his office, one moiety of every manner of lagan, dragged or raised from the bottom of the sea, whether it be anchors, tables, chests, or any other thing, and the gainers of the same the other moiety". Twiss, op. cit., p.397.

158. R. Marsden, op. cit., p.359.

159. Cf. C.6., below.

160. For details, see generally Chapter Two. For extracts of the Act, see Appendix 1.

161. A distinction was drawn between the grant of rights to wreccum maris and the grant of rights to adventurae maris: see Moore, op. cit., pp.467-469 and R v. Forty-nine Casks of Brandy (1836) 3 Hagg Adm 257, which concerned the grant by Queen Elizabeth I of Corfe Castle in Dorset, including "...wrecks of the sea, shipwrecks,..." to Sir Christopher Hatton, K.G., Lord Chancellor of England. See also Dunwich v. Sterry (1831) 109 ER 995; Halsbury's Laws, (4th edn.), Vol. 8, paras. 1506-1509.

162. P. Marsden, The Wreck of the Amsterdam, op. cit.

163. See Chapter Two for details.

164. [1986] QB 384.

165. Currently set by the Territorial Sea Act 1987. Section 1(1)(a) provides for a territorial sea of 12 nautical miles in breadth.

166. De Jure Maris, as cited in Moore, op. cit., p.410. See R. Marsden, op. cit., p.353.

167. R. Marsden, op. cit., p.359.

168. R. Marsden, op. cit., p.364.

169. M. Nash, "The Lusitania and Its Consequences" op. cit.; see also J. Gibson, "The Lusitania and Ownership of Wreck" (1986) 1 IJECL 323.

170. (1835) 1 Hagg Adm 383, 166 ER 136.

171. See also The Thetis (1835) 3 Hagg Adm 228, where the ship was sunk off Brazil.

172. [1986] QB 384, at p.395.

173. [1986] QB 384, at pp.392-3. Cf. the Treasure Salvors case [1978] AMC 1404, at pp.1418 et seq., which assumed that the Crown did have such rights, see C.6., below.

174. For example, it appears that in the Netherlands, a bona fide purchaser from a salvor will acquire good title three years after the loss.

175. See F. Rose, "Restitution for the Rescuer" (1989) 9 OJLS 167.

176. See Falcke v. Scottish Imperial Insurance Co (1886) 34 Ch D 234, at

p.248.

177. The Two Friends (1799) I C Rob 271, at p.277; 165 ER 174.

178. See C.2., below, on the question of whether all wreck is considered as maritime property.

179. For further reference on the elements of a salvage service, see Kennedy, op. cit.; G. Brice, Maritime Law of Salvage 1983 (2nd edn., 1993, forthcoming); N. Gaskell, C. Debattista, R. Swatton, Chorley and Giles' Shipping Law (8th edn., 1987), Chap. 24.

180. That is not to deny the possibility of a contract for salvage: see further C.4., below.

181. In The Five Steel Barges (1890) 15 PD 142, at p.146, Sir James Hannen P. managed to refer both to the "equitable character" of the jurisdiction while stating that the right to salvage was a "legal liability". Although sometimes described as equitable, salvage rights are historically unconnected with those derived from the Court of Chancery and the central tenets are not derived from the law applied by the common law courts: see generally Kennedy, op. cit., Chap. 2.

182. The 1910 Salvage Convention and the 1989 Salvage Convention, see C.5., below.

183. See further, D. Jackson, Enforcement of Maritime Claims (1985), especially Chap. 12; R. Thomas, Maritime Liens (1980), especially Chaps. 1 and 5; W. Tetley, Maritime Liens and Claims (1985), especially Chaps. 1 and 8.

184. The Civil Aviation Act 1982, s.87(1) extends the jurisdiction to aircraft which are wrecked in the sea. With the exception of aircraft, salvage rights do not extend to types of property found at sea which cannot easily be fitted into the definition of "ship" in the MSA 1894, s.742. Therefore, they do not apply to archaeological remains which do not derive from the wreck of a ship or aircraft.

185. See the Supreme Court Act 1981, ss.20(1)(j), 21(3).

186. The Bold Buccleugh: Harmer v. Bell (1850) 7 Moo PCC 267.

187. See Jackson, op. cit., pp.221-3; Tetley, op. cit., p.541 et seq., H. Staniland, Comments, in [1989] LMCLQ 174, [1990] LMCLQ 491.

188. The Halcyon Isle [1981] AC 221. See also The Russland [1924] P 55.

189. Certain "public" claims, such as the expenses of the court official responsible for arrest, may be afforded the first priority in most systems.

190. See The Gustaf (1862) Lush 506, at p.508, 167 ER 230, at p.231; The Lyrma (No.2) [1978] 2 Lloyd's Rep. 30, at p.33.

191. Maritime Conventions Act 1911, s.8.

192. See generally, Kennedy, op. cit., p.518 et seq., Brice, op. cit., p.92 et seq., pp.114-118.

193. (1887) 13 App Cas 160, at p.181.

194. See A.2., above.

195. Cossman v. West (1887) 13 App Cas 160, per Sir Barnes Peacock, at

p.181, even if the master and crew have left the vessel temporarily for the purpose of obtaining assistance: The Aquila (1798) I C Rob 36, 165 ER 87, per Sir William Scott, at p.88.

196. Cossman v. West (1887) 13 App Cas 160 at p.181.

197. S. Braekhus, "Competing Salvors" [1967] Scandinavian Studies in Law 65 at p.80.

198. Ibid. Note that interference with divers authorised to work on a site designated under the Protection of Wrecks Act 1973 (PWA 1973) is an offence: s.1(6).

199. (1887) 13 App Cas 160, at p.181.

200. The authorities are inconclusive: see Kennedy, op. cit., p.520.

201. Braekhus, "Competing Salvors", op. cit.

202. Although similar results were achieved in The Fleece (1850) 3 W Rob 278, 166 ER 966.

203. The salvor does not need a possessory lien where there is a maritime lien, as the latter is inchoate and travels with the ship. (The security is only undermined if the vessel travels to a state where the maritime lien cannot be enforced.)

204. The mechanism exists in salvage law to compensate superseded salvors: see e.g. The Hassel [1959] 2 Lloyd's Rep 82.

205. See The Tubantia [1924] P 78, at p.86.

206. The Association and The Romney [1970] 2 Lloyd's Rep 59, per Dunn J., at p.61.

207. [1924] P 78.

208. Fifty miles from Britain and 20-27 miles from France, Belgium and Holland.

209. [1924] P 78, at p.89.

210. The Tubantia [1924] P 78, per Sir Henry Duke at p.90.

211. The Protection of Wrecks Act 1973 (PWA 1973) only prevents competition between "salvors" on a small number of designated sites in UK territorial waters (see generally, Chapter Three below).

212. [1970] 2 Lloyd's Rep 59.

213. Although decided before American Cyanimid v. Ethicon [1975] AC 396, it does not appear that the result would have differed.

214. Some of the treasure recovered from the Association and the Romney was donated to the Penzance Maritime Museum. However, the episode caused outrage among archaeologists and led almost directly to enactment of the Protection of Wrecks Act 1973. For further details, see Chapter Three below.

215. Columbus-America Discovery Group v. the Unidentified, Wrecked and Abandoned Sailing Vessel [1989] AMC 1955 (reversed on other grounds, (1992) 337 LMLN 1) and see M. King, "Admiralty Law: Evolving Legal Treatment of Property Claims to Shipwrecks in International Waters" (1990) 31 Harv Int L J 313.

216. [1989] AMC 1955, at p.1958.

217. Ibid. Moreover, it is necessary to distinguish between possession of the wreck site, the wreck itself and artefacts within it: cf. Robinson v. Western Australian Museum (1977) 51 ALJR 806, at p.821.

218. Of particular relevance to ancient wrecks, possession may be difficult to prove where wreckage is scattered for some distance over the seabed.

219. See Kennedy, op. cit., p.297 et seq., Chorley and Giles, op. cit., pp.453-454.

220. The Lloyd's Standard Form of Salvage Agreement 1990 - known as the Lloyd's Open Form (LOF) - is the most common form used internationally for salvage by professional salvors. See further, N. Gaskell, "Contractual Remedies and the LOF" [1986] LMCLQ 306 and "LOF-1990" [1991] LMCLQ 104.

221. Cf. cases such as The Texaco Southampton [1983] 1 Lloyd's Rep 94.

222. See Kennedy, op. cit., p.266 and Castellain v. Thompson (1862) 13 CB (NS) 105, 143 ER 41.

223. See e.g. The Solway Prince [1869] P 120 where the contract was with the insurers and the contractor was unable to sue the owners in rem.

224. It was reported that the spectacular finds from the Dutch East Indiaman Geldermalsen were to be split 10% to the Dutch government and 90% to the salvors: The Times, 29 April 1986. With other ships, such as the de Leifde, the Dutch government accepted 25% of the gross, see Van Meurs, op. cit., p.42.

225. B. Penrose, Stalin's Gold (1982), p. 218.

226. Cf. The Association and The Romney [1970] 2 Lloyd's Rep 59 and see C.3., above.

227. See generally on this issue, F. Berlingieri, "The Draft of a New Salvage Convention and the Salvage of Wrecks", reproduced as an Annex to the IMO Legal Committee document LEG/58/inf.2, 5 August 1987.

228. See A.2., and B., above.

229. Berlingieri, op. cit., citing C. Abbott (Lord Tenterden), A Treatise of the Law Relative to Merchant Ships and Seamen, in a passage from the fifth edition (the last for which Abbott was responsible) which was reinstated in later editions. Abbott based himself upon The Aquila (1798) 1 W Rob 36.

230. See e.g. The Cadiz and the Boyne (1876) 3 Asp MLC 332, The Egypt (1932) 44 Ll L Rep 21. But cf. Simon v. Taylor [1975] 2 Lloyd's Rep 338.

231. Berlingieri, op. cit.

232. Ibid.

233. See N. Gaskell, "The 1989 Salvage Convention and the Lloyd's Open Form (LOF) Salvage Agreement 1990" 16 Tul Mar LJ 1, 34-37.

234. Ibid.

235. See Kennedy, op. cit., p.60, citing Castellain v. Thompson (1862) 13 CB (NS) 105, 143 ER 41.

236. P. O'Keefe, "The Law and Nautical Archaeology: An International Survey", in S. Langley and R. Unger (eds.), Nautical Archaeology: Progress and Public Responsibility (1984), p.9.

237. See Art. 30(1)(d) of the 1989 Salvage Convention and cf. O'Connell, op. cit., p.908, f.n. 283.

238. See e.g. The Rilland [1979] Lloyd's Rep 455 and Art. 13(1) of the 1989 Salvage Convention.

239. See e.g. the scheme of the Merchant Shipping Act 1894, s.521, Chapter Two, A.3., and A.4., below.

240. See below.

241. See generally, Palmer, op. cit., Chap. 23.

242. [1982] QB 1004. See also Elwes v. Brigg Gas Co (1886) 13 Ch D 562, which concerned a prehistoric boat embedded in the land, rather than at sea. See also Van Meurs, op. cit., pp.40-41, regarding "wreck formations".

243. [1986] QB 384, see B.2., above.

244. See further, Benedict, op. cit., s.158; D. Owen, "Some legal troubles with treasure" (1985) 16 JMLC 139; D. Owen,"The Abandoned Shipwreck Act of 1987: Good-Bye to Salvage in the Territorial Sea" (1988) 19 JMLC 499; B. Alexander, "Treasure salvage beyond the territorial sea" (1989) 20 JMLC 1; M. King, "Admiralty Law: Evolving Legal Treatment of Property Claims to Shipwrecks in International Waters" (1990) 31 Harvard International Law Journal 313.

245. [1978] AMC 1404 (Salvors I), [1981] AMC 1857 (Salvors III).

246. [1990] AMC 2409 (reversed on appeal, (1992) 337 LMLN 1).

247. In Benedict, op. cit.

248. See Benedict, op. cit. In the latest edition at s.158, Norris would limit the law of finds to long lost wrecks such as the Nuestra Senora de Atocha or where the owners of maritime properties have publicly abandoned them.

249. See e.g. Salvors I [1978] AMC 1404, 1411-1412. Also MDM Salvage Inc v. The Unidentified, Wrecked and Abandoned Sailing Vessel [1987] AMC 537, Klein v. The Unidentified, Wrecked and Abandoned Sailing Vessel [1985] AMC 2970, Platoro Ltd Inc v. The Unidentified Remains of a Vessel (1981) 518 F Supp 816, Indian River Recovery Co v. The China [1989] AMC 50, Rickard v. Pringle [1968] AMC 1008, Wiggins v. 1100 Tons, More or Less of Italian Marble [1960] AMC 1774, Nippon Shosen Kaisha, KK v. US [1964] AMC 2032, Chance v. Certain Artefacts Found and Salvaged from the Nashville a/k/a The Rattlesnake [1985] AMC 409.

250. [1981] AMC 1857, at p.1865.

251. [1990] AMC 2409, at p.2421. On appeal, the majority of the court did not expressly disagree with such a formulation, but adopted a much more restrictive application of it.

252. Cf. the reluctance of the High Court to grant a declaration in The Association and The Romney, above.

253. Cf. The Lusitania [1984] QB 284, see B.2., above.

254. See A.2., above.

255. Norris felt obliged to concede that this was the only sort of case where abandonment was possible.

256. [1990] AMC 2409 (reversed on appeal, (1992) 337 LMLN 1).

257. On appeal, a new trial was ordered on this part of the case as the trial judge had denied discovery.

258. See A.3., above.

259. To this extent, the assumption made by the majority that Kellam D.J. had found a prima facie case of ownership is questionable.

260. Many documents were destroyed in wartime and insurance records from very early cases were also burned in a fire at the Royal Exchange in 1838: see Lay, op. cit. In any organisation changes in personnel can result in old documents being accidentally discarded.

261. Underwriters do not consider themselves in the business of fitting out expensive and speculative salvage operations and are happy to rely on the entrepreneurialism of salvors.

262. Most insurance companies would have management minute books or loss books, recording simply that ship X sank and £Y were paid out. It may be rare for companies to keep original documents from before World War I.

263. See discussion in A.3., above.

264. Salvors III [1981] AMC 1857, at p.1874.

265. See Alexander, op. cit., pp.17-19.

266. See Benedict, op. cit., s.158; Owen, "The Abandoned Shipwreck Act of 1987" op. cit. When the Act came into force the "submerged lands" accorded, for the most part, with the then existing three mile territorial limit. Even though the US extended its territorial limit to 12 miles in 1988, this extension did not extend or alter existing federal laws: A. Giesecke, "Shipwrecks: The Past in the Present" [1987] Coastal Management 179 at p.183.

267. I.e. those not embedded and not included in the National Register: see Abandoned Shipwreck Act of 1987 Sec.6.

268. See further, Chapter Six, C.1., below.

269. See further, Chapter Six, A.7., below.

270. Prott and O'Keefe, Law and the Cultural Heritage, Vol.1, op. cit., p.15.

CHAPTER TWO: THE MERCHANT SHIPPING ACT 1894

INTRODUCTION

The main body of statute law in the UK relating to the reporting, handling and disposal of wreck is to be found in Part IX of the MSA 1894. Most of the provisions relate to times when the majority of vessels were propelled by sail and there were only minimal aids to navigation. Casualties to ships on the coast were far more numerous than they are today and the MSA 1894 provisions were passed to deal in particular with a pressing problem of the time: namely, the traditional plunder of distressed vessels by coastal communities. To these communities "a wreck was a natural dispensation of providence for the better redistribution of wealth".[1] The provisions were therefore primarily concerned with the safekeeping and disposal of property from vessels in distress or recently wrecked and not from vessels which had been lying on the seabed for a considerable period of time, possibly for centuries.

The term "wreck" for the purposes of Part IX of the MSA 1894 includes jetsam, flotsam, lagan and derelict[2] found in or on the shores of the sea or any tidal water.[3] The definition therefore includes rights pertaining to land[4] and those constituting droits of admiralty.[5] The Act does not exclude from its operation historic wreck, including material from sites designated under the Protection of Wrecks Act 1973 (PWA 1973).[6]

A. THE MERCHANT SHIPPING ACT 1894 AND ITS PRACTICAL OPERATION IN RESPECT OF HISTORIC WRECK[7]

1. The Receiver of Wreck Service

The MSA 1894 establishes a Receiver of Wreck Service to administer the handling and disposal of wreck.[8] Section 566 provides for the appointment of receivers by the Secretary of State[9] from among officers of the Customs or Coastguard or Inland Revenue or, "where it appears to [the Secretary of State] to be more convenient"[10] any other person.

There are approximately 100 receivers, most of whom are Customs officers. The country is divided into "Collections" with a Head Receiver of each Collection and junior officers appointed to each district within the Collection. The appointment as receiver "runs with" the appointment as Customs officer; it is therefore not for a prescribed period but for an indeterminate length of time. On the south-west coast of the UK the receiver's services are most called upon, the busiest district being the Scilly Isles; in other districts approximately 5% of the working hours of each receiver is spent on wreck administration.

It appears that the Customs Service would like to be released from its receivership duties. Like other public bodies, the Service is suffering from cuts in public spending and increasing work burdens. Its duties as receiver of wreck are undertaken as an agency service for the DTp rather than forming one of its main functions and undoubtedly it would view, for example, illicit drugs trafficking, as having greater priority. Receivership duties used to be widely spread among local customs officers to provide sufficient coverage. As these duties have become less called upon, the number of customs officers with receivership duties has been reduced. There are also plans to

regionalise Customs offices since Customs controls will be relaxed on 1 January 1993 with the creation of the Single European Market. This would make the service less suitable to undertake receivership duties as these really need to take place on a local, rather than regional, basis. For this reason, it is clear that an alternative to the current receiver service is now being sought.[11]

Section 567 provides for the payment to every receiver of expenses "properly incurred by him in the performance of his duties" and such fees "as may be directed" by the Secretary of State.[12] Until 1991 the fee was 7.5% of the value of wreck taken by the receiver into his custody.[13] The sum arising was set off against the cost of the Receiver of Wreck Service. As from 1 April 1991, the Treasury waived the fee,[14] apparently because the costs of collection were greater than the sum raised. This was quite a surprising move in light of the fact that in August 1988 Paul Channon, then Secretary of State for Transport, stated:-

> "The Commission charged by Receivers of Wreck is intended to meet the costs of providing the Receiver of Wrecks service. To waive the charges when antiquities are to go to museums would amount to a hidden subsidy from the taxpayer to add to the grants already made to museums by Government and I do not believe that would be acceptable".[15]

So, in 1988, the government was not prepared to waive the fee in relation to material going to museums, in order to assuage concerns expressed about the difficulties museums sometimes faced in raising funds to pay the fee. However, in 1991, it was prepared to waive the fee, no matter to whom it was chargeable.

Expenses incurred by the receiver, in so far as they are not paid by any private person, are paid out of moneys provided by Parliament.[16] In practice receivers' expenses do not usually amount to very much unless they include storage charges.[17] It is interesting to note that

the service has, apparently, always been run at a loss. Before the fee waiver took place, its proceeds, including fees and the proceeds of the sale of unclaimed wreck, were estimated to be £1,500-£2,000 per year, while the annual cost of maintaining the service was greater than £10,000.

2. Powers of a Receiver in the Event of a Casualty[18]

Receivers are afforded wide powers[19] to take control in the event of a casualty, with the purpose of protecting life and property. For example, a receiver may "take...command of all persons present", assign duties and give directions as he thinks fit;[20] require the officer in charge of any vessel close by to give assistance;[21] cause persons to be apprehended,[22] and use force to suppress plunder and disorder and call on others to use force to assist him.[23]

Evidently, these provisions were enacted in particular to control the activities of "wreckers", i.e. local communities who would descend on the scene of a newly-wrecked vessel, claiming "wreckers' rights".[24] It would obviously be essential to have a public official present with the power to suppress plunder and riot. However, it might well be thought that with the advent of modern vessels, organised salvage facilities, advanced communications and an efficient police force, there was now little need for such provisions. However, the DTp considers that few of the provisions are completely obsolete[25] and the statutory powers were found to be very necessary during a rather extraordinary incident in 1982. On New Year's Eve 1982 a Dutch coaster, the Johanna grounded off Hartland Point, North Devon. The master, along with the other crew members, was taken off the vessel by rescue services, having every intention of returning. However, the following day more than 100 people[26] arrived on the scene claiming "wreckers' rights". Using iron

bars and hammers, they stripped the vessel of anything that could be moved. The receiver, with police support, was able to collect back much of the plunder on the spot after giving a warning that prosecutions would follow if items were not reported. No prosecutions resulted from the incident.[27]

3. Handling and Disposal of Wreck

Section 518 of the MSA 1894 provides that:-

> "Where any person finds or takes possession of any wreck within the limits of the United Kingdom he shall -
>
> (a) If he is the owner thereof, give notice to the receiver of the district stating that he has found or taken possession of the same, and describing the marks by which the same may be recognised;
>
> (b) If he is not the owner thereof, as soon as possible deliver the same to the receiver of the district."

This section also applies to wreck found or taken possession of outside the limits of the UK and brought within such limits.[28] The provision is designed to prevent an improper detention of the property and to protect owners' and salvors' interests.[29] Within 48 hours of taking possession of any wreck the receiver must post a notice describing the wreck in the nearest customs house[30] in order to inform potential claimants of the find. If the wreck exceeds a value of £20, the receiver must notify the Secretary at Lloyd's in case an insurance claim has been paid out on the property.[31] Owners[32] of any wreck in the possession of the receiver must establish their claim to the wreck within a period of one year from the time when the wreck first came into the receiver's possession. Once this is done and they have paid salvage[33] to the finder and the receiver's fees and expenses they are then entitled to the wreck or the proceeds thereof.[34]

The Crown has title to all unclaimed wreck[35] found in "Her Majesty's dominions" except in places where there has been a royal grant of the right to wreck.[36] Lords of the manor and other persons entitled by royal grant to unclaimed wreck, including successors in title, must provide the local receiver with a formal statement containing the particulars of their title and an address to which notices of finds may be sent.[37] If such title is proved to the satisfaction of the receiver, he/she must notify that person when wreck is found in the area to which the statement refers.[38] Where no owner claims wreck in the possession of the receiver within one year and no other claim has been made to it by a person entitled through royal grant, the MSA 1894 provides that the receiver shall sell the wreck[39] and (after deducting fees, expenses, VAT[40] and such amount of salvage as the Secretary of State may determine) pay the proceeds for the benefit of the Crown.[41]

Finders describe and value the wreck material on Form WRE 5.[42] It is interesting to note that the DTp (and many divers) call reports of finds "droits".[43] This is clearly a misuse of the word since a droit of admiralty covered only the right to adventurae maris, whereas the term "wreck" for the purposes of the MSA 1894 Part IX covers adventurae maris and wreccum maris, which was not a droit of admiralty.[44] In the case of historic material and anything worth more than £250, the receivers are instructed to refer the report to the DTp.[45] The Department approves valuations and, in this way, exercises control over the disposal of wreck.[46] There is, however, no formal procedure for checking the archaeological accuracy or importance of items that have been declared.

When material is being recovered regularly from a particular wreck site an agreement is sometimes reached with the local receiver to report finds weekly or monthly. In the case of wrecks designated under the PWA 1973[47] reports are usually made only once a year. Generally,

the receiver will wait for an approach to be made by the finder of wreck, but it is not unknown for a receiver to be on the quayside while finds are being landed from an historic wreck under excavation and to request that such finds be inspected. It appears that such requests are rarely refused for to do so would naturally raise suspicion. The receiver service has no special facilities for the storage and preservation of historic wreck.[48] For this reason and despite the statutory requirement that the wreck be "delivered" to the receiver, such finds invariably remain in the finder's possession, the finder "attorning" to the receiver by providing an assurance that the wreck is being held on behalf of the receiver.[49] The costs of conservation and storage during the period while entitlement is being determined must be paid for by the finder.

As to the process of claiming title, the DTp requires only that the claimant produce sufficient documentary evidence to convince the receiver. Proof is required in two respects: first, that the wreck has been correctly identified; secondly, that the claimant has title to the vessel identified. The DTp gives as an example of the former the identification of a wreck by the matching of finds to copies of the ship's manifest held by local museums; an example of the latter given is the evidence provided by the records held at Lloyd's that an insurance claim was paid out. In the case of the wreck known as Wrangels Palais, designated under the PWA 1973 in 1990, it appears that the Danish government initially showed an interest in the discovery of the wreck and produced evidence that Wrangels Palais was a Danish naval frigate. However, as yet the remains found have not been positively identified as those of Wrangels Palais.[50]

Unclaimed wreck is sold[51] by whatever practical means seem appropriate.[52] Occasionally items are advertised for sale in national or local newspapers and quite a lot of wreck is sold as scrap metal. In

the past, it appears to have been the practice that unclaimed historic wreck, if worthless,[53] would usually be returned to the salvor in lieu of salvage; if of moderate value, it would be offered for sale to the salvor, having been valued either by a firm of auctioneers or, in the case of sites designated under the PWA 1973, often by the licensees themselves.[54] A percentage representing the salvage reward (less receivers' fees and expenses) would be deducted from the valuation sum to arrive at the sale price. Where a quantity of valuable wreck was found from one particular vessel, it was occasionally sold by public auction, either by Sotheby's or Christie's, or by WH Lane in Plymouth.[55] This system of sale at market value militated against the active involvement of the Museums Service in acquiring underwater finds.[56] For example, the Ulster Museum had to raise £132,000 to acquire the collection of finds from the Spanish Armada ship, the Gironia, which sank off the Giant's Causeway in 1588. The Northern Ireland Assembly made an acquisition grant of £80,000, but the remaining £52,000 had to be raised by public appeal. The Spanish government made no claim to the wreck and therefore, because of the Crown's right to unclaimed wreck, the Treasury benefitted by an estimated £30,000.[57] This system, whereby the Treasury benefitted by the commercial sale of cultural material ~~is~~ was clearly open to criticism.

In the mid 1980s there was a change of practice and it now appears that all unclaimed historic wreck of whatever value[58] is returned to the salvor in lieu of a salvage reward, or sold and the full proceeds paid as a salvage reward.[59] The Crown therefore effectively forfeits its right to unclaimed historic wreck. Exactly when, or why this change of policy took place is unclear, but if the intention was to appease the cultural interests, then the current practice may be no more satisfactory than the old one. Now, in many cases it will simply be the salvor - rather than the DTp - who will auction the material.[60] Museums will still in such cases have to pay commercial prices for

material, all the proceeds going this time to the salvor. Of course, in cases where the salvor is a reputable archaeological body, then the current practice will be of benefit to cultural interests.

4. Salvage

The Act provides[61] for a reasonable amount of salvage to be paid to any person other than a receiver in saving any wreck from a vessel in UK territorial waters.[62] It therefore assumes that salvage law applies to wreck, including historic wreck.[63] A receiver has power[64] to detain wreck until salvage is paid and, if such payment is not made, to sell the detained wreck.[65] The proceeds of sale are then applied by the receiver in payment of expenses and salvage, any proceeds that remain being paid to the person entitled to the property.[66] Before the statutory recognition of historic wrecks in 1973,[67] finders would receive between one-quarter and one-half of the value of unclaimed wreck,[68] the remainder going to the Crown.[69] After the PWA 1973 was passed, salvage awards in the case of historic wreck were raised to encourage the reporting of finds.[70] The willingness of finders to report material brought ashore was dependent, so the DTp believed, on the offer of attractive salvage rewards and such awards were therefore recognised by the DTp as central to the enforcement of the wreck provisions. A salvor of unclaimed historic wreck now usually receives 100% of the net proceeds of any sale less receivers' expenses[71] and in practice, much historic wreck is returned to the salvor in lieu of salvage. In the case of gold and silver coins, the salvor generally receives 75% of net proceeds, the reason for this being that coins are of interest to collectors and therefore have a very good commercial value. What appears to be a policy of offering enough but not too much reward seems reasonable when it is realised that the other 25% of the proceeds will offset the costs of the receiver service.

5. Enforcement of Wreck Provisions

There are a number of offences under the wreck provisions, in relation to both a recent casualty[72] and to the handling of wreck.[73] Yet strangely, over the last 20 years there appears to have been only ~~been~~ one prosecution. In the autumn of 1984 a diver brought into England gold coins from a Dutch East Indiaman wrecked off the coast of Holland. The Dutch police discovered that he had taken the coins and handed the case over to the British police to follow up on their behalf. In the course of their investigations, his home was searched and items were found from the Mary Rose and other wrecks on which he had been a diver. He was charged with theft and failure to report his finds to the receiver under s. 518. He admitted five charges of theft for which he was given a three month prison sentence suspended for two years.[74] He was also fined £50 or, alternatively, given one day's imprisonment for each offence of failing to report items to the receiver. The DTp admitted that it was only able to bring the prosecution under the wreck legislation because the police were bringing the prosecution for theft.

By virtue of s.537, where a receiver "suspects or receives information" that undeclared wreck is in someone's possession, he may apply to a Justice of the Peace for a search warrant and the receiver may enter any house or vessel and seize wreck found. It appears that the DTp has scarcely ever sanctioned use of this power but did decide it was appropriate on one occasion in 1991.[75] In April 1991 pottery recovered from a 150 year old wreck off Anglesey was declared to the receiver. The DTp then received representations from the owner of the wreck and its cargo that the salvors were recovering items of great value and shipping them to the USA. The owner alleged that a considerable quantity of valuable finds could be recovered if the salvors' boat was raided. The local receiver, instructed by the DTp, therefore obtained a warrant under s.537 and raided the boat in October

1991. Five thousand pieces, of "no special value" according to the DTp, were recovered. No prosecutions were brought, however, apparently because the offenders were Americans and because the forfeiture of any claim to the goods was considered a sufficient punishment.[76] In fact, the action by the receiver was bitterly contested by the salvors, although no proceedings against the receiver were brought. It appears that the reason why the DTp was persuaded to act in this case was that the owner showed an interest in the material and was willing to pay to have the powers under the MSA 1894 exercised on his behalf.[77]

There seem to be three main reasons for the lack of prosecutions under Part IX of the MSA 1894. First, there is the lack of resources within the receiver service. The service has neither the personnel to investigate reports of evasion nor the financial resources to take cases to court. Secondly, there is a problem with regard to evidence. The DTp is well aware that the MSA 1894 is evaded and that finds are not always being declared. It receives many informal reports of such practice, but sufficient evidence to prosecute is not being made available and the Department is not prepared to bring prosecutions unless it has a watertight case. The DTp has been advised that it requires prima facie evidence that someone has wreck in their possession and - of course - that it is wreck. The latter may not be as straightforward as it seems. Independent evidence is required of the origin of the property and this is "almost impossible to obtain".[78] A shrewd defendant might claim that the find did not come from the sea at all but from a river or lake, or might suggest that it had been washed out to sea and did not derive from a vessel. The Department has suggested that some fault also lies with archaeologists who inform the DTp about incidents of infringement but are unwilling to testify since they feel they would alienate the diving community.[79] The third and probably most significant reason is that the DTp's view is that the offences available under the MSA 1894 "are not there to enforce the

requirement to report finds in which the owner has no interest".[80] The receiver system, it believes, exists to protect the rights of property owners and salvors, "if they will pay to have the powers available used on their behalf".[81] It is indeed true that the reason for the establishment of the receiver system was to protect these interests. However, it seems a pity that the DTp is not willing to enforce the duty to report in order to assist in the protection of the cultural heritage. Unfortunately, the Department believes that, since most finds are returned to the finder anyway in lieu of a salvage award, "little harm [is] done if they are not reported".[82] This belief negates the fact that, if a proper record of reports was made, this information of itself could be of great value.[83]

6. Disuse of the System

The system for reporting, handling and disposal laid out in the MSA 1894 has largely fallen into disuse.[84] In 1989 there were 18 reports of finds made to the receiver service, in 1990, 25. Of the 25 items of wreck reported in 1990, 21 had no value and were disposed of immediately by the receiver.[85] The four other cases involved a small pleasure craft broken free from its moorings, a marine engine, a coil of rope and an item from an historic wreck.[86] In 1991 there were approximately ten reports of wreck.[87] The need for receivers of wreck from recent casualties has largely been removed by modern communications and search-and-rescue support.[88] As far as historic wreck is concerned, it is clear that the reporting duty is "as much honoured in the breach as it is in the observance".[89] Recoveries from wrecks designated and licensed under the PWA 1973[90] are reported on an annual basis and are not included in the figures given above. However, there are thousands of other wrecks - of various ages - around the shores of the UK. With a conservative estimate of 70,000 British sport divers,[91] it is clear

that only a tiny proportion of recoveries are being reported. According to Dean,[92] the system is subject to flagrant abuse, probably 95% of material not being declared. However, there appears to be very little misappropriation from sites designated under the PWA 1973 because of the strict control over excavations and the attitude of the majority of divers working on such sites.

In practice, there seems little advantage in non-declaration as the DTp returns most historic wreck to the finder in lieu of a salvage reward. Non-declaration may be due to ignorance of this practice or perhaps to unwillingness to wait the statutory period of one year before becoming entitled to the wreck. It may even be due to the very fact that finders often receive the material in the end anyway and therefore see little point in reporting it. Another reason may be the lack of enthusiasm on the part of Customs Officers (and their instructing department, the DTp) for their receivership duties: it is not unknown for finders to be turned away by receivers in some areas.

B. PROPOSALS FOR REFORM, JULY 1992

The DTp has been working on a set of proposals for administrative changes to the Receiver of Wreck Service in view of the relaxation of Customs controls from 1 January 1993 with the creation of the Single European Market. From this date the Customs Service will be reorganised on a regional, rather than local, basis.

In July 1992 the DTp produced a draft paper which proposed the replacement of the present network of receivers with a single appointment in the DTp Marine Directorate. Reports would be made directly to the DTp, which would keep a central record and would copy reports to any local museum which registered an interest in finds in

their area. The Department would also deal with any claims arising out of the find, including assessment of the salvage award. Customs officers would still have supplies of the WRE 5 reporting form (redesigned), as would the Marine Directorate's local offices, including offices of HM Coastguard. It was also proposed that customs officers would still be assigned certain tasks if appropriate, for example if required to intervene in a dispute over salvage. The proposed changes, which can be implemented without legislative amendment, are planned to take effect from 1 January 1993 after they have been agreed with HM Customs and Excise, and the Department of National Heritage (DNH).[93]

The proposed changes may not make much difference in practice. As the DTp draft paper points out, for a long time much of the administrative work regarding receivership has in fact been done centrally and the new arrangements would therefore give this practice formal recognition. The draft also states that the new system will "facilitate the build up of central expertise in assessing the likely interest and value of finds, and knowledge of which bodies might be interested in their acquisition". However, it seems likely that this has happened through the informal practices taking place already. In reality, what appears to be happening is the winding down of the receivership service in line with the dwindling number of reports. It seems even less likely that reports will be made to a central body as to a local one, or that efforts will be made to enforce the reporting provision since this would require assigning tasks to a Customs officer.

Initially, when it became clear that changes to the reporting system would be required, the DTp considered replacing the local Customs offices with another <u>local</u> network of reporting points, based either on County Council Sites and Monuments officers[94] or on local museums. The great advantage of such a system would have been that it would have facilitated the identification of finds of archaeological

importance. Unfortunately, it was concluded that such an arrangement would have been too costly in light of the likely number of reports.[95] The only positive aspect of the new system is that local museums will be able to register an interest in finds from their area and will therefore become aware of such finds. However, the proposals will do nothing to increase their ability to acquire underwater cultural property.

C. ASSESSMENT OF THE MERCHANT SHIPPING ACT 1894 IN RELATION TO HISTORIC WRECK

In its application to historic wreck, there are clearly a number of defects in the MSA 1894. Some of these defects could be overcome by changes to the administrative policies of the DTp, some would require amendment of the MSA 1894. Others, however, are so fundamental that they could be overcome only by the exclusion of historic wreck from the MSA 1894 provisions. In this section it is proposed simply to highlight the defects. The issues raised here will be discussed further in Chapter Six and proposals for reform will be made in Chapter Eight.

1. Application of Salvage Law

The MSA 1894 assumes that salvage law applies to historic, as well as other forms of, wreck and provides for the payment of a salvage reward to someone who brings historic wreck ashore. It is, however, widely felt that the application of salvage law to historic wreck is completely inappropriate[96] and its application via the MSA 1894 certainly leads to the following consequences.

(i) The application of salvage law via the MSA 1894 encourages the removal of objects from underwater

By providing for the payment of salvage for items brought ashore, it is arguable that the MSA 1894 encourages the removal of objects from underwater, which may well be contrary to the interests of historic wreck. For example, if material is removed from a site without the use of proper archaeological survey and excavation techniques, the integrity of the site will be lost, the artefacts recovered will lose their archaeological context and the site itself, once destabilised,[97] may well begin to deteriorate rapidly. Artefacts brought ashore will also begin to decay unless subject to proper conservation techniques. This need not be a problem on sites designated under the PWA 1973[98] because control on removals from such sites can be exercised through the licensing system. However, the problem will arise with apparently isolated finds and undesignated sites.

The DTp has countered this argument by saying that since very few objects are reported, the MSA 1894 cannot be encouraging the recovery of finds! Nonetheless, the nature of the MSA 1894 in applying the rules of salvage is such that emphasis is laid on recovery. The Act does not provide for the reporting of finds that have been left underwater, or of sites, and yet this would be more advantageous to any protective regime. Furthermore, the fact that the reporting duty is not properly enforced obviously encourages the recovery of finds because there is no deterrence against so doing.

(ii) The application of salvage law via the MSA 1894 encourages the sale of finds

Where the finder does not wish to receive the find in lieu of a salvage reward, the find must be sold in order to pay the reward. In

cases where finders do receive the material in lieu, they are then entitled to do as they please with it. If it is of commercial value, they may well decide to sell it. In the case of HMS Invincible, a wreck designated under the PWA 1973, it was only at the discretion of the finder that a private sale agreement was reached with Chatham Historic Dockyard Trust for a representative sample of items; the rest were sold at public auction.[99] Such sales lead to the dispersal of collections of material from the same site and to its export abroad. They also militate against the involvement of British museums in acquiring such finds.[100]

(iii) The application of salvage law via the MSA 1894 leads to finders taking precedence over museums

Following on from the previous point, the MSA 1894 leads to a conflict of interests between finders and museums. Because the Act was designed partly to protect the interests of salvors, it gives precedence to the finder. As seen in Chapter One, salvors are seen to be undertaking a useful public service in returning property to its owner. However, in the historic wreck context, the usefulness of salvors' activities is questionable. In general the finder will be able to choose whether or not to keep historic material in lieu of a salvage reward. If the choice is made not to keep it, it will be sold, probably on the open market. If a museum wishes to acquire the material, it will need to pay the full market value, the proceeds of which will go to the finder as a salvage reward. In cases where the finder has been awarded the items in lieu of a salvage award, it is entirely at the discretion of the finder as to whether the material is even offered for sale to a museum. In the case of historically or archaeologically significant material it seems inappropriate that the finder's rights should come before those of publicly accessible museums and of the general public as a whole, especially in the case of material from sites designated

under the PWA 1973.

(iv) The application of salvage law via the MSA 1894 leads to misunderstandings and confusion

A common misunderstanding appears to have arisen about the relationship between the MSA 1894 and the common law principle of "salvor in possession". For example, in a document presented to the DTp by the Joint Nautical Archaeology Policy Committee (JNAPC),[101] it was stated that "[u]nder the common law deriving from the Merchant Shipping Act the finder of a wreck has salvage rights to the entire contents of the site". Besides the obvious confusion between common law and statute law, there also appears to be a belief that once a finder has raised any material from a site and reported it to the receiver, he becomes the "salvor in possession" of the site and entitled to salvage proceeds for any other material later raised from the site.[102] This even appears to have been the belief of the DTp. For example, in 1969 the wreck of the Dutch East Indiaman Amsterdam was found and the finder recovered objects from the site and declared them to the receiver. Later, an archaeologist[103] undertook excavations and the objects which he recovered were apparently added to the original finder's collection, presumably as a temporary holding measure while entitlements were being established. Later, the Dutch government - recognised owner of the wreck - was instructed by the DTp to pay a salvage reward for all the finds to the original finder, while the archaeologist received nothing. This does not seem to have been an isolated incident. In 1981 the British Museum was asked by the receiver to buy items it had raised in an excavation of the Langdon Bay Bronze Age designated site. It appears that the money raised by the sale of the artefacts, less receivers' fees and expenses, was passed to the local diving club - who had discovered the site - as a salvage reward.[104]

It appears that the source of this confusion is a little book called Discovering a Historic Wreck[105] by the underwater archaeologist Keith Muckelroy, which was intended to be a handbook for those undertaking preliminary assessment of a wreck site and is very popular with divers. Muckelroy states: "Protection [for a site] in law can be secured in two ways, through ordinary salvage law and through the Protection of Wrecks Act, 1973. The former comes into play as soon as anything is lifted from a wreck; the latter applies only on specially designated sites".[106] Later, he goes on to state:-

> "The Merchant Shipping Act itself says nothing about establishing exclusive rights to a wreck. However, the courts have come to recognise the concept of "salvor in possession", accepting that it is only fair that a team which has commenced salvage should be allowed to continue without interference. The best, if not the only, way of establishing possession seems to be to recover something from the site and declare it to the local Receiver of Wreck... Without having recovered something and declared it, the courts are unlikely to accept that possession has been established... If another group does attempt to interfere after these steps have been taken, then you can approach the courts for an injunction to stop them...".[107]

The essential error made by Muckelroy was the emphasis he placed on the recovery of material and the suggestion that this was the decisive factor in establishing rights as a salvor in possession. He fails to mention the need for such a salvor to take continuing action to exploit the wreck, even if such action only takes place during the diving seasons.[108] Muckelroy's words suggest that the first person or group that declares material to a receiver becomes the salvor in possession and remains so even after their activities on the wreck have long since ceased.

The DNH and DTp, in liaison with the JNAPC, are currently preparing "A Note on Wreck Laws" which it is hoped will dispel this and other myths surrounding the MSA 1894 Part IX.[109]

2. Recognition of Ownership Rights

It is arguable that the MSA 1894 leads to the neglect of objects while ownership is being established. Although s.518 requires finders to "deliver" wreck to the receiver, it has been the practice of receivers for many years to allow the finder to look after the object during the one year ownership claim period and to pay for so doing. It is arguable that the finder (or any institution caring for the material on the finder's behalf) may feel hesitant about investing resources in the care of the object if it may be taken away from them at the end of the one year period. The DTp has countered this argument by saying that finders have little need to worry about ownership claims. In practice very few are made and in most cases the find will be returned to the finder in lieu of a salvage reward. Nonetheless, it is clear that the one year claim period does make finders feel uneasy and this may lead to the neglect of objects during this period. It also appears that issues relating to entitlement may be left unresolved after the one year period. "Cases can linger for years where there are unresolved questions, for example about ownership or payment of salvage and receivers' expenses".[110] When the reference here to unresolved questions of ownership was queried, Mr. Burr of the Marine Directorate, DTp, explained[111] that ownership claims should be established within the one year period according to the MSA 1894 s.521, but that occasionally longer had been allowed. Most of the unresolved questions, however, appear to relate to payment of salvage or receivers' expenses.

3. Crown Rights to Unclaimed Wreck

Under the MSA 1894, the Crown has a right to unclaimed wreck, but at present, in the case of historic wreck, the Crown effectively "forfeits" this right to the finder. The reason for this policy was

probably that there had been criticism that the Crown had previously benefitted from the sale of culturally significant material. Unfortunately, the present system - as pointed out above[112] - is in many cases no more advantageous to the historical and archaeological interests than the old system. Instead of forfeiting its rights to the finder, the Crown should exercise its rights positively in the interests of the cultural heritage. This could be done, for example, by claiming the material and delivering it into the care of a national museum.

4. Archaeological Evaluation of Finds

Under the MSA 1894, finds are reported to the receiver who will usually be a Customs officer with no archaeological knowledge. If the find is clearly of archaeological interest then the receiver (or the DTp) may contact an archaeological body in order that the find can be examined and identified. However, if this is done it is on the initiative of the individual receiver or of the DTp official. There is no legal requirement that such contact be made. In many cases, finds of archaeological significance may not be readily identifiable as such anyway when they are retrieved from the sea, and may well be returned to the finder without their true significance being appreciated or recorded.[113] The MSA 1894 provides for the appointment of receivers from among officers of the Customs or Coastguard or Inland Revenue or, where it appears to be more convenient, any other person.[114] Therefore, it seems that there would not have to be legislative amendment in order to appoint a local museum or other body or person with archaeological expertise as a receiver. Nonetheless, if such a change was made, the DTp's limited interest in this field would be further weakened. At present the Department's general marine responsibilities necessitate dealing with HM Customs and Excise on a regular basis; they do not require it to deal with, for example, local

museums. Furthermore, this idea has been recently dismissed in the DTp's July 1992 draft proposals for changes to the receiver service.[115]

5. Administration by the DTp

A further drawback of the MSA 1894 provisions from an archaeological point of view is that they are administered by the DTp. The DTp is responsible for an aspect of historic wreck administration and yet this is completely at odds with its primary functions in the shipping and navigation field. Although the Department has made some attempts to administer the MSA 1894 in the interests of historic wreck, for example by waiving the receivers' right to take material into their possession, there are limits upon the willingness of the DTp to so act. It does not have a duty to act in this regard and, furthermore, on occasions such interests may conflict with its own. For example, a duty to report finds is seen by archaeologists to be an essential prerequiste of a good protective regime and such a duty exists in the MSA 1894. However, this duty must be enforced in order to be useful but the DTp does not see its role as being to enforce the duty for the duty's sake. Instead it believes that it should only use its enforcement powers to protect the rights of owners and salvors and then only when such owners or salvors express an interest in (and are willing to pay for) enforcement. Furthermore, the DTp is unlikely to be enthusiastic about mounting an enforcement campaign because it would then have to deal with the large increase in reports that would be brought about. Once the receivers' duties are undertaken centrally by one official, this would be impractical anyway.

A further important drawback to the administration of this legislation by the DTp is that the Department is unlikely to push for revision of the legislation purely in the interests of historic wreck

since this is not part of its primary remit.[116] There are a number of defects in the MSA 1894 relating to its application to historic wreck which could be overcome by legislative amendment, e.g. the one year ownership claim period could be reduced, but it is clear that the DTp is not interested in reforming the legislation to improve its operation in this respect.[117]

Until 1 April 1991 the DTp was responsible for all aspects of historic wreck, including the operation of the PWA 1973. At that time its responsibility for the PWA 1973 was transferred to the DOE (and since then to the DNH)[118] and this transfer highlights the inappropriateness of provisions relating to historic wreck being applied by a department whose main concern is transport. There is clearly an inherent conflict between the interests of the DTp and the interests of archaeology. While the MSA 1894 provisions continue to apply to historic wreck, this conflict is likely to continue and the position will remain unsatisfactory.

CONCLUSION

In summary, although the DTp has tried to exercise an enlightened policy in administering Part IX of the MSA 1894 in order to provide for the interests of historic wreck, the system has virtually collapsed. The Department's practices in respect of enforcement and salvage rewards actually seem to have led to a situation where a tiny proportion of material recovered from the sea is actually reported. Nonetheless, a reporting system is <u>vital</u> to any protective regime for marine archaeology. It provides information about finds which would otherwise be lost to common knowledge.

The MSA 1894 Part IX was designed to protect the interests of salvors, owners and the Crown. While these interests take precedence,

it cannot provide appropriate protection for the cultural heritage. It is particularly invidious that it applies to material from sites designated under the PWA 1973, which are the most important historical and archaeological sites known in UK waters. Furthermore, the MSA 1894 provisions are antiquated, a fact recognised by the government[119] and no longer required for the purposes for which they were designed. Instead, a system of reporting, handling and disposal is required that is specifically designed to deal with archaeological material. Moreover, it should be a system which applies not just to wreck, but to recoveries from other submerged sites, since there is no valid archaeological reason to distinguish the two.[120]

NOTES

1. P. Marsden, The Wreck of the Amsterdam op. cit. An example of the type of incident that the law was framed to control arose in respect of the Dutch East Indiaman, Amsterdam, that foundered on the south coast of England in 1749. Troops sent to guard the vessel were unable to reach the scene until one low tide had passed and, with the coming of low water, a contemporary account estimated that 1,000 people were on the beach, many armed with long poles and hooks to assist their "wrecking" operations. Marsden, The Wreck of the Amsterdam, op. cit.

2. For the meaning of these terms, see Chapter One, Introduction.

3. MSA 1894, s.510(1).

4. "Wreccum maris": see Chapter One, Introduction and B.1., above.

5. "Adventurae maris": see Chapter One, Introduction and B.1., above.

6. For details, see generally, Chapter Three.

7. Unless otherwise stated, information relating to practice has been obtained through interviews and personal communications with DTp officials between 1985 and 1992.

8. Similar services exist in other countries, for example in New Zealand, Australia, Canada, South Africa, Ireland, Guernsey, Norway and France.

9. The Secretary of State for Transport. The administration of the Act, along with all other shipping functions, was transferred from the Secretary of State for Trade to the Secretary of State for Transport in 1983 (SI 1983, No.1127). In practice, the Marine Directorate remained in the same offices and with the same officials and therefore, the change was nominal only.

10. MSA 1894 s.566. In remote parts of the Highlands and Islands of Scotland "it appears to the Secretary of State to be more convenient" to appoint members of the local community as Civilian Deputy Receivers, the appointment often running in a particular family. Such receivers are rarely required to exercise their powers, but the DTp pays them a small retainer of between £10 and £30 per year.

11. See B., below.

12. In addition to all other rights and remedies for recovery of expenses and fees, the receiver has the same rights and remedies as has a salvor in respect of salvage owing (see s.547). Disputes as to the amount of a receiver's fees and expenses must be determined by the Secretary of State whose decision is final.

13. Merchant Shipping (Fees) Regulations 1990 (SI 1990, No.555) (now replaced by SI 1991, No.784). Such fees were paid into the Exchequer: Merchant Shipping (Mercantile Marine Fund) Act 1898, s.1(1)(a).

14. Merchant Shipping (Fees) Regulations 1991 (SI 1991, No.784).

15. Letter to Cranley Onslow M.P. dated 15 August 1988.

16. Merchant Shipping (Mercantile Marine Fund) Act 1898, s.1(1)(b).

17. A. Burr of the Marine Directorate, DTp, at a meeting in April 1991.

18. Although this section has no direct relevance to historic wreck, it has been included because it illustrates the background to the reporting, handling and disposal provisions and also for the sake of completeness.

19. MSA 1894 ss. 511-517.

20. s.511(1).

21. s.512(b).

22. s.514(2).

23. s.514(2). The receiver and any person acting under his orders are immune from liability for any injury or loss of life sustained in consequence of the lawful execution of their duties or orders (s.514(3)).

24. See further, Chapter One, B.1., above.

25. Some of the powers are no longer used, e.g. holding preliminary inquiries into wrecks (s.517) and forcibly suppressing plunder and disorder (s.514). However, the power to "take command of all persons present" at a wreck (s.511) may be used to restrain journalists and other curious bystanders: personal communication with A. Burr, Marine Directorate, DTp, 29 April 1991.

26. The Times, 4 January 1983.

27. For a discussion of the incident and the sanctions, both civil and criminal, that can be brought to bear in such a case, see Goddard, op. cit.

28. Merchant Shipping Act 1906, s.72. See discussion of The Lusitania [1986] QB 384 in Chapter One, B.2., above.

29. A receiver is authorised to take wreck by force from a person refusing to deliver it to him/her (s.519(3)). If a receiver suspects or receives information that wreck is unlawfully in the possession of someone, he/she may apply to a Justice of the Peace for a search warrant and the receiver may then enter any place to search for, seize and detain any wreck found there (s.537(1)) (see further A.5., below). If wreck is seized in consequence of information given by an informer, the informer is entitled, by way of salvage, to a sum not exceeding £5 (s.537(2)).

30. s.520(a).

31. See Chapter One, A.3., above.

32. Including a successor in title to the original owner: see Chapter One, A., above.

33. See A.4., below.

34. s.521(1). N.B. The fees have now been waived, see A.1., above. In certain cases a receiver may make immediate sale of any wreck in his/her custody, e.g. where its value is small, where it is damaged or perishable or its value is insufficient to pay for warehousing (s.522). The sale proceeds are then held by the receiver subject to the same claims and liabilities as the wrecked property.

35. On Crown rights to wreck, see further, Chapter One, B., above.

36. MSA 1894 s.523. See further, Chapter One, B., above. The Secretary

of State has power (s.528(1)) to purchase for and on behalf of the Crown any rights to wreck possessed by any other person. The purpose of this provision is somewhat obscure, but one suggestion is that it could mean the buying back of the rights granted by the Crown to lords of the manor. However, the DTp has no record of this ever happening.

37. s.524. The DTp maintains records of such rights which it relies on if a claim is made. In 1991 the DTp was dealing with a claim to manorial rights, but the details remain confidential.

38. s.524. On delivery of the wreck or payment of the proceeds, the receiver is discharged from all liability, but delivery does not prejudice any question raised by third parties concerning the right or title to the wreck (s.527). Presumably this provision means that the receiver is discharged from all liability in respect of wrongful delivery, but a person who has a right to the wreck does not automatically lose such rights upon delivery to another and would be able to claim the goods. However, any such claim must be made within the statutory one year period, otherwise it will be time-barred.

39. s.525.

40. See DTp, Historic Wrecks: Guidance Note, December 1986. See further, Chapter Five, C.4., below.

41. In practice, these proceeds are paid into the Exchequer. Provision is made for disputes as to title to unclaimed wreck to be determined summarily by a county court having Admiralty jurisdiction or proceedings may be brought in any other court having such jurisdiction.

42. See Appendix 4.

43. See example WRE 5 in Appendix 4, which has a space for a "droit number".

44. See further Chapter One, Introduction and B., above.

45. However, apparently no check is undertaken as to whether all such reports to receivers are actually passed on to the Department.

46. The MSA 1894 itself does not require receivers to obtain the Department's permission before disposing of finds.

47. For details, see generally, Chapter Three below.

48. Problems were caused by this in the past, see Chapter Three, A., below.

49. Thus giving the receiver constructive possession of the wreck.

50. It appears that the Danes are not pursuing their claim since they have come to an agreement with the finder of the wreck for a joint survey and excavation project.

51. The receiver is not obliged to sell to the highest bidder: DTp, Historic Wrecks: Guidance Note, December 1986. However, present practice is to dispose of material in such a way as to produce a reasonable amount for salvage.

52. In one case an inflatable dinghy was sold to a local scout group.

53. The wreck was valued as found, i.e. before cleaning and conservation treatment, and for this reason quite a lot of historic wreck was of no commercial value.

54. The DTp justified this practice by saying that it saved the cost of valuation and allowed agreement to be reached easily. The valuation would have been subject to the approval of the DTp.

55. WH Lane handled several sales of items from HMS Association, see Chapter Three, A., below.

56. There are other factors which have also hampered and discouraged museums from taking an active interest in underwater archaeology: see Chapter Six, C.2., below.

57. P. Marsden, "Archaeology at Sea" [1972] 46 Antiquity 198.

58. With the exception of gold and silver coins, see A.4., below.

59. As to salvage, see A.4., below.

60. Cf. the sale of items from the designated wreck HMS Invincible, see Chapter Three, D., below.

61. MSA 1894 s.546.

62. Provision is made for the determination of salvage disputes (ss. 555 and 556) in any court having Admiralty jurisdiction (s.547). Where a dispute as to salvage arises, on the application of either party the local receiver may appoint a valuer to value the property (s.551(1)).

63. However, the discovery and recovery of wreck which has been lying on the seabed for some considerable time does not fit easily into the framework of salvage law, especially in respect of the motivation of the salvor and the requisite elements of danger and success. See further, Chapter One, C.1., above.

64. s.552.

65. s.553(1).

66. s.553(2).

67. See further, Chapter Three, below.

68. From which they would have to pay the receiver's fees and expenses.

69. Because the Crown has a right to unclaimed wreck (s.523).

70. See H.C. Debates, Vol. 851, Col. 1870 (1972-73).

71. In the case of the Mary Rose, although the vessel itself and military material were granted by the MOD under deed of transfer to the Mary Rose Trust, the receiver of wreck tried to claim 7.5% of the value of the personal effects of the crew from the Trust. Presumably, since the change of policy regarding fees, this claim has now been relinquished. Private salvors could, of course, recoup such charges from the sale of material, e.g. in the case of HMS Invincible. See Chapter Three, D., below.

72. For example, ss. 511(2), 512(2), 513(3), 536(1), 536(1)(a), 536(1)(b), 536(1)(c).

73. For example, s.518: failure without reasonable cause to give notice of wreck or to deliver wreck to the receiver (penalty: fine not exceeding Level 4 on the standard scale); s.519(2): secreting or keeping possession of wreck or refusal to deliver wreck to the receiver (penalty: fine not exceeding Level 4); s.535: taking of wreck found in UK

territorial waters to a foreign port and there selling such wreck (penalty: imprisonment). For the standard scale of fines, see orders under the Magistrates Courts Act 1980 s.143. (By the Criminal Penalties etc. (Increase) Order 1984 (SI 1984, No.447) the scale was: Level 1: £50; Level 2: £100; Level 3: £400; Level 4: £1,000; Level 5: £2,000.)

74. The Times, 26 October 1984.

75. Personal communication with A. Burr, Marine Directorate, DTp, 16 October 1992.

76. Ibid.

77. The alleged value of the material also seemed to have been a reason for the DTp authorising use of s.537.

78. Personal communication with A. Burr, Marine Directorate, DTp, 12 September 1991.

79. In this respect, the DTp appears to be pointing a finger in the direction of the Archaeological Diving Unit (ADU): see Chapter Three, C.2., below.

80. Personal communication with A. Burr, Marine Directorate, DTp, 16 October 1992.

81. Ibid.

82. Internal DTp draft paper, 1991.

83. See further, Chapter Six, A.4(c) below.

84. The extension of the territorial sea from three to 12 miles as from 1st October 1987 (see SI 1987, No. 1270, bringing into force the Territorial Sea Act 1987, s.1(1)(a)) has not had any significant effect upon the workload of the receiver because all wreck brought ashore in the UK must be declared, not simply wreck found in territorial waters. Therefore, it seems likely that, even before the extension, most wreck found in the three to 12 mile zone would have been brought ashore in the UK.

85. In accordance with s.522.

86. Personal communication with A. Burr, Marine Directorate, DTp, April 1991.

87. Personal communication with A. Burr, Marine Directorate, DTp, 16 October 1992.

88. This fact was recognised by the DTp in a Consultative Document entitled Proposals for Legislation on Marine Wreck, published in 1984, which contained proposals for the reform of Part IX which have never been implemented. For further details of these proposals, see Chapter Five, B., below.

89. Joint Nautical Archaeology Policy Committee (JNAPC), Policy Document on disposal of finds (1988).

90. For details, see generally, Chapter Three below.

91. Personal communication with R. Yorke, then Chairman of the Nautical Archaeology Society, April 1991.

92. Leader of the ADU: see Chapter Three, C.2., below.

93. The DNH is the government department which administers the PWA 1973. See further, Chapter Three below.

94. See further, Chapter Six, A.4(c) below.

95. DTp, draft paper on Changes Proposed to the System of Receivers of Wreck, July 1992.

96. See further, Chapter Six, A.7., below.

97. See further, Chapter Six, B.1., below.

98. See generally, Chapter Three below.

99. See Chapter Three, D., below for further details.

100. It appears that in Ireland, where the MSA 1894 applies also, there have been internal government proposals to amend the Act so that all unclaimed wreck would be subject to first refusal by the Director of the National Museum of Ireland. Salvage would be payable by the Museum: personal communication with Nessa O'Connor, Assistant Keeper, National Museum of Ireland, 30 September 1992.

101. JNAPC, "The Merchant Shipping Act 1894: Its detrimental effects on material from underwater and the sites where it is found: commentary paper", April 1991. The JNAPC has been lobbying the government for reform of the law relating to underwater cultural property. For further details, see Chapter Five, C., below.

102. For the true position, see Chapter One, C.3., above.

103. Peter Marsden, Museum of London and Hastings Historic Shipwreck Centre.

104. British Museum internal memo dated 5 July 1991.

105. Handbooks in Maritime Archaeology 1, National Maritime Museum (1981).

106. Ibid. at p.3 (emphasis added).

107. Ibid. at p.4.

108. The need for continued possession was evident from the judgment in The Tubantia [1924] P 78. See further, Chapter One, C.3(b) above.

109. See Appendix 14 for draft. Unfortunately, such documents may sometimes create myths instead of dispelling them! For example, the most recent draft suggests that "wreck" for the purposes of Part IX of the MSA 1894 includes "anything thrown, washed or dropped overboard" from a ship. This does not appear to be strictly accurate. Material simply dropped over the side of a ship accidentally is probably not included, nor is material thrown or washed overboard unless the ship is afterwards wrecked: see further, Chapter One, Introduction, above.

110. Personal communication with the DTp, 12 September 1991. The DTp has been attempting to clear the backlog of unresolved cases (involving goods conservatively estimated to be worth £26,000), some dating back to 1974.

111. In a personal communication dated 16 October 1992.

112. See A.3., above.

113. For examples of mistakes being made in this respect and for further

discussion on the issue of reporting, see Chapter Six, A.5., below.

114. MSA 1894 s.566.

115. See B., above.

116. In a 1991 internal DTp draft paper it was stated that: "It is now proposed not to seek legislation [to amend the MSA 1894 provisions] unless a favourable occasion arises".

117. See Chapter Five, B., below.

118. See further, Chapter Three.

119. In its response to the JNAPC's initiative, Heritage at Sea (see further, Chapter Five, C., below), the DOE stated that: "The Government recognises that the [MSA 1894] provisions...were framed in an earlier age". Also, in the DTp's 1984 Consultative Document (see Chapter Five, B., below) it was admitted that "Part IX...is generally regarded as being archaic...".

120. Issues relating to reporting, handling, disposal and rewards are considered further in Chapter Six. Specific proposals for reform of the MSA 1894 are made in Chapter Eight.

CHAPTER THREE: SPECIFIC WRECKS LEGISLATION

INTRODUCTION

There are two statutes in the UK which relate specifically to wrecks. The first is the Protection of Wrecks Act 1973 (PWA 1973), one of the main aims of which is to protect wrecks of cultural significance.[1] The second is the Protection of Military Remains Act 1986 (PMRA 1986), which was enacted mainly for the purpose of protecting human remains on board certain wrecks, but which may indirectly afford a mechanism of protection to wrecks of historical interest.[2]

A. THE THREAT TO HISTORIC WRECKS

In the late 1960s and early 1970s greatly improved diving equipment became available which led to the growth of aqualung diving as a popular sport. The soaring membership of the British Sub Aqua Club reflected this growth: in 1965 its membership was 6,800; in 1971 it was approximately 15,000.[3] Until this time, it was generally considered impossible that historic wrecks could survive the rigours of British waters,[4] but the growth in underwater exploration brought about the discovery of numerous wrecks. Suddenly, vessels of immense historical importance were at risk from ignorant and indiscriminate looting. Treasure seekers and souvenir hunters were interested only in items of commercial value or in trophies for the mantlepiece. In their wake they were destroying irreplaceable "time-capsules" of information about early ship design and the social and economic life of the period.[5]

The provisions of the MSA 1894 were found to be unsuitable to deal with the peculiar problems of increasing public access to historic wrecks.[6] There were two particular areas of concern. First, there was the control of access itself. The pre-1973 law imposed no restrictions on the freedom of salvors to recover what they could using whatever methods they chose from a vessel on the seabed provided the statutory procedure as to reporting and disposal was followed and the rights of other salvors in possession of the wreck were observed.[7] Secondly, at this time the Department of Trade and Industry (DTI)[8] apparently maintained an increasingly rigid control over the fate of historic wreck[9] and was perhaps over-zealous in its endeavours to follow the letter of the law. Despite having no special facilities for the preservation of historic artefacts, such items were taken into the custody of the receiver and, whilst there, dried out, split open, corroded and disintegrated.[10] As salvors could only expect to receive 25% to 50% of the value of finds as reward, the finds declared to the receiver seemed, not surprisingly, to be only a small proportion of what was actually found.[11] Salvors were not obliged to keep records of what they found or where they found it and there was no control over the disposal of artefacts to prevent objects of great historical and public interest being sold off indiscriminately. The only record made of the thousands of items salvaged in 1966-68 from HMS Association and HMS Romney[12] was the auctioneer's catalogue.[13] Museums had no prior knowledge of what was being found and, in any event, lacked the resources to take on responsibility for historic wreck material. As few ancient ships had been discovered in British waters until this time, they were not considered "a significant class of historic monument".[14]

A catalyst in effecting change was the plight of the wreck of HMS Association. The Association had formed part of a fleet of British warships returning home in 1707 from a successful campaign in the Mediterranean when she struck rocks near the Scilly Isles and sank.

The vessel was carrying a large quantity of gold and silver coins. Legal title to the remains of the Association and the rest of the fleet presumably continued to rest with the Crown,[15] who issued contracts to salve to three competing teams. In 1967 the wreck site was discovered, the MOD released news of the find to the Press and the discovery brought to the area amateur and professional divers from all over Britain and abroad.[16] The Times newspaper called the wreck "a lung divers' Klondike",[17] with as many as five different teams diving on the site at any one time.[18] The naval team that had located the Association said that the site had become almost unrecognisable as a result of divers using explosives.[19] The extent of the damage and looting was such that, when the PWA 1973 came into force, the Association site "was not considered worth protecting".[20]

The Association was not the only important historic wreck being exploited and fought over at this time. Others included her companion ship HMS Romney; the Dutch East Indiamen Hollandia,[21] de Leifde[22] and Amsterdam;[23] and the wreck of the Mary, a yacht belonging to Charles II.[24] There were stories of:-

> "underwater fighting, of the sabotaging of rival groups' equipment, of the uncontrolled use of explosives to 'loosen up' wrecks and in one instance injuring a diver, of a shooting incident, of powered boats weaving about dangerously over a wreck as divers [were] surfacing, of the disappearance of silver coins and bronze cannons from wrecks, and of their being secretly brought ashore at secluded areas of coastline, and even of cannons being hidden in coffins".[25]

It was these events which in 1973 inspired a Private Member's Bill to be laid before Parliament, introduced by Iain Sproat M.P., with the intention of providing an interim measure of protection for historic wrecks while a comprehensive review of the wreck provisions in the MSA 1894 was taking place.[26] In fact, it appears that the Bill was only given Parliamentary time because it contained a provision prohibiting interference with certain dangerous wrecks.[27] The Bill's sole aim in

respect of historic wrecks was to control salvage operations on certain sites of special importance and to secure the protection of these wrecks from unauthorised interference.[28] It was recognised that there was a need to have only one salvor on each site, who would be required to make a proper archaeological excavation and to record and report all finds so that as much historical information could be gained as possible. The intention was also expressed[29] of establishing a reputable advisory board to advise the Minister on the designation of sites and also on the issue of licences. It was acknowledged that the owner or salvor in possession had the prior claim to any wreck and should be given the opportunity to excavate the wreck provided he/she could meet the requirements for a licence.[30] The difficulty of enforcement was appreciated but it was felt that the vigilance of the local receivers, diving fraternity and local community would provide a reliable safeguard. The provisions of the Bill relating to historic wreck were the result of discussions with the Council for Nautical Archaeology,[31] the British Sub Aqua Club and representatives of commercial salvors, and apparently were "generally acceptable" to them all.[32] In any event, the Bill met with a smooth passage through Parliament.

B. PROTECTION OF WRECKS ACT 1973: THE PROVISIONS[33]

Section 1(1) of the PWA 1973 provides that:-

> "If the Secretary of State[34] is satisfied with respect to any site in United Kingdom waters [i.e. territorial waters[35]] that -
> (a) it is, or may prove to be, the site of a vessel lying wrecked on or in the seabed;[36] and
> (b) on account of the historical, archaeological or artistic importance of the vessel, or of any objects contained or formerly contained in it...the site ought to be protected from unauthorised interference,
> he may by order designate an area around the site as a restricted area".

It should be noted that the designated area is not a prohibited area,[37] simply a restricted one. The extent of the restricted area is whatever

the Secretary of State thinks appropriate to ensure protection for the wreck and to facilitate enforcement.[38] A person commits an offence[39] if, within a restricted area, he/she does any of the following without the authority of a licence granted by the Secretary of State:[40]

> (i) tampers with, damages or removes wreck lying on or in the seabed;
> (ii) carries out diving or salvage operations to explore such wrecks or to remove former contents, or uses diving or salvage equipment;
> (iii) deposits, so as to fall and lie abandoned on the seabed, anything which, if it were to fall on the wreck site would wholly or partly obliterate the site or obstruct access to it, or damage the wreck.

For example, it would be lawful to tow a dumb barge full of dredged-up mud through the restricted area, but an offence to dump the mud. Someone who causes or permits any of the above to be done by others without the authority of a licence also commits an offence.[41] This provision prevents someone directing such operations at arm's length and also discourages connivance or collusion in unauthorised activities by, for example, the owners of salvage vessels and equipment. No offence is committed where a person breaches the provisions in the course of an emergency; or in exercising statutory functions, for example those imposed upon Trinity House or a Harbour Conservancy Board;[42] or out of necessity due to bad weather or navigational hazards.[43]

The Secretary of State must consult with such persons as he/she considers appropriate before making a designation order, but this consultation may be dispensed with in a case of urgency.[44] This may occur, as in the case of HMS Association, if disorder follows the discovery of an historic wreck with contents of commercial value, or a site becomes a target for looters.

Licences must be in writing and will be granted only to persons who appear to the Secretary of State to be competent and properly

equipped to carry out salvage operations in a manner appropriate to the importance of the wreck in question.[45] Licences will also be granted to those having any other legitimate reason for requiring a licence, for example, to tend submarine cables or raise lobster pots.[46] A licence may be granted subject to conditions or restrictions, or may be varied or revoked by the Secretary of State upon giving at least one week's notice to the licensee.[47] The Secretary of State will revoke any such order where he/she is of the opinion that there never has been, or is no longer, any wreck in the area requiring protection.[48] It is an offence for any person to obstruct, or cause or permit the obstruction of, a licensee in carrying out authorised diving or salvage operations.[49]

A person guilty of an offence under these provisions shall be liable on summary conviction to a maximum fine of £2,000,[50] or on conviction on indictment to an unlimited fine.[51]

The PWA 1973 applies in England, Scotland, Wales and Northern Ireland.[52]

C. PROTECTION OF WRECKS ACT 1973: THE PRACTICE[53]

In order to understand the protection afforded to historic wreck by the PWA 1973, it is necessary to consider how the provisions are applied in practice.

Until April 1991 the PWA 1973 was administered by a single official, together with two assistants, at the Marine Directorate, DTp. At that time, its administration was transferred to the DOE Heritage Sponsorship Division. In April 1992, a further transfer took place, this time to the Department of National Heritage (DNH) in relation to England,[54] Historic

Scotland in relation to Scottish waters, Cadw in relation to Welsh waters, and the DOE (Northern Ireland) in relation to Northern Ireland. The various transfers have resulted in the monitoring of the practice outlined in this chapter, which was initiated by the DTp. However, as yet there have been no significant changes.[55]

1. Advisory Committee on Historic Wreck Sites

In the Parliamentary Debates on the Protection of Wrecks Bill the view was expressed[56] that it would be necessary to establish a reputable advisory board to guide and advise the Department. Such a body has been appointed by the Secretary of State to give expert advice on the selection of sites for designation and on the issuing of licences. Its Chairman is currently Basil Greenhill, former Director of the National Maritime Museum, who was appointed in 1986.[57] The Committee is not a statutory body; it is in fact a "quango".[58] Its members are appointed for an indefinite period by the Secretary of State upon the advice of the Chairman. They are paid no fees but are entitled to expenses. The leader of the Archaeological Diving Unit (ADU)[59] attends meetings in order to report on the Unit's activities and to make recommendations on designations and the issue of licences, but does not take part in decision-making. The Committee meets three times a year, in March, July and December, but extraordinary meetings are called where necessary.[60] The number of meetings has been found by the Committee to be quite adequate and members do, in any event, communicate regularly by telephone when they have business to deal with. Committee membership includes members of the Museums Service, the Committee on Nautical Archaeology, the Hydrographic Section of the Royal Navy, the British Sub Aqua Club, English Heritage, commercial salvage interests and active marine archaeologists. However, membership is ad hominem: the members do not represent the bodies to which they

belong, but rather are appointed as individuals by the Secretary of State. As a result, a number of institutions and societies involved closely with the discipline are not represented, for example, the National Maritime Museum and the Nautical Archaeology Society.

There has been considerable criticism of the composition of the Advisory Committee, which appears to lack the respect of much of the archaeological community. One of the central criticisms is that several licensees and archaeological advisers of licenced sites[61] are members and, therefore, at times may be faced with a conflict of interests. According to Dean,[62] standards on one member's site are particularly poor and yet the member apparently remains at meetings when the site is being discussed. In 1988, the Chairman of the Advisory Committee was said to be "well aware of the potential risk of a conflict of interests but was confident that with good sense these [sic] could be avoided".[63] He apparently said that he would have no hesitation in asking members of the Committee to withdraw during discussions of licences in which they had an interest.[64] The DTp used to argue that the reason for licensees and advisers being present on the Advisory Committee was that the number of marine archaeologists in the UK was limited and therefore most of them would have an active involvement with at least one of the designated sites. According to Dean, however, this is no longer really the case since there are over 100 qualified marine archaeologists in the country. The ad hominen membership, and the fact that members are appointed for an indefinite period, have also been the subject of criticism and it is evident that applications by other interested parties to become members have been refused. For example, an offer was made in 1988 by the Association of County Archaeological Officers to send a representative to meetings and also to provide the Advisory Committee with information on offshore sites. The Association argued that it was not possible to assess the importance of sites without having knowledge of the available resource. It felt that it

would be able to provide such knowledge through the information available in the County Sites and Monuments Records.[65] However, the offer was firmly rejected by the DTp. In a letter to the Association dated 22 February 1988, Mr. Margetts, then Secretary of the Advisory Committee, stated:-

> "The Act does not apply to anything other than the wrecks of ships which is a subject in which the existing members of the Committee are well versed and therefore I do not think it necessary to take up your offer."[66]

A further criticism of the workings of the Advisory Committee is that its business is conducted in confidence and its minutes are therefore confidential. This has led to complaints that the Committee is "secretive". Undoubtedly some information must remain confidential, but it seems likely that an annual report of its business could be published without any harm being done. The informal, non-statutory, status of the Committee has afforded it useful flexibility at times,[67] but has also led to some questionable practices. For example, no quorum is required for any meeting and business is frequently carried out by telephone.

The DNH is currently undertaking a review of the Advisory Committee's membership. However, it appears to believe that the membership works well and has gained much useful experience. Nonetheless, it appears to be open to suggestions as to new members.

A comparison can be drawn with an advisory committee established by the Historic Shipwreck Act 1981 in the State of Victoria, Australia. The membership, organisation and functions of both committees are very similar, but in Victoria these factors are strictly governed by the legislation. Whether it would actually be desirable for the UK's Advisory Committee on Historic Wreck Sites to be closely regulated by statute is unlikely, but it might induce greater external confidence if its membership was laid down by statute. It would certainly be

preferable if the membership was representative and reviewed on a regular basis, and also if some form of report or minutes of its business was produced.

2. Archaeological Diving Unit

One criticism for a long time levelled at the system of historic wreck administration was the absence of full-time archaeological expertise in the DTp. The Advisory Committee consists of members who are employed full-time elsewhere and who meet together only three or four times a year to consider applications for designation and licences. Until 1986 the Committee had to rely completely on the information submitted by the applicant for a designation order or a licence and, provided it appeared sound, the application was granted. Recognising this weakness in the system, and as the result of a private initiative by archaeologists, the DTp put out to tender a contract for the provision to the Advisory Committee of archaeological expertise and support[68] and an agreement was made with the Scottish Institute of Maritime Studies at St. Andrews University.[69] The original appointment was for five years and began in April 1986.

The ADU originally comprised one full-time member, assisted by two other divers appointed for the diving season, i.e. for approximately four months.[70] Since 1990 the ADU has been allocated additional funding which has enabled it to employ the two part-time divers full-time and to acquire further part-time help.

After a trial year, the DTp laid down formal guidelines detailing the responsibilities of the ADU:[71]

(i) To examine and assess the importance of specified sites so that informed decisions could be taken about designation.

(ii) To assess work on designated sites, and to report to the Advisory Committee.
(iii) To advise and assist licensees.
(iv) To act as a sounding board for opinion on matters relating to historic wreck sites.
(v) To report on its activities as required.

At the beginning of each diving season the ADU is given a work programme by the Advisory Committee. Increasingly, as the confidence of the Committee in the ADU has grown, the details of the programme have been left to the ADU's discretion. Its primary role is to provide the Committee with an independent[72] report on every application for designation and also on initial applications for a licence (which usually accompany applications for designation). The purpose of the report is to assess thoroughly the quality of the application. The ADU's leader usually gives a verbal recommendation at Advisory Committee meetings as to whether a designation should be made or licence granted. A further function of the ADU is to visit and assess the work on all existing sites, to consider progress, working standards and site problems. The length of visits is at the discretion of the ADU but has varied from one day to three weeks. It took four seasons for the first round of visits to licensed sites to be completed.

It seems that there is a varied reaction by licensees to ADU visits. Some are happy to benefit from its advice (although it is conceivable that they respond because they fear that if they do not their licence may be revoked); others view them as interlopers. Many licensees are by nature self-reliant, not welcoming interference and, at times, there has been a clash of personalities. The DTp placed emphasis upon the advisory role of the team, encouraging licensees to use the team as advisers and the ADU to advise and assist. However, the ADU sees itself primarily as an inspectorate, rather than an advisory service. Undoubtedly it is a government inspectorate of licensed sites in all but name, no matter how much the DTp liked to play this aspect down. According to Dean, the attitude of licensees is "Here come the

men from the Ministry!" and ADU personnel are viewed very much as inspectors. Primarily, they verify the information supplied to the Advisory Committee by licensees. Initially, the ADU was instructed not to tell licensees the contents of its reports. Now it does so on an informal basis. In its secondary role, it is able to advise licensees who are then able to achieve higher standards of work,[73] although it seems inevitable that those licensees who readily respond to advice will already have good standards. Dean suggests that non-archaeologists, in particular, are unlikely to take up the advice proffered.

The ADU is financed out of the general departmental budget and this means that funding is limited.[74] The ADU itself would like to see its work expanded in order to include a training and educational role, seabed surveys, recording and conservation of finds. Unfortunately, time constraints caused by the need to complete the work programme for each season mean that effort can seldom be directed towards work outside the official schedule. Furthermore, an expanded role would require extra funding. In 1988 the ADU proposed to the DTp via the Advisory Committee that its work be expanded to include, inter alia, the survey of a number of sample areas and the monitoring of WRE 5s.[75] The DTp refused to accept these proposals. However, since 1991 the ADU has been provided with funding to undertake some limited seabed survey work in order to locate and investigate specific wreck sites. The information gathered is then used as a basis for decisions on whether or not to designate.

The DTp was very satisfied with the work of the ADU, which certainly does appear to be fulfilling the role for which it was created. In the summer of 1990, in the middle of the diving season, the Scottish Institute of Maritime Studies was told by the DTp to prepare its tender for the ADU contract, due to expire in April 1991. It was given only three weeks to submit the tender, which meant that the team had to

leave the field and return to St. Andrews. In the event, the Institute submitted the only tender for the contract, but it appears that the DTp considered the tender too high. The reason for this may have been that it included money for a new boat in order to undertake side-scan surveys, as the old boat was too small for this purpose. After protracted negotiations, the DTp agreed to contract with the Institute for a further year and in 1992, ~~again~~ after competitive tender, a further contract was made with St. Andrews for five years.

Now that St. Andrews has built up considerable expertise in its role as the ADU, the continual requirement for short term contracts and competitive tendering appears to be the source of unnecessary uncertainty and inconvenience.

3. Designation

During the Debates on the Bill, both Houses of Parliament were anxious that designation orders be restricted to sites of special importance.[76] This anxiety is perhaps understandable when one discovers that the number of wrecks, both modern and historic, around the shores of the UK may be as many as 200,000.[77] The DTI expressed an expectation that the number of sites would not exceed 24 in all;[78] the present figure is 37.[79] Until 1989 the number had hovered at around the 30 mark. The recent increase appears to be the result of the ADU bringing sites to the attention of the Advisory Committee, rather than due to a concerted policy to increase the number.[80]

Until recently it was the policy of the Advisory Committee not to actively look for wreck sites to designate, but rather to wait until parties carrying out, or interested in carrying out, a survey or excavation applied for designation. Cases where an application was made

by someone who did not want to "work" the site were exceptional, although in such instances the application was usually made with the co-operation of the current salvor.[81] The DTp recognised that some sites worthy of designation were not protected because divers, by their very nature, were free-spirited and did not take kindly to the "hand of officialdom". Designation of a site necessarily restricted a licensee because of the conditions imposed by the licence, but it also afforded considerable advantages in that the licensee had exclusive rights to "work" the site and need have no fear of interference by competing salvors. This method of bringing sites forward for consideration for designation was subject to criticism. It is unclear why critics did not themselves recommend sites for designation, but this may have been due to a misconception of what was required.

With the creation of the ADU, this policy was recognised to be unduly reactive and in the last two or three years the Advisory Committee, with the assistance of the ADU, has been taking a more active role by looking for sites for designation. Unfortunately, limited resources mean that the ADU has little capacity to search for sites upon its own initiative. Dean has suggested that only a small proportion of wrecks of potential archaeological importance have come to the attention of the Advisory Committee and that there is still a marked reluctance on the part of finders of potentially important sites to apply for designation. However, increasingly sites are being recommended for designation by someone other than the finder.

Once an application for designation is made to the Department (such applications being made two or three times a year) it is passed to the ADU for a report. The importance of the site must be proved to the Advisory Committee's satisfaction and will be assessed according to the age of the wreck, its identity (if known) and the quality of artefacts found. In practice it seems that most applications are now

accepted for designation, presumably because applicants have become aware of the Committee's requirements.

Although there is no statutory duty to do so, the Secretary of State's intention to designate a site used to be advertised in the Department's journal and diving magazines. It was then realised that such an advertisement, in identifying the wreck and giving its co-ordinates, was an open invitation to some divers to take advantage of the information before the wreck was designated. Also, although a period of one month was allowed for objections, none was ever received. For these reasons the Department ceased to advertise its intention to designate a site.

In order to comply with the PWA 1973[82] a number of bodies are apparently[83] consulted before sites are designated, including the British Sub Aqua Club and other diving interests, the Ministry of Agriculture, Fisheries and Food (MAFF), the Coastguard Office, Harbour Authorities, Trinity House, the Royal Navy Hydrographic Section at Taunton, the Crown Estates Commissioners (as effective owners of the territorial seabed[84]), English Heritage, the DOE Wildlife Division (in case of conflict with Marine Nature Reserves[85]), English Nature[86] and the Dumping[87] and Dredging[88] sections of the DTp's Marine Directorate. Equivalent groups in Scotland and Wales are approached where appropriate. The Salvage Association[89] is now consulted in the case of nineteenth and twentieth century wrecks.[90]

A period of one month is allowed for representations but few are ever received, perhaps because the areas designated are relatively small. MAFF is sometimes interested in buoyage because it is concerned to ensure that restricted areas are clearly and specifically marked, presumably in the interests of fishermen. In cases where the wreck site is close to the shoreline, notices are placed on the shore and

representations have been received as to the size of signs and their legibility from the sea.[91] Occasionally, where an area is popular with amateur divers and there are lots of wrecks, both modern and historic, requests are made that the designated area be limited very tightly so as not to unduly interfere with underwater activities. Objections appear always to have been overcome and there has never been a case where a proposed designation order has been abandoned because of representations received.

In most cases, the length of time between the Advisory Committee's meeting to consider a proposal for designation and the coming into force of the order is between eight and ten weeks. Designation orders, made by Statutory Instrument, identify the site of the wreck and specify the extent of the restricted area around it.[92] It has been the practice to limit the area as tightly as possible in order to encourage respect for the site by divers and to prevent conflict with other interests. However, there has been at least one instance where a prosecution was abandoned because the witnesses could not say for certain that the divers were operating within the restricted area. Designation orders are widely publicised in the Press, including the London Gazette, local newspapers and divers' magazines. The Hydrographer of the Navy issues Notices to Mariners to mark designated sites on Admiralty charts and in appropriate cases the sites are marked with buoys by Trinity House. Of course, such publicity, although required to give notice of the restricted area, may actually lead unlicensed intruders to a site. Sites could possibly be marked on the seabed by means of concrete blocks but, of course, this would not provide, e.g. trawlers and dredgers, with satisfactory notice.

The power of the Secretary of State to revoke designation orders[93] has been used in nine instances, two for the reason that the site had been "worked out". Five designations have been revoked and

redesignated because of an error in the original co-ordinates, despite their confirmation by the Hydrographer of the Navy.[94] Co-ordinate errors have been a major headache for those trying to enforce the designations.[95] Another revocation was made because the wreck designated actually lay outside the, at that time, three mile territorial limit.[96] The other order to be revoked related to a vessel which had originally been designated in 1974. The order was revoked in 1979 because it was thought that the site had been worked out. After a visit by the ADU and discussions with the original licensee, the site was redesignated as there appeared to be considerable archaeological material left on the site. It appears that the original licensee had not been consulted about the revocation and was very pleased that the site was redesignated.[97] Orders have been varied where the designated site is found to be too big or too small.[98]

4. Emergency Designations

The PWA 1973 makes provision for emergency orders to be made in a case of immediate urgency[99] and a number of sites have been subject to such an order. Most emergency designations have occurred at the height of the diving season where a wreck is located in a popular diving area and an Advisory Committee meeting is not due for some time. In the case of the Anne, an English warship run ashore near Hastings in 1690, one morning in 1974 a mechanical excavator was seen by local people on the beach near the wreck. An historian interested in the wreck was informed by telephone of the potential threat and rang the DTp official who administered the PWA 1973. A designation order was drafted and sent by taxi to the chairman of the Advisory Committee for approval. By the same evening the site had been designated and the historian was on the beach to warn the operator of the excavator that he would be committing an offence if he interfered with the wreck. A

full application for designation was then presented and accepted by the Advisory Committee when it next met. This incident shows the remarkable speed and efficiency with which such an emergency designation can be implemented, but on this occasion the fact that the information was related to the DTp so quickly was purely a matter of luck. The historian was well-known by local people and was aware of the power to pass an emergency designation. It is unlikely that the local police or coastguards would have been so knowledgeable.

The DTp did not encourage emergency designations, apparently because of their effect of bypassing the Advisory Committee and presenting it with what amounted to a fait accompli. However, the view has been expressed by one member[100] that the procedure is a good one, not in any way resented by the Committee. It seems that in any event the activists will be consulted, along with someone specialising in the period and someone who knows the area. Certainly, the usual consultation with other organisations and groups is not undertaken before an emergency designation, but provision for dispensing with such consultation is made in the Act and an emergency designation could be, but never has been, revoked as a result of representations later received.

There have been three emergency designations since the transfer of responsibility for the PWA 1973 away from the DTp in April 1991. One of these designations was of the Erme Estuary site, designated on 3 May 1991, after an application by the finders on 16 April. It was suspected that other divers had knowledge of the site and were intending to dive on it over the imminent Bank Holiday weekend to remove material. After consultations with the Chairman of the Advisory Committee and Martin Dean of the ADU, the DOE decided to proceed with an emergency designation. The order came into force on 3 May, which was the Friday prior to the Bank Holiday weekend.[101]

5. Licences[102]

At least until the mid 1980s, it had been the policy of the Advisory Committee to have, as far as possible, a licensee for each designated site, believing that this was the best and possibly only way to protect such sites.[103] Designation inevitably gives notice that there may be something on a site worth investigating and it was felt that to designate a site and leave it unprotected by a licensee would be worse than not to designate it. Therefore, in practice, an application for a licence (to survey[104]) would usually be made along with the application for designation. More recently, the Advisory Committee has apparently changed its attitude regarding the issue of licences. It now believes that the designation of a site without the issue of a licence can be useful and what is really necessary to enforce restrictions is the education of divers to respect designated sites.

Licences are issued annually for the diving season which runs from the spring until the late autumn. Occasionally, a separate licence will be issued where a team requires extra time at the end of the season or wants to work throughout the winter. In the case of three particular sites permanent licences have been granted, apparently because of the size and importance of the wrecks, the large-scale operations being undertaken and the professional organisations involved.[105] Dean considers permanent licences to be disgraceful: it is indeed interesting to note that two out of the three permanent licensees are members of the Advisory Committee. In Dean's view, these permanent licences should be revoked and the licensees given one year licences. However, this seems unlikely to happen because of the vested interests.[106]

The Act provides for licences to be granted to persons who appear to the Secretary of State to be competent, and properly equipped, to carry out salvage operations.[107] In practice, licences are granted to

individuals, rather than to a team or organisation, in order that one person has overall responsibility.[108] At least 50% of licensees are actually the finder of the site, in the main amateur divers with no archaeological background. The policy of issuing licences to such people is questionable, but it seems that the Advisory Committee believes that finders would not declare sites if they thought they would be excluded from survey and excavation work.

The Act does not specifically provide for different types of licence but, nonetheless, two types are issued: first, a licence to survey and secondly, a licence to excavate. Usually, an application for a licence to survey will be issued some time before a licence to excavate because one aim of the licence to survey is to test the ability of the licensee to work in a disciplined manner. Occasionally, for example in the case of the Mary Rose, both licences are issued at the same time, but this only occurs where a site has been worked for some time and its team have proved their competence. In the case of the recently designated Duart Point site, an excavation licence was issued instead of a survey licence because of the potential requirement - during the course of survey - to make rescue recoveries.[109] It was also felt that it might be necessary to consolidate parts of the site to resist erosion and this would have involved disturbance of the seabed.[110]

In order to be granted a licence to survey a site the applicant must, in practice, prove that he/she has access to archaeological expertise in the form of a named Archaeological Adviser, who can verify the information recovered but who need not be a diver. The nominated adviser must be approved by the Advisory Committee. In some cases, the licensee and the Archaeological Adviser may be one and the same person. A licence to survey precludes the raising of any part of the wreck or any artefacts, except for small items which may help to

identify or date the wreck. In the past, it appears that a lot of material was raised under this guise, but this practice is no longer tolerated by the Advisory Committee.

The requirements for an excavation licence are more rigorous than those for a licence to survey and generally excavation licences are only granted once the site has been fully surveyed to the satisfaction of the Advisory Committee.[111] Excavation Directors must be nominated and approved by the Advisory Committee. They should have underwater archaeological experience and should be prepared to take an active, on-site, role in directing and supervising the excavation work. Details must be submitted of an operations programme and of the resources and equipment available to the team. The Advisory Committee is apparently very keen that proper facilities are available to preserve artefacts and a firm line is taken in this respect. A Conservation Specialist must be named and approved by the Advisory Committee and on-site and support conservation facilities must be described. Where adequate facilities for preservation are not available, a restriction on lifting will be imposed.[112]

It seems that the Advisory Committee has not been in the practice of making conditions about disposal of finds from designated sites because it understood that it was not legally entitled to do so. This appears to have been a misunderstanding of the interaction of the PWA 1973 and the MSA 1894 in relation to the disposal of recovered material. In 1989 the DTp stated that "[t]he disposal of material from any wreck site is governed by Part IX of [the MSA 1894] and it is not legally possible therefore to make any conditions in this respect in a licence issued under [the PWA 1973]."[113] Clearly the Advisory Committee cannot interfere with the operation of the MSA 1894 in deciding <u>entitlement</u> to finds from designated sites. However, there appears to be no legal reason why the Advisory Committee cannot impose a condition on a

licence placing limits on the disposal or alienability of artefacts, should the licensee become entitled to them through the operation of the MSA 1894. For example, it could require that artefacts be placed in a publicly accessible museum, be sold only to a reputable museum in the UK, or be sold only as an integral collection.

Each licensee must, as a condition of the licence, submit a report to the Advisory Committee at the end of the diving season, giving details of the work undertaken. Duration of time spent at the site, methods of operation, equipment used, a site report and a log of finds complete with drawings and diagrams must all be included. The purpose of the report is to maintain a check on the operations and the report must meet with the Advisory Committee's approval before a licence will be re-issued. The official line is that the report must be of a high standard in terms of content, drawings and presentation, as the Advisory Committee consider that the standard of submissions usually reflects the standard of operations undertaken. The final section of the report will generally include an application for licence renewal and must discuss proposals and objectives for the coming year's work. There is some indication that these annual reports are not always very satisfactory[114] and that licensees may actually be encouraged by the Advisory Committee to keep reports brief. Licensees are given a nominal deadline at the end of the season for submission of reports, the intention being to have all reports ready for consideration at the December meeting of the Advisory Committee. Not surprisingly, some reports do not arrive until the Committee's spring meeting.[115]

Officially, the requirements for a licence are strict and high standards of work must be maintained. However, in 1988 Dean expressed the view that the standard of archaeological work on designated sites was, with one or two notable exceptions, "atrocious". This was felt to be the fault, generally, not so much of the licensees, but of the

archaeological profession, including presumably the Advisory Committee, who had failed to lay down proper standards. Apart from this, there seemed to be four other reasons for the low standards:-[116]

> (i) Archaeological advisers often had no personal interest in the site.
> (ii) The experience of diving teams was often not archaeological, i.e. not experienced in recording, simply in recovery.
> (iii) The tradition of amateur involvement caused problems. On land sites, amateur leaders usually had extensive experience working with others, but this was generally not the case underwater. Team leaders were often only taking on this role because they had found the site.
> (iv) The lack of guidelines on acceptable archaeological practice meant that divers had little guidance.[117]

Dean has suggested that a further reason for the low standards was that the Advisory Committee did not examine the motives of potential licensees, for example whether they were interested in obtaining a licence to undertake archaeological research, or simply to hunt for material of commercial value. It seems that the standards of work are now gradually improving, although the motives of potential licensees still do not appear to be investigated and taken into account when licences are issued.

It was the stated policy of the DTp to encourage licensees to publish their findings in appropriate journals,[118] publication being an essential aspect of proper archaeological survey and excavation work, since it adds to the available body of knowledge and facilitates the research of others. However, it appears that few detailed academic reports of work on designated sites have been published. It is true that work on a site may proceed over many years. However, there appears to be no reason why interim reports cannot be made, rather than publishing results only when the research project is finally completed.

The requirement that a licensed site has a nominated archaeological adviser or director has not proved to be an adequate

safeguard for maintaining standards. There are still only a handful of marine archaeologists in the UK.[119] For this reason the appointed adviser or director may not have the right experience or the time to devote to the project.[120] One person may be the nominated archaeologist on several sites and may not live or work nearby.[121] For these reasons he/she may not be able to closely supervise the work. There has been some concern that the archaeologist was not always being consulted when licensees prepared their annual reports[122] and so the Advisory Committee now insists that reports are signed by the archaeologists. This can at least be taken as evidence that they have read the report. It is felt that if the nominated archaeologists are dissatisfied with the work, they would say so and it certainly has not been unknown for an archaeological adviser or director to submit an independent report. Lack of proper supervision seems, prima facie, to be the fault of the archaeologist in question,[123] but it appears that, in the past at least, archaeologists were sometimes persuaded by the Advisory Committee to become nominees against their better judgment, presumably because the Advisory Committee wanted a licensee for a site. The limited number of marine archaeologists appears to be the root cause of the problem and this should be alleviated gradually as more people receive marine archaeological training.[124]

The Advisory Committee understands the part-time and seasonal nature of excavation work and the financial and other difficulties of launching an expedition. It therefore tries to foster interest and enthusiasm in order to encourage licensees to continue working and to work regularly. Many licences are issued to excavate only a small proportion of the wreck, coverage being reviewed each year in order that the wreck is systematically "worked". Although provision is made in the PWA 1973 for revocation of licences,[125] in practice this does not appear to have happened. Instead, occasionally licensees have been sent a letter of warning by the Chairman of the Committee. One reason

for the lack of revocations is that poor performance was, until 1986,[126] evident only when the annual report was submitted and, where it was decided that a team was not working hard enough or was adversely exploiting a site, the licence would simply not be renewed. This continues to be the practice. Where a licence is not renewed, it has been known for the DTp to advertise in diving journals for someone to take up the licence.[127] A difficulty found with those licensees who are divers rather than archaeologists is making them understand just how much recording is required at all stages of the excavation work and, in one or two cases where there has been inadequate recording, excavation licences have been varied[128] by being "reduced back" to a licence to survey.

6. Enforcement of Designation Orders

During the Parliamentary Debates to the Bill, both Houses were concerned about the question of enforcement, particularly because public finance cannot be committed under a Private Member's Bill.[129] It was expected that the greatest aid in this respect would be the licensees themselves who would be anxious to protect their own interests and would therefore report unauthorised interference with their sites. It was also expected that local Sub Aqua Club members, Customs Officers and the Coastguard would play a part in reporting interference. In practice, the major source of information regarding infringement is the licensees themselves, although if the licensee maintains good relations with the local community, it too will help to protect the site by reporting unauthorised interference. Customs officers, coastguards, harbour-masters and even lighthouse-keepers[130] have at times been unofficially enlisted to help police sites.

The licensee of the Amsterdam wreck (which lies on the foreshore near Hastings) has been lucky in finding a local person who lives within sight of the beach and who volunteered to keep an eye on the site and warn of interference. Also, the Town Council has passed bylaws limiting the use of the beach in respect of the wreck.[131] The availability of these methods of protection is an advantage of the foreshore site of the Amsterdam, but the greater accessibility of this site as compared with those underwater makes it particularly vulnerable to interference, deliberate, wanton or inadvertent.

In some cases, the local receiver acted as the communication channel for the reporting of interference to the Department. For example in the Scillies, the receivers are very much part of the local community and are well aware of everything that happens in their area. Other receivers are more office-based and therefore depend on the willingness of people to report interference. Obviously, with the regionalisation of the Customs Service and the centralisation of the receivership duties[132] this channel of communication will no longer exist.

The only prosecutions so far under the Act were in 1991 and concerned interference with the Hazardous site in Bracklesham Bay.[133] Two divers were found diving on the site by the ADU in July 1990 and were again seen diving in August 1990. On the second occasion, the ADU alerted the police who apprehended the divers when they came ashore. They pleaded guilty of an offence under the PWA 1973 s.1(3)[134] and each diver was fined £125 and ordered to pay £275 costs.[135] In another incident, line fishing caused some damage to the Mary Rose site, constituting an offence under the PWA s.1(3)(a), but as the damage was inadvertent the fishermen were simply warned and no prosecution was brought.

Undoubtedly, the system of designation does prevent large-scale interference with sites and conflict between rival groups. Small-scale pilfering by divers working alone or in pairs is known to occur but appears to be almost impossible to control. It usually happens out of season, when the wreck is not being "worked" by its licensee and evidence of infringement is only discovered some time later. Dean suggests that one reason for the lack of prosecutions is that it is very difficult to prove an offence under the Act. This is partly because the restricted zones are too small and therefore it is difficult to prove that a diver is operating within the restricted area,[136] and partly because the offences in the PWA 1973 are poorly drafted. This is particularly the case in respect of s.1(3)(b) which provides:-

> "[A] person commits an offence if, in a restricted area...
>
> (b) he carries out diving or salvage operations directed to the exploration of any wreck or to removing objects from it or from the seabed, or uses equipment constructed or adapted for any purpose of diving or salvage operations".

It may be very difficult to prove the requisite intent, i.e. the intent that the diving or salvage operations were directed to the exploration of any wreck, etc. It is also unclear from the wording whether this intent is required when someone uses "equipment constructed or adapted for any purpose of diving or salvage operations".[137]

7. Conflict with Other Activities

Designated sites are usually protected by a restricted zone of between 50 and 300 metres in radius. The Advisory Committee strives to limit designated areas as much as possible and, as yet, no conflict appears to have arisen with other legitimate activities. It may be, however, that the restricted sites are in fact too limited in extent to allow for evidence to be collected of infringements of the PWA 1973.[138]

The fact that these zones are restricted rather than prohibited provides some flexibility in that other activities such as bathing and sailing can be undertaken within the area so long as they are not conducted for the purpose of obstructing the activities of the licensee.[139] As mentioned above,[140] some fishing activities may interfere with a designated site, but it appears that the DTp adopts a flexible attitude in this respect and would only bring a prosecution for repeated interference. One of the restrictions in the PWA 1973 has been poorly drafted resulting in ambiguity,[141] but it has been generally construed as meaning that diving should not take place within a restricted zone. This is seen as a drawback by many as it is felt that amateur divers should be able to visit wreck sites so long as they do not disturb them. Of course, there would be difficulties in policing such visits.[142]

The provision in the PWA 1973[143] which allows the Secretary of State to grant licences to persons who have "other legitimate reasons for doing in the [restricted] area that which can only be done under the authority of a licence" has never been used. It was envisaged[144] that this might include licences to service underwater cables and undertake salvage jobs but, so far, the provision has been unnecessary.

A potential problem is the outflow of sewage effluent into the sea near designated wrecks. Nutrients in the sewage encourage microbial growth, a high level of which has been found to destroy wreck. However, it seems that the outflow of the pipe would have to be in the designated area in order to constitute a potential offence. Under the PWA 1973 s.1(3)(c) it is an offence to deposit, "so as to fall and lie abandoned on the seabed, anything which, if it were to fall on the site of a wreck...would...damage any part of the wreck". Whether sewage effluent could be said to "fall and lie abandoned on the seabed" is, however, questionable.

D. ASSESSMENT OF THE PROTECTION OF WRECKS ACT 1973[145]

The PWA 1973 has achieved its primary aims: to end conflict between competing salvors and to prevent large-scale unauthorised interference with certain wrecks of special importance. It was an interim measure and not designed to be a comprehensive system for the protection of historic wreck. In 1973, marine archaeology in the UK was in its infancy. There was little recognition of the extent or importance of the underwater heritage. Since that time, awareness of the potential value in archaeological terms of the underwater heritage has grown significantly.

The obvious and major failing of the PWA 1973 is that it does not in any way update the MSA 1894 provisions relating to the reporting, handling and disposal of wreck in order to cater for the special requirements of historic wreck. Despite the willingness of the DTp to adapt the 1894 system - at least to some extent - to meet the needs of historic wreck, the provisions relating to disposal in particular are completely inappropriate.

On 8 March 1988, in answer to a Parliamentary Question, the Secretary of State for Transport made the following statement to the House of Commons:-

> "Our aim is that the disposal of items recovered from wreck sites designated under the provisions of the [PWA 1973]...should be conducted in such a way as to ensure as far as possible they remain accessible to the general public, that collections of items are kept together and that items of particular local interest go to local museums."[146]

Two days later, 400 artefacts from the designated wreck, HMS Invincible,[147] were auctioned at Christie's in London. The sale raised £60,000 towards the further excavation of the wreck[148] for which a licence had already been granted. It is true that, prior to the auction, the licensee sold 200 items to the Chatham Historic Dockyard Trust,

these items having been selected by the Trust and comprising a representative sample. Nonetheless, this private sale was purely at the licensee's discretion. The licence had not been issued subject to any condition regarding disposal[149] and therefore the Advisory Committee had no power under the Act to prevent the auctioning of recovered material or to require a representative collection to be sold to a museum. It appears that both the Advisory Committee and the DTp knew at the time the new licence was issued in February 1988 that the auction was planned. However, they felt that since the Dockyard Trust had been sold a representative sample of the items and that there was a "severe risk" of unauthorised diving on the site by other parties, that a licence should be issued.[150] The established archaeological community was outraged by the sale.[151] By insisting that designated sites are excavated archaeologically and then by allowing (and in some cases prescribing[152]) the sale of finds, the present legislation creates an absurd situation. It is true that the legislation does not prevent conditions relating to disposal being imposed on licences, but the very fact that this was not understood by the Advisory Committee shows that the interaction of the two pieces of legislation is unclear and causes confusion.[153]

Some of the policies underlying the PWA 1973 must also be questioned. One is the policy of designating only a few sites of "special" importance. The number of sites protected is only a tiny proportion of the total underwater archaeological resource.[154] This policy has resulted in the PWA 1973 affording no protection at all to the potentially vast number of historic wrecks in UK territorial waters. As a result, known and unknown sites may be destroyed, for example, by dredging and other commercial activities, without infringing the PWA 1973. The Act does not provide for the designation of areas of high archaeological potential.[155] On land, stress is increasingly being placed upon the management of the archaeological resource, yet at sea the PWA

1973 does not provide the mechanisms for such management.[156]

Also, the policy of having most designated sites "worked", either through survey or excavation, is highly questionable. It results in standards being a great deal less than ideal because there are few people with the necessary training and finance to undertake a proper scientific investigation. Historic wrecks are of value from an archaeological point of view because of the information they can provide. If they are surveyed or excavated inadequately much information will be lost and - once disturbed - a site will become destabilised and will begin to deteriorate rapidly. Little consideration appears to be given to the preservation of remains in situ,[157] nor are those with commercial motives prevented from becoming licensees. A problem connected to this, but which the law can do little to rectify, is that of the lack of trained marine archaeologists. This is something that must be addressed primarily by the archaeological profession itself. Training is required in two areas: land archaeologists must be trained to become divers and to master the techniques of underwater survey and excavation; amateur divers must be trained in the skills of underwater archaeology. This "two-way" training is necessary because it is amateurs who invariably find wrecks, so in order to encourage them to report such finds it is necessary to educate them and to allow them to become involved in archaeological work. Such amateurs will also help to provide a "police force" to enforce protective measures.[158]

The ADU would like to see its role expanded to include, for example, seabed surveying to locate sites of importance; training and education. Such activities would be of great value but cannot take place without a substantial increase in funding. There may be a legislative obstacle to providing the ADU with significant extra funds since the PWA 1973 was a Private Member's Bill and therefore cannot commit substantial government expenditure.[159] It is unclear whether it

would be possible to overcome this obstacle simply by amendment of the Act.[160]

E. PROTECTION OF MILITARY REMAINS ACT 1986[161]

In 1986 the Protection of Military Remains Act (PMRA 1986) was enacted, its main purpose being to protect the sanctity of wrecks containing human remains. However, Michael Mates M.P., who promoted this Private Member's Bill, recognised that there were other reasons, such as safety and security, why there may be a need to protect military remains from unauthorised interference.[162]

Three incidents in particular led to the Act being introduced before Parliament. The first was the government-authorised salvage of gold from HMS Edinburgh in 1982, which caused concern over the treatment of the human remains on board.[163] Secondly, in 1982 there was general public concern about the sanctity of vessels sunk during the Falklands campaign.[164] The third incident, "which really brought matters to a head and convinced [the MOD] of the need for legislation",[165] involved HMS Hampshire, which sank during World War I off the Orkneys, with the loss of many military personnel, including Lord Kitchener. In 1983 a German consortium applied to the MOD for a licence to dive on and film the wreck.[166] Owing to heightened public sensitivity about the sanctity of military remains since the Falklands conflict, permission was refused. Despite this, the consortium went ahead with their plans and raised a number of items from the ship, including personal belongings.[167] The MOD's inability to enforce its unofficial war graves policy[168] in this instance made it realise that some form of enforcement mechanism was required in such circumstances.

The PMRA 1986 is of interest in the context of this thesis because, as will be shown below,[169] it may provide an indirect means of protection for certain historic wrecks and wreckage.

1. Provisions of the Act

In contrast to the fairly straightforward wording of the PWA 1973, the wording of the PMRA 1986 is very convoluted. The PMRA 1986 applies to certain vessels which have sunk or stranded while on military service,[170] and any aircraft which has, at any time, crashed while in military service. Under the Act it is possible for the Secretary of State for Defence to designate a particular vessel, even if its location is not known, and also to designate certain areas as controlled sites. Both types of designation will apply in the UK, in the territorial waters of the UK, or in international waters. This contrasts with designations under the PWA 1973, which will apply only in territorial waters. However, in international waters offences under the PMRA 1986 will only be committed if the acts or omissions constituting the offence are committed on board a British-controlled ship, or by a British national.[171]

(a) Designated vessels and "protected places"

Under the PMRA 1986 the Secretary of State for Defence may, by order made by statutory instrument, designate any vessel "which appears to him to have sunk or been stranded (whether before or after the passing of this Act) while in military service".[172] This power enables the Secretary of State to provide protection to a vessel even though the position of its remains is unknown, but the protection will only have effect if the remains are in the UK, UK waters, or international waters.[173] It is only possible to designate vessels which sank or

stranded on or after 4 August 1914, the outbreak of World War I.[174] As well as vessels which were on British military service, it is interesting that the PMRA 1986 also allows the designation of vessels which were in the military service of another state, where those remains are in UK waters.

Under the 1986 Act certain places will be "protected", i.e. those places which comprise the remains of an aircraft or vessel to which the Act applies[175] and which are on the seabed or in the immediate vicinity of the crash, sinking or stranding. The Act therefore establishes protected places to encompass the remains of all aircraft which have crashed while on military service and also the remains of designated vessels. Such protected places will be established only in the UK, UK waters or international waters.

The PMRA 1986 creates certain offences in relation to protected places. These offences are not subject to strict liability but instead depend on whether the defendant believed, or had reasonable grounds for suspecting, that the place comprised "any remains of an aircraft or vessel which has crashed, sunk or been stranded while in military service".[176] The reason that these offences are not subject to strict liability is that the location of protected places will usually be unknown. Therefore, when divers come across remains on the seabed they may not realise that they are military remains until some interference has already taken place. Where persons have the requisite belief or notice however, they will commit an offence if, without the authority of a licence,[177] they undertake the following in relation to a designated vessel or any aircraft which crashed while on military service:-

(i) tamper with, damage, move, remove or unearth the remains;

(ii) enter any hatch or other opening in any of the remains which enclose any part of the interior of an aircraft or vessel;

(iii) cause or permit any other person to do anything falling within (i) or (ii) above.[178]

Excavation, diving and salvage operations are prohibited, if carried out for the above purposes.[179] An offence will also be committed if a person "knowingly takes part in, or causes or permits any other person to take part in", such operations,[180] or if a person "knowingly uses, or causes or permits any other person to use", equipment in connection with such operations.[181]

These offences are not dissimilar to those in the PWA 1973. The differences result mainly from the different purposes for which the two statutes were designed. For example, in the PWA 1973, depositing or dumping material over a designated site would usually be an offence,[182] but it would not be an offence under the PMRA 1986 unless it actually damaged the remains. Obviously the dumping of material may be a bigger hazard to what may be very fragile archaeological remains than to human remains which would probably simply become buried. Under the PMRA 1986 it would be an offence to enter a hatch or other opening in the remains, but - if the remains were more broken up - it would not be an offence to dive among them.[183] By contrast, diving among broken up remains would be an offence under the PWA 1973 because even slight disturbance of the remains may cause the loss of valuable archaeological information.

A provision that may have surprisingly wide implications is s.2(3)(c). This provides that excavations anywhere in the UK or UK waters are prohibited if undertaken to discover whether the place comprises any remains of an aircraft or vessel which has crashed, sunk or been stranded while in military service.[184] This provision apparently relates to all aircraft or vessels on military service, <u>whenever</u> the casualty took place and does not relate only to remains "to which the Act may apply". Taken at its widest, it appears to prohibit any archaeological

excavations on a wreck which either is, or may be, a military vessel (of any nationality), since one purpose of such excavations will inevitably be to establish the identity of the vessel. If this is the case, where there is any possibility that a wreck may have been a military vessel, a licence should be obtained under the PMRA 1986 before archaeological excavations take place.[185] This would mean that the initial excavations to establish the identity of the seventeenth century warship found in 1992 off the coast of Scotland[186] should have been licensed under the PMRA 1986. This appears to be the case even if the vessel is already designated under the PWA 1973 and a licence under the 1973 Act issued. However, designation under the PWA 1973 may be unlikely since the "historical, archaeological or artistic importance" of a vessel, i.e. the criterion for designation under the 1973 Act,[187] will probably not be determined until after its identity (at least approximately) has been established.

It is a defence to any of the above offences, if a person shows that their actions were "urgently necessary in the interests of safety or health or to prevent or avoid serious damage to property".[188] Those guilty of an offence are liable on summary conviction, to a fine not exceeding the statutory maximum,[189] or on conviction on indictment, to a fine.[190]

(b) Controlled sites

In cases where the location of an aircraft or vessel is known, it is possible for the Secretary of State to designate an area as a "controlled site". Such sites may comprise any area, whether in the UK, UK waters or international waters, which appears to the Secretary of State "to contain a place comprising the remains of, or of a substantial part of" an aircraft which has crashed while in military service, or a vessel which has sunk or been stranded while in military service.

There are three requirements for the designation of a controlled site:-

> (i) it must appear to the Secretary of State that less than 200 years has elapsed since the crash, sinking or stranding of the aircraft or vessel;
>
> (ii) the owners and occupiers of any land to be designated as a controlled site in the UK, do not object to the designation order; and
>
> (iii) that where the remains are of a vessel or aircraft which was in the military service of another state, those remains are in the UK or UK territorial waters.[191]

It is possible to designate Crown land as a controlled site[192] but, as with other land, the owners and occupiers must give their assent. Presumably, this means that the Crown Estate Commissioners, on behalf of the Crown, would need to give their consent before a controlled site could be designated on the territorial seabed. Certainly, in the Parliamentary Debates it was confirmed that such consent would be sought.[193] It was also stated that it would be MOD policy to consult the FCO before designating a controlled site in international waters.[194]

Not surprisingly, there are restrictions on the extent of controlled sites. The area should not extend further around the remains than appears to the Secretary of State to be appropriate "for the purpose of protecting or preserving" the remains, or "on account of the difficulty of identifying that place".[195] Also, where the controlled site is in international waters, any two points on its boundary should be no more than two nautical miles apart.[196] This specific restriction was apparently inserted in order to avoid suspicion on the part of other states that the UK was claiming excessive jurisdiction.[197]

In relation to a controlled site, the offences <u>are</u> based on strict liability, since the location of controlled sites will be published in the Statutory Instrument designating the site. An offence will therefore be committed if, without the authority of a licence, a person:-

(i) tampers with, damages, moves, removes or unearths any remains on the controlled site;

(ii) enters any hatch or other opening in any of the remains which enclose part of the interior of the aircraft or vessel;

(iii) causes or permits any other person to do anything falling within (i) or (ii) above.

Excavation, diving and salvage operations are also prohibited (unless carried out with the authority of a licence), if carried out for the purpose of investigating or recording details of any remains on the controlled site.[198]

Since diving activities for the purpose of investigating any remains on a controlled site will be prohibited, this means that in practice there will be a virtual ban on diving activities in these areas. This can be contrasted with the position in "protected places", where diving and salvage activities are prohibited only if carried out for the purpose of interfering with remains to which the Act applies. It is interesting to draw an analogy here with the position under the PWA 1973, where "diving or salvage operations directed to the exploration of any wreck..." (emphasis added) are prohibited[199] and this has been interpreted as imposed a total ban on diving within these areas.[200] It might be possible to argue that diving to "investigate" a wreck is a wider activity than diving to "explore" a wreck and that it might be easier to contravene a ban on the former activity than the latter. However, there is probably little justification for such a distinction.

Again, it will be a defence to show that the actions were undertaken because they were "urgently necessary in the interests of safety or health or to prevent or avoid serious damage to property".[201] Penalties are the same as for offences in protected places.

(c) Licences

As under the PWA 1973,[202] the Secretary of State has power to grant licences authorising that which would otherwise be an offence. However, under the PMRA 1986 the provisions in regard to licences are more specific. For example, it is stated that a licence may be granted to a particular person, to persons of a particular description or to persons generally.[203] Conditions may be imposed upon the licence for the purpose of protecting or preserving remains[204] and presumably such conditions would relate particularly to the treatment of human remains since it was for the purpose of protecting such remains that the statute was enacted. Licences will be given for a certain period of time and may be varied or revoked.[205]

Licences will be issued "without prejudice" to the rights of any owner of an interest in the land where the remains are situated (for example the Crown in respect of the territorial seabed), or of any owner of (or person entitled to claim), an interest in the remains.[206] Usually, the owner of a military wreck would be the Crown (whose rights would be exercised by the MOD)[207] or an overseas government, but some individuals may have bought military wrecks, or salvage rights in military wrecks, from the original owner.[208] Such rights would be retained, but could not be exercised if to do so would constitute breach of the Act's provisions. Therefore, those with such rights may require a licence under the Act to investigate a wreck, or to undertake salvage activities. Where licensees under the Act did not have ownership rights, they would retain their ordinary salvage rights[209] and would be required to declare material brought ashore in the UK to a receiver under the MSA 1894.[210] In the case of British military remains administered by the MOD, it was stressed in the Parliamentary Debates that a licence under the PMRA 1986 was not a salvage contract, but that separate salvage contracts could be negotiated with the MOD.[211]

In respect of wrecks in international waters, the salvage industry and diving interests apparently expressed opposition to the provisions controlling the activities of British nationals or those on board British-controlled vessels, since they felt this would provide foreign salvors with an unfair advantage. In light of this opposition, the government made a significant concession to British salvors and divers by providing an assurance that licences would be issued to all reputable British salvage companies in respect of British military wrecks in international waters, provided that they operate under a code of practice which tried to minimise disturbance of human remains.[212]

(d) Enforcement powers

The PMRA 1986 gives to "authorised persons" wide powers to board and search vessels.[213] Section 6(8) provides that:-

> "'authorised person' means a person authorised in writing by the Secretary of State to exercise the powers conferred by [s.6] (whether in all cases or only in cases specified or described in the authority) or a person of a description of persons so authorised".

No mention was made of such persons in the Parliamentary Debates, but presumably they could include certain British military personnel, for example the officers of patrol vessels. In particular, an authorised person may - in certain circumstances - board and search any vessel in UK waters or any British-controlled vessel in international waters.[214] There is, however, an interesting distinction in this regard between British-controlled and other vessels. In the case of the former, authorised persons may board a vessel where they have reasonable grounds for believing that an offence was being, had been, or was to be, committed. In the case of other vessels, they may only board a vessel if there were reasonable grounds for believing that an offence "was being committed" on board the vessel. This is almost certainly another mechanism for avoiding suspicion that the UK was claiming excessive

jurisdiction. The Act gives authorised persons the power to seize anything on board the vessel where there are reasonable grounds for believing that it is evidence of an offence, or has been obtained in consequence of the commission of an offence, and that seizure is required to prevent it being concealed, lost, altered or destroyed.[215] Authorised persons may also "do anything...reasonably necessary" for the purpose of exercising their powers, including using force and ordering the vessel to stop.[216] Obstruction of authorised persons in exercising their powers is an offence.[217]

The provision of enforcement powers in the PMRA 1986 can be contrasted with the complete absence of any such powers in the PWA 1973.[218] This distinguishing feature exists despite the fact that both Acts had been Private Members' Bills.

2. Assessment of the Protection of Military Remains Act 1986

The main reason for the enactment of the PMRA 1986 was to provide some form of protection for the human remains on board military vessels and aircraft.[219] However, it is interesting to note that the Act does in no way emphasise this particular aspect and in fact hardly makes reference to human remains at all. Protected remains are defined to include "any cargo, munitions, apparel or personal effects" on board and any "associated" human remains,[220] and therefore cover all the contents of a vessel or aircraft. None of the offences relate specifically to human remains and there is no specific reference to human remains in relation to the type of conditions which may be imposed on a licence.[221] Also, aircraft and vessels to which the Act applies do not have to contain human remains, although this seems logical since in many cases it would be very difficult to know whether a wreck contained human remains until interference actually took place.[222]

The Act does not provide protection only for vessels and aircraft lost in war or other conflict, despite the fact that the justification for protecting the remains of military personnel rather than those of others lost at sea is probably that special honour should be accorded to those who lost their lives defending their country.[223] The effect of the Act is therefore considerably wider than simply providing protection for "war graves", instead offering the MOD extensive powers to protect its property and security interests.[224]

As yet, there have been no designation orders under the Act.[225] Its provisions therefore only apply to aircraft which have crashed in military service, whose sites will be protected places. In contrast, no vessels receive protection. The PMRA 1986, although a Private Member's Bill, was fully supported by the MOD[226] and it does seem rather odd that the Act has not even been used to protect well-known military wrecks, such as HMS Repulse and HMS Prince of Wales, which lie in accessible international waters off the coast of Malaysia,[227] or HMS Royal Oak which lies in Scapa Flow.[228]

There may in fact be a combination of reasons for the lack of designations. The provisions of the Act in relation to international waters would actually have little practical effect since they could not be enforced against foreign ships or personnel, and since the government agreed to issue licences to all reputable British salvage companies. It may well be that a great number of wrecks to which this Act was intended to apply will in fact lie in international, rather than territorial, waters.[229] As far as territorial waters are concerned, s.2(3)(c) prohibits, inter alia, any excavations in UK waters if they are undertaken to discover whether the place comprises any remains of a vessel which has sunk or been stranded in military service and, as explained above,[230] this provision has wide effect. It may therefore be felt unnecessary to designate specific vessels or create controlled

sites. Also, in the Parliamentary Debates it was stated that the ability to designate controlled sites would be used "very sparingly"[231] and it was suggested that they may be used "mainly or even exclusively" in territorial waters.[232] Of course, the MOD may simply be awaiting an incident to arise, such as those that precipitated the enactment of the PMRA 1986,[233] before making a designation order. However, this would rather defeat its ability to designate wrecks before their whereabouts are known.

F. ASSESSMENT OF THE INTERACTION OF THE PROTECTION OF MILITARY REMAINS ACT 1986 AND THE PROTECTION OF WRECKS ACT 1973

To recap, the primary reason for the enactment of the PMRA 1986 was to protect the sanctity of wrecks containing human remains. On the other hand, one of the primary reasons for enactment of the PWA 1973 was to provide protection to certain wreck sites of special historical importance by securing those sites from unauthorised interference.

Despite its primary purpose, however, the PMRA 1986 could provide significant, though indirect, protection to wrecks of historical value. Some World War I and World War II aircraft and ship wrecks are considered to have such significance[234] and, in the case of protected places, wrecks up to 200 years old may receive protection and this could clearly cover shipwrecks of historical importance. For example, the warship HMS Colossus, which was lost in 1798 off the Scillies, was designated under the PWA 1973 in 1975,[235] but would also have fallen within the scope of the PMRA 1986. However, no twentieth century wreck has received protection under the PWA 1973 and there may be a consensus of opinion on the Advisory Committee on Historic Wreck Sites that the PWA 1973 is really designed to protect older wrecks.[236] If this is the case, the interests of World War I and World War II wrecks

of historical significance could be better served, in practice, by the PMRA 1986. It should also be noted that, apart from military remains, the PMRA 1986 may also afford protection, indirectly, to non-military remains which happen to lie in protected places or controlled sites.[237]

The PMRA 1986 may, in certain circumstances, provide protection for wrecks of historical significance which could not receive protection under the PWA 1973. First, the PMRA 1986 extends protection to aircraft, which the PWA 1973 does not, and therefore provides a mechanism for protection for historic military aircraft, especially those which have crashed at sea.[238] For example the 1986 Act will apply to the Hampden bomber which crashed in the North Sea and is lying on the seabed at a depth of approximately 60 feet,[239] so long as it lies in UK, or international, waters. This particular aircraft may be a unique example of this kind of bomber[240] and is therefore clearly of historical significance. Secondly, under the PWA 1973 it is necessary to know the position of a wreck in order to designate it, while under the PMRA 1986 it is possible to designate wrecks without knowing their location. The 1986 Act could therefore afford protection for a wreck right from the moment that its location is actually detected. Under the PWA 1973 a wreck could not be afforded designated status until its "historical, archaeological or artistic importance" had been assessed, which may be some time after its discovery. In the meantime, it could be tampered with freely. Thirdly, whereas the PWA 1973 only applies to UK waters, the PMRA 1986 provides some measure of protection for the wrecks of British military vessels situated in international waters,[241] although in practice the extent of such protection may be limited.[242]

The range of offences is quite similar in both Acts and the penalties the same. Where the protection afforded by the two Acts differs significantly is in terms of provision for enforcement. Under the PWA 1973 there are no enforcement powers. By contrast, s.6 of the

PMRA 1986 provides quite extensive powers, in fact reminiscent of those provided to receivers under the MSA 1894.[243] This means that the PMRA 1986 is provided with the teeth that the PWA 1973 lacks.

Curiously, the PMRA 1986 makes no reference to the PWA 1973 and, therefore, how the two statutes should interact must be a matter of speculation. In the Parliamentary Debates on the Protection of Military Remains Bill, when the 200 year time limit was queried in respect of the Mary Rose,[244] the Parliamentary Under-Secretary of State for the Armed Forces, Roger Freeman, M.P., did make a brief reference to the PWA 1973:-

> "Certainly the Mary Rose foundered and sank more than 200 years ago, but she was protected by the Protection of Wrecks Act 1973, which protects vessels of historic or archaeological interest. Therefore, there is sufficient protection for any vessel that sank prior to 1914. The Bill deals with those involved in the great war, the second world war and subsequent conflicts where the classifications historic or archaeological would not be appropriate."[245]

He went on to state:-

> "For the sake of clarity, good order and procedure, we intend to start from August 1914 and work to the present day. We are satisfied that existing legislation is sufficient to deal with vessels that sank earlier than that - even if there are human remains - because they would be regarded as of historical or archaeological interest."

He therefore appeared to assume that there would be an "administrative" cut-off date of 1914 for the PMRA 1986 and that human remains on wrecks before that date would receive adequate protection under the PWA 1973. If this was a general assumption on the part of the MOD (and the drafters of the PMRA 1986), it is unclear why it was then felt necessary to have a somewhat arbitrary 200 year period in the Act (in relation to controlled sites). The youngest vessel designated under the PWA 1973 was lost in 1864[246] and, if a military vessel, would clearly have fallen within the 200 year period in the PMRA 1986. The fact that such a recent vessel should have received protection under the PWA

1973 on account of its "historical, archaeological or artistic importance"[247] shows that vessels of that age, and possibly those that were lost even later, may be considered of such importance. Also, to consider that human remains on wrecks which sank before 1914 would receive protection through the PWA 1973 makes rather a big assumption. In practice, under the PWA 1973 no account is taken, in issuing licences or in making conditions on licences, of human remains which may be on board the designated wreck. Furthermore, there may be some wrecks which sank after 1914 which may be of significance from an historical point of view, but which may be known not to contain human remains, for example the wrecks of German vessels scuttled in Scapa Flow in 1919.[248] It is very unlikely that such wrecks would be designated under the PMRA 1986.

The Under-Secretary of State for the Armed Forces too easily side-stepped the jurisdictional conflicts which could clearly arise between the PMRA 1986 and the PWA 1973. Since the PMRA 1986 does not state that it does not apply to wrecks already designated under the PWA 1973,[249] it would theoretically be possible for a wreck to be designated under both Acts and it is interesting to note that the Parliamentary Under-Secretary of State for Defence Procurement gave an assurance in Parliament that authority under the PMRA 1986 to dive would not be "withheld unreasonably from genuine scientific and archaeological research groups".[250] This statement appears to contain an assumption that some wrecks to which the PMRA 1986 could apply will be of historical interest or significance. Nonetheless, to allow designation under both Acts would undoubtedly lead to confusion and conflict, for example a licence might be issued under one Act but not under the other, or might be issued to one group under one Act and another group under the other. Furthermore, the conditions for the issue of a licence under each Act might be different or contradictory. No guidance is provided in the PMRA 1986, or elsewhere, as to which Act

would take precedence if such conflicts arose. Presumably those administering the Acts would be careful to ensure that a situation did not arise whereby a wreck was designated under both Acts, perhaps - as the Under-Secretary of State for the Armed Forces suggested - by exercising an administrative boundary at the 1914 cut-off point. However, to separate the jurisdictions in this manner would not be satisfactory, since there may be military wrecks which sank before 1914 with great loss of life, but of little historical value, and also some which sank after 1914 with no loss of life, but which are of historical significance.

CONCLUSION

The specific legislation in the UK dealing with wrecks is clearly in a muddle. The PWA 1973 affords no protection to the large number of undesignated historic wrecks which undoubtedly exist and, in reality, little real protection to those that are designated. It simply brings pressure to excavate "protected" sites, such excavation resulting in destruction of the site and, in many cases, dispersal of the artefacts. Some of the defects could be overcome simply by a change of administrative policy, but others would require legislative amendment.[251]

The PMRA 1986 is a confusingly worded statute and its provisions are indeed complex. No designation orders have been made under the Act and, therefore, at present it affords some measure of protection only to military aircraft and not to shipwrecks. Since it makes no reference to the PWA 1973, it provides no guidance as to how the two Acts should interact and clearly there is room for considerable jurisdictional conflict.[252]

NOTES

1. See further, A.-D., below.

2. See further, E., below.

3. The 1992 membership figure was 46,000 (worldwide): British Sub Aqua Club, October 1992.

4. R. Larn, Buried and Sunken Treasure (1974). In fact, it now appears that wrecks are often better preserved in colder rather than warmer waters.

5. In more recent years a similar problem has been occurring on land, where the increasing use of metal detectors has potential to undermine the security of the terrestrial archaeological heritage: see Law Commission, Treasure Trove: Law Reform Issues, September 1987 and Chapter Seven, A., below.

6. Ironically, when the MSA 1894 was being drafted it would not have been impossible for the drafters to have anticipated the problem of interference with historic wrecks on the seabed, although at that time the extent of such interference was minimal. Nonetheless, from about 1832 divers were salvaging guns and cargo from ships sunk in the Solent and Portsmouth area, including the Royal George lost in 1782 and the Mary Rose. For details, see A. McKee, How We Found the Mary Rose (1982).

7. See Chapter Two, A., above, regarding the statutory procedure and Chapter One, C.3., above, regarding salvors' possessory interests.

8. It was the DTI that administered the MSA 1894 until 1983 when this responsibility (along with all other shipping matters) was transferred to the DTp: see Chapter Two, A., above.

9. Marsden, The Wreck of the Amsterdam, op. cit.

10. H.C. Debates, Vol. 851, Col. 1855 (1972-73).

11. Larn, op. cit. Even though finders of historic wreck now generally receive 100% of the value of finds, this does not seem to have encouraged reporting: see Chapter Two, A.3., and A.4., above.

12. See further, below.

13. Marsden, The Wreck of the Amsterdam, op. cit.

14. P. Marsden, "The Origin of the Council for Nautical Archaeology", [1986] IJNA 179.

15. See Chapter One, A.1(c) above, regarding government ownership of wrecks.

16. The Times, 22 September 1967.

17. The Times, 7 August 1967.

18. Larn, op. cit.

19. Mr. Harold Wilson, then Prime Minister, feared that commercial divers using explosives would destroy much of the wreck: The Times, 26 August 1967.

20. Marsden, "The Origin of the Council for Nautical Archaeology" op. cit.

21. For details, see R. Cowan, Z. Cowan, P. Marsden, "The Dutch East Indiaman Hollandia Wrecked on the Isles of Scilly in 1743" [1975] IJNA 267.

22. Sunk off the Shetland Isles in 1711.

23. In 1969 workmen in the employment of a contractor completing a new main sewer scheme spent some of their free time using mechanical excavators to dig into the wreck of the Amsterdam, which was lying deep in the sand on the foreshore near Hastings. The excavator brought up many objects including five bronze cannon, household implements and wine: the operation was watched by a growing crowd of holidaymakers and local people. Later, workmen and sightseers found themselves in open competition to get the best objects. See P. Marsden, The Wreck of the Amsterdam, op. cit. For details of the earlier history of this wreck, see Chapter Two, f.n.1.

24. Which struck a rock off Anglesey in 1675. In this case the Royal Navy was dispatched to separate rival salvors: H.C. Debates, Vol. 851, Col. 1850 (1972-73). See P. Davies, "The discovery of the wreck" [1973] IJNA 59.

25. Marsden, The Wreck of the Amsterdam, op. cit.

26. By the Wreck Law Review Committee, see Chapter Five, A., below, for details.

27. PWA 1973 s.2. This provision was framed to deal with one particular wreck, the Richard Montgomery, an American cargo vessel which went aground in the Thames Estuary in 1944. Although much had been removed, the wreck still held a large quantity of ammunition and was (and still is) a serious potential threat to the town of Sheerness. It was decided that the safest course of action was to leave the vessel undisturbed, but concern was aroused by the recurrence of boat trips out to the vicinity of the wreck by curious sightseers.

28. For the Parliamentary Debates, see H.L. Vol. 342, Col. 914; H.C. Vol. 851, Col. 1848; H.C. Vol. 855, Col. 1656: Under-Secretary of State for Trade and Industry.

29. H.C. Debates, Vol. 851, Col. 1855 (1972-73).

30. H.C. Debates, Vol. 851, Col. 1869: Under-Secretary of State for Trade and Industry.

31. Now the Committee of Nautical Archaeology of the Council for British Archaeology.

32. H.C. Debates, Vol. 851, Col. 1866 (1972-73).

33. This work is concerned with two of the Act's three sections, i.e. those relating to historic wrecks. Section 2, relating to dangerous wrecks, is outside its scope and will not be considered. The practical application of the provisions will be considered at C., below. See Appendix 2A for a copy of the Act.

34. Prior to April 1991 it was the Secretary of State for Transport. Between April 1991 and April 1992, it was the Secretary of State for the Environment. Since April 1992 it has been the Secretary of State for the National Heritage.

35. PWA 1973 s.3(1). Now 12 miles, see Territorial Sea Act 1987, s.1(1)(a).

36. s.3(1) defines "seabed" to include any area submerged at high water of ordinary spring tides and therefore the provision includes wrecks, such as the Amsterdam, which lie on the foreshore.

37. Cf. the dangerous wrecks provision: s.2.

38. s.1(b). In the Parliamentary Debates, the Under Secretary of State for Trade and Industry suggested that a restricted area was not likely to exceed a radius of 500 yards, H.C. Vol. 851, Col. 1868. The Mary Rose has a designated area of 300 metres radius, the Grace Dieu and the Assurance 75 metres and the Yarmouth Roads wreck 50 metres, i.e. all well within the area suggested.

39. s.1(3). Subject to the saving provisos in s.3(3). See below.

40. Cf. Restrictions that can be imposed on Marine Nature Reserves by virtue of the Wildlife and Countryside Act 1981 s.36: Chapter Seven, D., below.

41. PWA 1973 s.1(3).

42. It is possible that dredging carried out by port authorities to clear navigation channels may fall under the statutory function exemption, but there do not appear to have been any incidents where such dredging has taken place over a designated site.

43. s.3(3).

44. s.1(4). See C.4., below.

45. s.1(5). See C.5., below.

46. H.L. Debates, Vol. 342, Col. 919.

47. s.1(5)(b).

48. s.3(2)(a). See C.3., below.

49. s.1(6).

50. s.3(4). See Magistrates Courts Act 1980, s.32, as amended by SI 1984, No. 447.

51. Proceedings may take place wherever in the UK the potential defendant may be and the offence may be treated as having been committed in that place (s.3(4)).

52. No sites have, as yet, been designated in Northern Ireland although the ADU (see C.2., below) has recently been investigating a site there with a view to recommending its designation.

53. Information in this section has been acquired from a number of sources: through interviews with DTp officials in 1985 and 1988; from personal communications with DNH officials in November 1992; from an interview with Margaret Rule, a member of the Advisory Committee on Historic Wreck Sites (see C.1., below) in 1985; and from Martin Dean, leader of the ADU (see C.2., below) in an interview in 1989, and in more recent correspondence and meetings.

54. DOE Circular 20/92 "Responsibilities for Conservation Policy and Casework". The Circular sets out the new departmental responsibilities following the creation of the DNH and states that the casework transferred to the DNH includes "responsibility for the protection of wrecks (Section 1 of the PWA 1973), and for nautical archaeology

generally"(emphasis added). The reference to "nautical archaeology generally" is interesting because it acknowledges that the role of the DNH in this respect should be wider than simply operating the PWA 1973. The DTp would not have accepted a wider remit. See also DNH Circular 1/92.

55. C. Dawes, DNH Heritage Sponsorship Division, 6 November 1992.

56. H.C. Debates, Vol. 851, Col. 1855.

57. Also author of Archaeology of the Boat (1976). Previously, the Chairman was Lord Runciman and the Committee is still sometimes referred to as the Runciman Committee.

58. Quasi-autonomous non-governmental organisation.

59. For details, see C.2., below.

60. For example, to discuss the formation of the ADU, see C.2., below.

61. See C.5., below.

62. Leader of the ADU (see C.2., below) and present at Committee meetings.

63. Letter dated 15 August 1988 from P. Channon, then Secretary of State for Transport, to Cranley Onslow M.P.

64. Ibid.

65. See further, Chapter Six, A.4(c) below.

66. This has proved to be a very short-sighted reaction since County Archaeological Units are likely to play an increasingly important role in the protective regime for underwater archaeology: see further, Chapter Six, A.4(c) below and Chapter Seven, C., below.

67. For example, in relation to emergency designations: see C.4., below.

68. Apparently the decision to allocate funds in this respect was taken at Ministerial level. The decision was the first indication that the government was finally prepared to give some financial support to historic wreck administration. See further, Chapter Five, C., below.

69. In 1978, the first Chair in Marine Archaeology was established at St. Andrews, The Times, 17 August 1978.

70. It is a legal requirement that working divers should operate in teams of three: Diving Operations at Work Regulations 1981 (SI 1981, No.399), regulation 8. The team tends to be in the field for four weeks and then home for two weeks. It has adopted this practice since it is inadvisable to dive for continuous periods.

71. Notes of a Conference on Nautical Archaeology held in the Royal Armouries on 30 January 1988.

72. I.e. independent of the applicant.

73. The ADU has published guidelines for acceptable archaeological practice on underwater sites: M. Dean, Guidelines on acceptable standards in underwater archaeology, Scottish Institute of Maritime Studies, St. Andrews (1988).

74. Initial funding was probably no more than £50,000 p.a. (Sheldon, op.

cit., p.1). During the transfer period from the DTp to the DOE, the DTp allocated £150,000 and the DOE a similar amount in ad hoc funding. Funding is now approximately £150,000 p.a.

75. Reports of finds made to receivers: see Chapter Two, A.3., above.

76. See H.C. Vol. 851, Col. 1867; H.L. Vol. 342, Col. 923.

77. JNAPC, Heritage at Sea, op. cit, p.25. It is estimated that UK territorial waters cover over 50,000 square miles of seabed: P. Marsden, "History at Sea in Britain", unpublished paper (1989).

78. H.C. Debates, Vol. 851, Col. 1867. See also H.C. Debates, Vol. 851, Col. 1851, where Iain Sproat M.P., who proposed the Bill, stated that he had been informed that it was "the intention that restricted areas in relation to historic wrecks will be strictly limited in number and extent."

79. See Appendix 5 for a list of designated sites. Two of the orders have been revoked. A map showing the approximate position of these sites can be found in Appendix 6.

80. Personal communication with M. Dean, 14 October 1992. For a comparison of the number of designated sites under the PWA 1973 and the number of scheduled monuments on land under the Ancient Monuments and Archaeological Areas Act 1979 (AMA 1979), see Chapter Seven, A., below.

81. But occasionally without such co-operation. In June 1985 the wreck of the Admiral Gardner in the Goodwin Sands was considered for designation at the request of an historian who was concerned that the wreck was being unreasonably exploited by its salvor. The Admiral Gardner, an early nineteenth century vessel, was carrying thousands of copper coins and the salvor had contracted to sell them to an oil company to be used for promotion purposes. The Advisory Committee decided that the wreck was worthy of designation and the salvor was approached to discover whether or not he would like to apply for a licence. Although it appeared to have been necessary to persuade him of the advantages of working within the law, the salvor was later granted a licence.

82. s.1(4): "Before making [a designation] order...the Secretary of State shall consult with such persons as he considers appropriate having regard to the purposes of the order..."

83. Dean is doubtful whether these bodies are in practice always consulted about designations. Despite being present at Advisory Committee meetings, he has not been aware that consultations have taken place.

84. See G. Marston, The Marginal Seabed: United Kingdom Legal Practice (1981) Chaps. XII and XIII. The Crown Estates Commissioners issue dredging licences (see Chapter Seven, C.2., below) but it does not seem that this is the reason for their being consulted.

85. See Chapter Seven, D., below.

86. And its counterparts, Scottish Natural Heritage, the Countryside Council for Wales and the DOE (Northern Ireland). These bodies took over the responsibilities of the Nature Conservancy Council in 1990: Environmental Protection Act 1990 s.128.

87. The wreck may be near a licensed dumping area: see Food and Environment Protection Act 1985, Pt. II. See further, Chapter Seven,

C.2., below.

88. The Marine Directorate issues licences to dredging companies under the Coast Protection Act 1949 s.34. See further, Chapter Seven, C.2., below. For the threat posed to historic wrecks by dredging activities, see Chapter Six, A.4(a) below.

89. See further, Chapter One, A.1(b) above.

90. It appears that a paper by the writer called "Protection of Historic Wrecks: the UK Approach" (1989) 4 IJECL 26 and 95, drew the DTp's attention to the absence of consultation with the Salvage Association when nineteenth and twentieth century wrecks were proposed for designation. At that time however, only one such wreck had been designated. In 1989, when Iona II, a passenger ferry lost in 1864, was proposed for designation, the Salvage Association was consulted for the first time. It could find no reference to the vessel in its records and had no comments on the designation: personal communication with C. Dawes, DNH Heritage Sponsorship Division, 6 November 1992.

91. Buoys and markers are normally coloured green and inscribed "Protected Wreck": DTp, Historic Wrecks: Guidance Note, December 1986.

92. Usually activities are restricted in an area of between 50 and 300 metres from a particular co-ordinate. For an example of a designation order, see Appendix 7.

93. By virtue of PWA 1973 s.1(5)(b).

94. For example, in the case of the Yarmouth Roads wreck. In one extreme instance, the designated area specified in the order was 500 metres away from the wreck site itself: A. Croome, "Underwater Archaeology in Britain: discussion meeting at the Royal Armouries, London, 30 January 1988" [1988] IJNA 113.

95. Dean has said that the errors in this respect are appalling. They have resulted in intruders being caught red-handed interfering with a designated wreck and yet, because the co-ordinates of the restricted area were inaccurate, prosecutions could not be brought. See further, Chapter Six, A.3., below.

96. The Admiral Gardner, Site No. 31, Order No. 1985 No. 1. Revoked on 18 July 1986 by SI 1986, No.1020. Once the Territorial Sea Act 1987 came into force a new application for designation was made and the site was redesignated in 1989: SI 1989, No.2295. This is the only site that has so far been designated in the three to 12 mile zone: personal communication with C. Dawes, Heritage Sponsorship Division, DNH, 6 November 1992.

97. Personal communication with M. Dean, ADU, 14 October 1992.

98. Variations have happened eight times. For example, the restricted area around HMS Hazardous was increased at the request of the licensee because a number of items relating to the wreck extended beyond the original restricted area. The ADU confirmed that an extension was necessary. See SI 1988, No.287.

99. PWA 1973 s.1(4).

100. Personal communication with Margaret Rule, Mary Rose Trust, November 1985.

101. Order No. 1991 No.1, SI 1991, No.1110. Personal communication with C. Dawes, DNH Heritage Sponsorship Division, 6 November 1992. The other

two emergency designations related to the Duart Point and Smalls sites, the two most recent designations.

102. Cf. the salvage permit system operated in South Africa: Werz, op. cit.

103. In fact this view appears to have been prevalent at least until 1988, since this was one of the reasons given for the issue of a licence in the case of HMS Invincible after the public auction of material from the site: see D., below.

104. See further, below.

105. These wrecks are: the Mary Rose, under the aegis of the Mary Rose Trust; the Mary, under Liverpool Museum sponsorship; and HMS Romney, under the direction of the self-styled "underwater explorer", Rex Cowan.

106. When the ADU visited one of the permanently licensed sites, it found standards of archaeological work appalling. It appears that the licensee was not a diver and was unaware of what was going on underwater.

107. PWA 1973 s.1(5).

108. Licences are generally issued subject to the condition that diving is limited to named individuals.

109. On this wreck site, see further, thesis Introduction.

110. C. Martin, Scottish Institute of Maritime Studies, in a presentation given to the Advisory Committee on Historic Wreck Sites' meeting with licensees, 25 November 1992.

111. DTp, Historic Wrecks: Guidance Note, December 1986.

112. Ibid.

113. Letter from R. Latham of the DTp Marine Directorate, to P. Marsden, dated 15 June 1989.

114. See A. Croome, op. cit.

115. If there was a failure to report at this time it seems likely that the licence would not be renewed.

116. JNAPC, Notes of a Conference on Nautical Archaeology held at the Royal Armouries on 30 January 1988.

117. This problem has hopefully been alleviated by the publication of guidance by the ADU: Dean, Guidelines on acceptable standards in underwater archaeology, op. cit.

118. DTp, Historic Wrecks: Guidance Note, December 1986.

119. Although the number is increasing rapidly.

120. In the past, some archaeological advisers and directors did not have archaeological training. However, the Advisory Committee has been tightening up on this recently.

121. If this is the case the question of travel expenses can cause difficulties. Presumably, licensees should pay them but there is no requirement that they do so.

122. As mentioned above, sometimes the licensee and the archaeologist are one and the same person. Also, sometimes the licensee will ask the archaeologist to write the report.

123. In the United States so-called "contract archaeologists" are employed by some treasure hunters in order to provide a respectable "veneer" to their operations. See, e.g., D. Matthewson, The Treasure of the Atocha (1986).

124. For details of a recent training initiative, see further Chapter Six, B.2., below.

125. s.1(5)(b).

126. The first season that the ADU operated.

127. Apart from the policy of having a licensee for each site, another reason for this is that if work on a site is stopped suddenly, the site will be exposed and vulnerable to human and natural forces.

128. By virtue of PWA 1973 s.1(5)(b).

129. See further, D., below.

130. In one case a lighthouse-keeper reported interference with a designated site to the local receiver, but the "intruder" was in fact the licensee!

131. Other Councils have passed bylaws to protect wrecks, for example there is an Orkney Council bylaw which bans unauthorised diving on HMS Royal Oak, which was lost in 1939 in Scapa Flow with great loss of life and was subject to looting by amateur divers in 1973: H.C. Debates, Vol.90, Cols.1231-1232 (1985-86). See further, E., below.

132. See Chapter Two, B., above.

133. This interference took place after the designated area around the wreck had been increased in order to cover all the material associated with the wreck: see C.3., above.

134. See B., above.

135. Personal communication with C. Dawes, Heritage Sponsorship Division, DNH, 6 November 1992.

136. See further, Chapter Six, A.3., below.

137. For a suggestion as to the amendment of this provision, see Chapter Eight, A.1(a) below.

138. See further, C.6., above and Chapter Six, A.3., below.

139. PWA 1973 s.1(6). Before the Act, instances were known of rival salvors driving motor boats at speed across the wreck area to prevent working divers from surfacing (see A., above). However, there appears to be little now to be gained from such action because of the exclusivity of the licensing system.

140. C.6., above.

141. PWA 1973 s.1(3)(b). See further, C.6., above.

142. For a discussion of the interests of amateur divers, see Chapter Six, B.2., below.

143. PWA 1973 s.1(5)(ii).

144. H.L. Debates, Vol. 342, Col. 919.

145. In this section it is proposed simply to point out the achievements and defects of the PWA 1973. The issues will be discussed fully in Chapters Six and Seven and proposals for reform will be made in Chapter Eight.

146. H.C. Debates, Vol. 129, Col. 155. This has been the stated government policy since, at least, 1979: see DTI, Historic Wrecks: The Role of the Department of Trade (1979).

147. An eighteenth century British warship, which sank in the Solent in 1758.

148. Since the vessel was a British warship, a large number of the artefacts belonged to the Crown and were returned to the licensee in lieu of salvage. The remaining items, as unclaimed wreck, were sold to the licensee by the receiver.

149. The Advisory Committee apparently did not believe that this was within its power: see C.5., above.

150. Letter dated 15 August 1988 from P. Channon, then Secretary of State for Transport, to Cranley Onslow M.P.

151. See "Invincible relics sale deplored", The Independent, 10 March 1988. The Director of the Council for British Archaeology called upon the government "as a matter of urgency" to review the legislation and the resources it makes available for scientific investigation of historic wrecks. However, for an alternative view, see K. McDonald, "Yippee! Here Comes The Loot (Or: I say, here are some interesting archaeological artefacts)", Diver, May 1988, p.15.

152. MSA 1894 s.525. See Chapter Two, A.3., above.

153. This is evident in other ways also, see Chapter Two, C.1(d) above.

154. See further, Chapter Seven, A.1(a) below.

155. See further, Chapter Six, A.1., below.

156. See further, Chapter Six, A.4., and Chapter Seven, B., below.

157. See further, Chapter Six, B.1., below.

158. On training and the utilisation of amateur divers, see Chapter Six, B.2., below.

159. See D. Marsh, M. Read, Private Members' Bills (1988), p.20. A Private Member may not propose a Bill the main object of which is the creation of a charge on the public revenue; where a Private Member's Bill proposes charges on the revenue which are incidental to its main object, a financial resolution moved by a Minister is required before the financial clauses can be considered in committee: ibid.

160. D. Marsh, M. Read, op. cit. and C. Boulton (ed.), Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliamentary Practice (21st edn., 1989) are unable to provide an answer to this question.

161. For a copy of the Act, see Appendix 2B.

162. H.C. Debates, Vol.90, Col.1227 (1985-86).

163. A major controversy was caused during salvage of the vessel, which sank in 1942, when divers reportedly showed a lack of respect for remains, for example by putting chemical lights in skulls to startle other divers: The Sunday Times, 18 October 1981.

164. The Ardent and the Antelope lie in Falkland Islands territorial waters: H.C. Debates, Vol.90, Col.1232 (1985-86). Under s.10(4) of the PMRA 1986, it would be possible to extend the provisions of the Act by Order in Council to any colony, including the Falkland Islands. The Coventry, Sheffield, Atlantic Conveyor, RFA Sir Galahad and a Sea King helicopter were lost in international waters (H.C. Debates, Vol.90, Col.1232 (1985-86)) and could receive protection under the Act (see E.1., below) without the need for extension of its provisions.

165. John Lee M.P., Parliamentary Under-Secretary of State for Defence Procurement: H.C. Debates, Vol.90, Col.1232 (1985-86).

166. H.C. Debates, Vol.90, Col.1233 (1985-86). Permission had been given to the consortium by the MOD in previous years.

167. Ibid.

168. Prior to 1986 it was often said that a ship sunk in war-time was a war grave (see, e.g., B. Penrose, op. cit., p.86, stating that HMS Edinburgh had been designated an official war grave in 1957). Before 1986 such statements had to be treated with scepticism as the term did not have any formal significance or legal basis: see the statement by John Lee M.P., Parliamentary Under-Secretary of State for Defence Procurement, in the Parliamentary Debates on the PMRA 1986, H.C. Debates, Vol.90, Col.1230 (1985-86). Government departments may have used the expression to deter unwanted diving activities.

169. See F., below.

170. I.e. "in service with, or being used for the purposes of, any of the armed forces" of the UK or any other country or territory: PMRA 1986 s.9(2). Such vessels could therefore include Royal Fleet Auxiliary vessels and merchant vessels requisitioned or chartered in support of the armed forces.

171. See PMRA 1986 s.3(1). For the jurisdictional basis in international law of these provisions, see Chapter Four, C.1(b) below.

172. s.1(2)(a).

173. s.1(6).

174. s.1(3)(a). It is possible under the Act for the Secretary of State to substitute a later date: see s.1(8).

175. s.1(6).

176. s.2(1)(b).

177. s.2(4). Licences may be issued under s.4, see (c) below.

178. s.2(2).

179. s.2(3).

180. s.2(1)(c).

181. s.2(1)(d).

182. See B., above.

183. "We would certainly wish to deter people from meddling inside an aircraft or vessel which contains the bodies of its crew, but not to prevent a diver from simply standing amid the scattered wreckage of a vessel on the seabed": per Lord Trefgarne, Minister of State for Defence Support, H.L. Debates, Vol.475, Col.822 (1985-86).

184. s.2(3)(c).

185. John Lee M.P., Parliamentary Under-Secretary of State for Defence Procurement, gave an assurance in Parliament that authority to dive would not be "withheld unreasonably from genuine scientific and archaeological research groups": H.C. Debates, Vol.90, Col.1233 (1985-86).

186. See thesis Introduction.

187. See further, B., above.

188. s.2(6). Cf. the defences under the PWA 1973 s.3(3): see B., above.

189. I.e. £2,000: Level 5 on the standard scale under the Criminal Penalties etc. (Increase) Order 1984 (SI 1984, No.447).

190. The penalties are the same as those under the PWA 1973, see B., above.

191. s.1(4).

192. s.1(7).

193. H.L. Debates, Vol.475, Col.778 (1985-86).

194. Ibid.

195. s.1(5). Cf. the wording of the PWA 1973 s.1(2)(b) in this respect.

196. s.1(5).

197. H.C. Debates, Vol.90, Col.1228 (1985-86).

198. s.2(3)(a).

199. PWA 1973 s.1(3)(b). See further, C.6., above.

200. See C.7., above.

201. s.2(6).

202. See C.5., above.

203. s.4(2). Such licences may be contained in an order designating a controlled site: s.4(2). At the time of the Parliamentary Debates it was apparently intended that a general licence would protect fishermen from prosecution, provided they used reasonable care: H.C. Debates, Vol.100, Col. 1301 (1985-86). There is no facility under the PWA 1973 to grant licences to a class of persons, but such a facility might be useful, e.g. to protect fishermen provided they had used reasonable care.

204. s.4(3).

205. s.4(4).

206. s.4(6).

207. See further, Chapter One, A.1(c) above.

208. See further, Chapter One, A.1(c) above.

209. See further, Chapter One, C., above.

210. See H.L. Debates, Vol.475, Col.784 (1985-86). On the duty to report under the MSA 1894, see Chapter Two, A.3., above.

211. See H.L. Debates, Vol.475, Col.784 (1985-86). See also, Chapter One, C.4., above, regarding salvage contracts generally.

212. Roger Freeman M.P., Parliamentary Under-Secretary of State for the Armed Forces: H.C. Debates, Vol.100, Col.1300 (1985-86).

213. PMRA 1986 s.6.

214. s.6(1).

215. s.6(3).

216. s.6(4).

217. s.6(6).

218. See C.6., above.

219. For a discussion of the rights of relatives and personal representatives to human remains and personal possessions, see Chapter One, A.1(d) above.

220. s.9(1).

221. See s.4(3).

222. This fact was acknowledged in the Parliamentary Debates, see H.C. Debates, Vol.90, Cols.1227-8 (1985-86).

223. As suggested by Michael Mates M.P.: H.C. Debates, Vol.90, Col.1227 (1985-86). The reason why the Act was not limited to vessels and aircraft lost in time of war appears to have been the difficulty a potential offender would have of knowing whether or not a crash or sinking happened in wartime: see H.C. Debates, Vol.90, Cols. 1227-8 (1985-86).

224. For a critical review of the Act, see J. Gibson, "Protection of Military Remains Act 1986" (1987) 2 IJECL 182.

225. The only Statutory Instrument issued under the Act is the Protection of Military Remains Act 1986 (Guernsey) Order 1987 (SI 1987, No.1281) which extends the Act's provisions to the Bailiwick of Guernsey and territorial waters adjacent thereto (subject to certain exceptions and modifications).

226. See H.C. Debates, Vol.90, Col.1230. In fact, in the Parliamentary Debates there was a suggestion that this was a government bill in all but name: see H.C. Debates, Vol.100, Col.1292. See also Marsh and Read, op. cit., Chap.3, regarding the relationship between government and Private Members' Bills.

227. One reason why these wrecks may not have been designated under the PMRA 1986 is that, in the mid-1970s, interest was shown in them by

Japanese salvage companies (H.C. Debates, Vol.90, Col.1232 (1985-86)) but in international waters it would not be possible to enforce any designations under the Act against foreign salvage ships or personnel.

228. In fact this vessel already receives protection from unauthorised diving under an Orkney Council bylaw: see H.C. Debates, Vol.90, Cols.1231-2 (1985-86). See also C.6., above.

229. Gibson states that the majority of military wrecks are situated outside territorial waters: "Protection of Military Remains Act 1986" op. cit., p.184.

230. See 1(a) above.

231. H.L. Debates, Vol.475, Col.784 (1985-86).

232. H.C. Debates, Vol.100, Col.1302 (1985-86).

233. e.g. in respect of HMS Edinburgh or HMS Hampshire.

234. See, e.g., P. Marsden, The Historic Shipwrecks of South-east England, op. cit. See further, Chapter Six, A.1(c) below. In introducing the Bill, Michael Mates M.P. commented on the fact that there had been an upsurge in "aircraft archaeology": H.C. Debates, Vol.90, Col.1227.

235. Although the designation order was revoked after the site was worked out: Gaskell, et al., op. cit., p.469. The vessel sank with Sir William Hamilton's collection of Greek and Roman antiquities on board: ibid., at p.469.

236. The relationship between age and historical importance is discussed further in Chapter Six, A.1(c) below.

237. See s.2(9).

238. Aircraft may be scheduled under the Ancient Monuments and Archaeological Areas Act 1979 (AMA 1979) (s.61(7)(c)). However, the provision (in the AMA 1979 s.53) for scheduling in UK territorial waters has never been activated: see further, Chapter Seven, A.1(a) below.

239. The Times, 12 March 1990.

240. Ibid.

241. Protection in this respect is only provided against the activities of British nationals and those on board British-controlled ships.

242. See E.2., above.

243. See further, Chapter Two, A.2., and A.3., above.

244. By Ian Mikardo M.P., see H.C. Debates, Vol.100, Col.1290 (1985-86).

245. H.C. Debates, Vol.100, Col.1301 (1985-86).

246. The Iona II, a passenger ferry lost off the island of Lundy: for details, see Chapter Six, A.1(c) below.

247. PWA 1973 s.1(1): see further, B., above.

248. In the Parliamentary Debates, John Lee M.P., Parliamentary Under-Secretary of State for Defence Procurement, emphasised that the government had no intention of restricting diving activities on these vessels, after concern was expressed about the potential loss of the

revenue brought into Orkney and Shetland by visitors to these wrecks: see H.C. Debates, Vol.90, Cols.1232 and 1229.

249. Cf. the AMA 1979, s.61(8)(b): see further, Chapter Seven, A.1(a) below.

250. John Lee M.P., H.C. Debates, Vol.90, Col.1233 (1985-86).

251. For the writer's proposals for administrative and legislative changes to the PWA 1973, see generally Chapter Eight.

252. For the writer's specific proposals for reform, see Chapter Eight, A.3(b) and B.3(b) below.

PART II: DEVELOPMENTS FOR CHANGE

CHAPTER FOUR: EUROPEAN & INTERNATIONAL DEVELOPMENTS

INTRODUCTION

Over the course of the last 15 years, bodies at both a European and international level have been taking an interest in the protection of the underwater cultural heritage. This interest has resulted in a number of important initiatives. The purpose of this chapter is to outline these developments and to consider their application to the situation in the UK.

A. COUNCIL OF EUROPE RECOMMENDATION 848 (1978)[1]

1. Background

In January 1977, in the course of a debate on progress at the Third UN Conference on the Law of the Sea (UNCLOS III) (which eventually produced the UN Convention on the Law of the Sea 1982[2]), the Parliamentary Assembly of the Council of Europe came to the conclusion that it needed to address in detail the subject of the underwater cultural heritage.[3] The Assembly recognised that the UN Conference was deeply embroiled with issues of a strategic and economic nature and that its treatment of the underwater cultural heritage, although itself a relatively uncontroversial field, was likely to be - as a result of these concerns - only general and superficial. Also, for a number of reasons, progress at UNCLOS III was being delayed. It was felt, therefore, that much ground could be gained at a European level and that such progress might eventually form the basis of wider

international agreement.[4] Although it was acknowledged that there were differences between, for example, the Mediterranean, and North and Baltic Seas, it was felt that in general the experiences and interests of most European states were sufficiently similar "to suggest that recommendations for action in the member states of the Council of Europe may meet with some success".[5] The Council's Committee on Culture and Education therefore established a sub committee to examine the topic and prepare a report.[6] The report was presented to the Parliamentary Assembly of the Council of Europe in October 1978.[7] It included a Recommendation, known as Recommendation 848, for a scheme of protection of the underwater cultural heritage of Europe[8] and this Recommendation was adopted by the Assembly.[9]

In adopting Recommendation 848, the Assembly agreed to take two important steps:-

(i) to recommend that the Committee of Ministers draw up a European convention on the protection of the underwater cultural heritage;[10]

(ii) to urge member governments to revise where necessary their existing legislation in order to comply with certain <u>minimum</u> requirements laid out in the annex to the Recommendation.

2. <u>Minimum Requirements</u>

The minimum requirements laid down in Recommendation 848 to be fulfilled by the legislation of Member States were as follows:-

(i) *The definition of "underwater" heritage should extend up to what is covered by land antiquities legislation, so that there are no gaps in what is protected.*[11] This Recommendation was designed to include remains found in the non-tidal parts of rivers and in inland lakes, and also remains "partially or totally or regularly (by tidal movements) submerged in water."[12] The UK PWA 1973

provides for the designation of certain wreck sites in tidal waters.[13] It does not provide for the designation of non-wreck sites, nor for the designation of sites in non-tidal waters. Nonetheless, all types of underwater site, whether in inland or territorial waters, may be scheduled under the Ancient Monuments and Archaeological Areas Act 1979 (AMA 1979) (so long as not already designated under the PWA 1973). However, the provision for scheduling in territorial waters is not in practice used, perhaps because of concern that its use would cause a jurisdictional conflict with the PWA 1973.[14] This means that in reality marine archaeological remains other than wrecks do not receive legal protection in the UK. In any event, it is arguable that all underwater sites should be protected by the same legislative scheme because of their commonalities.[15]

(ii) *Protection should cover all objects that have been for more than 100 years beneath the water, but with the possibility of discretionary exclusion of less important objects once they have been properly studied and recorded, and the inclusion of historically or artistically significant objects of more recent date.* This proposal for blanket designation has the great merit of flexibility, but there are drawbacks to such blanket protection which will be considered later.[16] It is certainly in contrast to the site-specific designation system currently administered by the UK. Furthermore, the number of sites designated under the PWA 1973 is only a tiny proportion of the historic wreck sites that are known to exist in UK territorial waters.[17]

(iii) *Individual, and apparently isolated, underwater objects should be protected to the same extent as wreck sites.* Clearly it would be impracticable to require that finders leave individual historic objects unconnected with a particular wreck site on the seabed

to await recovery by licensees because of the difficulties of identification and relocation. It can only be presumed, therefore, that this recommendation does not mean that isolated finds should be treated in the same way as wreck sites, but simply that they should be afforded commensurate protection. A system which requires the obligatory reporting of all recoveries seems to be the most appropriate way to deal with such items. Its effectiveness, however, is dependent upon its encouragement and enforcement.[18] In the UK there is a legal obligation to report finds under the MSA 1894, but enforcement of the obligation has been a problem.[19] Also the present system in the UK provides no protection for such items once brought ashore.[20]

(iv) *National jurisdiction in respect of underwater cultural heritage should be extended to a 200 mile limit, with an international agreement providing for reciprocal treatment of cultural goods landed in countries other than those in whose cultural zone they were found.* The Roper Report suggested that such a proposal could be adopted through a European convention on the underwater heritage.[21] The recommendation for an extension of national jurisdiction to control activities threatening the underwater cultural heritage to 200 miles is analogous with the Exclusive Economic Zone (EEZ) established by the Law of the Sea Convention 1982.[22] It was felt that if such a "cultural protection zone" was widely adopted by European states, it would form the basis of an international custom and would therefore become valid in international law.[23] Wrecks on the deep seabed are likely to be extremely well preserved because of the virtual absence of oxygen and therefore, with recent developments in deep sea recovery, the need for protection of wrecks beyond the 12 mile limit is increasing rapidly.[24] Some states have already unilaterally extended their cultural

protection regimes beyond the 12 mile limit,[25] but the UK has not yet done so.

(v) *Existing salvage and wreck law should not apply to any items protected under (b) and (d) above.* At present, by virtue of the MSA 1894, salvage and wreck law applies to all items brought ashore in the UK including those brought ashore from sites designated under the PWA 1973.[26]

(vi) *Reporting of finds to appropriate authorities should be compulsory.* In the UK the MSA 1894 s.518 imposes a duty upon finders to report wreck recoveries to a receiver of wreck. At present the receiver of wreck will usually be an officer of HM Customs and Excise, although from 1 January 1993 it is likely to be an official at the DTp.[27] Such persons are clearly not "appropriate authorities" because they have no archaeological expertise and therefore will not necessarily be able to identify material of archaeological significance. A local museum or County Sites and Monuments Officer would undoubtedly be a more "appropriate authority".[28] In the UK there is no provision for the reporting of sites, or material left underwater, or material that is not wreck.

(vii) *A single authority should be given primary responsibility for dealing with both land and underwater finds and determining their significance.* This is certainly not the case at present in the UK. In fact there is no system in the UK for the reporting of archaeological finds from land sites. A proposal in 1988 that there should be such a system was vetoed by the government who felt that public interest in such finds was not sufficiently great to warrant a compulsory reporting system.[29] Even though there is a system for reporting the recovery of wreck, it is not

concerned with determining the cultural significance of the finds, but only with establishing entitlement.

(viii) *A standard system of fixed finder's monetary reward should be established, related to each identification of an object or site and not necessarily linked to the commercial value of the find. It should differentiate between an individual object and a site, and be heavily weighted in favour of the latter.* At present a salvage reward is paid to the finder of wreck brought ashore in the UK by virtue of the MSA 1894. The very nature of a salvage reward is such that it is assessed as a percentage of the commercial value of the find. No payment of any kind is made for the reporting of a site, and if the reporting of an object leads to the discovery of a site, this makes no difference to the reward paid.[30]

(ix) *Provision should be made for appropriate enforcement measures.* This is a very vague recommendation. It does not give any indication as to what sort of enforcement measures would be regarded as "appropriate". Despite this, it is clear that the UK would not be able to comply with the Recommendation because it does not have <u>any</u> scheme of enforcement of restricted areas under the PWA 1973 and of the reporting scheme under the MSA 1894. The only method of enforcement of designations is the watchful eye of licensees, the ADU[31] and the goodwill of others who spend time at sea or near the coast. Enforcement of the reporting system is non-existent and this actually appears to be an unstated policy of the DTp.[32]

There is no doubt that the present legal regime in the UK falls considerably short of these "minimum" requirements and would need to be thoroughly overhauled to comply with them.

B. COUNCIL OF EUROPE DRAFT CONVENTION ON THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE 1985

1. Background

As already noted,[33] in 1978 the Parliamentary Assembly of the Council of Europe recommended that the Committee of Ministers draw up a European convention on the underwater cultural heritage. The Assembly proposed that the convention be open to all Member States of the Council of Europe and also to all non-Member States "bordering on seas in the European area".[34] This would include, e.g. the North African and Levantine states in order to ensure better coverage of the Mediterranean.[35] At its fifth meeting at deputies level in 1979, the Committee of Ministers decided to set up an Ad Hoc Committee of Experts on the Underwater Cultural Heritage, its remit being to draft such a convention.

A draft Convention and Explanatory Report were finalised in March 1985 and submitted to the Committee of Ministers for approval. Unfortunately, a dispute arose between Turkey and Greece concerning the territorial scope of application of the Convention[36] and it appears that this dispute has still not been settled, nor is an agreement foreseeable.[37] Until the dispute is resolved, the Committee of Ministers cannot sign the Convention. As the draft has not yet been approved by the Committee of Ministers, the final text of the Convention and all related documents remain confidential and consequently not available to the public. Nonetheless, an early version of the draft, which does not necessarily correspond to the actual state of the draft as it was left pending, was declassified to allow for consultation by interested parties.[38] It is this version which will be used here for purposes of discussion and analysis. Comparisons will be drawn with Recommendation 848 and with present UK law and practice.

2. Provisions of the 1985 Draft Convention

There are 15 articles in the draft Convention of a permissive or mandatory nature, which establish a protective regime for the underwater cultural heritage. Provision is then made, in Articles 16 and 17, for the establishment of a Standing Committee comprising representatives of each Contracting State.[39] The Standing Committee's terms of reference would include keeping under review the implementation of the provisions of the Convention and making recommendations concerning the protection of the underwater cultural heritage, the development of particular aspects of the Convention or the improvement of its effectiveness.

Article 18 has been left blank in the declassified version of the draft. Apparently[40] it was meant to contain provisions on the settlement of disputes arising from the implementation of the Convention. However, for some unknown reason the Ad Hoc Committee of Experts later decided not to include in the Convention any provisions on the settlement of disputes, which may be seen as a substantial defect in the Convention.[41] There follows a discussion of the substantive provisions of the Convention.

(a) Scope of protective regime

Article 1 describes the property which the Convention aims to protect. This is "underwater cultural property" being at least 100 years old. Also, Contracting States may provide that such property which is less than 100 years old may enjoy the same protection. This they may do by either designating for protection certain specific wrecks which are less than 100 years old, or by laying down a lower age limit.

The definition of "underwater cultural property" given in Article 1(1) appears to be all-embracing. It includes remains found in all bodies of water, fresh or saline, in other words lakes, rivers, canals etc., as well as the sea. It also includes "periodically flooded areas" which presumably would include river banks and river flood plains.[42] In drafting this definition the issue of private ownership of fresh waters, e.g. rivers and lakes, was considered, but it was felt that there would be no conflict between the Convention and such private ownership since the Convention does not deal with the issue of ownership of cultural property.[43] The definition is also comprehensive in that it includes "all remains and objects and any other traces of human existence" and therefore does not simply cover shipwrecks and their contents. The Convention therefore provides protection for isolated objects and inundated man-made structures, e.g. the ancient fish traps discovered in September 1992 off the Essex coast and the medieval city of Dunwich in Suffolk.[44] The expression "any other traces" was apparently[45] also intended to include geographical features of historical significance. This presumably would include submerged landscapes such as the palaeo-valleys which exist in the Solent and English Channel, which hold remains of the palaeolithic hunters and animals that inhabited this area when it was dry land.[46] Archaeologists have always argued that protective legislation should include all archaeological remains and not just wrecks, and would almost certainly approve of this aspect of the definition.

As well as covering remains which are entirely underwater, the Convention also covers those which are partly or sometimes underwater, objects washed ashore and objects recovered and brought ashore. So a wreck such as the Amsterdam, which lies on the foreshore at Hastings and which is covered with water only at high tide would receive protection, as would the Grace Dieu, which lies in mudflats on the River Hamble and which is exposed at low tide.

The general protection the draft Convention provides would be afforded to all human remains over 100 years old and it is therefore a form of blanket protection, rather than protection given only to certain specified remains. However, the definition of "underwater cultural property" also provides some flexibility to include property less than 100 years old. This is commendable as many historians would admit that there are remains of historical interest which are less than 100 years old. The formula is similar to that in the minimum requirements of Recommendation 848, except that for some reason the draft Convention does not include the possibility of discretionary exclusion of less important objects and yet such a provision might help to placate salvage and insurance interests.[47]

The extent of the protective legal framework in the UK falls well short of that laid down in this article. The PWA 1973 provides protection to only a handful of specific sites, 37 at present. Not only does the PWA 1973 apply only to a few designated sites, but also the sites must be sites of wrecked vessels.[48] Although the AMA 1979 s.53 provides protection for marine monuments by scheduling, and this would include submerged structures other than wrecks, this provision has never been used.[49] However, it does exist and could be activated. Furthermore and very importantly, in the UK there is no specific legal protection for objects recovered and brought ashore.

Article 2 defines the geographical scope of application of the Convention, i.e. the "area" over which Contracting States may exercise jurisdiction in respect of the protection of underwater cultural property.[50] Paragraphs (2) and (3) are the key provisions. States will obviously be able to exercise jurisdiction over their 12 mile territorial sea, but paragraphs (2) and (3) effectively extend coastal States' jurisdiction out to 24 nautical miles, in other words over the contiguous zone as envisaged by the 1982 Law of the Sea Convention.[51]

In this area, a State may exercise the control necessary to prevent and punish infringement within its territory or territorial sea of its underwater cultural property laws. In this respect a State may presume that removal of underwater cultural property from the seabed in the contiguous zone without its approval would constitute such an infringement.

This is a controversial provision[52] which appears to be based on Article 303(2) of the 1982 Law of the Sea Convention.[53] This provides that, in order to control traffic in objects of an archaeological and historical nature found at sea, a coastal state may "presume that their removal from the seabed" in the contiguous zone without its approval "would result in an infringement within its territory or territorial sea" of customs, fiscal, immigration and sanitary laws and regulations. This is a legal fiction which would effectively authorise coastal states to exercise jurisdiction, control and powers of punishment within the contiguous zone, without formally recognising an extension of the 12 mile territorial limit.[54] The provision in the draft European Convention differs, however, from Article 303(2) in that its applies to infringement of the cultural property laws of the state, rather than of the customs, fiscal, immigration and sanitary laws and regulations. In this respect, it is likely to prove more effective because it would apply to simple interference with a site, as well as the landing of material.[55]

In respect of its geographical scope of application, the draft Convention does not go as far as Recommendation 848 which, in its minimum guidelines, recommended the establishment of a 200 nautical mile cultural protection zone. Instead, the 24 nautical miles limit is a compromise solution, i.e. the limit that received the widest approval of the Ad Hoc Committee of Experts. This may have been because this limit is in line with Article 303(2) of the 1982 Law of the Sea Convention. Another limit for the protective regime which undoubtedly must have

been considered is the outer extent of the continental shelf. A number of countries have already extended their jurisdiction in respect of underwater cultural property to the continental shelf.[56] A limit of 24 nautical miles is certainly preferable to a 12 mile limit. Important archaeological remains are known to lie in waters beyond the 12 mile territorial limit, so the further out protection extends the better, especially in light of the very general nature of the provisions in the 1982 Law of the Sea Convention.[57] However, it is arguable that, geographically, the continental shelf would have been more appropriate, since it is this zone which is likely to be accessible because it is not too deep for conventional diving techniques. In some parts of the world, the continental shelf extends far further out than the 24 mile limit. Diving technology is improving steadily and remains in deeper and deeper waters are becoming accessible. UK legislation at present extends only to the 12 mile territorial limit.

(b) Ownership rights

Article 2(7) states that "[n]othing in this Convention affects the rights of identifiable owners, the law of salvage or other rules of maritime law, or laws and practices with respect to cultural exchanges".[58] This provision, based on the same formula as Article 303(3) of the 1982 Law of the Sea Convention, is quietly tucked away in the middle of Article 2[59] and yet it reveals the limited scope of the Convention. In 1978 Prott and O'Keefe, in a report to the Council of Europe's Committee on Culture and Education[60] recommended that the Convention include a provision vesting in the coastal State title to all items of cultural property which had been underwater for more than 100 years. It may be that this recommendation was not adopted because of fears that vesting title in states could conflict with some states' constitutional provisions relating to compensation for confiscation of property, or that - in assuming title - states might become responsible

for the liabilities of ownership, e.g. liability for causing a navigational hazard or damage to fishing nets, etc.

A significant criticism of the draft Convention is that it ignores the ownership issue. It is clear that the Ad Hoc Committee of Experts did not want to get embroiled in difficulties arising from the domestic law of Contracting States, and in any event this may have been unnecessary. In the UK, although rights of original owners and their successors are recognised and upheld by the MSA 1894, in practice very few claims to historic wreck are actually made and, where they are made, they are almost invariably made by other states. Claims such as these can be dealt with by agreements such as that between the Netherlands and Australia concerning Dutch East Indiamen and the agreement between France and the USA concerning the protection and study of the Confederate raider, CSS Alabama.[61] In fact, such agreements are actively encouraged by this Convention.[62] It is however true that delays caused by allowing an ownership claim period, and by negotiations leading up to inter-state agreements, may result in uncertainty and neglect of artefacts recovered. Certainly, the one-year ownership claim period under the MSA 1894 has been criticised in this respect.[63] Nonetheless, a claim period could be shortened to, say, three or six months without any significant interference with ownership rights. The maintenance of the rights of identifiable owners by the Convention, although perhaps a cowardly evasion, may not in fact make any enormous difference to the protection afforded to underwater cultural property. However, with the provision for inter-state co-operation, there does not really seem to be a good reason for not cutting off ownership claims after 100 years. It is perhaps a pity that the Convention did not lay down any principles for dealing with the abandonment issue.[64]

(c) Salvage

The provision in Article 2(7) that "Nothing in this Convention affects...the law of salvage..." is a considerable disappointment. It does nothing to take cultural property out of the ordinary salvage law regime, even though the protective regime only applies in general to property over 100 years old. One would have thought that this could have been treated as a cut-off point for the application of salvage law. However, it is likely that salvage interests would argue that there may be commercial interests in vessels and more particularly cargoes dating before this time.[65] Sadly, the draft Convention does not follow the minimum requirements of Recommendation 848 which stated that existing salvage and wreck law should not apply to protected items. However, under the 1989 International Convention on Salvage it is possible for Contracting States to make a reservation in respect of "maritime cultural property of prehistoric, archaeological or historic interest" situated on the seabed.[66] Therefore, it would be possible under that Convention to take underwater cultural property out of the salvage law regime. The UK has not yet ratified the 1989 Convention, but it seems likely that it will do so in due course and it is to be hoped that it will make a reservation in this respect. This would then give it the flexibility to decide whether to keep such property within the salvage law regime, or to take it out. The 1989 Convention to some extent remedies the defect in the draft European Convention, but nonetheless it would be pleasing to see a convention purporting to give protection to underwater cultural property resisting the pressure to give precedence to commercial interests.

The preservation of salvage law means that the drafters managed to avoid another thorny but crucially important issue: that of finders' rights and rewards.[67] While salvage law applies, it provides an incentive for finds to be reported. If cultural property was taken out

of the salvage law regime, most finds would not be reported unless finders believed they would be rewarded in some way. Nonetheless, a reporting system which is abided by is fundamental to any protective regime. One of the minimum requirements of Recommendation 848 was that a system of fixed finders' monetary rewards should be established. Clearly this would be a difficult provision to include in an international convention because many governments (including that in the UK) would be politically adverse to paying such rewards, and the question would then be, who else would - or could - pay. Despite these problems, salvage law and its commercially-orientated outlook is completely inappropriate in a convention specifically designed to protect the underwater cultural heritage.

(d) Operations on protected underwater cultural property

As we have already seen, Article 2 provides that removal of underwater cultural property from the seabed in the contiguous zone without approval would constitute infringement. Such approval may be obtained by virtue of Article 5 which gives Contracting States discretion to provide authorisations to carry out operations on protected underwater cultural property to competent persons using proper equipment. According to the Explanatory Report to the draft Convention, such authorisations can be issued in the contiguous zone, as well as in territorial waters.

Under the PWA 1973 licences can be granted by the Secretary of State to persons who appear "to be competent, and properly equipped" to carry out "salvage operations" appropriate to the historical, archaeological or artistic importance of the wreck. Under the PWA 1973 licences may also be granted to persons who have "any other legitimate reason" for interfering with the wreck. This last provision would probably not be contrary to Article 5 because it relates to people who

might inadvertently interfere with a wreck, e.g. fishermen and salvors of another vessel, and not to people who actually wish to carry out operations on the designated wreck. Article 5 would certainly emphasise the requirement in the PWA 1973 that licensees be "competent and properly equipped" and perhaps would encourage the UK's Advisory Committee on Historic Wreck Sites to raise its standards in this respect.[68]

(e) Publication of survey and excavation work

Article 8 simply endeavours to encourage publication of research work in appropriate publications, at the same time bearing in mind the need to exclude risk of premature publicity. The Explanatory Report draws attention to the fact that protection of the discovery may be attained simply by keeping secret the precise location of the find, and not details of the find itself. In the UK there has been criticism that research work on designated sites is not being published, although it appears that encouragement is being given to licensees to do so.[69]

(f) Reporting and recording

States contracting to the Convention would make a fundamental undertaking by virtue of Article 3 to protect underwater cultural property both in situ and after recovery. In order to conform with the latter provision, the UK would almost certainly have to amend, or replace, the MSA 1894 provisions relating to the disposal of property.

Article 6 is interesting in that it provides that Contracting States shall require that all discoveries of underwater cultural property (whether or not over 100 years old) be reported, whether the property has been brought ashore or not. At present in the UK, there is a duty only to report wreck brought ashore. There is no duty to

report wreck found in territorial waters but taken ashore elsewhere, or to report finds that are not wreck. Article 6 also lays down a meritorious principle that discoverers of underwater cultural property leave the property in situ rather than recovering it. The Explanatory Report states that this principle may only be departed from for "serious reasons". This exception may, for example, apply where an isolated object on the seabed may not be found again if it is left in situ, or where the material is threatened, for example by commercial operations of some sort or by natural causes like shifting sands, and there is no time to obtain authority to undertake rescue archaeology. Article 6 also provides that: "In the case of accidental recovery, Contracting States shall require that discoverers limit themselves to taking the necessary measures for temporary protection." The Explanatory Report states that accidental recovery might include recovery through fishing activities and, if this is the case, it would presumably include dredging activities also. However, the precise meaning of this provision is rather puzzling: it almost seems to suggest that discoverers take the minimum amount of care of items recovered. Finally in relation to Article 6, the Explanatory Report points out that there is nothing in this article which prevents Contracting States from offering a reward to discoverers, or taking other measures to encourage reporting. Presumably, such other measures might include strict enforcement of the duty to notify and severe penalties for infringement.

Article 15 provides that a Contracting State may require its nationals to report any discovery of underwater cultural property "outside the jurisdiction of any State". The purpose of this article, according to the Explanatory Report, is to increase the availability of information on discoveries of underwater cultural property. Presumably such information would then be added to the register to be established under Article 7.[70] Article 15 suggestively states that "[t]his could be

a first step towards the protection of such property." Under the MSA 1894, all wreck brought ashore must be reported, even if found outside territorial waters.[71]

A "full recording" of finds would have to be made, according to Article 3, and this provision recognises the emphasis placed by archaeologists on the recording of information. At present in the UK, excavations of designated sites and finds from such sites must be recorded as a condition of obtaining a licence under the PWA 1973. However, there is no requirement for a record to be made of excavations of non-designated sites, of individual objects brought ashore from such sites, or of isolated finds. Even if there was such a requirement, in many cases there would be no-one available who would be qualified to make such a record. However, under the MSA 1894 reporting system, it might be relatively easy to design a reporting form for the recording of important information about the find, although under the present system and under proposals for its reform, it is unclear who would be qualified to record this information.[72]

(g) Registration of sites

A valuable provision in the draft Convention is Article 7, which provides for the registration of underwater cultural property. Registration is increasingly being seen as a key to a successful protection policy because, without knowing what cultural resources are available, it is difficult to allocate what may well be scarce protective, recovery and conservation facilities.[73] Article 7 provides for registration of property that has been discovered[74] and also property which can be presumed to exist because of historical records. In the UK the Royal Commission on the Historical Monuments of England (RCHME) and its equivalents in Scotland and Wales launched a National Record for Maritime Sites in June 1992.[75] This record is based on a mixture of

historical evidence and discovery, although there is no formal link with the reporting mechanism under the MSA 1894. Obviously it will need to be expanded to include other cultural property as well, but is a step in the right direction. Article 7 tries to balance the need for confidentiality in some cases in order to prevent illicit interference with a site, with the need for freedom of public information and attaining such a balance has been a matter of concern to those involved in establishing the UK's Record for Maritime Sites.[76]

(h) Conservation, research and display

The Explanatory Report to the draft Convention states that Article 3 lays down the principle that all recovered underwater cultural property shall be conserved, "regardless of the time and circumstances of its recovery". What Article 3(2) actually states is that "Contracting States shall ensure that all appropriate measures are taken to protect and conserve recovered underwater cultural property". Obviously, this is easier said than done with current pressure on conservation resources. However, the provision suggests that items should not be recovered until conservation facilities are available. This would support an argument for the mothballing of sites until such time as resources are available to adequately excavate and conserve materials.[77] In the UK, it is a condition of licences under the PWA 1973 that appropriate conservation facilities are available for material brought ashore. Nonetheless, there is clearly pressure on the limited facilities that are available.[78]

Article 10(1) reiterates that Contracting States shall take appropriate measures to ensure that recovered underwater cultural property is conserved. The conservation conditions should facilitate study, according to the Explanatory Report, even in the period between excavation and deposition in a museum. Also, a suitable selection of

artefacts and other material should be put on display to the public. However, these requirements are subject to several reservations. First, a Contracting State need only comply with this paragraph "to the extent permitted by its domestic legislation". According to the Explanatory Report, this covers situations where, for example, the rights of private property inhibit the application of these provisions. This appears to mean that if private owners do not wish to put their property on display to the public or make it available for research, then their wishes may be observed. A second reservation has been made in order to safeguard the "traditional right" of the chief archaeologist on an excavation to have priority in publishing the results obtained. The third reservation relates to the archaeological principle of "association of finds". This means that, as far as possible, finds recovered during the same excavation should be kept together. Presumably, "respecting" this principle, as required by Article 10(1), means that finds from the same site should not be split up in order to be made available to researchers and to the public, or that any fragmentation should be done along similar lines to that provided for in the Australia/Netherlands Agreement.[79]

Article 10(2) imposes a more general duty on Contracting States to "promote the appreciation of the underwater cultural heritage and the awareness of the need to protect it". States have discretion in this respect but, in particular, are encouraged to promote collaboration among diving associations, qualified archaeologists and cultural bodies to further these objectives. Obviously the encouragement of museums and exhibitions on the underwater cultural heritage would help to fulfil this duty. According to the Explanatory Report, one measure to promote these objectives might be some kind of <u>access</u> to certain underwater sites. In certain parts of the world, e.g. Israel and Florida, underwater theme parks have been developed, and this is a notion that is being actively considered by certain bodies in the UK, notably English Nature,

the nature conservation arm of the UK government, and the Marine Conservation Society.[80] Areas around the Scilly Isles and the island of Lundy, off Cornwall, have been suggested as possible sites for such a park. However, in order to visit such a park, it would be necessary to be able to dive and obviously this requirement severely limits the number and type of people able to benefit from such an arrangement. Public education is being seen increasingly[81] as the key to enforcement of provisions for the protection of the underwater cultural heritage and this was apparently recognised by the drafters of the Convention in imposing a duty on Contracting States to encourage the process of such education.

(i) Education and training of divers

Article 4 recognises the importance of educating divers and others in the techniques of underwater archaeological investigation and in conservation techniques. It states that Contracting States may either provide instruction or encourage appropriate bodies to do so. The reform movement in the UK recognises the vital importance of education and training and the current lack of skilled underwater archaeologists and conservators.[82] Although it seems likely that the present UK government would prefer to encourage, rather than provide instruction itself, it is interesting to note that in 1991 the DOE provided funding for the appointment of a nautical archaeology training officer to develop courses run by the Nautical Archaeology Society. This was a surprising and welcome development, which already appears to be bearing fruit.[83] Article 7 seeks to foster the co-operation of divers and archaeologists in order to promote education and involvement. The co-operation of amateur divers in the protection of the underwater cultural heritage is seen by many to be another essential linchpin to a successful protection policy: Article 7 recognises this factor.[84]

(j) Inter-state co-operation

Article 9 provides that Contracting States "shall co-operate" in the protection of the underwater cultural heritage. It refers particularly to instances where another Contracting State may have a special interest in a discovery, perhaps for historical reasons.[85] Where this is the case, the Contracting State in whose "area"[86] the discovery was made must consider providing information and also collaboration in the actual excavation, conservation, study and cultural promotion of the discovery. The Agreement Between the Netherlands and Australia Concerning Old Dutch Shipwrecks provides the best example of such collaboration already happening.[87] Such agreements are highly desirable and the Convention can only be commended if it encourages further collaboration. In the past, the UK has recognised the ownership claims of foreign countries to certain wrecks, e.g. the claims of the Dutch government to the Dutch East Indiamen de Liefde and Amsterdam, and has informally collaborated in a similar way,[88] but has not yet been party to such a formal agreement.

Article 14 provides for co-operation between Contracting States to discover the identity of perpetrators of damage to underwater cultural property. The Explanatory Report to the draft Convention states that the main aim of this article is to give archaeological authorities in Contracting States the opportunity to gather information on damaged underwater cultural property. The facilitation of penal action against the perpetrators of damage is only a secondary aim of the provision.

(k) Illicit traffic in underwater cultural property

The Explanatory Report to the draft Convention states that international co-operation to control illicit traffic in underwater cultural property is one of the basic objectives of the Convention.

Provisions to deal with this issue are contained in Articles 11-13. Article 11 requires that each Contracting State "shall take all measures it deems appropriate to make available evidence on any lawful export" of underwater cultural property. It is evident from the Explanatory Report that, during discussions on the draft Convention, the question of establishing certificates of origin or ownership was raised, but no agreement could be reached on this because of the practical difficulties of such a system. Instead, the more general concept of evidence mentioned above was adopted. Article 11 commences "In order to facilitate the control of traffic in underwater cultural property..." and it is interesting to note that the word "traffic" was chosen deliberately in preference to "commerce" because it covered activities of a non-commercial, as well as commercial, nature.

The system of export control in the UK, according to Prott and O'Keefe, "relies on substantial co-operation from the public [including owners and dealers] rather than punitive measures" and there is a reluctance to be too draconian as this would interfere with Britain's prominent position in the art trade.[89] The UK government has been urged to ratify the 1970 UNESCO Convention on Illicit Trade in Cultural Material,[90] the most important international instrument on the control of illegal trade in cultural property.[91] However, the government has raised the practical difficulty of implementing measures to supplement the export controls of other countries[92] as its excuse for not ratifying the Convention. In fact, it seems clear that the "major contribution of the big auction houses to the British economy, and their influence in public life"[93] are significant factors in the government's decision not to ratify.

Article 12 imposes a duty on Contracting States to co-operate to locate and secure underwater cultural property that is being illegally transferred between Contracting States, or has been recovered illegally.

According to the Explanatory Report, the word "illegally" refers to acts in contravention of relevant legislation in Contracting States.

Article 13 provides that "all practicable measures" shall be taken towards the restitution, i.e. return, of such property. It is interesting to note that the Convention does not provide an obligation to return property. Instead the words "all practicable measures" qualify the statement and allow Contracting States to take into account their domestic legislation and to take what steps are practicable in light of that. The provision does not affect existing remedies in domestic law.[94] Apparently this is a "compromise solution" adopted owing to difficulties with domestic legislation in a number of States.[95] According to Prott and O'Keefe,[96] the recovery, from an importing state, of illicitly trafficked objects, is one of the most controversial areas in the field of cultural heritage law. Clearly there may be conflict of law problems. Different states will maintain a different balance between the rights of an owner and the rights of a bona fide purchaser for value. In common law systems the general rule is that the bona fide purchaser gets no special protection (although there are a number of exceptions). In contrast, in civil law countries the bona fide purchaser takes priority and generally gets title after a relatively short period of time, for example three years in France, Belgium and the Netherlands. This significant difference between the two legal systems obviously creates problems in making international provision for restitution. There are other difficulties too. For example, the concept of theft may vary between importing and exporting countries. Also, some countries, notably the US, have a declared policy of ignoring foreign export controls on the grounds of free trade.[97]

The implementation of strict controls on the export of underwater cultural material would be of great help in providing protection for the underwater heritage. If the export of such material was restricted,

there would be less incentive for treasure hunters to operate because they may well not obtain, on the domestic market, prices as high as those on the international market. Also, such controls would held to prevent the dispersal of collections around the world.

3. Criticisms of the 1985 Draft Convention

One of the most praiseworthy aspects of the draft Convention is the comprehensive nature of its provisions defining the extent of the protective regime, i.e. the provisions in Article 1. In this respect, as outlined earlier, the UK would have to make considerable legislative amendments to comply with the draft Convention. What the draft Convention also proposes which is of considerable interest is (i) to establish a grounding for co-operation between Contracting States in a number of areas, and (ii) to set up a Standing Committee to review the situation periodically. Furthermore, the establishment of a comprehensive registration system would be of great assistance. It would allow assessment of the underwater archaeological resource so that priorities could be determined and resources allocated.

However, the draft Convention can also be criticised in a number of important respects. In particular, the geographical scope of application of the Convention is limited and a 200-mile "cultural protection zone" would have been more satisfactory. The main regulatory aspect of the draft Convention, i.e. relating to the removal of protected underwater cultural property from the seabed, relies - as far as the contiguous zone is concerned - on a legal fiction.[98] In both contiguous zone and territorial waters it is left for individual states to lay down the detailed regulations and offences. The draft Convention also avoids the difficult issues of ownership, salvage and rewards instead of making a clear stand on them.

It is interesting to compare the draft Convention with the minimum requirements of Recommendation 848.[99] Some of the most constructive and innovative recommendations of the latter have been excluded from the draft, in particular, two fundamental principles of the Recommendation, namely creation of a 200-mile cultural protection zone and exclusion of salvage law from protected cultural property. The reason for this divergence is probably the very nature of the two instruments. Recommendation 848 simply provides unenforceable guidance to Member States of the Council of Europe, who can choose whether or not to abide by it. Its preparation and agreement must therefore have been a much less contentious process than preparation and agreement of the draft Convention which, upon ratification, would becoming binding in international law upon Contracting States. For this reason, a Convention will always be a product of compromise and controversial standpoints on issues of principle may well have to be sacrificed. Despite these criticisms of the draft Convention, it will become clear that it has much more to offer in terms of a protective regime that the 1982 Law of the Sea Convention.[100]

In due course, it may become necessary to harmonise the cultural heritage laws of the Member States of the European Community (EC) in order to accord with EC law and, in particular, with the rules relating to free movement of goods laid down in the original Treaty of Rome.[101] If there were to be a harmonised European regime (whether through an EC or Council of Europe initiative) we have a "hesitant but useful indicator"[102] as to what it might entail in the form of the draft Convention. For this reason, it is a worthwhile exercise to examine how far UK law would need to be amended to conform with such a regime. The UK is probably no further apart from the provisions of the draft Convention than most other European states. Nonetheless, it would need to make considerable legislative amendments to be able to comply with the regime. Even though the draft Convention has failed to reach

signature, it is interesting to note that the recent French legislation on underwater archaeology reflects to some degree the draft Convention, so clearly the draft has had some influence.[103]

C. UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982

1. Background

In order to appreciate the specific provisions of the 1982 Law of the Sea Convention relating to underwater cultural property, it is necessary to have a basic understanding of the development and present state of international law concerning the functional zones of the sea: the territorial sea, high seas, continental shelf, contiguous zone, exclusive economic zone (EEZ) and deep seabed.[104] In particular, it is necessary to understand the position in international law of a state that wishes to control interference with, and excavations on, underwater cultural property outside its strict territorial limits.

(a) Territorial waters

Within its own territorial limits a state has full sovereignty and legislative competence and may therefore exercise control over diving and excavation activities in its inland waters and territorial sea, including the activities of the nationals of other states.[105] The PWA 1973 is an example of legislation to control such activities in territorial waters. Such control is, of course, subject to the right of innocent passage.[106] Sea ports are presumed to be open to foreign vessels, but a coastal state may exercise some control over the activities of foreign ships by restricting or prohibiting use of its ports or by making their use dependent on consent.[107] In this way it may be able to control the activities of these ships outside its strict

territorial limits. This could prove to be a significant impediment, as foreign ships clearly need to use local ports for refuelling and taking on supplies, etc.

The Geneva Convention on the Territorial Sea and Contiguous Zone 1958[108] does not define the breadth of the territorial sea,[109] but it is now generally accepted that 12 miles is allowable under customary international law[110] and this is the limit claimed by the UK since 1987.[111] Some states, however, claim jurisdiction - at least in some respects - over areas varying up to 200 miles.[112] It is interesting to note that recently enacted Chinese legislation declares prescriptive jurisdiction over ancient Chinese underwater artefacts, wherever found, even within the territorial waters of other states.[113]

(b) High seas

Traditionally, the sea was divided into two zones: territorial waters and the high seas. On the high seas, the historical principle of customary international law has been freedom of the seas, which embraces several freedoms including freedom of navigation and freedom of fishing.[114] None of these freedoms refers specifically to marine archaeology, but it is arguable that this activity may be embraced by the principle of freedom to undertake scientific research.[115] Such freedom would in any event be limited by the principle that states must refrain from activities which might adversely affect the exercise of freedoms by other users of the high seas.

Until the 1958 Geneva Convention on the High Seas, the traditional rule had been that property deriving from a shipwreck continued to enjoy the protection of the vessel's flag-state. Whether this is still the rule, post 1958, is arguable.[116] According to some, including Caflisch,[117] a wreck may no longer qualify as a vessel subject to the

exclusive jurisdiction of its flag state and the general principle of freedom of the seas may govern the search for and recovery of the wreck. Of course, activities conducted from a ship will be subject to the law of the ship's flag state, or the national laws of those on board. However, it will obviously be difficult in practice for the flag or national state to have effective control over its vessels or nationals on the high seas.[118] An example of domestic legislation which attempts to control activities on the high seas is the UK's PMRA 1986, which makes it an offence for British nationals, or those on board British-controlled ships, to interfere with certain specified remains.[119] Where there is a conflict between the laws of different states, for example the flag-state of the wrecked vessel and the flag-state of the salvage vessel, the issues must be resolved by the choice of law rules of the forum.[120]

(c) Contiguous zone

The 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone Article 24(1) provides that:-

> "In a zone of the high seas contiguous to its territorial sea, the coastal state may exercise the control necessary to: (a) prevent infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea; (b) punish infringement of the above regulations committed within its territory or territorial sea."

Whether this article gives the coastal state legislative competence in the matters listed over the contiguous zone, or whether it only gives it certain powers of control is unclear.[121] In any event, as coastal states have extended the breadth of their territorial waters to 12 miles, the significance of the provision disappears, since Article 24(2) provides that the contiguous zone may not extend beyond 12 miles. The 1982 Law of the Sea Convention Article 33 extends the limit of the contiguous zone to 24 miles[122] and, as has already been shown, the

draft European Convention adopted this zone too for its regulatory regime. The relatively new French legislation on underwater archaeology also applies in the 24 mile contiguous zone,[123] as does Danish law.[124]

(d) Continental shelf[125]

The 1958 Convention on the Continental Shelf Article 2(1)[126] allows coastal states to exercise sovereign and exclusive rights over the continental shelf "for the purpose of exploring it and exploiting its natural resources".[127] Article 2(4) of the Convention defines natural resources to include mineral and other non-living resources. It is probably correct to say that a wreck of a ship is not a natural resource,[128] although it is possible to see arguments that a cargo of ore, which may be all that is left of a wreck, is a valuable non-living resource. Gold bullion is a little more difficult to think of as "natural", although it is a base metal. However, in neither case can it really be said that they are resources of the seabed in the same way as, say, manganese nodules. After all, they have been brought to their position on the seabed by the interference of man. Underwater cultural property can be said to be a resource in that it is a non-renewable source of archaeological and historical information,[129] but it is not a natural resource of the continental shelf and therefore is not within the definition. It seems from the International Law Commission's explanatory comments on the draft Convention on the Continental Shelf that it was "...clearly understood that the rights in question do not cover objects such as wrecked ships and their cargoes (including bullion) lying on the seabed or covered by the sand of the subsoil".[130]

There are, however, examples of States, notably Australia,[131] Ireland,[132] Norway,[133] the Seychelles[134] and Cyprus,[135] which have enacted legislation extending control in respect of underwater cultural property over the continental shelf, or which interpret their laws

protecting the underwater cultural heritage as applying to the continental shelf. However, in hearings to consider the Abandoned Shipwreck Act of 1987, the US Department of State strongly objected to the assertion of federal title to shipwrecks on the outer continental shelf, beyond state boundaries, as this would be inconsistent with the 1958 Convention.[136] However, a state could pass legislation protecting the marine resources generally, or to create safety zones around oil platforms (as allowed for by the Convention), which would enable it indirectly to restrict diving operations.[137] It is interesting to note that the US Marine Protection, Research and Sanctuaries Act 1972 provides for the creation of marine sanctuaries on the US continental shelf and in 1975 an area was designated as a marine sanctuary around the site of the USS Monitor, which lies four miles outside the 12 mile limit.[138] It may be that as more and more states assert jurisdiction beyond their territorial limits without the objection of other states, such jurisdiction will become customary international law and therefore reliance will not need to be placed on the provisions of the 1958 Convention. It is indeed arguable that a rule of customary international law relating to control of diving activities to protect the archaeological heritage on the continental shelf is already emerging. Obviously, however, the continental shelf varies in width significantly (from one to several hundred miles)[139] and control over this area for some states may mean very little in practice. Furthermore, exercising effective control and enforcement over what may prove to be wide areas may be very difficult.

(e) Exclusive economic zone of 200 miles

Part V of the 1982 Law of the Sea Convention created the concept of the 200 mile exclusive economic zone (EEZ).[140] Article 56 provides that the coastal state has sovereign rights over natural resources, as with the continental shelf, but also "with regard to other activities for

the economic exploitation and exploration of the zone". Such a zone already has a wide measure of support and many states claim a 200 mile wide fishery zone.[141]

Analogous to the EEZ was the proposal in the Council of Europe's Recommendation 848 for a cultural protection zone of 200 miles in which national jurisdiction could be exercised in respect of the underwater cultural heritage. The adoption of such a recommendation would enable coverage of some areas of the deep seabed which would not be included in a continental shelf limit.[142] Unfortunately, that proposal was not adopted in the draft European Convention, which confined itself to the 24 mile contiguous zone. It appears that only one country so far - Morocco - has legislation creating its own 200 mile EEZ,[143] together with a provision requiring all archaeological activities therein to be subject to the authority of the government of Morocco.[144] Clearly the concepts of a "cultural protection zone" and an "exclusive economic zone" should be carefully distinguished in order to avoid states thinking, when they have a right to control exploitation, that instead they have a right to title and to exploit themselves.

(f) Deep seabed

The final area that needs to be considered is the sea beyond the 200 mile EEZ, in other words the deep seabed. It was not until the early 1970s that operations on the deep seabed were technically possible and therefore, until then, there was no need for regulation in this respect. Until then, operations in this area were subject only to the rules of public international law regarding the high seas and of private international law regarding salvage. However, by UNCLOS III which was convened in 1973, the need for the ability to regulate in this sphere was becoming obvious. The 1982 Law of the Sea Convention creates what it calls the "International Sea-bed Area" or simply the

"Area", which is that part of the seabed under the high seas, outside other zones. Activities in the "Area" were stated in Article 140 to be for the benefit of mankind as a whole and those relating to exploration and exploitation of natural resources were to be under the supervision of a body called the "International Sea-bed Authority". The Convention also makes some provision for underwater cultural property in the "Area".[145] The deep seabed is of crucial importance in this field because it is there that the most well preserved wrecks of all may be found. For example, in 1963 there was the discovery by camera of a completely loaded Roman ship at 400 metres depth in the Strait of Gibraltar,[146] and in 1985 a cargo of 180,000 pieces of perfectly preserved Chinese porcelain was recovered from the wreck of a Dutch East Indiaman lost in 1752 in the South China Sea.[147] Gradually the technology is becoming available to find such wrecks and explore and exploit them.[148]

An interesting unilateral move to control activities on the deep seabed was the US RMS Titanic Maritime Memorial Bill of 1986, which was drafted after the discovery of the vessel in 1985 lying 12,000 feet down on the seabed in international waters.[149] Several exploration and salvage ventures were being planned and the US government felt there was a need to control these activities. The US Bill provided for three things:-

> (i) the establishment of the Titanic as an international maritime memorial to those who lost their lives aboard her;
>
> (ii) the establishment of national guidelines for conducting research on, exploration and, if appropriate, salvage of the vessel;
>
> (iii) the US Secretary of State was to enter into negotiations with the UK, France and Canada to develop an international agreement providing for international research, exploration and, if appropriate, salvage of the wreck, consistent with the national guidelines.[150]

Sec.7 of the Bill provided:-

> "It is the sense of Congress that pending adoption of an international agreement...no nations should undertake any activities in regard to the shipwreck Titanic which are not in compliance with the guidelines...".

Furthermore, Sec.8 provided:

> "By enactment of this Act, the United States does not assert sovereignty or jurisdiction over, or the ownership of, any marine areas, the vessel or any of its cargo, unless otherwise subject to its jurisdiction."

The French failed to respond to repeated initiatives by the State Department and instead launched an expedition in 1987.[151] The US Senate therefore responded by producing another Bill, S.1581, which would have prohibited the importation for commercial gain of objects from the Titanic until such time as the US became bound by international agreement governing the exploration and salvage of the wreck. Neither Bill was ever enacted.[152]

2. Provisions of the 1982 Convention Relating to the Underwater Cultural Heritage

By the early 1960s it was becoming apparent that the law of the sea framework established by the 1958 Conventions was not adequate to deal with developments of science and technology which were making the sea more and more accessible. It was also becoming recognised that the traditional system of free fishing could not continue and that the living resources of the sea were not inexhaustible. Furthermore, radical changes were taking place in the size and composition of the international community. Countries of the third world were anxious to participate in drawing up rules governing the maritime zone to replace those framed by the smaller, and fundamentally different, international community at the 1958 Conference.[153]

The 1982 Convention was produced by UNCLOS III, which convened in 1973 and held 11 sessions. The Convention addresses issues relating to the cultural heritage, but unfortunately in a highly qualified fashion. In negotiations before and at the Conference, Greece and Turkey were primarily responsible for inclusion of some provision relating to the underwater cultural heritage.[154] It is thanks to their efforts that all the drafts of the Convention included such provision. The main problem arose, however, over exactly what this provision should set out to do.

The Convention contains two articles relating to underwater archaeology, Articles 149 and 303.[155] Article 149 relates to items found in the "Area"; Article 303, apart from containing some general provisions, defines the jurisdiction of the coastal state over underwater cultural property found in its contiguous zone. These two articles will be looked at in turn.

(a) Article 149[156]

The text of this article developed through several stages.[157] The first significant stage was in 1975 when an "Informal Single Negotiating Text" (ISNT) was produced, drawn up by the Committee Chairmen and the Conference President on their own initiative.[158] Article 19 read as follows:-

> "1. All objects of an archaeological and historical nature found in the Area should be preserved or disposed of [by the Authority] for the benefit of the international community as a whole, particular regard being paid to the preferential rights of the [State of country of origin], or the State of cultural origin, or the State of historical and archaeological origin.
> [2. The recovery and disposal of wrecks and their contents more than 50 years old found in the Area shall be subject to regulation by the Authority without prejudice to the rights of the owner thereof.
> 3. Any dispute with regard to a preferential right under paragraph 1 or a right of ownership under paragraph 2, shall, on the application of either party, be subject to the procedure for settlement of disputes provided for in this Convention.]"[159]

The term "the Area" refers to the deep seabed, beyond other zones.[160] One major query over this early draft was the suitability of the International Seabed Authority to deal with underwater cultural property. According to Strati,[161] "the Authority was seen as a sort of 'custodian' of archaeological treasures for the benefit of mankind as a whole: an approach that did not challenge the rightful interests of the state(s) of origin." However, the Authority's main concern was with deep sea mining and other profit-making activities.

In 1976 a new "Revised Single Negotiating Text" (RSNT) was produced,[162] which contained a substantially modified article:-

> "All objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of the international community as a whole, particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin."[163]

Clearly the deletion of paragraphs 2 and 3 of the ISNT version and the omission of the reference to the Authority, leave the provision in a somewhat emasculated state. The only positive modification was the substitution of the term "State of country of origin" with "State or country of origin", which seems to make more sense.[164]

This article, renumbered as Article 149, found its way into the "Informal Composite Negotiating Text" (ICNT) of 1977 and its revisions in 1979 and 1980.[165] The only change made to the final text of the article in 1980 at the 9th Session in Geneva was substitution of the phrase "for the benefit of the international community as a whole" with the phrase "for the benefit of mankind as a whole".[166] Article 149 is found in Part XI on "The Area".

Article 149 (as it appears in the Final Text)

Archaeological and historical objects

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

This article is open to criticism on many grounds. First and foremost, it is weak and ambiguous, leaving open a great number of questions. A prime example of its weakness and ambiguity is the failure to define the property to be protected, i.e. "objects of an archaeological and historical nature".[167] "Nature" seems wider than terms such as "value", "importance" or "significance". Was the intention for Article 149 really to protect all such objects? "All" would encompass a great deal of material, much of which archaeologists would not find of value, importance or significance. Does the term "objects" include immovable cultural property e.g. the site of a wreck or the remains of a submerged town, such as Dunwich in Suffolk? Furthermore, exactly how old would an artefact have to be to classify as "archaeological and historical"? There appears to be a view that the legislative history of the Convention suggests that the term should be interpreted as only covering property more than 300-400 years old.[168] This view seems to derive from certain statements by Oxman,[169] who was Vice-Chairman of the American delegation.

The drafting history of Article 149 shows that reference to "objects of historical origin" was added to the term "archaeological objects" at the insistence of the Tunisian delegation, who felt that the expression "archaeological objects" might not be broad enough to cover Byzantine relics.[170] From this Oxman concludes that the negotiating history of the phrase would suggest that it covers "the idea of objects that are many hundred years old". He then goes on to suggest:-

> "...it may be that if a rule of thumb is useful for deciding what is unquestionably covered by this article, the most appropriate of the years conventionally chosen to represent the start of the modern era would be 1453: the fall of Constantinople and the final collapse of the remnants of the Byzantine Empire. Everything older would clearly be regarded as archaeological or historical. A slight adjustment to 1492 for applying the article to objects indigenous to the Americas, extended perhaps to the fall of Tenochtitlan (1521) or Cuzco (1533) in those areas, might have the merit of conforming to historical and cultural classifications in that part of the world."[171]

This is clearly a very restrictive interpretation and Caflisch argues[172] persuasively that the provision should be interpreted much more widely. Rather than considering the recollections of partisan negotiators as conclusive, he suggests that the rules laid out in Articles 31 and 32 of the Vienna Convention on the Law of Treaties 1969[173] should be followed. According to Article 31(1) of the Vienna Convention, a word, if not defined, should be given its ordinary meaning. Caflisch therefore suggests that the ordinary meaning of the word "archaeology" would probably be the meaning attributed to it by archaeologists and it seems likely that archaeologists would given the word a much wider meaning than that given by Oxman. The Vienna Convention Article 31(3)(c) provides for examination of the relevant rules of international law applicable in the relations between the parties. One such rule of importance is the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property which establishes time limits of 50 and 100 years. It is certainly probable that most historians and archaeologists would feel that Oxman's interpretation would leave unprotected many important wrecks, e.g. the Dutch East Indiamen and the Mary Rose. In fact, only four of the 37 wrecks designated under the PWA 1973 would qualify. Also, it would not conform to provisions in many domestic pieces of legislation, which consider 50 or 100 years to be the relevant cut-off point.[174] A further point is that paragraph 2 of the early ISNT text mentioned property more than 50 years old. Although this paragraph was dropped, it may be an indication that the negotiators had a less restrictive

interpretation in mind, even if it was thought that 50 years was too recent.

A further criticism of Article 149 is that it does not impose a duty upon anyone who finds objects to report them or to notify interested parties, including states with preferential rights. The phrase "preserve or dispose of" is ambiguous. Does "dispose of" include sale and, if so, how will this be regulated in order to benefit mankind as a whole? What exactly does "preserve" mean? Does it mean that objects should be preserved in situ, or only once they have been recovered? If the latter, should they be preserved in a public museum, or sent on a world tour in order to benefit as much of mankind as possible? No mechanisms are laid down for the preservation or disposal of property. How, where and by whom is this supposed to happen? Who will pay? It may well be that the duty falls on the individual states and its fulfilment relies very much on their goodwill. Moreover, the Convention only seems to address the issue of cultural property <u>after</u> objects are found: no regime is laid down to protect objects before they are found. Does this mean that the Convention envisages that anyone can search for underwater cultural property under the principle of freedom of the high seas? Does it mean that anyone can explore and exploit sites so long as objects found are "...preserved or disposed of for the benefit of mankind as a whole..."? Does it also mean that no efforts should be made "for the benefit of mankind as a whole" to locate sites, in particular where this may be necessary for their preservation and protection. For example, there may be a need for rescue archaeology to be undertaken before digging or drilling for mineral resources - as envisaged by the Convention - takes place. At the moment, such activities are prohibitively expensive, but this will not be the case forever.

The early ISNT draft recognised ownership rights in the property as well as preferential rights. This suggests that there is no longer any recognition of ownership rights of property found in the "Area" and that a preferential state will not be treated as owner of the property. In other words, it will have an interest in the property short of title. The exact nature of this interest is very unclear. It may even mean simply that mankind in the preferential state(s) should receive the benefit - in other words, the property should be located there. This would seem to be a sensible conclusion as the artefacts would have to be located somewhere and mankind in the preferential state would have a greater interest in them than anyone else. It would probably not be advisable for material to be moved around constantly because of the likelihood of damage being caused.[175] This sort of interpretation would help to make it clear how the rights of mankind as a whole fit in with the preferential rights of states. Where a state claimed preferential rights, it would mean that that state's population in a sense received the benefit in priority to mankind as a whole.

The number of states given "preferential rights" is likely to cause confusion and, in any event, it is unclear to exactly which states the term is intended to apply. What exactly is the distinction between "State or country of origin", "State of cultural origin" and "State of historical and archaeological origin"? The origin of the term "State or country of origin" has already been explained.[176] The reason that several terms were included in the article is almost certainly to be found in the historical background to the Convention. The initial Greek proposal used the expression "State of historial origin";[177] a subsequent Greek proposal used the expression "State of cultural origin";[178] and a Turkish proposal used the expression "State of the country of origin".[179] Clearly, as Strati points out,[180] these terms were never intended to be used as alternatives. For this reason, there probably is no exclusive meaning for each; rather they overlap and the

hope was that the three terms used together would cover all possible situations, for example where one state has succeeded to another, where several countries share, or shared, the same culture, and so on.[181]

What happens when more than one State claims preferential rights? Which, if any, has priority?[182] Arend[183] gives as an example the case of a Roman ship, built in North Africa in 200 A.D. and discovered in the "Area". Italy would arguably be the State of cultural origin, but Libya might be the State now possessing the territory in which the ship was built. Clearly a situation could arise where different claims arise in respect of the cargo of a vessel and the vessel itself, which might result in fragmentation of material recovered from the site. For example, an Italian vessel may have been carrying Greek statues and amphorae from Greece to Italy. Italy may have a preferential right to the vessel and Greece to the wares it was carrying. Fragmentation would breach the archaeological principle that as far as possible items from one site should be kept together to preserve their context. In such a situation an inter-state agreement such as the Australia/Netherlands Agreement[184] may be necessary and desirable, but the Convention makes no provision for such agreements.[185]

How are all the various rights to be protected? The final text of Article 149, in contrast to the ISNT,[186] does not refer disputes under the article to the Convention's dispute settlement procedure, nor does it make any reference to a mechanism of dispute settlement.[187] Also, there is no reference to an international body or procedure to ensure that objects are "preserved or disposed of for the benefit of mankind as a whole". It may have been realisation that the Authority was inappropriate in this respect that led to reference to it being excluded. Alternatively, it may have been the influence of the US and other maritime powers which came to bear: they wanted to restrict the powers of the Authority to mineral resource exploration and exploitation.[188] It

does, however, seem that placing reliance in this matter on the goodwill of states[189] is the "worst possible solution".[190] Strati calls for the establishment of a supervisory agency under the auspices of UNESCO, although recognising that at times there may arise problems of conflicting competence with the Authority.[191] This may be too elaborate an organ to supervise such general provisions.[192] However, perhaps it would be possible to establish a body of arbitrators, one drawn from each of the Contracting States. In the case of a dispute between two States, each could nominate an independent arbitrator from the body who would form a panel to resolve the dispute.

(b) Article 303[193]

This article relates to the contiguous zone which, by virtue of Article 33, extends to 24 miles. It resulted from dissatisfaction on the part of some states - notably Greece, but also Italy, Cape Verde, Malta, Portugal, Tunisia and Yugosalvia - over the fact that Article 149 related only to the "Area" and that there was no provision for cultural property in the EEZ or on the continental shelf. These states proposed, at the Ninth Session of the Conference held at New York in 1980, an addition to Article 77 which related to the continental shelf.[194] The proposed new paragraph was as follows:-

> "The coastal State may exercise jurisidiction, while respecting the rights of identifiable owners, over any object of 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 orgin, in case of sale or any other disposal, resulting in the removal of such objects out of the coastal State."[195]

This new draft was opposed by the US, the UK and the Netherlands, according to Caflisch[196] for the following reasons: (a) it failed to solve the conflicts that might arise among the states entitled to preferential rights; (b) it failed to mention national salvage laws; (c) its

presentation amounted to re-opening the negotiations on the continental shelf, which had already been concluded; and (d) it granted the coastal state rights over its continental shelf unrelated to natural resources and might lead to an expansion of coastal state competence over the continental shelf for non-resource related purposes.[197] The US therefore suggested a proposal of its own, to appear as a new section of text under the "General Provisions" heading:-

> "All States have the duty to protect objects of an archaeological and historical nature found in the marine environment. Particular regard shall be given to the State of origin, or the State of cultural origin, or the State of historical and archaeological origin of any objects of an archaeological and historical nature found in the marine environment in the case of sale or any other disposal, resulting in the removal of such objects from a State which has possession of such objects."[198]

This counter-proposal was opposed by the co-sponsors of the earlier proposal because it rejected the idea of coastal state jurisdiction and, by so doing, upheld the principle of flag state jurisdiction. This, it was felt, would be insufficient to ensure effective control. The two sides got together to agree a compromise. The result - which eased the fears on both sides - is the text of Article 303 as it appears in the Final Text of the Convention.

Article 303 (as it appears in the Final Text)

Archaeological and historical objects found at sea

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

The location of Article 303 in the "General Provisions" section of the Convention means that, other than paragraph 2 which specifically refers to the contiguous zone, the article applies to any area of the sea, including the "Area". One question that immediately arises therefore, is how does Article 303 fit in with Article 149 in relation to the "Area"? For example, Article 303 upholds the law of salvage and other rules of admiralty. Surely, conflicts could arise between this and the principle laid down in Article 149 that objects found in the Area shall be preserved or disposed of for the benefit of mankind as a whole? For example, the law of salvage may provide for the sale of an unclaimed object in order to raise funds to pay for the salvage reward. This would not necessarily lead to disposal "for the benefit of mankind as a whole". Another potential area of conflict is over the recognition of ownership rights. The historical development of Article 149 suggests that its final text does not recognise the rights of owners and yet Article 303(3) specifically reserves such rights. Which article takes precedence in this respect?

Although general and vague like Article 149, the value of Article 303(1) is that it applies to the whole of the sea, unlike Article 149 which is confined to the "Area". Article 303(2), on the other hand, relates to the contiguous zone. Its aim is to provide states with an international legal basis for action to control traffic in material found within the contiguous zone, if they so wish. This is achieved through a legal fiction. The fiction is that the coastal state is allowed to presume that the removal of objects from the contiguous zone did in fact take place within its territory.[199] The fiction presupposes that removal of objects from <u>within</u> the territorial sea would amount to an infringement of the customs, fiscal, immigration or sanitary regulations. This may not necessarily be the case. It seems likely that only where a foreign vessel attempted to import the antiquities into the territory of the coastal state, or attempted to export them, would there be a

potential conflict with customs or fiscal regulations. It seems very unlikely that interference with a site would constitute an infringement of these regulations. Immigration or sanitary regulations would appear to be completely irrelevant. Therefore, the provision is unlikely to have much impact and does not create a very significant protective regime for property in the contiguous zone. It is interesting to compare this provision with that in the 1985 draft European Convention Article 2, which provides that a State may exercise the control necessary to prevent and punish infringement within its territory of its underwater cultural property laws.[200] Such provision is likely to have much more practical effect.

In any event, if the aim of the fiction was to avoid "converting the contiguous zone from an area where the coastal state has limited enforcement competence to one where it has legislative competence", as suggested by Oxman,[201] then it was doomed to failure. Caflisch suggests that the provision does grant coastal states legislative competence in their contiguous zones as regards the removal of underwater cultural property[202] and states are already asserting legislative competence over this area.[203] In fact, one of the values of the Convention in respect of underwater cultural property is that it has encouraged the expansion of coastal jurisdiction in relation to the protection of the underwater cultural heritage to the contiguous zone. A criticism that can be made is that the application of Article 303(2) to the contiguous zone actually does not go far enough. It should at least have covered the continental shelf and, even then, it is clear that the deep seabed "is likely to contain the best preserved wrecks of all...".[204]

A further criticism of Article 303 is that it is extremely qualified and, in the same way as the 1985 draft European Convention, avoids the difficult issues of ownership and application of salvage law. The

criticism in the discussion of Article 149[205] about the failure to define "objects of an archaeological and historical nature" is equally applicable here. However, it is interesting to note that Article 149 refers to "all" such objects, whereas Article 303 does not. It is unclear whether this distinction was intended and, if so, for what reason. Unlike Article 149, Article 303 does not refer to the purpose of the protection, e.g. "for the benefit of mankind", or to the "preferential rights" of states. The latter is a particularly significant omission. The 1985 draft European Convention provided for collaboration with other contracting states with a particular interest[206] and there is also a series of UN General Assembly Resolutions on the Return or Restitution of Cultural Property to the Countries of Origin which invite "Member States engaged in seeking the recovery of cultural and artistic treasures from the seabed in accordance with international law to facilitate by mutually acceptable conditions the participation of States having a historical and cultural link with those treasures."[207] Yet, in the 1982 Law of the Sea Convention such provision is made only in respect of property on the deep seabed. As Prott and O'Keefe point out, the "saving grace" of the article is Article 303(4) which leaves open the way for specific international agreement in the field of underwater cultural property.[208]

A significant criticism which applies to the two provisions, Articles 149 and 303 taken together, is that they leave a gap in the protection they afford. The gap relates to the outer continental shelf beyond the contiguous zone, in other words areas of the continental shelf which extend further out than 24 miles. The reason for the gap is that the outer limit of the continental shelf - as defined by Article 76 - forms the inner limit of the "Area". So parts of the continental shelf extending further out than 24 miles will fall between the protection afforded by Article 149 to the "Area", and the protection afforded by Article 303(2) to the contiguous zone. This "gap" is only afforded the very general protection of Article 303(1), which in any

event is subject to the restrictions of Article 303(3) and (4). Otherwise, the "gap" is governed by the principle of freedom of the high seas and the jurisdiction of the flag state of the ship engaged in any search for and recovery of property.

Caflisch summarises perfectly the four separate legal regimes that the Convention establishes:-

> "In the territorial sea, the maximum breadth of which is to be fixed at 12 miles, the coastal state enjoys exclusive jurisdiction. In the contiguous zone, which may extend to the 24-mile limit, the coastal state is entitled to apply its customs and fiscal laws and regulations to the removal of antiquities as if such removal had taken place on its territory or in its territorial sea (Article 303(2)). As regards the part of the continental shelf located outside the 24-mile limit, on the contrary, the traditional regime of freedom appears to subsist, subject to the general provisions contained in paragraphs 1,3 and 4 of Article 303. Finally as far as the International Seabed Area is concerned, Article 149 of the Draft Convention establishes a new regime calling for the preservation and disposal of antiquities 'for the benefit of mankind as a whole', though some 'preferential rights' are attributed to various categories of states."[209]

The 1982 Law of the Sea Convention is not yet in force. The desire on the part of the developing countries to frame a new set of rules means that the Convention is not merely a codification of existing law and practice, but is innovative and establishes new rules. Therefore, it cannot be said that all the Convention's provisions are declaratory of customary international law. In fact, under customary law it seems probable that cultural property in the "Area" is still governed by the traditional principle of freedom of the high seas. Furthermore, the Convention was intended to be treated as a "package", i.e. that states should accept all or none of its provisions and that rights under the Convention should not be claimed without assuming the respective obligations.[210] There is a view that for this reason individual parts of the Convention cannot become part of customary law through state legislation before entry into force of the whole Convention. In any event, once it comes into force the Convention may itself become evidence of customary law if it receives broad acceptance

amongst the international community and Contracting and non-Contracting States behave in line with its provisions.[211]

The "package" concept has in fact been undermined by the decision of the US not to sign the Convention.[212] Many of the provisions of the Convention, including the wording of Article 303, were the result of compromise between the US and other states, and the fact that the US will not be adhering to the provisions may mean that the other countries will feel that they need not do so either. This particularly affects Article 303. Article 149, on the other hand, was relatively uncontroversial and may come to represent a general policy to which all states can adhere.[213]

Articles 149 and 303, although perhaps not of much practical significance, are certainly of symbolic importance. They are the only provisions existing at present in the international realm which refer specifically to the protection of the underwater archaeological heritage. They manifest international recognition of the need to have some form of protection in this field and this recognition is of great significance.

D. INTERNATIONAL LAW ASSOCIATION DRAFT CONVENTION 1992

As mentioned above,[214] Article 303(4) of the 1982 Law of the Sea Convention leaves open the possibility of a specific international convention on the underwater cultural heritage. During the final negotiations of UNCLOS III on the 1982 Convention, an attempt was being made by the Council of Europe to produce such a convention.[215] However, when it became clear that this attempt had reached a stalemate, the International Law Association (ILA) set up a Committee on Cultural Heritage Law in 1988 to begin work on a new draft Convention

on the underwater cultural heritage. The Committee made its first report at the ILA's 64th Conference at Queensland in 1990.[216]

1. Report to Queensland Conference, 1990

The Queensland Report concentrated on two main issues:-

(i) the jurisdictional issue of how to control marine excavations beyond the territorial sea and excavated material taken from that area;

(ii) the definition of the property to be protected.

Appendix I to the report contained two draft articles covering these issues, which will be discussed below.

At a Working Session held by the Committee in August 1990, Professor Nafizer, the Committee's Raporteur, stated that the main emphasis of the Convention was intended to be jurisdiction over the underwater cultural heritage beyond the territorial sea.[217] It was felt that it was particularly in this area that protection was urgently required. Professor O'Keefe, Chairman of the Committee, pointed out that the case of the Titanic was a good illustration of the need for regulation beyond territorial limits.[218] In the mid 1980s, when that vessel was being exploited, there were no applicable international legal rules to deal with the matter.[219] Clearly technological developments were taking place all the time and increasing areas of the seabed were becoming accessible.

The Committee's Report considered the unsatisfactory position left by the 1982 Law of the Sea Convention as far as the underwater cultural heritage was concerned[220] and noted the territorial dispute which was blocking movement on the draft European Convention.[221] The Committee felt that a combination of general principles of jurisdiction

might be the way forward. It therefore proposed the following tentative article for discussion:-

> "1. Contracting States undertake to protect underwater cultural heritage in accordance with this Convention.
>
> 2. Each Contracting State may establish a "zone of control" which is coextensive with the territorial sea, the continental shelf and/or a 200-mile offshore cultural protection zone. Within such zone of control, the State has the right to regulate all activities affecting the underwater cultural heritage in accordance with the criteria set forth in the Appendices to this Convention [as yet undrafted].
>
> 3. Each Contracting State shall prohibit its nationals from interfering with or excavating underwater cultural heritage except in accordance with the criteria set forth in the Appendices to this Convention.
>
> 4. Each Contracting State undertakes to seize and confiscate underwater cultural heritage brought within its territory after having been excavated either within or beyond that State's zone of control in a manner not conforming with the criteria set forth in the Appendices to this Convention. If the underwater cultural heritage in question is or was within the zone of control of another State, it is to be returned to that State; otherwise it is to be protected and, if possible, kept on display for the benefit of the public."

Paragraph 1 is similar to Article 303(1) of the 1982 Law of the Sea Convention in that it imposes a general duty of protection on Contracting States. Paragraph 2 gives states a choice as to the zone of control they will exercise. At present different states extend their control of archaeological material over different areas, for example some states, e.g. the UK, exercise control only over their territorial waters; others e.g. Australia, Ireland, Spain, Norway, the Seychelles and Cyprus, exercise control over the continental shelf; French and Danish law extends control over the contiguous zone; and Morocco extends control over the EEZ. By giving states the choice, the Committee hoped to circumvent the jurisidictional difficulties that foundered the 1985 draft European Convention.[222]

Paragraphs 3 and 4 deal with the position of underwater cultural heritage situated beyond the zones of control of coastal states.[223] They combine the nationality principle of jurisdiction which determines

jurisdiction by reference to the nationality of the person committing the offence, and the territorial principle which determines jurisdiction by reference to the place where the offence is committed. Paragraph 3 adopts the nationality principle which would seem to permit a state to govern or prohibit the conduct of its nationals and ships anywhere at sea (although it would not preclude another state from applying its own regulations in its territorial waters).[224] Paragraph 4 relies on the territorial principle by allowing a state to assert control over material excavated outside its zone of control and brought within its limits. The Committee realised, however, that such a provision would only become fully effective if those states that are major destinations for such material became party to the Convention. Furthermore, the present draft allows excavations to take place in areas beyond state control so long as they are prosecuted following internationally accepted standards. However, it is acknowledged that it may in fact be necessary to institute some kind of licence system instead.[225] It was felt that the establishment of a global regulatory body was unrealistic at this time and that the best alternative was to allocate control to states, subject to clear international standards.

As far as the property to be protected was concerned, the following article was proposed for discussion:-

> "1. For the purposes of this Convention all remains, objects and any other traces of human existence located entirely or in part in the sea, lakes, rivers, canals, artificial reservoirs or other bodies of water, or in tidal or other periodically flooded areas, or recovered from any such environment, or washed ashore, shall be considered as the underwater cultural heritage, and are hereinafter referred to as "underwater cultural heritage".
>
> 2. The protections of this Convention shall apply to all underwater cultural heritage at least 100 years old. Any contracting State may extend protection, however, to remains, objects and traces of that heritage which are less than 100 years old."

This article is almost precisely the same as Article 1 of the 1985 draft European Convention and is the same in all substantive respects.[226] It

is a comprehensive provision which seeks to overcome the view that the 1982 Law of the Sea Convention provisions dealing with underwater cultural heritage concern only those items which are more than 300-400 years old.[227] It was, however, noted in the Working Session that the 100 year cut-off point was somewhat arbitrary and should be open to discussion.

The Committee noted in its report that questions still remained for it to address, including:-

1. Should the draft convention include draft model municipal legislation to implement provisions of the Convention?

2. Should the Committee define the property to be protected in terms of what is of "historical or archaeological importance", or "important historical" material?

3. How far should be the zone of control beyond territorial waters: to embrace the continental shelf, the contiguous zone or the EEZ?

4. Should the draft Convention impose criminal sanctions, or was it sufficient simply to make it an offence to interfere with or excavate items of underwater cultural heritage except in accordance with the draft Convention?

5. What were the appropriate standards for implementation by contracting states? It was noted in the report that appropriate criteria might be drawn from the 1956 UNESCO Recommendation on International Principles Applicable to Archaeological Excavations and/or the International Council for Monuments and Sites (ICOMOS) Charter for the Protection and Management of the Archaeological Heritage, both of which represented the accepted professional standards for the preservation of the cultural heritage.

6. Special consideration may need to be given to naval vessels, which may occupy a special position even though situated in the zone of control of another state.[228]

2. Report to Cairo Conference, 1992

A full draft Convention was then presented for consideration to the ILA's Cairo Conference in April 1992 by the Committee on Cultural Heritage Law.[229] The preamble to the draft Convention reiterated the common heritage of mankind principle espoused in Article 149 of the 1982

Law of the Sea Convention, by providing that States party to the Convention recognised "that the underwater cultural heritage is common to humanity, and that therefore responsibility for protecting it rests not only with the State or States most directly concerned with a particular activity affecting the heritage but with all States and other subjects of international law". The draft Convention contains 11 articles, the last seven of which are procedural rather than substantive.

(a) Scope of the draft Convention

Article 1 sets out the scope of the Convention. The Committee on Cultural Heritage Law clearly decided against defining the property to be protected in terms of "importance" and instead opted for a form of blanket protection based on "underwater cultural heritage" at least 50 years old.[230] This can be contrasted with the 100 year cut-off point in the 1990 draft articles and with that in the 1985 draft European Convention and the Council of Europe's minimum requirements in Recommendation 848.[231] The choice of a 50 year cut-off point is likely to cause significant conflict with salvage and insurance interests in some states and notably the UK.[232]

The definition of material covered has also been amended from that in the 1990 draft articles and Article 1(1)(a) now defines "underwater cultural heritage" as meaning:-

> "Wreck, and any part of the cargo and other contents thereof, including human remains, as well as underwater sites, structures (including wharfs and bridges), buildings, artefacts, implements, and related objects, together with their contexts."

This definition is much more restrictive than that in the 1990 draft and, it is submitted, much less satisfactory. The 1990 draft detailed the locations of the remains, whereas this definition does not and may

therefore lead to confusion. The reference in Article 1(1)(a) does not actually give any indication as to the location of the remains. The definition of "wreck" in Article 1(1)(b) as "a vessel, ship or aircraft or any part thereof that has been lost or abandoned" does not provide assistance. In its current state, "underwater cultural heritage" could technically include the remains of a vessel or aircraft which are not actually underwater, e.g. the recently discovered remains of an ancient ship at Dover, which lie inland.[233] It should be noted that remains other than wreck are at least qualified by the word "underwater". It is also unclear from the definition whether it includes remains located partly underwater; this was spelt out in the 1990 draft.

Furthermore, it seems unclear why it was felt necessary to list the type of remains other than wreck to be included in the definition. There is always a danger with this approach that a situation will arise where remains which should clearly receive protection are not included in the definitive list. The application of a general all-embracing term or phrase seems much more satisfactory, such as "all remains, objects and any other traces of human existence", used in the 1990 draft. Why it was felt necessary to depart from this approach is unknown. The definition in Article 1(1)(a) of the 1992 draft would not necessarily include historic landscapes, on which there is so much focus by the archaeological community at present.[234] This is particularly the case where the context remains, but nothing else.

The reference in Article 1(2) to the continued application of sovereign immunity in the municipal legal systems of Parties notwithstanding the Convention is probably intended to cover the special position of naval vessels which was recognised as requiring attention in the Committee's Queensland Report.

(b) Jurisdictional provisions

The jurisdictional provisions appear to have the same effect as those in the 1990 draft. Article 1(3) is a rather odd provision: "This Convention shall apply to all activity that could affect the underwater cultural heritage beyond the territorial sea of States Parties, as defined by international law". This appears to be simply a general permissive provision, the effect of which is clarified in Articles 2 and 3.

Under Article 2 Contracting Parties shall undertake to establish a "cultural heritage zone", analogous to the "zone of control" in the 1990 draft. As with the 1990 draft, Parties are free to choose the extent of that zone,[235] but within it they may regulate all activities affecting the underwater cultural heritage in accordance with criteria laid down in the Appendix (still undrafted). An addition to the 1990 draft is that the Parties' ability to regulate activities in the "cultural heritage zone" is explicitly subject to "internationally recognised principles of innocent passage, transit passage, and freedom of navigation".[236]

Article 3 outlines the position beyond the "cultural heritage zone" and again is in line with the provisions in this respect in the 1990 draft. Each Party shall prohibit its nationals from interfering with or excavating underwater cultural heritage except in accordance with the criteria set forth in the Appendix and Parties may seize underwater cultural heritage brought within their territory which has been excavated in a manner not conforming with the criteria in the Appendix. Issues of evidence and proof clearly arise here: how would a Party necessarily know whether material has been excavated in a manner not conforming to the criteria? Obviously, this depends to some extent on the nature of the criteria, which is as yet unknown. Nonetheless, it may have been better to have allowed seizure if a Party suspected that

material had not been so excavated. Article 3 does embellish on the 1990 draft by providing that Parties undertake to make such seizures "on the request of any Party", as well as on their own initiative. This clearly allows for a case where, for example, the Dutch government is concerned that material is being raised from a Dutch East Indiaman outside the Dutch cultural heritage zone and is being landed in, say, Britain. There is also the provision, present in the 1990 draft as well, that material seized which was raised in the cultural heritage zone of another Party must be returned to that Party.

(c) Other provisions

The draft Convention does not mention the question of ownership and, as far as salvage laws are concerned, it provides in Article 1(6) that: "Parties are encouraged to prescribe by law that heritage covered by this Convention shall not be subject to salvage laws". In this way the drafters have overcome the problem of specifying for ownership or salvage and the consequent difficulties of obtaining different countries' agreement to such specific provisions. For example, in some countries including the UK, the blanket confiscation of ownership rights would not be easy to enact, nor would an interference with salvors' rights. Instead, the draft Convention concerns itself with the matter of control of activities affecting the underwater cultural heritage. Exactly what the criteria in the appendix will be is not yet known, nor is the extent of the activities which the criteria will regulate. For example, will they simply cover survey, investigation and excavation activities, or will they also cover activities which indirectly affect the underwater cultural heritage, such as fishing, dredging, dumping, etc. It appears that the reason that criteria have not yet been drawn up is that the Committee recognised a need to consider how far values other than strict scientific standards of archaeology and conservation should be incorporated into the Convention.[237] Its report referred to the US

Abandoned Shipwreck Act of 1987, which provides for the publication of guidelines in relation to the management of underwater resources.[238] The Act provides[239] that these guidelines shall seek to:-

> "(1) maximise the enhancement of cultural resources;
> (2) foster a partnership among sport divers, fishermen, archaeologists, salvors, and other interests to manage shipwreck resources...;
> (3) facilitate access and utilisation by recreational interests;
> (4) recognise the interests of individuals and groups engaged in shipwreck discovery and salvage."

The Cairo Report questioned "whether a Convention should attempt to incorporate all of these and possibly other values, at the risk of diluting the chief effort to conserve the cultural heritage",[240] but recognised the need to identify and take account of all relevant interests. Just how far interests other than strict archaeological and conservation interests should be taken into account appears to be the crux of the problem and the reason why - as yet - the criteria have not been drafted. Clearly the best means of achieving an effective regime is to obtain a high level of support and co-operation from other sea-users. It is therefore necessary to achieve a careful compromise. However, it is submitted that the US Abandoned Shipwreck Act of 1987 has gone too far towards placating the interests of recreation and salvage.

Article 4 provides some general provisions relating to, for example, the sharing of information regarding "illegally excavated or transferred heritage", location of heritage and technology. It also recognises the importance of public education by providing that:

> "Each Party shall endeavour by educational means to create and develop in the public mind a realization of the value of the underwater culture and the threat to the cultural heritage created by violations of this Convention and non-compliance with the criteria in the Appendix."

In relation to criminal sanctions, the draft Convention is permissive, allowing Contracting Parties to impose criminal sanctions for

violation of the provisions of the Convention.[241] It also provides for co-operation between Contracting States in bringing offenders to justice.[242] It seems that, as a result of the Cairo meeting, the draft will be revised in this respect to make the criminal provisions more explicit.[243]

3. Assessment

The major significance of the ILA initiative is that it is attempting to address the threats to the underwater cultural heritage outside the control of coastal states' traditional jurisdiction and clearly there is a need in this regard. It attempts to achieve this by developing a permissive rather than prescriptive framework, relying to a great extent upon bilateral and international co-operation. The Cairo Report[244] recognised that the establishment of a global regulatory body at this time was unrealistic and that the "best alternative" was probably to allocate control to states, subject to clear international standards.

The regime set out in the 1992 ILA draft Convention does not apply directly to the territorial waters of Contracting States,[245] but States Parties are "encouraged" to apply the provisions to activities within their territorial and internal waters.[246] A provision for blanket protection of underwater cultural heritage at least 50 years old would probably cause bitter opposition from some commercial interests in the UK, whether this protection was to extend to property inside, or outside, territorial waters. However, how far the protective measures would impinge upon these interests is unclear. The draft Convention does not affect ownership and Parties are only "encouraged" to exclude protected property from salvage law. How far the controls upon activities affecting the underwater cultural heritage envisaged by the

Convention will have an impact on commercial operators - such as salvors, dredging companies and fishermen - will remain unclear until the criteria to be set out in the Appendix have been drafted.

The draft Convention is now subject to further revision and will be reconsidered by the ILA at its next meeting in 1994.

E. EUROPEAN CONVENTION ON THE PROTECTION OF THE ARCHAEOLOGICAL HERITAGE (REVISED) 1992

While the outcome of the ILA's work is awaited, some protection for the underwater cultural heritage in territorial waters may emerge from a surprising source: the revision of a rather old convention on the terrestrial archaeological heritage. On 16 January 1992 the UK was among 20 nations which signed the revised European Convention on the Protection of the Archaeological Heritage.[247] It is unclear as yet whether the UK will actually ratify the Convention, but the signs are encouraging.

The 1992 Convention updates and extends the original 1969 Convention, a "worthy but relatively unadventurous measure",[248] which did not specifically deal with the underwater heritage. It appears that one of the main motivations behind the revision was in fact to rescue the underwater cultural heritage on the European scene from its stagnant position since the Council of Europe's Committee of Ministers found itself unable to sign the 1985 draft European Convention. Apart from its extension to the underwater heritage, the new Convention is much more specific and detailed than its 1969 predecessor. As the Explanatory Report accompanying the Convention points out,[249] the problems of safeguarding and enhancing the archaeological heritage had

changed considerably over the last 20 years. In particular, the major threat to the archaeological heritage was now seen to be, not clandestine excavation which was the case in the 1960s,[250] but large scale construction projects. Furthermore, there had been a change of focus of archaeological research away from excavation and towards survey and other techniques, and greater emphasis on protection in situ. The main innovation of the 1992 Convention is that it attempts to reconcile the requirements of archaeology and development.[251]

1. Scope of Protection

The Convention states its aim as being "to protect the archaeological heritage as a source of the European collective memory and as an instrument for historical and scientific study."[252] It defines the "archaeological heritage", first in general terms so as to embrace "all remains and objects and any other traces of mankind", so long as those elements meet four criteria. Those criteria are:-

(a) the elements must come from past human existence;

(b) the elements must be capable of advancing knowledge of the history of mankind and his relation with his natural environment;

(c) the main sources of information about the elements must be investigation of an archaeological nature or deliberate discovery;

(d) the elements must be located in any area within the jurisdiction of the Parties.

The first three criteria are somewhat obscure and derive from the 1969 Convention. The 1992 revision cleverly avoids the problems of jurisdiction met by the 1985 draft European Convention on the Underwater Cultural Heritage by providing for the protection of the archaeological heritage "located in any area within the jurisdiction of the Parties".[253] This clearly includes the territorial sea, but also appears to extend to any other area validly claimed by a State Party in

respect of protection of the archaeological heritage. On this point, the Explanatory Report states that:-

> "the actual area of State jurisdiction depends on the individual States and in respect of this there are many possibilities. Territorially, the area can be coextensive with the territorial sea, the contiguous zone, the continental shelf, the exclusive economic zone or a cultural protection zone."

The Explanatory Report points out that some member States of the Council of Europe restrict their jurisdiction "over shipwrecks" to the territorial sea, while others extend it to the continental shelf, and that the Convention recognises these differences without indicating a preference for one or the other. By not stating a preference the drafters have avoided providing a target for dispute between States.

Article 1(3) then goes on to be more specific in defining the archaeological heritage, stating that it shall include: "structures, constructions, groups of buildings, developed sites, movable objects, monuments of other kinds as well as their context, whether situated on land or under water." The Explanatory Report stresses that this list is not conclusive, but illustrative only. In specifying "movable objects...as well as their context", Article 1(3) clearly covers shipwrecks and associated artefact scatter, and other structures and constructions on the seabed, for example the ancient fishtraps recently found off the coast of Essex.[254] Presumably it would also cover historic landscapes where some movable objects, such as flints, have been found, since such landscapes would provide the "context" for the objects.

2. Legal System for the Protection of the Archaeological Heritage

By virtue of Article 2, State Parties undertake to institute, "by means appropriate to the State in question", a legal system for the protection of the archaeological heritage. Within such legal system,

they must make provision for four things:-

(i) *Provision for the maintenance of an inventory of the archaeological heritage.* In respect of the underwater heritage, the UK's recent establishment of a National Record for Maritime Sites[255] is opportune (almost certainly not by coincidence).

(ii) *Provision for the designation of protected monuments and areas.* In this respect, the UK already has provision for protection of historic wreck sites by designation under the PWA 1973 and provision for the designation of other underwater sites under the scheduling procedure in the AMA 1979. However, as yet there is no provision for the designation of areas in the marine sphere. In the Parliamentary Debates on the AMA 1979,[256] it was said that the provision in Part II of that Act for Areas of Archaeological Importance[257] would not be applied to the territorial sea. In any event, the fact that the designation under the Convention should be of "protected" areas suggests that there should be more than simple provision for rescue archaeology, which is all that is afforded by the Area of Archaeological Importance designation under the AMA 1979.[258] The Convention does not specify the size of protected areas, or the activities which should be prohibited.

(iii) *Provision for the creation of archaeological reserves "even where there are no visible remains on the ground or under water, for the preservation of material to be studied by later generations".* This is an interesting provision for the protection of remains in situ and presumably could be met quite easily by the UK in the marine sphere if there was a policy that certain designated wrecks be protected in situ, rather than being subject to survey and excavation. The phrase "archaeological reserve" is

not defined further by the Convention. However, the Explanatory Report states that the creation of reserves does not mean that the "land" cannot be used at all; rather it means that operations which disturb the soil cannot be allowed, or must be authorised by the relevant authorities. If an analogy is drawn in the marine zone, this might mean that some fishing, boating and salvage activities would be permissible in the reserve, but the dropping of anchors and possibly the use of trawls would not. The Explanatory Report also states that "[a]ny excavation [in a reserve] must be subject to severe scrutiny in the light of scientific objectives".[259] Presumably, if a site became threatened by natural processes such as sandbank movements, excavation might be required, or if a careful decision was made that the time was now right to undertake a particular excavation to provide certain information in the furtherance of archaeological research.

(iv) *Provision for the mandatory reporting to competent authorities by a finder of chance discoveries and "making them available for examination".* The Explanatory Report makes it clear that this provision "has nothing to do with ownership". It is interesting to note that the Explanatory Report, although not the Convention itself, states that "[a] State...may only require mandatory reporting of finds of precious materials or on already listed sites". It appears that much of the resistance to some of the more stringent measures proposed at the drafting stage, came from the UK government[260] and it does not seem unlikely that it may have been the UK government's representations that were responsible for this "get-out" clause. Certainly it means that the UK government will have to make few changes in order to conform with this requirement, especially in regard to finds on land.[261] The provision for reporting is already met, as far as

wreck is concerned, by the receivership system established by the MSA 1894, although it is not met for other underwater archaeological finds. However, no provision is made in the MSA 1894 for making finds available for examination by appropriate archaeological bodies.[262]

3. Authorisation and Supervision of Archaeological Activities

Article 3 of the 1992 Convention relates to the authorisation and supervision of archaeological activities. The article does not actually state that it only applies to designated monuments and areas, but this appears to be the implication. The first point to note is that authorisation procedures should provide for non-destructive methods of investigation wherever possible.[263] In the marine context, this may mean that in general licences to survey should be the only type of licence issued, if survey is considered to be a non-destructive method of investigation.[264] Each party undertakes to ensure that archaeological excavations are undertaken in a scientific manner and that excavations "and other potentially destructive techniques" are carried out only by "qualified" specially authorised persons. Unfortunately, the word "qualified" is not further defined, but the Explanatory Report states that the provision does not mean that members of the general public cannot be engaged on excavations, but that they must be under the control of a qualified person who is responsible for the excavation. In fact, the Explanatory Report acknowledges that amateurs have contributed greatly to the development of knowledge through their assistance in excavations. The UK government could therefore argue that its present system, whereby excavations on designated sites must be supervised by a nominated Excavation Director would be perfectly adequate to fulfil its obligation in this respect. Exactly what "other potentially destructive techniques"

means is unclear, but if it did cover surveying then again the UK government could argue that survey licences are only issued where there is a nominated Archaeological Adviser. The Explanatory Report states that "[e]xcavations made solely for the purpose of finding precious metals or objects with a market value should never be allowed": this might mean that the UK's Advisory Committee on Historic Wreck Sites would have to look more closely at the motivation of its licensees.[265]

4. Physical Protection of the Archaeological Heritage

Article 4 is an odd little provision which relates to the implementation of measures for the physical protection of the archaeological heritage. In order to make such provision, Parties to the Convention must do three things, although this requirement is qualified by the phrase "as circumstances demand". First, they must make provision for the "acquisition or protection by other appropriate means" by public authorities of areas intended to constitute archaeological reserves, so reinforcing the provision in Article 2 for the creation of such reserves. This requirement has more relevance to land sites than underwater sites. Secondly, and more importantly for the underwater heritage, States must make provision for the conservation and maintenance of the archaeological heritage, "preferably in situ".[266] It is a pity that this requirement is qualified by the phrase "as circumstances demand" which the UK government could easily use as another means of avoiding the need for change. Nonetheless, the Explanatory Report states that the Article "obliges States to allocate resources, both fiscal and human, to the tasks specified". It also emphasises that the creation of archaeological reserves is a "continuing obligation", "the beginning of a process of maintenance". Taken at its widest, the conservation and maintenance of the archaeological heritage

in situ could mean, in the underwater sphere, the regular monitoring of remains to check their stability and condition and possibly even the provision of physical protective measures, such as sandbagging. Finally, States must make provision, again "as circumstances demand", for appropriate storage places for archaeological remains which have been removed from their original location. As the UK government already provides funding for national museums, it is difficult to see how it could be required to do much more in this respect. However, the government could put an onus on the limitation of excavations so that material is not raised for which there is no appropriate storage place.

5. "Integrated Conservation"

Article 5 falls under a general heading "Integrated conservation of the archaeological heritage", and this article is probably the most interesting and innovative provision of the 1992 Convention. The Explanatory Report rightly states that "[t]his Article encapsulates contemporary thought and practice on the relationship between development projects and preservation of the archaeological heritage". Each Party undertakes to try to reconcile the requirements of archaeology and development plans by ensuring that archaeologists participate in planning policies and in various stages of development schemes, and to ensure that archaeologists and planners consult with one another. Already, on land there are procedures which allow for these requirements to take place,[267] but it is unclear how they could be applied in the marine sphere where there are no plans or policies governing development. Whether the drafters actually considered the applicability of the provision to the marine zone is unknown; certainly the article does not appear to require State Parties to institute a system of development policies and plans, where one does not already exist. However, some of the provisions in the article have clearer

application in the marine sphere. For example Parties should ensure that environmental assessments and the resulting decisions involve full consideration of archaeological sites and their settings, which - in the marine zone - may not always be the case at present.[268]

Parties should also make provision, when elements of the archaeological heritage have been found during development work, for their conservation in situ "when feasible". The exact nature of "development work" is unclear. For example, would it cover only traditional forms of development, e.g. the construction of marinas and jetties etc., or would it also cover development in the wider sense encompassing dredging and mineral exploration and exploitation? The wider its coverage, the more applicable it will be in the marine sphere. This provision for remains found during development work really represents a general statement of principle and, since it is qualified by the words "when feasible", may not mean very much change is required in practice. Nonetheless, the whole of Article 5 does raise the profile of the underwater archaeological heritage in relation to "development" activities and may at least result in it being considered rather than disregarded altogether.[269]

6. Financing

Article 6 relates to the financing of archaeological research and conservation. It provides, on a general level, that Parties undertake to arrange for public financial support for archaeological research and then, more specifically, that each Party undertakes to "increase the material resources for rescue archaeology" in two ways. First, where there are major public or private development schemes, public sector or private sector resources should be allocated to cover the total costs of any "necessary" related archaeological operations. Secondly,

provision should be made in the budget relating to these schemes for "preliminary archaeological study and prospection, for a scientific summary record as well as for the full publication and recording of the findings". This whole article holds out some hope that there may be some provision of government and private funding for marine archaeology. At present, virtually no government funding is provided for archaeological operations underwater. The only examples appear to be very recent: the limited funding provided to the ADU for surveying and investigation of sites, the funding provided by English Heritage for the investigation of the ancient fish traps recently found off Essex and some funding provided by Historic Scotland for work on the Duart Point wreck.[270] This article may therefore lead to the targeting of underwater archaeology for more government funding and perhaps for some funding provision for archaeological operations being required of marina developers and others whose developments impinge on the marine zone.[271]

7. Surveys and Inventories

The final article which has direct practical significance for the underwater heritage is Article 7 which provides that each Party undertakes, inter alia, "to make or bring up to date surveys, inventories and maps of archaeological sites in the areas within its jurisidiction". In respect of an inventory, it has already been noted that this process has been initiated very recently, for UK territorial waters. Presumably, when sufficient information has been collated, maps will be drawn up which will identify known sites and areas of high archaeological potential. What is particularly significant, is that the Convention makes provision for the carrying out of surveys[272] and this is something that the UK government has not yet been willing to envisage funding, except in very limited circumstances. The Explanatory

Report links the provision in Article 7 for surveys, inventories and maps with the provisions in Article 5 for consultation between archaeologists and developers, stating that it is only with up-to-date surveys, inventories and maps of archaeological sites that the process of consultation work can be effective. One of the main obstacles in the marine zone to a requirement that developments take into account the underwater archaeological resource is that - apart from designated sites and a few others - the location of the archaeology is unknown.[273]

8. Other Provisions

The other five substantive articles of the Convention provide for the national and international exchange of material and pooling of information,[274] the promotion of public access and display of archaeological material,[275] co-operation to prevent illicit circulation of archaeological material[276] and mutual technical and scientific assistance.[277] Of particular relevance to the underwater heritage is the provision in Article 9 that Parties conduct "educational actions with a view to rousing and developing an awareness in public opinion" of the value of the archaeological heritage and threats to this heritage. In the marine sphere, where policing and physical protective measures may in practice be very difficult to pursue, education is a key to the effective enforcement of a protective regime.[278]

9. Assessment

The 1992 Convention is of particular interest because it will probably provide the first true supra-national protective regime for the underwater cultural heritage. It has managed to do this by slipping the underwater heritage into its remit through "the back door". Attempts to draft conventions applying specifically to the underwater cultural

heritage, i.e. the 1985 draft European Convention and the 1992 draft ILA Convention have become bogged down in the jurisdiction issues, but the 1992 Convention has astutely avoided this. It is true that, if the UK government does decide to ratify the Convention, very little may need to change in order for it to comply with the letter (if not the spirit) of the Convention. This in fact appears to be a direct result of UK government representations at the drafting stage.[279] Nonetheless, the significance of the Convention is that it does finally give European recognition to the importance of the underwater heritage and provides that heritage with a status equivalent to the land heritage. By treating both types of heritage in the same way the Convention shows that this is indeed possible, and perhaps even preferable.[280] Furthermore, it raises important issues such as protection in situ, use of non-destructive methods of investigation, protection of areas, significance of context as well as sites and artefacts, the importance of reporting, the requirement for financing, the need for inventories and surveys and the relationship between development and archaeology and, for the first time, these issues are specifically linked to the underwater heritage. At the very least, this should affect the attitude of the UK government towards the underwater heritage and help to educate the government about this aspect of the cultural heritage. It is submitted that the 1992 Convention may well be the most significant development yet made at a supra-national level for the protection of the underwater cultural heritage.

CONCLUSION

The purpose of this chapter has been to review developments on the European and international planes relating to the underwater cultural heritage. As has been seen, there have been a number of initiatives. The Council of Europe's minimum requirements set out in

Recommendation 848 provide unenforceable, but useful, guidance to Member States about their schemes of protection for the underwater cultural heritage. It is, however, extremely unfortunate that progress with the 1985 draft European Convention has reached a deadlock. It is a very detailed scheme of protection for the underwater cultural heritage and is the result of eight years' work. The 1982 Law of the Sea Convention contains two provisions relating to the underwater cultural heritage, but these are of only a very general nature, as was foreseen by the Council of Europe's Parliamentary Assembly in 1977. However, there have been two promising recent developments. The first is the ILA's work on a draft Convention which is intended to provide some measure of protection for the underwater cultural heritage beyond the 12 mile territorial limit.[281] The second is the 1992 European Convention on Protection of the Archaeological Heritage, which appears likely to become the first supra-national scheme of protection for the underwater cultural heritage in territorial waters and other areas within the jurisdiction of the Parties.

Until there is a convention in force which deals with the jurisdictional issues, the UK should examine the possibility of extending its jurisdiction in respect of cultural property beyond the 12 mile limit, just as other countries have done without apparent objection. If the UK wished to proceed on a sound jurisdictional basis, it could follow the jurisdictional techniques employed by the ILA through taking action on items brought into its territory, no matter in which part of the sea they originated; and to create offences for its own nationals wherever they might be.[282]

NOTES

1. Parliamentary Assembly of the Council of Europe, Recommendation 848 on the Underwater Cultural Heritage (1978).

2. For further details, see C., below.

3. See Order No. 361 (1977) and Council of Europe, Parliamentary Assembly, 28th Ordinary Session, Official Report 24 January 1977 (AS(28)CR 20, 20th and 21st Sittings).

4. The Roper Report, op. cit., p.3.

5. Ibid.

6. Document 4200-E, known as the Roper Report after the sub committee's Chairman, John Roper.

7. Ibid.

8. Underwater cultural heritage in this context includes fixed remains, for example, submerged settlements or harbour works: Roper Report, op. cit., p.5.

9. See Appendix 17.

10. See B., below.

11. This requirement applies where there is no general antiquities law covering both terrestrial and marine heritage.

12. Roper Report, op cit., p.4.

13. PWA 1973 ss.1(1) and 3(1).

14. See further, Chapter Seven, A.1(a) below.

15. See Chapter Six, A.1(a) and (b) below, and Chapter Seven, A., below.

16. See Chapter Six, A.1(d) below.

17. See further, Chapter Six, A.4., below.

18. See Chapter Six, A.3., A.7., and D., below.

19. See Chapter Two, A.5., above.

20. See generally, Chapter Two above.

21. See B., below. In fact the 1985 draft European Convention on the Protection of the Underwater Cultural Heritage actually adopted a 24 mile limit, see B., below.

22. See C.1(e) below.

23. O'Keefe and Prott, Law and the Cultural Heritage, Vol.1, op. cit, p.101.

24. See further, C.1., below.

25. See C.1(c), (d) and (e) below.

26. See generally, Chapters Two and Three above.

27. See further, Chapter Two, B., above.

28. See Chapter Two, B., above. The issue of reporting is discussed in detail in Chapter Six, A.5., below.

29. DOE, Consultation Paper on Portable Antiquities (1988). See further, Chapter Seven, A.1(b) below.

30. For a detailed discussion of rewards, see Chapter Six, A.7., below.

31. See Chapter Three, C.2., above.

32. See further, Chapter Two, A.5., above.

33. See A.1., above.

34. Recommendation 848 (1978), Doc. 4200-E, 1(a).

35. L. Prott, P. O'Keefe, Final Report on Legal Protection of the Underwater Cultural Heritage, Appendix II to Doc. 4200-E, p.80.

36. See B.2(a) below.

37. Personal communication with A. Papandreou, Head of Division, Legal Documentation and Research, Directorate of Legal Affairs, Council of Europe, August 1991.

38. DIR/JUR (84) 1, Strasbourg, 22 June 1984 (together with a draft Explanatory Report to the Convention). The draft Convention and Explanatory Report, as released, constitute the version adopted by the Ad Hoc Committee of Experts on the Underwater Cultural Heritage (CAHAQ) on the occasion of its fifth meeting, held in Strasbourg, 19-23 March 1984. The confidential character of these texts was waived by decision of the Committee of Ministers taken at their 374th meeting at Deputies level (14-22 June 1984). See Appendix 18.

39. Provision for the establishment of a Standing Committee in this draft Convention can be contrasted with the much criticised lack of such provision in the 1982 Law of the Sea Convention to enforce Articles 303 and 149. See C., below.

40. Personal communication with A. Papandreou, Head of Division, Legal Documentation and Research, Directorate of Legal Affairs, Council of Europe, July 1990.

41. Art.18 of the final version of the draft Convention, as it was left pending, contains the provision in Art.2(7) of the declassified version, i.e. the provision preserving the rights of identifiable owners and the effect of salvage law, etc.

42. Cf. the minimum requirements laid down in Recommendation 848, see A., above.

43. See draft Explanatory Report and Art.2(7) of the Convention. See further, B.2(b) below.

44. See further, thesis Introduction.

45. See draft Explanatory Report.

46. See further, thesis Introduction.

47. See generally, Chapter One, above.

48. Although note the indirect protection which may be afforded to vessels and aircraft of historical significance by the PMRA 1986: see Chapter Three, E., and F., above.

49. See further, Chapter Seven, A.1(a) below.

50. It appears that, as regards the territorial application of the draft Convention, in spite of the fact that the relevant article of the final version is shorter and structured in a different manner, the substance remains identical to the provisions which appeared under Art.2 of the declassified version: personal communication with A. Papandreou, Head of Division, Legal Documentation and Research, Directorate of Legal Affairs, Council of Europe, 20 July 1990.

51. See the Geneva Convention on the Territorial Sea and Contiguous Zone 1958, which established the concept of contiguous zones, and the 1982 Law of the Sea Convention Art.33, which extends the limit of the contiguous zone to 24 miles. See also C., below.

52. In fact it seems that it is objection to Art.2 which has been the obstacle to approval of the draft Convention by the Committee of Ministers.

53. See further, C.2(b) below.

54. F. Dawson, "Protecting the Underwater Cultural Heritage: A New Security Concern", in Proceedings of the Fifth Anglo-Soviet Symposium on the Law of the Sea, 17-23 July 1988, Moscow. The issues surrounding this legal fiction are discussed at C.2(b) below.

55. See further, C.2(b) below.

56. See C.1(d) below.

57. I.e. Arts. 303 and 149. See C.2(a) and (b) below.

58. Exactly what was in mind when the drafters decided to insert in Article 2(7) the provision "Nothing in this Convention affects...laws and practices with respect to cultural exchanges" is difficult to envisage. For details about such exchanges, see Prott and O'Keefe, Law and the Cultural Heritage, Vol.3, op cit., pp.294-298.

59. In the final version, this provision appears in Art.18.

60. Roper Report, op. cit., Appendix II, p.68.

61. See further, Chapter One, A.1(c) above.

62. See Art.9, B.2(j) below.

63. See Chapter Two, C.2., above, and Chapter Five, A., below.

64. See further, Chapter One, A.2., above. For further discussion of ownership issues, see Chapter Six, C.1., below.

65. See generally, Chapter One, above.

66. International Convention on Salvage 1989, Art.30(1)(d).

67. Although Article 6 provides that there is nothing to prevent Contracting States from offering rewards.

68. See further, Chapter Three, C.5., above.

69. See Chapter Three, C.5., above.

70. See B.2(g) below.

71. See Chapter Two, A.3., above.

72. See Chapter Two, B., above.

73. See further, Chapter Six, A.4., below.

74. See also Article 15 regarding property in international waters.

75. See further, Chapter Six, A.4(c) below.

76. See Chapter Six, A.4(c) below.

77. See further, Chapter Six, B.1., below.

78. See further, Chapter Six, C.2., below.

79. See further, Chapter Six, C.2., below.

80. See further, Chapter Seven, D., below.

81. See further, Chapter Six, A.3. and D., below.

82. See further, Chapter Five, C., below.

83. See Chapter Six, B.2., below.

84. For a discussion of amateur interests, see Chapter Six, B.2., below.

85. Cf. Article 149 of the 1982 Law of the Sea Convention which uses a concept of "preferential rights". See further, C.2(a) below.

86. See Art.2.

87. For details of this and other inter-state agreements, see Chapter One, A.1(c) above and Chapter Six, C., below.

88. See Chapter One, A.1(c) above.

89. It is not intended to go into details of the UK system of export control here, but details may be found in Prott and O'Keefe, Law and the Cultural Heritage, Vol.3, op. cit., pp.484-486.

90. JNAPC, Notes of a Conference on Nautical Archaeology, held in the Royal Armouries on 30 January 1988. See also H.L. Debates, Vol.513, Col.1339 (1989) where, in a debate on museums and galleries, Lord Montagu of Beaulieu - then Chairman of English Heritage - called for the government to consider ratification of the Convention.

91. Prott and O'Keefe, Law and the Cultural Heritage, Vol.3, op. cit., p. 726. For a brief outline of the UNESCO Convention, see the International Law Association, International Committee on Cultural Heritage Law, Report to the Cairo Conference of the International Law Association (1992) (referred to hereafter as the Cairo Report).

92. See Prott and O'Keefe, Law and the Cultural Heritage, Vol.3, op. cit., p.785.

93. Prott and O'Keefe, Law and the Cultural Heritage, Vol.3, op. cit., p.786.

94. Explanatory Report, p.19.

95. According to the Explanatory Report, p.19.

96. Prott and O'Keefe, Law and the Cultural Heritage, Vol.3, op. cit, p. 611.

97. Prott and O'Keefe, Law and the Cultural Heritage, Vol.3, op. cit, p.612.

98. See further, C.2(b) below.

99. See A., above.

100. See C., below for details.

101. Part II, Title 1 of the Treaty of Rome 1957. Article 100 of the Treaty provides for the "approximation" of laws directly affecting "the establishment and functioning of the internal market". How far such approximation, or harmonisation, will be required in the field of cultural goods will depend largely on the interpretation of Article 36 of the Treaty, which provides an exception to the principle of free movement of goods where justified for "the protection of national treasures possessing artistic, historic or archaeological value": see further, J. Goyder, "Free Movement of Cultural Goods and European Community Law" (1992) 1 IJCP 219 and 403. See also, A. Loman et al., Culture and Community Law: Before and after Maastricht (1992) for an interesting examination of the impact of EC law on cultural matters.

102. Dawson, op. cit., p.9.

103. See A. Firth, "Archaeology Underwater in France" (1992) 7 IJECL 57.

104. These matters will only be dealt with briefly here. For a detailed analysis, see generally O'Connell, op. cit.

105. No mention will be made here of archipelagic waters as they are irrelevant to the UK situation.

106. There has always been tension between the concept of freedom of passage and the sovereignty of the coastal state: see O'Connell, op. cit., p.271 and Chapter 7 generally.

107. L. Caflisch, "Submarine Antiquities and the International Law of the Sea" (1982) XIII Netherlands Yearbook of International Law 3 at p.10.

108. 516 UNTS 205. This Convention was one of four produced by the first UN Conference on the Law of the Sea (UNCLOS I), the others being: the Convention on the Continental Shelf 1958, the Convention on the High Seas 1958 and the Convention on Fishing and Conservation of Living Resources of the High Seas 1958. The two first mentioned will be referred to below. The Fishing Convention is not relevant here.

109. UNCLOS II met in Geneva in 1960 to attempt to reach a consensus on this point, but it was unsuccessful.

110. The customary character of the 12 mile limit was questionable in 1958, but recent state practice leaves no doubt that the 12 mile limit has now acquired that character: Caflisch, op. cit., p.10, f.n. 31. See also Article 3 of the 1982 Convention, which probably on this point is declaratory of customary international law. As to the measurement of the distance, see Prott and O'Keefe, Law and the Cultural Heritage, Vol.1, op. cit., p.90.

111. Territorial Sea Act 1987, s.1(1)(a).

112. For examples, see (c), (d) and (e) below.

113. International Law Association, Cairo Report, op. cit., p.5.

114. The 1958 Geneva Convention on the High Seas in Article 2 reiterates the principle of freedom of the high seas and specifies four freedoms, but it states specifically that these are not exclusive of others recognised by the general principles of international law.

115. A. Strati, "Deep Seabed Cultural Property and the Common Heritage of Mankind" (1991) 40 International and Comparative Law Quarterly 859 at p.869, and A. Arend, "Archaeological and Historical Objects: The International Legal Implications of UNCLOS III" (1982) Virginia Jnl of Int. Law 777 at p.786, argue that it does; the International Law Association's Queensland Report p.5 suggests that it does not. The freedom to undertake scientific research is confirmed by the International Law Commission's Report to the General Assembly, 11th Session, GAOR Supp (No.9), UN Doc A/3159 (1956), reprinted in [1956] 2 Yrbk of Int L Comm 253, at p.278.

116. See International Law Association's Queensland Report, p.7 and O'Connell, op. cit., p.914. This was a matter of dispute in negotiations leading up to the 1989 Salvage Convention. However, the FCO sees itself as having a role in protecting British rights and interests on the high seas where the wreck in question and/or its contents remain Crown property: letter from P. Williams, Aviation and Maritime Department, FCO, to A. Firth, University of Southampton, dated 3 March 1992.

117. Op. cit. p.25 and p.25 f.n. 81.

118. See Strati, op. cit., p.870. See Chapter One for discussion of issues relating to jurisdiction and the ownership of wreck and the rights of salvors and finders.

119. For details, see Chapter Three, E., above.

120. See further, O'Connell, op. cit., p.911 et seq.

121. See Caflisch, op. cit., p.12.

122. In this respect, see discussion of Article 303 below.

123. Loi n.89-874 of 1st December 1989. See further, Firth, "Archaeology Underwater in France", op. cit.

124. Conservation of Nature Act 1984 (Denmark). Strati, op. cit., p.864, f.n. 17.

125. For further details, see O'Connell, op. cit., Chap. 18 and Allen, op. cit.

126. The equivalent provision in the 1982 Law of the Sea Convention is Article 77.

127. As to whether the provisions of this Convention relating to scientific research could apply to marine archaeology, see Caflisch, op. cit., pp.14-15, who concludes that they could not. Cf. Arend, op. cit., p.785-6 and Korthals Altes, "Submarine Antiquities: A Legal Labyrinth", op. cit., pp.80-81. The doctrine of the continental shelf, embodied in the Geneva Convention, was founded on a series of unilateral declarations by states, the first being that of the US in 1948: Prott and O'Keefe,

"Law and the Underwater Heritage" in UNESCO, Protection of the Underwater Heritage (1981).

128. See O'Connell, op. cit., p.918; Caflisch, op. cit., p.14. This conclusion is apparently supported by the travaux preparatoires of the Convention: see Caflisch, op. cit., p.14. For an interesting discussion of this issue, see Strati, op. cit., p.869.

129. Korthals Altes, "Submarine Antiquities: A Legal Labyrinth", op. cit. p.80 argues that wrecks are resources. Cf. Strati, op. cit., p.869.

130. Report of the International Law Commission to the General Assembly, 11th Session, GAOR Supp No 9, UN Doc A/3159 (1956), reprinted in [1956] 2 Yrbk of Int L Comm 298. See also, O'Connell, op. cit., p.918.

131. Historic Shipwrecks Act 1976.

132. National Monuments (Amendment) Act 1987 s.3.

133. Section 44 of the Royal Decree of 8 December 1972 relating to Exploration and Exploitation of Petroleum in the Seabed and Substrata of the Norwegian Continental Shelf, as cited in Prott and O'Keefe, Law and the Cultural Heritage, Vol. 1, op. cit., p.96. This provision requires petroleum exploration companies to report discoveries of historical interest on the continental shelf and not to damage or destroy them: O'Keefe, "The Law and Nautical Archaeology: An International Survey", op. cit.

134. Maritime Zones Act 1977, s.7(1).

135. Law No.4 of 1974 which ratifies the Geneva Convention.

136. Owen, "The Abandoned Shipwreck Act of 1987", op. cit., p.503.

137. Article 80 and O'Connell, op. cit., p.918. O'Connell suggests (at p.918) that states can regulate disturbance of the seabed of the continental shelf where a wreck is embedded in coral and presumably this would extend even to wrecks embedded in sand and sediment, as these are natural resources of the seabed. It is submitted that Allen, op. cit., pp.21-22, is being rather optimistic in considering that Articles 81 and 85 dealing with drilling and tunnelling, could be used to regulate salvage operations except in a most minor way.

138. A. Giesecke, "Shipwrecks: The Past in the Present", op. cit., p.183. See also, O'Keefe, "The Law and Nautical Archaeology: An International Survey", op. cit., pp.10-11. By designating this area, the US has attempted to control access to the wreck site. Cf. the US Department of State's objection to the assertion of federal title to shipwrecks on the outer continental shelf, mentioned above.

139. Prott and O'Keefe, Law and the Cultural Heritage, Vol. 1, op. cit., p.94.

140. I.e. a zone of 200 nautical miles in breadth, measured from the territorial sea baselines.

141. This does not necessarily mean that states have claimed exclusive rights to fishing in the whole 200 mile zone. For example, British fishery limits extend to 200 miles under the Fishery Limits Act 1976, but Britain only has exclusive rights in a six mile zone. Between six and 12 miles certain other EC states have limited fishing rights and between 12 and 200 miles all EC states have a right to fish: L. Warren, "Legislation for Marine Affairs", Marine Forum for Environmental Issues, North Sea Report, (1990), p.159.

142. See further, (f) below.

143. Dahir instituting a 200 nautical mile exclusive economic zone off the Moroccan coast of 1991.

144. It appears, however, that - in order to secure navigation in waters adjoining its straits, Denmark has established a special "buoyage zone" co-extensive with its 200 mile fishing zone. Within this zone it regulates removal and salvage of wrecks that are deemed dangerous to navigation: International Law Association, Cairo Report, op. cit., p.5.

145. See discussion of Article 149 at C.2(a) below.

146. Korthals Altes, "Submarine Antiquities: A Legal Labyrinth", op cit., p.83.

147. The Times, 29 January 1986. When auctioned, the cargo fetched £9 million: The Listener, 15 May 1986. For details of archaeology on the deep seabed, see Muckelroy, Maritime Archaeology (1978) pp.150-1.

148. "Midget submarine will help mark war graves", The Independent, 5 August 1991. This news cutting explained that it had been discovered that divers can spend longer underwater and at greater depths when they breathe Heliox, a helium oxygen mixture which the body uses more easily than air. The mid-1980s' investigation and salvage of items from the Titanic, lying at a depth of 12,000 ft is an example of the growing abilities of mankind. See further, below.

149. In fact, the Titanic may not be located in the "Area", but rather on the outer continental shelf as defined by the 1982 Convention: see Strati, op cit., p.893, f.n.82. "Search pinpoints Titanic wreck", The Observer, 1 September 1985.

150. It seems rather odd that the Bill provided for the establishment of "national" as opposed to "international" guidelines, in view of the circumstances.

151. IFREMER, a French oceanographic organisation, with American and European backing, spent 54 days on the site and raised approximately 900 items: D. Lynch, Titanic: An Illustrated History (1992) p.208.

152. International Law Association, Cairo Report, op. cit., p.16.

153. For a very interesting summary of the background to the Conference, see Council of Europe, Parliamentary Assembly, Report on the UN Conference on the Law of the Sea, Rapporteur: Mr. Grieve, Doc. 3910 (12 January 1977).

154. On the UN Seabed Committee's list of subjects to be discussed, the underwater cultural heritage was 23rd on a list of 25 items: S. Langley, "The Law and Nautical Archaeology in Canada", in S. Langley and R. Unger (eds.), Nautical Archaeology: Progress and Public Responsibility (1984) p.20.

155. The Convention also provides for marine scientific research in Part XIII, but it appears that, as with the 1958 Continental Shelf Convention, archaeological research does not qualify as marine scientific research, which is confined to the natural environment and its resources: Strati, op. cit., p.883 and p.883 f.n. 62; Caflisch, op. cit., p.23; International Law Association, Queensland Report, op. cit., p.9.

156. For a very comprehensive consideration of Article 149, see Strati, op. cit., pp.871-892. See also Caflisch, op. cit., pp.25-32 and Arend, op. cit., p.788-791.

157. For information about the very early stages, see Caflisch, op. cit., pp.26-27; Strati, op. cit., pp.874-6; Korthals Altes, "Submarine Antiquities: A Legal Labyrinth", op. cit., pp.82-84.

158. At the Third Session in Geneva, 17 March-10 May 1975. UN Doc A/CONF.62/WP.8, UNCLOS III Off. Rec. Vol. IV p.137.

159. UN Doc A/CONF.62/WP.8/PART I, UNCLOS III Off. Rec. Vol. IV p.140. Square brackets show parts left out or altered in the 1976 draft (see below).

160. Article 140 of the final text provides that activities in the Area are to be for the benefit of mankind as a whole.

161. Op. cit., p.875.

162. By the Fourth Session of the Conference in New York. UN Doc A/CONF.62/WP.8/Rev.1/Part I, UNCLOS III Off. Rec. Vol. V, p.125.

163. UN Doc A/CONF.62/WP.8/Rev.1/Part I, UNCLOS III Off. Rec. Vol. V, p.131.

164. The original phrase was a modification of the term "State of the country of origin" used in a proposal of the Turkish delegation in 1973. It was apparently intended to designate the state which presently exercises sovereignty over the "country" of origin: Caflisch, op. cit., p.30, f.n.98. When the ISNT was revised, the formula was modified and Caflisch suggests that the modification was quite possibly based on the assumption that the word "of" was a typographical error!

165. UN Doc A/CONF.62/WP.10, Rev.1, Rev.3, (1977) 16 ILM 1108, (1979) 18 ILM 686.

166. See further below. For a discussion of the concept of the "common heritage of mankind" and the distinction between its application in the cultural field and in the natural resources field, see Strati, op. cit.

167. A term which is also used in Article 303, C.2(b) below, again without definition.

168. See International Law Association, Queensland Report, op. cit., pp.8-9.

169. B. Oxman, "The Third United Nations Conference on the Law of the Sea: The Ninth Session (1980)" (1981) 75 AJIL 211, at pp.239-241.

170. Oxman, op. cit., p.241, f.n. 152.

171. Ibid., p.241, f.n. 152.

172. Op. cit., pp.9-10; as does Strati, op. cit., p.872.

173. (1969) 8 ILM 679.

174. See Chapter Six, A.1(d) below for examples. Cf. the minimum requirements of Recommendation 848 (see A., above), and the draft European Convention (see B., above), which use 100 years as a cut-off point, and the International Law Association's draft proposal (see D., below), which uses 50 years.

175. Although under the Australia/Netherlands Agreement there are plans for travelling exhibitions designed to make the Australian and Western European public aware of the valuable finds that have been made: see G. Bolton, "ANCODS - Australian Netherlands Committee on Old Dutch Shipwrecks", in Proceedings of the First Southern Hemisphere Conference

on Maritime Archaeology (1977).

176. See above.

177. UN Doc A/AC.138/SC.I/L.16, 2 August 1972 (Greece). Text reprinted in S. Oda, The International Law of the Ocean Development: Basic Documents (1975) Vol. II, p.328.

178. UN Doc A/AC.138/SC.I/L.25, 14 August 1973 (Greece). Reprinted in Oda, op. cit., p.330.

179. UN Doc A/AC.138/SC.I/L.21, 28 March 1973 (Turkey). Reprinted in Oda, op. cit., p.330.

180. Op. cit., p.886.

181. Cf. Art.9 of the 1985 draft European Convention which refers to states having a "particular interest" in a discovery. See B.2(j) above.

182. See Strati, op. cit., pp.883-4 for an interesting application of the decisions of the International Court of Justice in the Fisheries Jurisdiction Cases which considered the notion of preferential rights in a different context.

183. Op. cit., p.800, f.n. 106.

184. For details, see Chapter Six C.1., and C.2., below.

185. Cf. the 1985 draft European Convention Art.9 (see B.2(j) above).

186. See above.

187. But see Strati, op. cit., p.884.

188. Strati, op. cit., p.877 and p.876, f.n. 45.

189. International Law Association, Queensland Report, op. cit., p.8.

190. Caflisch, op. cit., p.29. See also, Strati, op. cit., p.878.

191. Strati, op. cit., p.878. Cf. the provision in the draft European Convention for a Standing Committee comprising representatives of each Contracting State.

192. See the view of the International Law Association's Committee on Cultural Heritage Law on the establishment of a regulatory body, at D., below.

193. For a full discussion of Article 303, see Caflisch, op. cit.

194. For earlier proposals by the group, see Arend, op. cit., pp.793-795.

195. UN Doc C.2/Informal Meeting/13/Rev.3 of 27 March 1980, as cited in Prott and O'Keefe, Law and the Cultural Heritage, Vol.1, op. cit., p. 98.

196. Op. cit., p.17.

197. Cf. Oxman, op. cit., p.240.

198. UN Doc. GP.4 of 27 March 1980, as cited in Caflisch, op. cit., p.17.

199. See further, Caflisch op. cit., p.19, Arend op. cit., p.799 and Oxman op. cit., p. 241.

200. See B.2(a) above.

201. Op. cit., p.240.

202. Op. cit., pp.19, 20, 24.

203. E.g. Denmark and France. See C.1(c) above.

204. Blackman, op. cit., p.35. See further, C.1(f) above. According to the Vice-Chairman of the US delegation, "while enforcement protection in the territorial sea alone was insufficient, the vast seaward reaches of the economic zone and continental shelf were not really relevant to the problem": Oxman, op. cit., p.240.

205. See C.2(a) above.

206. Art.9, see B.2(j) above.

207. Res. 38/34 of 25 November 1983, Res. 40/19 of 21 November 1985, Res. 42/7 of 22 October 1987, Res. 44/18 of 6 November 1989, as cited by Strati, op. cit., p.865.

208. Such as the 1985 draft European Convention (see B., above) and the 1992 International Law Association draft Convention (see D., below.)

209. Op. cit., pp.31-32.

210. See W. Butler, "Custom, treaty, state practice and the 1982 Convention" [1988] Marine Policy 182.

211. Ibid, at p.182.

212. The UK followed the US decision not to sign.

213. Prott and O'Keefe, Law and the Cultural Heritage, Vol.1, op. cit., p.105. But see also, the International Law Association's Queensland Report, op. cit., p.9.

214. C.2(b) above.

215. See B., above.

216. ILA, Queensland Report, op. cit.

217. International Law Association Yearbook (1990) p.223 at p.228.

218. See further, C.1(f) above.

219. Although the US attempted to act unilaterally, see C.1(f) above.

220. See C., above.

221. See B., above.

222. P. O'Keefe, "Drafting a Convention on the Underwater Cultural Heritage", unpublished paper (undated).

223. For an outline of the common principles of international jurisdiction, based on the format of Harvard Research on International Law, see ILA, Cairo Report, op. cit., p.13.

224. Cf. Protection of Military Remains Act 1986, see Chapter Three, E., above.

225. O'Keefe, "Drafting a Convention on the Underwater Cultural Heritage", op. cit.

226. For further discussion, see B.2(a) above.

227. See C.2(a) above.

228. O'Keefe, "Drafting a Convention on the Underwater Cultural Heritage", op. cit. See also, discussion of government ownership, Chapter One, A.1(c) above.

229. See Appendix 19.

230. Art.1(4).

231. See, respectively, A., and B., above.

232. See further, Chapter One, above.

233. See Chapter One, A.1(a) above.

234. See Chapter Seven, B., below.

235. It may be co-extensive with the contiguous zone, continental shelf, 200 mile EEZ, a special 200 mile protection zone, "or any combination of these": Art.2. The meaning of "or any combination of these" is unclear.

236. Article 2.

237. See ILA, Cairo Report, op. cit., p.4.

238. US Abandoned Shipwreck Act of 1987, Sec.5.

239. Sec.5.

240. ILA, Cairo Report, op. cit., p.4.

241. Article 3(3).

242. Article 3(3).

243. Personal communication with P. O'Keefe, Chairman of the Committee on Cultural Heritage Law, 10 September 1992.

244. op. cit., p.16.

245. See Art.1(3).

246. See Art.1(5).

247. See Appendix 20.

248. Editorial, (1992) 66 Antiquity 287.

249. Explanatory Report of the European Convention on the Protection of the Archaeological Heritage (Revised), Provisional edition, MPC(91)8.

250. Cf. Chapter Three, A., above, which outlines the threat to historic wrecks in UK territorial waters at this time.

251. The issue of development will be dealt with in detail in Chapter Seven, C., below.

252. European Convention on the Protection of the Archaeological

Heritage (revised) 1992, Article 1(1).

253. Article 1(2)(iii).

254. See thesis Introduction for details.

255. See further, Chapter Six, A.4(c) below.

256. K. Marks, Under Secretary of State for the Environment, H.C. Debates, Vol.965, Vol.1363 (1978-79).

257. See further, Chapter Seven, A.1(a) below.

258. See further, Chapter Seven, A.1(a) below.

259. Explanatory Report, p.4.

260. Editorial, (1992) 66 Antiquity 287.

261. For the position regarding the reporting of finds on land, see Chapter Seven, A.1(b) below.

262. See Chapter Six, A.5., below.

263. Article 3(i)(b).

264. Arguably, even survey methods are destructive, because they may destabilise the site and cause its condition to deteriorate.

265. See Chapter Three, C.5., above.

266. Article 4(ii).

267. See Chapter Seven, C.1., below.

268. See further, Chapter Seven, C.2., below.

269. See further, Chapter Seven, C.2., below.

270. See further, Chapter Seven, B.5., below.

271. See further, Chapter Seven, C., below, particularly in regard to voluntary codes of conduct.

272. See further, Chapter Six, A.4(b) below.

273. See further, Chapter Seven, C., below.

274. Article 8.

275. Article 9

276. Articles 10 and 11.

277. Article 12.

278. Education is discussed further in Chapter Six, D., below.

279. Editorial, (1992) 66 Antiquity 287. A senior Scandinavian archaeologist, closely associated with the drafting, apparently stated that "the Convention would have been much more effective had it not been for the UK's objections": ibid.

280. See generally, Chapter Seven, below.

281. If the ILA's attempt at a convention fails, moves to draft an international convention may be made within UNESCO, which has had a long-standing interest in the underwater cultural heritage (see, e.g., UNESCO, Underwater Archaeology: A Nascent Discipline (1972) and UNESCO, Protection of the Underwater Heritage (1981)).

282. See further, thesis Conclusion.

CHAPTER FIVE: UK DEVELOPMENTS

INTRODUCTION

At the same time as developments in the field of the underwater cultural heritage were taking place in the European and international spheres, developments were also taking place in the UK.

A. WRECK LAW REVIEW COMMITTEE 1970-74

In response to the exploitation of important historic wrecks, such as the Association and the Amsterdam, in the late 1960s,[1] a committee was established by the DTI[2] in 1970 to undertake a comprehensive review of the legislation relating to such wrecks. The PWA 1973 was designed simply as an interim measure to control diving activities during one summer season, further legislation to follow once the Wreck Law Review Committee had reported.

In 1974 the Committee made its report, but the document was never published and is "unavailable" upon request. Nonetheless, it appears that its main recommendations were:-

(i) the abolition of the receiver service;
(ii) the retention of the designation procedure under the PWA 1973;
(iii) the vesting of ownership of all vessels over 100 years of age in the Crown;
(iv) the establishment of a statutory authority with regional inspectors for overall supervision of wreck administration.

Clearly, these proposals - in particular (iii) and (iv) - were radical and it is therefore not surprising that the report was not published and that it received a somewhat muted response from government. In 1976,

in reply to a Parliamentary Question as to whether or not the report had been considered, the Secretary of State for Trade and Industry said:-

> "I have carefully considered the recommendations of the Committee on Wrecks but consider that it is premature to enact a change in the law at present. In making that decision I took into account the PWA 1973 which was enacted during the life of the Committee... This was an interim piece of legislation, but it has been working effectively and a further period should be allowed for experience to be gained. Similarly, a proposal by the Committee on Wrecks to set up a Statutory Authority should not be proceeded with until a clearer need has been established. Nevertheless the proposals in the Report will provide useful material as and when the need for a substantial change in the law is considered to be justified ..."[3]

In fact, it appears that the Wreck Law Review Committee's main proposal - the establishment of a statutory authority - was considered by the DTI as unnecessarily grand and, perhaps more importantly, too expensive.[4] Also, the recommendation that the receiver service should be abolished apparently made no suggestions as to a replacement procedure for the handling and disposal of wreck. What the government thought of the recommendation that ownership of all vessels over 100 years of age be vested in the Crown is unknown.

These recommendations were made in 1974, 18 years ago. It is therefore interesting to review them in the light of current thinking and developments.

Exactly what was meant by "the abolition of the receiver service" is unclear. In 1984 the DTp published a Consultative Document containing proposals for new legislation on wreck[5] and it too made a proposal for the abolition of the receiver service. However, the effect of the proposal in the 1984 Consultative Document was in practice nominal only: the duty to report wreck would still have existed and such reports would still have been made to HM Customs and Excise. Whether the proposal by the Wreck Law Review Committee meant that the duty to

report would have been abandoned, or whether there would still exist some form of reporting mechanism, is unknown.

It is not at all surprising that a committee reporting in 1974 should recommend retention of a system established by a statute enacted the previous year. However, the PWA 1973 has now been in operation for nearly 20 years. Over this period, defects in the designation system have become evident[6] and also the methodology and ideology of the archaeological community has developed and changed. In particular, in recent years attention has been focussed upon the management of the entire archaeological resource and the protection of archaeological remains that are not yet known to exist. The PWA 1973, in its current form, would not be capable of providing such protection. Furthermore, it does not extend protection to underwater archaeological remains other than wreck and yet, again, current archaeological thinking would probably not distinguish between the two forms of underwater cultural heritage.[7]

The vesting of ownership of all wrecks over 100 years of age in the Crown would have overcome the uncertainty caused by recognition of ownership claims,[8] but it raises some difficult issues.[9] It might be thought that a proposal for the vesting of ownership of all wrecks over 100 years of age in the Crown would be accompanied by a proposal for the blanket protection of all such wrecks,[10] but that does not appear to have been the case here. Again, current archaeological thinking would probably extend this recommendation to include other underwater cultural property.

The final recommendation - the establishment of a statutory authority - is of topical interest. The ADU to some extent fulfils the role of a government inspectorate, although not on the regional level envisaged by the Wreck Law Review Committee. However, the JNAPC's

policy document Heritage at Sea published in 1989,[11] recommended the establishment of a "maritime heritage protection agency" based on the ADU, but with more staff and a wider remit. In the government's response to this document,[12] it was stated that: "[t]he Government is not persuaded of the need for setting up a new agency". This response, although disappointing, was predictable and mirrors that in 1976.

B. DTp CONSULTATIVE DOCUMENT 1984

In March 1984 the Marine Directorate of the DTp published a Consultative Document containing proposals for new legislation on wreck and offering the opportunity for comment.[13] The reason for making such proposals at this time is unclear, but it seems likely that the DTp wanted to make some improvements to wreck law as part of a general revision of the MSA 1894. It may also have wanted to achieve economies within HM Customs and Excise. The DTp's intention appears to have been to undertake a general "housekeeping" exercise: to tighten up the administrative system, to abandon what was not required and to update the law to reflect the system as it had developed in practice. The preface announced that the Consultative Document heralded an "important change in emphasis in [the DTp's] approach to the need for official control of wreck", i.e. the demise of official intervention in modern wreck and the tightening up of legislation relating to historic wreck.

1. 1984 Consultative Document: Proposals

The Consultative Document concluded that corporate ownership of modern ships, organised salvage facilities and the existence of the Coastguard able to co-ordinate search and rescue activities had largely removed the need for receivership duties in respect of recent

casualties. Advanced communications soon made owners aware when their vessels were in difficulties and it seemed that they were well able to take steps to protect their own interests.

As far as historic wreck was concerned, the Consultative Document proposed to retain in full the provisions of the PWA 1973.[14] The possibility of transferring responsibility for the administration of historic wreck to the DOE was also considered, but it was concluded that there was "no overwhelming advantage in placing responsibility for protection of wrecks in one Department rather than another." At the time, this conclusion was not surprising since it appeared to have been based on the assumption that no extra government funding would be available for historic wreck administration and it seemed likely that the DOE would not be willing to assume the task unless such funding was forthcoming. Nonetheless, the conclusion in the Consultative Document is interesting now in light of the changeover of departmental responsibilities that took place on 1 April 1991,[15] which came about despite the fact that there was no intention to significantly increase government funding for the task.

Following the recommendations of the Wreck Law Review Committee in 1974,[16] the 1984 Consultative Document proposed the abolition of the receiver service. The reasons given were its under-utilisation and the fact that it had been running at a loss for many years. However, it also proposed that the receivers' duties should be shared by HM Customs and Excise and the Coastguard. The Customs Service would have been responsible for the handling and disposal of wreck[17] and the Coastguard would have been empowered to take command in the event of a casualty.[18] It appeared, therefore, that as far as the handling and disposal of wreck was concerned, the abolition would have been nominal only.

The 1984 Consultative Document's main proposal was for the establishment of a new procedure for the handling and disposal of wreck to replace the existing procedure. The proposals were based on the assumption that most reports related to historic wreck of little value which was often returned to the salvor in lieu of salvage. The Consultative Document recognised that improvements to the system were required in order to ensure that the more important historic finds could be identified and, if the Museums Service wished, made available to them for preservation and study.

The Consultative Document proposed that all wreck, including that from sites designated under the PWA 1973, would have been reported to the nearest office of HM Customs and Excise. A notice giving details of reports would have been posted up in the district to inform possible claimants. Possession would have been retained provisionally by the finder while claims to the wreck were considered,[19] any costs incurred in providing facilities for preservation being reimbursed if a claim was established. A copy of all wreck reports would have been sent to the nearest of a number of archaeological reporting points designated within the Museums Service and also to the Office of Arts and Libraries. In this way, artefacts of particular interest could be identified.[20] A two month period would have been allowed for claims to the wreck to be made. At the end of this period if the wreck was left unclaimed (or at such time that any claim was proved to be unfounded) title to the wreck would be transferred to the Crown. Where such was the case, a further period of two months would be provided to allow requests for acquisition to be made by the Museums Service, or other organisation intending to preserve the artefact in the public interest. Where any such request was made, the Crown would have relinquished its title to the museum concerned. Such relinquishment would have been subject to the payment of salvage, assessment of which would take into account the expenses incurred by the salvor in preserving the artefact. Also, the

Secretary of State would have been empowered to require payment of a fee to cover the cost of transferring Crown title. Museums would have been given a period of one year to raise funds for the payment of salvage and fees, such period not to be exceeded without good reason for the delay.

Where any claim was made to wreck, either by the owner or by a museum or other organisation, payment of salvage would have been by agreement between the claimant and the finder. If agreement could not be reached, the dispute would have been subject to arbitration if both parties agreed, or otherwise, to settlement in court. Where any payment of salvage was not made within a reasonable time, Crown title would have been renounced in favour of the finder. Also, in the case of unclaimed wreck, where no museum showed an interest during the second two-month period, the Crown would have relinquished its title to the finder. In the case of sites designated under the PWA 1973, where licensees were making satisfactory arrangements for conservation, Crown title to unclaimed finds would have been renounced in their favour at the end of the four month period.

2. 1984 Consultative Document: Evaluation

There were several advantages to the system proposed in the 1984 Consultative Document as opposed to the existing system. The reduction of the period to allow for claims from one year to two months would have considerably speeded up the claims process, which has been severely criticised for the delays it causes. A shorter claim period seems adequate for the owners of modern property who are usually well aware of their casualties and will probably be awaiting reports of finds. As far as historic wreck is concerned, the shorter period would have alleviated the problem of tenuous claims.[21] The provision for the

reimbursement to finders of the costs involved in preserving artefacts which are subsequently claimed would have undoubtedly encouraged proper treatment and allayed criticism that the resources made available in this respect are, in effect, lost. A further advantage of the proposals was that the reporting of all finds to the Museums Service would have enabled artefacts of particular interest to be identified. At present, many valuable artefacts are returned to the finder in lieu of a salvage reward without any knowledge of their existence on the part of the Museums Service or archaeological community. Finally, the proposal for the relinquishment of Crown title to unclaimed wreck to a museum which showed an interest, in preference to the finder, would have been a considerable improvement over the current system. However, it would still have been a major drawback that museums would have had to find funds to pay for salvage[22] and fees, unless their acquisition grants were increased accordingly.

The 1984 Consultative Document's proposals would have made improvements to the handling and reporting system, but in other respects the system would have remained virtually the same. The proposals did not attempt to improve the designation and licensing system under the PWA 1973. Therefore, the problems in this respect would have continued.[23] The salvage regime would have remained, both with regards to undesignated and designated wrecks and, for this reason, museums would still have needed to raise funds to meet salvage payments. Also, the charging of fees, either for the services of the receiver (as was until recently the case[24]), or for the transfer of Crown title (as proposed in the Consultative Document), will always be resented by museums. Even the 7.5% until recently charged for receivers' fees amounted to an appreciable sum which most museums found hard to raise.

3. 1984 Consultative Document: Response[25]

The DTp allowed a period of one month to receive representations and 120 were made. Apparently, some complaints were received that the two month ownership claim period was too short, but there appear to have been few objections to the abolition of the receiver service, especially when it was realised that a point of contact with the DTp would be maintained through the Customs Service. In general, instead of commenting on the substantive proposals, it seems that much criticism went to the actual basis of the Consultative Document: the method of its preparation and the assumptions on which it was based. First, the preparation of the Consultative Document without consultations with those representing historical and archaeological interests was questioned, as was the one month period allowed for representations, which was considered too short.[26] Secondly, the Consultative Document was based on the assumption that any new system would have to work, as at present, without the assistance of government funds. The general view of respondents was that, in making any reform, a complete change of approach was necessary: the government accepting responsibility for the management of the underwater cultural heritage. It was felt that piecemeal improvements, such as those proposed in the Consultative Document, would only delay further the change of attitude on the part of government that was sought by those concerned for the cultural heritage.

For several years after the Consultative Document was published, interested parties hoped that amendments to the MSA 1894, based on the 1984 consultative process, might be included in the government's legislative programme for the next Parliamentary session. However, it seems that there were always other matters to which the government afforded greater priority. Some provisions based on the 1984 Consultative Document were apparently inserted into the internal draft

of the 1987 Merchant Shipping Bill,[27] but were taken out before the published version. The reason for this seems to have been that the Bill was considered to be too long and to cover too much: the provision for historic wreck was therefore sacrificed. In 1988 it still seemed to remain the government's intention, when Parliamentary time allowed, to introduce legislation on the lines proposed in the 1984 Consultative Document.[28] Thereafter, the position seemed to change. In December 1990, a DOE Memorandum stated that:-

> "The Government recognises that the provisions of the Merchant Shipping Act 1894 in relation to the reporting of salvaged wreck and the payment of salvage awards were framed in an earlier age. But it is not convinced that serious damage is done to archaeological material, nor that important material is being lost to public collections, simply as a result of the requirements of salvage law."[29]

It was further stated that changes to the system of reporting and awards were likely to prove controversial and "for the present, [the government] intends to keep the working of this legislation under review". No mention was made of the 1984 Consultative Document.

C. NEW REFORM MOVEMENT

1. Genesis

Since 1988 a new reform movement has been in evidence. It first manifested itself on 30 January 1988, when a conference on nautical archaeology was held at the Royal Armouries in London. It was attended by a wide cross-section of interested parties including archaeologists, divers and lawyers. The chairman was Dr. Basil Greenhill, who is also chairman of the DTp's Advisory Committee on Historic Wreck Sites. The purpose of the meeting was to review the existing situation with regard to nautical archaeology and to consider a future strategy.

A paper entitled "National Policy for Nautical Archaeology", prepared jointly by the Council for British Archaeology, the Institute of Field Archaeologists, the Nautical Archaeology Society, and the National Maritime Museum, was presented to the meeting. The paper set out proposals for a national policy for nautical archaeology and it highlighted the following issues as requiring attention in order to establish a sound basis for nautical archaeology:-

(i) *Sites and monuments record.* A national inventory of underwater archaeological sites should be established, together with a national survey to gather information for the record.

(ii) *Role of government and its agencies.* English Heritage and its equivalents in Scotland and Wales should take over administrative responsibility for historic wrecks from the DTp. Such organisations, already concerned with cultural resource management, were better equipped to deal with underwater archaeological sites than a department specialising in the regulation of maritime traffic.

(iii) *Disposal of finds.* Recommendations should be made for an improved procedure for the disposal of finds so that archaeologically important material could be recognised and dealt with appropriately.

(iv) *Acquisition of finds by museums.* Museums needed to establish a finds acquisition policy which took into account the desirability of maintaining the integrity of site assemblages and provided a code of conduct regarding unethically obtained material.

(v) *Illicit trade in cultural material.* The government should be urged to ratify the 1970 UNESCO Convention on Illicit Trade in

Cultural Material.[30]

(vi) *Conservation of finds.* There was a need to make available adequate facilities for the conservation of finds and to control the raising of material from the seabed.

(vii) *Legislation.* The paper called for the assessment of the suitability of current legislation.

(viii) *Implementation.* Implementation of a national policy would require a full-time co-ordinating body and an inspectorate, for which permanent funding would be necessary.

(ix) *Training.* A national policy for development of training facilities was required, which would encourage courses at all levels, including universities, professional bodies and diving clubs.

(x) *Public education.* The paper called for a national education and publicity campaign to highlight the enjoyment and satisfaction that can be obtained from nautical archaeology and the differences between legitimate archaeological methods and treasure hunting.

(xi) *Funding.* Resources from both the public and private sector should be sought in order to achieve the desired objectives.

(xii) *Unified View.* It was proposed that a national conference be convened with the aim of bringing together all interested parties and raising awareness. The aim of the conference would be to agree a list of objectives and a programme for achieving them.

The paper proposed the establishment of working parties to discuss the issues highlighted and to develop a unified national policy document for presentation to the conference. It was estimated that this process would take one year. At the Royal Armouries conference, there was considerable support for the view that effort should be concentrated upon achievable targets, rather than the creation of an ideal but politically impossible framework. In particular, the importance of establishing realistic aims for the near future, while still bearing in mind long-term goals, was emphasised.[31]

In July 1988 a press release announced the formation of the Joint Nautical Archaeology Policy Committee (JNAPC) consisting of representatives of the Nautical Archaeology Society, the Committee for Nautical Archaeology of the Council for British Archaeology, the National Maritime Museum, and the Institute of Field Archaeologists. The JNAPC was formed to co-ordinate the development of policy proposals covering: legislation, disposal of finds, conservation, education and training, recording of wrecks and other archaeological sites, and the infrastructure required to achieve the policy objectives. These were the areas identified as requiring improvement and change in order to preserve the underwater cultural heritage.

2. JNAPC Conference, 1988

The JNAPC organised a conference, held on 29 October 1988 at the Institute of Archaeology in London, which was open to anyone interested in the plight of nautical archaeology. Discussion papers covering the main policy areas were prepared by the working parties, comprising "experts" in each field,[32] and presented to participants at the conference as the basis for consultation and discussion. Feedback at the conference was to be taken into account in formulating proposals

for a definitive national policy. Discussion papers were presented on: legislation, disposal of finds, infrastructure, conservation, education and training, recording of wrecks and other sites. The first three are of direct relevance to this thesis and will be discussed here.[33]

(a) Discussion paper on legislation

The discussion paper on legislation stated that the underwater heritage of the UK was not adequately protected by the existing legal framework. Some of the laws were antiquated; some ineffectively applied; and some actually encouraged the loss of historical and archaeological sources of information. The paper identified two main problem areas: the threat to archaeological sites underwater and the unsatisfactory way the present system dispersed archaeological material once recovered from the sea. Problems were identified with both the MSA 1894 and the PWA 1973.

The paper stated that a number of specific defects in the legislation had been observed:-

(i) *There was no legislation to prevent destruction of archaeological sites in UK territorial waters, except for the very small proportion of sites designated under the PWA 1973.*[34] *There was not even a requirement to undertake minimum recording before destruction took place. For these reasons, there was potential for the loss of a great deal of historical and archaeological information.* This point referred to the fact that only between 30 and 40 wreck sites at any one time receive legal protection by designation, and yet there are potentially hundreds of historic wrecks and other archaeological sites in UK territorial waters which are left unprotected.[35]

(ii) *Enforcement of the MSA 1894 duty to report finds to a receiver was inadequate.* The paper declared that "[m]ost archaeological material recovered from the seabed [was] not declared...", and this is manifestly the case.[36]

(iii) *Most archaeological material recovered from the seabed was treated, legally, without regard to scientific or cultural considerations.* This referred to the fact that recoveries could be retained by the finder until their fate was determined and yet the finder may well have had no training in conservation techniques.

(iv) *There was no mechanism for assessing the cultural value of material raised.* This was a reference to the fact that the fate of such material is decided by a receiver and is not at any time considered by a qualified archaeologist. For this reason, archaeologically important material may be recovered and disposed of with no record of its existence being available to the archaeological community.[37]

(v) *The MSA 1894 Part IX "actively encourages" the Crown to sell unclaimed material regardless of its cultural importance.* This referred to s.525, which provides that, in the case of unclaimed wreck, "the receiver shall sell the same, and shall pay the proceeds...for the benefit of the Crown...". In practice, this is no longer the case. Instead, in the case of unclaimed historic wreck, the receiver will usually return it to the finder in lieu of a salvage reward, and it will actually be the finder who may well then sell it if it has commercial value.[38]

The discussion paper made two alternative recommendations for improving the situation. It is interesting that neither approach

involved completely new legislation: rather, they required more effective implementation of, and/or modification to, existing laws.

The first recommendation was to press for an immediate change in the law and included proposals as to how the law should be amended. The first proposal was to amend the MSA 1894 to make it an offence to disturb any wreck more than 100 years old, unless licensed to do so, or if the wreck had been specifically "de-scheduled". The second proposal was to use the PWA 1973 to designate specific historically important wrecks less than 100 years old. It is obvious from the nature of the first proposal that a lawyer was not involved in making it! It would be completely inappropriate to amend the MSA 1894 to make it an offence to disturb historic wrecks: such a provision would be much more appropriate in the PWA 1973. However, a provision for blanket protection of wrecks over 100 years old, with the de-designation of certain wrecks and the specific designation of some under 100 years old would be in line with the Council of Europe's minimum requirements in Recommendation 848[39] and the 1985 draft European Convention on the Protection of the Underwater Cultural Heritage.[40] The third proposal was for the MSA 1894 to include a statutory requirement for commercial seabed operators to undertake pre-disturbance archaeological surveys and have the results independently assessed. Again, such a provision would seem more appropriate in the PWA 1973, although it seems unlikely that the government would support it in view of the fact that there is no such statutory requirement in the case of operations on land.[41] It would be much more likely that the government would prefer such matters to be governed by a voluntary code of practice, such as that which operates on land.[42]

The second, alternative, recommendation in the discussion paper was to allow a period (stated to be less than five years) for education and political pressure to achieve a suitable climate for the smooth

introduction of legislative amendment. During this interim period the legal framework should be more fully exploited to reduce the rate of destruction of the underwater heritage. The following suggestions were made as to how the administration of the present legislation could be improved:-

(i) *Increase the number of sites designated under the PWA 1973 by encouraging applications from finders and non-finders.* Until very recently, it appeared to be the case that sites were only designated by the Advisory Committee on Historic Wreck Sites if the finder requested such protection. This was simply a policy operated by the Advisory Committee: the legislation itself allows for any site to be designated if the Secretary of State is satisfied that it falls within the criterion laid down in the PWA 1973. It now appears that the Advisory Committee's approach in this respect is becoming more flexible,[43] although the number of designated sites is still only 37.

(ii) *Enforce the reporting procedure and publicise it.* At present the duty to report is not really enforced at all, in the main because of a lack of commitment to protecting the underwater heritage on the part of the DTp.[44] If a commitment was made to enforce the duty in the interests of archaeology, it would obviously become necessary to publicise the fact that a new regime had come into operation in order to persuade divers of the need to declare recoveries.

(iii) *Provide for archaeological screening of items declared to the receiver so that information on archaeological material can be collected.* Without such screening, the enforcement of the duty to report would be of little value.

(iv) *Encourage the Crown to retain its title to unclaimed wreck of archaeological interest and to "treat it more sympathetically".* This probably meant that, instead of the Crown "forfeiting" its rights to finders by awarding them the unclaimed wreck in lieu of a salvage award,[45] museums should first be given the opportunity to acquire the material, even if they would have to pay a salvage award.

(v) *Encourage the use of Section 53 of the AMA 1979 to protect underwater sites.* Presumably, this suggestion meant that the AMA 1979 s.53 should be used to protect non-wreck sites (since wreck sites receive protection under the PWA 1973). At present, despite its existence, s.53 has never been used.[46]

When the discussion paper on legislation was presented to the 1988 conference, there was no consensus of opinion on which of the two alternative recommendations should be put forward to government. There was much debate as to whether 100 years was an appropriate cut-off point for blanket protection, and some views were expressed that far more recent artefacts should be included, and even that the cut-off point should be as recent as 25 years.[47] The divergence of views on this issue is evidence of the difficulty of producing a policy document which represents a consensus of the opinions of archaeologists and historians. The suggestion of blanket designation was also of concern to diving interests who would prefer as many sites as possible to be accessible and who supported the view that legislation should allow for "non-destructive" access to sites. Their main concern was that they should be able to dive to protected sites even if they were not able to touch the remains or recover objects. The diving interests felt that, if there was some form of blanket protection, it should be an offence to tamper with the site, but not to dive to it. This view was also supported by many archaeologists, who felt that the interests of

amateur divers should be protected.[48]

The suggestions made in the discussion paper on legislation as to ways of improving the administration of the present legislation were perfectly valid, but appeared to ignore the practicalities involved. In particular, enforcement of the reporting procedure would have required the support of the Customs Service since it would have to deal with the extra reports. This support was unlikely to have been forthcoming. Also, no suggestions were made as to exactly how the duty to report should be enforced. One of the reasons for the current lack of enforcement appears to be the difficulty of obtaining sufficient evidence to prosecute.[49] The discussion paper did not suggest how such evidence could be made available. The suggestion that there should be archaeological screening of declarations to the receiver did not explain who should carry out such screening and how the archaeological screening should be fitted into the reporting mechanism.[50] Also, the proposal that the Crown should retain its title to unclaimed wreck raised the issue of salvage rewards, but did not tackle it. If the Crown retained the artefact, rather than returning it to the finder in lieu of a salvage reward, then presumably the Crown - or a museum - would have to bear the cost of such rewards. Some of the questions raised by the discussion paper on legislation were in fact answered by the discussion paper on disposal of finds.[51]

(b) Discussion paper on disposal of finds

A separate discussion paper on disposal of finds was presented to the 1988 conference. Having two discussion papers dealing with the legislation was, in fact, rather illogical and resulted in some overlap.

The discussion paper on disposal of finds recognised as the basic strength of the MSA 1894 framework that it imposed a legal obligation

upon finders to declare recoveries to the receiver of wreck. This was, rightly, felt to be a foundation upon which an effective system for handling and disposal of artefacts could be built. However, this discussion paper identified three particular weaknesses in the present legislation:-

> (i) Receivers had no archaeological expertise and there was no formal provision for expert advice to be made available to them.
> (ii) There was no procedure for material of archaeological or historical importance to be made available for research and public enjoyment.
> (iii) The system of salvage rewards and payment of fees was unsatisfactory as it penalised archaeological bodies and museums.

The discussion paper therefore made the following recommendations:-

(i) *The MSA 1894 should be amended so as to declare all unclaimed artefacts over 100 years old and all material associated with historic wrecks designated under the PWA 1973 to be cultural property belonging to the Crown. Such cultural property should be made available without charge to national or regional museums.* In order to encourage reports of such material, a system of ex gratia payments was seen to be "an essential and inevitable concomitant".

(ii) *Relevant government departments should acknowledge ownership of wreck coming within their respective purviews.* This referred in particular to the MOD for naval vessels and the FCO for East India Company wrecks.[52]

(iii) *A maritime archaeological executive should be established to assume responsibility for dealing with all historic underwater sites and antiquities.*

(iv) *Finds should be reported in the first instance to the nearest customs officer, in order to determine ownership.* Where no

ownership claim was established, the appropriate county Sites and Monuments Record (SMR)[53] would be notified of the find and the finder instructed to present the material there for examination. After adding information about the material to its records, the SMR would have two options. The first would be to return the material to the finder, either immediately or after an agreed period for study and recording, and to make recommendations for its conservation; the second option would be to take possession of the material and assign it to a museum. The second option would be exercised after consultation with the Maritime Heritage Executive, which would also advise on the level of ex gratia payment, based on nationally agreed guidelines.

Apart from the 100 year cut-off period,[54] the only recommendation that appeared to be contentious at the 1988 conference was that of ex gratia payments to finders. It was recognised that some method of encouraging finders to report finds was necessary, but that there were a number of drawbacks to ex gratia awards. For example, it was unclear who would actually pay for such awards - the government or museums - and on what they would be based. If they were too generous they would probably encourage divers to raise material; if they were too low they would not encourage reports to be made. Some felt that, whatever the drawbacks of monetary rewards, they were an essential pre-requisite of a good reporting system.[55] Eventually, participants at the conference were asked to vote on ex gratia payments and, in fact, few appeared to be in favour. The recommendations in the discussion paper as a whole were reasonable and straightforward. In particular, the recommendation that unclaimed finds should be notified to the county SMR was a good one.[56] The proposal least likely to be acceptable to government was the establishment of a special maritime archaeological agency because of the costs involved.[57]

(c) Discussion paper on infrastructure

The only other discussion paper of direct relevance to this thesis was that on infrastructure. Again, the strengths and weaknesses of the present system were outlined. The strengths were seen to be the administratively straightforward nature of the Advisory Committee on Historic Wreck Sites, with the assistance of the ADU, giving advice directly to the Secretary of State. The weaknesses centered around the Advisory Committee, in particular its "passive" nature, responding to applications for designation rather than actively looking for new sites to designate; the confidentiality of Advisory Committee proceedings which was felt to lead to the loss of valuable archaeological information; and the composition of the Advisory Committee, which was felt to be unrepresentative and to include "those who are known not to have applied adequate archaeological standards in underwater work".[58] A further weakness perceived was that the terms of reference of the Advisory Committee only extended to the PWA 1973. Other aspects of underwater archaeology, in particular the fate of finds, fell outside its remit.

The proposals made in the discussion paper on infrastructure were based on the two alternative options presented in the discussion paper on legislation.[59] If the first option in that paper was adopted, i.e. immediate blanket protection, then the receiver service would become virtually redundant.[60] The Advisory Committee would still be required in order to assess applications for licences and the ADU would also be required to monitor licensed work and to investigate reports of unlicensed disturbance of protected sites.

If the second option was adopted, i.e. that there should be an interim period during which the administration of the present legislation would be improved, a more complex organisation would be required. It

was proposed that receivers should pass on reports to an archaeologist, who would be part of a network of county Sites and Monuments Officers. The archaeologist would register the find and pass it to a museum for documentation or retention. The museums would require a central co-ordinating committee to deal with ex gratia payments. Under this option it was envisaged that many more sites would be proposed for designation and the Advisory Committee and ADU would consequently have a greater work load. The Advisory Committee was seen as an "essential part" of the administrative framework. Along with its present responsibilities, it might have other tasks including formulation of policy, development of research and survey work, etc. An essential step forward was seen to be the establishment of a Maritime Archaeological Executive, to subsume the functions of the present ADU and to take on additional responsibilities. It would consist of a small administrative and research group with a diving team. It would continue to service the Advisory Committee, but would also organise the policing of protected sites and issue proceedings against infringers. Furthermore, it would liaise with the receiver service and SMRs on finds, and advise on their conservation and allocation to museums. It would undertake surveys and excavations, promote knowledge of the maritime archaeological heritage and encourage proper standards and procedures by advising on and organising training. These suggestions might well provide a near ideal system, if sufficient funding was available to support the ex gratia payment system, the extensive activities of the ADU and the SMRs.

The discussion paper on infrastructure also made three separate alternative proposals as to the government department or organisation which should take overall responsibility for nautical archaeology. The first alternative was that responsibility should remain with the DTp; the second alternative was to transfer responsibility to English Heritage and its equivalents;[61] and the third alternative was to transfer

responsibility to the Crown Estate Commissioners.[62] This third alternative, although highly novel, seems to be based on a misconception of the role and workings of the Commissioners. In particular, it would appear to have been made in ignorance of their commercial motivation.[63] It is odd that the paper did not suggest, as an alternative, that the DOE should have direct responsibility for nautical archaeology.

It is interesting that, in response to a letter from Cranley Onslow M.P. about the allocation of departmental responsibilities for nautical archaeology, the then Prime Minister, Margaret Thatcher, stated in a letter dated 15 December 1988:-

> "While I can see that the present allocation of departmental responsibilities may seem less than ideal from the standpoint of nautical archaeology, you will understand that nautical archaeology is not the only consideration: we need to take account of the way it relates to the responsibilities of departments for both heritage and maritime matters more generally.
>
> "It seems that the Joint Nautical Archaeology Policy Committee may well have views on these matters. In these circumstances I should like to wait until their work is complete and their proposals published. It will then be possible to take a considered view on whether any changes in the present arrangements would be beneficial overall."

3. Heritage at Sea

As a result of the JNAPC's conference in October 1988 and the reaction to the discussion papers presented there, a document entitled Heritage at Sea: Proposals for the Better Protection of Archaeological Sites Underwater, was published by the JNAPC in May 1989. Its publication coincided with the launch by the JNAPC of a campaign to save Britain's maritime heritage. On 11 May 1989, representatives of the JNAPC rowed a replica of a fourth century B.C. Greek ship along the Thames outside the Palace of Westminster and later discussed the issues with M.P.s at the House of Commons.[64]

Heritage at Sea was a rather glossy 39 page document. Its preface stated that the proposals contained therein represented "a consensus of involved opinion", in other words, the opinions represented at the 1988 conference, including those of amateur divers as well as archaeologists and historians. The document made seven recommendations for change, each supported by a paper outlining the present situation and its defects.

(a) Underlying principle of Heritage at Sea

The principle underlying the recommendations in Heritage at Sea was stated to be that "archaeological sites of national importance underwater should receive no less protection than those on land". This is a useful principle on which to base any discussion of the legal protection of the underwater cultural heritage because it establishes the limits of such protection in the eyes of "a consensus of involved opinion". Lawyers are not qualified to set such limits: it is for archaeologists and historians to state what, in their informed opinion, needs to be protected, for other interested parties to make their views known, and then for lawyers to design a suitable scheme of protection.

There are three points of note in relation to the underlying principle in Heritage at Sea. First, it relates to archaeological sites in general and not just to wreck sites. Archaeologists are keen that all underwater archaeological sites of national importance, not just historic wrecks, should receive protection.[65] Secondly, the underlying principle does not call for the protection of all archaeological sites, but only those of "national importance". This is in line with the criterion presently used to choose which land sites should be protected by scheduling under the AMA 1979. Thirdly, the underlying principle states that sites of national importance should receive "no less protection" than those on land. As will be seen in Chapter Seven, there

is an enormous disparity at present between the protection of archaeological sites on land and the protection of those underwater, for example in terms of number of sites protected, enforcement of protective measures, funding for protective measures and rescue archaeology.[66] The underlying principle does not imply that land and marine sites should receive the same protection, but rather that they should receive equal protection, even though that protection may be separate and distinct. The protection of all underwater archaeological sites of "national importance" would be one step forward in affording equal treatment.

(b) Recommendations of Heritage at Sea

The recommendations themselves are listed in Appendix 10 but are outlined and discussed below.

(i) *Recommendation 1. New legislation should be enacted as soon as possible, which would be specifically drafted for the protection of underwater sites and the artefacts associated with them, and would cover all aspects of the underwater cultural heritage.* It is notable that this recommendation departs from both the alternative recommendations in the JNAPC's 1988 discussion paper on legislation[67] in that it calls for completely new legislation, rather than simply for amendment of the existing legislation. The recommendation obviously fits in with the underlying principle of Heritage at Sea because it requires legislation to cover all underwater archaeological sites and not just wrecks. Heritage at Sea stated that the law should take as its basis the Crown's right to unclaimed wreck. It stated that "[t]hat right and responsibility should be interpreted as an obligation to safeguard cultural property". It is rather incongruous that Heritage at Sea stated that this should be the basis of the new legislation since the Crown's right relates only to wreck, whereas Heritage at Sea calls for

legislation to cover all aspects of the underwater cultural heritage. However, Heritage at Sea explained this apparent anomaly by saying that unclaimed wreck covers "in effect all finds likely to be of archaeological importance". This is a questionable proposition[68] and therefore it is also questionable whether the Crown's right to unclaimed wreck could actually be a "basis" for the new legislation. Nonetheless, the general principle that the Crown's right to unclaimed wreck should be interpreted as an obligation to safeguard cultural property, at least cultural property deriving from wrecked vessels, is a good and logical one.

As part of its commentary on Recommendation 1, Heritage at Sea stated that there was "a fundamental need to separate underwater cultural property from commercial salvage". However, there was no mention of whether there should be a replacement for salvage rewards, e.g. a system of ex gratia awards, as proposed in the 1988 conference paper on disposal of finds,[69] nor any attempt to tackle the tricky problems that would ensue from any attempt to separate underwater cultural property from the salvage regime.[70] The significance of Recommendation 1 is that it calls for completely new legislation and is not simply asking for amendments to the current legislation. This is a very positive and radical step, indicating that those preparing the policy document decided to make an immediate demand for their ideal goal, rather than calling for piecemeal interim measures to take place until there was a suitable climate for legislative reform.[71]

(ii) *Recommendation 2. An inventory of underwater sites within territorial waters should be compiled and maintained at a national and local level. A set of criteria for assessing the importance of sites should be established and the sites should be graded accordingly.* Without an inventory of underwater sites, there would be no means for assessing the marine archaeological resource and identifying the sites

of national importance, i.e. the sites requiring protection according to the underlying principle. Heritage at Sea stated that the inventory should be integrated with the current organisation on land, in other words with the National Archaeological Record maintained by the various Royal Commissions on Historical Monuments (RCHMs), which are supplied with data and supplemented by the county SMRs. Also, a system of referral of finds to archaeologists should be introduced, either to supplement the receivership, or to replace it. Heritage at Sea called for pilot projects to be initiated (a) under the aegis of the RCHMs, to develop satisfactory recording strategies and create and maintain an inventory of sites; and (b) to develop a programme of underwater survey co-ordinated by the proposed Maritime Heritage Agency.[72] The national record would require sources of information; one of these would be historical, but the other would be surveys of the territorial sea.

Supporting Paper No.2 to Heritage at Sea listed the criteria which should be used for selecting historic wreck sites of national importance. It stated that the criteria for selecting land sites[73] could be applied to submerged non-wreck remains, but a different set of criteria was needed for shipwrecks. The proposed criteria were as follows:-

> a) All wreck sites (ship structure, groups of associated artefacts or both) earlier in date than 1650 A.D.
>
> b) Other wreck sites up to 1850 which retain a substantial and coherent element of ship structure and vessels of special historic importance, or sites where there are groups of artefacts which make a major contribution to knowledge of the period.
>
> c) Certain vessels of later date which demonstrate a significant advance in ship technology or have special importance.

The reason for the distinction between wrecks dated earlier than 1650 A.D. and wrecks dated between 1650 and 1850 was said to be that knowledge about ship structure and operations was more comprehensive for later centuries than for earlier ones. It was envisaged that there were probably less than 100 known sites which would be eligible for

statutory protection under these criteria, and that the proportion of more recent wrecks would be small. However, as the marine inventory was built up, it may be found that more sites would require protection under the criteria, and also it may be possible to refine the criteria.

It is interesting to note that Heritage at Sea again moved away from the October 1988 conference papers in not calling for some kind of blanket protection. Rather it recommended specific site designation in the same way as sites are protected on land. It may have relieved the government to see that the number of sites envisaged as requiring protection was still quite small in comparison with the total number of sites known to exist.[74] As far as non-wreck sites were concerned, according to Supporting Paper No.2, there were only a few known to exist and therefore they should not present a problem as far as numbers were concerned.

(iii) *Recommendation 3. Payment of receivers' fees[75] and VAT should be waived in the case of items which are to be kept in publicly accessible collections and this should include all finds from sites which are statutorily protected.* This recommendation would bring marine sites in line with land sites, in accordance with the underlying principle. There are no requirements for payment of fees or VAT on artefacts discovered on scheduled sites on land, even when the land in question is - like the seabed - Crown property. The only exception to this is where an item is declared treasure trove, in which case the Crown retains administrative costs.[76] As already noted,[77] museums sometimes found it very difficult to raise the money to pay receiver's fees (7.5% of the value of the artefact) and VAT (currently 17.5%), plus in some cases a salvage reward as well.

(iv) *Recommendation 4. Commercial seabed operators and statutory undertakers active on the seabed should be encouraged to carry out*

archaeological implication surveys before the seabed is disturbed and to co-operate with archaeologists during potentially destructive work. They should be encouraged to contribute to the costs of rescue excavation of threatened sites. Again it can be seen that Heritage at Sea departed from the October 1988 conference paper on legislation and its recommendation that there should be a statutory requirement in this respect. The new position in Heritage at Sea was in line with the position on land[78] and therefore, if implemented, would help to meet the underlying principle of the policy document.

(v) *Recommendation 5. The MOD and the FCO should "acknowledge and fulfil their responsibilities" in respect of the wrecks for which they are responsible.* Heritage at Sea proposed that these government departments enter into consultation with archaeological bodies before disposing of property from underwater and that, in the longer term, they should consider transferring the administration of these wrecks to the proposed Maritime Heritage Protection Agency.[79] There would certainly be an inconsistency if one government department (either Transport or Environment, for example) was undertaking a review of the protection afforded to the underwater cultural heritage, while others were to some extent undermining such protection by making salvage contracts or sale contracts in respect of wrecks of historical importance on an ad hoc basis.[80]

(vi) *Recommendation 6. The new legislation should provide for the establishment of an agency to: carry out and co-ordinate the survey work necessary for the inventory; assess the importance of sites; arrange for the protection of sites by buoying and burial; process applications for licences to carry out work on sites and co-ordinate archaeological diver training and public education.* Heritage at Sea stated that the nucleus for such an agency already existed in the form of the ADU.[81] However, it would need additional staff and resources to

carry out all the functions proposed. Such an agency would need to operate within a government department or agency and the document proposed several options in this regard, including the Crown Estate Commissioners, DOE and English Heritage and its equivalents.

Recommendation 6 of Heritage at Sea, deriving from the earlier 1988 conference papers, was probably the recommendation least likely to be acceptable to government. The scale of such an agency is difficult to determine and would depend very much on just how many activities would be within its remit. If the proposal simply meant a minor extension of the ADU with a limited number of extra responsibilities, then the government might not baulk at the suggestion. However, the recommendation might conjure up images of the statutory authority proposed by the Wreck Law Review Committee in 1974 and it may well be viewed in much the same light: as unnecessarily grand and too expensive.[82]

(vii) *Recommendation 7. In the short term, better use should be made of existing legislation.* In particular, Heritage at Sea called for effective arrangements to be made for the reporting of artefacts recovered from the seabed, along the lines proposed in the 1988 conference paper on disposal of finds. An additional useful suggestion was that, once the new system was in place, an amnesty for undeclared finds should be declared, in the hope of encouraging finders to come forward and make declarations, so allowing information presently lost to be retrieved.

In general, Heritage at Sea appeared to be much better conceived than the original 1988 conference papers and its recommendations, although fairly general in nature, were positive and sensible. As will be seen,[83] its major achievement was that it made the government, for the first time since the PWA 1973, address the plight of underwater archaeology and decide to make some important changes.[84]

4. Response to Heritage at Sea

Heritage at Sea was published in May 1989. It was not until September 1990 that there was even an indirect response. In the DOE's long, expensively-produced, White Paper, This Common Inheritance: Britain's Environmental Strategy,[85] two important announcements were made. The first was that responsibility for protecting historic wrecks was to be transferred from the DTp to the DOE. In the first year the DOE was to administer the historic wreck provisions for the whole of the UK and, thereafter, the territorial departments, i.e. the Scottish Office, Welsh Office and Northern Ireland Office would administer the legislation in their areas. The second announcement was that the RCHME was to begin work on a central record of historic wrecks.[86] The White Paper stated that the departmental transfer would bring together control of archaeology on land with that underwater and that the Advisory Committee on Historic Wreck Sites and the ADU would offer advice to the DOE on these new responsibilities.

The White Paper heralded a major breakthrough. However, it gave no details, nor did it state a timescale for the changes. It also transpired that it was rather misleading in stating that the departmental transfer "would bring together control of archaeology on land with that underwater". It became clear later that the transfer would not include transfer of the administration of Part IX of the MSA 1894, which would remain with the DTp. Therefore, complete control of archaeology underwater would not be transferred to the DOE because it would not have control of the system for dealing with historical artefacts brought ashore in the UK.[87]

(a) The formal response

The government's formal response to Heritage at Sea came finally on 20 December 1990. In the House of Lords, in reply to a Parliamentary Question from Lord Gainford, who asked when the government expected to respond to Heritage at Sea, the Heritage Minister, Baroness Blatch, stated in a Written Answer[88] that the government had responded that day and that copies of the response had been placed in the library of the House. The response was contained in a six page Memorandum, issued by the DOE and dated 17 December 1990. The Memorandum stated that the White Paper set out the main changes that the government proposed to make in response to Heritage at Sea, but that there were a number of other points which the government intended to pursue. The Memorandum then made an individual response to each of the recommendations in Heritage at Sea.

(i) *Recommendation 1 (that new legislation, specifically drafted for the protection of underwater archaeological sites and the artefacts associated with them, and covering all aspects of the underwater cultural heritage, should be enacted as soon as possible).*

As far as the PWA 1973 was concerned, the Memorandum stated that the government considered that its provisions had "served quite well". Therefore, before deciding whether to make changes to them, it intended to see how they operated under the DOE. The Memorandum also stated that the government was satisfied with the provisions of the Protection of Military Remains Act 1986.[89] As far as the MSA 1894 was concerned, the Memorandum stated that the government "recognises that [its provisions] were framed in an earlier age". However, it was "not convinced" that serious damage was being done to archaeological material, nor that important material was being lost to public collections, simply as a result of "the requirements of salvage law".

Although proposals had subsequently been submitted to the government,[90] it was apparent that changes to the system of reporting and awards were likely to prove controversial and therefore, for the present, the government intended to keep the working of this legislation under review. However, one point made in Heritage at Sea under Recommendation 1 did appear to be taken up by the government. Heritage at Sea stated that the Crown's right to unclaimed wreck should be interpreted as an obligation to safeguard cultural property. Although this was not mentioned in the Memorandum, Lady Blatch in her Written Answer to Lord Gainsford said that the government was willing to exercise its powers of ownership, where these can be established, in order to conserve artefacts. Despite the fact that Recommendation 1 of Heritage at Sea referred to underwater archaeological sites in general, and their associated artefacts, the DOE's Memorandum made no reference to the position of non-wreck sites.

The fact that the government did not agree that new legislation was required was immensely disappointing to the JNAPC. Nonetheless, despite its apparent reticence to admit such a need, the government did not reject the possibility altogether. However, it would probably be necessary for the JNAPC to keep up pressure on the government for reform of the law. It may be remembered that in 1976 similar statements to those in the DOE's Memorandum of December 1990 were made in relation to the Wreck Law Review Committee's Report.[91] For example, the then Secretary of State for Trade and Industry said, in relation to the PWA 1973, that - although it was an interim piece of legislation - "a further period should be allowed for experience to be gained". It was not until 1984, more than ten years later, that any review took place with the publication of the DTp's 1984 Consultative Document.[92] Even then, no changes to the legislation resulted from the review.

(ii) *Recommendation 2 (that an inventory of underwater sites within territorial waters should be compiled and maintained at a national and local level. A set of criteria for assessing the importance of sites should be established and the sites should be graded accordingly).*

The DOE's Memorandum reiterated the development announced in the September 1990 White Paper, This Common Inheritance, i.e. that it had invited the RCHMs of England, Scotland and Wales to start work on preparing a central record of historic wrecks. The Memorandum stated that work would progress as resources allowed, and subject to the competing claims of the Commissions' other work. This was a very positive development, although the government gave no indication that it was prepared to fund seabed surveys to provide information, other than simply historical data, for the record.

(iii) *Recommendation 3 (that payment of fees and VAT under the MSA 1894 should be waived in the case of items which are to be kept in publicly accessible collections. This should include all finds from sites which are statutorily protected).*

The DOE's Memorandum clarified the position in regard to the payment of customs duty and VAT. It stated that these were not payable on "antiques over 100 years old, nor on collectors' pieces of historical or archaeological interest". This would appear to mean that any item likely to be of historical or archaeological interest would not be subject to customs duty or VAT. The Memorandum also stated that antiques over 100 years old, except wines and spirits, were also exempt from excise duty and that the restricted range of excise duties meant that wreck would seldom attract a charge anyway. In light of these facts, therefore, the government saw no need for a change at present. The position regarding past practice in relation to the charging of customs duty and VAT is not clear, but it does appear that customs

duty and VAT have sometimes been charged on material that could be classified as "antiques over 100 years old, or collectors' pieces of historical or archaeological interest".[93]

As far as receivers' fees were concerned, the Memorandum stated that legislation would be required to abolish the requirement for their payment. It also stated that the DTp was looking at this possibility and an announcement would be made when it had reached its conclusion.[94]

(iv) *Recommendation 4 (that commercial seabed operators and statutory undertakers active on the seabed should be encouraged to carry out archaeological implication surveys before the seabed is disturbed and co-operate with archaeologists during potentially destructive work).*

An interesting and practically important development announced by the DOE's Memorandum was that the DOE and the heritage bodies would work with the JNAPC[95] and representatives of seabed operators to consider whether a code of practice could be developed and what form it might take. It stated that the principles established in relation to land developments might be relevant, including the provision of help by developers for excavation. Progress in this respect may be of great significance in affording some protection to as yet unknown sites and areas of high archaeological potential.[96]

(v) *Recommendation 5 (that the MOD and the FCO should acknowledge and fulfil their responsibilities in relation to the historic wrecks for which they have responsibility. They should enter into proper consultation with archaeological bodies before disposing of property from underwater and, in the long term, consider transferring the administration of these wrecks to the maritime heritage protection agency proposed in Recommendation 6).*

The DOE's Memorandum stated that the MOD recognised its obligation to dispose responsibly of its interest in historic wreck, and to consult the appropriate archaeological bodies before so doing.[97] It went on to say that title to, and responsibility for, the wrecks of East Indiamen may not always be as clear as Heritage at Sea suggested.[98] The Memorandum stated that the FCO would "consider whether it is possible to seek to establish any rights belonging to the Crown." It would be for the DOE and the territorial departments elsewhere (e.g. the Welsh Office) to exercise any rights of ownership and this they would do in consultation with the relevant archaeological bodies. In Lady Blatch's Written Answer to Lord Gainsford, she stated more specifically that the government was "willing to exercise [its] powers of ownership, where these can be established, in favour of conserving wreck sites and the artefacts recovered from them." A point that will require clarification in due course is the composition of the "relevant archaeological bodies".

The government's response to Recommendation 5 of Heritage at Sea was very encouraging. At present it appears that the policy of the MOD is to sell or license wrecks on a case-by-case basis, depending on the value of the wreck or its cargo, both financially and historically, and on the motives of the intending purchaser.[99] What this appears to mean is that, where the wreck is of historical value and the purchaser's interest is historical, then the MOD will sometimes charge a flat fee for the wreck and will occasionally gift ownership of a vessel to a reputable archaeological body. This appears to be done very much on an ad hoc basis, without apparent consultation with archaeological interests (contrary to the statement in the DOE's Memorandum). As far as East India Company wrecks are concerned, for political reasons[100] the FCO has been reticent about exercising rights. Clearly, the uncertain position of these wrecks should be clarified. In regard to all government-owned wrecks, a proper policy should be established, based on historical and archaeological considerations, in full consultation with

the government agencies responsible for nautical archaeology.[101]

(vi) *Recommendation 6 (that the new legislation should provide for the establishment of a maritime heritage protection agency to: carry out and co-ordinate the survey work necessary for the inventory; assess the importance of sites; arrange for the protection of sites by buoying and burial; process applications for licences to carry out work on sites and co-ordinate archaeological diver training and public education).*

Not surprisingly, the DOE's Memorandum announced that the government was "not persuaded of the need" for such an agency. Instead, "lead responsibility" for maritime archaeology would be transferred to the DOE, along with the services of the Advisory Committee and ADU. The advice of the Advisory Committee and ADU would also become available to the "other heritage Departments", presumably referring to the Scottish Office, Welsh Office and Northern Ireland Office. The Memorandum stated that the activities of the ADU and the expenses of the Advisory Committee would continue to be financed by government. It made no mention of the availability of additional government funding for these purposes. Nonetheless, it did announce that the Secretary of State for the Environment was prepared "in principle" to consider proposals for grant-aiding a small programme of education for archaeological divers. The aim would be to encourage the training of amateur underwater archaeologists so that those divers might ultimately be able to help the government in providing information about protected sites, and disseminating information and guidance to other sport divers.

It is possible that the JNAPC's call for "the establishment of a maritime heritage protection agency", if worded slightly differently, may have met with a different reaction by government. If the recommendation had simply been for "an extension of the responsibilities

of the ADU", it may have been looked upon more favourably. Nonetheless, the government was unlikely to have been willing to commit substantial funding to survey work, burial of sites, public education, and so on.

The transfer of responsibility for maritime archaeology to the DOE was a very significant and welcome development. In April 1992, a further transfer of responsibility for nautical archaeology took place when the whole Heritage Sponsorship Division of the DOE became a division of the DNH. At this time, responsibility for historic wrecks in Scottish waters passed to Scottish Heritage, responsibility for those in Welsh waters to Cadw and responsibility for those in Northern Irish waters to the DOE (Northern Ireland). It is probably best that there should now be a period in which the workings of the new system can be monitored before deciding whether a new agency is required. It was disappointing that there was no sign that any extra government funding would be available for the administration of the PWA 1973. Nonetheless, the offer to fund a training programme suggested that further funds might become available, perhaps on an ad hoc basis[102] and, in fact, one-off payments were later made to the ADU by both the DOE[103] and the DTp,[104] for a new boat, a vehicle and for a limited amount of survey work.

(vi) *Recommendation 7 (that, in the short term, better use should be made of existing legislation to protect underwater sites).*

The government's response to Recommendation 7 was less than satisfactory. The DOE's Memorandum stated that the DOE and territorial departments would "continue to exercise [their powers under the PWA 1973] to safeguard important sites." Also, "[t]hey will endeavour to improve the current reporting arrangements for artefacts where this can be achieved within the existing level of resources." Obviously, the

latter would have entailed co-operation between the DOE and the DTp, as the DTp remained responsible for the MSA 1894. This point, however, was not stated in the Memorandum. Nor did it state that the government would endeavour to make better use of the PWA 1973. Despite this lukewarm response to Recommendation 7, Lady Blatch stated in her Written Answer to Lord Gainsford that the government was making "a commitment to make the best of existing salvage reporting arrangements to encourage important finds to be properly conserved and displayed." It is notable that the answer did not state that the government would encourage the reporting of finds, and yet the flouting of the reporting duty in the MSA 1894 is one of the main problems, from an archaeological point of view, with this legislation.[105] Exactly how the government's "commitment to make the best of existing salvage reporting arrangements" will manifest itself is unclear. It certainly has not manifested itself in the DTp's July 1992 proposals for changes to the receivership service, which are due to take effect on 1 January 1993.[106] In reality, all these proposals do is to represent a winding down of the "salvage reporting arrangements".

In her response to the Parliamentary Question, Lady Blatch promised that:-

> "The Government does not accept that there is a need for a new agency or legislation but it does intend to make the best use of the powers and resources available in the interest of conservation and to review these matters once the new allocation of responsibilities has had time to take effect."[107]

Presumably, this meant that the government would review, among other things, the need for a new agency and for legislation.

(b) Analysis of response

In a letter dated 17 December 1990 to Admiral of the Fleet Lord Lewin, who is Chairman of the Trustees of the National Maritime Museum,

Lady Blatch stated that she hoped that the JNAPC would agree that the government's response, "whilst not implementing Heritage at Sea in full, will be a good basis for taking forward policy in this important branch of history and archaeology." This is probably the case. There are several very positive elements to the response, not least the fact that it suggests that the government has at last addressed the issue of the underwater cultural heritage. It is possible that the sympathetic nature of the response demonstrates that the government has finally recognised the disparity between its treatment of archaeology on land and of archaeology underwater.[108] The transfer of administrative responsibilities away from the DTp is of crucial significance because it suggests that the interests of marine archaeology will be handled more sympathetically in future. There is no doubt that the transfer results in much more likelihood of departmental pressure for legislative change and extra funding. The fact that these were not promised as part of the government's response to Heritage at Sea is however, very disappointing, although unsurprising in the current political and economic climate.

An interesting response to the DOE's Memorandum came from Basil Greenhill, Chairman of the Advisory Committee on Historic Wreck Sites. "I certainly don't unwelcome it", he was reported as commenting.[108] He apparently felt that the DTp had already "gone a long way down a road that might not have been expected". Greenhill's response may indicate a reluctance, on the part of the Advisory Committee, to see change and possibly a fear that the Advisory Committee's practices may be "shaken up". Richard Ormond, Director of the National Maritime Museum and Chairman of the JNAPC, was apparently "very encouraged" by the proposals, although there was no timetable for their implementation.[110]

Despite the lack of a published timetable, even before the formal response was made, the RCHME was provided with funding for a post to

undertake a marine record pilot project.[111] Transfer of responsibility for the PWA 1973 from the DTp to the DOE took place on 1st April 1991 and it is apparent that the Advisory Committee, ADU and DTp were operating in close liaison with the DOE for some time before this. Funding for a nautical archaeology training officer and the one-off payments to the ADU also became available in April 1991 and the receivers' fee waiver took place at this time too. The government was therefore prompt in implementing its main proposals.

5. Further Developments

The JNAPC's major disappointment was that the government had no immediate plans to amend the legislation and, in particular, that it had shown reluctance to tackle the problems raised by the MSA 1894. However, it was heartened by the fact that the possibility of changes had not been completely dismissed. As far as the PWA 1973 was concerned, the government had said that - before deciding whether to make changes to the Act, it intended to see how it operated in practice under its new administrative agencies. As far as the MSA 1894 was concerned, the government had stated its intention to keep the working of this legislation under review. The JNAPC decided to grasp tightly these signs of government willingness to review the legislation, and to pursue a policy of pressing the government about them.[112] The JNAPC felt that, rather than reaching the end of the campaign, it was simply entering a new phase.[113]

In continuation of the campaign, the JNAPC has been keen to continue dialogue with the government departments concerned. Since the April 1991 handover of responsibility to the DOE, there have been a number of informal meetings at lunches, lectures and social functions between JNAPC members and officials of the DOE and DTp. There have

also been two formal meetings[114] at which two items were on the agenda: first, a code of practice for seabed users and secondly, analysis of defects in Part IX of the MSA 1894.

(a) Code of practice

The JNAPC presented a draft Code of Practice for Seabed Developers to the DOE and DTp at their first formal meeting on 26 April 1991.[115] The draft Code is modelled on that for land developers,[116] which appears to have been working very successfully. The aim of the draft Code is to improve the preservation of the underwater cultural heritage through co-operation with seabed developers. It is hoped that the developers, e.g. dredging companies, port and harbour authorities, etc., will view the Code as a means of providing the opportunity to meet the interests of all parties concerned on a voluntary basis, rather than having the area regulated by legislation. The Code provides basic points for co-operation which can be tailored to form specific agreements to suit individual situations.[117]

At the second formal meeting held on 9 May 1991, the DOE stated that it was interested in the Code and would support it, but felt that it should be the result of co-operation between the JNAPC and the developers. It was agreed that it was important to obtain the support of the Crown Estate Commissioners and the DOE offered to approach the Commissioners to discuss the Code.[118] Liaison has since been taking place between the JNAPC, dredging companies and other marine developers in order to obtain support for the code and to agree its detailed provisions.

(b) Defects in the MSA 1894

A discussion paper entitled "The MSA 1894: Its detrimental effects on material from underwater and the sites where it is found"[119] prepared by the JNAPC, was presented to the DOE and DTp officials at their meeting on 26 April 1991. This paper was intended to indicate problems that had arisen through the operation of the MSA 1894 Part IX provisions. Each defect identified in the Act was illustrated by a particular incident that had supposedly occurred in practice as a result of the defect. JNAPC members admitted that it had actually been quite difficult to discover such incidents as it was not easy to find out what had really been happening in practice. The meetings did not proceed well for the JNAPC in this respect because the DTp official was able to show that each illustration was in some way incorrect or out-of-date. The argument eventually reached a stalemate, mainly because representatives of both sides had not actually been involved, first hand, in the incidents and so much of what was being said was hearsay. Unfortunately, the paper's reliance on rather weak examples clouded the real issues and, because the JNAPC could not provide any evidence that problems had arisen in practice, the DTp official was unwilling to accept that there were any defects in the 1894 Act. Correspondence ensued, but it appears that both the DOE and DTp are still not convinced that there is a need to amend the legislation.

One point that did become evident from these meetings was that there was confusion on both sides about how the MSA 1894 should operate in practice.[120] It was therefore agreed that a paper would be prepared by the DTp, in consultation with the DOE and the JNAPC, which would endeavour to explain the position.[121] This note will be published by the DTp early in 1993.

6. Assessment of the Position in 1992

At this point, it is worth summarising the developments that have taken place as a result of the JNAPC's initiative, Heritage at Sea:-

(i) Administrative responsibility for the PWA 1973 was transferred from the DTp to the DOE Heritage Sponsorship Division in April 1991. In April 1992, the Heritage Sponsorship Division, along with its responsibility for the PWA 1973, was transferred to the newly created DNH. At the same time, responsibility for operating the PWA 1973 in Scottish waters passed to Scottish Heritage, in Welsh waters to Cadw, and in Northern Irish waters to the DOE (Northern Ireland).

(ii) The RCHME has begun work on a national record of historic wrecks. A three year pilot project commenced in September 1990 and the government provided funds for an appointment in this respect. Once the pilot project is completed, the RCHMs in Scotland and Wales will establish similar records.

(iii) Receivers' fees have been waived for all wreck as from 1 April 1991.

(iv) A code of conduct for seabed developers is being developed by the JNAPC, with the support of the DNH, and in consultation with seabed developers.

(v) A note on wreck laws, clarifying the system under the MSA 1894 is being produced by the DTp, in consultation with the DNH and JNAPC, which should be available early in 1993.

(vi) The ADU received a one-off payment of approximately £300,000, for a new boat, a vehicle and for limited survey work.

(vii) The government is funding a full-time training officer for the Nautical Archaeology Society for a three year period commencing in April 1991.

(viii) Operation of the PWA 1973 and MSA 1894 provisions relating to wreck is being monitored and will be kept under review.

In the writer's opinion, Heritage at Sea was a significant turning point in the fortunes of nautical archaeology in the UK. The developments listed above represent a considerable achievement for those responsible for Heritage at Sea and the progress already made should not be understated.

The transfer of responsibility for the administration of the PWA 1973 away from the DTp was undoubtedly the major step forward. This will certainly result in improvements. Responsibility for historic wreck

always was an anomaly among the DTp's functions and, for this reason, the subject was never afforded priority. Certainly, pressure to reform the legislation was unlikely under the DTp, as was made apparent by the decision to exclude from the Merchant Shipping Act 1988 new provisions based on the 1984 Consultative Document.[122] Furthermore, there was a lack of willingness on the part of the DTp to allocate funding to historic wreck administration and it is significant that, once the decision to make the transfer was reached, further funding became available almost immediately. Allocation of monies to fund such things as diver training, surveying, etc. was never likely under the DTp because such activities fall well beyond the scope of the Department's usual work in the marine field. In the past there was criticism of the DTp's administration of the PWA 1973. This criticism centered on: the composition of the Advisory Committee; the DTp policy of having each designated site excavated; and poor standards of work on licensed sites. Despite efforts made in recent years by the DTp to improve these matters, no doubt greater progress will be made under the new administration. The PWA 1973 is a well-drafted piece of legislation which provides a flexible framework for protection of sites, leaving the details to departmental practice. This means that many improvements can be made without legislative amendment.

The transfer of responsibility for historic wrecks in Scottish, Welsh and Northern Irish waters to Scottish Heritage, Cadw and the DOE (Northern Ireland) respectively is an interesting development. Sufficient time has not yet passed to be able to assess how this arrangement will work in practice. Therefore, just how satisfactory and manageable it will be remains to be seen. It may be that there will be a need to develop regional branches of the ADU in order that it may respond quickly to the requirements of the regional agencies and also to prevent a potential conflict of responsibilities. There may also be a need to transfer responsibility for the PWA 1973 in England to English

Heritage, but more will be said on this point later.[123]

The archaeological community has given warm applause to the recent developments, yet the feeling is strong that they will not suffice in meeting the underlying principle of Heritage at Sea, namely that archaeological sites of national importance underwater should receive as great a degree of protection as those on land. One of the issues left unresolved is that archaeologists are keen that all types of underwater archaeological remains, not just historic wrecks, should receive proper protection. There is therefore a need to review the use, or more precisely the lack of use, of s.53 of the AMA 1979. The likely reason for it not being used in the past was the potential for departmental conflict in the marine field. Now that the AMA 1979 and PWA 1973 are being administered by the same department and agencies, there is no longer such potential and it should be possible to co-ordinate use of the two provisions. Whether there should be two separate methods for protecting underwater sites, or one method which covers all such sites, is a question which will need to be addressed in any review of the legislation.[124]

A second outstanding point is that it is not really possible to assess the national importance of sites until one is aware of the total resource that exists. Assessment of the total marine archaeological resource is obviously much more difficult than assessing the land resource, and this no doubt is the reason for the different criterion for designation of wrecks under the PWA 1973 and scheduling of monuments under the AMA 1979.[125] No-one knows if the marine sites already designated under the PWA 1973 are the most important sites that exist in territorial waters and, without a complete survey of these waters, it will be impossible to find out. Furthermore, seaward developments are proceeding at a progressively more rapid rate and there is a constant and growing danger that these activities will

disrupt and even destroy archaeological sites of major importance, the existence of which is at present unknown. Some progress is being made in this respect. The preparation of a central record of historic wrecks by the RCHMs, the funding (although limited) that has been made available to the ADU for surveying work, and the government's support for the publication of the Code of Practice, are all important developments.[126] However, more needs to be done.[127]

At last the government has directed its attention to the anomalous position of historic wreck and the various changes noted above constitute an extremely welcome first step. Obviously, a period of time is now required for monitoring and review. However, there is little doubt that, in the longer term, legislative amendment will be required.[128]

NOTES

1. For details, see Chapter Three, A., above.

2. The administration of wreck legislation, along with all other shipping functions, was transferred from the Secretary of State for Trade to the Secretary of State for Transport in 1983 (Transfer of Functions (Trade and Industry) Order 1983, SI 1983, No. 1127).

3. H.C. Debates, Vol. 906, Col. 708 (1975-76).

4. Personal communication with I. Milligan, Marine Directorate, DTp, 1985.

5. For details, see B.1., below.

6. See further, Chapter Three, D., above.

7. See further, Chapter Six, A.1(a) below. See also, generally Chapter Four, which shows that European and international initiatives do not distinguish between wreck and non-wreck remains.

8. See Chapter Two, C.2., above.

9. See further, Chapter Six, C.1., below.

10. See Chapter Six, A.1(d) below and also the recommendation of Prott and O'Keefe to the Council of Europe's Committee on Culture and Education in 1978: Chapter Four, B.2(a) above.

11. For details, see C.3., below.

12. Outlined in a Memorandum entitled The Government's Response to Heritage at Sea, issued by the DOE on 17 December 1990. For details, see C.4., below.

13. DTp Consultative Document, Proposals for Legislation on Marine Wreck 1984.

14. At that time, and until 1991, administered by the DTp: see Chapter Three, C., above.

15. See C.4., below and also Chapter Three, C., above.

16. But summarily dismissing its recommendation for a statutory authority.

17. As was already the case in practice: see Chapter Two, A.1., above.

18. Although most of the provisions giving powers to a receiver in such an event would be repealed, i.e. MSA 1894, ss.512, 514-517, 522, 524-5, 527-9, 537-43, 551-3, 555, 566-9. The DTp has recently indicated that, in this respect, the 1984 Consultative Document was "ill-conceived" because it was evident that the Coastguard still needed these powers: personal communication with A. Burr, Marine Directorate, DTp, May 1991.

19. In practice, this happens anyway under the present system: see Chapter Two, A.3., above.

20. According to Tomalin, the DTp's reasoning behind this proposal was that potential purchasers of artefacts might be found in public museums: Tomalin, County Archaeological Policies in the Inter-tidal Zone and Beyond, op. cit.

21. See further, Chapter One, A.1., above.

22. Especially if the policy continued to be to pay a reward based on 100% of the value of the find: see Chapter Two, A.4., above.

23. See Chapter Three, D., above.

24. See Chapter Two, A.3., above.

25. Information in this section was obtained through an interview with I. Milligan, Marine Directorate, DTp, in 1985.

26. Cf. the DOE's Consultation Paper on portable antiquities published in 1988, which allowed a period of nearly three months for comments (see further, Chapter Seven, A.1(b) below).

27. Now the Merchant Shipping Act 1988.

28. See H.C. Debates, Vol. 129, Col. 155 (1987-88): statement of the Secretary of State for Transport, March 1988, confirmed in a letter from the then Secretary of State for Transport, P. Channon, to Cranley Onslow M.P., dated 15 August 1988.

29. DOE Memorandum, The Government's Response to Heritage at Sea, 17 December 1990.

30. See further, Chapter Four, B.2(k) above.

31. JNAPC, Notes of a Conference on Nautical Archaeology held in the Royal Armouries on 30 January 1988.

32. The discussion papers on legislation and the disposal of finds were produced by archaeologists and there was no input from anyone legally qualified. Hence they included a number of inaccuracies and misunderstandings.

33. Material in the other discussion documents will be referred to in Chapter Six, below.

34. There is also the AMA 1979 s.53 which provides for the protection of sites in territorial waters (other than wrecks designated under the PWA 1973) by scheduling. However, this provision is not in practice used and was not referred to in the discussion paper. For details of s.53, see further, Chapter Seven, A.1(a) below.

35. For further information on these unprotected archaeological remains, see Chapter Six, A.4., and Chapter Seven, A., below.

36. See Chapter Two, A.6., above.

37. See further, Chapter Two, C.4., above.

38. See further, Chapter Two., C., above.

39. See further, Chapter Four, A.2., above.

40. See further, Chapter Four, B.2(a) above.

41. See further, Chapter Seven, C.1., below.

42. See Chapter Seven, C.1., below. A draft code of practice for seabed operations was drawn up in 1991 and is currently the subject of discussions between archaeologists and seabed developers, see C.5(a) below.

43. See Chapter Three, C.3., above.

44. See Chapter Two, A.5., above.

45. See Chapter Two, A.4., above.

46. See further, Chapter Seven, A.1(a) below.

47. For discussion of this issue, see Chapter Six, A.1(d) below.

48. For an examination of these interests, see Chapter Six, B.2., below.

49. See further, Chapter Two, A.5., above.

50. However, the issue was discussed in the paper on disposal of artefacts (see (b) below).

51. See (b) below.

52. See further, Chapter One, A.1(c) above.

53. See further, Chapter Six, A.4(c) below.

54. See C.2(a) above.

55. For further discussion of these issues, see Chapter Six, A.7., below.

56. See further discussion on this point in Chapter Six, A.4(c) and A.5., below.

57. Cf. government reaction to a similar proposal in 1974 by the Wreck Law Review Committee, see A., above.

58. JNAPC, Discussion Paper on Infrastructure, 1988.

59. See C.2(a) above.

60. Objects accidentally raised could be reported to appropriate musems.

61. Scottish Heritage and Cadw (in Wales). In Northern Ireland the responsible body would be the DOE (Northern Ireland).

62. See further, Chapter Seven, C.2., below.

63. Under the Crown Estate Act 1961 s.1, the Commissioners have a duty to maintain and enhance the value of the estate and the return obtained from it. See further, Chapter Seven, C.2., below.

64. The Independent, 12 May 1989.

65. See further, thesis Introduction.

66. See further, Chapter Seven, A.1(a) below.

67. See C.2(a) above.

68. On two counts: there are important underwater archaeological remains other than wreck (see thesis Introduction), and some wreck of importance may be claimed, in particular by states (see further Chapter One, A.1(c) above).

69. See C.2(b) above.

70. See generally, Chapter One, and see also Chapter Six, A.7., below.

71. Cf. the JNAPC's 1988 discussion paper on legislation, discussed at C.2(a) above.

72. See (vi), Recommendation 6, below.

73. See Appendix 16.

74. See further, Chapter Six, A.4., below.

75. Heritage at Sea was published in 1989, before the government waived receivers' fees in 1991. See further, Chapter Two, A.3., above.

76. For further details of treasure trove, see Chapter Seven, A.1(b) below.

77. See B.2., above.

78. See further, Chapter Seven, C.1., below.

79. See (vi), Recommendation 6, below.

80. See further, Chapter One, A.1(c) above. Heritage at Sea made no mention of the PMRA 1986, but clearly it would be desirable for the MOD to administer this legislation with due regard to the interests of underwater archaeology.

81. For details, see Chapter Three, C.2., above.

82. See A., above.

83. See C.4., below.

84. See C.4., below.

85. Cmnd. 1200, September 1990.

86. The Commissions in Scotland and Wales would be asked to take on similar tasks. It later became clear that the RCHME had already received £100,000 for a three year pilot project and that an appointment was made in this respect in September 1990.

87. The separation of responsibilities for the PWA 1973 and the MSA 1894 is discussed at C.6., below.

88. H.L. Debates, Vol. 524, W.A. 59-60 (1990/91).

89. See Chapter One, A.1(d) above.

90. On 7 March 1990 a meeting was held at the DOE between members of the JNAPC, officials of the DOE, and Anne Giesecke who drafted the US Abandoned Shipwreck Act of 1987. Detailed proposals drafted by the writer for reform of the legislation were presented to the DOE (see Appendix 11).

91. See A., above.

92. See B., above.

93. Wines and spirits are an exception to the rule that customs duty is not charged on items over 100 years old. When the Dutch East Indiaman Amsterdam was excavated in the late 1960s (see Chapter Three, A., above), a lot of bottles of wine were recovered. The criterion employed by the Customs Service in that case to decide whether or not to charge duty was to check whether the wine was drinkable: it was not!

94. In 1991, the DTp reached its conclusion and announced that the receivers' fee was to be waived as from 1 April 1991, the decision being brought into effect by Statutory Instrument: Merchant Shipping (Fees) Regulations 1991 (SI 1991, No.784). This was a constructive step which will be of assistance to museums wishing to acquire underwater cultural property. See further, Chapter Two, A.3., above.

95. On this point the Memorandum actually referred to the National Maritime Museum rather than the JNAPC, but the Director of the National Maritime Museum later clarified with the DOE that this was a JNAPC, rather than National Maritime Museum, initiative.

96. See further, Chapter Six, A.4., and Chapter Seven, C., below.

97. Cf. the position as outlined in Chapter One, A.1(c) above.

98. For details of the FCO's interest in East India Company vessels, see Chapter One, A.1(c) above.

99. See further, Chapter One, A.1(c) above.

100. See Chapter One, A.1(c) above.

101. Since April 1992, the DNH, Scottish Heritage, Cadw and the DOE (Northern Ireland). The government's response made no mention of the PMRA 1986, but such consultation would also be appropriate with regard to its administration by the MOD (see further, Chapter Three, E., and F., above).

102. The DOE later announced that the offer would materialise in the form of funding for a full-time training officer for the Nautical Archaeology Society for a three year period commencing in April 1991 (approximately £30,000 p.a.). See further, Chapter Six, B.2., below.

103. Approximately £150,000.

104. Approximately £180,000.

105. See Chapter Two, A.6., above.

106. See further, Chapter Two, B., above.

107. H.L. Debates, Vol. 524, W.A. 59-60 (1990-91).

108. For further details, see generally Chapter Seven, below.

109. L. Murdin, "Underwater Heritage Success" Museums Journal, December 1990.

110. Ibid.

111. In September 1990, two months before the formal response was made.

112. In a letter dated January 1991 from the Director of the National Maritime Museum to the Head of the Heritage Sponsorship Division, DOE, after giving the JNAPC's reaction to the government's response to Heritage at Sea and after expressing his concerns at the lack of plans for changes to the legislation, the Director stated that the JNAPC looked forward to frequent meetings with the DOE!

113. See Appendix 13 for the JNAPC objectives for the new phase.

114. The first took place on 26 April 1991 and the second on 9 May 1991.

115. See Appendix 15 for current draft (November 1992).

116. Drawn up by the British Archaeologists and Developers Liaison Group and published by the British Property Federation Standing Conference of Archaeological Unit Managers. See further, Chapter Seven, C.1., below.

117. A detailed consideration of such codes of practice will be made in Chapter Seven, C., below.

118. It appears that, perhaps rather surprisingly, the Commissioners were generally supportive of the idea of a code.

119. See Appendix 12.

120. For details, see further, Chapter Two, C.1., above.

121. See Appendix 14 for the November 1992 draft of the Note on Wreck Laws. See further, Chapter Two, C.1., above.

122. See B.3., above.

123. See Chapter Six, E., Chapter Seven, B., and Chapter Eight, B.2., below.

124. This point is discussed further in Chapter Seven, A., below.

125. See further, Chapter Six, A.1(c) below.

126. See further, Chapter Six, A.4., below and Chapter Seven, C., below.

127. See further, Chapter Six, A.4., Chapter Seven, C., and generally, Chapter Eight.

128. See further, Chapter Two, C., and Chapter Three D., and F., above. Suggestions for legislative amendment will be made in Chapter Eight, below.