

ISSUES FROM MARITIME LAW REGARDING HERITAGE RESOURCES OF PACIFIC RIM NATIONS

Roger E. Kelly
United States Department of Interior; National Parks
San Francisco

A Nation's heritage does not stop at her waters' edge. Maritime historical and archeological resources are international in nature since nations and peoples are interconnected by oceans and rivers. Shipwrecks, piers and boatyards, lost cargos and landings, breakwaters and inundated structures and coastal native features carry equal importance as heritage resources on dry land. Oceans and rivers contain nautical patrimony relating the human story of war, peace, commerce and travel, tragedy and valor, and everyday life, often preserved in remarkable circumstances.

World-wide public attention has increased about such resources and their multi-national meanings; books, newsclips, press coverage and scholarly studies on maritime subject abound. In some areas, controversy has arisen as interest groups struggle to define public and private interests in such heritage. Preservation does not seem to have moved equally within governments and nations in the Pacific region protect their natural resources more effectively within marine protected areas (see Salm and Clark 1984).

'Pacific Rim' nations from North America to Southeast Asia form many different networks and are a mix of young island countries and a few continental states with extensive coasts. Great geographical and cultural distances separate each from its neighbor; water or air-bourne connections are vital. While earth's waters nourish her inhabitants, it is not a human environment for living without artificial means, now readily available in every country for adventuresome individuals for business, recreation, inspiration, and research. These values may be molded into policies of highest public benefit or may be allowed to operate unregulated. This discussion examines how some nations of the region answer this issue - how some are struggling to develop appropriate effective means and how some nations need to consider changing existing policy or law. Common threads will be noted and recommendations will be given. International agreements (UN Convention on the Law of the Sea and UNESCO Convention on Illicit Import, Export, and Transfer of Cultural Property) form background statements against which a nation's management might be gauged.

In addition to traditional political systems of governance in some island countries, overlays of United Kingdom, United States, France and other legal systems flavor localized expressions of heritage regulation and policy. For this reason, the following discussions are loosely grouped according to basic source of official regulatory management for heritage maritime resources. Ownership of properties or antiquities, authorization for recovery or study, procedures for protecting a state's rights of ownership, qualifications for authorized persons, criminal sanctions and illegal taking of property, and so forth are guideposts to measure a country's development of effective policies. Only a few summary articles are available but these well illustrate international issues (see Miller 1973; UNESCO 1981; Prutt and O'Keefe 1978, 1982, 1984; Roper 1978; Altes 1976; O'Keefe 1981, 1983; Cycon 1985). With the approach of 50th Anniversary of World War II, the numerous submerged historic sites and physical evidence of this great conflict may require special protective management from some Pacific nations lest this heritage suffer irreversable damage.

Third International Conference on the Law of the Sea

The UN Convention of the Law of the Sea was finally signed in December 1982 by more than 120 countries after many years of international discussion (see Sohn and Gustafson 1984) but not many nations have ratified the Convention internally. Protection or conservation management of submerged heritage resources is discussed in Article 303 of the General Provisions which commences with the statement "States have the duty to protect archeological objects and objects of historical origin found at sea, and shall cooperate for this purpose". But removal of such resources without approval of the governing state was termed only 'an infringement' of a state's territorial rights relating to its definition of territorial sea (Cycon 1985: 81). In fact, one commentator views the four statements of Article 303 as exempting "...a large part of the underwater activities that affect archeological objects. It is safe to say that 'finders, keepers' regime of international waters will remain in effect for many years even though the first steps toward restructuring that arrangement have been taken." (Cycon 1985: 81). Article 149 states that archeological and historic objects found beyond the limits of national jurisdiction should be preserved or disposed of for the benefit of mankind but with preferential rights recognized for the state of origin, both of cultural source and past associations. Unfortunately, key definitions of 'archeological', 'historical', 'objects', 'disposed of...' and other ambiguities leave that Article open to many interpretations (see Watters 1983: 812). Although these Articles of the Convention have shortcomings, legal expressions addressing maritime heritage within territorial seas, contiguous zones, exclusive economic zones, and international waters have potential of becoming 'customary international law through widespread practice' as noted by Watters (1983:815). The United States voted against adoption of the Convention while Canada and Mexico voted in favor as did France. Applicability of the Convention for dependencies of Great Britain is uncertain since that nation Abstained.

Admiralty

Salvage of property from a maritime peril and claimed rights to effect such recovery is centuries old as legal practice. Salvors usually are required to demonstrate location of vessel or property, value of property to be saved, value of means utilized by salvor as expended for recovery, skill, labor, and risks of the recovery project. Many other legal aspects are also significant and recent cases in the United States illustrate these complexities. In some countries, relinquishment of ownership, control, and right of use through loss or abandonment may result in a finder reducing the property to his possession. In other nations, a state's right of sovereign prerogative for title and control is asserted (Miller 1973:19). Since the United States has not exercised its sovereign rights by statute, State courts and Federal courts sitting in admiralty will apply 'maritime but local' law, resulting in differing legal solutions (see Maraist 1983, Shallcross and Giesecke 1983). In addition, in the United States, 'navigable waters' including rivers and lakes are pertinent to admiralty law but in England, jurisdiction was limited to 'high seas' and ocean-going vessels (Maraist 1983:7). French law characterizes abandoned property nearly identical to terrestrial common law practice (Miller 1983: 18). To date, use of admiralty law to claim historic shipwrecks has not occurred in Pacific Rim nations except within the United States.

Affiliates of Great Britain

Australia, New Zealand and its affiliated Western Samoa, Solomon Islands, Fiji, Independent State of Papua New Guinea, the Kingdom of Tonga, and other directly affiliated islands have followed a Great Britain perspective on the preservation of maritime historic heritage (see Dean 1986, McCarthy 1985, Prott and O'Keefe 1982). For New Zealand, three maritime parks are established (Bay of Islands, Hauraki Gulf, and Marlborough Sounds) which offer sport diving attractions. This nation has an Historic Articles Act (1962) and Antiquities Act (1975) which address ultimate sovereign ownership of heritage resources. The several states of the Australian Commonwealth have legislation regarding maritime archeological resources. In the early 1960s, salvage of Dutch 17th Century merchantmen stimulated legislation in Western Australia but legal actions continued into the 1970s. The Commonwealth Government, State governments, citizens representing diving interests cooperated in drafting Australia's Historic Shipwreck Act, later amended in 1980 to specify divers' recreational activities. Approximately 100 protected shipwrecks have now been documented from New South Wales, Queensland, South Australia, Western Australia, and Victoria. Discoverers must report wrecks appearing to be over a century old before receiving a 'finders fee' and such vessels must also possess historical or technical importance for formal protective listing. Within offshore marine protected areas such as Great Barrier Reef in Queensland and others managed by the Northern Territory, known shipwrecks are designated "Historic Protected Zones". Case law, States' legislation, and national level protection legislation have developed in the past 20 years for Australia. In Papua New Guinea, a National Cultural Property (Preservation) Act was established which focused on controls for export of properties depicting 'traditional life of any peoples of the Territory'. Regulations exist prohibiting removal of historical objects without approval. Several areas are rich in World War II materials which are accessible to equipped sport divers. These include Simpson Harbour/Rabaul and Milne Bay (Tounissen and Altman 1987). Traditional political and legal systems continue to operate within Tonga, Fiji, Western Samoa, Solomon Islands, and related islands with superimposed English jurisprudence. England's Protection of Wrecks Act only applies to shipwrecks specifically designated under this Act; disturbance of underwater historic features or objects is not illegal when such resources have not been officially documented.

Canada's active maritime archeology program, her parks system of the central and province governments, and recent public workshops on maritime preservation issues, particularly in Vancouver during 1983, illustrate strong preservation stewardship fostered by citizens' groups on the local level.

Affiliates of France

In French Polynesia, New Caledonia, Wallis and Futuna Islands and elsewhere for epaves francaises, a 1961 and 1965 enactment 'Wrecks of Archaeological Historic or Artistic Interest' provides permit authority, specific competence for an excavator, and cross-agency coordination of control. Ministers of Cultural Affairs, Regional Director of Antiquities, Marine Registry Administrator and the discoverer are referenced and directed to follow certain actions regarding shipwrecks (see Altas 1976:88-89). Maritime historic and archeological resources are not protected from public works projects, however.

In 1960, New Caledonia established Resolution No. 226 which addressed heritage resources and objects in terms of control over export from the region.

Mexico

In its 1972 Federal Law on Archaeological, Artistic, and Historical Monuments and Zones, Mexico proclaimed that 'archeological goods or properties are inalienably and imprescriptibly the Nation's property'. The legislation did not reference submerged heritage resources of any time period within territorial waters. In fact, the 1972 law distinguished between those properties produced by cultures previous to the Spanish civilization and those of post-Spanish Conquest. Permits and other regulatory actions are the responsibility of the National Institute of Anthropology and History. Criminal sanctions are stated but standards of researcher competence are left to the National Institute. Attention to maritime historical and archeological resources from officials of the Government began in 1981 with two projects in Territorial locations of the Gulf of Mexico (see Luna 1981). But for decades, wreck and ruin diving has been both a popular and commercial activity in Mexican waters, particularly in Gulf of Mexico regions. Professional staff of the Institute recognize the need for specific regulations regarding offshore heritage resources.

Philippines

The National Museum of the Republic is that officially permitting governmental agency for archeological work and has recently sanctioned projects on galleons of Spanish origin and Late Ming Chinese porcelain and gongs as lost cargo. Contracts with divisions of recovered objects are customarily used by the Museum for such arrangements.

Japan

This nation's marine parks number at least 60 but are established for natural resources. The Marine Parks Center of Japan is responsible for this program and in 1970 a Society of Underwater Archaeology was established by university staff and faculty for the scientific investigation of submerged archeological resources. Japan's Maritime Museum and preserved flagship as an exhibit vessel indicate preservation interests for this nation's maritime history.

Affiliates of United States

Composed of Truk, Yap, Ponape, and Kosrae States, regulatory protection of heritage resources within the Federated States of Micronesia (FSM) is developing. In a 'Free Association' relationship with the United States, technical assistance for heritage programs including submerged resources is in place from the US Interior Department's National Park Service. From a 1981 Chapter in the Kosrae State Code (KSC 14), antiquities and their preservation is detailed but this Code predated independence of FSM and may require revision. The historic vessel Leonora in Kosrae has been designated for protection by an Executive Order 2-79. Truk Lagoon is well-known for World War II materials: removal of objects is prohibited and visitors are accompanied by guides. Other war-related vessels and objects are present in Lelu Lagoon. Guam's PL 12-128 addresses heritage resources with detailed regulations. Its scope and use is

currently being written by officials. US Federal laws apply to military control of submerged lands immediately offshore. American Samoa and other US-held islands are within American regulations but local governments have not instituted specific policies. Within the Commonwealth of the Northern Mariana Islands, US regulations obtain since these communities are under American sovereignty but are self-governing. Recently a contract from the Saipan government was awarded for artifact recovery and study of a supposed galleon wreck; this was a detailed business arrangement and included a division of materials recovered. The United States is also in Free Association relationship with the Republic of the Marshall Islands; regulatory measures for preservation of submerged historic resources are not available at this time. For the Republic of Palau, an Historical and Cultural Preservation Act was legislated in 1982. Title to such resources is held exclusively by the Republic and its States with a Division of Cultural Affairs as official administrator. The 1982 Act details many aspects of heritage preservation and protection, including enforcement, public works projects review, and management of privately owned historic sites or resources.

United States

Subject to considerable legal and media attention, the need for a federal law addressing submerged historic resources has been discussed by Shallcross and Giesecke (1983), Meenan (1978) and others. For a third time, legislation is now before the US Congress which would place shipwrecks under US historic preservation regulations rather than admiralty and would vest States with ownership in most cases. One-half of the States have laws regarding submerged resources but clarity and effectiveness differ widely. Many situations have resulted in case law pronouncements in Federal and State courts; criminal actions against persons illegally taking objects from shipwrecks are very rare.

Discussion and Summary

Foremost, Pacific Rim nations should enhance official recognition to maritime heritage resources as both sovereign right and responsibility with significance values equal to terrestrial resources. Clear statements as legislation should define highest public interest to be served, technical definitions if needed, civil and criminal procedures and sanctions, and responsible official offices. Local political variations should be encouraged where appropriate. Within the parameters of affiliated powers, nations should remove historic shipwrecks and related properties from admiralty law arenas. Cooperative assessment projects, public and visitor education, and protection efforts among a nation's governmental offices and between nations can share costs and increase awareness. These multinational ventures may take the form of technical exchange and training as recently conducted by US Interior staff on Guam or international agreement on policies, exemplified by the Council of Europe's Ad Hoc Committee of Experts on the Underwater Cultural Heritage (CAHAQ) report in 1984. This group has prepared a draft Convention on the Protection of the Underwater Cultural Heritage which corrects deficiencies in the Law of the Sea. Existing treaties and UNESCO Convention on the import/export of cultural properties can be amended to include heritage materials from submerged places of origin. Above all, nations should continue to recognize vital maritime history which connects people and places as elements of world-wide human heritage.

REFERENCES

- Altes, Alexander Korthals
- 1976 Submarine Antiquities: A Legal Labyrinth. Syracuse Journal of International Law and Commerce. Vol. 4, No. 1, pp. 77-96. Syracuse, New York.
- Cycon, Dean E.
- 1985 Legal and Regulatory Issues in Marine Archeology. Oceanus, Vol. 28, No. 1, pp. 78-84. Woods Hole Oceanographic Inst. Woods Hole, Mass.
- Dean, Martin
- 1986 Archeology - All at Sea? Sea History, No. 39. p. 11. National Maritime Historical Society, Croton-on-Hudson, New York.
- Luna, Pilar
- 1981 Two Expeditions to the Gulf of Mexico and the Recovery of the Oldest Bronze Cannon in America. In Underwater Archeology: The Challenge Before Us, edited by Gordon Watts, pp. 76-80. Fathom Eight, San Marino, California.
- Maraist, Frank L.
- 1983 Admiralty. West Publishing Company, St. Paul, Minn.
- Meenan, James Kevin
- 1978 Cultural Resources Preservation and Underwater Archeology: Some Notes on the Current Legal Framework and a Model Underwater Antiquities Statute. San Diego Law Review, Vol. 15, No. 3, pp. 623-662. San Diego.
- McCarthy, Mike
- 1985 The Steamship as Part of Australia's Maritime Archeology. Proceedings of the Sixteenth Conference on Underwater Archeology. Special Publication Series, No. 4, Society for Historical Archeology, Ann Arbor, Mich.
- Miller, H. Crane
- 1973 International Law and Marine Archeology. Academy of Applied Science. Belmont, Mass.
- O'Keefe, Patrick J.
- 1981 Current Developments regarding Regulation of Marine Archeology outside Territorial Waters. In Underwater Archeology: The Challenge Before Us, edited by Gordon Watts, pp. 338-347. Fathom Eight, San Marino, California.
- 1983 Export and Import Controls on Movement of the Cultural Heritage Problems at the National Level. Syracuse Journal of International Law and Commerce, Vol. 10, No. 2, pp. 352-370. Syracuse, New York.
- Roper, John
- 1978 The Underwater Cultural Heritage. Committee on Culture and Education; Council of Europe, Doc. 4200. Strasbourg.
- Prott, L.V. and P. J. O'Keefe
- 1978 Final Report on Legal Protection of the Underwater Cultural Heritage; Appendix II to John Roper, The Underwater Cultural Heritage
- 1982 Existing Legislative Protection of the Cultural and Natural Heritage of the Pacific Region. UNESCO 100-01.
- 1984 Law and the Cultural Heritage I: Discovery and Excavation. Professional Books, Abingdon, Cambridge.
- Salm, Rodney V. and John R. Clark
- 1984 Marine and Coastal Protected Areas: A Guide for Planners and Managers. International Union for Conservation of Nature and Natural Resources, Gland, Switzerland.
- Shallcross, Douglas B. and Anne G. Giesecke
- 1983 Recent Developments in Litigation Concerning the Recovery of Historic Shipwrecks. Syracuse Journal of International Law and Commerce. Vol. 10, No. 2, pp. 371-404. Syracuse, New York.
- Toumissen, Sebastian and Jennifer Altman
- 1987 WWII Sites A Feature of Papua New Guinea. Underwater USA February, pp. 41, 43.
- Sohn, Louis B. and Kristen Gustafson
- 1984 The Law of the Sea. West Publishing Company. St Paul, Minn.
- UNESCO
- 1981 Protection of the Underwater Heritage. Paris.
- Watters, David R.
- 1983 The Law of the Sea Treaty and Underwater Cultural Resources. American Antiquity, Vol. 48, No. 4, pp. 808-816. Ann Arbor.

ISSUES FROM MARITIME LAW REGARDING HERITAGE RESOURCES OF PACIFIC RIM NATIONS

Maritime historic resources, particularly shipwrecks, located within jurisdictions of Pacific Rim nations are international heritage resources as well. Increased public interest, discovery and documentation projects, salvor claims, and governmental efforts are factors raising preservation issues in this region.

Some nations (United States, Australia, Canada) have established regulations and laws for preservation and protection of historic shipwrecks after salvors' claims were filed. Subpolitical units of these nations have developed local regulatory procedures as well. Some nations (New Zealand, Japan, Indonesia, United States, Australia) have established marine and coastal protected areas for natural resources which may also include historical or archeological evidence as well. Newly established Pacific nations (Federated States of Micronesia, Republic of Palau, Republic of the Marshall Islands) as in Free Association with the United States have some type of local legislation. Guam, American Samoa, and Commonwealth of Northern Mariana Islands are in political union with the United States and recognize local governmental stewardship over submerged cultural resources congruent with US historic preservation law and regulation. Some communities may rely on traditional owner concepts in addition. In these nationalities, the legislative establishment of researcher or salvor standards of performance, contractual arrangements with permit-granting governments, and provisions for public benefit from maritime resource projects varies from brief to detailed and thorough. Use of age determination for submerged historic resources also varies and excludes certain types of heritage materials.

World War II materials are protected by some regulations in some nations but not clearly in others; removal of these properties may increase as the 50th anniversary of that conflict approaches. Other nations (Mexico, Philippines) may not refer to maritime or submerged heritage resources specifically.

Agreements and other formal arrangements between nations for return of illegally obtained cultural properties offer another mechanism for controlling illicit antiquities traffic which UNESCO Convention on Cultural Properties Implementation Act addresses. The United Nations Convention on the Law of the Sea (1982) has not been signed by Pacific Rim nations but also contains indirect references to submerged heritage resources and role of national sovereignty.

Such issues are multinational, interdisciplinary and for this region, growing in complexity.

Roger E. Kelly
US Interior Dept.
National Park Service
450 Golden Gate Ave.
San Francisco, CA 94102

PUNTOS DE LEY MARITIMA RELACIONADOS A LAS RIQUEZAS DE LOS PAISES DEL BORDE DEL PACIFICO

Las riquezas históricas marítimas particularmente provenientes de naufragios, localizados dentro de la jurisdicción de las naciones del Borde del Pacífico son riquezas de herencia internacional. El aumento del interés público, descubrimiento y documentación, reclamos y esfuerzos gubernamentales, son factores que están aumentando los puntos relacionados a la preservación en esta región.

Algunas naciones (Estados Unidos, Australia, Canadá) han establecido regulaciones y leyes para la preservación y protección de naufragios históricos después de que los documentos de salvedad han sido registrados. Así también, las unidades sub-políticas de estas naciones han desarrollado procedimientos regulatorios locales. Algunas naciones (Nueva Zelandia, Japón, Indonesia, Estados Unidos, Australia) han establecido áreas protegidas costeras y marinas para riquezas naturales, las cuales pueden asimismo incluir evidencias históricas o arqueológicas. Algunas naciones del Pacífico recientemente establecidas (Estados Federados de Micronesia, República de Palau, República de las Islas Marshall) en Libre Asociación con los Estados Unidos poseen cierto tipo de legislación local. Guam, Samoa Americana y la Comunidad de las Islas Marianas Norteña están unidas políticamente con los Estados Unidos y reconocen la administración del gobierno local sobre las riquezas culturales sumergidas, congruentes con la ley y regulación histórica de preservación de los Estados Unidos. Es más, algunas comunidades pueden regularse por los conceptos de la propiedad tradicional. En estas nacionalidades, el establecimiento legislativo de estándares de conducta del investigador o descubridor, arreglos contractuales provenientes de permisos gubernamentales, y regulaciones para beneficio público de proyectos de riquezas marítimas varía, desde muy breve hasta sumamente detallado y complicado. El uso de determinación de la antigüedad de riquezas históricas sumergidas varía también y excluye ciertos tipos de materiales históricos.

Materiales de la Segunda Guerra Mundial están protegidos bajo algunas regulaciones en algunas naciones, pero no muy claramente en otras; la remoción de estas propiedades podría aumentar al acercarse el cincuenta aniversario de este conflicto. Otras naciones (México, Filipinas) pueden no referirse específicamente a riquezas marítimas o sumergidas.

Convenios y otras clases de arreglos formales entre naciones para efectuar la devolución de propiedades culturales obtenidas ilegalmente ofrecen otro mecanismo para controlar el tráfico ilícito de antigüedades, la cual está contenida en la Convención del Acto de Implementación de Propiedades Culturales de la UNESCO. La Convención de Ley Marítima de las Naciones Unidas (1982) no ha sido firmada por las naciones del Borde del Pacífico, pero contiene referencias indirectas a herencia de riquezas sumergidas y su papel en la soberanía nacional.

Estos puntos son multinacionales, inter-disciplinarios y para esta región, están aumentando en complejidad.