

Spain and the Law of the Sea: 20 years under LOSC

Protecting underwater cultural heritage

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The protection of underwater cultural heritage (hereinafter UCH) is one of the latest subjects that have entered into the areas of concern, and legal regulation, of Public International Law. The interest in establishing an international legal regime for this particular category of cultural heritage derives largely from the failure of the State action against the various risks that threaten him, taking into account, in addition, that the treasures and shipwrecks are immersed in all marine areas.

Spain is a State that has important interests in the sector due to the existence of multiple Spanish shipwrecks sunken in waters of third countries and, in general, in waters not subject to its sovereignty or jurisdiction. At the time, in Spanish waters remains rests from wrecks of vessels belonging to third countries. This situation highlights the need of Spain showing some sensitivity toward the legal regulation and protection of underwater cultural heritage.

In the next pages it will be carry out an analysis in order to clarify if the attitude shown by Spain corresponds with this last statement, reviewing the practice developed in relation to the protection of the underwater cultural heritage from three points of view: its position in relation to the existing international agreements; the legislative internal practice developed to protect these treasures; and, finally, the attitude of Spain before the findings in which there were Spanish interests.

(A) SPANISH POSITION BEFORE THE INTERNATIONAL CONVENTIONAL PRACTICE

The protection of the underwater cultural heritage has received attention, directly or indirectly, from two conventional regimes not always clearly separated: the rules concerning the international protection of cultural property, on one side, and the law of the sea, on the other hand. It should be noted, from the outset, the active attitude shown by Spain to be incorporated as State part in the existing relevant international agreements.

(1) International agreements about the protection of the cultural heritage.

In relation to the international protection of cultural property, it is a conventional scheme adopted with the primary purpose of raising awareness about the need for States to carry out the protection of

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their own cultural heritage. They are rules that do not cater to the problems of specific categories of goods, with a very few exceptions. In the context of the United Nations Educational, Scientific, and Cultural Organization (UNESCO), are of interest for our purposes the conventions adopted in relation to the protection of the cultural heritage, especially the Paris Convention on measures to be taken to prohibit and prevent the import, export and transfer of ownership illicit cultural property¹ and the Convention on the protection of world heritage cultural and natural;² and, in time of war, The Hague Convention relative to the protection of the cultural heritage in the event of armed conflict.³ Conventions all them ratified by Spain.

In relation to the work from the Council of Europe, the Spanish practice has shown the delay experienced in the acceptance of the main instrument applicable to the archaeological activities. It's true that Spain had ratified without too many years of delay the Convention adopted in 1969 for the protection of the archaeological heritage,⁴ agreement that Spain has already denounced. But it was an agreement that was aimed at the protection of the archaeological sites and the suppression of clandestine excavations, including the obstruction of trade from excavations of such works, without addressing the specific problems of the underwater cultural heritage; that heritage is not even mentioned in its articles. A legal regime adapted to the needs to be displayed at the time of drafting of the Convention by archaeology, which did not fit even the underwater cultural heritage.

Art. 1(3) of the revised European Convention of *La Valetta*, currently ratified by Spain, covers in part this omission,⁵ even if it does not pursue to establish a legal regime applicable to all the UCH, regardless of the maritime space in which is located. Fundamentally, it is extending the regime of the Convention to the subaquatic archaeological heritage located in waters subject to the jurisdiction of the Member States, aside from high seas and the Area. It is an agreement that poses a particular situation in relation to UCH in the contiguous zone, continental shelf or exclusive economic zone of the coastal State. Without being a title of attribution of competences in favour of the coastal State in these spaces, which would go far beyond the provisions of the Convention on the law of the sea, this Agreement recognizes the differences in the internal legislation, because some States, such as Spain,⁶

¹ Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (adopted 14 November 1970, entered into force 24 April 1972), [823 UNTS 231](#) (BOE No. 30 and 31, 4 and 5 February 1986).

² Convention concerning the Protection of the World Cultural and Natural Heritage (adopted 16 November 1972, entered into force 17 December 1975), [1037 UNTS 151](#) (BOE No. 156, 1 July 1982).

³ Convention for the Protection of Cultural Property in the Event of Armed Conflict (adopted 14 May 1954, entered into force 7 August 1956), [249 UNTS 215](#) (BOE No. 282, 24 November 1960) and Protocols of the same date (BOE No. 178, 25 July 1992) and Protocol of 26 March 1999 (BOE No. 77, 30 March 2004). Vid. G. CARDUCCI, "L'obligation de restitution des biens culturels et des objets d'art en cas de conflit armé: droit coutumier et droit international conventionnel avant et après la Convention de la Haye de 1954", *RGDIP* (2000-2), at 289.

⁴ European Convention on the Protection of the Archaeological Heritage (adopted 6 May 1969, entered into force 20 November 1970), [CETS No. 66](#) (BOE No. 160, 5 July 1975).

⁵ European Convention on the Protection of the Archaeological Heritage (Revised) (adopted 16 January 1992, entered into force on 25 July 1995), [CETS No. 143](#) (BOE 20 July 2011). The *raison d'être* of the elaboration of a new Convention on the subject is due to the new problems that affect the archaeological heritage that, in general, were not present in the 1960s. Vid. in this regard the explanatory report to the Convention.

⁶ The same applies to the relevant Australian legislation. Vid. C. Johnson, "For keeping or for keeps? An Australian perspective on challenges facing the development of a regime for the protection of underwater cultural heritage", 1 *Melbourne*

come to extend their jurisdiction to 200 miles, while others limit it to the territorial sea or the twenty-four miles. Therefore, without going to speak out about problems belonging to the Law of the sea, this Convention tries to avoid the lack of protection of the UCH because of controversies related to the determination of the competent jurisdiction. Otherwise, it sends a message to the States concerned so that, in the event that they have decided to extend its jurisdiction to the UCH located beyond the territorial sea, do so with all the consequences and, therefore, apply the protection regime established in the Convention to cultural property located in these waters.

(2) International agreements in the field of the law of the sea.

Spain has also participated actively in the major international agreements adopted in the strict sphere of the law of the sea in its main historical stages. Although, in general, the agreements concluded, beyond two ambiguous provisions contained in the 1982 LOSC (Articles 149 and 303), have not included a specific legal regime applicable to the underwater cultural heritage, their legal status has been, and remains for many States, the basic legal regime applicable to the matter.

In this way, Spain ratified in its day the Geneva Conventions of 29 April 1958. In the absence of specific regulations, it is necessary to recognize, under this legal regime, the application of the principle of sovereignty of the coastal State on the activities directed at underwater heritage located in their internal waters and territorial sea, and the application of a principle of freedom of the high seas beyond the limits of the territorial sea. Therefore, the need to have the authorization of the coastal State in each specific activity of removal or archaeological research carried out in these waters of other States, and the free exercise of the same activities if the remains were found outside the territorial sea. The US Courts recognized these ideas in connection with the discovery of the *Nuestra Señora de Atocha*. In this case, it was a Spanish ship sunken in 1622 on the US Continental Shelf. It was located in 1971 by two companies from Florida. The US Supreme Court said, firstly, that this area was not under jurisdiction of Florida and, later, that the rules of USA did not grant jurisdiction over treasures located on the Continental Shelf.⁷ Nonetheless, this conventional regime must be nuanced depending on the content, not answered, of the domestic laws of some States, such as Spain, which have extended their competence in relation to the UCH to the outer Continental shelf boundary as I will have the opportunity to expose later.

Spain has also ratified the 1982 United Nations Convention on the law of the sea (LOSC), the main conventional instrument of our days for the regulation of the legal regime of the seas.⁸ It's a Convention that did emerge the underwater archaeology as a problem of international law,⁹ including

Journal of International Law (2000), at 19. Vid. text of the *Historic Shipwreck Act 1976* in L.V. Prott, I. Srong, *Background materials on the protection of the underwater cultural heritage* (vol. I, UNESCO, Nautical Archaeology Society, Paris, 1999), at. 1.

⁷ Vid. in this regard L. Migliorino, *Il recupero degli oggetti storici ed archeologici sommersi nel Diritto internazionale* (Giuffrè editore, Milán, 1984), at. 134; and N. Ronzitti, "Stato costiero, archeologia sottomarina e tutela del patrimonio storico sommerso", *Il Diritto Marittimo* (1984), at 18.

⁸ UN Convention on the Law of the Sea, [1833 UNTS 3](#) (adopted 10 December 1982, entered into force 16 November 1994) (LOSC hereinafter). In force for Spain since 14 February 1997 (BOE No. 39, 14 February 1997).

⁹ T. Treves, "Stato costiero e archeologia sottomarina", *Riv.Dir.Int.* (1993), at. 698.

two provisions, the arts. 149 and 303, laying down, with little success, the regime applicable to these goods in certain marine areas. This has meant the introduction of a special regime applicable only in contiguous zone (even to consider the creation of a new space marine called by the doctrine marine archaeological zone) and in the Area. In addition, article 303.1 applicable to all marine areas, establishes “the duty to protect objects of an archaeological and historical nature found at sea”, and the obligation of cooperation “for this purpose”. It is a provision which stands on the line of the duties assumed by States under cooperation agreements relating to the protection of the cultural heritage which, however, has been deservedly criticized for the doctrine because it is a provision which sets only too generic and vague cooperation obligations as to have a significant normative content.¹⁰

It is, in short, a legal regime essential in our days, to the extent that a larger number of States are not joining the list of States party at the 2001 UNESCO Convention. A legal regime that, except for the indicated provisions, involves the application of the general rules of the different marine areas to the UCH. Therefore, it does not serve the interests of the State of origin of the wrecks founded in waters of other States, leaving such property submitted to the territorial sovereignty of the coastal State; and even though the extension of the jurisdiction of the coastal State to 24 miles is a point worth highlighting, for stealing a handful of miles at the principle of the freedom of the seas, the problems generated by the interpretation of Article 303(2) break with the positive prospects that could be deduced from this precept, and not allow to say that it has improved the regime of the Geneva Convention on territorial sea and contiguous zone. In addition, the LOSC has omitted any reference to a specific regime for the UCH in the exclusive economic zone and continental shelf, what constitutes a significant gap. It's true that the LOSC has introduced a provision directed at UCH located beyond the jurisdiction of the States, but the doubts that also generate its interpretation allow affirming that, in practice, remains the principle of freedom of the seas in relation to these objects. A regime that is unsatisfactory because it does not protect adequately the rights of States of origin (though Article 149 include a reference to them) and because, ultimately, it leaves in the hands of hunting treasures the fate of many wrecks found in a good part of marine spaces.

Halfway between the conventional rules on the protection of the cultural heritage and which establish the legal regime of the seas is the specific Convention adopted by UNESCO for the protection of the underwater cultural heritage. Entered into force, in general and for Spain, on January 2, 2009, once ratified by 20 States, in the spring of 2017 it obliges fifty-six States.¹¹ Without going to appreciate in detail its contents,¹² it is remarkable that we are in presence of a specific legal regime applicable to UCH. It aims to put a curb to the multiple shortcomings presented by the international regulations in force exposed in the previous sections, and to the varied activities undertaken by companies specialized in removals of wrecks against the logical criteria of conservation required by the UCH. It is an agreement that was approved by the General Conference of UNESCO

¹⁰ L. Caflisch, “Submarine antiquities and the international law of the sea”, *NYIL* (1982), at 20.

¹¹ Convention on the Protection of Underwater Cultural Heritage (adopted 2 November 2001, entered into force 2 January 2009), [2562 UNTS I](#) (BOE No. 55, 5 March 2009).

¹² Vid. F.J. Carrera Hernández, *Protección internacional del patrimonio cultural submarino* (ed. Universidad de Salamanca, Salamanca, 2005).

on 2 November 2001, after several years of discussions that, finally, not stacked in the achievement of a consensus on its content despite the efforts made to achieve a balance; this situation has found a clear reflection in the articulated text of the Convention, to the detriment of the interests of the UCH.¹³ It is the reference text in our days, and Spain is among the States that have ratified it earlier. However, the still relative acceptance prevents consider it as a universal regime that will necessarily be present in the disputes that may arise in this area in relation to States, such as United States Russia, China or United Kingdom, which have not accepted the agreement.

Finally, it is necessary to make reference to two legal regimes in additional way by its impact on the protection of the underwater cultural heritage. The first, into the regime of maritime law, is the regulation derived from the International Convention on maritime search and rescue. It's a not designed legislation to address the specific problems of the protection of the wrecks but which raises its application to certain cases related to his recovery. Spain has ratified this Convention, but has done so in an environmentally friendly manner from the point of view of the cultural heritage; Spain reserves the right not to apply the Convention in the case of a maritime property of cultural character that present a historical, archaeological or historic interest and which is in the bottom of the sea.¹⁴

The second is the result of the specific legislation adopted in relation to the Mediterranean Sea. Spain is a State party in the Convention for the protection of the marine environment and the coastal region of the Mediterranean,¹⁵ and in the Barcelona Protocol on specially protected areas and biological diversity in the Mediterranean. This last instrument allows the creation of specially protected areas in the marine areas under the sovereignty or jurisdiction of the coastal State.¹⁶ The objective of these areas can also be the safeguarding of places of particular importance because of his cultural interest (Art. 4(d)). Among the measures that can be taken by the coastal State are the regulation or prohibition of any activity involving the exploration or modification of the soil or the exploitation of the subsoil of the land part, the seabed or the subsoil.¹⁷ In Spain there have been

¹³ See the text in Proceedings of the UNESCO General Conference, 31th meeting, Paris, 15 October- 3 November 2001, at. 53 (Res. 31 C/24). The text was approved with 87 votes in favour (as Spain), four votes against (Russia, Norway, Turkey and Venezuela) and fifteen abstentions (Germany, Brazil, Colombia, France, Greece, G-Bissau, Iceland, Israel, Netherlands, Paraguay, United Kingdom, Czech Republic, Sweden, Switzerland and Uruguay).

The draft Convention arrived the General Conference without consensus. Even in Commission IV five States voted against and nineteen they abstained (see debate 4. Point 8.4. Records of the General Conference of UNESCO, 31st session, p. 163).

¹⁴ SAR Convention, made in Hamburg the 27 April 1979. In force since 22 June 1985. Spain is State party since 13 March 1993 (BOE No. 103, 30 April 1993).

¹⁵ Convention of 16 February 1976 (BOE No. 22, 21 February 1978), emended in 1995 (BOE No. 173, 19 July 2004).

¹⁶ Art. 5(1) and Art. 7 of the Barcelona Protocol of 10 June 1995 on specially protected areas and biological diversity in the Mediterranean, in force since 12 December 1999 (BOE No. 302, 18 December 1999).

¹⁷ Art. 6(e). Although the primary objective of the Convention is the conservation of the natural heritage, trying to achieve other objectives such as the conservation of the cultural heritage, is highly desirable in the case of SPAMI's and constitutes a factor favorable to the inclusion of a place on the list, insofar as it remains compatible with the conservation objectives (annex I).

About the protection of the UCH in the Mediterranean Sea vid. U. LEANZA, "Il patrimonio culturale sottomarino del mediterráneo", in G. Camarda, T. Scovazzi, *The protection of the underwater cultural heritage. Legal aspects* (Giuffrè editore, Milán, 2002), at. 253. Vid. also J-P Beurier, "Commentaire de la déclaration de Syracuse sur le patrimoine culturel sous-marin de la mer Méditerranée", in *ibidem*, at 279.

included in the specially protected areas of interest for the Mediterranean list (SPAMI's List) the Cap de Creus, the Islands Medes, Columbretes, Cabrera, the Mar Menor and the Mediterranean area east of the coast of Murcia, Almeria, Cabo de Gata-Níjar, seabed the cliffs of Maro-Cerro Gordo and the island of Alborán.¹⁸

Inside this framework, Spain has also accepted the 2008 Protocol's about integrated management of coastal zones of the Mediterranean, affecting the internal waters and the territorial sea.¹⁹ Article 13, intended to the cultural heritage, establishes the duty to take protection measures also in relation to underwater cultural heritage, the conservation *in situ* as a priority option, and the conservation of elements extracted, ensuring that they are not subject to exchange, sale, bought or bartered as commercial goods.

(B) SPANISH LEGISLATIVE PRACTICE RELATED TO THE PROTECTION OF UCH

The absence of an international legal framework specific and clear applicable universally to the UCH for many years, even at present, determines that such heritage has been subject to a plurality of divergent national legislations which are not characterized, in the majority of cases, to carry out a proper or specific protection of the UCH. That heritage, is subjected, in many cases, to the domestic laws of salvage and findings, favouring the existence of treasure seekers characterized, in good logic, by the search for economic profitability to its operations, without taking into account that, in the case of cultural, historical or archaeological heritage, rather than of economic profitability it is necessary to refer to the protection in strict sense; protection even *in situ* in many cases, avoiding extracting any object. Logically, if we add to this general framework the difficulties to determine the jurisdiction in the protection of UCH beyond 24 miles, it is logical to understand why also proliferate here the flags of convenience, allowing carrying out underwater excavations under a legal umbrella little guard in areas not subject to the sovereignty of the coastal State from the point of view of protecting UCH. Spain has a domestic legislation that moves away from this approach, notwithstanding that it is necessary to address a legislative reform that responds with greater attention to the specific problems raised by the protection of the underwater cultural heritage, especially after the ratification by Spain of the UNESCO Convention. This work of reform has already begun, as outlined below. By using the same structure of the previous paragraph, I will expose the most relevant internal rules on the subject, differentiating which aims to adjustment the sovereignty or jurisdiction of Spain in the maritime spaces and which are intended, more specifically, the protection of the cultural heritage. They must not forget, however, the references made in the previous section regarding the inclusion of certain Spanish areas in the SPAMI's list.

(1) Legislation on the law of the sea and marine spaces

Spain has issued several regulations in order to extend their jurisdiction over the different marine

¹⁸ See the reference with data [here](#).

¹⁹ In force since 24 March 2011. BOE No. 70, 21 March 2011.

areas in accordance with the options that the exposed conventional regime allows. In general, they are rules adopted much before the adoption of the text of the Convention concerning the protection of UCH, even of the LOSC, which explains, in the majority of cases, the absence of specific provisions applicable to the underwater cultural heritage. Therefore, except for the important qualifications that are included below, they are standards which are essentially directed to take generically the prerogatives that international law permits to the States in every marine space.

From this point of view, and in relation to the territorial sea, it is necessary to take into account the Law 10/1977, which extends the Spanish sovereignty until the twelve nautical miles.²⁰ In relation to the exclusive economic zone in waters of the Cantabrian Sea and the Atlantic, it is necessary to take into account the Law 15/1978 on economic zone exclusive. It extends the sovereignty and jurisdiction of Spain up to two hundred miles.²¹ The most striking aspect of this regulation contains in its Art. 1 in relation to the Spanish archipelagos, considering the application of a kind of archipelagic principle at the time of the delimitation of this space, pointing out that the outer limit of the economic zone is measured from the straight baselines that unite the end points of the islands and islets of the archipelago. This legal regime is completed with Law 44/2010 of Canarian waters (*aguas canarias*).²²

In relation to the exclusive Spanish economic zone in the Mediterranean Sea, after years of absence policy and subsequent partial regulation through a fishing area,²³ Spain proceeded to regulate the exclusive economic zone in the North-Western Mediterranean, from *Cabo de Gata* to the French border, through Royal Decree 236/2013.²⁴ Regarding the Spanish continental shelf, its geographical extension is covered already by Spanish law on exclusive economic zone in the majority of cases, without prejudice to the existence of specific rules applicable to the exploitation of hydrocarbons.²⁵

This legal regime is completed with two rules. On the one hand, the Spanish law of ports of the

²⁰ Law 10/1977, 4 January, on the Territorial Sea ([BOE No. 7](#), 8 January 1977).

²¹ Law 15/1978, 20 February 1978, on the Economic Zone ([BOE No. 46](#), 23 February 1978).

²² Law 44/2010, 30 December 2010, on the Canary Island Waters ([BOE No. 318](#), 31 December 2010). “Artículo único: 1. Entre los puntos extremos más salientes de las islas e islotes que integran, según el artículo 2 de su Estatuto de Autonomía, el Archipiélago canario, se trazará un contorno perimetral que siga la configuración general del archipiélago, tal como se establece en el Anexo de esta Ley. Las aguas que queden integradas dentro de este contorno perimetral recibirán la denominación de aguas canarias y constituyen el especial ámbito marítimo de la Comunidad Autónoma de Canarias. 2. El ejercicio de las competencias estatales o autonómicas sobre las aguas canarias y, en su caso, sobre los restantes espacios marítimos que rodean a Canarias sobre los que el Estado español ejerza soberanía o jurisdicción se realizará teniendo en cuenta la distribución material de competencias establecidas constitucional y estatutariamente tanto para dichos espacios como para los terrestres”. Vid. E. Orihuela, “La delimitación de los espacios marinos en los archipiélagos de Estado. Reflexiones a la luz de la ley 44/2010, de 30 de diciembre de aguas canarias”, 21 REEI (2011).

²³ Royal Decree 1315/1997, 1 August 1997, establishing a Fisheries Protection Zone in the Mediterranean ([BOE No. 204](#), 26 August 1997), amended by Royal Decree 431/2000, 31 March 2000 ([BOE No. 79](#), 1 April 2000). Vid. V.L. Gutiérrez Castillo, E.M. Vázquez Gómez, “La zone de protection de la pêche établie par l’Espagne en Méditerranée”, 13 *Espaces et ressources maritimes* (1999-2000), at 207.

²⁴ Royal Decree 236/2013, 5 April 2013, establishing the Spanish Exclusive Economic Zone in the North-West Mediterranean ([BOE No. 92](#), 17 April 2013).

²⁵ Art. 2 (1) of the Law 34/1998, of October 7th, in the sector of hydrocarbons, consider State public property “los yacimientos de hidrocarburos y almacenamientos subterráneos existentes en el territorio del Estado y en el subsuelo del mar territorial y de los fondos marinos que estén bajo la soberanía del Reino de España conforme a la legislación vigente y a los convenios y tratados internacionales de los que sea parte” ([BOE No. 241](#), 8 October 1998).

State and of the merchant shipping that includes additional provisions on the competence of Spain on the different marine areas (internal waters, territorial sea, contiguous zone and exclusive economic zone). In relation to the contiguous zone, and up to the approval of the general Law of navigation, can be considered that it has been the applicable basic legislation.²⁶ Art. 8 (1) establishes that is contiguous zone which extends from the outer limit of the territorial sea up to twenty-four nautical miles counted from the baselines from which the breadth of the territorial sea is measured. This wording has made it possible to say that Spain was exerting in its contiguous zone those skills acknowledged by public international law. Therefore, from the perspective of LOSC, not only the contained in Art. 33, but also those laid down in Art. 303 (2) relating to underwater cultural heritage. Another interpretation might have required the adoption of specific provisions relating to the UCH in the contiguous zone.²⁷

On the other hand, it is necessary to take into account the general Law of maritime navigation, adopted after the adoption by Spain of the national plan on underwater archaeological heritage which I will make reference in the following section. In this case, and for this reason, it contains provisions related to the UCH from different points of view.²⁸ Firstly, it includes references to navigation activities in Spanish waters that can compromise the underwater heritage. As a result, they can set exceptions to the general regime of navigation and underwater activities carried out in the Spanish maritime spaces for reasons of conservation of underwater cultural heritage (Art. 20); this Law also requires respect for the rules on the protection of the underwater cultural heritage in the case of innocent passage through the territorial sea (Art. 38). Secondly, if it still remained some doubt, it extends Spanish jurisdiction over the UCH to the contiguous zone.²⁹ Thirdly, the Law precludes the application of Salvage Law to underwater cultural heritage, not allowing considering salvage any operation directed over UCH, which is governed by specific legislation and existing international treaties to which Spain is a party (Art. 358). It refers also to the specific legislation, and excludes, with exceptions, the application of the chapter relating to shipwrecks and sunken property (Art. 369) and relating the extraction of goods forming part of the underwater cultural heritage (Art. 381). Fourthly, in relation to the wrecks of State, Art. 382 refers to the UNESCO Convention to determine the legal

²⁶ Royal Legislative Decree 2/2011 of September 5, approving the consolidated text of the State Ports and Merchant Marine Act ([BOE No. 253](#), 20 October 2011).

²⁷ Indeed, Art. 40 (1) of the Law 16/1985 of 25 June on Spanish historical heritage, deemed to be part of the Spanish historic heritage goods of historic character, that can be studied with archaeological methodology, extracted or not, and whether they are on the surface or underground, in the territorial sea or on the continental shelf. While in the contiguous zone applies the residual regime of the continental shelf, this provision does not mention the contiguous zone. So a different interpretation of the Spanish Law of State ports and merchant marine could have led to interpretations which deny the competence of Spain about the UCH located in the contiguous zone, especially if we take into account that conventional law does not cover the extension of the jurisdiction of the coastal State in such categorical terms about the continental shelf in connection with UCH.

²⁸ Law 14/2014, 24 May 2014, on Maritime Navigation ([BOE No. 180](#), of 25 July 2014). English version available [here](#).

²⁹ Art. 23 (2) establishes that “Unauthorised extraction of archaeological and historic objects found on the seabed or subsoil of water in the contiguous zone shall be considered a breach of the laws and regulations referred to in the preceding Section, as well as of the provisions on underwater cultural heritage”.

Art. 383 adds: “In all cases, administrative authorisation shall be required to extract archaeological or historic objects located on the seabed of the Spanish contiguous zone. Recovery of such goods without the required authorisation shall be penalised as an offence committed in Spanish territory”.

regime applicable to operations on their remains.

Finally, Art. 383, of special interest for heritage in the exclusive economic zone or continental shelf (though I have already pointed out that it is also applicable in the contiguous zone by completing the regime of Art. 23.2), performs a referral to specific legislation, especially to the UNESCO Convention, in terms of regulation and authorisation of activities on UCH. It is a provision which can serve to avoid apparent incompatibility presented by the Spanish law on cultural heritage with the Convention.

(2) Rules concerning the protection of cultural heritage

Spain has adopted internal rules concerning the protection of cultural heritage in the central State and regional level. They are not specific rules relating to the protection of the underwater cultural heritage. However, they include specific provisions applicable to this category of goods.

At the State level, the applicable Law was adopted in 1985, long before the adoption of the UNESCO Convention in the matter, even of the entry into force of the LOSC.³⁰ This Law allows to apply its contents to UCH in various aspects which regulates (such as the inclusion of obligations of inventory goods, the need to adopt measures for the conservation and to prevent the looting or illicit export, the declaration as BIC, goods of cultural interest...) because it is considered as part of the Spanish historic heritage the property of historical character that can be studied with archaeological methodology, extracted or not, and whether they are on the surface or underground, in the territorial sea or on the continental shelf (art. 40.1). Similar references are included when defining the archaeological zones (art. 15.5) and archaeological excavations (art. 41). With this legal regime, Spain has clearly opted to establish a precise legal regime for cultural heritage from the time of the exploration or, in the case of findings, ruling out the application of the rules of the Spanish civil code in these cases. The most striking aspect of the Spanish legislation, as I have already advanced in the previous section, derived from the expansion of the Spanish competence on heritage submerged up to the outer limit of the continental shelf. This regulation, however, does not contain rules directed to UCH dipped in the waters of third countries or in waters not subject to the jurisdiction of any State, neither has accommodated its content to the provisions of the UNESCO Convention.

The truth is that the ratification by Spain of the 2001 UNESCO Convention and various incidents, as the derivative of the case of *La Mercedes*, has shown greater sensitivity and concern of the Spanish authorities in the protection of this particular category of cultural heritage. The first result has been the elaboration of a national plan on underwater archaeological heritage on 30 November 2007, developed through a green paper agreed between all the institutions involved. The main actor is the Ministry of education and culture and, linked to this, the National Centre for Underwater Archaeological Research (MNAM-CNIAS). The relevant role that can play other ministries has led to the signing of three cooperation agreements with the Ministries of defence, interior and foreign affairs in order to strengthen the protection of the underwater heritage. In the case of the Ministry of foreign

³⁰ Law 16/1985, June 25th, on Spanish historical heritage ([BOE No. 155](#), 29 June 1985). Vid. also Royal Decree 111/1986, January 10th, of partial development of Law 16/1985 ([BOE No. 24](#), 28 January 1986).

affairs, the question is to adequately cover the performance of Spain before wrecks found outside Spanish waters, actions that are designed from the national plan itself.³¹ In general, therefore, the national plan aims to achieve coordination of all actors involved in the protection of UCH. From this point of view, coordination with the Spanish autonomous communities (which in Spain also take responsibilities in relation to the archaeological heritage and have laws for the protection of historical and cultural heritage) is transcendental to avoid distortions to concrete actions that can only benefit the treasure hunters. The national plan, at the time, tries to define the priorities of Spain in relation to its protection. These include the adoption of a new Law that suits their contents to the commitments entered into by Spain. Among many other aspects, this new Law could allow to include a definition of underwater cultural heritage.

(C) JUDICIAL PRACTICE: ATTITUDE OF SPAIN BEFORE THE DEPREDATIONS OF THE UCH

The attitude of the Spanish authorities in our recent history before to the most striking cases of looting of shipwrecks can be analysed by distinguishing two different stages. During a very long first stage, in Spain there was no political will for the protection of this type of heritage, neither to protect the interests of Spain, especially when there were wrecks sunken outside Spanish waters. The plundering of the *Nuestra Señora de Atocha* at the end of the 1970s is perhaps the prime example of the passive attitude of Spain before the underwater cultural heritage in general, but the same fate ran the *Santa Rosalea*, the *San Lorenzo de el Escorial* or the *Santa Clara*, among others.³²

The turning point occurs in the last years of the last millennium as a result of the case of the *Juno* and *La Galga*. Spain, with its new attitude, joined in the judicial procedures developed in the United States Courts, getting the rights in relation with both wrecks. The Spanish position was based on the maintenance of property rights on the wrecks and on the negation of abandonment, required by U.S. law to recognize the rights of removal to others.³³ In this case, therefore, Spain expressed its new options of foreign policy concerning the protection of UCH which lies beyond our waters, which translates, in cases such as the indicated, in the development of an active attitude toward judicial procedures developed in other States.

³¹ References to all these documents can be found on the website of the Ministry of education and culture of Spain [here](#).

³² The *Atocha* was a Galleon of the firm earth fleet sunken in 1622 in the Florida straits 10 miles off the coast. The property of load in gold and silver was awarded to the treasure hunter Mel Fischer by the Courts of Florida, before Spanish passivity. For a more detailed explanation of the Spanish attitude in this and other cases vid. M. Aznar, *La protección internacional del patrimonio cultural subacuático, con especial referencia al caso de España* (Tirant lo Blanch, Valencia, 2004) and V. BOU, *La flota imperial española y su protección como patrimonio cultural subacuático* (Minim, Valencia, 2005).

³³ They are two Spanish frigates sunken in 1802 and 1732 off the coasts of the United States because of two storms. The Courts of the State of Virginia stated the persistence of the property right of the State of the flag in relation to warships, at least in the absence of an explicit act of abandonment by the flag State. The arguments of Spain were that these wrecks were tombs where remains the rests of Spanish military personnel. In addition, Spain never abandoned the vessels and, therefore, they remained as Spanish Navy ships, being applicable the doctrine of immunity. The Court of appeals of Virginia gave Spain the reason because there was no public and express abandonment of the remains (vid. in this regard M. Aznar, “La reclamación española sobre los galeones hundidos frente a las costas de los Estados Unidos de América: el caso de La Galga y la Juno”, *REDI* (2000-1), at. 247; L. Vierucci, “Le statut juridique des navires de guerre ayant coulé dans des eaux étrangères: le cas des fregates espagnoles Juno et La Galga retrouvées au large des cotes des Etats Unies”, *RGDIP* (2001-3), at. 705.

In that cases, Spain is located in the position in which it is necessary to defend the heritage before foreign courts and States where traditionally the solution to these conflicts derived towards the application of the law of salvage and finds³⁴. That means that Spain has participated in judicial procedures that our State has not excited. They are procedures in which we participate as a result of a complaint filed by others (the hunting treasures) in order to acquire rights of ownership or possession over the property or, at least, receive a ransom as a result of its finding. In these procedures, one of the main questions it is to valuing the right of ownership according to the Law of the United States (Admiralty Law), far away from the normal standards of the rules concerning the protection of cultural heritage.

History has become to repeat later, as happened with the *Nôtre Dame de la Deliverance*³⁵ or the *San Salvador*,³⁶ and in a most striking manner, in the case of *La Mercedes*.³⁷ The last mentioned is a case of spoliation by the company *Odyssey*. This American company was developing underwater exploration activities in the *Alborán* Sea to, according with UK authorities, locate the *Sussex*, a British Galleon sunken in 1641. However, from April 2007, once completed his documentary research, the ship turned to the Atlantic, discovering the remains and the treasure of *La Mercedes* and starring in a spectacular pillaging. On May 18, 2007 *Odyssey* announced the finding about six hundred thousand coins, most silver, minted in Peru at the end of the 18th century. The load was transported from Gibraltar to Tampa in the United States. Previously the company had recovered a small block of bronze, dropping it to U.S. Court and requesting that the wreck was subjected to a measure of arrest. This was the beginning of an action *in rem* and the establishment of a nexus of connection between the jurisdiction of the United States and the wreck located thousands of kilometers away.³⁸

Through this action, *Odyssey* created a legal fiction allowing an extraterritorial exercise of U.S. jurisdiction, transferring the case to the substantive law of that State (to the right of salvage and findings). For this reason, *Odyssey* claimed possession and property rights on the assets recovered and those which remained in the area of the discovery, and a reward for his services. All seasoned with a strategy of confusion about the wreck, hiding the place of location and pointing out that it was not a single wreck, but an amalgam of remains from different shipwrecks.

The topic of *La Mercedes* is certainly the case that greater public impact has had. The media have tried to approach quite rightly to the citizen the different facts of the case, showing great sensitivity.

³⁴ See O. Varmer, [Underwater cultural heritage law study](#), OCS Study, BOEM 2014-005.

³⁵ In this case were at stake the remains of a French Galleon, chartered by Spain, found by the company *Sub Sea Research*, from Portland, in the continental shelf of the United States, 40 miles off the coast of *Cayo Oeste*.

³⁶ Vessel intended for the carriage of troops, sunken in 1812 on the Bay of Maldonado (Uruguay).

³⁷ [Odyssey Marine Exploration, Inc. v. Unidentified Shipwrecked Vessel](#), 657 F.3d 1159 (11th Cir. 2011), cert. denied, 132 S. Ct. 2379 (2012).

For an evaluation of this first judicial pronouncement in the United States vid. F.J. Carrera Hernández, “El asunto del Nuestra Señora de la Mercedes (*Odyssey*)”, 17 REEI (2009). For an appraisal of the case after the Supreme Court Judgment vid. M.J. Aznar, “Patrimonio cultural subacuático español ante Tribunales extranjeros o internacionales: los casos de *La Mercedes* y del *Louisa*”, 19 *Anuario de la Facultad de Derecho de la Universidad Autónoma de Madrid* (2015), 44-77.

³⁸ In this action *in rem*, the plaintiff is the company *Odyssey*, while the respondent *in rem* is the wreck ‘unknown’, parties which were joined as claimants of property, Spain, as owner of the ship *La Mercedes* and its cargo; Peru, as this State believes that it is the State of origin of the recovered property; and twenty-five descendants of persons who had used the Spanish frigate to move their goods towards Spain.

This same sensitivity has been manifest in the attitude of the Spanish Government, acting with great diligence in the courts of the United States and finally getting the recovery of the coins. In this kind of issues Spain has had to defend arguments aimed at the application of the principle of immunity to the wrecks of state's vessels, irrespective of the place in which they were located, and has denied the abandonment of our historical vessels that are under water. All that according to the specific circumstances present in this kind of cases, as I've already pointed. It is a very important legal success because, as Aznar pointed, these decisions clearly establish that private companies cannot and should not start any recovery operation over sunken ships of state without the express consent of the flag State (and the coastal State when necessary). Companies hunting treasures should take note that it will not receive any prize for operations not authorized, despite the huge amount of money invested in them. On the contrary, who consider themselves injured States could initiate actions, civil and/or criminal, against those companies, as the practice is proving particularly in the case of Spain.³⁹

The origin of this case also serves to illustrate the Spanish position in reverse; in other words, our position towards the wrecks of third States located in our waters. As I have already said, when the company began its exploration activities which led him to the discovery of *La Mercedes*, *Odyssey* did so in order to locate the *Sussex*, British state Galleon sunken in Spanish waters in 1694. Spain cooperated with United Kingdom authorizing the archaeological exploration, including the recovery of certain objects, always under strict conditions. Later they signed the *Agreement concerning the Shipwreck of H.H.S. Sussex*, which is inspired by two basic principles: respect for sovereign immunity and public property (from United Kingdom) of the wreck; and respect for the sovereign powers of the coastal State over its waters; in this case, the Spain's powers over the territorial sea, demanding at all times the authorization from the Spanish authorities to act on the remains. The Spanish attitude, therefore, is consistent with which has claimed to other States when it was Spanish heritage submerged in the waters of others States.⁴⁰

Last, the Spanish authorities have also been very actives in other cases related to activities carried out by foreign vessels on goods immersed in Spanish waters. This has happened in relation to the actions carried out in 2012 and 2013 in the Alboran Sea by the *Seaway Invincible* and the *Seaway Endeavour* (both flying the flag of Togo and owned by the Swedish company Seaway Offshore Ltd.). These vessels have been expelled from Spanish waters on more than one occasion, in accordance with Spanish legislation on the protection of cultural heritage, due to the realization of unauthorized exploration activities on underwater cultural heritage.⁴¹

Some years before, Spain has successfully defended its exclusive competence on the activities carried out by foreign vessels in the internal waters and in the Spanish Territorial sea. This was the case with the *Louisa*, a merchant ship that had been authorized to carry out oil and gas research activities in the Bay of Cadiz, but was finally detained as a result of unauthorized activities against

³⁹ Aznar, *supra* n. 37, at 65.

⁴⁰ Vid. text in Aznar, *supra* n. 31, at 602.

⁴¹ M.J.Aznar, 'The Contiguous Zone as an Archaeological Maritime Zone', 29 *The International Journal of Marine and Coastal Law* (2014), 1-51, at 29.

the UCH. This is a case which has given rise to various pronouncements by the Spanish judicial authorities, as well as the International Tribunal on the Law of the Sea, following the demand filed by the State of the flag (Saint Vincent and The Grenadines) against Spain as a result of the arrest of their ships in the Spanish port. The Court has recognized that it has no jurisdiction to address the issue because, in the case, the State of the flag was questioning the correct application of the law of the Sea in relation to the criminal procedure developed in Spain against the offenders. But, at the same time, which is truly relevant to our effects, The Court recognized the competence of the coastal State (Spain) to address and stop a foreign ship in its ports as a result of illicit activities directed against the UCH.⁴²

(D) CONCLUSION

Being Spain a country with large interests in relation to the activities directed at underwater cultural heritage, it must be recognized that our country has begun to truly worry about its protection only in the past twenty years. Until then, in Spain has lacked a true political, to internally and externally, directed to the protection of the UCH. With the turn of the millennium, however, Spain clearly changed its attitude. This change, which began to show through an active defence of our interests in courts proceedings initiated by treasure hunters in the United States, has led him to be included in the listing of the first States which have ratified the 2001 UNESCO Convention. The elaboration of a national plan on underwater archaeological heritage represents a point and continued in the same way. However, the task has not been completed. Spain needs to adopt new internal rules on historical heritage that reflect the new commitments assumed at the international level in this matter. At the same time, Spain must improve its coordination with the Autonomous Communities (Regions) in all actions that could be necessary to undertake. The peculiar distribution of competences between the State and the Regions can't impede the set of actions that are needed to adopt in each specific situation.

⁴² Judgment of the International Tribunal for the law of the sea, *The M/V "LOUISA" case* (Saint Vincent and The Grenadines v. Kingdom of Spain), 21.5.2013.