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THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE BILL

**A Legislation Drafting Project submitted in partial fulfillment of the
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1. **EXPLANATORY NOTE**

The Protection of the Underwater Cultural Heritage Bill

(In order to Incorporate and give effect to the Provisions of the Convention on the Protection of the Underwater Cultural Heritage)

1.1 INTRODUCTION

"To learn about the past in the light of the present is to learn about the present in the light of the past." D.D. Kossambi (The Culture and Civilization of Ancient India)

Sri Lanka is strategically situated in the middle of the Indian Ocean and to the south of the Indian peninsula facing the sea routes linking countries on either side of the Indian Ocean. Ancient Sri Lanka played a very significant role to ships that sailed through the Maritime Silk Route. Fleets of Chinese vessels transporting silks and ceramicware for sale to the countries on the East African coast and the Arabian vessels carrying the spices of the East to European markets had to call at Sri Lanka ports, half-way in their sea routes for fresh water and re-victualling¹. Ancient Sri Lanka was also the world's leading exporter of cinnamon to Egypt and other markets.

Jambukola Pattanam in Jaffna and Sambilthurai are two ports mentioned frequently in *the Mahavamsa*, (The Great Chronicle of Sri Lanka) in its resume of the country's history. These

¹ "The Ports of Ancient Sri Lanka", < <http://www.lankalibrary.com/geo/ancient/jambukola.htm> >12/11/09.

ports were in existence during the time of colonization by Aryan-language speakers of the island as far back as 500 B.C.²

However, the navigation in the southern part of the country was not safe to ancient seafarers, especially the areas of the Great and Little Basses, which was called by the Chinese Navigators as the *'Iron Pincer Island'*. Their knowledge of this hazardous region was well illustrated in the Navigational pattern followed by Cheng Ho in the first decade of the fifteenth century (Figure I). These Chinese sailors moved along the latitude directly in line with either Adams Peak or moved directly southwards to avoid the Great and Little



Basses reefs³.

The Ancient Navigational Route

Figure I

The Persians referred to these hidden rocks as being magnetic. The *'Arabian Nights'* in their fairytale descriptions mentioned how the nails of the wooden ships were attracted towards the magnetic rocks and how the ships burst asunder. These poetic presentations reflect the danger that prevailed centering on the Great Basses and Little Basses.

² “ Ancient Ports of Sri Lanka”, <http://www.lankalibrary.com/geo/ancient/ancient_ports2.htm>9/10/09.

³ Maritime Archeology", <<http://www.navy.lk>> 12/11/2009.

Until the Lighthouses were established by Imperial Lighthouse Service of UK in 1870, numerous ships ran aground and perished on these deadly reefs away from the shore. Apart from the vicinity of Great Basses and Little Basses, there are over 1600 shipwrecks around the country.

It is therefore necessary to protect those historical objects including shipwrecks for the benefits of the mankind. This drafting project seeks to incorporate the Convention on the Protection of the Underwater Cultural Heritage and its Annex into Sri Lankan law to afford better protection regime to those objects with the cooperation of other States.

1.2 THE REGIME FOR THE PROTECTION OF UNDERWATER CULTURAL HERITAGE

The development of the discipline of underwater cultural archaeology began when human first embarked to access Underwater Cultural Heritage in the relatively shallow coastal waters. Coastal States from the very beginning extended the terrestrial cultural heritage legislations to regulate activities in the territorial sea. The historic rule regarding control over ancient shipwrecks and other archaeological objects beyond the territorial waters was that *the finder was the owner*.

The need for a new regime was felt from the middle of the last century due to development activities such as harbour dredging, land reclamation schemes, pipe construction, deep sea bed mining, oil, gas explorations and fishing activities. Several countries during this era, unilaterally declared parts of the sea as the areas of their jurisdiction with regard to cultural heritage subsequent to the Truman Declaration.⁴ In fact, there is no uniformity in State practice in this respect. Some States apply controls to historic shipwrecks on the continental shelf,⁵ exclusive economic zone,⁶ while China proclaims prescriptive jurisdiction over ancient Chinese underwater relics no matter where they are found. The United States has developed the concept of marine parks, one of which includes part of a historic shipwreck.⁷ Moreover, Cyprus claims the right to control exploitation of antiquities on the continental shelf. Similarly, Seychelles considers antiquities to be among the non-living resources on the continental shelf over which the State exercises sovereign rights for the purposes of exploration, exploitation, conservation, and management. Under the Historic Shipwrecks Act of 1976, the Australian Minister for Home Affairs has authority to declare shipwrecks or other objects on the continental shelf to be historic, and thereby subject to acquisition by the Government. On the other hand, countries like United Kingdom do not assert the right to control Underwater Cultural Heritage beyond the territorial waters.⁸

⁴ These States include: Australia, Belgium, China, Cyprus, Denmark, France, Ireland, Morocco, Netherlands, Norway, Seychelles and Spain.

⁵ Australia, Belgium, Cyprus, Ireland, Norway, Seychelles and Spain.

⁶ Denmark and France.

⁷ Document UNESCO doc. 151 EX/10 Add, dated 04/10/95,
<<http://unesdoc.unesco.org/images/0010/001026/102628E.pdf>> 30/11/2009.

⁸ Pierce v Bemis (1986) Q.B 384.

These inconsistent unilateral claims by countries and historical rule favoring the finder of archeological objects initiated the review of the international law in respect of underwater cultural heritage.

1.2.1 The United Nations Convention on the Law of the Sea

The need for a regime to protect underwater cultural heritage was first deliberated during the third United Nations Conference on the Law of the Sea in 1979 (hereinafter sometimes referred to as UNCLOS III). In the deliberations, seven Mediterranean nations attempted unsuccessfully to include objects of archaeological and historical significance within the definition of natural resources of the continental shelf during the conference. Due to the political and economic concerns of the negotiators, the subject of underwater cultural heritage attracted little attention of UNCLOS III. Hence, the United Nations Convention on the Law of the Sea⁹ (hereinafter sometimes referred to as UNCLOS) provides only substantive international law and general principles relating to underwater cultural heritage through Articles 33, 149 and 303.

⁹ United Nations Convention on Law of the Sea, Montego Bay Jamaica, 10 December 1982; entry into force:16 November 1994.

The essence of the said provisions of UNCLOS can be summarized in the following manner.

- (1) the duty to protect UCH in various zones at sea,
- (2) the duty to protect UCH for the benefit of the mankind and
- (3) the duty of the States to cooperate with other States to achieve the said objectives.

Several authors have expressed views on the framework Article 303 of the UNCLOS. Commenting on Article 303(1), Professor Migliorino is of the view that protection of underwater cultural heritage on land as well as in the sea is part of the general principles of law¹⁰.

With regard to Article 303(2) of the UNCLOS, Churchill and Lowe are of the view that Coastal States have no jurisdiction beyond 24 miles especially for protection of shipwrecks.¹¹ Garabello and Scovazzi also state that there is no clarification in the UNCLOS about the regime relating to the archeological objects found beyond contiguous zone.¹² It is clear that UNCLOS is silent about the regime beyond contiguous zone. However, State practice¹³ has shown that the jurisdiction to protect shipwrecks in the continental shelf has now become part of customary international law.¹⁴

¹⁰ Migliorino, L; “ In Situ Protection of the Underwater Cultural Heritage under International Treaties and National Jurisdiction”, *The International Journal of Marine and Coastal Law*, Vol. 10, No 4, (1995), p.483 at p.487.

¹¹ Churchill, R.R and Lowe, A.V; *The Law of the Sea*, Third Edition , Manchester University Press., London, U.K.,1999, p.152.

¹² Garabello, Roberta et.al; *The Protection of the Underwater Cultural Heritage*, Martinus Nijhoff Publishers., Boston, U.S.A., 2003, p. 7.

¹³ Eg: Australia under Historic Shipwrecks Act of 1976- Sec 6 and 8, Legislations in Seashells, Cyprus, United States contain similar provisions; Vide [Note] 5.

¹⁴ Alexander Bruce; “Treasure Salvage beyond the Territorial Sea: An Assessment and Recommendation”, *Journal of Maritime Law and Commerce*, Vol. 20, No1, (1989), p.1.

Article 303(iii) is another Article in the Convention which hinders at times the very essence of the concept of protecting cultural heritage. In the event of a dispute, under the UNCLOS regime, the law of Salvage prevails. The opposition to the application of salvage law to UCH is clearly reflected in the International Law Association Draft Article 4.

It reads thus

It should be noted that the law of salvage solely to the recovery of items endangered by the sea; it has no application to saving relics on land. For Underwater Cultural Heritage danger has passed; either the vessel has sunk or an object has been lost overboard. Indeed heritage may be in greater danger from salvage operations than from being allowed to remain where it is.¹⁵

The law of salvage in most of the jurisdictions is never intended to apply to submerged archaeological objects. Brice quoting a judgment¹⁶ in Canada argues that salvage claim would always fail due to absence of danger which is an essential ingredient of the Law of Salvage.¹⁷ It is apparent that existing salvage law cannot be applied per se to the underwater cultural heritage.¹⁸ One possible way suggested to harmonize the two regimes was to amend the Salvage Convention 1989 to incorporate the Brice Protocol.¹⁹

The UNCLOS provisions therefore, lack clarity as to the regime in relation to the archaeological and historical objects found in the exclusive economic zone beyond contiguous zone and continental shelf. Due to the lacuna in the regime, some authors

¹⁵ Patrick J, O’Keefe and James, A.R; “The Draft Convention on Protection of Underwater Cultural Heritage, Ocean Development and International. Law, Vol 25, (2000), p. 309 at p.408.

¹⁶ [1997] AMC 1000.

¹⁷ Reeder, J;Brice on Maritime Law of Salvage, Forth Edition, Sweet & Maxwell., London, U.K., p. 288

¹⁸ Forrest, Craig;“ Has the Application of Salvage Law to Underwater Cultural Heritage Becoming a Thing of the Past?”, Journal of Maritime Law and Commerce, Vol. 34, No. 2, (2003), p. 309.

¹⁹ CMI Yearbook, (2001) at p. 255.

argue that drafters of the UNCLOS have made room to draft a more specific treaty regime which can ensure a better protection regime on UCH²⁰.

Six years after the adoption of UNCLOS, the International Law Association (Cultural Heritage Committee), decided that a convention was needed to overcome the difficulties apparent in the provisions of UNCLOS with regard to the protection of under water cultural heritage.

The United Nations Educational, Scientific and Cultural Organization, (hereinafter sometimes referred to as UNESCO), the United Nations Organization responsible for the protection of Cultural heritage, undertook a feasibility study to consider a new international convention on the preservation of underwater cultural heritage. After many deliberations, a draft was finally agreed and adopted by the general conference on 2nd November 2001. The drafters have now developed a convention incorporating all three spheres of law namely law of the sea, admiralty law and cultural heritage law, two of which is not within the mandate of UNESCO.

1.2.2 The Convention on the Protection of the Underwater Cultural Heritage

Cultural Heritage in a country is always seen as being essentially a collective and public notion, in the realm of public interest and held for the public good.²¹ This notion is equally valid under the international law. The Convention on the Protection of Underwater

²⁰ Garabello, Roberta et.al; *loc. cit.*

²¹ Amarasinghe, A.R.B; *The Legal Heritage of Sri Lanka*, Sarvodaya Vishaleka Publishers., Colombo, Sri Lanka.,1999. p.2.

Cultural Heritage²² (hereinafter sometimes referred to as the Convention) has been drafted to cover a grater area namely all traces of mankind.

It is proposed to discuss some of the salient features of the Convention and diverse views expressed by scholars, which have been considered in drafting the Bill under this heading.

The Convention applies to all traces of human existence having a cultural, historical or archaeological character which have been there for at least 100 years.²³ However, the CMI argues that the 100 year rule would exclude important shipwrecks like Titanic.²⁴ The preamble of the Convention highlights the danger posed to the UCH through the use of non-scientific methods of excavations and disturbance through commercial exploitation and other uses of the oceans including activities related to the exploration and exploitation of natural resources in the various maritime zones. The Convention is based on the clear trend emerging in customary international law; the non-commercialization of underwater cultural heritage²⁵.

The main objective of the Convention is to introduce the principle of preservation of UCH *in situ* as the first option by using all reasonable methods at the disposal of the State.²⁶ This concept of preservation of underwater cultural heritage *in situ* dates back to UNESCO Recommendations on International Principles Applicable to Archeological Excavations

²² The Convention on the Protection of Underwater Cultural Heritage, Paris, 2 November 2001; entry into force: 2 January 2009.

²³ Article 1(a) of the Convention.

²⁴ "Report of the CMI Working Group", CMI Yearbook (2001), p.154.

²⁵ Dromgoole, Sarah ; "2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage", The International Journal of Marine and Coastal Law, Vol 18, No 1, (2003), p. 27.; Rule 2 of the Annex.

²⁶ Article 2(4) and (5).

adopted on 5th December 1956.²⁷ The said recommendations were applicable to artifacts found both in the ground as well as in territorial waters.²⁸ Since then, the notion of preservation of UCH *in situ* has been incorporated in many regional conventions²⁹ and in many jurisdictions.³⁰ Therefore, the concept of preservation of cultural heritage *in situ* in the Convention is an acknowledgement of this established principle in the realm of protection of antiquities.

Salvage

Article 4 of the Convention to a great extent, has eliminated the application of the law of salvage to underwater cultural heritage. However, a possibility of a conflict occurring with the provisions of the 1989 Salvage Convention and Article 303(3) of the UNCLOS cannot be ruled out as the Convention is not in conformity with the international law position.³¹ Forrest however, argues that such a conflict is unlikely to occur as latter convention prevails over the former conventions³².

Territorial Waters

Articles 7-12 of the Convention make specific provisions for the protection of UCH in each maritime zone. The jurisdiction of the Coastal State is unquestionable within the territorial waters.³³ Therefore, it is not necessary for the Coastal State to refer to the exclusive

²⁷ Article 9.

²⁸ Article 1.1 –Definition of Archeological excavations in the Recommendations on International Principles Applicable to Archeological Excavations, New Delhi, 5 December 1956.

²⁹ Eg European Convention on the Protection of the Archeological Heritage, Valletta 16 January 1992; entry into force: 1 December 2009.- Article 4(ii).

³⁰ Churchill, R.R and Lowe, A.V; *loc. cit.*

³¹ “Letter of the President of the CMI to the Director General of UNESCO” CMI Yearbook (2001), p. 620 at p. 621.

³² Forrest, Craig; *op.cit.*, p.348.

³³ Article 7(1).

jurisdiction of the flag State. However, article 7(2), stipulates that States shall apply rules in the annex to activities directed at UCH.

Contiguous Zone

With regard to the regime governing the contiguous zone, article 303(2) of the UNCLOS provides that a State Party in applying Article 33 shall presume that the removal of Underwater Cultural Heritage without its approval may amount to infringement of the laws of the coastal State. It was expressed in informal meetings that the rights and duties of the Coastal States under article 303(2) are different in kind from those under article 33.³⁴ Dromgoole argues that Article 303(2) relates only to removal of objects and therefore does not regulate on any activities other than removal.³⁵ A doubt remains however, as to whether Article 303(2) grants enforcement competence or legislative competence³⁶.

However, many States claim both enforcement and legislative competence in the contiguous zone.³⁷ In the case of Taiya Maru, the Court held that the provisions in Article 24 of the 1958 Geneva Convention on Territorial Sea and Contiguous Zone should be understood as permissive and not exhaustive. Churchill and Lowe citing the above judgment, state that a Coastal State has both enforcement as well as legislative jurisdiction in respect of certain powers in the contiguous zone. Therefore, the provision in Article 8 of the Convention is expressly acknowledging this customary law position with regards to objects lying in the contiguous zone.

³⁴ A/CONF.62/L.160 (1982) XVII Off Rec .225.

³⁵ Dromgoole, Sarah.; *op. cit.*, p.79.

³⁶ Churchill, R.R and Lowe, A.V; *op. cit.* p.138.

³⁷ *ibid.*

Exclusive Economic Zone and Continental Shelf

It was proposed in the first Draft of the Convention that the jurisdiction of the Coastal State be extended to the continental shelf.³⁸ This proposal was met with strong opposition from world maritime nations on the basis that any move in this regard would tilt the balance created in UNCLOS.³⁹ The General Assembly in the Resolution on Oceans and the Law of the Sea re-emphasized the importance of ensuring that the instrument to be in full conformity with the relevant provisions of UNCLOS.⁴⁰

Hence, Article 3 of the Convention restricts the operation of the Convention to the manner inconsistent with the provisions of UNCLOS and international law. According to the present formulation of the Convention, the jurisdictional structure beyond contiguous zone is based on the nationality principle. Therefore, the Coastal State is required to consult the State parties who have shown interest in respect of cultural objects before any activity is intended in the area in terms Article 9 of the Convention. The Article also requires for the State Parties to notify the UNESCO Director General of any discoveries or intended activities.

Article 10 creates a right of the Coastal State, to take protective measures to prevent immediate danger to underwater cultural heritage located in the EEZ or on its continental

³⁸ Document A/CONF.62/WP.10/Rev.3, "Draft Convention of the Law of the Sea (Infrmal Draft)", <http://untreaty.un.org/cod/diplomaticconferences/lawofthesea-1982/docs/vol_VIII/a_conf-62_wp-10_rev-3.pdf>, 29/03/09

³⁹ Ibid 151 ex/10.

⁴⁰ Document A/RES/54/31, "General assembly Resolution 54/31", <<http://www.undemocracy.com/A-RES-54-31.pdf>> 19/03/2010.

shelf. Hence, it is apparent that it is the primary duty of the coastal State to regulate activities in the EEZ and the Continental Shelf even though the nationality principle appears to be applicable to the objects found therein. Some writers argue that Article 10 may probably lead to disputes in the future⁴¹. The CMI also opposes this expansion of the jurisdiction of coastal States as this is in conflict with UNCLOS⁴².

Professor Attard is of the view that under the customary international law, there is a duty cast on the Coastal States to protect UCH and therefore the Coastal State has both legislative and enforcement powers in the EEZ and Continental Shelf to protect UCH.⁴³

Other Salient Provisions in the Convention

Article 14 requires States to take measures to prevent the entry into their territory of any UCH which has been recovered contrary to the Convention. Article 15 requires States to take measures to prohibit the use of territory in support of any activity that is not in conformity with the Convention. Under Article 16, State Parties are obliged to take all practical measures to ensure that their nationals and vessels flying their flags do not engage activities not in conformity with the Convention.

Under the Convention, the Coastal State may request such assistance from other Parties to prevent immediate danger to UCH from human activities including looting. The whole

⁴¹ [Note] 9.

⁴² "CMI report", Yearbook (2002), p. 156.

⁴³ Meeting with Professor David Attard on 12/02/10.

purpose of the Convention is to protect the UCH with the assistance of all State Parties as they are an integral part of the cultural heritage of humanity.

It is apparent that UNCLOS and the Convention are in certain aspects inconsistent to each other.⁴⁴ However, some writers are of the view that the international community must react positively to prevent any further damage to UCH under the Convention irrespective of the said inconsistencies.⁴⁵

1.3 THE IMPORTANCE OF IMPLEMENTING THE CONVENTION ON THE PROTECTION OF UNDERWATER CULTURAL HERITAGE

As stated above in the introduction, Sri Lanka is an island bordering a busy sea route in the Indian Ocean and there are over two hundred estimated ship wrecks around the coast of Sri Lanka. According to unconfirmed report this figure is as high as one thousand six hundred along the coast line of Sri Lanka from Colombo to Potuvil in the eastern coast. Five hundred years of trade, commerce, conflict and war from the times of the Portuguese, Dutch and the British are the reasons for having such large number of shipwrecks all around the coast of Sri Lanka. Till recently, there had been only one occasion when an underwater site was explored. This was when a wreck, which had been carrying a cargo of silver coins was discovered by Arthur C. Clarke and studied by Peter Throckmorton in the early 1960. According to recent survey, there are 11 iron wrecks of the 19th century, five

⁴⁴ "Report of the CMI Working Group at CMI", Yearbook (2002), p. 154.

⁴⁵ Carducci, Guido.; "New Development in the Law of the Sea: The UNESCO Convention on the Protection of Underwater Cultural Heritage", American Law Journal of International Law, Vol. 96, No. 2, (2002), p.419.

European wooden wrecks dating back to the 17th century, and a stone anchor site dating back to the 14th century lying within the territorial sea.

There is no proper system of protecting UCH in Sri Lanka, even though there were moves to introduce such laws in this regard. All steps have been taken to ratify the Convention in the near future.

Several developments outlined above have made it imperative that legislation be enacted to give effect to the Convention on the protection of underwater cultural heritage.

1.4 THE EXISTING LEGAL REGIME

The territory of the Republic of Sri Lanka consists of the twenty- five administrative districts, and its territorial waters⁴⁶. **Maritime Zones Law No 22 of 1976** defines the rights and obligations of the State in the different zones of the sea. The President of Sri Lanka has declared⁴⁷ 12 nm territorial sea, 24 nm contiguous zone, 200nm exclusive economic zone and pollution prevention zone under the Act.⁴⁸ Sri Lanka has also submitted a claim on 8th May 2009 in accordance with paragraph 8 of article 76 and article 3 of Annex III of UNCLOS for the continental shelf beyond 200 nm.⁴⁹

⁴⁶ Article 5 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

⁴⁷ Section 1 ,5 ,6 of the Maritime Zones Law of 22 of 1976.

⁴⁸ “Presidential Declaration”, < <http://faolex.fao.org/docs/pdf/sr12633.pdf>> 17/02/10.

⁴⁹ “Commission on the Limits of the Continental Shelf (CLCS) Outer limits of the continental shelf beyond 200 nautical miles from the baselines: Submissions to the Commission: Submission by the Democratic Socialist Republic of Sri Lanka”, <http://www.un.org/depts/los/clcs_new/submissions_files/submission_ika_43_2009.htm> 17/02/10.

Antiquities Ordinance No 9 of 1940 has been amended by Act No. 22 of 1955 and No. 24 of 1998. Antiquities Ordinance No. 9 of 1940 provides mainly for the protection of land based antiquities belonging to the period prior to 1815.

The word *antiquity* is defined in the Ordinance as any ancient monument, or any of the defined objects lying or being found in Sri Lanka, which dates back to the period prior to the 2nd day of March, 1815. According to Section 2 of the Ordinance, any antiquity found in any *land* is deemed to be a property of the State provided that it is not claimed by any person in terms of the Ordinance.

Article 6 stipulates that no person shall excavate for the purpose of discovering antiquities, except under the authority of a licence issued by the Director-General of Archaeology. Sections 7-12 of the Ordinance deal with matters connected to issuing of licences for the purpose of excavation works. Sections 13-15 of the Ordinance regulate the offences relating to the excavation without a licence, theft of such articles and punishment for related offences. Sections 16-31 legislate the regime governing the declaration of monuments by the Minister and rules relating to the maintenance of such monuments and also penalty for destruction of such monuments.

Part IV of the Ordinance deals with Archaeological Reserves. The Director-General of Archaeology is empowered to declare any specified area of land to be an archaeological reserve for the purposes of the Ordinance⁵⁰.

⁵⁰ Section 33.

Part V of the Ordinance stipulates the procedure relating to the issuance of export licences. The law prohibits the export of articles without the permission of the Director-General of Archeology.⁵¹ Any person who is aggrieved by a decision of the Director-General may appeal to the Minister and his decision is final and conclusive on the matter.⁵²

Some of the provisions in the Ordinance were amended by Act No. 24 of 1998. By this amendment, the area of operation of the Act was extended to territorial waters. Hence, all provisions applicable to terrestrial antiquities are applicable to underwater cultural heritage in the territorial sea. It is accepted worldwide that terrestrial protection regime cannot be extended to protection of UCH in the sea.⁵³ The existing provisions are also silent as to the procedure that should be adopted in preserving the underwater cultural heritage beyond territorial waters and rights and duties recognized under the UNESCO Convention.

Antiquities Ordinance is intrinsically interconnected with the **Cultural Property Act of No. 73 of 1988**. Under the Cultural Property Act, the export of cultural property is permitted with the consent of the Director-General of Archaeology. The Act also deals with the procedure for granting licenses for the purpose of export of cultural property. Hence, the export of UCH is regulated under Cultural Property Act of No. 73 of 1988.

⁵¹ Section 36.

⁵² Section 38.

⁵³ Forrest, Craig; *op. cit.*, p.313.

The Part XI of the **Merchant Shipping Act of Sri Lanka** deals with Wreck and Salvage. Chapter 3 of Part XI specifically governs the regime of finding or taking possession of any wreck within Sri Lanka, or brought within Sri Lanka. It further stipulates the procedure to determine the owner of shipwrecks.

Chapter 4 of the Act deals with the unclaimed shipwrecks. The State is entitled to all unclaimed wrecks lying in any part of Sri Lanka or taken possession of outside Sri Lanka and brought within the territorial jurisdiction of Sri Lanka.⁵⁴ If no owner establishes title to the shipwreck, such wreck shall be sold and from the proceeds of the sale, the Salvos are entitled to such payments as determined by the Minister.⁵⁵

Besides the above laws, there are other archaic laws relevant to antiquities. **Treasure Trove Ordinance No. 17 of 1887** declares that all treasure trove⁵⁶ shall be the absolute property of the Republic of Sri Lanka. The finder or other person, who has surrendered treasure trove to the Government of Sri Lanka, is entitled to receive a payment equivalent to the value of such treasure trove.⁵⁷

⁵⁴ Section 239 of the Merchant Shipping Act.

⁵⁵ Section 240 of the Merchant Shipping Act.

⁵⁶ According to Section 10 of the Ordinance, "treasure trove" shall mean *any money, coin, gold, silver, plate, bullion, precious stones, or anything of any value found hidden in, or in anything affixed to, the earth, and the owner of which is unknown or cannot be found, but shall not include any "antiquity" as defined in the Antiquities Ordinance.*

⁵⁷ Section 6 of the Treasure Trove Ordinance.

The **Lost Property Regulation No. 15 of 1823** stipulates that any person who finds any money or goods, of whatsoever description is entitled to one-half of the proceeds if the owner cannot be found within a period of six months.⁵⁸

At present⁵⁹ one or more of the above laws are applicable to any antiquity found in Sri Lanka. However, the laws do not provide effective protection to UCH in line with the objectives of the Convention. Moreover, the present regime does not provide any protection to UCH beyond the territorial waters.

1.5 THE PROCEDURE IN IMPLEMENTING A CONVENTION

Sri Lanka gained independence in 1948 over 400 years of colonial rule of Portuguese followed by Dutch and British. Portuguese and Dutch were able to conquer and control only the coastal areas of the country and they introduced the civil law system in the areas under their control. The hill-country areas commonly known as the *Kandian Kingdom* remained independent until 2nd March 1815, the day, the whole country finally ceded to the British Empire.

The laws of Sri Lanka have been influenced by two great legal traditions - the civil law and common law systems. In addition to the above systems there are many different systems of law such as Sinhalese Law (more commonly referred to as Kandian law), Buddhist Law, Hindu Law, Tesawalamai law, Islamic law, and Mukkuvar Law have contributed to the

⁵⁸ Section 2 of the Lost Property Regulations.

⁵⁹ There had been an attempt to draft a separate legislation in 1995 for territorial waters.

development of the existing legal regime in Sri Lanka.⁶⁰ With the introduction of the Royal Proclamation of 1799, the British introduced most of its commercial laws to Sri Lanka and therefore, pure Roman Dutch law does not exist in the country. The whole system of laws including the Roman Dutch Law has been further modified in many directions by statute laws and by judicial decisions.⁶¹

The administration of justice in Sri Lanka is based on English law since 1815. Pereira J commented on the then Sri Lankan law position as *A Ceylon Court of Justice is a British Court of Justice*⁶². Justice A.R.B Amarasinghe in his book on *the Legal Heritage of Sri Lanka* has reproduced often quoted phrase in the Sri Lanka Law “*If justice had a voice, she would speak like an English Judge*”.⁶³

Sri Lanka has had many Constitutions since then. The Ceylon (Constitution) Order 1946 which took effect from 4th February 1948 (from the day of independence) gave Sri Lanka a constitution based on the Westminster model with a parliament consisting of two chambers. Under the Constitution, executive power in Ceylon resided with the monarch of the United Kingdom, and represented by the Governor-General. The constitution introduced in 1972 replaced the Monarch with a President which was a ceremonial position.

⁶⁰ Cooray, M; An Introduction to Legal System of Sri Lanka, Second Edition, Lake house Investments Ltd., Colombo, Sri Lanka., 1991, p.5.

⁶¹ *Korossa Rubber Company v Silva* (1917) 20 NLR 65.

⁶² *Vanny Aiyar* (1915) 18 New Law Report p 181.

⁶³ Amarasinghe, A.R.B; *The Legal Heritage of Sri Lanka*, Sarvodaya Vishaleka Publishers Ltd., Colombo, Sri Lanka.,1999, p. 10.

The Constitution of the Democratic Socialist Republic of Sri Lanka was introduced in 1978 replacing the 1972 Constitution. The present Constitution is an amalgamation of the Westminster model with the French presidential system. Presently there is an executive President with real power but also a Prime Minister and a Cabinet.⁶⁴ A post of President was created with a longer term and independence from Parliament.

The Parliament exercises the power to make laws, including laws having retrospective effect and repealing or amending any provision of the Constitution, or adding any provision to the Constitution.

Sri Lanka being a dualist country needs to enact legislations to give effect to international obligations. The legal position in Sri Lanka in respect of international treaties has been lucidly explained by the Supreme Court of Sri Lanka in the case of *Singaraja v Attorney General* where Court held

*On the other hand where the President enters into a treaty or accede to a covenant the content of which is inconsistent such act would not bind the republic qua state. This conclusion is not drawn merely in reference to **dualist theory** referred to above..... The accession and declaration does not bind the Republic qua State and has no legal effect within the Republic.* ⁶⁵

The procedure in drafting a bill stems from a request (cabinet memorandum) made by the relevant Minister to the Cabinet of Ministers. Thereafter the cabinet memorandum, the cabinet decision and other relevant instructions are communicated to the legal draftsman to prepare a draft. Once the draft is completed, it is submitted to the Attorney-General.

⁶⁴ ibid at p.13.

⁶⁵ SC(Spl) 182/99 SC Mts 15/09/2006.

The Role of the Attorney General is to examine every Bill for any contravention of the requirements of paragraphs (1) and (2) of Article 82⁶⁶ and to advise as to whether the Bill can be passed by a simple majority⁶⁷.

Once the Bill is published in the gazette, it is placed in the Order paper seven days after the publication in the gazette.⁶⁸ Within seven days from the date of publication, the President of the Republic or any citizen may invoke the jurisdiction of the Supreme Court on any question regarding the Bill. Having heard the parties, the Supreme Court shall communicate the Decision on the constitutionality of the Bill to the President and Speaker along with reasons.⁶⁹

The Bill becomes the law once it is passed by Parliament and certified by the speaker and no court or tribunal is permitted thereafter by law to inquire into, or in any manner question, the validity of such Act on any ground whatsoever⁷⁰.

1.6 THE METHOD OF IMPLEMENTING THE CONVENTION

Preservation of underwater cultural heritage for the mankind is the theme of the UNCLOS and UNESCO Convention 2001. Preservation of the underwater cultural heritage *in situ* is the paramount concern under the UNESCO Convention.

⁶⁶ Article 82 (1) and (ii) deals with the amendment of the Constitution.

⁶⁷ Article 77 of the Constitution.

⁶⁸ Article 78 of the Constitution.

⁶⁹ Article 121 of the Constitution.

⁷⁰ Article 124 of the constitution.

It is accepted worldwide that terrestrial protection regime and underwater cultural heritage regime are different from each other and therefore, latter cannot be protected based on same concepts due to following reasons.

- a) Preservations techniques are different
- b) The paramount concerned under the regime of underwater cultural heritage is to preserve the heritage *in situ*⁷¹
- c) Nature of the marine environment dictates techniques and tools that are not used in terrestrial excavation.
- d) Prohibition of the commercial exploitation.

It is therefore necessary to repeal the provisions introduced in 1998 extending the terrestrial regime to territorial sea and draft a new law exclusively governing the underwater cultural heritage.

1.7 PROTECTION OF THE UNDERWATER CULTURAL HERITAGE BILL

1.7.1 The Maritime Advisory Committee

It is proposed under Part I of the Bill to establish a Maritime Advisory Committee to advice the Minister as well as the Director-General of Archeology on matters connected with the discharge of their duties. Members of the proposed Advisory Committee will be appointed by the Minister in charge of the subject for a period of two years. The proposed

⁷¹ Forrest, Craig: *op. cit.*, p.313.

Advisory Committee will be comprised of members who have experience in the fields of Archeology, Science, Law and other related subjects.

1.7.2 Declaration of Protected Areas

The Minister is empowered to declare protected areas in the Territorial Waters, Exclusive Economic Zone and Continental Shelf where he is satisfied that such area is a site or likely to be a site of an of underwater cultural heritage. Declaration of such areas is ancillary to the protection of such heritage. The idea of establishing such Area is to protect underwater cultural heritage temporarily until steps are taken to protect them under an appropriate regime more fully described in the Bill. The declaration of such areas is common in the Mediterranean.⁷² As discussed in this note earlier, such practice has now entered into the kingdom of customary international law. The practice supplements the provisions in Convention. Once the Protected Area is declared, certain activities in the said Area are prohibited as per Section 4 of the Bill.

1.7.3 Protection of the Underwater Cultural Heritage in the Territorial Sea

It is proposed in the Bill to introduce different regimes for Territorial sea, Contiguous Zone and Exclusive Economic Zone / Continental Shelf. The Convention contains provisions to make reservations to exclude certain parts of internal waters and territorial sea from the operation of the Convention.⁷³ It is proposed that a declaration (similar to the declaration

⁷² “ Legal framework and instruments for the establishment of a network of MPAs in the Mediterranean”, Ameer Abdulla, Marina Gomei, Elodie Maison, and Catherine Piante (2008) Status of Marine Protected Areas in the Mediterranean Sea. IUCN, Malaga and WWF, France, pp. 79-92.

⁷³ Article 29 of the Convention on the Protection of the Underwater Cultural Heritage.

made by Panama) should be made at the time of acceding to the Convention, in respect of some parts of the territorial sea, as most of the historic ship- wrecks found in certain areas are over 500 years old and State has acquired prescriptive title to said ship wrecks under the Roman-Dutch Law.

As per Part III of the Bill, underwater cultural heritage within the territorial sea is deemed to be the property of Sri Lanka. The Director General of Archeology is required to take steps to protect the underwater cultural heritage in consultation with the Advisory Committee. The Director-General shall make all endeavors to protect the UCH *in situ* as the first option. If the Director-General is satisfied in consultation with the Advisory Committee that the cooperation of other States or other organizations is necessary for the protection of the property, the Minister may take appropriate steps as more fully described in Section 8 of the Bill.

Even though the Coastal State has some flexibility with regard to the protection of such objects, Part III is drafted to give effect to the objectives of the Convention and to preserve such objects in terms of the Rules more fully described in the schedule II.

1.7.4 Protection of the Underwater Cultural Heritage in the Contiguous Zone

Some scholars doubt as to whether coastal States have power to exercise both legislative competence and enforcement jurisdiction in the contiguous zone.⁷⁴ The State practice proves that claiming such powers are part of the customary international law. The

⁷⁴ Pl see sub heading 1.2.2.

presumption under Section 10 is that Sri Lanka is the absolute owner of the property. However, the presumption is a rebuttable one. If a claim is made by a State which is having a link to the property within three years after notification to the Director-General of UNESCO, such property would be protected based on principles under Part V of the Bill. Time limit is set out in Section 10, as Sri Lanka cannot indefinitely postpone preserving such heritage pending responses from interested States without taking steps to preserve the same. Long delays would certainly defeat the objectives of the Convention. If no such request is made within the stipulated time, it would be protected under Part III of the Bill.

1.7.5 Protection of the Underwater Cultural Heritage in the Exclusive Economic Zone and the Continental Shelf

The Part V of the Act deals with the underwater cultural heritage found in Exclusive Economic Zone and Continental Shelf. It is proposed in the Bill to protect the UCH in the EEZ and Continental shelf in the manner set out in Articles 9 and 10 of the Convention on the Protection of the Underwater Cultural Heritage and rules made there under. Customary international law position which supplements the Convention has also been taken into consideration in drafting the Bill.

The offences aimed at a particular heritage in **three zones** and the **Area** are more fully described under part V of the Bill. Part V of the Bill also covers the violation of laws in the **Convention States** and all possible violations under the Convention. Provisions regarding the dissemination of information between Convention States, UNESCO and International Seabed Authority are dealt under part IX of the Bill.

The Minister is granted powers to issue directions which are necessary to implement the obligation undertaken by Sri Lanka. Such powers are couched in the section 24 as an Act cannot provide for provisions to cover all exigencies.

As explained earlier, there are provisions in other Acts which are not consistent with the Bill. Section 28 is incorporated in the Bill to ensure that the Bill will prevail in the event of any conflict.

The general provisions are incorporated at the end of the Bill, in order to implement the main provisions in a more efficient manner.

ACT OF SRI LANKA

Protection of the Underwater Cultural Heritage

Bill

AN ACT TO GIVE EFFECT TO THE CONVENTION ON THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE; AND TO PROVIDE FOR MATTERS CONNECTED THEREWITH AND INCIDENTAL THERETO.

Preamble

WHEREAS the Convention on the Protection of the Underwater Cultural Heritage (hereinafter referred to as "the Convention") was adopted in Paris on the Second Day of November Two Thousand And One:

AND WHEREAS Sri Lanka intends to accede to the aforesaid Convention:

AND WHEREAS it is necessary to make legal provision to give effect to Sri Lanka's obligations under the aforesaid Convention:

NOW THEREFORE, be it enacted by the Parliament of the Democratic Socialist Republic of Sri Lanka as follows:-

Short title 1. This Act may be cited as the Protection of the Underwater Cultural and date of Heritage Act, No. of 2010, and shall come into operation on such date operation as the Minister may appoint by Order published in the Gazette.

PART 1

MARITIME ADVISORY COMMITTEE

Maritime
Advisory
Committee

2. (1) The Minister may, by Order published in the Gazette, establish a Maritime Advisory Committee (hereinafter referred to as "Advisory Committee").

(2) It shall be the function of such Advisory Committee to advise -

(a) on any or all of the matters the Minister considers necessary for the purpose of carrying out or giving effect to the principles and provisions of this Act; and

(b) the Director General of Archeology on matters connected to the performance of his duties under this Act.

(3) The Minister may appoint to such Advisory Committee such number of members who have experience in Archeology, Science, Law or any other related fields on such terms and conditions as he may determine. The Minister shall appoint one of the members of the Advisory Committee to be the Chairman of such Committee.

(4) Every member of the Advisory Committee shall hold office for two years unless he earlier resigns, dies or is removed from office.

(5) The Advisory Committee shall have the power to fix and regulate its own procedure.

(6) A member shall be eligible for re- appointment.

(7) The Minister may, if he considers it expedient so to do, remove from office, by Order published in the Gazette, any member of the Advisory Committee.

PART II
DECLARATION OF PROTECTED AREAS

Protected Areas 3. (1) Where the Minister is satisfied, on the recommendation of the Director General of Archaeology with respect to any site of the areas as defined in the Maritime Zones Law of No. 22 of 1976 that it is or likely to be a site of an underwater cultural heritage, may by Order published in the Gazette declare such site as a protected Area under the provision of this Act.

(2) The Minister may make regulations stipulating the coordinates of the protected area

Prohibition of certain activities in the Protected Area

4. Notwithstanding anything contrary to in any other law, no person shall -

(a) carry out within such Area any diving or salvage operations directed towards any underwater cultural heritage;

(b) use any explosives within such Area;

(c) cause the mooring of or use of ships within such Area;

(d) engage in trawling or any such underwater activity as may be prescribed within such Area.

Provided that nothing in this section shall apply to any activity carried out by or on behalf of the Director-General of Archaeology.

Offences

5. Every person who carries out any activities in contravention of the provisions of this Part shall be guilty of an offence and shall on conviction after summary trial before a Magistrate be liable to a fine not less than two hundred and fifty thousand rupees and not exceeding one million rupees or to imprisonment of either description for a term not exceeding one year or to both fine and imprisonment.

PART III

PROTECTION OF UNDERWATER CULTURAL HERITAGE IN THE TERRITORIAL WATERS

Property in under water cultural heritage

6. *(1) All discovered or undiscovered underwater cultural heritage, whether lying on or hidden beneath the surface of the ground within the territorial sea of Sri Lanka, shall be deemed to be the absolute property of the State, subject to the provisions of this Act.*

(2) Subject as hereinafter provided, no person shall excavate for the purpose of discovering Underwater Cultural Heritage, except under the authority of the Director-General of Archaeology.

Duty of the Minister in respect of certain underwater cultural heritage

7. The Minister if he considers necessary may inform the country of verifiable link of the State vessel or aircraft with respect to discovery of such identifiable vessel or aircraft.

Discovery of underwater cultural heritage

8. (1) Every person who discovers any underwater cultural heritage otherwise than under the authority of the Director General of Archeology shall forthwith report the discovery to the nearest officer of the Port Authority, peace officer and, if it is practicable so to do, deliver the property to such officer and obtain a receipt therefor from such officer, and

(2) The aforesaid officer to whom the discovery of any antiquity is reported under paragraph (i) shall communicate forthwith to the Director General of Archaeology the fact of such discovery together with the particulars furnished to him.

Preservation of
underwater
cultural heritage

9. (1) The Director General of Archaeology in consultation with the Advisory Committee shall take steps to protect any underwater cultural heritage in the territorial sea in terms of the rules as are set out in Schedule II to this Act as the case may be.

(2) The Director General in consultation with the Advisory Committee shall consider the preservation in situ of underwater cultural heritage as the first option before allowing or engaging in any activities directed at this heritage.

(3) The Director General of Archeology in consultation with the Advisory Committee may request the Minister to take appropriate steps to protect the underwater cultural heritage in cooperation with the other States or any Organization with relevant skills.

(4) The Minister having satisfied with such request may invite appropriate authority or enter into agreements with such State or Organization for the preservation of underwater cultural heritage.

PART IV

PROTECTION OF UNDERWATER CULTURAL HERITAGE IN THE CONTIGUOUS ZONE

Property in under
water cultural
heritage

10. *(1) All discovered or undiscovered underwater cultural heritage, whether lying on or hidden beneath the surface of the ground within the territorial sea of Sri Lanka, shall be deemed to be the absolute property of the State, subject to the provisions of this Act until the contrary is proved by another convention State of its interest based on the verifiable link to any underwater cultural heritage.*

(2) The Minister shall notify the Director General of UNESCO of such discovery.

(3) No claim of any convention State shall be entertained by the Minister after the expiry of three years from the date of

notification
under
subsection
(2).

Protection of
underwater
cultural heritage

11. (1) Where no request is made by another convention State based on the cogent evidence to establish interest based on verifiable link to any underwater cultural heritage within three years from the notification to the Director General of UNESCO of such discovery, the Director General shall take steps to preserve the cultural heritage under section 9 of the Act after due notice to the Director General of UNESCO of the intention to proceed to preserve such property.

11. (2) Where an established claim is lodged by another convention State based on verifiable link to any underwater cultural heritage in the contiguous zone, the Minister shall take steps to protect such underwater cultural heritage in terms of the section 14 of the Act.

PART V

PROTECTION OF UNDERWATER CULTURAL HERITAGE IN THE EXCLUSIVE ECONOMIC ZONE AND CONTINENTAL SHELF

Reporting and
Notification

12. (1) A master of a ship or any person who discovers or reasons of to believe the existence of underwater cultural heritage shall report such discovery to the Director-General of Archeology in conformity with the relevant Articles of Schedule I to this Act.

(2) The Minister shall notify the Director General of UNESCO of such discovery.

Declaration of
interest by other
Convention State

13. Where a request is made to the Government of Sri Lanka by or on behalf of the Government of another Convention State of its interest based on the verifiable link to any underwater cultural heritage, the Government of Sri Lanka may consult such State on how to ensure the effective protection of the said underwater cultural heritage under Schedule II of the Act.

Protection of
Underwater
Cultural Heritage

14. (1) Where there is a discovery of Underwater Cultural Heritage in the exclusive economic zone or continental shelf, the Minister shall take steps to protect such underwater cultural heritage under the relevant Articles of Schedule I and Schedule II to this Act.

(2) Subject to the aforesaid, no person shall excavate or interfere with Underwater Cultural Heritage in the exclusive economic zone and continental shelf of Sri Lanka.

PART VI

OFFENCES RELATING TO UNDERWATER CULTURAL HERITAGE

Offences relating
underwater
cultural heritage

15. (1) Every person who -

(a) willfully destroys, injures, defaces or tampers with any underwater cultural heritage or willfully damages any part of it;

(b) carry out any diving or salvage operations directed towards any underwater cultural heritage;

(c) use any explosives directed towards any underwater cultural heritage;

(d) fails to report the discovery of any underwater cultural heritage in accordance with the provisions of section 8;

(e) knowing or having reason to believe that any underwater cultural heritage has been excavated in contravention of the provisions of this Act, purchases or removes, or otherwise acquires or purports to acquire, any underwater cultural heritage, whether for himself or on account of or as agent for any other person; or

(f) knowing or having reason to believe that any underwater cultural heritage has been excavated in contravention of the provisions of the Convention or in violations of the laws of any Convention State, purchases or removes, or otherwise acquires or purports to acquire, any underwater cultural heritage, whether for himself or on account of or as agent for any other person;

shall be guilty of an offence under this Act and shall on conviction after summary trial before a Magistrate be liable to a fine not less than two hundred and fifty thousand rupees and

not exceeding one million rupees or to imprisonment of either description for a term not less than two years and not more than five years or to both such fine and imprisonment:

Provided that no person shall be liable to be convicted of an offence where the Underwater Cultural Heritage is, in the opinion of the Court, insignificant or of trivial value.

(2) The Director General of Archeology in consultation with the Advisory Committee may request the Minister to take appropriate steps on the seized underwater cultural heritage.

No Bail for
the offences

16. Notwithstanding anything to the contrary in the Code of Criminal Procedure Act, No. 15 of 1979 or any other written law, no person charged with, or accused of an offence under this Part shall be released on bail.

PART VII

POWERS AND DUTIES OF DIRECTOR GENERAL OF ARCHAEOLOGY

Duties of Director of Archaeology 17. The Director General of Archaeology shall perform and discharge all such duties and functions as are assigned to him by this Act or any regulations.

Authorization of Agents and other Officers 18. The Director-General of Archaeology may, generally or specially authorize the exercise, performance or discharge of any of his powers, duties or functions under this Act - Officers

(a) to the Government Agent or the District Secretary of a District or Divisional Secretary of any division within that district, or division respectively;

(b) to any officer authorized by him;

(c) to any person possessed of special expertise and resources in or for, the exploration, excavation, conservation, restoration or maintenance of monuments and antiquities, in such areas and on such terms and conditions as may be specified in such

authorization :

Provided that the Director-General of Archaeology may at any time revoke or withdraw such authorization if in his view the purpose and objectives thereof are not being satisfactorily served.

PART VIII

REWARDS

Maritime Rewards
Fund

19. (1) There shall be established under the control and administration of the Director-General of Archaeology a Fund known as the "Maritime Rewards Fund" (hereinafter referred to as the "Fund") for the purpose of rewarding the persons who notify the Director General.

(2) There shall be credited to the Fund –

(a) one-half of all fines recovered by any court in respect of convictions for offences under this Act;

(b) donations to the Fund from UNESCO ,Convention States individuals, other institutions;

(c) any other prescribed payment.

(3) The accounts of the Fund shall be audited annually by the Auditor-General in accordance with Article 154 of the Constitution.

Rewards

20. (1) The Minister may -

(a) *reward the person who notifies the Director-General in accordance with the provisions of this Act of the location of any remains of underwater cultural heritage; or*

(b) reward the person who first furnishes the authority such a description of the location of the remains of

underwater cultural heritage as is sufficient to enable such underwater cultural heritage to be located.

(2)The reward to a person shall be by way of payment to such person of an amount not exceeding the amount prescribed by the Minister under the regulations.

PART IX

COOPERATION AND INFORMATION-SHARING

Assistance of
Convention States

21.(1)The Government of Sri Lanka shall afford all such assistance to, and may through the Minister request all such assistance from, a Convention State as may be necessary for the investigation, excavation, documentation, conservation, study and presentation of such underwater cultural heritage.

Information
sharing

(2) The Information shared between Convention States or UNESCO or International Seabed Authority regarding the discovery or location of underwater cultural heritage shall be kept confidential so long as the disclosure of such information might danger or otherwise put at risk the preservation of such underwater cultural heritage.

PART X

MISCELLANEOUS

Power of the
agreements

22. The Minister may enter into bilateral, regional or other Minister to multilateral agreements for the preservation of underwater enter into cultural heritage . All such agreements shall be in conformity with the Convention and shall not dialute the universal character.

Evidence

23. In a prosecution for an offence under this Act, a certificate to be signed by the Director-General and to the effect that the object

described therein is an underwater cultural heritage, shall be admissible in evidence without further proof, and shall be prima facie evidence of the facts stated therein.

Minister to issue directions 24. The Minister may from time to time issue such general or special directions as are necessary for the implementation of the principles and provisions of the Convention to such extent as they are embodied in this Act and in conformity with the obligations of Sri Lanka under the United Nations Convention on the Law of the Sea.

Regulations 25. (1) The Minister may make regulations in respect of any matter required by this Act to be prescribed or in respect of which regulations are required or authorized by this Act to be made.

(2) Every regulation made by the Minister shall be published in the Gazette and shall come into operation on the date of publication or on such later date as may be specified therein.

(3) Every regulation made by the Minister shall as soon as convenient after its publication in the Gazette be brought before Parliament for approval. Every regulation which is not so approved shall be deemed to be rescinded as from the date of disapproval but without prejudice to anything previously done thereunder.

(4) Notification of the date on which any regulation is deemed to be so rescinded shall be published in the Gazette.

Protection of public officers. 26. No suit shall lie against any public officer for anything done by him in good faith under this Act or purporting to be done under this Act

The Lost Property, Treasure Trove and Cultural Property not to apply to Underwater Cultural Heritage Act 27. Nothing contained in the Lost Property Regulation, Treasure Trove Ordinance, Cultural Property Act shall in any manner apply to Protection of Underwater Cultural Heritage Act.

This Act to prevail over other law

28. The Provisions of this Act shall have effect notwithstanding anything contained in any other written law, and accordingly in the event of any conflict or inconsistency between the provisions of this Act and such other law, the provisions of this Act shall prevail.

Interpretation

29. In this Act, unless the context otherwise requires -

“Convention” means the Convention on the Protection of Underwater Cultural Heritage;

“Convention State” means a State the Government of which is a party to the Convention on the Protection of Underwater Cultural Heritage;

"Continental shelf" means the area declared to be the continental shelf of Sri Lanka by Proclamation made under the Maritime Zones Law, No. 22 of 1976;

"Director-General of Archaeology" means the person appointed to be or to act as Director-General of Archaeology Under the Antiquities Ordinance (Chapter 188);

"Exclusive economic zone" means the area declared to be the exclusive economic zone of Sri Lanka by Proclamation made under the Maritime Zones Law, No. 22 of 1976;

“Minister” shall mean the Minister in charge of the Subject of Underwater Cultural Heritage;

“Regulations” means the regulations which are required to be prescribed by the Minister under this Act;

“ship” means any sea going vessel including , without limitation, pleasure vessels, fishing vessels, hydrofoil boats, air-cushion vehicles, submersibles, floating craft and fixed or floating platforms to any warship, naval auxiliary or other ship owned or operated by a State and used, for the time being, only on government non-commercial service;

“State vessels and aircraft” means warships, and other aircraft that were owned or operated by a State and used, at the time of sinking, only for government non commercial purposes, that are identified as such and that meet the definition of underwater cultural heritage;

"Territorial sea" means the area declared to be the territorial waters of Sri Lanka by Proclamation made under the Maritime Zones Law, No. 22 of 1976;

“Underwater Cultural Heritage” means all traces of human existence having a cultural, historical or archeological character which has been partially or totally underwater periodically or continuously for at least 100 years such as

- (i) Sites structures , buildings, artifacts and human remains together with there archeological and natural context;
- (ii) vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archaeological and natural context; and
- (iii) objects of prehistoric character.

Provided that pipelines and cables placed on the seabed and installations other than pipelines and cable placed on the seabed and still in use shall not be considered as underwater cultural heritage.

“UNESCO” means the United Nations Educational, Scientific and Cultural Organisation;

“Verifiable link” includes any, cultural, historical or archeological link.

Repeal of
Section 2(3) of
the Antiquities
Ordinance

30. Section 2(3) of the Antiquities Ordinance is hereby repealed.

Sinhala text to
in case
of inconsistency

31. In the event of any inconsistency between Sinhala and Tamil prevail texts of this Act, the Sinhala text shall prevail.

Article 9 – Reporting and notification in the exclusive economic zone and on the continental shelf

1. All States Parties have a responsibility to protect underwater cultural heritage in the exclusive economic zone and on the continental shelf in conformity with this Convention.

Accordingly:

(a) a State Party shall require that when its national, or a vessel flying its flag, discovers or intends to engage in activities directed at underwater cultural heritage located in its exclusive economic zone or on its continental shelf, the national or the master of the vessel shall report such discovery or activity to it;

(b) in the exclusive economic zone or on the continental shelf of another State Party:

(i) States Parties shall require the national or the master of the vessel to report such discovery or activity to them and to that other State Party;

(ii) alternatively, a State Party shall require the national or master of the vessel to report such discovery or activity to it and shall ensure the rapid and effective transmission of such reports to all other States Parties.

2. On depositing its instrument of ratification, acceptance, approval or accession, a State Party shall declare the manner in which reports will be transmitted under paragraph 1(b) of this Article.

3. A State Party shall notify the Director-General of discoveries or activities reported to it under paragraph 1 of this Article.

4. The Director-General shall promptly make available to all States Parties any information notified to him under paragraph 3 of this Article.

5. Any State Party may declare to the State Party in whose exclusive economic zone or on whose continental shelf the underwater cultural heritage is located its interest in being consulted on how to ensure the effective protection of that underwater cultural heritage. Such declaration shall be based on a verifiable link, especially a cultural, historical or archaeological link, to the underwater cultural heritage concerned.

Article 10 – Protection of underwater cultural heritage in the exclusive economic zone and on the continental shelf

1. No authorization shall be granted for an activity directed at underwater cultural heritage located in the exclusive economic zone or on the continental shelf except in conformity with the provisions of this

Article.

2. A State Party in whose exclusive economic zone or on whose continental shelf underwater cultural heritage is located has the right to prohibit or authorize any activity directed at such heritage to prevent interference with its sovereign rights or jurisdiction as provided for by international law including the United Nations Convention on the Law of the Sea.

3. Where there is a discovery of underwater cultural heritage or it is intended that activity shall be directed at underwater cultural heritage in a State Party's exclusive economic zone or on its continental shelf, that State Party shall:

(a) consult all other States Parties which have declared an interest under Article 9, paragraph 5, on how best to protect the underwater cultural heritage;

(b) coordinate such consultations as "Coordinating State", unless it expressly declares that it does not wish to do so, in which case the States Parties which have declared an interest under Article 9, paragraph 5, shall appoint a Coordinating State.

4. Without prejudice to the duty of all States Parties to protect underwater cultural heritage by way of all practicable measures taken in accordance with international law to prevent immediate danger to the underwater cultural heritage, including looting, the Coordinating State may take all practicable measures, and/or issue any necessary authorizations in conformity with this Convention and, if necessary prior to consultations, to prevent any immediate danger to the underwater cultural heritage, whether arising from human activities or any other cause, including looting. In taking such measures assistance may be requested from other States Parties.

5. The Coordinating State:

(a) shall implement measures of protection which have been agreed by the consulting States, which include the Coordinating State, unless the consulting States, which include the Coordinating State, agree that another State Party shall implement those measures;

(b) shall issue all necessary authorizations for such agreed measures in conformity with the Rules, unless the consulting States, which include the Coordinating State, agree that another State Party shall issue those authorizations;

(c) may conduct any necessary preliminary research on the underwater cultural heritage and shall issue all necessary authorizations therefore, and shall promptly inform the Director-General of the results, who in turn will make such information promptly available to other States Parties.

6. In coordinating consultations, taking measures, conducting preliminary research and/or issuing authorizations pursuant to this Article, the Coordinating State shall act on behalf of the States Parties as a whole and not in its own interest. Any such action shall not in itself constitute a basis for the assertion of any preferential or jurisdictional rights not provided for in international law, including the United Nations Convention on the Law of the Sea.

7. Subject to the provisions of paragraphs 2 and 4 of this Article, no activity directed at State vessels and aircraft shall be conducted without the agreement of the flag State and the collaboration of the Coordinating State.

SCHEDULE II [Sections 9, 13,14]

Rules concerning activities directed at underwater cultural heritage

I. General principles

Rule 1. The protection of underwater cultural heritage through in situ preservation shall be considered as the first option. Accordingly, activities directed at underwater cultural heritage shall be authorized in a manner consistent with the protection of that heritage, and subject to that requirement may be authorized for the purpose of making a significant contribution to protection or knowledge or enhancement of underwater cultural heritage.

Rule 2. The commercial exploitation of underwater cultural heritage for trade or speculation or its irretrievable dispersal is fundamentally incompatible with the protection and proper management of underwater cultural heritage. Underwater cultural heritage shall not be traded, sold, bought or bartered as commercial goods.

This Rule cannot be interpreted as preventing:

(a) the provision of professional archaeological services or necessary services incidental thereto whose nature and purpose are in full conformity with this Convention and are subject to the authorization of the competent authorities;

(b) the deposition of underwater cultural heritage, recovered in the course of a research project in conformity with this Convention, provided such deposition does not prejudice the scientific or cultural interest or integrity of the recovered material or result in its irretrievable dispersal; is in accordance with the provisions of Rules 33 and 34; and is subject to the authorization of the competent authorities.

Rule 3. Activities directed at underwater cultural heritage shall not adversely affect the underwater

cultural heritage more than is necessary for the objectives of the project.

Rule 4. Activities directed at underwater cultural heritage must use nondestructive techniques and survey methods in preference to recovery of objects. If excavation or recovery is necessary for the purpose of scientific studies or for the ultimate protection of the underwater cultural heritage, the methods and techniques used must be as non-destructive as possible and contribute to the preservation of the remains.

Rule 5. Activities directed at underwater cultural heritage shall avoid the unnecessary disturbance of human remains or venerated sites.

Rule 6. Activities directed at underwater cultural heritage shall be strictly regulated to ensure proper recording of cultural, historical and archaeological information.

Rule 7. Public access to in situ underwater cultural heritage shall be promoted, except where such access is incompatible with protection and management.

Rule 8. International cooperation in the conduct of activities directed at underwater cultural heritage shall be encouraged in order to further the effective exchange or use of archaeologists and other relevant professionals.

II. Project design

Rule 9. Prior to any activity directed at underwater cultural heritage, a project design for the activity shall be developed and submitted to the competent authorities for authorization and appropriate peer review.

Rule 10. The project design shall include:

- (a) an evaluation of previous or preliminary studies;
- (b) the project statement and objectives;
- (c) the methodology to be used and the techniques to be employed;
- (d) the anticipated funding;
- (e) an expected timetable for completion of the project;
- (f) the composition of the team and the qualifications, responsibilities and experience of each team member;
- (g) plans for post-fieldwork analysis and other activities;
- (h) a conservation programme for artefacts and the site in close cooperation with the competent authorities;
- (i) a site management and maintenance policy for the whole duration of the project;
- (j) a documentation programme;
- (k) a safety policy;
- (l) an environmental policy;
- (m) arrangements for collaboration with museums and other institutions, in particular scientific institutions;
- (n) report preparation;
- (o) deposition of archives, including underwater cultural heritage removed; and
- (p) a programme for publication.

Rule 11. Activities directed at underwater cultural heritage shall be carried out in accordance with the project design approved by the competent authorities.

Rule 12. Where unexpected discoveries are made or circumstances change, the project design shall be reviewed and amended with the approval of the competent authorities.

Rule 13. In cases of urgency or chance discoveries, activities directed at the underwater cultural heritage, including conservation measures or activities for a period of short duration, in particular site stabilization, may be authorized in the absence of a project design in order to protect the underwater cultural heritage.

III. Preliminary work

Rule 14. The preliminary work referred to in Rule 10 (a) shall include an assessment that evaluates the significance and vulnerability of the underwater cultural heritage and the surrounding natural environment to damage by the proposed project, and the potential to obtain data that would meet the project objectives.

Rule 15. The assessment shall also include background studies of available historical and archaeological evidence, the archaeological and environmental characteristics of the site, and the consequences of any potential intrusion for the long-term stability of the underwater cultural heritage affected by the activities.

IV. Project objective, methodology and techniques

Rule 16. The methodology shall comply with the project objectives, and the techniques employed shall be as non-intrusive as possible.

v. Funding

Rule 17. Except in cases of emergency to protect underwater cultural heritage, an adequate funding base shall be assured in advance of any activity, sufficient to complete all stages of the project design, including conservation, documentation and curation of recovered artefacts, and report preparation and dissemination.

Rule 18. The project design shall demonstrate an ability, such as by securing a bond, to fund the project through to completion.

Rule 19. The project design shall include a contingency plan that will ensure conservation of underwater cultural heritage and supporting documentation in the event of any interruption of anticipated funding.

vi. Project duration – timetable

Rule 20. An adequate timetable shall be developed to assure in advance of any activity directed at underwater cultural heritage the completion of all stages of the project design, including conservation, documentation and curation of recovered underwater cultural heritage, as well as report preparation and dissemination.

Rule 21. The project design shall include a contingency plan that will ensure conservation of underwater cultural heritage and supporting documentation in the event of any interruption or termination of the project.

vii. Competence and qualifications

Rule 22. Activities directed at underwater cultural heritage shall only be undertaken under the direction and control of, and in the regular presence of, a

qualified underwater archaeologist with scientific competence appropriate to the project.

Rule 23. All persons on the project team shall be qualified and have demonstrated competence appropriate to their roles in the project.

viii. Conservation and site management

Rule 24. The conservation programme shall provide for the treatment of the archaeological remains during the activities directed at underwater cultural heritage, during transit and in the long term.

Conservation shall be carried out in accordance with current professional standards.

Rule 25. The site management programme shall provide for the protection and management in situ of underwater cultural heritage, in the course of and upon termination of fieldwork. The programme shall include public information, reasonable provision for site stabilization, monitoring, and protection against interference.

ix. Documentation

Rule 26. The documentation programme shall set out thorough documentation including a progress report of activities directed at underwater cultural heritage, in accordance with current professional standards of archaeological documentation.

Rule 27. Documentation shall include, at a minimum, a comprehensive record of the site, including the provenance of underwater cultural heritage moved or removed in the course of the activities directed at underwater cultural heritage, field notes, plans, drawings, sections, and photographs or recording in other media.

x. Safety

Rule 28. A safety policy shall be prepared that is adequate to ensure the safety and health of the project team and third parties and that is

in conformity with any applicable statutory and professional requirements.

XI. Environment

Rule 29. An environmental policy shall be prepared that is adequate to ensure that the seabed and marine life are not unduly disturbed.

XII. Reporting

Rule 30. Interim and final reports shall be made available according to the timetable set out in the project design, and deposited in relevant public records.

Rule 31. Reports shall include:

- (a) an account of the objectives;
- (b) an account of the methods and techniques employed;
- (c) an account of the results achieved;
- (d) basic graphic and photographic documentation on all phases of the activity;
- (e) recommendations concerning conservation and curation of the site and of any underwater cultural heritage removed; and
- (f) recommendations for future activities.

XIII. Curation of project archives

Rule 32. Arrangements for curation of the project archives shall be agreed to before any activity commences, and shall be set out in the project design.

Rule 33. The project archives, including any underwater cultural heritage removed and a copy of all supporting documentation shall, as far as possible, be kept together and intact as a collection in a manner that is available for professional and public access as well as for the curation of the archives. This should be done as rapidly as possible and in any case not later than ten years from the completion of the project, in so far as may be compatible with conservation of the underwater cultural heritage.

Rule 34. The project archives shall be managed according to international professional standards, and subject to the authorization of the competent authorities.

xiv. Dissemination

Rule 35. Projects shall provide for public education and popular presentation of the project results where appropriate.

Rule 36. A final synthesis of a project shall be:

(a) made public as soon as possible, having regard to the complexity of the project and the confidential or sensitive nature of the information; and

(b) deposited in relevant public records.

Done in Paris this 6th day of November 2001 in two authentic copies bearing the signature of the President of the thirty-first session of the General Conference and of the Director-General of the United Nations Educational, Scientific and Cultural Organization, which shall be deposited in the archives of the United Nations Educational, Scientific and Cultural Organization and certified true copies of which shall be delivered to all the States and territories referred to in Article 26 as well as to the United Nations.

Depositary :

UNESCO

Entry into force :

In accordance with its Article 27, this Convention shall enter into force on 2 January 2009 for those States that have deposited their respective instruments of ratification, acceptance, approval or accession on or before 2 October 2008. It shall enter into force for any other State three months after the deposit by that State of its instrument of ratification, acceptance, approval or accession.

Authoritative texts :

Arabic, English, Chinese, French, Spanish and Russian

States Parties

[List in alphabetical order](#)
[List in chronological order](#)

Declarations and Reservations :

Cuba
“The Republic of Cuba declares that, pursuant to Article 9, paragraph 2, of the Convention, it will transmit the relevant information on any discovery or activity relating to the underwater cultural heritage in the exclusive economic zone or on the continental shelf of another State Party by means of a document issued by the Office of the President of the National Commission of

Monuments and endorsed by the National Cultural Heritage Council of the Ministry of Culture.” [Original: Spanish]

“The Republic of Cuba, in regard to Article 25, paragraph 3, relating to the application *mutatis mutandis* of the provisions on the settlement of disputes set out in Part XV of the United Nations Convention on the Law of the Sea, declares that it reaffirms the declaration made under Article 287 of the Convention, concerning its non-acceptance of the jurisdiction of the International Court of Justice and, consequently, its non- acceptance of the Court’s jurisdiction over the provisions of Articles 297 and 298 of the Convention.”
[Original: Spanish]

Panama

"On depositing its Instrument of Ratification of the Convention on the Protection of the Underwater Cultural Heritage (approved by Law No. 32 of 26 March 2003 and proclaimed in the Official Gazette No. 24,773 of 2 April 2003), the Republic of Panama declares that it has sole sovereignty over the Gulf of Panama, by nature and history a Panamanian bay, whose coasts belong in their entirety to the Republic of Panama. It is a clearly defined geographic configuration, being a large scooped-out incurvation to the south of the Isthmus of Panama, with sea waters underlying the seabed and its subsoil in the area between latitudes 07°28'00" North and 07°31'00" North, and longitudes 79°59'53" and 78°11'40", both west of Greenwich. These determine the location of Punta Mala and Punta Jaqué, at the West and East of the entrance of the Gulf of Panama respectively. This large indentation cuts well into the land area of the Isthmus of Panama. The width of its entrance, from Punta Mala to Punta Jaqué, is about two hundred kilometres (200 kms) and its extension inland

(measured from an imaginary line linking Punta Mala and Punta Jaqué up to the mouths of the Río Chico, east of Panama City) is one hundred and sixty-five kilometres (165 kms).

In view of its current and potential resources the Gulf of Panama, a historic bay, has been a vital necessity for the Republic of Panama since time immemorial, both with regard to its security and defence and to the economic field, since its marine resources have long been used by the inhabitants of the Isthmus of Panama.

Oblong in shape, with a coastal outline which somewhat resembles a calf's head, the Gulf has a coastal perimeter under Panamanian sea control of some six hundred and sixty-eight kilometres (668 kms). Within this demarcation, the Gulf of Panama, a historic bay, has an area of approximately thirty thousand square kilometres (30,000 kms²).

The Republic of Panama declares that in the exercise of its sovereign and jurisdictional rights and the accomplishment of its duties, it will act in accordance with the provisions of the Convention, reserving the right to issue other related declarations, should the need arise."

“Moreover, pursuant to Article 9, paragraph 2, of the Convention on the Protection of the Underwater Cultural Heritage, Portugal declares that the information referred to in paragraph 1(b) of that same article will be transmitted in the manner stipulated in subparagraph (ii).” [original: French]

Ukraine

« to Articles 9 and 11:

“Ukraine hereby declares that in case of discovery of the underwater cultural heritage in the exclusive economic zone or on the continental shelf of a State Party or in the Area, or if there is an intention to carry out, there, activities directed towards the underwater cultural heritage, it shall provide the rapid and effective transmission of information about the aforesaid to all the States Parties and to the Director General of UNESCO through the National Commission of Ukraine on Affairs of UNESCO;”

to Article 22:

“The competent authority authorized in accordance with Article 22 of the Convention shall be the central executive authority in the sphere of the protection of the cultural heritage;”

to Article 28:

“Ukraine declares that the Rules of the Convention shall be implemented to the inland

waters not of a maritime
character.”

» [original: English]