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The Legal Situation of the Shipwreck *Nuestra Señora del Juncal*: Ownership and Protection Under International Law

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Abstract

On 31 October 1631, the Spanish galleon *Nuestra Señora del Juncal* succumbed to a storm and sank near the coasts of Campeche (Mexico). From a legal perspective, Mexico and Spain retain a legal interest over the wreck as coastal state and flag state, respectively. This article examines the legal situation of the wreck in the light of international law and bilateral instruments between Mexico and Spain. In a first section, this article examines the issue of the ownership by considering the *Juncal* as a Spanish state vessel vested with sovereign immunity. Yet, the article also argues that Spain transferred the ownership of the wreck to Mexico during the state succession of 1836. In a second section, the article examines the general obligation to protect and preserve the *Juncal* as underwater cultural heritage pursuant the 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage. This research argues that the general obligation requires from Spain and Mexico a duty to cooperate and due diligence obligations.

Keywords: UNESCO 2001, underwater cultural heritage, state succession, cooperation, due diligence

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1. Introduction

On 31 October 1631, the *Nuestra Señora del Juncal* (the *Juncal*), one of the flagships escorting the New Spain Fleet, sank during a storm near the coast of Campeche, Mexico¹. During the second half of the twentieth century, expeditions attempted to find the wreck, although without further information about its location.² Archaeologists and historians have relied on Mexican, Spanish and Cuban archives to study *inter alia* the nature and features of the ship, the cargo, the social context of the crew, the route and the possible loca-

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1 Jorge Manuel Herrera Tovar, 'Intentando salvar la nao: decisiones náuticas y quebrantos de esperanza' in Flor Trejo Rivera (ed.), *La Flota de la Nueva España 1630-1631: Vicisitudes y Naufragios* (INAH 2003) 130-140.

2 Roberto Junco and Flor Trejo, 'The 2012 Field Season of the 1630-31 New Spain Fleet Archaeological Project in the Gulf of Mexico' in Paul Johnston (ed), *Underwater Archaeology Proceedings 2016* (Advisory Council for Underwater Archaeology 2016).



tion of the wreck.³ From a legal perspective, Mexico and Spain have legal interests over the wreck as coastal state and flag state, respectively. Both are parties to the United Nations Convention on the Law of the Sea (UNCLOS),⁴ and the 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage (2001 UNESCO Convention),⁵ which constitute the main legal framework to protect underwater cultural heritage. Furthermore, certain bilateral instruments are relevant to elucidate those legal interests, namely the 1836 Definitive Treaty of Peace and Friendship between Mexico and Spain (1836 Santa María-Calatrava Treaty)⁶ and the 2014 Memorandum of Understanding for Cooperation in the Identification, Management, Research, Protection, Conservation and Preservation of Underwater Cultural Heritage, (2014 MoU).⁷

The available historical and archaeological information enables the legal analysis of at least two aspects of the wreck: the ownership, and the rights and obligations that Spain and Mexico have towards the protection of the wreck. The scholarship on the governance of underwater cultural heritage before and after the 2001 UNESCO Convention is vast.⁸ This article contributes by examining the particularities surrounding the ownership of the *Juncal*, and the rights and obligations of each state. Concerning ownership, this article examines the rule of state property as a first argument. It builds upon the rule of state succession to argue that, after the 1836 state succession between Spain and Mexico, the former could have renounced any rights over the wreck. This argument seeks to foster an alternative to the argument of state property and immunity over warships and official vessels carrying cargo extracted from former colonies. Regarding the protection of the wreck, this article explores the obligations that Spain and Mexico should observe under international law, to protect the wreck against natural deterioration and commercial exploitation. In this regard, the paper highlights the bilateral cooperation efforts between Spain and Mexico towards the protection of underwater cultural heritage, which represents good practice.

3 Some historical and archaeological studies analysing these and other aspects are: Flor Trejo (ed), *La Flota de la Nueva España 1630-1631: vicisitudes y naufragios* (INAH 2003); Fernando Serrano Mangas, *Los tres credos de don Andrés de Aristizábal: Ensayos sobre los enigmas de los naufragios de la Capitana y la Almiranta de la Flota de la Nueva España* (Universidad Veracruzana 2012).

4 United Nations Convention on the Law of the Sea, (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS).

5 Convention on the Protection of the Underwater Cultural Heritage, (adopted 2nd November 2001, entered into force on 2nd January 2009) 2562 UNTS 3 (2001 UNESCO Convention).

6 Tratado definitivo de paz y amistad entre la República Mexicana y su Majestad la reina gobernadora de las Españas, (Mexico-Spain) (adopted 28 December 1836, entered into force for Mexico 28 February 1838, for Spain 14 November 1837), Article 1 <https://aplicaciones.sre.gob.mx/tratados/muestratratado_nva.sre?depositario=0&id_tratado=613> accessed 24 November 2021.

7 Memorandum of Understanding for Cooperating in the Identification, Management, Research, Protection, Conservation and Preservation of Underwater Cultural Heritage (Mexico-Spain) (adopted in Mexico-Spain 5 and 10 June 2014) (2014 MoU).

8 Some comprehensive studies are: Roberta Garaballo and Tullio Scovazzi, *The protection of the underwater cultural heritage: before and after the 2001 UNESCO Convention* (Brill 2003); Sarah Dromgoole, *Underwater Cultural Heritage and International Law* (CUP 2013); Patrick O'Keefe, *Shipwrecked heritage: a commentary on the UNESCO Convention on Underwater Cultural Heritage* (2nd edition, Institute of Art and Law 2014); Marine They, *La protection internationale du patrimoine culturel de la mer* (Brill/Nijhoff 2018); Valentina Vadi, *Cultural Heritage in International Investment Law and Arbitration* (CUP 2014) 137-160, 240-296.



This article presents four main sections. First, it provides a contextual overview of the governance of underwater cultural heritage. Second, it presents an historical and geographical factual background of the *Juncal*. Third, the article examines the arguments concerning ownership. Finally, this article elaborates on the obligations that Mexico and Spain should observe under the 2001 UNESCO Convention.

2. Governance of underwater cultural heritage

Technological development opened a new chapter in ocean exploration, including access to shipwrecks located on the deep sea-bed. In this context, maritime archaeology developed in the second half of the twentieth century because of this. From the use of scuba diving to the more recent LiDAR scanners⁹ or remotely operated underwater vehicles (ROV)¹⁰ powered with artificial intelligence and other features.¹¹ Unfortunately, as elsewhere, some governments and research institutions may be unable to afford the newest technologies, and they instead rely on private companies with the financial means and infrastructure to conduct underwater operations.¹² Issues arise when these private companies launch expeditions with commercial purposes. An example is Thomas G. Thompson, who discovered the *SS Central America* in 1988, and obtained funding from investors to bring the valuable cargo to the surface. The outcome was the loss of important cultural objects.¹³ Another example is the British vessel *Diana*, who sank in 1817. In that case, Malaysia contracted a salvage company to search and locate the wreck; bring the cargo to the surface; restore it; and arrange for the auction of the items by the auction house Christie's.¹⁴ The salvage company recovered 24,000 pieces of Chinese porcelain, from which Malaysia reserved from sale some items, leaving the rest for the auction.¹⁵ As explained by Bass, treasure hunting does not equate to archaeology in societal value largely because salvage companies aim to achieve profit in order to repay the financial backers of their search and salvage operations, even those inclined to conserve the nonsalable items from their sites cannot wait for decades to repay sponsors.¹⁶ It is also necessary to shift the cultural conception from shipwrecks as treasures to shipwrecks as cultural heritage.¹⁷ From an archaeological perspective, shipwrecks

9 Erin Blakemore, 'Lasers are driving a revolution in archaeology' (*National Geographic*, 29 July 2019) <www.nationalgeographic.com/culture/article/lasers-lidar-driving-revolution-archaeology> accessed 24 November 2021.

10 George Bass, 'The Development of Maritime Archaeology' in Ben Ford, Donny Hamilton, and Alexis Catsambis, *The Oxford Handbook of Maritime Archaeology* (OUP 2013), 4-10, 15-16.

11 Ocean One is the latest ROV's powered with artificial intelligence and haptic feedback systems. B. Carey, 'Maiden voyage of Stanford's humanoid robotic diver recovers treasures from King Louis XIV's wrecked flagship' (*Stanford News*, 27 April 2016) <<https://news.stanford.edu/2016/04/27/robotic-diver-recovers-treasures/>> accessed 24 November 2021.

12 Ulrike Guerin, 'La Convención de 2001 y el Desarrollo Sostenible' (2015) 13 *Cultura y Desarrollo* 10-11; Vadi (n 8) 156.

13 Concepción de Leon, 'Treasure Hunter Notches 5th Year in Prison for Refusing to Forfeit His Loot' (*The New York Times*, 19 December 2020) <www.nytimes.com/2020/12/19/us/tommy-thompson-gold-treasure-hunter.html> accessed 24 November 2021.

14 *Malaysian Historical Salvors SDN BHD v The Government of Malaysia*, ICSID Case No. ARB/05/10, Award of Jurisdiction, 17 May 2007, paras 8-10.

15 *ibid*, paras 13-14.

16 Bass (n 10) 13.

17 Guerin (n 12) 11; Bass (n 10) 13-14.



are time capsules, well preserved by the ocean, which provide vast information on the social, economic, political or anthropological development of mankind in a determined period of time and region¹⁸

In international law, the conception of these objects developed to the point of considering them as cultural heritage and prohibiting their commercialisation.¹⁹ A first stage of this development is the 1982 UNCLOS, which governs these objects as ‘archaeological objects’ in two provisions. Article 149 fosters the protection of shipwrecks for the benefit of mankind as a whole, and to pay due regard to preferential rights of states of historical or cultural origin.²⁰ Article 303 follows the same pattern and enables coastal states to exercise jurisdiction to this end over the contiguous zone. It also recognizes the rights of identifiable owners, the law of salvage or other rules related to cultural exchanges.²¹ Nonetheless, the convention is silent on aspects such as the commercialisation of shipwrecks or the applicable regime to shipwrecks found between the contiguous zone of a state and its exclusive economic zone.²² As an attempt to regulate this vacuum, the 2001 UNESCO Convention promotes the protection and preservation of underwater cultural heritage. The convention defines ‘underwater cultural heritage’ as all traces of human existence having a cultural, historical or archaeological character, which have been partially or totally under water, periodically or continuously, for at least 100 years, such as vessels or any part thereof, their cargo or other contents, together with their archaeological and natural context. The definition also includes sites, structures, buildings, artefacts, human remains, and objects of prehistoric character. It excludes pipelines, marine cables and other installations still in use, placed on the seabed.²³ As governing principles, the convention is founded on the obligation to cooperate, the obligation to preserve underwater cultural heritage for the benefit of the humanity, the prohibition of commercialising cultural heritage²⁴, due diligence obligations aimed at protecting cultural heritage, the preference for preservation *in situ*, among others.²⁵

For many years, treasure hunters relied on admiralty law rules such as salvage law and the law of finds for their ownership over the wreck and its cargo.²⁶ Under salvage law, a salvage operation means any act or activity undertaken to assist a vessel or any other property in danger in navigable waters or any other waters

18 P. Pomey, ‘Defining a Ship: Architecture, Function, and Human Space’ in B. Ford, D. L. Hamilton and A. Catsambis, *The Oxford Handbook of Maritime Archaeology*, (OUP 2013) page 25; S. Willis, *Shipwreck: A history of disasters at sea* (Quercus 2009) 12.

19 For a comprehensive overview on this development: Dromgoole (n 8) 28-64.

20 UNCLOS, Article 149, Myron Nordquist, Shabtai Rosenne (et al) *United Nations Convention on the Law of the Sea: A Commentary*, Vol. VI, (Brill 2003) 226-232; Tullio Scovazzi, ‘Article 149’ in Alexander Proelß (ed), *The United Nations Convention on the Law of the Sea: A Commentary* (C.H. Beck 2017) 1053-1058.

21 UNCLOS, Article 303, Myron Nordquist, Shabtai Rosenne (et al) *United Nations Convention on the Law of the Sea: A Commentary*, Vol. V (Brill 1989) 158-162.

22 Tullio Scovazzi, ‘The Law of the Sea Convention and Underwater Cultural Heritage’ (2012) 27 IJML 757 and 759.

23 2001 UNESCO Convention, Article 1 (a).

24 2001 UNESCO Convention, Article 2; for a comprehensive analysis on these principles: They (n 8) 358-435.

25 For a general overview of the 2001 UNESCO Convention: Dromgoole (n 8) 59-64; Markus Rau, ‘The UNESCO Convention on Underwater Cultural Heritage and the International Law of the Sea’ (2002) 6 *Max Planck Yearbook of United Nations Law* 387-472.

26 On this trend of litigation: James A.R. Nafziger, ‘The Evolving Role of Admiralty Courts in Litigation Related to Historic Wreck’ (2003) 44(1) *HarvIntLJ* 253-264.



whatsoever.²⁷ The law of finds provides that a finder of abandoned property be entitled to ownership.²⁸ On this point, two considerations are raised. First, the convention underscores the prohibition to exploit underwater cultural heritage for commercial purposes.²⁹ As will be explained in subsequent sections, this creates an umbrella framework that obliges states to adopt, *inter alia*, domestic legislation to criminalise activities incompatible with the convention.³⁰ A second consideration is the relation between the rules of admiralty law and the regime of the 2001 UNESCO Convention. In this regard, the convention limits the use of the law of salvage and law of the finds to those cases where a state authorizes it and when the operation ensures that any recovery achieves its maximum protection.³¹ To this aim, the convention includes as an annex the Rules for Activities Directed at Underwater Cultural Heritage, which function as binding standards for the handling of underwater cultural heritage sites.³² The rules are clear in prohibiting the commercialisation of underwater cultural heritage, but they allow for the use of necessary ancillary services and the deposition of underwater cultural heritage under certain parameters.³³ That is to say, states can request the services of salvage companies or other private entities to assist with maritime archaeology operations designed under the parameters of the convention and its rules. In fact, salvage contracts aimed at recovering underwater cultural heritage can be deemed as a foreign direct investment as long as they contribute to the development of the host state.³⁴

Furthermore, regional or bilateral legal instruments result in an additional reference for a proper governance of underwater cultural heritage. For example, the Agreement concerning the Shipwrecked Vessel *RMS Titanic* - negotiated by the United Kingdom, the United States of America, France and Canada, but only ratified by the first two – depicts a legal framework based on UNCLOS, where the parties shall adopt substantive and procedural measures towards the conservation and curation of the *Titanic*.³⁵ Inclusively, the agreement comprises binding rules of archaeological operation, as those included in the 2001 UNESCO Convention.³⁶ Additional examples can be found in soft law instruments such as the MoU 2014 concluded between Spain and Mexico to cooperate in the protection and preservation of underwater cultural heritage.³⁷

27 IMO, The International Convention on Salvage (adopted in London on 28 April 1989) Article 1(a); For a comprehensive analysis on salvage law: Simon Baughen, *Shipping Law*, (6th edition, Routledge 2015), 287-309 *The Blackwall*, US Supreme Court, 77 U.S. 10 Wall. 11 (1869) 77.

28 Dromgoole, (n 8) 683.

29 2001 UNESCO Convention, Article 2(7) and Rule 2 of the Annex.

30 2001 UNESCO Convention, Articles 16 and 17.

31 2001 UNESCO Convention, Article 4; Guido Cardazzi, 'The Crucial Compromise on Salvage law and the Law of Finds', in Garabello and Scovazzi (n 3) 194-195.

32 Under Article 33 of the 2001 UNESCO Convention, these Rules are an integral part of the treaty.

33 Annex to the 2001 UNESCO Convention, Rule 2 a) and b).

34 *Malaysian Historical Salvors SDN BHD v The Government of Malaysia*, ICSID Case No. ARB/05/10, Decision on the application for Annulment, 16 April 2009, para 61.

35 Agreement concerning the Shipwrecked Vessel *RMS Titanic* (entered into force on 18 November 2019) 8 UKTS 3, Preamble, Article 3 to 6 (Agreement concerning the *Titanic*).

36 Agreement concerning the *Titanic*, Preamble and Annex: Rules concerning activities aimed at the *RMS Titanic* and/or its artefacts.

37 2014 MoU.



In sum, the rules of international law aimed at protecting underwater cultural heritage has developed to the stage of prohibiting the commercialisation of these objects and requiring states to adopt domestic measures to that end.

3. The fate of the *Juncal*

The story of the *Juncal* involves a series of unfortunate events derived from negligence and the urgency of the Spanish Crown to stabilise its finances with valuable cargo coming from the colonies. To contextualise this, let us remember that the Spanish Treasure Fleet was one of the main economic pillars of the Spanish Crown.³⁸ The Regulations of 1564 provided for the dispatch of two fleets: the New Spain fleet, covering Mexico, Honduras and the Greater Antilles; and the Tierra Firme fleet, covering Panama, Cartagena, Santa Maria and other south American ports.³⁹ To protect these merchant convoys against pirates, corsairs and other countries, Spain and private investors designed different navies to protect their interests. Among them, the Navy of the Oceans, which protected the Spanish coasts, escorted the merchant fleets toward and on their return from the Canaries Islands. The Royal Navy of Indies, composed by eight galleons, escorted the Tierra Firme fleet and on the return journey, transported the royal treasure and precious metals from private investors. The Navy for the New Spain fleet composed of two ships *Capitana* and *Almiranta* escorted the fleet and transported the royal treasure.⁴⁰ Sometimes, the fleets and navies would meet at the Greater Antilles to set sail together to Spain. The *Juncal* was part of the Navy of the New Spain fleet.

In the mid seventeenth century, the Spanish crown and investors struggled to gather ships to form the navies that would escort the fleets.⁴¹ An alternative to this was the seizure of private vessels, not necessarily designed as warships and, thus, not in fulfilment with the ship construction regulations of 1618.⁴² The *Juncal* was one of these ships seized and prepared to sail with the Navy of the New Spain fleet of 1630-1631. The ship was modified to reinforce its structure that will enable it to carry cannons and cargo.⁴³ Yet, this proved to be insufficient to carry out the functions of a flagship carrying the significant weight of the royal treasure.

3.1 The sinking

The New Spain fleet of 1630-1631 sailed towards America in 1630, escorted by the *Juncal* and the

38 Patricia Meehan Hermanson, 'Criterios y procedimientos para la elección de navíos insignia: el caso de Nuestra Señora del Juncal, capitana de la Flota de la Nueva España de 1630' in F. Trejo (n 3) 80.

39 *ibid* 81.

40 For an overview on the development of the fleets and navies: José Antonio Caballero Juárez, *El régimen jurídico de las armadas de la Carrera de Indias siglos XVI y XVII*, (Instituto de Investigaciones Jurídicas –UNAM, 1997), 24-72; Meehan Hermanson (n 38) 80-85.

41 Caballero Juárez (n 40) 67-68.

42 On the naval construction requirements, Iván Valdez-Bubnov, *Poder naval y modernización del Estado política de construcción naval española (siglos XVI-XVIII)* (Instituto de Investigaciones Históricas – UNAM, 2011) p.84.

43 Meehan Hermanson (n 38) 31-32.



Santa Teresa, reaching the port of Veracruz without incident in October of that year. The fleet began its return journey on 14 October 1631.⁴⁴ The itinerary was to reach La Havana (Cuba) to meet the other fleets and sail together to Spain.⁴⁵ The *Juncal* and the *Santa Teresa* carried the main treasure of the fleet. Unfortunately, sailing the Gulf of Mexico in October carries the risk of storms and hurricanes, which was the case for the *Juncal* and the fleet under its watch.⁴⁶ Before reaching Cuba, the fleet was trapped by seasonal storms, and many ships from the fleet decided to make harbour at a safe port, yet, the *Juncal* and other ships decided to continue through the storm. On 31 October 1631, after sixteen days sailing, the stern of the *Juncal* broke in two and the ship sank in a final attempt to reach the coast of Campeche.⁴⁷ Only 39 people survived and later on remained as the more direct testimonies of the wreck location.⁴⁸

According to the official reports of the General Archives of the Indies, the *Juncal* was carrying the equivalent to 1077840 pesos of silver bars, coins and other precious metals, in addition to silk, grana, indigo, chocolate and timber.⁴⁹ This number could be more considering the additional cargo exclusively destined to the Spanish Crown and the corruption surrounding the fleet. Some historians propose that the amount of silver and coins carried by the *Juncal* could increase to 2,456,922 pesos.⁵⁰

3.2 The location of the shipwreck

Since the second half of the twentieth century, the Mexican government and private companies have been looking for the wreck of the *Juncal*. In 1983, the company Seaquest International LTD launched the first modern expedition aimed at finding the *Juncal*. It failed. The Mexican government launched an expedition in 1993, with the assistance of the *R/V Akademik Mstislav Keldysh* of the Institute of Oceanology of the Russian Academy of Sciences. In 1995, the National Institute of Anthropology and History (INAH) started the project '*Pecio Nuestra Señora del Juncal*', aimed at researching the historical, social and economic context of the *Juncal*, relying on Mexican and Spanish archives.⁵¹ In 2009 the 'treasure hunters' company *Odyssey Marine Exploration* requested a permit from the Mexican government to search for the wreck with commercial purposes. Yet, the Mexican archaeologists lobbied against the grant of the permit due to the commercial nature of the expedition and the obligations of Mexico under the 2001 UNESCO Convention.⁵² In 2012, the Mexican government, through the

44 Flore Trejo, 'Adversidades en la administración de la Carrera de Indias: el caso de la flota del general Miguel de Echazarreta' in F. Trejo (ed), *La Flota de la Nueva España 1630-1631: vicisitudes y naufragios* (INAH 2003) 49 and 51.

45 Meehan Hermanson (n 38) 79.

46 Herrera Tovar (n 1) 130-140.

47 For an account on the sink: Trejo (n 3) 117-121.

48 Serrano Mangas (n 3) 55-64.

49 Serrano Mangas (n 3) 57.

50 Serrano Mangas (n 3) 182-187.

51 Cf. Laura Carrillo Márquez, 'Arqueología Marítima en México' (2018) 12(1) *Revista de Arqueología Histórica Argentina y Latinoamericana* 40-41; Pilar Luna Erreguerena, 'Introducción', in Trejo (n 3) 13.

52 Junco and Trejo (n 2) 80; Abida Ventura 'A la caza de un navío hundido en Campeche' (*El Universal*, 12 July 2013) <<http://archivo.eluniversal.com.mx/cultura/2013/a-la-caza-de-un-navio-hundido-en-campeche-935633.html>>



National Institute of Anthropology and History (INAH) and the National Autonomous University of Mexico (UNAM), launched a new expedition to locate the shipwreck, obtaining relevant data for future prospections. Unfortunately, the lack of financial support for the project prevented the INAH and UNAM from following up on these prospection sites. In 2014, Spain and Mexico concluded the 2014 MoU to establish a cooperation framework to protect and preserve underwater cultural heritage located in maritime areas within their jurisdiction.⁵³ In 2020, Spain and Mexico announced the launching of a joint expedition but this was postponed due to the COVID-19 pandemic.⁵⁴

The precise location of the wreck therefore remains unknown. Archaeologists, historians, and scientists have worked together in proposing the location of the Juncal, considering the weather and oceanographic conditions in that year.⁵⁵ Moreover, the testimonies of some of the 39 survivors⁵⁶ and rescuers are a starting point to determine the wreck's location. Among the documented testimonies are those of Francisco Granillo, boatswain of the Juncal; Francisco de Olano, master of the ship who rescued the survivors; a friar traveling on board; and Martin de Irriberi, a trader.⁵⁷ This and other research data have been the base for establishing potential prospection areas. For example, the historian Serrano Mangas and Loïc Menanteau proposed in 2012 the following map, setting the wreck location close to Cay Arcas, a Mexican island near the coasts of Campeche:

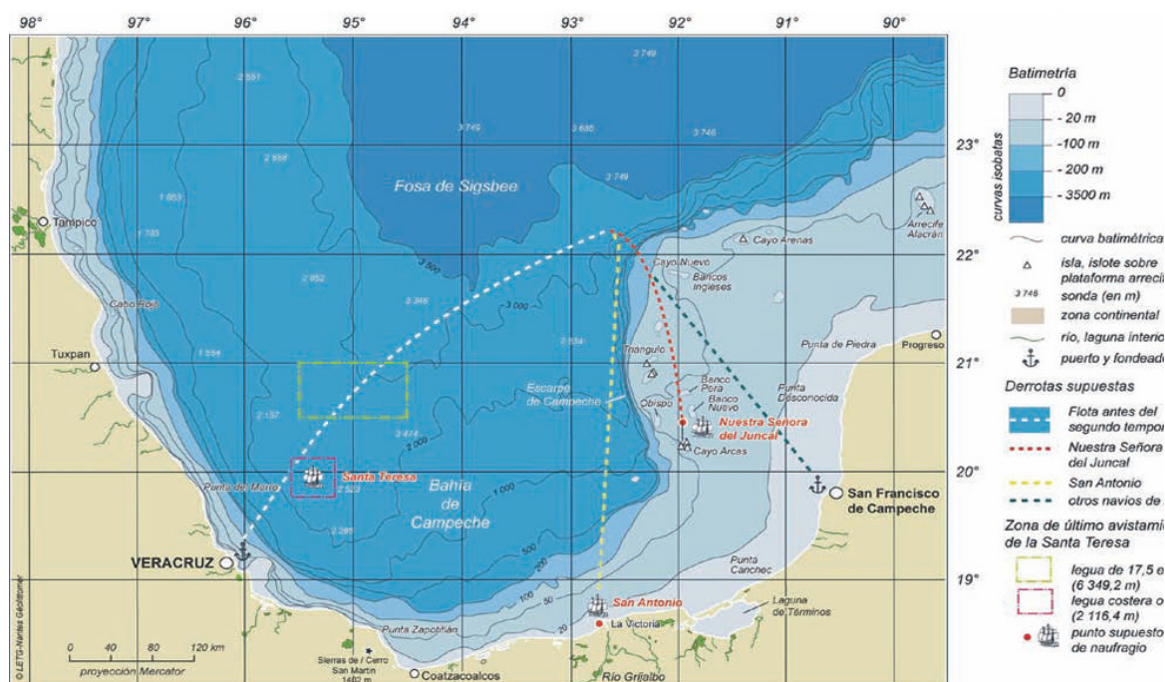
⁵³ 2014 MoU accessed 25 October 2021.

⁵⁴ INAH, 'Redoblan México y España los esfuerzos para encontrar vestigios del pecio de Nuestra Señora del Juncal' (INAH, 7 February 2020) <https://www.inah.gob.mx/attachments/article/8906/20200207_boletin_036.pdf> accessed 25 October 2021.

⁵⁵ Roberto Junco, 'La ruta de Veracruz a La Habana en la época colonial' in Vera Moya (ed), *Arqueología Marítima en México* (INAH 2012) 93-114.

⁵⁶ On the final moments of the *Juncal* and the survivors: Herrera Tovar (n 1) 139.

⁵⁷ Junco and Trejo (n 2) 80.



Map. 1. Source: F. Serrano Mangas (n 3) 231.

Locating the shipwreck could enhance its governance. As a first point, its location can narrow the scope of measures towards the enforcement of laws and regulations adopted by Mexico as a coastal state towards the protection of the wreck. In this regard, other measures can be adopted such as the prevention of other activities that could result in damage or loss of the wreck, for example, oil and gas operations, common in the area. Secondly, as will be exposed, its location could be determinative of the question of ownership under a state succession argument.

4. Ownership

In the case of the *Juncal*, two states with a verifiable link can claim ownership. Spain, as the flag state of a ship conducting official functions during 1631. Mexico as a coastal state in whose territorial sea or area under its jurisdiction the wreck may be located. In this context, this section will examine two lines of arguments surrounding the ownership: first, the shipwreck as a state vessel with sovereign immunity; and second, the shipwreck as part of the property transferred by Spain to Mexico in the state succession of 1836.



4.1 The *Juncal* as a state vessel

The *Juncal* was a merchant cargo vessel requisitioned by the Spaniard Crown and appointed as flagship to the New Spain fleet 1630-1631. The question is whether the *Juncal* continues to belong to Spain as the flag state. And if yes, how does this coexist with the sovereign rights of Mexico as the coastal state.

Under international law, a warship enjoys sovereign immunity.⁵⁸ In the case of shipwrecks, the practice reflected in bilateral agreements and domestic case law shows that this prerogative continues to exist over sunken warships. Conversely, some suggest that since the warship or state vessel stopped carrying out its official functions, the shipwreck loses its immunity as a warship.⁵⁹ Yet, the practice shows an adherence to the first position. For instance, the Institut de Droit International concluded that sunken ships remain the property of the flag State unless the flag State has clearly stated that it has abandoned the wreck, relinquished, or transferred title to it.⁶⁰ Moreover, the 2001 UNESCO Convention defines 'state vessels' as those warships and other vessels owned or operated by a state and used at the time of sinking for governmental non-commercial purposes. It continues by recognising the sovereign immunity conferred upon them under international law.⁶¹ Spain maintains a consistent practice in protecting its sunken warships, pleading sovereign immunity over them due to their official purpose. Spain has relied on this argument to defend its rights and prerogatives over the *Nuestra Señora de las Mercedes*, *La Galga*, *Juno*, and, more recently, the galleon *San José*. In *Sea Hunt, Inc. v Unidentified Shipwrecked Vessel or Vessels*, a court recognized *La Galga* and the *Juno* as part of the Royal Spanish Navy, which requires prior authorisation from Spain to transfer or abandon the vessels.⁶² Similarly, in *Odyssey Marine Exploration v. Unidentified Shipwrecked Vessel*, the Court recognised the *Nuestra Señora de las Mercedes* as a warship and upheld its sovereign immunity.⁶³ Judicial practice, therefore follows the trend of recognising the status of warship to sunken vessels and the attached sovereign immunity to shipwrecks. This status will be only lost if the flag state consents.⁶⁴

Furthermore, the 2001 UNESCO Convention introduced a balance between the rights of the flag

58 UNCLOS, Article 95; *ARA Libertad* (Argentina v. Ghana), Provisional Measures, Order of 15 December 2012, ITLOS Reports 2012, p. 332, para 95.

59 Marlène M. Losier, 'The Conflict between Sovereign Immunity and the Cargo of Sunken Colonial Vessels' (2018) 33 IJMCL 535-536.

60 Institut de Droit International, 'The Legal Regime of Wrecks of Warships and Other State-owned Ships in International Law' (9th Commission, 29 August 2015) Article 4; Institut de Droit International, 'The Legal Regime of Wrecks of Warships and Other State-owned Ships in International Law: Travaux préparatoires' in (2015) 76 Yearbook of Institute of International Law 271-378.

61 2001 UNESCO Convention, Articles 1 (8) and 2(8).

62 *Sea Hunt, Inc. v Unidentified Shipwrecked Vessel or Vessels*, 638–639 (4th Cir.2000), 221 F.3d, p. 634.

63 *Odyssey Marine Exploration, Inc. v. Unidentified, Shipwrecked Vessel*, 675 F.Supp.2d (M.D. Fla. 2009), 1148.

64 For a comprehensive account on these cases, Tullio Scovazzi, 'Sunken Spanish Ships before American Courts' (2019) 34 IJMCL 245-290; Mariano Aznar Gómez, 'Patrimonio Cultural Subacuático Español ante Tribunales Extranjeros o Internacionales: los casos de la Mercedes y del Louisa' (2015) 19 Anuario de la Facultad de Derecho de la Universidad Autónoma de Madrid 47-77.



state and those of the coastal state, depending on the maritime area where the wreck lies.⁶⁵ If the wreck lies within the territorial sea, the coastal state retains the exclusive rights to regulate the activities over the shipwreck without affecting the rights of the flag state. In fact, the coastal state should inform the flag state about any discovery or activity in line with a spirit of cooperation.⁶⁶ In the contiguous zone, the coastal state can regulate and authorise activities directed at shipwrecks taking into account the Rules of the 2001 UNESCO Convention.⁶⁷ In the exclusive economic zone and on the continental shelf, all states have the obligation to protect underwater cultural heritage and notify any discovery in this area. Moreover, the coastal state can prohibit or authorise any activity directed at a shipwreck to prevent interference with its sovereign rights or jurisdiction under the UNCLOS and international law.⁶⁸ The convention confers a logical preference to the coastal state due to its proximity to the wreck. It grants upon the coastal state the character of coordinating state to work in conjunction with interested states.⁶⁹ Some of these provisions of the 2001 UNESCO Convention were the basis of controversy between maritime powers and coastal states, and were among the reasons of why some maritime powers decided not to ratify the convention.⁷⁰

In this context, it is unquestionable that the *Juncal* is a Spaniard state vessel for the purposes of the 2001 UNESCO Convention, and only a subsequent act from Spain could modify the ownership upon it, as will be exposed in the next section. Thus Spain would retain the ownership of the wreck. However, if the *Juncal* happens to be within Mexico's territorial sea, Mexico enjoys full sovereignty to regulate activities towards the wreck in cooperation with Spain. Even if found in its exclusive economic zone and continental shelf, Mexico would be the coordinating state of activities directed at the wreck due to its proximity to the wreck but would not retain ownership.

4.2 The succession of the *Juncal* as state property

A less-explored argument regarding the ownership of underwater cultural heritage is the impact of state succession in respect of state property. What would be the effect of a state succession instrument where the flag state renounces rights to its property? Spain and Mexico did celebrate a treaty following this trend. The question is whether this instrument and international law would modify ownership over the *Juncal* and how this will affect the rights and obligations established under the 2001 UNESCO Convention.

65 Craig Forrest, 'A New International Regime for the Protection of Underwater Cultural Heritage' (2002) 51(3) The International and Comparative Law Quarterly 528-530.

66 2001 UNESCO Convention, Article 7(1) and (3).

67 2001 UNESCO Convention, Article 8.

68 2001 UNESCO Convention, Article 9 and Article 10 (2).

69 2001 UNESCO Convention, Article 9(3) (b).

70 On these debate: Sarah Dromgoole, 'Reflections on the position of the major maritime powers with respect to the UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001' (2013) 38 Marine Policy 119-120 Dromgoole (n 8) 160-165.



Under international law, state succession implies *inter alia* the definitive replacement of a state by another regarding its sovereignty over a determined territory, in accordance with international law.⁷¹ The creation of a new state following succession entails the obligation to respect pre-existing international frontiers, whether or not the rule is expressed in the formula *uti possidetis*.⁷² Following the succession, the rights and obligations of a predecessor state are transferred to the successor State, who inherits the rights and obligations derived from treaties, public property and debts.⁷³ In this regard, state property passes from the predecessor to the successor state, extinguishing the rights of the former and creation of rights of the latter.⁷⁴

In the case of shipwrecks, state succession includes only the property within the territory of the predecessor state, including the marine areas considered as such in the time when the succession occurred.⁷⁵ In *Sea Hunt v. Unidentified, Shipwrecked Vessel*, an American District Court ruled that Spain expressly abandoned any rights over the Juno; by signing the 1763 Treaty between the United Kingdom, Spain, and France. Particularly, Article XX of the treaty establishes that the Kingdom of Spain cedes the sovereignty, property, possession and all rights over the agreed countries, lands, places, and inhabitants.⁷⁶ The District Court considered that the rights over the June are included in this provision. Nevertheless, in a subsequent appellation, the Court of Appeals of the Fourth Circuit reversed the decision by considering that the treaty of 1763 did not mention 'vessels' or 'shipwrecks', nor property in the sea or on the seabed.⁷⁷ Thereby, the title over the shipwreck, in principle, remains on the flagship state, and only an express act of abandonments could modify this situation.⁷⁸ Yet, it is uncertain whether this is the state of customary international law.⁷⁹

71 Vienna Convention on Succession of States in respect of State Property, Archives and Debts, adopted in Vienna on 8 April 1978, not yet in force, Article 2 (1) (a); Institut de Droit International 'State Succession in Matters of Property and Debts' Resolution (7th Commission, 26 August 2001) Article 1.

72 *Frontier Dispute*, Judgment, I.C.J. Reports 1986, p. 554, para 24; *Land, Island and Maritime Frontier Dispute* (El Salvador/Honduras, Nicaragua intervening), Judgment, 1992, I.C.J. 351, paras 40–43; Marcelo Kohen, 'Titles and *effectivités* in territorial disputes', in Marcelo Kohen and Mamadou Hébié, *Research Handbook on Territorial Disputes in International Law* (Edward Elgar Publishing 2018)153.

73 Daniel Patrick O'Connell, *The Law of State Succession* (CUP 1956) 6-9; *Peter Pázmány University, 1933*, PCIJ Series A/B, No. 61, p. 237; Institut de Droit International 'State Succession in Matters of Property and Debts' Resolution (7th Commission, 26 August 2001) Articles 12 and 13.

74 United Nations Tribunal in Libya, *Decision of 31 January 1953*, RIAA Volume XII, 365-366; Institut de Droit International, 'State Succession in Matters of Property and Debts' Resolution (7th Commission, 26 August 2001) Articles 12 and 13; Malcolm Shaw, 'State Succession Revisited' (1994) 5 Finnish Yearbook of International Law 85-92.

75 See for example the criteria regarding the importance to the cultural heritage of the successor state. Institut de Droit International, 'State Succession in Matters of Property and Debts' Resolution (7th Commission, 26 August 2001) Articles 16 (5).

76 *Sea Hunt, Inc. v. Unidentified, Shipwrecked Vessel or Vessels*, 47 F. Supp. 2d 678 (E.D. Va. 1999); OAS, The Definitive Treaty of and Friendship between his Britannick Majesty, and the King of Spain, concluded at Paris on 10th February 1763, Article XX.

77 *Sea Hunt, Inc. v Unidentified Shipwrecked Vessel or Vessels* ('*Sea Hunt*'), 221 F.3d 634, 638–639 (4th Cir.2000).

78 Institut de Droit International, 'The Legal Regime of Wrecks of Warships and Other State-owned Ships in International Law' Resolution (9th Commission, 29 August 2015) Article 4; Institut de Droit International, 'The Legal Regime of Wrecks of Warships and Other State-owned Ships in International Law: Travaux préparatoires'.

79 Cardazzi (n 31) 203-206.



For the *Juncal*, its nature could change in the light of subsequent acts conducted between Spain, and Mexico as an independent state. To that end, we now turn to examine two aspects: *first*, the date of the state succession and its terms; and *second*, whether the *Juncal* is included in the succession. Turning to the first aspect, the date of the succession means the date upon which the successor state replaced the predecessor state in the responsibility for the international relations of the territory to which the succession of states relates.⁸⁰ Let us remember that Mexico became independent on 27 September 1821, reflected in the Act of Independence of the Mexican Empire and the Treaties of Villa Córdoba between Augustin de Iturbide and the last Viceroy, Juan O'Donoju.⁸¹ Nonetheless, Spain hesitated to recognise the independence until 1836, with the Definitive Treaty of Peace and Friendship between Mexico and Spain (Santa María-Calatrava Treaty). For the purposes of this research, Article 1 deserves to be reproduced:

'ARTICULO I. S. M. la reina gobernadora de las Españas, á nombre de su augusta hija Doña Isabel II, reconoce como nacion libre, soberana é independiente la república mexicana, compuesta de los estados y paises especificados en su ley constitucional, á saber: el territorio comprendido en el virreinato llamado antes Nueva España; el que se decia capitanía general de Yucatan; el de las comandancias llamadas antes de provincias internas de Oriente y Occidente; el de la baja y alta California, y los terrenos anexos é islas advacentes de que en ambos mares está actualmente en posesion la expresada república. Y S. M. renuncia, tanto por sí, como por sus herederos y sucesores, á toda pretension al gobierno, propiedad y derecho territorial de dichos estados y paises.'⁸²

In this provision, Spain ceded the territory previously comprised by the Viceroy of New Spain, Yucatan, the west and east provinces, and the High and Low California, including islands located in the Pacific and Atlantic oceans. The second part of the provision includes a renunciation by Spain to any claim, property and territorial right over the mentioned territory. Following a broad interpretation, the scope of the provision could include the *Juncal* as part of the renounced territory and as property within it. Nevertheless, to determine whether the *Juncal* was included in the succession, we should consider some aspects of intertemporal law regarding the maritime areas that were considered as part of the territory of a state in 1836. That is, the issue should be appreciated in the light of the law contemporary to it.⁸³ Under the

80 Vienna Convention on Succession of States in respect of State Property, Archives and Debts (adopted in Vienna on 8 April 1983, not yet in force) Article 2 (1) (e).

81 Roberta Lajous, *Historia Mínima de las Relaciones Exteriores de México: 1821-2000* (El Colegio de México 2019), 25-55; Oscar Cruz Barney, *Historia del Derecho en México* (Tirant 2021) 908-917; Marco Antonio Pérez de los Reyes, *Historia del Derecho Mexicano* (OUP 2008), 422-425.

82 Tratado definitivo de paz y amistad entre la República Mexicana y su Majestad la reina gobernadora de las Españas, adopted at Madrid on 28 December 1836, Article 1, available at: <<https://aplicaciones.sre.gob.mx/tratados/ARCHIVOS/ESPANA-PAZ%20Y%20AMISTAD.pdf>>

83 *Island of Palmas case (Netherlands/USA)*, RIAA, Volume II 829-871, 845; *Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I. C. J. Reports 2002, p. 303, para 205; Mohamed Bennouna, *Le droit international entre la lettre et l'esprit* (Brill/Nijhoff 2017), paras 634-655; Rosalyn Higgins, 'Time and the Law: International Perspective of an Old Problem' (1997) 46(3) *International and Comparative Law Quarterly* 515-520.



current law of the sea, the territorial sea extends up to 12 nautical miles.⁸⁴ In the nineteenth century, the territorial sea as an extension of the territory was an accepted rule. However, there was no consensus on the breadth of the territorial sea. The practice from that period shows that maritime powers like the United Kingdom, United States of America or France claimed three nautical miles; whereas Spain, Portugal and Italy claimed six nautical miles.⁸⁵ Therefore, whether the *Juncal* was part of the state succession depends on locating the wreck within the six nautical miles of the current Mexican territorial sea, which corresponds to the length accepted under the law of the nineteenth century. This includes the territorial sea of islands or rocks include in the state succession. For example, Serrano Mangas⁸⁶ projected that the shipwreck lies near Cayo Arcas⁸⁷, which is an island entitled to a territorial sea under UNCLOS.⁸⁸ Only future expeditions will tell whether wreck is within the property renounced by Spain in 1836.

Nonetheless, even if Mexico acquires the ownership through the state succession of 1836, Spain remains an interested state because of the archaeological, historical and cultural links, as recognised by the 2001 UNESCO Convention.⁸⁹ In a manner to reconcile the legal interests of Spain and Mexico over the wreck, an alternative could be the negotiation of a subsequent bilateral agreement, either a binding treaty or a MoU, concerning the wreck of the *Juncal*.⁹⁰ This practice proved to be efficient with other shipwrecks located in the a maritime jurisdictional area of a state different to the flag state.⁹¹ For example, United Kingdom and Canada concluded a MoU regarding the *HMS Erebus* and *HMS Terror* before even finding the wrecks. In this instrument, the United Kingdom agreed on assigning the custody and control over the wrecks to Canada without waiving ownership. Moreover, the United Kingdom agreed on transferring the ownership of certain objects to Canada.⁹² Considering that Mexico is proximate to the potential location of the wreck, a similar clause on custody could be a solution in addition to the cooperation framework aimed at protecting the wreck.

Recent practice follows the trend of fully recognising the rights of the flag state without accepting claims from other interested states. For example, Peru argued that the cargo of *Nuestra Señora de las Mercedes* was physically, culturally and historically originated in Peru.⁹³ In fact, Peru sought reliance on Article 149 of UN-

84 Mathias Forteau and Jean-Marc Thouvenin, *Traité de Droit International de la Mer* (Pedone 2017) 355-366.

85 Charles Henry Alexandrovic, *An Introduction to the History of the Law of Nations in the East Indies* (Clarendon Press 1967) 42-49; Víctor Luis Gutiérrez Castillo, 'La evolución de la anchura del mar territorial: perspectiva internacional y Española' (2003) 9 *Revista de Estudios de Ciencias Sociales y Humanidades* 89; Robin Churchill and Alan Vaughan Lowe, *The Law of the Sea* (Manchester University Press 1999) 72; Tullio Treves, 'Historical Development of the Law of the Sea' in Donald Rothwell, Alex Oude Elferink, Karen Scott and Tim Stephens, *The Oxford Handbook of the Law of the Sea* (OUP 2015) 6.

86 Serrano Mangas (n 3) 231.

87 INEGI, *Catálogo de Territorio Insular Mexicano* (INEGI 2014) 129-131.

88 UNCLOS, Article 121.

89 2001 UNESCO Convention, Article 9(5).

90 2001 UNESCO Convention, Article 6.

91 Dromgoole (n 8) 140-146.

92 Memorandum of Understanding between the Governments of Great Britain and Canada pertaining to the shipwrecks *HMS Erebus* and *HMS Terror* (United Kingdom and Canada) (adopted 5 and 8 August 1997) paras 2 and 3.

93 *Odysey Marine Exploration, Inc. v. Unidentified, Shipwrecked Vessel*, 675 F.Supp.2d (M.D. Fla. 2009), 1129.



CLOS to support its claim. The court recognized that nor the United States of America nor Peru ratified UNCLOS, and there was not a customary law related to underwater cultural heritage discovered in international waters.⁹⁴ What would be the outcome of a similar case where both states are parties to UNCLOS? In an attempt to decolonising international law, the rules governing the ownership of underwater cultural heritage should consider other interests in addition to from the flag state.⁹⁵ In fact, denying claims of former colonies and indigenous people over underwater cultural heritage is a modern way of maintaining colonisation.

5. Preservation and protection of the *Juncal*

Under the 2001 UNESCO Convention, underwater cultural heritage shall be preserved for the benefit of humanity. In the present analysis, Spain and Mexico, as interested states on the *Juncal*, have this duty. To that end, the general obligation, provided by UNCLOS, establishes that states have the duty to protect objects of an archaeological and historical nature found at sea and shall cooperate for this purpose.⁹⁶ In a similar tone, Article 2 (2) and (3) of the 2001 UNESCO Convention comprises the general obligation for states to cooperate in the protection of the underwater cultural heritage and to take all the appropriate measures to that aim.⁹⁷ In subsequent provisions, the convention elaborates on this obligation with obligations of conduct. For elucidating the scope and content of the general obligation, this article approaches it by looking at two of its main components. Firstly, the obligation to cooperate as a corner stone to the whole convention Secondly, the set of due diligence obligations enlisted along the convention.

5.1 Duty to cooperate

International law recognises the duty to cooperate as a fundamental principle,⁹⁸ this is also found in the jurisprudence.⁹⁹ For instance, in the *Enrica Lexie* Arbitration, the Tribunal asserted that the obligation to cooperate is an obligation of conduct and not of result; and requires the enactment of domestic legislation or concluding bilateral or multilateral agreements with other interested states.¹⁰⁰ In the context of underwater cultural heritage, Article 303 (1) of UNCLOS provides that states shall cooperate in the protection of objects

94 *Odyssey Marine Exploration, Inc. v. Unidentified, Shipwrecked Vessel*, 675 F.Supp.2d (M.D. Fla. 2009), 1145,1146.

95 Chelle Haynes 'Decolonizing shipwrecks through considerations of indigeneity in Underwater Cultural Property Decisions' (2018) 30(2) *FlaJIntL* 111-166.

96 Tullio Scovazzi, 'Article 303 Archaeological and historical objects found at sea' in A Proelß (ed), *United Nations Convention on the Law of the Sea: A Commentary* (C.H. Beck 2017) 1953, para 10; Tullio Scovazzi, 'The Law of the Sea Convention and Underwater Cultural Heritage' (2012) 27 *IJMCL* 753–761.

97 2001 UNESCO Convention, Article 2 (2) and 3.

98 Declaration on Principles of International Law, Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, UNGA Resolution 2625 (adopted on 24 October 1970) Laurence Boisson de Chazournes and Jason Rudall, 'Co-operation', in Jorge Viñuales (ed), *The UN Friendly Relations Declaration at 50: An assessment to the Fundamental Principles of International Law* (CUP, 2020) 105-132; Rüdiger Wolfrum, 'International Law of Cooperation', *Max Planck Encyclopedia of International Law* (2010).

99 *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, Advisory Opinion of 2 April 2015, ITLOS Reports 2015, para 140, *MOX Plant* (Ireland v. United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001, p. 95, para 82.

100 Cf. *The Enrica Lexie Incident Arbitration* (Italy v. India), PCA Case No. 2015-28, Award of 21 May 2020, para 723.



of archaeological and historical nature found at sea.¹⁰¹ Yet, it is Article 19 of the 2001 UNESCO Convention which elaborates on the scope and content by providing a list of actions: collaborating in the investigation, excavation, documentation, conservation, study and presentation of such heritage; sharing information with other States Parties concerning underwater cultural heritage, including discovery of heritage, location of heritage, heritage excavated or recovered in violation of international law, scientific methodology and technology, and legal developments relating to such heritage.¹⁰² Thereby the obligation to cooperate entails the adoption of measures and the engagement with interested actors to coordinate efforts.¹⁰³

As discussed above, state practice shows that bilateral agreements have been among effective mechanisms to ensure cooperation and coordination mechanisms. In the context of the Juncal, Mexico and Spain concluded in 2014 a MoU on underwater cultural heritage. The instrument draws upon the 2001 UNESCO Convention and highlights the relevance of cooperation between them to protect the common underwater cultural heritage. Article Two of the MoU stands as the basis of the cooperation framework. It underscores the importance of exchanging technical, historical, and archaeological information; participation in conferences, seminars, and capacity building workshops; the loan of equipment and availability of personnel, specialists, advisers, and other resources.¹⁰⁴ The second paragraph of this article comprises a non-exhaustive list of actions included in the cooperation framework, including: the exchange and sharing of information regarding the localization of underwater cultural heritage; cooperation in the investigation and prospection towards underwater cultural heritage pursuant to the Rules of the 2001 UNESCO Convention; the notifications made under Articles 9 and 10 (3) regarding the localisation of underwater cultural heritage within the exclusive economic zone and continental shelf of one of the states;¹⁰⁵ and the sharing of information about potential unauthorised perturbation aimed at underwater cultural heritage.¹⁰⁶ Regarding the financial aspect, the MoU underscores that the cooperation framework depends on the availability of funding, personnel capacity and the domestic regulations of each party. Moreover, this instrument does not establish any mechanism of financial assistance.¹⁰⁷ In early 2020, both countries announced the launching of a prospection expedition, but due to the COVID-19 pandemic, the parties postponed it.¹⁰⁸

Since the scope of the 2014 MoU is general, the question of ownership or custody of the *Juncal* is not addressed. A further step in the bilateral cooperation may be the adoption of a new MoU or a binding instrument pursuant to Article 6 of the 2001 UNESCO Convention. We pointed to practice

101 UNCLOS, Article 303(1).

102 2001 UNESCO Convention, Article 19.

103 Tullio Scovazzi, 'Article 303 Archaeological and historical objects found at sea' in A Proelß (ed), *United Nations Convention on the Law of the Sea: A Commentary* (C.H. Beck 2017) 1953, para 10; Michail Risvas, 'The Duty to Cooperate and the Protection of the Underwater Cultural Heritage' (2013) 2(3) CJICL 568-572.

104 2014 MoU, Article Second (2) (A-D).

105 2001 UNESCO Convention, Articles 9 and 10.

106 2014 MoU, Article Second (2) (E).

107 2014 MoU, Article Third (1) and (2).

108 INAH, 'Redoblan México y España los esfuerzos para encontrar vestigios del pecio de Nuestra Señora del Juncal' (INAH, 7 February 2020) <www.inah.gob.mx/attachments/article/8906/20200207_boletin_036.pdf> accessed 25 October 2021.



reflected in the MoU on the *HMS Terror* and *HMS Erebus*, or the agreement on the *RMS Titanic*, to define concrete channels of cooperation on technical and enforcement matters. In this regard, a new instrument between Spain and Mexico could include a more specific cooperation framework and the adoption of more narrowed regulations. For instance, the coordination between the parties for conducting archaeological expeditions with the intervention of private companies under the 2001 UNESCO Convention.

5.2 Due diligence obligations

The obligation of due diligence permeates international law as an obligation of conduct aimed at deploying all the means at the disposal of a state to prevent risk.¹⁰⁹ The conception of risk developed to reach both scientific / technical and a social / cultural dimension.¹¹⁰ In fact, the threshold of due diligence required will depend on the level of risk and the activity being carried out.¹¹¹ Drawing upon the due diligence as developed in international environmental law, the due diligence obligation entails the adoption of appropriate measures, a level of vigilance and monitoring over public and private entities under the jurisdiction or effective control of a state when they are carrying out activities that entails a significant level of risk.¹¹² Regarding vigilance and monitoring, the state should take measures to enforce its laws. For example, in the *South China Sea Arbitration*, the Tribunal held China responsible for not taking necessary measures to enforce its domestic legislation aimed at protecting marine wildlife.¹¹³

Due diligence obligations likewise permeate the governance of underwater cultural heritage. The general obligation to protect and preserve underwater cultural heritage, the 2001 UNESCO Convention includes subsequent due diligence obligations to prevent activities contrary to the convention. The first is the obligation to take measures to prevent the entry into their territory, the dealing in, or the possession of underwater cultural heritage illicitly exported.¹¹⁴ In cultural heritage law, this obligation appears in the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export

109 Samantha Besson, *Le due diligence en droit international* (Brill/Nijhoff, 2021) 72-180.

110 Heike Krieger, Anne Peters and Leonhard Kreuzer (eds), *Due Diligence in the International Legal Order* (OUP 2020) 353.

111 *Responsibilities and obligations of States with respect to activities in the Area*, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 10, para 117; Leslie-Anne Duvic-Paoli and Jorge Viñuales, 'Prevention of Environmental Harm' in Jorge Viñuales (ed), *The UN Friendly Relations Declaration at 50: An assessment of the Fundamental Principles in International Law* (CUP, 2020), 283-313.

112 *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*, Advisory Opinion, 2 April 2015, ITLOS Reports 2015, p. 4, para 128; *Responsibilities and obligations of States with respect to activities in the Area*, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 10, para 111; *Pulp Mills on the River Uruguay* (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010, p. 14, para 197.

113 *The South China Sea Arbitration* (The Republic of Philippines v. The People's Republic of China), PCA 2013-19, Award, 12 July 2016, para 964.

114 2001 UNESCO Convention, Article 14.



and Transfer of Ownership of Cultural Property.¹¹⁵ The second requires that states shall take measures to prohibit the use of their territory and areas within its exclusive jurisdiction or control in support of activities contrary to the convention.¹¹⁶ The design of this obligation follows the architecture of the no harm principle adopted in general international law.¹¹⁷ A third obligation, Article 16, stipulates that states should take all practicable measures to ensure that their nationals and vessels flying their flag do not engage in activities that go against the convention.¹¹⁸ Some scholars argue that these measures can only mean the adoption of prohibitions backed with criminal sanctions.¹¹⁹ Others consider that in addition to civil fines or imprisonment, sanctions should include the seizure of underwater cultural heritage to deprive the offenders of the benefit derived from their activities.¹²⁰ Under Article 17 of the 2001 UNESCO Convention, states shall impose sanctions adequate in severity to be effective in securing compliance and discouraging violations.¹²¹ Moreover, states should cooperate in ensuring enforcement of the sanctions.¹²² Thereby, states shall adopt criminal law to prohibit any attempt of pillaging underwater cultural heritage. For example, in the *M/V Louisa* case, the ITLOS underscored that Spain detained the *M/V Louisa* for violating its laws on the protection of underwater cultural heritage, which criminalise acts against these objects, and not under its regulations on marine natural resources.¹²³

The due diligence obligations in the context of the *Juncal* requires Mexico and Spain to adopt regulations and coordinated efforts aimed at protecting the wreck. As the coastal state proximate to the *Juncal*, Mexico already has some regulations addressing these obligations. The Federal Law on Monuments and Archaeological, Artistic and Historic Areas regulates the exploration and archaeological activities in the country. Under this law, only the INAH or authorised institutions can conduct explorations and discoveries over cultural heritage.¹²⁴ Moreover, whoever finds archaeological objects shall notify the closest authority, who will afterwards notify the INAH for considering subsequent steps.¹²⁵ This is relevant for considering underwater cultural heritage during among other activities extractive operations and fisheries. A model to improve this obligation are the rules for exploration adopted by the International Seabed Authority, which imposes an obligation upon a contractor to notify the Authority and to suspend its activities if it finds objects of archaeolog-

115 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, Article 2; Janet Blake, *International Cultural Heritage Law* (OUP 2015) 34, 48.

116 2001 UNESCO Convention, Article 15.

117 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1. C.J. Reports 1996, p. 226, para 29.

118 2001 UNESCO Convention, Article 16. For a comprehensive study on this provision: Anna Petrig and Maria Stemmler 'Article 16 UNESCO Convention and the Protection of Underwater Cultural Heritage' (2020) 69(2) ICLQ 397-429.

119 Petrig and Stemmler (n 118) 409-410.

120 Dromgoole (n 8) 330.

121 2001 UNESCO, Article 17(1).

122 2001 UNESCO Convention, Article 17 (3).

123 *M/V 'Louisa'* (Saint Vincent and the Grenadines v. Kingdom of Spain), Judgment, ITLOS Reports 2013, p. 4, paras 113 and 117. For a comment on the case, Aznar Gómez (n 64) 47-77.

124 Federal Law on Monuments and Archaeological, Artistic and Historic Areas (published in the Mexican Official Gazette on 6 May 1972, last amendment of 16 February 2018) Articles 29 to 32.

125 Federal Law on Monuments and Archaeological and Historic Areas, Article 29.



ical or historical nature.¹²⁶ A similar notification system could be introduced in the regulations of extractive sectors to ensure the protection and preservation of wrecks in coordination with the INAH. The act disposes a catalogue of administrative and criminal sanctions for those carrying out exploration and discovery activities without authorisation of the INAH.¹²⁷ For example, a person may be imprisoned for between three to ten years if they conduct archaeological exploration, excavation, or removal of cultural heritage, or if they took an archaeological object without informing the competent authorities.¹²⁸ For many years, this law remained silent regarding underwater cultural heritage. Fortunately, the INAH fostered an amendment which came into force in 2014, and included *inter alia* shipwrecks and their cargo as part of cultural heritage, excluding vessels with sovereign immunity under international law.¹²⁹ Regarding the enforcement, the Mexican Navy is in charge of enforcing the domestic law in Mexican waters.¹³⁰ Therefore, the Navy is the competent authority, in coordination with the INAH, to enforce the Federal Law on Monuments and Archaeological, Artistic and Historic Areas within Mexican maritime areas.¹³¹ Nevertheless, for more effective enforcement, it is crucial to determine the location of the *Juncal*. This will allow the Navy to deploy more precise patrols, in cooperation with Spain, to prevent pillaging by treasure hunters.

6. Conclusion

A shipwreck is a time capsule that contain cultural objects from different social contexts.¹³² For the purposes of international law, each shipwreck offers a case by case scenario regarding its legal nature and the way it should be protected and preserved. This article explained the legal situation of one of thousands of shipwrecks by looking at the rules established in UNCLOS, the 2001 UNESCO Convention and the applicable *lex specialis*. The research aims to be a guidance for enhancing efforts between Mexico and Spain towards the protection and preservation of the *Juncal*, and the rest of shared underwater cultural heritage.

This article underscores the importance of characterising the *Juncal* – and any shipwreck – as underwater cultural heritage. Although this is clear under international law, it is crucial to educate people to abandon the conception of shipwrecks as ‘treasures’ and promote the eradicate of their commercialisation. This can be done through expositions, conferences or any other pedagogical means.

126 ISA, ‘Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area’, (22 July 2013) ISBA/19/C/17, Rules 8 and 35; ISA, ‘Regulations on prospecting and exploration for polymetallic sulphides in the Area’ (15 November 2010) ISBA/16/A/12/Rev.1, Rules 8 and 37.

127 Federal Law on Monuments and Archaeological and Historic Areas, Articles 47 to 55.

128 Federal Law on Monuments and Archaeological and Historic Areas, Articles 47 and 51; J.E. Becerril Miró, *El Derecho del Patrimonio Histórico-Artístico en México*, (Porrua 2003), 108-176.

129 Federal Law on Monuments and Archaeological, Artistic and Historic Areas, Article 28 Ter; P. Luna Erreguerena, ‘Patrimonio Cultural Subacuático: Legislación Nacional e Internacional-Proyección de México ante el Mundo’, in Moya Sordo (n 55) 253-257.

130 Organic Law of the Mexican Navy, published in the Official Gazette on 30 December 2002, last amendment of 19 May 2017, Article 4 bis.

131 Federal Law on Monuments and Archaeological, Artistic and Historic Areas, Article 3 (VI).

132 Sam Willis, *Shipwreck: A history of disasters at sea* (Quercus 2013) 12.



For example, Mexico and Spain recently inaugurated an exposition about the *Juncal*, mainly based on the historical research conducted by Mexico since 1995.¹³³

Regarding the ownership of the *Juncal*, this article followed a twofold analysis attending to the legal acts that occurred before and after the 1631 sinking. The first line follows Spain claiming the *Juncal* as a state vessel entitled to sovereign immunity, which only can end after an express act of abandonment or waiver. Nevertheless, Mexico as a coastal State proximate to the wreck, remains as a coordinating state to manage the joint efforts of interested states. As an alternative, this article examined the rule of state succession under which Mexico can argue that Spain ceded the property of the wreck in the Treaty of Friendship and Amity of 1836. However, following the intertemporal law, the shipwreck must be located within the territory received by Mexico in 1836, that is to say, within the six nautical miles of the Mexican territorial sea. An alternative to a costly dispute is the conclusion of an agreement to protect and preserve the shipwreck, granting to Mexico the custody of the wreck, and coordinating efforts towards its location, protections and preservation.

Finally, Spain and Mexico should observe the general obligation to protect the underwater cultural heritage as established by international law. This article discussed the architecture of this obligation as included in the 2001 UNESCO Convention. To understand the scope and content of this obligation, this paper analysed the two main components of the obligation: the obligation to cooperate and the obligation of due diligence. Under the obligation to cooperate, both states should exchange information on the progress of locating the wreck or on any attempt to pillage the wreck. Moreover, both states should adopt measures to protect the *Juncal*, including the adoption of regulations, monitoring mechanisms, and guaranteeing efficient law enforcement through sanctions. To that end, a new MoU or even a bilateral treaty between the parties, could adopt comprehensive actions in the field of technical and financial cooperation, and capacity building, as well as defining ownership and coordinating efforts towards the protection of the wreck. An agreement like this could be negotiated before the discovery of the *Juncal*.

133 Jesús García Calero 'Así fue la agonía del Juncal, el galeón que naufragó en 1631 y que retorna hoy al Archivo de Indias' (*La Vanguardia*, 7 February 2020) <www.abc.es/cultura/abci-agonia-juncal-galeon-naufrago-1631-y-retorna-archivo-indias-202111282318_noticia.html> accessed 2 December 2021.