

A Chinese Perspective on the International legal scheme for the Protection of Underwater Cultural Heritage

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Abstract

With 18,000 km of coastline and plentiful streams and rivers, China has an extensive underwater cultural heritage (UCH), which preserves Chinese history and maritime civilization under the ocean as a kind of “time capsule”. After 20-years of development of underwater archaeology and the protection of UCH, China has set up a brand-new national protection system. This contribution first discusses the new development of the Chinese UCH legal system in the 21th century in three aspects: legal subject, legal object and legal content. Further it discussed the tremendous challenges faced by the Chinese legal system. Meanwhile, since its entry into force in 2009, the UNESCO Convention on the Protection of the Underwater Cultural Heritage (UNESCO 2001 Convention) has been gradually approved by more and more influential States who hold various and abundant UCH items. Part two explains the UNESCO 2001 Convention as the International Cooperation Scheme for Protection of UCH. Part three examines, from the Chinese perspective, the advantages and obstacles for a State that ratifies the UNESCO 2001 Convention. There is a final conclusion that argues that through the UNESCO 2001 Convention diverse national legal protection systems of the UCH have converged into an international cooperation legal instrument.

Key words: Underwater Cultural Heritage (UCH); the Chinese UCH legal system; UNESCO 2001 Convention; International legal scheme; “Coordinating State”

Introduction

New developments and the challenges for the protection of UCH in China

In 1986 an astonishing auction named “the Nanking cargo (Geldermalsen shipwrecks)” was held in the Netherlands. The auction contained more than 100 gold ingots and thousands of Chinese export porcelain from the "Geldermalsen" that had sunk in about 1752 in the South China Sea, and salvaged by Michael Hatcher. The auction raised more than £10 million (Jörg, 1986). The Chinese authorities were shocked to notice that there were no provisions in the Chinese legislation that addressed the salvage of UCH

or to claim ownership of the UCH. In the same year, the Chinese Government decided to develop the capacity for underwater archaeology and it established the Underwater Archaeology Research Institute under the Chinese History Museum (now the Chinese National Museum). In 1989, the State Council passed legislation entitled the *Regulations of the P. R. China on Protection and Administration of Underwater Cultural Relics (1989 Chinese UCH regulation)*.

After more than 20 years of development Chinese authorities established a wholly new UCH administrative protection mechanism, aimed at providing professional protection for the entire UCH in China. The State Administration of Cultural Heritage (SACH) is responsible for managing and protecting all kinds of national cultural relics, including UCH. After that the National Conservation Center for Underwater Cultural Heritage (NCCUCH) got full confirmation from the SACH in order to fulfill its functions, especially in developing the national UCH excavations, conservation, research and cooperation with local governments and local underwater archeology institutes. There are mainly four regional UCH protective administration offices: the Ningbo Office in the Zhejiang province, the Fujian Office in the Fujian province, the Wuhan office in the Hubei province, and the Qingdao office in the Shandong province.

The development of Chinese UCH legal system

The appearance of local legislative subjects

It is the local government that refines related local UCH regulations and formulates feasible operational guidelines after 2008. The Fujian province and the Guangdong Province contain most various UCH items in China, such as Nanhai I shipwreck, Nan'ao I shipwreck and Banyangjiao (Reef) I shipwreck. In 2009, the Fujian Provincial People's Congress revised *the Fujian Province Protection and Administration of Cultural Relics Regulations* by adding a new chapter on the protection of UCH, which was the first local regulation relative to UCH in China. In the same year, the Guangdong province enacted the *Guangdong Provincial measure for the implementation of the P. R. China on Protection of Cultural Relic*, which set up a new “underwater cultural relics reserves” in Art. 26 in order to protect scattered UCH objects along its continuous coastline.

The particularity of the legal object

In addition to wrecks, sites, artifacts and human remains, the “Chinese Maritime Silk Road Sites” and “Ming and Qing Dynasty Coast Defense Sites” are unique kinds of UCH in China. “The Chinese Maritime Silk Road” once provided unprecedented access by ancient China to the most distant destinations reached by maritime trade. And it can be seen as a promotion of friendly relations linking East and West. The “Maritime Silk Road” in China embraces four aspects: the ancient ports, oceanic routes, cargos, and wrecks, each of which has specific and abundant contents. These four aspects interrelate systemically in order to form the Chinese traces of marine exploitation ---- the said “Chinese Maritime Silk Road”. The “Ming and Qing Dynasties Coast Defense Sites” are the defense constructions and facilities erected by Chinese authorities in order to prevent invasion of the Chinese territorial sea and coastal areas in Ming and Qing Dynasties (from 1368 to 1800AD). These coast defense sites are situated throughout 13 provinces, including Macao, Hong Kong and Taiwan, and are being actively considered by China for nomination as World Heritage sites.

The extending of legal content in protection UCH

The UCH protection began with the national UCH survey, which now extends from the coastline to internal waters, the territorial sea and the contiguous zone. The UCH survey from 2007-2011 covered the Bohai Sea, Yellow Sea, the East China Sea (including the Taiwan Strait), the South China Sea (including the Chinese jurisdiction area in the Paracel Islands and the Spratly Islands). They are all situated adjacent to China, and in the internal waters of China. It was a comprehensive and scientific national survey of UCH, named as the third national cultural relics investigation project. There are 108 supposed UCH sites. SACH and NCCUCH established the South China Sea UCH office and the Paracel Islands archaeological workstation in 2012.

Excavation, preservation, protection and management are the main tasks of protection of UCH. With 20 years’ experience of UCH protection, the Chinese authorities are gradually forming different but more appropriate protecting approaches for each UCH site in China. Take Baiheliang UCH site for example, which is the world’s oldest hydrological inscription in the Yangtse River. After considering the Baiheliang UCH conditions, Chinese authorities decided to build a submerged museum for

preservation of its UCH *in situ*, which is now the symbol of a submerged museum in the world (UNESCO Museums and Tourism, 2013). Another example of protection of UCH in China is the Shanhujiào (Reef) I shipwreck, located in the Paracel Islands. Chinese authorities had to scientifically excavate (from 2006 to 2008) and conserve these cultural relics on land for preserving its scientific and archeological value in a good condition. After the excavation of the Shanhujiào (Reef) I shipwreck, the NCCUCH and CACH started the preliminary experimental study on the conservation of ceramics, metal and wooden relics from Shanhujiào (Reef) I shipwreck. The Chinese National Museum and the CCUCH organized more than 10 training courses on diving skills, methodology of underwater archaeology, and the UCH conservation since the 1980s. Now, the CCUCH and archaeological team in the coastal cities in China have been able to fill the gaps left open over decades.

Challenges in China's UCH legal protection

Firstly, from the 1980s, looting and illicit trafficking were rampant in the South China Sea. China's underwater relics attract a growing number of Chinese fishermen who dived for these riches (Yanhong, 2011). With the development of underwater technology and human understanding of the deep ocean, different marine exploration companies from all over the world came to the South China Sea for salvaging and exporting relics along the Maritime Silk Road. "The Nanking Cargo" auction in Christie's in the Netherland's was the main cause leading to the 1989 legislation. In April 2011 the Chinese authorities investigated UCH in the Paracel Islands and reported that 26 UCH sites (more than 50% of the UCH sites in the Paracel Islands) had been illegally destroyed and excavated. What is worse, there is a reasonable suspicion that some neighboring countries deliberately damaged Chinese UCH in the South China Sea. For instance, a Ming-dynasty shipwreck located near Huangyan (Scarborough Shoal) was commercially excavated and destroyed by two 2000 ton foreign vessels (Yanhong, 2011). Secondly, a huge number of Chinese UCH outside the Chinese territory was not preserved under the national legal UCH protection system. A frequent type of UCH were merchant ships of the British East India Company that once frequently carried Chinese goods, shipping out of South China Sea bypassing the Cape of Good Hope to Europe and even to Africa. In the Atlantic, Pacific and Arctic oceans a variety of

shipwrecks prove this fact, such as the Mauritius shipwreck in the Cape Lopez of the Gulf of Guinea, the Manila galleon *San Juan* in the Gulf of California of the USA, the Goteborg shipwreck in the Swedish bay, and the *Prince de Conty* (France) in Loscat, Mediterranean (Chumming, 2003). In addition to shipwrecks that contained Chinese goods, Chinese experts discovered more and more Chinese shipwrecks outside China's territory, such as nine Chinese shipwrecks in Lamu Islands, Kenya (Underwater Archaeology Research Centre, 2012). Thirdly, the Chinese UCH items are traded, sold, bought or bartered as commercial goods in eminent auctions. The most famous auction was the said "Nanking Cargo" in Christie's, Amsterdam in 1986. Then there was "The Vung Tau Cargo" auction in Christie's (Amsterdam) in 1992, "The Diana Cargo" auction in Christie's in Amsterdam in 1995, the "Tek Sing" (the China's Titanic) auction in Stuttgart, Germany in 2000, and the "Made in Imperial China" auction in Sotheby's (Amsterdam) in 2007(Christie's Auction Catalog , Amsterdam).

China has carried out the conservation of UCH for over 20 years and accumulated certain experience in practice and in theoretical research. The content, object, subject and the methods of protection of the UCH in China has changed a lot, but the national legislation is not effective in preventing illegal salvage or illicit export of the UCH outside the Chinese territorial sea. This is the proper time to explore the view on UCH outside of China, and to research an international legal approach to the protection of the UCH.

The UNESCO 2001 Convention: the International Cooperation Scheme for Protection of UCH

The UNESCO 2001 Convention, at the present time the most complete legal instrument for the protection of UCH, is far from being a powerful and popular international Convention. However, as the offshoot of the *United Nations Convention on the Law of the Sea 1982* (UNCLOS), it indeed provides an effective international cooperation scheme for protecting UCH in different maritime areas, which does not change the limits of maritime areas or of the maritime power and jurisdiction of coastal states. Although the two principles of the UNESCO 2001 Convention, the principle of *in situ* preservation as the first option and the principle of non-commercial exploitation are based on the recognition of significance of the interplay between the UCH, its history and its context,

this article aim to focus on the cooperation scheme which established the valuable and effective international legal instrument for Member States.

UCH International Database

Each State Party to the UNESCO 2001 Convention has the obligation to share UCH information with other States Parties concerning UCH. According to Art.19, that includes: discovery of heritage, its location, UCH excavation or UCH recovery contrary to this Convention. Therefore, the Secretariat of the UNESCO 2001 Convention suggests that States Parties submit to it national authority information to establish a worldwide UCH database. States parties are also able to disseminate UCH information to other appropriate regional, international databases, such as MACHU (to make information about our common UCH accessible to researchers, policymakers and the general public, originated by the European Union's Culture 2000 program,), NAVIS I, NAVIS II (an open database of ancient ship supported by the European Commission Directorate General X), Shipwreck Asia Database (a regional shipwreck database, classified by the geographical regions, supported by the Toyota Foundation).

The UCH Reporting and Notification System

States Parties have a different reporting and notifying obligation in different maritime areas. But in the territorial sea or the archipelagic waters, the coastal States have only a soft obligation ("should") to inform the flag State or other States with an effective link with UCH, with a view to protecting State vessels and aircrafts (Art. 7). In the Exclusive Economic Zone (EEZ), on the Continental Shelf (CS) or in the Area, each State Party have a definite obligation to report the UCH discoveries and activities to that other State Party accordingly, or to all other States Parties (in Art. 9 and Art. 11).

UCH Coordination States scheme

The UCH Coordination States scheme is regulated by Articles 9 to 12 of the UNESCO 2001 Convention. In the EEZ or on the CS, the "coordinating State" is the State Party in whose EEZ or on whose CS UCH is located "unless the State Party expressly declares that it does not wish to do so". In that case the "coordinating State" is that which is based on a cultural, historical or archaeological link to the concerned UCH. By the same rule is to be decided a "Coordinating State" in the Area to issue all necessary

authorizations for agreed measures on behalf of all interested States Parties. The right of a “Coordinating State” is to implement measures of protecting UCH, cooperation and consultation among States Parties and conduct their decisions.

Assessment of the desirability and feasibility of UNESCO 2001 Convention in China

Benefits for China to protect Chinese UCH

The UNESCO 2001 Convention sets up reciprocal obligations between Member States and it designs at the same time UCH protective rights for its States Parties. Without this legal instrument States would be entitled only to a limited jurisdiction and sovereignty in their EEZ and on the CS according to international law. And in the Area, the doctrine of international law on freedom of the high seas provides that activities related to UCH found in the Area are to be governed by the flag State. First, *UNESCO 2001 Convention* entitles coastal States in Art.8 to protect UCH within their contiguous zone. In case that China becomes a State Party to this Convention, it would acquire a positive right in its favour to initiate activities on UCH in its contiguous zone, more than defensive activities to prevent removing UCH from contiguous zone in UNCLOS Art 303 (2). Secondly, the UNESCO 2001 Convention entitles States Parties to take all practicable measures to prevent immediate danger to UCH in the EEZ and on the CS. According to the UNCLOS, the coastal State and other States share different rights and jurisdiction, as governed by its Parts 5 and 6, while the UNESCO 2001 Convention can be seen to expand the traditional rights of coastal States. As a State Party to UNCLOS, China regulated the marine sovereign rights in the *Law of the People's Republic of China on the Exclusive Economic Zone and the Continental Shelf (China EEZ and CS Law)* mainly “for exploring, exploiting, conserving and managing natural resources” and “for conserving and managing the trans-boundary population, highly migrating fishes, marine mammals (in Art. 3 and Art. 6) in its EEZ. And *the 1989 Chinese UCH regulation* does not provide for the UCH protective provisions based on different marine zones. However UCH cannot be defined as a natural resource or a fishery activity. Hence, the Chinese authorities are now not entitled to take measures for prevention of immediate danger of UCH according to current Chinese national laws or regulations. If China becomes a State Party to the UNESCO 2001 Convention, it will be able to take any

practicable and necessary measures or request other States Parties to handle looting or trafficking activities that happen in the Chinese EEZ in South China Sea. What is more important, the Operational Guidelines (draft) also provides possibility of cooperation of States Parties with other intergovernmental organizations, for example with Interpol, in order to prevent UCH excavations or recovery contrary to this Convention.

Last but not least, the UNESCO 2001 Convention provides the effective international cooperation mechanism for all States Parties in protection of UCH. China should take advantage of the information-sharing forum (Art. 19), such as MACHU, to collect information with other State Parties about any Chinese shipwrecks discovered outside Chinese territory. Otherwise, underwater archaeology and UCH management are still recent sciences, especially for training of underwater archaeologists. China should ask the Scientific and Technical Advisory Body for developing of Chinese UCH excavation, management and protection methods, even for academic training on underwater archaeology, such as the Unit win network.

Conformity with the existing Chinese UCH laws and regulations

After consideration of the domestic relevant legislation and regulations, it can be concluded that there will be no conflicting clauses in the context of the currently ratified international cultural heritage agreements upon China's ratification of the UNESCO 2001 Convention (including the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, ratified in 1989, the 1972 Convention concerning the Protection of the World Cultural and Natural Heritage ratified in 1985, the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects ratified in in 1996, the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage ratified in 2004 and the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions ratified in 2007. Only the purpose of the *International Convention on Salvage (1989)* is contrary to UNESCO 2001 Convention. But recognizing the nature of UCH, China made a reservation on its Art. 30(1)(d) upon its ratification in 1993: China reserves the right not to apply the provisions of this Convention, "when the property involved is maritime cultural property of prehistoric, archaeological or historic interest and is situated on the sea-bed".

China only needs to review the principle of non-commercial exploitation in its national regulations in the light of the UNESCO 2001 Convention. The main problem is in the *1989 Chinese UCH regulation*. It sets up the rule of exploitation and excavation activities of UCH in Art.7 in the way that: “archaeological exploration and excavation activities with respect to underwater cultural relics shall have, as their objective, the protection of cultural relics and scientific research ... with approval by SACH”. It seems a perfect provision for regulating the excavation of the UCH for protection of cultural relics and scientific research. But according to it the objective of exploitation should be for instance scientific research under commercial excavation, such as the early excavation of *RMS Titanic* (Zekala, 2012). Therefore, the *1989 Chinese UCH regulation* should confirm and clarify that any activities directed at UCH shall not consist of commercial exploitation or excavation.

Conclusion

The UCH protection is a recent scientific as well as legal issue for every nation. After analyzing the new developments in China, it becomes obvious that isolated national UCH legal systems still face problems in the effective protection of UCH. Every State should realize the significance of the exchange of the UCH legal and technical information for national underwater cultural resources. The 2001 UNESCO Convention provides for its States Parties an effective international cooperation scheme. Therefore, individual inadequate national legal protection systems for UCH are destined to result into a cooperating international legal protection system. After evaluating the desirability and feasibility of the UNESCO 2001 Convention in China, it is beneficial for a State, like China, to protect national UCH under the legal instrument of the UNESCO 2001 Convention.

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Biography

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