

Protecting the Underwater Cultural Heritage in the waters surrounding Hong Kong

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Abstract

Since its colonial founding in 1841 Hong Kong has been a vibrant centre for international trade and commerce. Its strategic location at the head of the Pearl River made it a perfect location for maritime trade. Before this the waters surrounding Hong Kong's 200 plus islands were the notorious hideouts of pirates seeking to plunder the rich merchant vessels trading between China and its South East Asian neighbours. The waters around Hong Kong are only now being fully explored for their cultural heritage. Professionals and amateurs are seeking the resting places of infamous pirate wrecks and the wrecks of their victims. Harbor developments and sea fortifications are being examined. However, the continued expansion of Hong Kong as a trading centre and the shortage of land for development places many underwater areas that may have significant heritage information at risk. Developments and land reclamation in the world famous Victoria Harbor have raised concerns locally and internationally. The building and expansion of the Chek Lap Kok Airport and the building of the Hong Kong-Macau-Zhuhai Bridge have given archaeologists opportunity to discover evidence of Hong Kong's underwater cultural heritage but have also raised concerns regarding its damage and destruction. This paper considers the protection Hong Kong's laws provide for the underwater cultural heritage in the face of threats from building projects, reclamation, increased traffic in established sea routes and the establishment of new commercial sea routes.

Keywords: Hong Kong, underwater cultural heritage, law, Guangdong, legal framework

Introduction

Archaeologists have discovered evidence of human occupation of Hong Kong dating back 6,000 years to the Neolithic period (The Chinese University of Hong Kong, 2013). Discoveries suggest that Hong Kong has always been a sea trading area with the concentration of its population on its coastline e.g. Lantau, Sai Kung, Tuen Mun and the Kowloon Peninsula. Hong Kong's position at the mouth of the Pearl River, close to the trading port of Guanzhou (previously Canton), made it useful for the trade in tea, silk,

porcelain and eventually opium. The many islands and the rich trade passing through these waters have also made the area a haven and rich plundering waters for pirates. The Portuguese, the first Europeans to pass regularly through these waters, referred to the islands of Hong Kong as 'the islands of thieves'. The problem of piracy in the area led to the Great Clearance Order of 1661–69, when the inhabitants of coastal Guangdong were ordered to move inland to prevent them from having any contact with pirates and perhaps providing aid to them. The area of Hong Kong was virtually deserted and only a small proportion of the original residents are said to have returned when the Emperor rescinded the order (Hayes, 1974). However, the coastal settlements around Hong Kong gradually re-established and benefitted from the opening up of Canton for the tea and opium trade (HSU, 2000); the islands of Hong Kong became watering, victualing and smuggling points. Piracy also continued with notorious local pirate chiefs controlling vast fleets in these waters, for example Cheung Po Tsai (1796-1820). After the First Opium War (1839-1842) the British took Hong Kong Island as a Crown Colony and it became the base for European trade in the area.

Archaeological and historical study of the underwater cultural heritage in Hong Kong

The importance of the sea to the history and development of Hong Kong and the cultural heritage of the people oft is reflected in their beliefs and custom; for example the prevalence of Tin Hau temples and the dragon boat festivals which occur throughout the region. The recognition of the importance of Hong Kong's maritime history is reflected in two dedicated museums (Maritime Museum and the Museum of Coastal Defence) and legislation such as the Protection of the Harbour Ordinance (Cap. 531), which recognises that 'the harbour is a special public asset and a natural heritage of the Hong Kong people' (*Society for the Protection of the Harbour Ltd v. Town Planning Board* [2004] 1 HKLRD 396).

Discoveries of evidence of Hong Kong's maritime cultural heritage have been made during the development of the infrastructure of Hong Kong including a Ming Dynasty (1368-1644 AD) shipwreck that is now located within the High Island Reservoir. Archaeological investigation during the building of the new airport at Chep Lak Kok,

Lantau Island, has resulted in evidence of coastal settlement in the region. Although no thorough archaeological exploration of the waters of Hong Kong has yet been carried out, in 2009 the Lord Wilson Heritage Trust, provided financial support for the Hong Kong Underwater Heritage Group to analyse and consolidate data for 300 Hong Kong sites in a wrecks database (Jeffery et al., 2013). Concern for underwater cultural heritage is driven by the problems related to the shortage of land in Hong Kong. Hong Kong consists of approximately 1,104 km² (426 square miles) of land including over 200 islands. Its hilly terrain results in only some 25% of its landmass being developed for habitation with concentration mostly along the coastline. Official population figures of seven million people make it one of the most densely populated areas in the world (Census 2011). The constant reclamation of land from the sea, infrastructure projects in, under or over the sea, and the huge amount of sea traffic in the area endanger the underwater cultural heritage.

The legal framework for the protection of underwater cultural heritage in Hong Kong

Hong Kong is a Special Administrative Region of the People's Republic of China (PRC) and operates under the 'One Country, Two Systems' political system, which permits the region to use the common law until 2047. Hong Kong claims territorial waters to a distance of 3 nautical miles (5.6 km). Although there are many statutes which may indirectly affect the protection of underwater cultural heritage in Hong Kong, there are two statutes which form the basis of protection for underwater cultural heritage in Hong Kong: the Antiquities and Monuments Ordinance (AMO) (Cap. 53), which provides the basis for all statutory protection of cultural heritage wherever situated in Hong Kong; and the Environmental Impact Assessment Ordinance (Cap. 499). The Antiquities and Monuments Ordinance was gazetted in 1971 and came into effect in 1972. AMO therefore predates the common usage of the term "cultural heritage" and so refers to "relics", "antiquities" and "monuments". AMO provides "for the preservation of objects of historical, archaeological and palaeontological interest and for matters ancillary thereto or connected therewith", to be effected by way of designating ownership in relics and declaration of "any place, building, site or structure" as a proposed monument or monument. Although AMO expressly refers to discovery as including finding in Hong

Kong 'in, on or under land or sea' (s. 2), Amo was drafted when the limitations of underwater archaeology and the appreciation of underwater cultural heritage meant that the protection of the underwater cultural heritage was only cursorily considered, which is apparent as subsequent sections only refer to land: e.g. ss 2, 2A, 2B, 3, 5 and 8. The Environmental Impact Assessment Ordinance was gazetted in 1998 and has from its implementation been interpreted as necessitating consideration of the impact of proposed development of the seabed on cultural heritage. This interpretation was strengthened in 2007 after the Chief Executive's Policy Address identified the protection of heritage and the requirement of Heritage Impact Assessments (HIA) as policy initiatives. The protection afforded the underwater cultural heritage in Hong Kong will be considered under two headings: protecting underwater cultural heritage from unauthorised excavation and removal, and protecting underwater cultural heritage before and during development.

Protecting underwater cultural heritage from unauthorised excavation and removal

AMO places restrictions upon the searching for and excavating of sites, antiquities and relics, and specifies what must be done when an antiquity is discovered either accidentally or after deliberate search. Whenever an antiquity is discovered, the discoverer or any person who knows of the discovery must report the discovery to the Authority, presently the Secretary for Development (s.2), or to a designated person, identify the antiquity or supposed antiquity if requested to, and take all reasonable measures to protect the antiquity (s.11(1)-(3)). A designated person includes, '(a) the officer in charge of a police station; (b) a police officer of or above the rank of inspector; and (c) any person specified by the Authority by notice in the Gazette'. The person making the report of the discovery of an antiquity may be paid a reward by the Authority, with the prior approval of the Chief Executive (s. 11(4)). AMO further provides that no person may 'excavate or search for antiquities' unless they have a licence to do so (s.12a). Licences are granted by the Antiquities and Monuments Office under the direction of the Authority.

AMO (s.2) defines an antiquity as:

- a. a relic; and a place, building, site or structure erected, formed or built by human agency before the year 1800 and the ruins or remains of any such
- b. place, building, site or structure, whether or not the same has been modified, added to or restored after the year 1799.

Although this definition was arrived at with terrestrial discovery in mind the provisions also apply to underwater cultural heritage predating 1800 as discovery may be 'in, on or under land or sea' (s. 2). Once an antiquity has been discovered and reported to the Authority, the Authority may designate it a proposed monument and or declared monument. The protection AMO provides is not restricted to places, buildings, sites or structures predating 1800, however, as AMO provides that the Authority may declare any place, building, site or structure a proposed monument (s.2A). Declaration lasts for 12 months with the possibility of extension for a further 12 months (s.2B). Furthermore, the Authority may declare any place, building, site or structure "to be a monument, historical building or archaeological or palaeontological site or structure if the Authority considers it 'to be of public interest by reason of its historical, archaeological or palaeontological significance" (s.3). The "place, building, site or structure" may be 'in, on or under land or sea' and is usually referred to as a "declared monument".

The status of "proposed monument" or "declared monument" provides protection for the site and anything contained within it. AMO empowers the Authority, with the prior approval of the Chief Executive, to authorise the fencing, repair, maintenance, preservation or restoration of any proposed monument or monument, and the excavate or search for relics in any proposed monument or monument and the removal of any relics thereby discovered (s. 5 (1)). These powers are limited when interfering with the property rights of owners or occupiers of the proposed monument or monument (s.5(3)). Compensation may be paid to the owner or occupier of monuments or proposed monuments if the Authority exercises these powers (s. 8). The Ordinance provides a restriction on excavation and interference with any proposed monument or declared monument by way of a permit scheme (s. 6). The scheme prohibits, amongst other acts, the excavation, carrying on of building or other works, depositing earth or refuse on or in

a proposed monument or monument, and the demolishing, removing, obstructing, defacing or interfering with a proposed monument or monument, except in accordance with a permit granted by the Authority. Anyone refused a permit to carry out these acts may appeal to the Chief Executive within 14 days of notice of the refusal by the Authority. The Chief executive may confirm, vary or reverse the refusal. The Chief executive's decision is final. Once a site is designated a proposed monument or declared monument no person may use a metal detector there to excavate and search for antiquities unless they have a licence from the Authority for these purposes (s.12aa). Furthermore no person may remove any relic 'hitherto undiscovered from a proposed monument or monument, or collect or remove any object which he supposes to be a relic from the site of its discovery' unless they have a licence which permits them to do so for the protection of the relic or supposed relic (s.12b).

Section 2 defines "relic" as:

- a. a movable object made, shaped, painted, carved, inscribed or otherwise created, manufactured, produced or modified by human agency before the year 1800, whether or not it has been modified, added to or restored after the year 1799; and
- b. fossil remains or impressions...

Every relic discovered in Hong Kong after the commencement of the AMO belongs to the Government of Hong Kong, although the Authority may disclaim ownership of the relic on behalf of the Government when common law principles would then apply (s.10). The licensing scheme (s.13 (2)) provides that a licence may only be issued if the Authority is satisfied that the licensee 'has had sufficient scientific training or experience to enable him to carry out the excavation and search satisfactorily; (b) has at his disposal sufficient staff and financial or other resources to enable him to carry out the excavation and search satisfactorily; and (c) is able to conduct, or arrange for, a proper scientific study of any antiquities discovered as a result of the excavation and search.'

A licence may be granted for a renewable period of 12 months (s.13 (3)), to enter land for the purposes of excavation and searching (s.14), it is accepted practice for such licences to be issued for marine exploration. A license may be cancelled but the

licensee must have the opportunity of making representation as to why it should not be cancelled (s. 15). An applicant or licensee may also appeal by way of petition to the Chief Executive within 14 days of a decision to refuse or cancel a licence: (s. 16). It may include such conditions as the Authority considers appropriate, e.g. the conduct of any excavation and search, the reporting, mapping and documenting thereof, the use of a metal detector, the preservation of materials discovered, their removal, examination and return, and the making and delivery of casts, rubbings, squeezes and other reproductions' (s. 13(6)). AMO provides penalties for those who: knowingly make 'a false statement to the Authority or to a designated person as to the situation or circumstances of the discovery of an antiquity'; do not report the discovery of an antiquity; excavate or search for antiquities without a licence (including the use of metal detectors (as proscribed in s. 12aa)); do not identify an antiquity they have reported if so requested; wilfully obstructs the Authority, or any designated person authorized by him (s. 19(1)). On conviction the offences carry maximum penalties of HK\$5,000 and imprisonment for 6 months.

There is a presumption in criminal and civil proceedings that any relic or alleged relic proved to be in Hong Kong after the date of commencement of the Ordinance was discovered in Hong Kong after the date of commencement of the Ordinance (s. 20(1)). The possessor of the relic or presumed relic must prove that the relic or presumed relic was in their possession or the possession from someone from whom they obtained possession for six years before the commencement of the proceedings or was imported into Hong Kong (s. 21(1)). AMO also provides more serious offences of excavating, carrying on building or other works, or depositing earth or refuse on or in a proposed monument or monument; or demolishing, removing, obstructing, defacing or interfering with a proposed monument or monument. These offences are punishable on conviction with a maximum fine of HK\$100,000 and imprisonment for 1 year.

The definition of antiquity limits the protection of undiscovered sites and artefacts to those predating 1800. However, the designation of a site as a proposed monument or declared monument will protect the site from any excavation or the removal of any object. Any wreck postdating this period and not subject to statutory designation may be subject to the law of salvage. The Merchant Shipping (Collision Damage Liability and

Salvage) Ordinance (Cap. 508) incorporated the International Convention on Salvage 1989, but Hong Kong has adopted the Reservation permitted in article 30(1) of the Convention, as specified in the Ordinance s 9 and Sch 1, Pt2, para 2(1)(a), that the provisions of the Convention do not apply 'when the property involved is a maritime cultural property of prehistoric archaeological or historic interest and is situated on the sea-bed.' Such property will be subject to the pre-existing Hong Kong common law of salvage. The Hong Kong Government is entitled to all unclaimed wreck within Hong Kong's territorial waters, except where the right has been granted to some other person (*Pierce v Bemis, The Lusitania* [1986] QB 384).

Protecting underwater cultural heritage before and during development

The most worrying prospect for those concerned with the underwater cultural heritage in Hong Kong's waters has been the continued expansion of Hong Kong into the sea and the major capital projects which have been undertaken in the seas. Contractors with the best intentions may never realise they have damaged underwater cultural heritage or may only realise there is an artefact or site which should be reported when major damage has already been inflicted on the integrity of a site. This concern has been reflected in Government policy to protect underwater cultural heritage. This policy has been described as "An excellent example of proactive management of underwater cultural heritage with relation to seabed development..." (Coroneos, 2006). The protection afforded underwater cultural heritage that may be damaged by building and development projects in Hong Kong is afforded by the Environmental Impact Assessment Ordinance (EIAO). Implemented in 1998, the EIAO specifies in its Technical Memorandum that Heritage Impact Assessments (HIA) should be carried out at the early planning stage of any required development. The EIAO specifies in Schedule 1 Interpretation that 'environmental impact' for a designated project includes an on-site or off-site change that the project may cause in the environment on cultural heritage or a structure, site or other thing that is of historical or archaeological significance'. Schedule 1 also defines a "site of cultural heritage" as "an antiquity or monument, whether being a place, building, site or structure or a relic, as defined in the Antiquities and Monuments Ordinance... and any place, building, site, or structure or a

relic identified by the Antiquities and Monuments Office to be of archaeological, historical or palaeontological significance”.

The EIAO Schedule 2 designates projects requiring HIA, which include: reclamation works (including associated dredging works) more than 1 ha in size with a boundary which is less than 500 m from the nearest boundary of an existing or planned site of cultural heritage; dredging operation which is less than 500 m from the nearest boundary of an existing or planned site of cultural heritage; sewage treatment works with an installed capacity of more than 5000 m³ per day and a boundary which is less than 200 m from the nearest boundary of an existing or planned site of cultural heritage; a sewage pumping station with an installed capacity of more than 2000 m³ per day and a boundary which is less than 150 m from an existing or planned site of cultural heritage; a drainage channel or river training and diversion works which discharges or discharge into an area which is less than 300 m from the nearest boundary of an existing or planned site of cultural heritage; All projects including new access roads, railways, sewers, sewage treatment facilities, earthworks, dredging works and other building works partly or wholly in a site of cultural heritage. Schedule 4 provides that any environmental permit granted may specify timing phasing or mitigation measures to mitigate the impact of a designated project. Mitigation measures include “processes, systems, practices, procedures or technologies for the conservation, preservation or protection of ...sites of... cultural heritage importance”. The requirement for HIA was extended by the Chief Executive’s Policy Address of 2007 to cover any public works.

Those undertaking HIA are required to engage “a qualified marine archaeologist” to “...identify whether there is any possible existence of sites or objects of cultural heritage, for example shipwreck, within any seabed areas that would be affected by the marine works of the Project” (Coroneos, 2006). The Technical Memorandum, Annex 19, provides ‘Guidelines for assessment of impact on sites of cultural heritage and other impacts’. These Guidelines explain that methodologies for assessing impact may vary depending on the site, and that there is ‘no quantitative standard in deciding the relative importance of these sites, but in general, sites of unique archaeological, historical or architectural value will be considered as highly significant. ’The Guidelines provide what must be done when undertaking the HIA:

1. **Baseline Study:** to compile a comprehensive inventory of places, buildings, sites and structures of architectural, archaeological and historical value within the proposed project area; and to identify possible threats of destruction in whole or in part of sites of cultural heritage arising from the proposed project.
2. **Methodology:** information should be assembled to assess the sites to provide detailed geographical, historical, archaeological, ethnographical and other cultural data. Sources for the assessment should include public records, published papers, 'records, archival and historical documents as well as oral legends. 'If these sources prove inadequate then field surveys and site investigations shall be conducted to assemble the necessary data.
3. **Impact Assessment:** the presumption is for 'preservation in totality'. However, if site constraints and other factors permit only partial preservation then 'this must be fully justified with alternative proposals or layout designs which confirm the impracticability of total preservation.' Total destruction is the 'very last resort' and 'shall only be recommended with a meticulous and careful analysis balancing the interest of preserving the archaeological, historical, architectural and other cultural values as against that of the community as a whole.'
4. **Mitigation Measures:** mitigation measures shall not be used to avoid total or partial preservation.

These general requirements for undertaking HIA have been further refined for underwater purposes by the Antiquities and Monuments Office's Guidelines for Marine Archaeological Investigation specifying the tasks necessary for a successful HIA, colloquially referred to, as Coroneos notes, as "the Four Commandments":

Task 1 Baseline Review;

Task 2 Geophysical Survey;

Task 3 Establishing Archaeological Potential;

Task 4 Remote Operated Vehicle (ROV)/Visual Diver Survey/Watching Brief.

The Baseline Review is the equivalent of the Baseline Study. The Geophysical Survey is usually conducted by marine geophysical contractors. These two tasks then feed into Task 3, Establishing Archaeological Potential, which identifies, or isolates, anomalies or

areas of archaeological potential. If no anomalies or areas of archaeological interest are found then Task 4 is not required. Otherwise Task 4 requires the use of ROV and/or visual divers, depending of the nature of the anomaly or area of archaeological potential, to investigate. If archaeological material is discovered then the Antiquities and Monuments Office must be notified to seek guidance on its significance and the preparation of appropriate mitigation measures.

Conclusion

Hong Kong's framework for the protection of underwater cultural heritage is relatively simple and seemingly effective. The development of Hong Kong's coast and seabed is undertaken with a requirement for heritage impact assessments specifying high levels of investigation and protection by professional archaeologists. Generally, no one is allowed to search for antiquities in Hong Kong's waters without a permit from the Secretary or Development. Any chance discovery of an antiquity must be reported to the Secretary for Development. Any relic discovered belongs to the Hong Kong Government. Once a site is identified then it may be protected by designation as a proposed monument or declared monument. Of course there is room for improvement in the legal framework protecting the underwater cultural heritage in Hong Kong. For example AMO could be updated in language and provisions to specify the importance of underwater cultural heritage. Further measures may be implemented to protect underwater cultural heritage in line with policy statements from Beijing that China will bring its domestic laws into line with the UNESCO Convention on the Protection of the Underwater Cultural Heritage (FU, 2003).

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Biography

Steven Gallagher is an Associate Professor and a Professional Consultant, The Chinese University of Hong Kong. He was called to the Bar of England and Wales in 2006 by Gray's Inn after many years as an antiques dealer. Steven has taught Equity and Trusts for undergraduate level and masters' students in England and Hong Kong, and on the Juris Doctor program in Hong Kong. In 2014 Steven began the first Cultural Heritage Law course in Hong Kong. Steven's cultural heritage research interests include issues involving human remains, and the traffic in cultural heritage such as 'wreck' porcelain.