

# FROM DIFFERENCE TO CONVERGENCE: A COMPARATIVE ANALYSIS OF THE DEVELOPMENT OF THE LEGAL PROTECTION OF THE UNDERWATER CULTURAL HERITAGE IN CHINA AND THE 2001 CONVENTION\*

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*The article begins by giving an overview of the Chinese perspective and then goes on to analyse various elements of the 2001 UNESCO Convention. It then explores potential amendments that would be needed in the relevant Chinese domestic legislation.*

*Basically, the authors present a review of existing international documentation and then they consider their domestic case.*

**Keywords:** *Underwater cultural heritage (UCH); principle of sovereign immunity of States; principle of non-commercial exploitation of the UCH; the UCH international database; "Coordinating State".*

## I. INTRODUCTION

With 18,000 km of its coastline and plentiful streams and rivers, China has an extensive underwater cultural heritage (UCH), which has preserved Chinese history and maritime civilization under the ocean as a kind of "time seed case". After 20 years of development of the underwater archaeology and the UCH protection, China has already set up a brand-new system of the UCH administrative protection mechanism. This contribution first tackles the new development of the Chinese UCH legal system in the 21<sup>st</sup> century in three aspects: legal subject; legal object; and legal content. It further addresses the tremendous challenge on the Chinese legal system. Meanwhile, since its entry into force in

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2009, the *UNESCO Convention on the Protection of the Underwater Cultural Heritage (UNESCO 2001 Convention)*<sup>1</sup> has been gradually approved by an increasing number of influential States<sup>2</sup> that hold various and abundant UCH items. Part III. addresses the development of the *UNESCO 2001 Convention* through the interpretation of its specific, practical international cooperation scheme, as well as two principles: the principle of the sovereign immunity of a State and the principle of non-commercial exploitation. They can be seen as having been accompanied by the requisite to crystallize into a general principle of law in the UCH protection. Part IV. examines – from the Chinese perspective – the advantages and obstacles for a State that ratifies the *UNESCO 2001 Convention*. There is a final conclusion that through the *UNESCO 2001 Convention* diverse national legal protection systems of the UCH converge into an international cooperation legal instrument.

## II. ASSESSMENT OF THE NEW DEVELOPMENT AND THE CHALLENGES ON THE UCH LEGAL SYSTEM IN CHINA

In 1986 was held an astonishing auction named “the Nanking cargo (Geldermalsen shipwrecks)” in the Netherlands<sup>3</sup>. The Chinese authorities were shocked to notice that, at that time, there was no way to salvage the UCH or to claim ownership on the UCH in Chinese legislation. In the same year, the Chinese Government decided to develop the capacity of underwater archaeology and 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)*<sup>4</sup>.

After more than 20 years of development, the Chinese authorities established a wholly new UCH administrative protection mechanism, aimed at providing professional protection of the entire UCH in China. The State Administration of Cultural Heritage (SACH) is responsible for managing and protecting all kinds

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<sup>1</sup> The General Conference of the UNESCO adopted this *UNESCO 2001 Convention* at its 31<sup>st</sup> session in Paris in Nov. 2001. *UNESCO 2001 Convention*, as an international treaty, intends to enable States to better protect the UCH and has 45 States Parties until Nov, 2013.

<sup>2</sup> From 2009 to 2013, more than 20 States ratified the *UNESCO 2001 Convention*, including France, significant UCH State, also one of the permanent members of the United Nations Security Council. Until July 2013, this Convention has already been approved by 43 States. See UNESCO, <http://www.unesco.org/eri/la/convention.asp?KO=13520&language=E&order=alpha>, accessed on 20 July 2013.

<sup>3</sup> The auction contained more than 100 gold ingots and thousands of Chinese export porcelain from the “Geldermalsen” (sank about 1752 in the South China Sea, and salvaged by Michael Hatcher), that were sold for more than £10 million in Amsterdam. More: see Christiaan J.A.Jörg. *The Geldermalsen History and Porcelain* (Groningen, The Netherlands: Kemper Publisher, 1986), 6-26.

<sup>4</sup> *Regulations of the P.R. China on Protection and Administration of Underwater Cultural Relics* promulgated by Decree No. 42 of the State Council of the People’s Republic of China on Oct 20, 1989 and effective as of the date of promulgation.

of national cultural relics, including the UCH. After that, the National Conservation Center for Underwater Cultural Heritage (NCCUCH) got full confirmation from the SACH in order to perform its functions, especially in developing the national UCH excavations, conservation, research and cooperation with local governments and local underwater archaeology 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.

## **A. The development of the Chinese UCH legal system**

### **1) *The appearance of local legislative subjects***

It is the local government that has been refining related local UCH regulations and formulating feasible operational guidelines since 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 the UCH, which was the first local regulation relative to the 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 new "underwater cultural relics reserves" in Art. 26,<sup>5</sup> in order to protect scattered UCH objects along its continuous coastline.

### **2) *The particularity of the legal object***

In addition to wrecks, sites, artefacts and human remains, the "Chinese Maritime Silk Road Sites" and "Ming & Qing Dynasty Coast Defense Sites" are unique kinds of the UCH in China. The "Chinese Maritime Silk Road" once provided unprecedented access of the ancient China to the most distant destinations by maritime trade. 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 systematically, in order to form the Chinese traces of marine exploitation – the said "Chinese Maritime Silk Road". The "Ming & Qing Dynasties Coast Defense Sites" are the defense constructions and facilities erected by the Chinese authorities in order to prevent maritime fo-

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<sup>5</sup> Art. 26 of Guangdong Provincial Measure for the Implementation of the P. R. China on Protection of Cultural Relics: "On the basis of the historic, artistic and scientific values of underwater cultural relics, the people's governments of the provinces, determine the underwater cultural relics reserves at provincial level and publicly announce them."

reign enemy invasions of the Chinese territorial sea and coastal areas in Ming & Qing Dynasties (from 1368 AD to 1800 AD). These “coast defense sites” are situated throughout 13 provinces, including Macao, Hong Kong and Taiwan, which is considered by the China government to apply for the World Cultural Heritage<sup>6</sup>.

### 3) *The extending of legal content in the UCH protection*

The UCH protection begins with the national UCH survey, which is now extending from the coastline to internal waters, territorial sea and contiguous zone. The UCH survey 2007–2011 was carried out in the Bohai Sea, the 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 UCH survey, named as the third national cultural relics investigation project. There are 108 supposed UCH sites<sup>7</sup>. SACH and NCCUCH planned to establish the South China Sea UCH office and the Paracel Islands archaeological workstation in 2012.

Excavation, preservation, protection and management are the main tasks of the UCH protection. In 20 years of experience of the UCH protection, the Chinese authorities were gradually forming different but more appropriate protecting approaches for each underwater cultural relic 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, the Chinese authorities decided to build a submerged museum for the preservation of its UCH *in situ*, which is now the symbol of submerged museums in the world<sup>8</sup>. Another example for the protection of the UCH in China is the Shanhujiào (reef) I shipwreck, located in the Paracel Islands. The Chinese authorities had to scientifically excavate (from 2006 to 2008) and conserve these cultural relics on land for preserving its scientific and archaeological value in 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 the Shanhujiào (reef) I shipwreck.

Moreover, the Chinese National Museum and the CCUCH have organized more than 10 training courses on diving skills, methodology of underwater archaeology, and the UCH conservation since the 1980s. Now, the CCUCH and the archaeological team in the coastal cities in China have been able to fill the gaps left open over decades.

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<sup>6</sup> Chinese UCH “12.5” National Project (Draft)[R], 2010 Annual Report of NCCUCH, 2010, p. 2.

<sup>7</sup> *Ibid*, pp. 9-12.

<sup>8</sup> UNESCO, ‘Museums and tourism’, <http://www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/museums-and-tourism/>, accessed on 20 June 2013.

## B. Challenges in China's UCH legal protection

First, since the 1980s looting and illicit trafficking have happened rampantly in the South China Sea. China's underwater relics attract not only a growing number of Chinese fishermen to dive for these riches.<sup>9</sup> 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 astonishing event in looting the UCH is "*the Geldermalsen*" shipwreck, salvaged in the South China Sea by Michael Hatcher in 1985. Thousands of Chinese porcelain figurines, bottles and stoneware, as well as 126 lots of gold ingots, were sold as "*the Nanking Cargo*" at the Christie's, Amsterdam in 1986.<sup>10</sup> "*The Nanking Cargo*" auction at the Christie's was the main cause leading to the legislation by the 1989 *Chinese UCH regulation*. In April 2011, the Chinese authorities investigated the UCH in the Paracel Islands and reported that 26 UCH sites (more than 50% of the area of the UCH sites in the Paracel Islands) had been illegally destroyed and excavated. What was worse, there is a reasonable doubt that some neighbouring countries deliberately damaged Chinese UCH in the South China Sea.<sup>11</sup>

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 Chinese UCH were merchant ships of the British East India Company that once frequently carried Chinese goods, shipping out of the 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,<sup>12</sup> such as "*the Mauritius shipwreck*" in the Cape Lopez of the Gulf of Guinea; the "*Manila galleon casa*" in the Gulf of California of the USA; "*the Goteborg shipwreck*" in the Swedish bay, "*Prince de Conty (France)*" in Loscat in the Mediterranean. In addition to shipwrecks that contained Chinese goods, Chine-

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<sup>9</sup> Underwater archaeologists had discovered 13 underwater archaeological sites between the 10<sup>th</sup> and the 19<sup>th</sup> century in Huaguang Reef, North Reef, Silver Island in the South China Sea, but all the sites were looted by local fishermen before the official excavation and exploration. Take *Wanjiao No.1 shipwreck* (a Qing Dynasty's merchant ship, discovered in Pengtan area, Fujian Province) for example: it is estimated that more than 50% of shipwreck artefacts in Wanjiao No.1 had been looted by fishermen before exploration and excavation in June 2005. See Cai Yanhong, "Grouping and Well-organizing is the New Trend of Illicitly Excavating UCH in China", *Legal Daily*, (Beijing, 15 Dec, 2011) 12.

<sup>10</sup> See Nick Habermehl, *Supra* note 3.

<sup>11</sup> For instance, a Ming-dynasty shipwreck located near Huangyan (Scarborough Shoal) once commercially excavated and destroyed by two 2000-ton foreign vessel, expressed by the Vice director of NCCUCH and reported by *Legal Daily*. *Supra* note 9.

<sup>12</sup> Wu Chunming, *Shipwrecks around China marine zone - Ancient sailing boat, ship technology and cargo*, (Jiangxi University Press, 2003), 36-43.

se experts discovered more and more Chinese shipwrecks outside the China territory, such as nine Chinese shipwrecks in the Lamu Islands, Kenya<sup>13</sup>.

Thirdly, the Chinese UCH items are traded, sold, bought or bartered as commercial goods at eminent auctions.<sup>14</sup> The most famous auction was the said "Nanking Cargo" at the Christie's, Amsterdam) in 1986. There was also "The Vung Tau Cargo" auction at the Christie's, Amsterdam in 1992; "The Diana Cargo" auction at the Christie's, Amsterdam in 1995; the "Tek Sing" (the China's Titanic) auction in Stuttgart, Germany in 2000; and the "Made in Imperial China" auction at the Sotheby's, Amsterdam in 2007.

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

### III. A CRITICAL APPRAISAL OF THE DEVELOPMENT OF THE UNESCO 2001 CONVENTION

The *UNESCO 2001 Convention*, at present time the most complete legal instrument for the UCH protection, 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)*<sup>15</sup>, it indeed provides an effective international cooperation scheme for protecting the UCH in different maritime areas. Besides, its two principles are commonly recognized by its Member States' legal systems and are increasingly applied to deal with the activities concerned. Both principles can be seen as crystallizing into a general principle of law in the UCH protec-

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<sup>13</sup> See generally Underwater Archaeology Research Centre, National Museum of China & Department of Coastal Archaeology, "National Museums of Kenya, Major Discoveries of Sino-Kenyan Cooperative Underwater Archaeological Survey in Coastal Areas of Kenya in 2010", *Journal of National Museum of China* (2012), Vol 8, 88-99.

<sup>14</sup> The auction contained thousands of Chinese export porcelain from the "Vung Tau shipwreck" sank about 1690 off the coast of Viet Nam. The Christie's Auction Catalogue "The Vung Tau Cargo", Amsterdam (1992), p. 132. The auction contained kinds of Chinese porcelain, figurines and artefacts from the "Diana" shipwreck sank in 1817 off the coast of Malaysia. See Christie's Auction Catalogue "The Diana Cargo", Amsterdam (1995), p. 145. The auction listed 16,100 lots of ceramics salvaged from the "Tek Sing" – China's *Titanic* – that sank in the South China Sea in 1822. Nagel Auctions, Stuttgart, Germany (2000), p. 1020. The auction included 1,208 lots, comprising 76,000 pieces of Chinese export porcelain from the Ca Mau shipwreck in about 1725 off Viet Nam. Sotheby's, Amsterdam (2007) p. 278. See also <http://www.sunkentreasurebooks.com/catalogs.htm>, accessed 1<sup>st</sup>, Nov, 2013.

<sup>15</sup> The United Nations Convention on the law of the Sea (UNCLOS) was opened for signature in 1982 and came into force in 1994 in accordance with its Art. 308, 12 months after the date of the deposit of the 60<sup>th</sup> instrument of ratification or accession.

tion, which means general legal consciousness applicable in the UCH protection aspect by the states.<sup>16</sup>

## A. The International Cooperation Scheme for the UCH Protection

After it entered into force in 2009, the *UNESCO 2001 Convention* completely covers a specific and practical international cooperation scheme for its States Parties. It changes neither the limits of maritime areas nor of maritime power of coastal states. This cooperation scheme has established an UCH international database and a plan to organize the UCH report & notification system and the UCH coordination states scheme.

### 1) *The UCH International Database*

Each State Party to the *UNESCO 2001 Convention* has the obligation to share UCH information with other States Parties concerning the UCH, according to Art. 19, that includes: discovery of heritage, its location, UCH excavation or UCH recovery contrary to this Convention.<sup>17</sup> Therefore, the Secretariat of the *UNESCO 2001 Convention* suggests that States Parties submit to it national UCH information to establish a worldwide UCH database. States Parties are also able to disseminate UCH information to other appropriate regional and international databases,<sup>18</sup> such as MACHU, NAVIS I, NAVIS II, Shipwreck Asia Database.<sup>19</sup>

<sup>16</sup> Although there is no consensus among legal scholars about what are the general principles of law in Art. 38.1(c) of the Statute of ICJ, thereunder are usually meant principles common to the municipal civil, criminal or constitutional legal orders, which are, subject to circumstances, applicable as legal norms in international relations. See Vladimir Djuro Degan, *Wuhan University lectures on International Law II*, China: Wuhan University Press, 2010, p. 7. Wang Tieya explained the general principles of law by two approaches. One is that the general principles of law may describe fundamental principles and rules applicable in all kinds of international legal relations which form part of international law, such as the principle of equity and the principle of sovereignty. Another explanation is that the general principles of law refer to general legal consciousness applicable in specific aspects of international legal relations, which are derived from treaty or custom and reflect the consent of states. For instance *Pacta sunt servanda* in contract law, freedom of the high sea. See Wang Tieya, *The Sources of International Law*, the Anthology of Wang Tieya, Deng Zhenglai (ed.). China: China University of Political Science and Law Press, 2003, p.141. This article adopts the second explanation of the general principles of law of Wang Tieya.

<sup>17</sup> Art. 19(2) of the *UNESCO 2001 Convention* "Each State Party undertakes to share information with other States Parties concerning underwater cultural heritage, including discovery of heritage, location of heritage, heritage excavated or recovered contrary to this Convention".

<sup>18</sup> Art. 19(4) of the *UNESCO 2001 Convention*: "Each State Party shall take all practicable measures to disseminate information, including where feasible through appropriate international databases ..."

<sup>19</sup> MACHU(Managing Cultural Heritage Underwater), originated by the European Union's Culture 2000 program, aims to make information about our common underwater cultural heritage accessible to researchers, policymakers and the general public, more details at <http://www.machuproject.eu/>; NAVIS I project and NAVIS II project is an open database of ancient ships supported by the European Commission Directorate General X, more details at <http://www2.rgzm.de/navis/home/frames.htm>; <http://www2.rgzm.de/navis2/home/frames.htm>. Shipwreck Asia Database is a regional shipwreck database, classified by the geographical regions, supported by the Toyota Foundation, more details at [www.shipwreckasia.org](http://www.shipwreckasia.org). Accessed on 20 July 2013.

## 2) *The UCH Report & Notification System*

States Parties have different reporting and notifying obligations in different maritime areas, according to the coastal state's meriting power. 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 to the UCH, with a view to protecting State vessels and aircrafts (Art.7).<sup>20</sup> In the Exclusive Economic Zone (EEZ), on the Continental Shelf (CS) or in the Area, each State Party has a definite obligation to report the UCH discoveries and activities to the other State accordingly, or to all other States Parties (Art. 9 and Art. 11).<sup>21</sup>

## 3) *The 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 that locates the UCH, "unless it expressly declares that it does not wish to do so". In that other case, the "Coordinating State" is the one that is based on a cultural, historical or archaeological link to the concerned UCH. On the basis of this principle the Director-General of the UNESCO shall appoint a State Party to be a "Coordinating State" in the Area. The right of a "Coordinating State" is to implement measures of the UCH protection, to coordinate cooperation and consultation among States Parties and to conduct their decisions, while acting on behalf of all interested States Parties.

## **B. The principle of the sovereign immunity of State vessels and its practice**

Consistent with the principle of sovereign immunity in international law, the *UNESCO 2001 Convention* in Art. 2(8)<sup>22</sup> set up a basic principle between the rights

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<sup>20</sup> Article 7(3) of the *UNESCO 2001 Convention*: "Within their archipelagic waters and territorial sea, in the exercise of their sovereignty and in recognition of general practice among States, States Parties, with a view to cooperating on the best methods of protecting State vessels and aircraft, should inform the flag State Party to this Convention and, if applicable, other States with a verifiable link, especially a cultural, historical or archaeological link, with respect to the discovery of such identifiable State vessels and aircraft."

<sup>21</sup> Article 9.1(b) of the *UNESCO 2001 Convention*: "Reporting and notification in the exclusive economic zone and on the continental shelf ... (i) States Parties shall...report such discovery or activity to that other State Party; (ii) alternatively, a State Party shall...report such discovery or activity to all other States Parties." Article 11.3 "Reporting and notification in the Area ... The Director-General shall promptly make available to all States Parties any such information supplied by States Parties."

<sup>22</sup> Art. 2(8) of the *UNESCO 2001 Convention*: "Consistent with State practice and international law, including the *United Nations Convention on the Law of the Sea*, nothing in this Convention shall be interpreted as modifying the rules of international law and State practice pertaining to sovereign immunities, nor any State's rights with respect to its State vessels and aircraft."



of the coastal States and the sovereignty of State vessels<sup>23</sup>. The following provisions elaborate how this principle applies to different marine areas. In internal waters, archipelagic waters and territorial sea, Art. 7(1)(3) affirms that States Parties have the exclusive right to regulate and authorize activities directed at the UCH, but the coastal State “should inform” the flag State Party on these measures.<sup>24</sup> In Art. 10(7) it has been provided that in the EEZ or on the CS activities directed at State vessels shall be conducted with the agreement of the flag State<sup>25</sup>. In the Area Art. 12(7) fully respects the principle of sovereign immunity in the way that for all the activities the consent of the flag State is needed.<sup>26</sup>

Before 2009 (the year of the entry of the 2001 Convention into force), most of wrecks of State vessels were located near the coast. These situations were settled through bilateral agreements respecting the principle of sovereign immunity of State vessels. They are: the *V.O.C shipwreck Batavia 1972*<sup>27</sup>; the *CSS Alabama 1989*<sup>28</sup>; the *La Belle* wreck 2003<sup>29</sup>. The agreement between the U.S. and France of the *La Belle* wreck (2003)<sup>30</sup> can be seen as the best national practice for respecting the principle of sovereign immunity. The *La Belle* was a French ship sunk in 1686 in Matagorda Bay, near the U.S. state of Texas. In this agreement, Article 1 states

<sup>23</sup> Art. 1(8) of the *UNESCO 2001 Convention*: “State vessels” mean “both warships and state vessels owned or operated at the time of sinking only for non-commercial purposes”.

<sup>24</sup> Art. 7(1) of the *UNESCO 2001 Convention*: “States Parties, in the exercise of their sovereignty, have the exclusive right to regulate and authorize activities directed at underwater cultural heritage in their internal waters, archipelagic waters and territorial sea.” Art. 7(3): “Within their archipelagic waters and territorial sea...States Parties, with a view to cooperating on the best methods of protecting State vessels and aircraft, should inform the flag State Party to this Convention....”

<sup>25</sup> Art. 10(7) of the *UNESCO 2001 Convention*: “... no activity directed at State vessels and aircraft shall be conducted without the agreement of the flag State and the collaboration of the Coordinating State.”.

<sup>26</sup> Art. 12(7) of the *UNESCO 2001 Convention*: “No State Party shall undertake or authorize activities directed at State vessels and aircraft in the Area without the consent of the flag State.”.

<sup>27</sup> Historic Shipwrecks Act 1976, 1976 Austl. Acts No. 190, SCHEDULE 1 (Agreement between the Netherlands and Australia concerning old Dutch shipwrecks, available at [http://www.austlii.edu.au/au/legis/cth/consol\\_act/hsa1976235/sch1.html](http://www.austlii.edu.au/au/legis/cth/consol_act/hsa1976235/sch1.html)). Art.1: “The Netherlands, as successor to the property and assets of the V.O.C., transfers all its right, title and interest in and to wrecked vessels of the V.O.C. lying on or off the coast of the State of Western Australia and in and to any articles thereof to Australia which shall accept such right, title and interest.”

<sup>28</sup> Agreement concerning the wreck of the *CSS Alabama*, U.S.- Fr., Oct. 30, 1989, T.I.A.S. No. 11687. The *CSS Alabama*, a Confederate warship, was sunk by the *USS Kearsarge* in battle off Cherbourg, France, 1864. The government of the United States of America was referred to as the owner of the wreck, the French Association *CSS Alabama* as the authorized operator, who has the responsibility for its actions on, to, and from the *CSS Alabama* wreck site.

<sup>29</sup> Agreement Regarding the Wreck of *La Belle*, U.S.-Fr., Mar. 31, 2003. See also Fu Kuncheng and Song Yuxiang, *International Legal Protection of the Underwater Cultural Heritage: Introduction of the Convention on the Protection of Underwater Cultural Heritage 297* (2006); Legal Press China, 297. La Salle Research Project, The Texas Historical Commission, <http://www.thc.state.tx.us/belle/> accessed 20 July 2013.

<sup>30</sup> Agreement between the Government of the United States of America and the Government of the French Republic Regarding the Wreck of *La Belle*, U.S.-Fr., Mar. 31, 2003.

that: “The French Republic has not abandoned or transferred title of the wreck of *La Belle* and continues to retain title to the wreck of *La Belle*.”<sup>31</sup> Therefore, the identifiable sunken State vessel was entitled to the sovereign immunity of the flag States unless expressly abandoned.

A new State legal practice in 2012 shows a new phenomenon in the UCH protection concerning State vessels located in “international waters”. That was the *Las Mercedes Case*<sup>32</sup> (also named as *Black Swan case*). The *Nuestra Senora de las Mercedes*, a Spanish shipwreck on board a cargo of gold was sunk in 1804, after an engagement with British forces. It was discovered by the *Odyssey Marine Exploration Inc. (USA)* in international waters about 100 miles west of the Straits of Gibraltar in 2007. The *Odyssey Marine Exploration Inc.* sought possessory rights under the *Law of Finds*. Spain opposed that claim. The U.S. Judge did not endorse the *Odyssey Marine Exploration Inc.* claim<sup>33</sup> and recognized Spain’s sovereign interest in *las Mercedes*. The U.S. court lacked jurisdiction in this case, holding *inter alia* the principle of sovereign immunity.

### C. The principle of non-commercial exploitation and its practice

The *UNESCO 2001 Convention* acknowledges the UCH to be of public interest that has unique value for humanity. Hence, it should not be treated as an economic or natural resource in the seabed unlike gas or oil. Commercial exploitation of the UCH for trade is fundamentally incompatible with the proposals of the *UNESCO 2001 Convention*.<sup>34</sup> Not only 43 States Parties to the Convention have respected the principle of non-commercial exploitation, but it was the same with recent bilateral or multilateral agreements concerning the UCH protection, which also avoided its commercial exploitation as follows:

The legal history of the protection of the *Titanic* shipwrecks can be taken as a good example for explaining the trend of the principle of non-commercial exploitation of the UCH instead of commercial exploitation of the UCH in practice, even by third States. The *R.M.S. Titanic*, the most famous “unsinkable ship” in modern history, was owned by the “White Star Line” in Great Britain, which was a part of the International Mercantile Marine conglomerate owned by an American, J.P. Morgan. The ship was sunk to the bottom of the Atlantic Ocean in 1912 with the

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<sup>31</sup> *Ibid.* at Art.1(2).

<sup>32</sup> No. 8:07-CV-614-SDM-MAP, 2009 U.S. Dist. LEXIS 119088 (M.D. Fla. June 3, 2009).

<sup>33</sup> Articles 95 and 96 of the UNCLOS confirm the customary rule that warships and state-owned or operated vessels used only on government non-commercial services “enjoy complete immunity from the jurisdiction of any State other than the flag State on the high seas”. This principle is also reflected in the 2001 Convention in similar language in Art. 12(7), *supra* note 26.

<sup>34</sup> Art. 2(7) of the *UNESCO 2001 Convention*: “that underwater cultural heritage shall not be commercially exploited.”

loss of more than 1,500 lives. In 1985 the location of the wreck of the *R.M.S. Titanic* was discovered on the Canadian CS, and then it caused 18 years of litigation. In the beginning, the U.S. Congress enacted the *R.M.S. Titanic Maritime Memorial Act of 1986* in remembrance of this significant discovery. The main purpose of that Act was to prevent any salvage operations, or overly-intrusive research expeditions that might damage the wreck, until necessary guidelines were established.<sup>35</sup>

Between 1986 and 2004, the R.M.S. Titanic Inc. ("RMST") had brought its cases to the United States courts and defended its claim against several challengers,<sup>36</sup> in order to achieve the salvor-in-possession status.<sup>37</sup> A federal court granted the RMST the exclusive salvage rights of *RMS Titanic*, based upon the RMST's efforts to meet the *Guidelines for Research, Exploration and Salvage of RMS Titanic*,<sup>38</sup> of investing significant capital into the retrieval and restoration of the artefacts, and in offering the artefacts for public display. Evidently, the RMST could also earn substantial income with its exhibitions.

In 2004, the United States, the United Kingdom, France and Canada concluded an international agreement on *RMS Titanic*<sup>39</sup>, which preferred its preservation *in situ* and the protection of scientific, cultural value of the *Titanic*<sup>40</sup>. This international agreement and its Annex can be seen as a paradigm of the *UNESCO 2001 Convention* and its Annex.

A hundred years after its sinking, the wreck of the *RMS Titanic* fell under the *UNESCO 2001 Convention* that defines the UCH should be under water for hundred years at least (Art. 1). This means that all Parties to the *UNESCO 2001 Convention* would prohibit commercial exploitation and provide an international cooperation system for *RMS Titanic* scientific and archaeological research for the benefit of humanity.

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<sup>35</sup> 16 U.S.C. § 450rr (2006)

<sup>36</sup> There are mainly four cases as follows: 1) *R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel (Titanic 1996 II)*, 924 F. Supp. 714, 716 (E.D. Va. 1996). 2) *Lindsay v. Wrecked & Abandoned Vessel R.M.S. Titanic*, No. 97 Civ. 9248(HB), 1998 WL 557591, at \*2 (S.D.N.Y. Sept. 2, 1998). 3) *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 969–71 (4th Cir. 1999), cert. denied, 528 U.S. 825 (1999); 4) *R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel (Titanic 2000)*, No. 293CV902, 2000 WL 1946826, at \*1 (E.D. Va. Sept. 15, 2000).

<sup>37</sup> Matthew E. Zekala, *Liability and Salvage: Titanic Jurisprudence in United States Federal Court*, p. 1078, <http://law.lclark.edu/live/files/11855-lcb163art8zekala.pdf>, accessed 20 July 2013.

<sup>38</sup> 16 U.S.C. § 450rr-3: "...guidelines for research on, exploration of, and if appropriate, salvage of the R.M.S. Titanic.", *Guidelines for Research, Exploration and Salvage of RMS Titanic*, 66 Fed. Reg. 18905, (Apr. 12, 2001).

<sup>39</sup> *Agreement Concerning The shipwrecked vessel RMS Titanic, U.S.-U.K.-Can.-Fr.*, NOAA website, available at <http://www.gc.noaa.gov/documents/titanic-agreement.pdf>, accessed 20 July 2013.

<sup>40</sup> *Ibid*, Art.4.2: "Each Party agrees that the preferred management technique is *in situ* preservation and that project authorizations referred to in this Article involving recovery or excavation aimed at RMS Titanic and/or its artefacts should be granted only when justified by educational, scientific, or cultural interests, including the need to protect the integrity of RMS Titanic and/or its artefacts from a significant threat."

#### IV. ASSESSMENT OF THE DESIRABILITY AND FEASIBILITY OF THE UNESCO 2001 CONVENTION IN CHINA

##### A. Benefits for China from the Chinese UCH protection

The *UNESCO 2001 Convention* sets up reciprocal obligations between Member States and designs at the same time the UCH protective rights for its States Parties. Without this legal instrument, the 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 the UCH found in the Area are to be governed by the flag State.

First, the *UNESCO 2001 Convention* entitles coastal States in Art. 8 to protect the UCH within their contiguous zone.<sup>41</sup> In case that China becomes a State Party to this Convention, it would acquire a positive right in its favour to initiate activities on the UCH in its contiguous zone, more than defensive activities to prevent removing the UCH from the contiguous zone in the UNCLOS Art 303(2).<sup>42</sup>

Secondly, the *UNESCO 2001 Convention* entitles the States Parties to take all practicable measures to prevent immediate danger to the 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,<sup>43</sup> 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..."<sup>44</sup> in its EEZ. And

<sup>41</sup> Art. 8 of the *UNESCO 2001 Convention*: "States Parties may regulate and authorize activities directed at underwater cultural heritage within their contiguous zone."

<sup>42</sup> Art. 303(2) of the UNCLOS: "In order to control traffic in such objects, the coastal State may, in applying article 33, presume that their removal from the seabed in the zone referred to in that article without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article."

<sup>43</sup> Part 5 of the UNCLOS "Exclusive Economic Zone (Art. 55 to Art. 75)" and Part 6 "the continental shelf." (Art. 76 to Art. 85) govern the rights and jurisdiction of the coastal State and the rights and freedoms of other States.

<sup>44</sup> *China EEZ & CS Law* was adopted in 1998. According to its Art. 3: "The People's Republic of China exercises sovereign rights for the purpose of exploring, exploiting, conserving and managing natural resources in water areas above the seabed, in seabed and subsoil of the exclusive economic zone as well as for the purpose of other economic activities of exploitation and exploration such as utilization of seawater, sea current and wind power to produce energy. In Art. 6 it is stated that: "The competent authorities of the People's Republic of China shall have the power in its exclusive economic zone to conserve and manage the trans-boundary population, highly migrating fishes, marine mammals, anadromous spawning population originating in rivers of the People's Republic of China, and downstream spawning fishes spreading most of their life cycles in the water areas of the People's Republic of China."

the 1989 Chinese UCH regulation does not provide for the UCH protective provisions based on different marine zones. However, the 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 the 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 from other States Parties to handle looting or trafficking activities that happen in the Chinese EEZ in the South China Sea. More importantly, the Operational Guidelines (draft)<sup>45</sup> also provides a possibility of cooperation of States Parties with other intergovernmental organizations, for example with the Interpol, in order to prevent the UCH excavations or recovery contrary to this Convention.

Last but not least, the *UNESCO 2001 Convention* provides effective international cooperation mechanism for all States Parties in the protection of the UCH. China should take advantage of the information-sharing forum (Article 19), such as MACHU, to collect information with other State Parties about any Chinese shipwrecks discovered outside the Chinese territory. Otherwise, underwater archaeology and the UCH management are still recent sciences, especially regarding the training of underwater archaeologists. China should ask the Scientific and Technical Advisory Body for developing of the Chinese UCH excavation, management and protection methods, even for academic training on underwater archaeology, such as Unitwin network<sup>46</sup>.

## **B. The Conformity with the existing Chinese UCH laws and regulations**

After the consideration of the relevant domestic 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<sup>47</sup> upon China's ratifica-

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<sup>45</sup> "Each State Party takes all practicable measures to disseminate information, including where feasible through appropriate international databases, about underwater cultural heritage excavated or recovered contrary to this Convention or otherwise in violation of international law and cooperate to this goal with UNESCO and other intergovernmental and governmental organizations, for example Interpol." See *Convention On The Protection Of The Underwater Cultural Heritage Working Group On The Operational Guidelines*, UCH/09/2.MSP/220/5 Rev.2011, 25.

<sup>46</sup> That is a new University Twinning Programme (Unitwin) for Underwater Archaeology. It shall bring together universities teaching underwater archaeology and increase their cooperation. More details on <http://www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/research-and-training/unitwin-programme/#c492115>. Accessed 20 July 2013.

<sup>47</sup> China ratified the *1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* in 1989. China ratified the *1972 Convention concerning the Protection of the World Cultural and Natural Heritage* in 1985. China ratified the *1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects* in 1996. China ratified the *2003 Convention for the Safeguarding of the Intangible Cultural Heritage* in 2004. China ratified the *2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions* in 2007.

tion of the *UNESCO 2001 Convention*. Only the purpose of the *International Convention on Salvage (1989)* is contrary to the *UNESCO 2001 Convention*. However, recognizing the nature of the 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 UCH ownership provision and the principle of non-commercial exploitation<sup>48</sup> in its national regulations in the light of the *UNESCO 2001 Convention*.

### **1) *The necessary correction on the ownership of the UCH in Chinese legal system***

The *UNESCO 2001 Convention* does not regulate the ownership of the UCH. Still, its Art. 12(6) provides that: “Particular regard shall be paid to the preferential rights of States of cultural, historical or archaeological origin in respect of the underwater cultural heritage concerned.”

The *1989 Chinese UCH regulation* and *Law of P.R. China on the Protection of Cultural Relics* regulated the ownership of the UCH in China. Art. 5 of the *Law of P.R. China on the Protection of Cultural Relics* states that: “all cultural relics remaining underground or in the internal waters or territorial seas within the boundaries of the P.R. China are owned by the State.” Art. 1 of the *1989 Chinese UCH regulation* reads that the ownership on “underwater cultural relics” shall reside in China and that China shall exercise jurisdiction over them in two circumstances:

“(1) all the cultural relics of Chinese origin, or of unidentified origin, or of foreign origin that remain in the Chinese internal waters and territorial waters”;

(2) “cultural relics that are of Chinese origin or of unidentified origin that remain in sea areas outside the Chinese territorial waters but under Chinese jurisdiction according to the Chinese law”

These provisions are too vague to be applied and are inconsistent with the *UNESCO 2001 Convention*. By application of Art. 2 of the *China EEZ & CS Law*<sup>49</sup>, the areas of the sea “outside the Chinese territorial waters but under Chinese jurisdiction according to the Chinese law” can be understood as its EEZ and CZ.

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<sup>48</sup> Art. 2(7), *supra* note 34.

<sup>49</sup> In its Art. 2 the EEZ is defined as “the area adjacent to and beyond the territorial sea of the People’s Republic of China, extending as far as 200 nautical miles measured from the baseline that is used for calculating the breadth of the territorial sea.”, and the CS is defined as: “all natural extensions following the land territory of the State and beyond the territorial sea of the People’s Republic of China, extending as far as the bed and subsoil of the undersea area on the outer fringe of the continent; or extending as far as 200 nautical miles in case where it is not more than 200 nautical miles measured from the baseline, which is used for calculating the breadth of the territorial sea, to the outer fringe of the continent.”

These two situations and provisions concerned can be analysed in three aspects: First, there is no doubt that the ownership of this UCH belongs to P.R. China, if the UCH of Chinese origin is discovered in the Chinese internal waters, territorial sea, and even in its CZ or EEZ. Secondly, if the UCH of foreign origin, e.g. other state-owned shipwrecks or aircrafts, is found in the Chinese internal waters or territorial sea, the P.R. China shall exercise jurisdiction over them, but the Chinese authorities should inform the flag State of the discovery of the UCH in the Chinese territorial waters, according to the principle of territoriality and the sovereign right of state-owned shipwrecks, confirmed in the *UNESCO 2001 Convention*.<sup>50</sup> Thirdly, the question is whether it is justified that the Chinese authorities are entitled to own them, if the UCH of unidentified origin is found in the Chinese EEZ or CZ. Neither the UNCLOS nor the *UNESCO 2001 Convention* stipulate this ownership issue in their contexts. The UNCLOS<sup>51</sup> and the *China EEZ & CS Law*<sup>52</sup> only entitle the coastal state to exercise sovereign rights on “natural resources”. The unidentified UCH, for which the establishment of a verifiable link with a certain State through current technology is failed, is definitely a “part of the cultural heritage of humanity” rather than a “natural resource”. It is more reasonable to preserve it or dispose of it for the benefit of mankind as a whole, which what is provided in the UNCLOS and the *UNESCO 2001 Convention*.<sup>53</sup>

## 2) *Necessary corrections of the exploitation provision in the Chinese legal system*

There are two Chinese domestic legal acts referring to the UCH exploitation rules that are inconsistent with the principle of non-commercial exploitation in the *UNESCO 2001 Convention*. The first is *the Maritime Code of P.R. China (1992)*. As the State Party of the International Convention on Salvage, *the Maritime Code* respects the principles and purposes of this Convention<sup>54</sup>. In the *Chinese Maritime law* the criteria of reward with a view of encouraging salvage operations apply. The “value of the ship and other property salvaged”, “nature and extent of the dan-

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<sup>50</sup> Art. 7(1), *supra* note 24.

<sup>51</sup> Art. 56(1)(a) of UNCLOS: “In the exclusive economic zone, the coastal State has: (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources,” and Art. 77(1) of UNCLOS: “The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.”

<sup>52</sup> Art. 3, *Supra* note 44.

<sup>53</sup> Art. 2 (3) of the *2001 UNESCO Convention*: “States Parties shall preserve underwater cultural heritage for the benefit of humanity in conformity with the provisions of this Convention.” Art. 136 of UNCLOS: “All objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole...”

<sup>54</sup> International Convention on Salvage (1989) states: “conscious of the major contribution which efficient and timely salvage operations can make to the safety of vessels and other property in danger and to the protection of the environment.”

ger”, “skill and efforts of the salvors in salving the ship, other property and life”, and even the protection of maritime environment are taken into account.<sup>55</sup> Therefore, the aim of *The Maritime Code of P.R. China* is to protect the legitimate rights and interests of maritime transport and those pertaining to ships for promoting the development of maritime transport, economy and trade. The scientific, historical and archeological significance of sunken vessels are neglected here. Therefore, before becoming a party to the *UNESCO 2001 Convention*, a revision of the *1989 Chinese UCH regulation* should consider to add a provision that any activities relating to the UCH, to which this Regulation applies, shall not be subject to *The Maritime Code of P.R. China* unless it ensures that any recovery of the UCH achieves its maximum protection.

The other problem lies in the *1989 Chinese UCH regulation*. It sets up the rule of the exploitation and excavation activities of the 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 the 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 the *RMS Titanic*<sup>56</sup>. Therefore, the *1989 Chinese UCH regulation* should confirm and clarify that any activities on the UCH shall not consist in commercial exploitation or excavation.

## V. CONCLUSION

The UCH protection is a recent scientific and legal issue for every nation. After analyzing the new developments in China, it becomes obvious that isolated national UCH legal systems still face the problems in the effective protection of the UCH. Every State should realize the significance of the exchange of the UCH legal, technical information for national underwater cultural resources. The *2001 UNESCO Convention* provides for its States Parties an effective international cooperation scheme. Besides, the two principles of the Convention – the principle of the sovereign immunity of State vessels, and the principle of non-commercial exploitation are increasingly crystallizing into a general principle of law in the UCH protection. Therefore, individual inadequate national legal protection

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<sup>55</sup> Article 180 of *The Maritime Code of P.R. China*: “The reward shall be fixed with a view to encouraging salvage operations, taking into full account the following criteria: (1) Value of the ship and other property salvaged; (2) Skill and efforts of the salvors in preventing or minimizing the pollution damage to the environment; (4) Nature and extent of the danger; (5) Skill and efforts of the salvors in salving the ship, other property and life....”

<sup>56</sup> RMST actually earned substantial income with its exhibitions; the salvage of the *RMS Titanic* was a commercial activity at the beginning. See Matthew E. Zekala, p. 1103, *Supra* note 37.



systems for the 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 its national UCH under the legal instrument of the *UNESCO 2001 Convention*.

**Sažetak:**

**OD RAZLIČITOSTI DO USKLAĐENOSTI:  
POREDBENA ANALIZA RAZVOJA PRAVNE ZAŠTITE  
PODvodNE KULTURNE BAŠTINE U KINI I KONVENCIJA IZ 2001.**

*Pisci izlažu pregled nalazišta potonulih objekata na moru, ali i na kineskim rijekama, koji predstavljaju glavna nalazišta kineskoga kulturnog blaga. Daje se pregled kineskoga zakonodavstva glede očuvanja toga naslijeđa koje se počelo donositi u 1989. godini. Potom se izlažu glavni propisi iz Konvencije UNESCO-a o podvodnoj kulturnoj baštini iz 2001. godine. Pisci se zalažu da Kina postane strankom te Konvencije i da svoje zakonodavstvo prilagodi njezinim odredbama.*

*Pisci izlažu službene stavove Narodne Republike Kine o nekim kopnenim prostorima. Danas većina država u svijetu priznaje Tajvan dijelom te zemlje, ali je ostala sporna pripadnost koraljnih otočja Paracel i Spratley u Južnom kineskom moru. Njih svojataju i neke druge obalne države u tome moru.*

**Ključne riječi:** *podvodna kulturna baština (UCH); načelo suverenog imuniteta država; načelo nekomercijalne eksploatacije UCH; baza podataka UCH; "koordinirajuća država".*