



Contents lists available at SciVerse ScienceDirect

# Ocean & Coastal Management

journal homepage: [www.elsevier.com/locate/ocecoaman](http://www.elsevier.com/locate/ocecoaman)

## Commentary

# Chasing provenance: Legal dilemmas for protecting states with a verifiable link to underwater culture heritage



Jie Huang\*

Law School, Shanghai Jiaotong University, 800 Dongchuan Rd, Minhang District, Shanghai 200240, China

## ARTICLE INFO

### Article history:

Available online 7 December 2012

## ABSTRACT

This paper demonstrates the legal dilemmas for protecting rights of states with a verifiable link to underwater cultural heritage (UCH) at doctrinal and practical levels and from international and domestic perspectives. The dilemmas include vague definitions, time-consuming procedures, weak remedies for violation, jurisdiction conflicts, and legal vacuum. It argues that domestic legislations are limited in offering protection to states with a verifiable link to UCH. More international cooperation is necessary. However, existing international conventions are insufficient in this aspect. Therefore, states are strongly encouraged to conclude bilateral or regional UCH treaties to protect themselves.

© 2012 Elsevier Ltd. All rights reserved.

The recent *Odyssey Marine Exploration, Inc. v. The Unidentified Shipwrecked Vessel and ET. AL*<sup>1</sup> provokes a controversial issue: how to protect states with a verifiable link to a historical shipwreck. *Odyssey Marine Exploration* is a Florida-based deep-sea salvage company. It salvaged an estimated \$500 million silver and gold coins in a 19th century shipwreck on the high seas.<sup>2</sup> Spain claims that the shipwreck was a Spanish Royal Navy Frigate, *Nuestra Señora de las Mercedes* (hereinafter “*Mercedes*”), so it has title to the shipwreck and cargo. What distinguishes this case from other historical shipwreck salvage cases<sup>3</sup> is the intervention of Peru, as a state with a verifiable link to the wreck. Peru claimed that the coins were minted in Lima in 1803 and crafted with Peruvian silver from the mines of Potosi.<sup>4</sup> Compared with Spain, it was a State with cultural, historical, and archaeological link to the coins and the link was crucial for recognizing sovereign state interest.<sup>5</sup> Therefore, it has the better preferential rights to the salvaged treasure.<sup>6</sup>

However, the *Odyssey* court dismissed the case without touching Peru’s claim, because it held that the *Mercedes* is a Spanish warship and enjoy sovereign immunity. This case brings up an important question that has not been well explored in the current literature<sup>7</sup>: what rights a state may have over an underwater cultural heritage (hereinafter “UCH”)<sup>8</sup> if the state has a verifiable link to it, and what is the procedure to exercise these rights and remedies for violation.

This paper explores these questions at doctrinal and practical levels and from international and domestic perspectives. It demonstrates the legal dilemmas for protecting rights of states with a verifiable link to UCH and provides solutions. This paper can be divided into four parts. First, it shows that, under international conventions, a state with a verifiable link to UCH has three rights:

<sup>7</sup> Current legal literature on UCH mainly concentrate on: (1) whether admiralty law is applicable to UCH, e.g., Terence P. McQuown, 2000. An archaeological argument for the inapplicability of admiralty law in the disposition of historic shipwrecks, 26 *Wm. Mitchell L. Rev.* 289; Linsey Gleason, 2007. Possession and the abandoned shipwreck act: promoting the discovery of historic shipwrecks and preventing an unconstitutional destruction of federal admiralty jurisdiction, *Michigan State Law Review* 1017. (2) Jurisdiction of the UCH, e.g., Nathan Murphy, 2011. Scuttle the abandoned shipwreck act: The unnecessary unconstitutionality of American historic shipwreck preservation, 36 *Tulane Maritime Law Journal* 159; Mary Ann Becker, 2001. Regulating the business of culture: the abandoned shipwreck act – can preservationists, salvors, and divers sail in calmer waters, 51 *DePaul Law Review* 569 (3) Comments on the UNESCO Convention, e.g., Craig Forrest, 2008. Historic wreck salvage: an international perspective, 33 *Tulane Maritime Law Journal* 347; Markus Rau, 2002. The UNESCO convention on underwater cultural heritage and the international law of the sea. 6 *Max Planck Yearbook of United Nations Law* 387.

<sup>8</sup> According to art. 1.1.a of the UNESCO Convention, “underwater cultural heritage” means all traces of human existence having a cultural, historical or archaeological character which have been partially or totally underwater, periodically or continuously, for at least 100 years.

\* Tel.: +86 15800442213.

E-mail address: [humilityus@gmail.com](mailto:humilityus@gmail.com).

<sup>1</sup> *Odyssey Marine Exploration, Inc. v. The Unidentified Shipwrecked Vessel and ET. AL.*, 657 F.3d 1159 (2011). Certiorari denied on February 9, 2012, <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/11a745.htm>.

<sup>2</sup> “High seas” refers to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a state, or in the archipelagic waters of an archipelagic state according to art. 86 of the United Nation Convention on the Law of the Sea.

<sup>3</sup> Eg., *Sea hunt Inc v. Unidentified Shipwrecked Vessel or Vessels* 221 F 3d 634 (4th Cir. 2000).

<sup>4</sup> Peru’s Brief to the 11th Circuit, Case: 10-10319 Document: 01116027806, page 27 and 36.

<sup>5</sup> Id.

<sup>6</sup> In *Re: Peruvian Artifacts*, Professor John Morton Moore’s Affidavit to the US District Court Middle District of Florida, Case No. 8:07-CV-00614-SDM-MAP, P5.

the preferential right, the right of being noticed, and the right of declaring interest. However, the three rights suffer from vague wordings and lack of practical importance for its programmatic character. The second part analyzes the jurisdiction conflicts among domestic legislations regarding the rights of states with a verifiable link to UCH. The third part proposes that, compared with international conventions and domestic legislations, concluding bilateral or regional UCH treaties can provide a more feasible, effective and enforceable protective regime for states with a verifiable link to UCH. The fourth part is a conclusion.

## 1. International conventions

### 1.1. Definition of “a verifiable link”

Existing international conventions fail to clearly define “a verifiable link”. Relevant provisions of international conventions regarding states with a verifiable link to UCH are Article 149 of the United Nations Convention on the Law of the Sea (hereinafter “UNCLOS Convention”)<sup>9</sup> and Articles 6, 7, 9, 11 and 18 of the United Nations Educational, Scientific, and Cultural Organization Convention on the Protection of the Underwater Cultural Heritage<sup>10</sup> (hereinafter “UNESCO Convention”). The UNESCO Draft Operational Guidelines 2009 generally provides that the fact that a state party or one of its nationals are not or have not been owner of a certain artifact does not exclude the existence of a verifiable link.<sup>11</sup> For UCH located in the internal waters, archipelagic waters, territorial sea, and exclusive economic zone, as well as on the continental shelf of a member state, Articles 7 and 9 of the UNESCO Convention indicate that states with a verifiable link, especially a cultural, historical or archaeological link, to the UCH have rights to declare their interests in relevant UCH.<sup>12</sup> Accordingly, the verifiable link includes but not limited to a cultural, historical, or archaeological link. Article 149 of the UNCLOS Convention and Article 11 of the UNESCO Convention are concerned with UCH found in the Area. The former provides that “particular regard being paid to the preferential rights of the [s]tate or country of origin, or the [s]tate of cultural origin, or the [s]tate of historical and archaeological origin.” Therefore, the verifiable link includes not only cultural, historical or archaeological origin but also country origin. Nationality of a vessel or an aircraft is a country-origin link. The wordings of Article 7.3 of the UNESCO Convention also imply that flag states are among states with a verifiable link to UCH.<sup>13</sup> However, Article 11.4 of the UNESCO Convention indicates that the preferential rights of states of cultural, historical, or archaeological origin should be especially considered. State of origin is not included. Arguably, nationality of the vessel is a verifiable link. Flag states should be a state with a verifiable link to UCH. Therefore, the verifiable link should include cultural, historical, archaeological and country-origin link. Moreover, the exact meanings of cultural, historical, or archaeological origin are uncertain, which clearly invites disputes. Therefore, a commentator concerns that

[ambiguous definition of “a verifiable link”] may prize Pandora’s Box off its hinges. For instance, would this permit Lebanon to influence fieldwork on Phoenician wrecks being excavated off Spain, or Greece to claim rights over statuary looted by Roman aristocrats and lost during transshipment overseas in the 1st century AD? Would France be permitted to claim the return of the 700 kg Neupotz hoard of 1000 silver and bronze bowls and other vessels wrecked down the Rhine in Germany after being looted by the Alamanni tribe in the late 3rd century AD? (Kingsley, 2010)

### 1.2. Rights of states with a verifiable link to UCH

The UNCLOS Convention and the UNESCO Convention provide three rights to states with a verifiable link to UCH: the preferential right, the right of being noticed, and the right of declaring interests. These rights should be exercised for preservation and disposition of the UCH.

#### 1.2.1. Preferential right

The UNCLOS Convention requires states to cooperate in protecting UCH.<sup>14</sup> Its Article 149 provides preferential rights to states with a verifiable link.<sup>15</sup> Although the concept of preferential rights is not new in the law of the sea,<sup>16</sup> the contents of preferential rights regarding UCH is undefined (Dromgoole, 2003). Article 149 also does not provide a criterion to measure the priority ranking among the state or country of origin, the state of cultural origin, the state of historical and archaeological origin. Therefore, this Article suffers from vagueness and ambiguity (Beukes, 2001; Nordquist, 1989). Moreover, how to ensure the implementation of the preferential rights is unspecified, either. No remedy for violation is provided. Thus, this Article is of little practical effect (Rau, 2002).

#### 1.2.2. Right of being informed

In two circumstances, states with a verifiable link to UCH have the right of being informed.

First, if a state vessel or aircraft is found in internal waters, archipelagic waters and territorial sea of a state, this state, should inform the flag state or other states with a verifiable link.<sup>17</sup> The notice should describe the discovery of such vessel or aircraft.<sup>18</sup> Because the UNESCO Convention uses “should” instead of “shall”, literally speaking, the coast state has no obligation to inform the flag state or other states with a verifiable link. (Garabello, 2003) Moreover, it is unclear whether the notice merely contains the basic facts of the discovery or should provide detailed information such as the location and situation of the vessel or aircraft, its contents and cargo on board. Detailed information is necessary for states with a verifiable link to identify the UCH and its contents. In jurisdiction with limited discovery rules, lack of detailed information of UCH may create a barrier for states with a verifiable link to

<sup>9</sup> U.N. Convention on the Law of the Sea, 1833 U.N.T.S. 397.

<sup>10</sup> UNESCO Convention on the Protection of the Underwater Cultural Heritage, November 2, 2001, Art. 1, 41 I.L.M. 40 (2002).

<sup>11</sup> Chapter 2, art. 2.4 of UCH/09/2.MSP/220/5 REV. – page 17.

<sup>12</sup> See *infra* Section 1.2.3.

<sup>13</sup> This provision states: “[w]ithin 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>14</sup> Art. 303 of the UNCLOS Convention.

<sup>15</sup> United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS]. As of October 1, 2012, 164 states have ratified, acceded to, or succeeded to, the UNCLOS. [http://www.un.org/Depts/los/convention\\_agreements/convention\\_overview\\_convention.htm](http://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm).

<sup>16</sup> International Court of Justice in Fisheries Jurisdiction Cases (UK v. Iceland, General List No. 56, Jul 25, 1974) (Federal Republic of Germany v. Iceland, General List No. 56, Feb. 2, 1973) examined the nature and scope of preferential rights with reference to the preferential rights of a coastal state in a situation of dependency on coastal fisheries.

<sup>17</sup> Art. 7.3 of the UNESCO Convention.

<sup>18</sup> *Id.*

Download English Version:

<https://daneshyari.com/en/article/8061665>

Download Persian Version:

<https://daneshyari.com/article/8061665>

[Daneshyari.com](https://daneshyari.com)