Chasing Provenance: Legal Dilemmas for Protecting States with a Verifiable

Link to Underwater Culture Heritage

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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.

The recent *Odyssey Marine Exploration, Inc. v. The Unidentified Shipwrecked Vessel and ET. AL*¹ 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.² Spain claims that the shipwreck was a Spanish Royal Navy Frigate, *Nuestra Senora de las Mercedes* (hereinafter “Mercedes”), so it has title to the shipwreck and cargo. What

¹ *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>.

² “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.

distinguishes this case from other historical shipwreck salvage cases³ 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.⁴ 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.⁵ Therefore, it has the better preferential rights to the salvaged treasure.⁶ However, the Odyssey court dismissed the case without touching Peru's claim, because 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 (McQuown, 2000; et al.) : what rights a state may have over an underwater cultural heritage (hereinafter "UCH")⁷ 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: the preferential right, the right of being noticed, and the right of declaring interest. However, the three rights suffer

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

⁴ Peru's Brief to the 11th Circuit, Case: 10-10319 Document: 01116027806, page 27 and 36.

⁵ Id.

⁶ 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.

⁷ 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 under water, periodically or continuously, for at least 100 years.

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 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”)⁸ 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 Heritage⁹ (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.¹⁰ 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

⁸ U.N. Convention on the Law of the Sea, 1833 U.N.T.S. 397.

⁹ UNESCO Convention on the Protection of the Underwater Cultural Heritage, November 2, 2001, Art. 1, 41 I.L.M. 40 (2002).

¹⁰ Chapter 2, art. 2.4 of UCH/09/2.MSP/220/5 REV. – page 17.

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.¹¹ 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.¹² 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

¹¹ See *infra* Section 1.2.3.

¹² 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.”

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 700kg Neupotz hoard of 1,000 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.¹³ Its Article 149 provides preferential rights to states with a verifiable link.¹⁴ Although the concept of preferential rights is not new in the law of the sea,¹⁵ 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). 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

¹³ Art. 303 of the UNCLOS Convention.

¹⁴ 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.

¹⁵ 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.

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.¹⁶ The notice should describe the discovery of such vessel or aircraft.¹⁷ 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 bring or participate in a court action.¹⁸ Moreover, the Convention does not require the coastal state to inform states with a verifiable link the preservation or disposal plan of the vessel or aircraft. Therefore, apparently the coastal state has no obligation to keep states with a verifiable link informed with the progress of the preservation or disposition of the UCH. Notably, if the discovered UCH is not a state vessel or

¹⁶ Art. 7.3 of the UNESCO Convention.

¹⁷ Id.

¹⁸ Domestic civil litigation laws generally impose pleading requirements for a plaintiff or an intervening party, eg., art. 119 of Chinese Civil Procedural Law (2012) requires that the plaintiff shall have direct interests with the subject matter of the case and shall provide detailed facts, reasons and claims in the pleading.

aircraft, coastal states do not need to inform states with a verifiable link under the UNESCO Convention.¹⁹

Second, Article 18 of the UNESCO Convention provides that, if a state party to the UNESCO Convention seizes of UCH in its territory that has been recovered in a manner not in conformity with this Convention, the state party shall notify the Director-General of UNESCO and any other state with a verifiable link to the UCH.²⁰ When the state party that has seized the UCH decides the disposition of such UCH, it should consider the interests of any state with a verifiable link.²¹ Therefore, the seizing state needs to determine which state has a verifiable link; however, no guideline is provided for such a determination. This Article also fails to indicate what information should be included in the notice and whether the obligation of notice is continuous or only one-off. Therefore, Article 18 may probably create controversies in practice.

1.2.3. Right of Declaring Interests

Besides the right of being informed, the UNESCO Convention also indicates two circumstances where states with a verifiable link to UCH have the right of declaring interests.

First, according to Article 9 of the UNESCO Convention, for UCH found in exclusive economic zone or on continental shelf of a state party, any other state party with a verifiable link to the UCH may declare to the state party “its interest in being

¹⁹“State vessels and aircraft” means warships, and other vessels or aircraft that were owned or operated by a State and used, at the time of sinking, only for government non-commercial purposes, that are identified as such and that meet the definition of underwater cultural heritage, art. 1.8 of the UNESCO Convention.

²⁰ Art. 18 of the UNESCO Convention.

²¹ Id.

consulted on how to ensure the effective protection of that UCH”.²² Although the Convention does not impose the state party an obligation to respond to the declaration in due time and due procedure, the Draft Operational Guidelines to the UNESCO Convention provide that generally the coastal state should function as a coordinating state among all interested states.²³ The coordinating state should consult the interested state within two months from receipt of their declaration in writing or in electronic form.²⁴ The decision on how to best protect the UCH concerned should be taken by consensus and in due consideration of the cultural, historical or archaeological origin of the concerned heritage and the links to the consulted states party.²⁵

Second, according to Article 11 of the UNESCO Convention, any state party may declare to the UNESCO Director-General its interest in being consulted on how to ensure the effective protection of UCH found in the Area.²⁶ Such declaration shall be based on a verifiable link to the UCH concerned.²⁷ Therefore, for UCH in the Area, a state with a verifiable link to the UCH should declare its interests to the UNESCO Director-General, not to the state party whose national, or a vessel flying its flag discovers or intends to engage in activities directed at the UCH concerned.²⁸ The Director-General invites, as soon as reasonably possible, all states parties which have declared an interest under Article 11.4 of the Convention to consult on how to ensure

²² Art. 9 of the UNESCO Convention.

²³ UCH/09/2.MSP/220/5 REV. – page 19. The Guidelines also provides rule to appoint a coordinating state in case that the coastal state does not want to serve as a coordinating state.

²⁴ UCH/09/2.MSP/220/5 REV. – page 20.

²⁵ Id.

²⁶ “Area” means the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction, art. 2.5 of the UNESCO Convention.

²⁷ Art. 11 of the UNESCO Convention.

²⁸ UCH/09/2.MSP/220/5 REV. – page 20.

the effective protection of UCH located in the Area, and to appoint a coordinating state.²⁹ The appointment will consider the readiness and capacity of a state party to act as coordinating state; and the preferential rights of the consulted states parties resulting from the cultural, historical or archaeological origin of the concerned UCH.³⁰ According to the UNESCO Draft Operational Guidelines, the state party, who declares either to the coastal state party or to the Director-General its interest to be consulted, should inform what is its verifiable link to the UCH concerned.³¹ The declaring state party should do so in accompanying its declaration by a) the results of scientific expertise; b) historic documentation; or c) any other adequate documentation.³² However, this coordinating information sharing system has been deemed as “unfortunate” because it is “overly bureaucratic and potentially time consuming”(Forrest, 2002).

1.3. Insufficiencies of Existing International Conventions

In three aspects, the existing international conventions are insufficient to protect the rights of states with a verifiable link to UCH. First, many basic concepts are unclear. For example, what is the basis for determining a verifiable link to UCH? Which body should be responsible for determination? What does the preferential right mean? Moreover, the right of being informed and the right of declaring interests are procedural rights and do not provide substantive protection for states with a verifiable link. Remedies for violation are also not provided. Second, under the UNESCO

²⁹ Id.

³⁰ UCH/09/2.MSP/220/5 REV. – page 21.

³¹ Id., page 17.

³² Id.

Convention, the location of UCH determines the rights of states with a verifiable link to UCH. For UCH found in places other than internal waters, archipelagic waters and territorial sea, a state party has no obligation to inform any state with a verifiable link to the UCH. Instead, the latter should take initiative to inform the former its interest in UCH and provide relevant evidence to prove the verifiable link. Thus, right of declaring interests can also be regarded as an obligation. However, the UNESCO Convention does not require costal states³³ and discovering states³⁴ to provide detailed information of UCH to states with a verifiable link. The UNESCO Draft Operational Guidelines provides that if costal states or discovering states give only little information on an UCH site or artifact, it may also only request a small amount of proof concerning the verifiable link from the state who declares its interest in being consulted concerning the UCH protection.³⁵ It is unclear whether this “teeth-for-teeth” clause can lead to cooperation. It may result in a deadlock between states. The third insufficiency of existing international law is that states with a verifiable link to UCH have no rights to the UCH, if it is not a state vessel or aircraft and if it is found in the internal waters, archipelagic waters and territorial sea of another state. However, in practice, states may have reasonable cultural, historical, and archaeological interests in a commercial vessel wreck located in internal waters, archipelagic waters and territorial sea of another state.

2. Domestic Legislation

³³ In case that UCH is found in exclusive economic zone or on continental shelf of the state.

³⁴ In case that a state whose national, or a vessel flying its flag discovers or intends to engage in activities directed at UCH.

³⁵ Chapter 2, art. 2.4 of UCH/09/2.MSP/220/5 REV. – page 17.

Some states enact domestic legislation to protect their rights when they have a verifiable link to a UCH located outside of their territorial jurisdiction. These national laws create jurisdiction conflicts and their extra-territorial application may be deemed as an intervention to foreign sovereignty. For example, Chinese Regulation Concerning the Management and Protection of Underwater Cultural Relics provides that China has right to identify the owner of UCH³⁶ in the contiguous zone, the exclusive economic zone, and the continental shelf of a foreign state or on the high seas as long as the UCH is with a Chinese origin.³⁷ The concept of Chinese origin is undefined. The underlying policy is to expand the scope of application of the Regulation. This is because as a country of thousand-year history, China may have verifiable links to many UCH spread out in the world. Archaeologists have estimated that more than 100 sites of UCH scattered across China's coastline, and particularly on the "Marine Silk Road" in the South China Sea.³⁸ The majority part of "Marine Silk Road" is outside of Chinese territory, so disputes regarding the title to the vessels and cargo on board may possibly occur. One goal of the Regulation is to protect

³⁶ Chinese Regulation Concerning the Management and Protection of Underwater Cultural Relics defines "cultural relics" as human cultural heritage that has historic, artistic and scientific values but does not cover objects that have remained underwater since 1911 and have nothing to do with important historical events, revolutionary movements or renowned personages. The "cultural relics" under Chinese law is different from the UCH under the UNESCO Convention. UCH may also be defined differently under other domestic legislations. These differences do not affect the arguments of this article. Therefore, for the convenience of writing, this article use the definition of the "UCH" under the UNESCO Convention to generally refer to UCH regardless of the different definition under domestic laws.

³⁷ Arts. 2 and 3 of the Regulations of the People's Republic of China Concerning the Management and Protection of Underwater Cultural Relics, promulgated by the State Council of the People's Republic of China on October 20, 1989. <http://www.china.org.cn/english/zhuanti/3represents/76269.htm>.

³⁸ Many Sunken Ships in South China Sea. http://news.xinhuanet.com/collection/2007-05/15/content_6103481_1.htm. Treasure Wait in the Deep. <http://english.cntv.cn/program/culturexpress/20100513/101468.shtml>. The Marine Silk Road can be dated back to Emperor Han Wudi (reigned 140-87 BC), who open the route to connect China with Roman Empire via India. After the Tang Dynasty (618-901 AD), the Marine Silk Road started from Guangzhou or Quanzhou, across the South China Sea, connecting countries throughout Southeast Asia, South Asia, West Asia, Africa and even Europe. The first ancient vessel to be discovered on the "Marine Silk Road" is "South China Sea No. 1[Nanhai No1]." For more information of Maritime Silk Road, see http://www.chinaculture.org/08olympics/2008-07/09/content_136318.htm.

China's rights when it has a verifiable link to UCH located outside of its territorial jurisdiction. If UCH with a verifiable link to China is found in the contiguous zone, the exclusive economic zone, and the continental shelf of a foreign state, according to the UNESCO Convention, China only has the right to declare interests. However, according to Chinese law, China has right to identify the owner of the UCH. Therefore, the Chinese law goes beyond the protection scheme under the UNESCO Convention. Moreover, Article 6 of the Regulation further provides that any organization or individual that has discovered UCH by any means shall report promptly to the China State Administration of Cultural Heritage, and those that have been excavated shall be turned in promptly to the China State Administration of Cultural Heritage to be identified and assessed. The extra-territorial application of this Article may probably be rejected by other states.

Moreover, some states have enacted laws to protect its military crafts sunken worldwide. Nationality is the verifiable link between a state and a sunken military craft (if it is qualified to be UCH). One typical example is the U.S. Sunken Military Craft Act prohibits unauthorized activities directed at sunken U.S. military crafts.³⁹ Accordingly, no person shall engage in or attempt to engage in any activity directed at a sunken military craft that disturbs, removes, or injures any sunken military craft except in circumstances permitted by the Act, regardless where the craft is located.⁴⁰ The worldwide immunity of U.S. sunken military crafts from jurisdiction of foreign

³⁹ Section 1402 of the Sunken Military Craft Act, Pub. L. No. 108-375, §§ 1401-08, 118 Stat. 1811, 2094-98 (2004). For comments, see Cory T. Stuart, 2011. The wake of discovery---a primer on legal, historical, and practical shipwreck salvage dynamics, 9 Loy. Mar. L.J. 45, 68-69.

⁴⁰ Id., sec. 1042.

courts may bring tension with foreign states. For example, Chinese Regulation Concerning the Management and Protection of Underwater Cultural Relics indicates that China has title and jurisdiction to all the UCH of foreign origin that remain in the Chinese inland waters and territorial waters. Accordingly, China may claim title to and exercise jurisdiction over U.S. warship wrecks as long as these wrecks are UCH.

The majority of states do not enact any domestic laws to protect their rights when they have a verifiable link to UCH located outside of their territorial jurisdiction.⁴¹ Very few states promise to inform foreign states with a verifiable link to UCH if they found the UCH in its territorial jurisdictions. Therefore, existing domestic laws are insufficient, because they may either create jurisdiction conflicts or leave legislative gaps for protecting states with a verifiable link to UCH.

3. Solution

Delineating rights of states with a verifiable link to UCH goes beyond the efficacy of domestic legislation and requires international cooperation. To some extent, states with a verifiable link to UCH outside of their territorial jurisdiction may be better protected when more states accede to the UNESCO Convention. For example, in order to meet the international best practice as set out in the Annex of the UNESCO Convention, states inside of the Commonwealth of Australia concluded the Australian Underwater Cultural Heritage Intergovernmental Agreement.⁴² Its Article 4.3 provides that the Commonwealth will notify foreign states of the location of any

⁴¹ Eg., the U.K. Protection of Wrecks Act (1973), U.S. Marine Protection, Research, & Sanctuaries Act of 1972, U.S. National Historic Preservation Act of 1966 (amended in 2006), U.S. Abandoned Shipwreck Act of 1987.

⁴² Art. 4.1 of the Australian Underwater Cultural Heritage Intergovernmental Agreement. This Agreement aims to establish roles and responsibilities for the identification, protection, management, conservation and interpretation of Australia's UCH. It was concluded on May 31, 2010. Notably, this Agreement is not binding upon the contracting parties.

flagged shipwrecks or aircraft in waters from adjacent to the Australian coast to the outer edge of the continental shelf.

However, for three reasons, it is doubtful whether the UNESCO Convention can ultimately help resolve the current legal dilemmas for protecting states with a verifiable link. First, as indicated in Section One, the UNESCO Convention fails to clarify the basic concepts and rights concerning states with a verifiable link to UCH. Second, while the UNESCO Convention has made admirable efforts to protect UCH and has become effective, its future is still uncertain (Neil, 2010; Regan, 2006). States with a verifiable link to UCH may be landlocked countries, and they are very cautious to the *in situ* protection under the UNESCO Convention (Gonzales, 2005). Therefore, they may not want to ratify the Convention. A significant number of archaeologically, historically or culturally important shipwrecks are warships (Forrest, 2012).

Traditional maritime powers, such as the U.K. and France, may have many flagged wrecks lying on the high seas or in the territorial waters of other states (Garabello, 2003 page 131). They do not agree with the *in situ* protection under the UNESCO Convention either. It is still debatable whether, based upon customary international law, sunken warships should be immune from law of salvage and law of finds except that the original, owning sovereign explicitly abandoned them (Bederman, 2000; Aznar-Gomez, 2003). Moreover, when states with a verifiable link to UCH are former colonies, the thorny issue is how to balance the rights of former colonies (eg., as Peru in the Odyssey case) and former metropolitan states (eg., as Spain in the Odyssey case). The international policy concerning self-determination and colonialism does

not lead to a wide-accepted consensus that heritages pillaged from colonies should be returned to the custody of newly independent states. And the UNESCO Convention also fails to address this issue. Third, the UNESCO Convention encourages states to enter into bilateral, regional, or other multilateral UCH agreements.⁴³ The agreements should be open to states with a verifiable link to the UCH concerned.⁴⁴ However, a state with a verifiable link joining such an agreement will be perceived as an invitee, rather than a partner on an equal footing with signature states (Gonzales, 2005). Therefore, it is uncertain whether states with a verifiable link to UCH can be well protected by the UNESCO Convention.

Because existing international conventions and domestic legislations are insufficient, landlocked states, maritime powers, independent colonial states, and etc. should actively conclude bilateral and regional treaties that delineate their rights when they have a verifiable link to UCH located in the territory of their contracting party or found by nationals or flagged vessels of their contracting party. Currently, this may be the most feasible way to create a protective regime for states with a verifiable link. Bilateral and regional treaties can be best catered to the special needs of member states. They provide an opportunity to clarify the concept of “verifiable link”, the procedure of notice, way of cooperation, remedies of violation, and even costs allocation in information exchange and preservation projects for UCH. For example, Agreement between the Netherlands and Australia Concerning Old Dutch Shipwreck

⁴³ The “agreements” should include formal and informal understandings, MEMO, treaties and etc.

⁴⁴ Art. 6.2 of the UNESCO Convention.

(Johnson, 2000)⁴⁵ provides a legal scheme to protect vessels that belonged to the Dutch "Vereenigde Oostindische Compagnie" (hereinafter "VOC") and were wrecked on or off the coast of Western Australia.⁴⁶ By this Agreement, Australia recognizes the Netherlands as the present legal successor to the VOC, so as to resolve potentially controversial state succession issue,⁴⁷ and the Netherlands transfers all its right, title and interest in and to wrecked vessels of the VOC 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.⁴⁸ Australia recognizes that the Netherlands has a continuing interest, particularly for historical and other cultural purposes, in articles recovered from any of the VOC vessels.⁴⁹ Australia shall set up a Committee to determine the disposition and subsequent ownership of the recovered articles between the Netherlands, Australia and the State of Western Australia.⁵⁰ If the members of the Committee cannot come to an agreement on the disposition of particular articles, Australia and the Netherlands shall appoint an independent consultant to report on the matter in issue and the report shall be referred to the Committee for re-consideration of the matter.⁵¹ If, on considering the consultant's report on a matter, the members of the Committee cannot come to an agreement on the disposition of the recovered articles, the matter will be referred to the Government of the Netherlands and the Government of Australia, which will settle the matter by negotiation.⁵² Regarding

⁴⁵ The Hague, Nov 6, 1972. (Australian Treaty Series, 1972, No.18).

⁴⁶ A of Agreement between the Netherlands and Australia Concerning Old Dutch Shipwreck

⁴⁷ Id., B.

⁴⁸ Id., art. 1.

⁴⁹ Id., art. 4.

⁵⁰ Id., art. 4.

⁵¹ Id., art. 8.

⁵² Id., art. 9.

cost allocation, the Agreement provides that Australia shall make no claim on the Netherlands for reimbursement of any costs incurred in searching for any VOC vessels or in recovering any articles from those vessels.⁵³ Expenditure incurred by the Committee in the performance of its work shall be shared between the two Parties represented on the Committee, the share to be borne by the Netherlands being one third and that by Australia two thirds.⁵⁴ Australia and the Netherlands also reached an Arrangement Setting Out the Guiding Principles for the Committee to Determine the Disposition of Material from the Shipwrecks of Dutch East India Company Vessels off the Coast of Western Australia.⁵⁵ The Arrangement further provides detailed requirements for representative collections of UCH, considerations governing the partition of archaeological collections, treatment of material recovered, code of operation, statistical samples, less common or rare objects, and etc. Therefore, this Agreement goes beyond the protective scheme of the UNESCO Convention, and helps the Netherlands to protect its rights when it has a verifiable link with a UCH located in Australian jurisdiction.

Compared with domestic laws, treaties can create binding international obligations and overcome the difficulties of extra-territorial application confronted by domestic laws. For example, the success of Spain in the *Odyssey* case largely comes from its 1902 Treaty of Friendship and General Relations with the U.S. Article 10 of this Treaty provides that “[i]n cases of shipwreck, damages at sea, or forced putting in, each party shall afford to the vessels of the other, whether belonging to the State or to

⁵³ Id., art. 3.

⁵⁴ Id., art. 7.

⁵⁵ http://www.austlii.edu.au/au/legis/cth/consol_act/hsa1976235/sch1.html.

individuals, the same assistance and protection and the same immunities which would have been granted to its own vessels in similar cases.”⁵⁶ Because of this treaty obligation, the U.S. has to afford sunken Spanish warships the same protections and immunities from implied abandonment and uncontested access and salvage as a sunken United States warship would receive according to the U.S. Sunken Military Act. Imagine that Spain had not signed the 1902 Treaty with the U.S. and had only enacted a domestic law to protect the sovereign immunity of its warship wreck, the U.S. court would possibly reject the extra-territorial application of the Spanish law. Consequently, the *Odyssey* case would have a very different ending.

A small number of bilateral agreements on specific UCH already exist. Examples include Exchange of Notes between South Africa and the United Kingdom Concerning the Regulation of the Terms of Settlement of the Salvaging of the Wreck of HMS *Birkenhead*,⁵⁷ Agreement Between the Government of the United States of America and the Government of French Republic Concerning the Wreck of the CSS *Alabama*,⁵⁸ and Memorandum of Understanding between the Government of Great Britain and Canada pertaining to the Shipwrecks HMS *Erebus* and HMS *Terror*.⁵⁹ The Agreement between the Republic of Finland, the Republic of Estonia and the Kingdom of Sweden Regarding the M/S *Estonia* is also an example.⁶⁰ However, the number of UCH treaties is still small, compared with bilateral treaties concerning

⁵⁶ This Treaty was signed on July 3, 1902 and came into force on April 14, 1903.

⁵⁷ Pretoria, Sep 22, 1989 (in United Kingdom Treaty Series, 1990, No. 3); South Africa Government Gazette No. 12117 of Oct. 6, 1989, notice No. 2150; reprinted in (1990) *IJECL* 405.

⁵⁸ Paris, Oct. 3, 1989 (in *Journal Officiel de la Republique Francaise* du 23 decembre 1989, p. 15.996; reprinted in (1989) *RGDIP* 975 and in U.N., *Law of the Sea Bulletin*, 1992, p. 26).

⁵⁹ Concluded on August 5-8, 1997.

⁶⁰ Tallinn, Feb 23, 1995. With additional protocol of Apr. 26, 1996. Sunk in 1994, *Estonia* is not a UCH, but it may become one in the future.

prohibiting and preventing illicit import, export and transfer of ownership of cultural properties. Some of the latter treaties actually cover the protection of UCH. For instance, the Bilateral Agreement between China and Peru on Protection and Restitution of Cultural Heritages prohibits a party's looted cultural, archaeological, artistic, and historical heritages from being illegally exported or transported into the territory of the other party.⁶¹ This Agreement provides a detailed list of cultural, archaeological, artistic, and historical heritages, and UCH is one of them.⁶² It further provides that at the request of one party, the other party shall, within its capacity, use legal means to regain and restitute cultural, archaeological, artistic, and historical properties, which are looted in one party's territory, illegally exported or transferred into the other party's territory in accordance with its domestic laws and international conventions.⁶³ It also specifies how to allocate costs for recovering and returning heritages between the requesting and requested parties.⁶⁴ However, this Agreement does not define UCH. Therefore, it is unclear if the Odyssey case happened in China, whether Chinese court would invoke this Agreement and transfer the title to the salvaged coins to Peru. Nevertheless, this Agreement will enhance China-Peru cooperation in UCH preservation. States may consider adapting or expanding their existing bilateral or regional agreements on protection and restitution of cultural

⁶¹ Art. 1 of the bilateral Agreement between People's Republic of China and Peru on Protection and Restitution of Cultural Heritages. This bilateral Agreement was concluded according to the principles of Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970), Convention Concerning the Protection of the World Cultural and Natural Heritage (1972), and Unidroit Convention on Stolen or Illegally Exported Cultural Objects (1995).

⁶² Art. 2 of the bilateral Agreement between People's Republic of China and Peru on Protection and Restitution of Cultural Heritages.

⁶³ Id., art. 3.

⁶⁴ Id.

heritages to UCH, so as to better protect their rights when they have a verifiable link to UCH located in the territory of the contracting party.

Many commentators have already recognized the advantages of bilateral or regional UCH treaties versus an international convention (Forrest, 2008, page 544; Gonzales, 2005, page 310). Parties to a bilateral or regional treaty may be more willing to offer reciprocity than those in an international convention. Bilateral or regional treaties are often concluded among states sharing either geographical proximity or cultural, traditional or archaeological values. With fewer member states, a bilateral or regional treaty is easier to negotiate than an international convention. Especially, when considering the insufficiencies of the UNESCO Convention for protecting states with a verifiable link to UCH, states are strongly encouraged to take initiative to conclude bilateral or regional UCH treaties to protect themselves.

4. Conclusion

Protecting UCH has been described as “the last major issue of a global nature that needs to be resolved in the Law of the Sea” (Couper, 1996; Frost, 2004). Protecting states with a verifiable link may be one of the most controversial topics for UCH. The Odyssey case demonstrates the legal dilemmas for protecting states with a verifiable link to UCH. It also teaches us that the insufficiencies of international conventions and limitations of the domestic legislations cannot provide a satisfactory solution. Arguably, states should take initiative to conclude bilateral or regional treaties that delineate what rights they have over UCH if they have a verifiable link to it, and what is the procedure to exercise these rights and remedies for violation.

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