

## Cross-Strait Cooperation for the Protection of Underwater Cultural Heritage in the Taiwan Strait: A Legal Perspective

ความร่วมมือข้ามช่องแคบในการป้องกันมรดกทางวัฒนธรรมใต้น้ำ

ในช่องแคบไต้หวัน: มุมมองทางกฎหมาย

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### Abstract

The Taiwan Strait, which runs between China and Chinese Taiwan, has been used as a seaborne trade route since ancient times. It is estimated that numerous archeological and historical objects regarded as underwater cultural heritage (UCH) remain in this area. Nevertheless, recently, joint conduction of investigation, exploration, protection, and excavation by competent authorities of China and Chinese Taiwan has not been possible due to political confrontation between the two sides. On the other hand, illegal excavation or exploration by treasure hunters and other private parties may occur easily.

To effectively protect UCH in this area, cooperation between the two sides is both essential and necessary. Nevertheless, achieving such cooperation between China and Chinese Taiwan will be difficult if their current laws remain inconsistent. The author found that there were at least five significant differences between the two sides' laws which should be harmonized. In addition, enhancing cooperation in terms of UCH protection in this area must involve the application of various approaches such as exchanging information, establishing organization, setting up a dispute settlement mechanism, and creating cooperation in law enforcement.

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**Keywords:** The Taiwan Strait, Underwater Cultural Heritage, Cross-Strait Cooperation

### บทคัดย่อ

ช่องแคบไต้หวันซึ่งไหลผ่านจีน (แผ่นดินใหญ่) และจีนไต้หวันถูกใช้เป็นเส้นทางการค้าทางทะเลตั้งแต่อดีตจนถึงปัจจุบัน ช่องแคบนี้ถูกคาดการณ์ว่าจะมีวัตถุทางประวัติศาสตร์และทางโบราณคดีซึ่งถูกเรียกว่าเป็นมรดกทางวัฒนธรรมใต้น้ำอยู่เป็นจำนวนมาก อย่างไรก็ตามในปัจจุบันนี้ความร่วมมือในการสืบสวน การสำรวจ การป้องกัน และการขุดค้นโดยเจ้าหน้าที่ผู้มีอำนาจของจีน (แผ่นดินใหญ่) และจีนไต้หวันไม่สามารถจะดำเนินการได้ เนื่องจากปัญหาทางการเมืองระหว่างสองฝั่ง ในขณะที่เดียวกันการลักลอบขุดค้นและสำรวจโดยนักล่าสมบัติและบริษัทเอกชนอาจเกิดขึ้นได้โดยง่าย

เพื่อการป้องกันมรดกทางวัฒนธรรมใต้น้ำในบริเวณนี้ ความร่วมมือระหว่างสองฝั่งเป็นสิ่งสำคัญและมีความจำเป็น อย่างไรก็ตาม การบรรลุความสำเร็จในความร่วมมือระหว่างจีน (แผ่นดินใหญ่) และจีนไต้หวันอาจเป็นเรื่องที่ยากหากกฎหมายภายในของจีน (แผ่นดินใหญ่) และจีนไต้หวันยังไม่สอดคล้องกัน ผู้เขียนค้นพบว่ากฎหมายภายในของจีน (แผ่นดินใหญ่) และจีนไต้หวันมี 5 ส่วนสำคัญที่ยังไม่สอดคล้องกันซึ่งควรได้รับการปรับปรุงให้สอดคล้องกันยิ่งกว่านั้นการยกระดับความร่วมมือของสองฝั่งช่องแคบไต้หวันยังต้องมีการปรับใช้แนวทางต่าง ๆ เช่น การแลกเปลี่ยนข้อมูล การจัดตั้งองค์กรกลาง การจัดทำกลไกการระงับข้อพิพาท และการสร้างความร่วมมือในการบังคับใช้กฎหมาย

**คำสำคัญ:** ช่องแคบไต้หวัน, มรดกทางวัฒนธรรมใต้น้ำ, ความร่วมมือข้ามช่องแคบ

### 1. Introduction

The Taiwan Strait is an excellent place to study underwater archaeology. Because many traded pieces of porcelain from the Song-Yuan Dynasties and Ming-Qing Dynasties have been uncovered in Penghu,<sup>1</sup> an archipelago of 90 islands and islets in the Taiwan Strait.<sup>2</sup>

The protection of underwater cultural heritage (UCH) in the Taiwan Strait is extremely difficult, not only because of the geographical and

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<sup>1</sup> Lee-fang Li, *Underwater Cultural Heritage Conservation Policy and International Cooperation in Taiwan*, China Oceans Law Review, Vol. 2010, No. 2, p. 140.

<sup>2</sup> Available at: <https://en.wikipedia.org/wiki/Penghu> (last visited 18 March 2018).

hydrological challenges of the region but also the presence of political and legislative conditions between China and Chinese Taiwan, which remain relatively segregated.<sup>3</sup>

In light of international law and to protect UCH effectively, the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage (the 2001 UNESCO Convention) emphasizes that cooperation among States, international organizations, and individuals is essential.<sup>4</sup> It further stresses that State parties shall cooperate and assist each other in the protection and management of UCH, including collaboration in the investigation, excavation, documentation, conservation, study and presentation of such heritage.<sup>5</sup> The 2001 UNESCO Convention also calls for sharing relevant information and the prevention of illegal wrecking.<sup>6</sup> The protection of UCH in the Taiwan Strait should also be conducted through cooperation in those matters between both sides.

China and Chinese Taiwan have collaborative experience in several fields,<sup>7</sup> including UCH protection. Specifically, the National Conservation Center for Underwater Cultural Heritage of China visited, in August 2011, the Taiwan Research Institute, Southern Office of Headquarters Administration of Cultural Affairs, Taiwan Undersea Technology Association, Penghu Underwater Archaeology Working Station and other institutes for profound learning on UCH management systems and implementation status in Taiwan to promote

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<sup>3</sup> LI Jiali, Cross-Strait Cooperation for the Protection of Underwater Cultural Heritage, *China Oceans Law Review*, Vol. 2007, No. 2, p. 441.

<sup>4</sup> Wen-Yan Chiau, Environmental Impact Assessment and Protection of Underwater Cultural Heritage in the Port of Taipei, as Well as Prospects for Cooperation between the Two Sides of the Taiwan Strait, *China Oceans Law Review*, Vol. 2010, No. 2, p. 17. ; Lee-fang Li, Underwater Cultural Heritage Conservation Policy and International Cooperation in Taiwan, *China Oceans Law Review*, Vol. 2010, No. 2, p. 60. ; The 2001 UNESCO Convention art. 6.

<sup>5</sup> The 2001 UNESCO Convention art. 19 (1).

<sup>6</sup> The 2001 UNESCO Convention art. 19 (3).

<sup>7</sup> Taiwan Affairs Office of the State Council PRC, available at: <http://www.gwytb.gov.cn/lhjl/laxy/> (last visited March 20, 2018).

exchange and cooperation in the field of UCH conservation between both sides.<sup>8</sup> Subsequently, the State Administration of Cultural Heritage Center for Underwater Cultural Heritage of China has established cooperative relationships with a variety of countries and regions, including France, Croatia, Italy, the Philippines, the Republic of Korea, and Chinese Taiwan.<sup>9</sup> Therefore, strengthening cooperation between the two sides for UCH protection is imaginable.

The most important things necessary in order for cooperation on UCH protection to be effective between the two sides are the laws of both sides, which must not be so dissimilar or contradictory so as to hinder or preclude cooperation. In addition, a variety of approaches should be applied to enhance cooperation in this matter.

Therefore, this article aims to point out certain differences between the domestic laws of both sides and suggest specific approaches to improve cooperation between them from a legal context. The article is divided into three chapters including (1) the existing laws of both sides, (2) differences between the laws of the two sides, and (3) approaches to enhance cooperation for UCH protection in the Taiwan Strait.

## **2. The existing Laws of Both sides**

China and Chinese Taiwan have paid attention to UCH protection for a long time. Recently, both have enacted specific laws in this matter. This chapter examines the history and evolution of those laws.

### **2.1 China**

In the beginning, China had no specific law on UCH protection. The Law of the People's Republic of China on Protection of Cultural Relics 1982 (The Law on the Protection of Cultural Relics 1982) as revised in 2007 was a general law implicitly applied to protect UCH of China. Then in 1989 the State Council promulgated a specific law on UCH protection named the Regulation of the

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<sup>8</sup> *Id.*

<sup>9</sup> Available at: <http://english.cach.org.cn/col/col1581/index.html> (last visited March 20, 2018).

People's Republic of China on Conservation and Management of Underwater Cultural Relics (The 1989 Regulation), which became effective on October 20, 1989.<sup>10</sup>

In accordance with the 1989 Regulation, the term “underwater cultural relics (UCR)” means human cultural heritage that has historic, artistic and scientific value, however, it shall not cover objects that have remained underwater since 1911 and that have nothing to do with important historical events, revolutionary movements or renowned personages.<sup>11</sup> It should be noted that the definition of ‘UCR’ of this Regulation is influenced by the Law on the Protection of Cultural Relics 1982. Hence, the term UCH should include movable and immovable objects by virtue of Article 2 and 3 of the Law on the Protection of Cultural Relics 1982.

One of the most outstanding characteristics of the Regulations is that it identifies the ownership of cultural relics within the waters under the jurisdiction of the People's Republic of China, and confirms the preferential rights of the State to dispose of cultural relics salvaged by it in its waters.<sup>12</sup>

Under this Regulation, the State Administration for the Protection of Cultural Relics is regarded as the competent authority in charge of the registration of UCR, of the administration of the protection thereof, and of the work of examination and approval concerning the archaeological exploration and excavation activities with respect to underwater cultural relics.<sup>13</sup> The State Council and the people's governments of the provinces, autonomous regions

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<sup>10</sup> LIU Bin, A Conference Summary on Cooperation Over Underwater Cultural Heritage Protection in the Taiwan Strait, *China Oceans Law Review*, Vol. 2010, No. 2, p. 144.

<sup>11</sup> The 1989 Regulation art. 2.

<sup>12</sup> As stipulated in Article 6, "any units or individuals that have discovered by any means underwater cultural relics specified in Items (1) and (2) of Article 2 of these Regulations shall report promptly to the State Administration for Protection of Cultural Relics or to the administrative departments for cultural relics in the localities and those that have been fished up shall be handed over promptly to the State Administration for Protection of Cultural Relics or to the administrative departments for cultural relics in the localities to be properly dealt with."

<sup>13</sup> The 1989 Regulation art. 4.

and municipalities directly under the Central Government may determine the UCR protection units and UCR reserves at the national or provincial levels and publicly announce them. As a result, any activities that may jeopardize the safety of the UCR, such as fishing and demolition within the limit of thus units or reserves, shall be prohibited.<sup>14</sup>

Any individual or organization that intends to conduct archeological exploration or excavation for UCR within the jurisdiction of China must apply for the permit from the National Bureau of Cultural Relics and provide relevant information.<sup>15</sup> When the exploration or excavation is being conducted, any units or individuals conducting it shall, abide by other laws and regulations of China and accept the administration by the departments concerned, observe rules concerning underwater archaeological activities such as diving and navigation, and ensure the safety of the personnel and the underwater cultural relics, prevent the water from environmental pollution and protect underwater biological resources and other natural resources from damage, protect all surface and underwater facilities and may not obstruct communication and transportation, fishery production, military drills and other normal surface and underwater operations and activities.<sup>16</sup>

Nevertheless, nowadays, China is considering to revise the Regulation and the Regulation draft is publicly available.<sup>17</sup> Nevertheless, the Regulation Draft does not too much different from the Regulation. The draft tries to contain some principles of the 2001 UNESCO Convention such as the principle of no commercial exploitation<sup>18</sup> and *in situ* preservation.<sup>19</sup>

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<sup>14</sup> The 1989 Regulation art. 5

<sup>15</sup> *Id.*

<sup>16</sup> The 1989 Regulation art. 9.

<sup>17</sup> The Regulation Draft is available at: [https://mp.weixin.qq.com/s?\\_\\_biz=MzA5MzUzOTI2NQ==&mid=2651313430&idx=2&sn=698b5f89bc8b04d1a1bed9580f5d5e9a&chksm=8baf2b%E2%80%A6](https://mp.weixin.qq.com/s?__biz=MzA5MzUzOTI2NQ==&mid=2651313430&idx=2&sn=698b5f89bc8b04d1a1bed9580f5d5e9a&chksm=8baf2b%E2%80%A6) (last visited 18 March 2018).

<sup>18</sup> The Regulation Draft, art 8 (1).

<sup>19</sup> The Regulation Draft, art 7 (1).

## 2.2 Chinese Taiwan

On November 11, 1981, Chinese Taiwan established the Council for Cultural Affairs (CCA) as its highest institution for the planning and oversight of cultural establishments.<sup>20</sup> Before having a specific law on UCH protection, Chinese Taiwan applied the Cultural Heritage Preservation Act 1982 to protect UCH. After that, in November 2015, the Underwater Cultural Heritage Preservation Act (The 2015 Act) was passed.<sup>21</sup> The Act was drafted in conformity with the 2001 UNESCO Convention, including seven chapters with forty-four articles.<sup>22</sup> The Act's objectives are to protect, preserve, and manage the UCH.<sup>23</sup>

The definition of UCH in this Act nearly quoted Article 1 of the 2001 UNESCO Convention, however, the temporal criterion that UCH should have been under water more than 100 years is not included.<sup>24</sup> Some provisions of the 2001 UNESCO Convention were included in the Act as follows:

(1) Conducting all activities involved UCH shall avoid the unnecessary disturbance of human remains or venerated sites.<sup>25</sup>

(2) Commercial exploitation of UCH is prohibited, except for the purpose of public access and educational promotion approved by the authority.<sup>26</sup>

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<sup>20</sup> Wen-Yan Chiau, Environmental Impact Assessment and Protection of Underwater Cultural Heritage in the Port of Taipei, as Well as Prospects for Cooperation between the Two Sides of the Taiwan Strait, *China Oceans Law Review*, Vol. 2010, No. 2, p. 17.

<sup>21</sup> Taiwan Today, ROC passes underwater cultural bill, *available at* <http://taiwan.today.tw/news.php?unit=18,23,18&post=24594> (last visited Sep. 29, 2017).

<sup>22</sup> Wendy Zeldin, *Taiwan: Law on Protection of Underwater Cultural Heritage Adopted*, *available at* <http://loc.gov/law/foreign-news/article/taiwan-law-on-protection-of-underwater-culturalheritage-adopted/>; [http://www.moc.gov.tw/information\\_250\\_40686.html](http://www.moc.gov.tw/information_250_40686.html) (all last visited Apr. 4, 2016). (in Chinese)

<sup>23</sup> The 2015 Act art. 1.

<sup>24</sup> The 2015 Act art. 3 (1).

<sup>25</sup> The 2015 Act art. 4 para. 1.

<sup>26</sup> The 2015 Act art. 4 para. 2.

(3) The *in situ* preservation shall be first option and the Act dedicates one chapter to elaborate implementation for this matter beyond the 2001 UNESCO Convention, such as establishing cultural heritage protection zone to preserve UCH *in situ* and concluding management and protection plan for thus zone.<sup>27</sup>

The UCH should be excavated out of the water for the following situations: UCH related to historical status or recognition of the nation, the absence of such UCH could be detrimental to a full understanding of human history, the UCH is of substantial commercial value that it cannot be protected without excavating it out of the water, excavation is necessary for the investigation and research of the UCH, the UCH cannot be sufficiently preserved, protected or managed without excavating it out of the water due to an emergency or a change of the existing environment, and other situations in which the competent authority deems necessary to excavate it out of the water.<sup>28</sup>

It is safe to say that these situations comply with the exceptions provided in Rule 1 of the Annex to the 2001 UNESCO Convention, in addition, the Act also empowers the competent authority to decide to excavate UCH out of water.

(4) Any salvage or declaration of interest relating to UCH shall not be subject to the law of salvage and law of finds.<sup>29</sup>

(5) In light of UCH protection in the internal waters and territorial sea, Chinese Taiwan has the exclusive jurisdiction to regulate, authorize, or approve activities directed at UCH, nevertheless, if state vessels and aircraft are discovered in those areas, Chinese Taiwan shall inform the flag state and, if applicable, other states with a verifiable link.

UCH discovered in Chinese Taiwan's internal waters or territorial sea shall belong to Chinese Taiwan except for the state vessels and aircraft in

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<sup>27</sup> The 2015 Act art. 27-33.

<sup>28</sup> The 2015 Act art. 34.

<sup>29</sup> The 2015 Act art. 14.



which a foreign state declares an interest.<sup>30</sup> It should be noted that there are two points that the Act differs from the 2001 UNESCO Convention. Firstly, Article 7 of the 2001 UNESCO Convention does not require States to inform the discovery of state vessels or aircraft in its internal water. Secondly, the 2001 UNESCO Convention does not provide any provision concerning ownership of UCH in internal water and territorial sea.

(6) The Act emphasizes that Chinese Taiwan has the exclusive jurisdiction to regulate, authorize, approve or prohibit activities directed at UCH in its contiguous zone, exclusive economic zone, and on its continental shelf<sup>31</sup> and the Coordinating State System is included in this Act. Namely, where the UCH was discovered or if it is intended to conduct activity directed at UCH in Chinese Taiwan's contiguous zone, exclusive economic zone or continental shelf, the competent authority may consult all States declaring an interest and coordinate such consultations as a coordinating state.<sup>32</sup> The provision may be applied *mutatis mutandis* in the area outside the exclusive economic zone and continental shelf of Chinese Taiwan.<sup>33</sup> The Act obliges a citizen or the vessel master of Chinese Taiwan who discovers suspected UCH or activities directed at UCH in Chinese Taiwan's exclusive economic zone and on Chinese Taiwan's continental shelf shall promptly report such discovery or activity to the competent authority,<sup>34</sup> as well as deliver such UCH to the competent authority if the UCH was recovered.<sup>35</sup>

(7) Any UCH that has been recovered in a manner not in conformity with this Act shall not be shipped out of the territory of Taiwan, nor transported, possessed, displayed, or sold in Taiwan's territory and the competent authority has the power to seize such UCHs.<sup>36</sup>

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<sup>30</sup> The 2015 Act art. 15.

<sup>31</sup> The 2015 Act art. 16 (1).

<sup>32</sup> *Id.*

<sup>33</sup> The 2015 Act art. 17.

<sup>34</sup> The 2015 Act art. 18.

<sup>35</sup> The 2015 Act art. 13.

<sup>36</sup> The 2015 Act art. 20.

(8) Chinese Taiwan was encouraged to enter into bilateral, regional or other multilateral agreements or develop existing agreements with other states or international organizations, for the preservation, protection, and management of UCH.<sup>37</sup>

The competent authority of this law is the Ministry of Culture,<sup>38</sup> having the rights and duties provided in the Act, such as undertaking the survey of UCH, or record and manage the files after conducting the investigation, research and review,<sup>39</sup> setting up case data for the investigation, research, excavation, preservation, and restoration for UCH,<sup>40</sup> designating a dedicated organization for the preservation and research of UCH,<sup>41</sup> organizing a review committee of UCH,<sup>42</sup> stipulating regulations related to the scope of the exploitation and utilization, the determination, investigation, and handling measures as well as the procedure of conducting a prior investigation related to the existence of UCH or suspected UCH,<sup>43</sup> stipulating regulations for the activities that will be granted permits from other authorities,<sup>44</sup> educating and training the relevant professionals with respect to UCH in order to undertake the preservation of UCH,<sup>45</sup> stipulating regulations related to the qualification limitation or application for activity approval, conditions, methods, scope, period, content of the plan and other matters which should be complied with during the operation of the activities directed at UCH,<sup>46</sup> supervising and regulating activities directed at UCH including the operational procedure, qualification of relevant operational personnel, method for *in situ* preservation,

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<sup>37</sup> The 2015 Act art. 21.

<sup>38</sup> The 2015 Act art. 2.

<sup>39</sup> The 2015 Act art. 5.

<sup>40</sup> The 2015 Act art. 6.

<sup>41</sup> The 2015 Act art. 7.

<sup>42</sup> The 2015 Act art. 8.

<sup>43</sup> The 2015 Act art. 9.

<sup>44</sup> The 2015 Act art. 10.

<sup>45</sup> The 2015 Act art. 11 para. 1.

<sup>46</sup> The 2015 Act art. 22 para. 3.

the method for excavated, preservation or protection method after excavation, and other matters related to the UCH activities.<sup>47</sup>

According to the Law on the Territorial Sea and the Contiguous Zone, ownership over the UCH found within the territorial sea and contiguous zone is asserted by the ROC government irrespective of its origin.<sup>48</sup>

Nevertheless, it can be said that so far, Chinese Taiwan has faced some issues for the protection of UCH such as limited funding, weak public-private partnerships, low public awareness, and destructive fishing.<sup>49</sup>

Given the laws of the two sides, the China's Regulation of 1989 was promulgated before the adoption of the 2001 UNESCO Convention. Since then, China has been considering revision of the 1989 Regulation. On the other hand, Chinese Taiwan's Act of 2015 was adopted after implementation of the 2001 UNESCO Convention. The provisions of Chinese Taiwan Act are somewhat similar to the 2001 UNESCO Convention. Therefore, the substance of the two sides' laws is excessively contrary, meaning that so far cooperation between two sides is not easy to implement and carry out.

### 3. Differences between the Laws of the Two Sides

As mentioned above, cooperation is an important factor for protecting UCH and is not possible, if the existing laws of two sides are extremely different. Thus, it is necessary to harmonize the laws in this matter. In so doing, a cooperative agreement between the two sides may be established.

This chapter will seek to identify the differences between laws of China and Chinese Taiwan in terms of UCH protection and to explain why such differences will make difficult to cooperation for the protection of UCH as well.

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<sup>47</sup> The 2015 Act art. 23.

<sup>48</sup> Zhao Yajuan, On the Legal Basis of the UCH Protection on the Two Sides of Taiwan Strait, *China Oceans Law Review*, Vol. 2010, No. 2, pp. 117-118.

<sup>49</sup> See Wen-Yan Chiau, The Protection of Underwater Heritage in Taiwan: Recent Initiatives and Major Issues, *WIT Transactions on The Built Environment*, Vol. 79, 2005, pp. 179-180.

### 3.1 The Definition of Objects to be protected

In light of the objects to be protected, the UCR of the 1989 Regulation and the UCH of the 2015 Act will be compared.

The UCR of the 1989 Regulation concerns the objects remaining underwater since 1911, while the UCH of the 2015 Act includes all objects remaining underwater regardless of submerged period.

The difference in these terms may lead to a situation in which an object submerged underwater in the Taiwan Strait after 1911 will not be protected by China but will be protected by Chinese Taiwan.

Thus, it is difficult for the two sides to cooperate on UCH protection in the Taiwan Strait when the objects to be protected are subject to incompatible sets of laws.

It is noteworthy to consider that whether or not the 100 years cut-off criterion of the 2001 UNESCO Convention, which is a specific international Convention for UCH protection, or the no time limit criterion of the 2015 Act should be applied, if a collaborative agreement is achieved. It should be noted that, at the time of drafting the 2001 UNESCO Convention, various international instruments and national laws had already used the time criterion to determine the definition of historical or archaeological objects, although they were somewhat arbitrary.<sup>50</sup> This was likely because they seemed contrary to archaeological standards and was familiar with this particular definition.

### 3.2 Ownership

There is little difference in the attitude of Chinese Taiwan and China towards the ownership of UCH within their respective territorial seas.<sup>51</sup> Namely, China claims that any UCR existing in Chinese internal waters and territorial sea as well as any UCR of Chinese origin of unidentified origin that remains in sea areas outside the Chinese territorial sea but under Chinese jurisdiction such as exclusive economic zone and continental shelf according to Chinese laws such

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<sup>50</sup> Zhang Xianglan & Zhu Qiang, Comments on the Convention on the Protection of the Underwater Cultural Heritage, *China Oceans Law Review*, Vol. 2006, No. 1, p. 451.

<sup>51</sup> LI Jiali, Cross-Strait Cooperation for the Protection of Underwater Cultural Heritage, *China Oceans Law Review*, Vol. 2007, No. 2, pp. 454-455.

as the Law on the Exclusive Economic Zone and the Continental Shelf of 1998, shall reside in the State and the State shall exercise jurisdiction over them.

Further, China shall have the right to identify the owners of any UCR of Chinese origin that remain in sea areas outside the territorial waters of any foreign country but under the jurisdiction of a certain country (other States' exclusive economic zones or continental shelves), or in the high seas.<sup>52</sup> This effectively means that China may claim UCR rights in other countries' exclusive economic zones or continental shelves.

Chinese Taiwan, meanwhile, claims ownership over UCH with an unidentified owner located in its territorial sea unless state vessels and aircraft in which a foreign state declares an interest.<sup>53</sup> Although the 2015 Act does not clearly offer a provision concerning ownership of UCH discovered in its exclusive economic zone or on continental shelf, the UCH discovered in these areas will be handed to the competent authority.<sup>54</sup> When UCH with a verifiable link to Chinese Taiwan is discovered in internal waters, archipelagic waters, territorial seas, contiguous zone, or on the continental shelf of other states, Chinese Taiwan shall declare to the relevant States or international organizations its interest in being consulted on the protection of such UCH.<sup>55</sup>

Consequently, in cases where unidentified ownership of UCH exists in the Taiwan Strait beyond the territorial sea of the two sides, China may claim ownership, while Chinese Taiwan will require to deliver such UCH to it. This situation will lead to a conflict which should be resolved through negotiation between the two sides. Further, all relevant circumstances should be considered to achieve the maximum benefit for the UCH.

### 3.3 Exercising Jurisdiction

Articles 2 and 3 of the 1989 Regulation imply that China enjoys exercising jurisdiction over UCR in its exclusive economic zone and on her continental shelf. While, the Act 2015 clearly provides that Chinese Taiwan has

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<sup>52</sup> The Regulation 1989 art. 3.

<sup>53</sup> The Act 2015 art. 15.

<sup>54</sup> The Act 2015 art. 13 para2.

<sup>55</sup> The Act 2015 art. 19.

the exclusive jurisdiction to regulate, authorize, approve or prohibit activities directed at UCH in its contiguous zone, exclusive economic zone and on its continental shelf.<sup>56</sup>

In this matter, of course, there is the overlapping of jurisdiction over UCH in the Taiwan Strait. Thus, conflict from exercising jurisdiction between the two parties may occur. Therefore, the question remains as to how to handle conflict. Li Jiali proposed that there are three plans that should be considered.

In Plan A, cooperation may be conducted across the entire sea areas of the Taiwan Strait. This plan has little possibility to achieve integration due to extensive scope of the blocked waterways connecting China and Chinese Taiwan as well as separate administration.

For Plan B, UCH protection within the respective territorial seas of China and Chinese Taiwan will be managed by each side separately, while cooperation will only be conducted only within exclusive economic zones.

Plan C establishes regions as special protection zones, where much UCH is located. This achieve all-around management of UCH in such special protection zones.<sup>57</sup> The author supports the two sides to the application of the plan because it is the most accommodating approach and complies with the precautionary principle.

### **3.4 *In Situ* Preservation**

The 1989 Regulation does not explicitly provide the principle of *in situ* preservation. Nonetheless, Article 5 of this Regulation authorizes the State Council and the people's governments of the provinces, autonomous regions and municipalities to determine the UCR units where any activities that may jeopardize the safety of the UCR shall be prohibited.<sup>58</sup> However, the principle will obviously be included in Article 7 of the Regulation draft.<sup>59</sup>

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<sup>56</sup> The Act 2015 art. 16 (1).

<sup>57</sup> LI Jiali, Cross-Strait Cooperation for the Protection of Underwater Cultural Heritage, China Oceans Law Review, Vol. 2007, No. 2, p. 452.

<sup>58</sup> “On the basis of the value of underwater cultural relics, the State Council and the people's governments of the provinces, autonomous regions and municipalities directly under the Central Government may in accordance with the pertinent procedures specified in the provisions in Chapter II of the Law of the People's Republic of China on

On the other hand, chapter 4 of the 2015 Act provides that the *in situ* preservation of UCH shall be the first option.<sup>60</sup> Before defining a specific UCH protection zone, the competent authority should consult with relevant authorities and hold a public hearing.<sup>61</sup> In addition, the competent authority shall consult with a relevant authority to provide a management and protection plan for the zone.<sup>62</sup> After designing such zone, no one shall enter without prior approval of the competent authority<sup>63</sup> for the purpose of social education and such approval will not disturb the UCH located in the zone.<sup>64</sup> It is safe to say that, the 2015 Act provides much more detail than the Regulation draft of China and even the 2001 UNESCO Convention.

Although the preservation of UCH by the two sides relies on the principle of *in situ* preservation, the details of implementation may vary because the existing laws of China and the Regulation draft do not elaborate on the details of implementation. This situation may lead to conflict between the two sides in terms of implementing *in situ* preservation. Therefore, this issue should be considered.

### 3.5 Permission to explore and excavate

For permission to explore and excavate the UCH, both sides adhere to the principle of no commercial exploitation. Even though the 1989 Regulation does not obviously mention the exploitation of UCH for commercial purposes, the Act permits the exploitation of UCR only for the purpose of the protection

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Protection of Cultural Relics, determine the underwater cultural relics protection units and underwater cultural relics reserves at the national or provincial levels and publicly announce them.”

<sup>59</sup> 《中华人民共和国水下文物保护管理条例》修订草案 第七条 “水下的文物保护单位和水下文物保护区应当尽可能实施原址保护...”

<sup>60</sup> The Act 2015 art. 27 (1).

<sup>61</sup> The Act 2015 art. 28.

<sup>62</sup> The Act 2015 art. 30.

<sup>63</sup> The Act 2015 art. 31.

<sup>64</sup> The Act 2015 art. 33.

of cultural relics and scientific research in accordance with Article 7 of the 1989 Regulation.<sup>65</sup>

However, the principle will be contained in the Regulation draft.<sup>66</sup> Any units or individuals intending to explore and excavate UCR in Chinese jurisdiction shall ask for permission from the State Administration for Protection of Cultural Relics and submit relevant data.<sup>67</sup> In addition, permission depends on the discretion of the competent authority.

For Chinese Taiwan, the UCH shall not be the object of commercial exploitation, except for the purposes of public access and educational promotion as approved by the competent authority.<sup>68</sup> Only qualified applicants are able to apply a plan for conducting activities directed at UCH<sup>69</sup> and they shall follow the approved plan.<sup>70</sup>

The laws of both sides allow their competent authorities to exercise discretion in permitting exploration and excavation. Therefore, conflict may arise between them when the competent authorities of the two sides have different opinions. China and Chinese Taiwan should reach an agreement on a complete set of standards in this matter.

#### **4. Approaches to enhance Cooperation on UCH protection in the Taiwan Strait**

Besides eliminating the problems that may arise from inconsistencies between the two sides' laws, establishing cooperation for UCH protection in the Taiwan Strait may be accomplished by using approaches based on bilateral agreement. This chapter aims to suggest such approaches to foster cooperation for UCH protection in the Taiwan Strait.

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<sup>65</sup> LI Jiali, Cross-Strait Cooperation for the Protection of Underwater Cultural Heritage, *China Oceans Law Review*, Volume 2007 Number 2, p. 461.

<sup>66</sup> The Regulation Draft art. 8.

<sup>67</sup> The 2015 Act art. 7 (1).

<sup>68</sup> The 2015 Act art. 4 (2).

<sup>69</sup> The 2015 Act art. 22 (1).

<sup>70</sup> The 2015 Act art. 22 (3).



#### 4.1 Exchanging UCH information

Information is of significance for cooperation on UCH protection in the Taiwan Strait. Therefore, relevant information between the two sides should be shared and exchanged to increase cooperation for the protection of UCH in the Taiwan Strait.

Both sides of the Taiwan Strait have provisions requiring organizations or individuals to report information to them. For example, China requires any units or individuals discovering UCR in Chinese internal waters and territorial waters, in sea areas outside the Chinese territorial sea but under Chinese jurisdiction according to Chinese law, as well as in sea areas outside the territorial waters of any foreign country but under the jurisdiction of a certain country or in the high seas, to report promptly to the State Administration for Protection of Cultural Relics or to the administrative departments for cultural relics in the localities. In addition, it shall be handed over promptly to the State Administration for cultural relics in the localities to be properly dealt with if the UCR was recovered.<sup>71</sup> The Regulation draft further stipulates that when the UCH is recovered, such UCH shall be registered with the competent authority.<sup>72</sup>

In light of Chinese Taiwan's Act of 2015, anyone who discovers suspected UCH shall terminate any activity and promptly report such discovery to the competent authority,<sup>73</sup> even when in another country's exclusive economic zone or continental shelf.<sup>74</sup>

Nevertheless, neither side appears to have complete information regarding UCH. And this limited information is not entirely opened. In addition, communication on this problem between China and Chinese Taiwan has been restricted, enabling cross-strait cooperation is difficult.

Therefore, it is necessary to establish an information sharing system regarding UCH, which covers not only the distribution and conditions of UCH, but also information regarding archaeological investigations, excavation and

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<sup>71</sup> The 1989 Regulation art. 6.

<sup>72</sup> The Regulation Draft art. 13

<sup>73</sup> The 2015 Act art. 13.

<sup>74</sup> The 2015 Act art. 18.

protection, as well as illicit excavation of UCH and the corresponding laws and regulations.<sup>75</sup>

#### 4.2 Establishing Organization

An organization may be used as a neutral forum for debate or negotiation to resolve disputes and to promote cooperation for specific purposes. This argument is very true and incontestable. Hence, it is necessary to establish an organization responsible for coordinating effective cooperation between China and Chinese Taiwan for UCH protection in the Taiwan Strait. The nature and authority of this coordinating body would be largely dependent on the desire of both parties to cooperate.<sup>76</sup>

Nevertheless, a coordinating organization should be authorized at least to exercise all possible powers that China and Chinese Taiwan can confer for the administration of UCH. This would ensure the alignment of powers and responsibilities for the protection of UCH as well as improve the efficiency of such protection. The powers of this organization would continue to expand as cross-strait cooperation deepened.<sup>77</sup>

#### 4.3 Setting up a Dispute Settlement Mechanism

In the process of cross-strait cooperation for the protection of UCH, disputes are inevitable. These disputes should be settled by both parties through mechanisms of equal negotiation. Where a dispute cannot be settled by the parties through negotiation, a judicial settlement should be considered. Further, dispute settlement penal may also be established under the organization discussed in the preceding chapter.

#### 4.4 Creating Cooperation in Law Enforcement

In order to have effective cross-strait cooperation regarding the protection of UCH, joint action to combat against illicit theft, trade, excavation or destruction of UCH is very important.<sup>78</sup> Both sides of the Taiwan Strait have their own manners. For Chinese Taiwan, after the competent authority receives

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<sup>75</sup> LI Jiali, Cross-Strait Cooperation for the Protection of Underwater Cultural Heritage, China Oceans Law Review, Volume 2007 Number 2, p. 455.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 464.

a report of discovery of suspected UCH, it shall take measures to restrict or terminate all or part of the activity which has an influence on the suspected UCH and set up temporary protection and take those measures the competent authority may request the coast guard agency to provide assistance under its authority.<sup>79</sup> In addition, the competent authority may request assistance from the coast guard agency for management and protection of the UCH and settle illegal matters.<sup>80</sup> It could be stated that law enforcement under the 2015 Act will be conducted by the competent authority and coast guard. For China, on the other hand, the administrative department for cultural relics shall, in conjunction with the departments concerned, order the operation to be suspended and set a deadline for correction or shall give administrative sanctions in case any violation is committed.<sup>81</sup>

The success of cooperation relies to a large extent on collaboration between the marine law enforcement organizations of both sides. Therefore, a joint marine law enforcement organization may be established.<sup>82</sup> Alternatively, the organization discussed previously may assume a role in this matter.

## 5. Conclusion

To protect UCH in the Taiwan Strait effectively, collaboration between China and Chinese Taiwan is of significant importance. As a result of the study, at least five points of inconsistency have been identified between the two sides' laws such as the definition of the objects to be protected, the ownership of UCH, the exercise of jurisdiction, the principle of *in situ* preservation, and permission to excavate or explore. These inconsistencies should be discussed between both parties.

In addition, certain provisions are suitable for application through bilateral agreement to enhance collaboration between both sides, such as a

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<sup>79</sup> The 2015 Act art. 13.

<sup>80</sup> The 2015 Act art. 32.

<sup>81</sup> The 1989 Regulation art. 10.

<sup>82</sup> LI Jiali, Cross-Strait Cooperation for the Protection of Underwater Cultural Heritage, China Oceans Law Review, Vol. 2007 Number 2, p. 464.

system for exchanging UCH information, setting up a dispute settlement mechanism, and creating cooperation for law enforcement.

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