



Gilt Dragons, porcelain and plundered doubloons: A comparative analysis of Taiwan and Australian underwater cultural heritage protection laws

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ABSTRACT

Taiwan and Australia are non-Parties to the UNESCO Convention on the Protection of the Underwater Cultural Heritage (UCH Convention). However, as the first two non-Parties in the East Asia region, both have incorporated the spirit and letter of the UCH Convention into their respective domestic laws, with minor exceptions to fit into their respective historical and cultural contexts, as well as their administrative and judicial settings. This paper traces and compares the very different origins of these two pieces of UCH specific domestic legislation. A comparative analysis is also made of the structure and content, similarities and differences of each piece of legislation as well as deviations between them and between the UCH Convention. The paper argues that the Taiwanese and Australian experience demonstrates models for the successful incorporation of the UCH Convention for States striving for the preservation, protection and management of UCH.

1. Introduction

The 2001 United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on the Protection of the Underwater Cultural Heritage (hereinafter the UCH Convention)¹ [1] provides the legal framework for the protection of the world's underwater cultural heritage (hereinafter UCH). Under the UCH Convention, UCH is defined as:

“all traces of human existence having a cultural, historical or archeological character which have been partially or totally under water, periodically or continuously, for at least 100 years such as: (i) sites, structures, buildings, artefacts and human remains, together with their archeological and natural context; (ii) vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archeological and natural context; and (iii) objects of prehistoric character”.²

This definition indicates that the UCH Convention applies to “all

traces of human existence.” As noted by UNESCO:

“Underwater cultural heritage” encompasses a variety of features, such as sunken cities and port structures, bridges and constructions, fish traps and fences, technical instruments, artefacts and traces of ancient human life preserved in submerged caves and wells, ruins, remains of prehistoric settlements and/or dwellings built on lakes and rivers, traces of ancient water-related religious sites or venerated sites, shipwrecks, block-ships and wreck barriers, aircraft wrecks, or submerged landscapes which testify the occurrences of climate changes [1]....

...While these ships, structures and other cultural items are not frequently visible from the water's surface, they have survived at the bottom of lakes, seas and oceans, safely preserved by the submarine environment. Such heritage provides testimony to various periods and aspects of our shared history; for example, the cruelty of the slave trade, the ferocity of war, the impact of natural disasters, traces of sacred ceremonies and beliefs and the peaceful exchange and intercultural dialog between disparate regions of the globe [2].

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¹ The UCH Convention was adopted on 2 November 2001 by the Plenary Session of the 31st General Conference with 88 votes in favor, 4 against and 15 abstentions. Commission IV of the General Conference had previously recommended (94 votes in favor, 5 against and 19 abstentions) the adoption of the draft Convention.

² Article 1(a), UCH Convention.

Thus the value of such UCH items comes from their “archeological and historical nature”, as Article 303 paragraph 1 of the 1982 United Nations Convention on the Law of the Sea³ (hereinafter the UNCLOS) states, or their “cultural, historical or archeological character”, as Article 1 paragraph 1(a) of the UCH Convention [3,4] puts it. UNCLOS, the “comprehensive constitution for the oceans” [5], through its Article 303 paragraph 1, provides that States “have the duty to protect” such objects which are “found at sea” and “shall co-operate for this purpose.” Such treaty obligations of protection and cooperation in relation to UCH have been further elaborated by the UCH Convention and its Annex titled “Rules concerning Activities directed at Underwater Cultural Heritage.” As UNESCO notes, the UCH Convention “is intended to enable States to better protect their submerged cultural heritage” [6]. The Convention “sets out basic principles for the protection of underwater cultural heritage; provides a detailed State cooperation system; and provides widely recognized practical rules for the treatment and research of underwater cultural heritage”.⁴ A set of principles are also enshrined in the UCH Convention, which include: obligations to preserve UCH, in situ preservation as the first option, no commercial exploitation, and training and information sharing.⁵

While the UCH Convention is a global level, multilateral legally binding instrument specifically and comprehensively dealing with all the issues in relation to the preservation, protection and management of UCH, ratified by 68 States,⁶ UNESCO argues that “[t]he first step in effective heritage protection is legal protection” and “[c]ertain national laws and pre-existing international law do not comprehensively protect underwater cultural heritage...[m]any national laws do not yet protect underwater cultural heritage, or do so in a way that may favor commercial interests over heritage protection...” and “[n]ational laws, in general, do not apply outside the national territory” [7].⁷ Thus, UNESCO encourages States to either ratify the UCH Convention or “[adapt] and [harmonize] national laws with the Convention.”⁸

Interestingly enough, Taiwan⁹ and Australia, two non-Parties to the UCH Convention, are the only two countries of the East Asia region¹⁰ [8] that have incorporated the UCH Convention into their specific domestic legislation for the preservation, protection and management of UCH, namely the *Underwater Cultural Heritage Preservation Act 2015*¹¹ (hereinafter *UCH Preservation Act 2015*) by Taiwan and the *Underwater Cultural Heritage Act 2018 (Cth)* (hereinafter *UCH Act 2018*) by Australia.

This article presents a comparative study of these two UCH domestic laws by briefly looking into the richness of UCH in these two countries; tracing and examining the different origins of the development of these

two domestic laws; comparing the major provisions or elements of and between the two domestic laws with the UCH Convention; and identifying the similarities and differences between the two domestic laws and between them and between the UCH Convention.

2. Rich legacy of underwater cultural heritage

Taiwan and Australia are “island nations”. Both Taiwan and Australia are surrounded by water and have experienced waves of migration and invasions or threats by foreign powers from the seas throughout their history. Sunken civilian, commercial or military vessels in their surrounding waters are the legacy of this history.

2.1. Taiwan’s underwater cultural heritage

The island of Taiwan and its adjacent islets or archipelagos, including the Penghu Islands (or Pescadores), underwent waves of migration by Chinese mainlanders and foreign domination, occupation, or colonization by Dutch and Japanese in the last several centuries. Migration, trading or battles at sea inevitably brought abundant sunken ships or military craft in the adjacent waters of Taiwan.

The shipwreck of *Jiangjun No. 1* (將軍一號) from the Ching Dynasty discovered in 1987 (and excavated in 1995) in the adjacent waters of Penghu Islands was the first major discovery of UCH in Taiwan. Its excavation was the first underwater archeological project carried out by the Government of Taiwan. The finding of *Jiangjun No. 1* and the later excavation project led directly to calls for greater protection of UCH through the enactment of a specific UCH domestic legislation by one of the co-authors of this paper as early as 1997 [9]. This also led to policy initiatives later being taken by the Government. Most notably, such initiatives were ultimately reflected in official ocean-related policy white papers and enactments, i.e., the *2006 Ocean Policy White Paper* (海洋政策白皮書) [10], the *Ocean Basic Act 2019* (海洋基本法)¹² and the *2020 National Ocean Policy White Paper* (國家海洋政策白皮書) [11].

According to the Bureau of Cultural Heritage of the Ministry of Culture, “[a] total of 90 objects were discovered, of which 20 were identified as shipwrecks, including six Chinese ships from the Qing Dynasty, four British ships from the 19th century, three Western-style sailing ships, one American ship, and six Japanese ships. Animal fossils from the late Pleistocene era were also identified” [12]. Six shipwrecks have been listed by the Bureau [13].

Apart from shipwrecks, other types of UCH have been identified by scholars resulting in calls for their legal protection [14]. These include the fish trap “*Twin Hearts Stone Weir*” (雙心石滬) in the Chimei Islet (七美嶼) of Penghu, a legendary maritime cultural scenic spot for the image of love in Taiwan. Others include the historic anti-landing piles (反登陸樁、軌條岩) along the coast of the Quemoy Island (金門), which mark the continuation of the civil war between Kuomintang (or Chinese Nationalist Party, 中國國民黨), the then ruling political party of the Republic of China (ROC) and the Chinese Communist Party (CCP, 中國共產黨, regarded as a rebellion party at the time) even after the ROC Government withdrew from Mainland China and moved to Taiwan and the CCP established the People’s Republic of China (PRC) on Mainland China in 1949. These later sites are of great significance as symbols of anti-Communism resistance not only for Taiwan but also for the East Asia as a whole during the Cold War era. Several of these sites are “partially” under water and therefore fall within the definition UCH under Article 1(a) of the UCH Convention.

³ 1982 United Nations Convention on the Law of the Sea, opened for signature 10 December 1982, in force 16 November 1994, 1833 UNTS 397.

⁴ See UNESCO [6].

⁵ Ibid.

⁶ As of 4 August 2021.

⁷ See UNESCO [7].

⁸ Ibid, slide no. 29.

⁹ Since the Republic of China (ROC) withdrew from the United Nations in 1971 and later from its various Specialized Agencies within the UN system, its ‘statehood’ has faced various challenges in the international community. While Article 26 paragraphs 1, 2 (a) and (b) of the UCH Convention lay down various qualifications for any ‘political entity’ to become a Contracting Party to the UCH Convention through ratification, acceptance, approval or accession, ROC (or Taiwan, as referred to by most of the world in recent decades) fits none of these qualifications. Thus, Taiwan has difficulties in becoming a Contracting Party to the UCH Convention due to its unique political status in the international community.

¹⁰ Cambodia and the Federated States of Micronesia are the only two Asia-Pacific countries among the sixty-eight States Parties to the UCH Convention up until this paper was submitted.

¹¹ The Underwater Cultural Heritage Preservation Act (水下文化資產保存法) was enacted and promulgated by the Presidential Order Hua-Zong-(1)-Yi-Zih No. 10400143861 (華總一義字第10400143861號總統令) on 9 December 2015.

¹² Article 13 of the Ocean Basic Act 2019 stipulates that “The government shall, based on the ecosystem approach, prioritize the protection of underwater cultural heritage assets.”

2.2. Australia's underwater cultural heritage

As an island nation whose history was shaped by the sea, the waters surrounding Australia hosts a vast legacy of UCH. The earliest confirmed underwater archeological sites in Australia were only discovered in 2020 [15]. Two sites off the Murujuga coastline (Dampier Archipelago) in north-western Australia contain artefacts from human occupation of the area which are at least 7000 and 8500 years old respectively.¹³

In addition to this ancient UCH, there are approximately 7500 historic shipwrecks, sunken aircraft and other UCH sites in the waters surrounding Australia [16]. The oldest known European shipwreck is the English East India Company vessel *Tryal* which collided with a reef near the Monte Bello Islands on 24 May 1622 [17,18]. However, it was the discovery of four vessels dating back to the colonial era of the Dutch East India Company or *Verenigde Oostindische Compagnie* ("VOC") that were instrumental in the development of measures to protect UCH in Australia. These include the remains of the *Batavia* (wrecked 1629) [19], the *Vergulde Draeck* (Gilt Dragon) (wrecked 1656) [20], the *Zuytdorp* (wrecked 1712) [21] and the *Zeewijk* (wrecked 1727) [22], all of which sunk off the Western Australia coastline.

3. Domestic legislation to protect underwater cultural heritage

The UCH Convention establishes fundamental principles for the preservation, protection and management of UCH. Pursuant to the UCH Convention, UCH shall be preserved in situ as the first option, and shall not be subject to commercial exploitation. The law of salvage and law of finds are applied with strict conditions. Article 3 of the UCH Convention qualifies the relationship between itself and UNCLOS by stating that.

"Nothing in this Convention shall prejudice the rights, jurisdiction and duties of States under international law, including the United Nations Convention on the Law of the Sea. This Convention shall be interpreted and applied in the context of and in a manner consistent with international law, including the United Nations Convention on the Law of the Sea."

Nonetheless, the UCH Convention goes beyond the scope of UNCLOS by providing States with much more detailed jurisdictional rights and obligations in various maritime zones in relation to the UCH, along with general international cooperation duties. Globally recognized principles for the preservation, protection and management of UCH are codified in the Annex Rules.

This section presents the historical background and the key provisions of Taiwan's *UCH Preservation Act 2015* and Australia's *UCH Act 2018*. Through this examination, the origins, development, similarities and differences of the key provisions of these two domestic laws, along with their deviations from the UCH Convention, are presented.

3.1. Historical background to Taiwan's enactment of the Underwater Cultural Heritage Preservation Act 2015

By 1997, one of the co-authors of this paper was aware that a draft international treaty regarding UCH was under negotiation at UNESCO, and began to advocate for the incorporation of such international instruments into Taiwan's domestic law specifically for the preservation, protection and management of UCH [23]. With the support of the Government and its commissioned research project, he drafted Taiwan's first draft bill specifically concerning the preservation, protection and management of UCH [24]. Later on, he was commissioned by the Government agency to undertake several important UCH-related projects which enriched his understanding on the UCH legislative pursuit as well as the output generated from such projects [25]. An expanded and

fully-fledged UCH domestic legislation draft bill was prepared by him [26]. This draft bill underwent the legislative review process by the Executive Yuan (the Cabinet) as well as the Parliamentary legislative process and ultimately became the *UCH Preservation Act* enacted on December 9, 2015. One of the co-authors¹⁴ of this paper also led the completion of the drafting of nine sets of regulations authorized by the *UCH Preservation Act 2015*. All of these Regulations entered into force one after another in 2016.¹⁵ A legal regime for the preservation, protection and management of UCH in Taiwan was thus fully established.

In retrospect, studies for the drafting of the *UCH Preservation Act 2015* demonstrated that a legal vacuum for the preservation, protection and management of UCH had existed in Taiwan.

For instance, the *1970 Regulations on the Application for Salvage of State-owned Buried or Sunken Property* (國有埋沉財產申請掘發打撈辦法) were the first regulations concerning "sunken property" in Taiwan. Nevertheless, the Regulations stipulated that "property or material salvaged shall be handed over to the authority of cultural heritage by the undertaking agency if the property or material is to be available for academic, art, archeological or historic research."¹⁶ This provision did nothing in relation to the substantive preservation, protection and management of UCH except for requiring basic interagency cooperation.

In 1982, the dominant law for the preservation, protection and management of cultural heritage, the *Cultural Heritage Preservation Act*, (CHPA, 文化資產保存法) was initially enacted and instituted with a terrestrial cultural heritage mindset. The only two provisions having relevance to the so-called 'underwater' matters were Articles 17 and Article 32, referring to "submerged ownerless ancient objects" (沉沒水中無主古物) and "submerged ownerless ancient relics" (沉沒水中無主古蹟), respectively. Such "ownerless" objects or relics were declared to be "State owned," and awards would be offered to finders. There were no more specific provisions with respect to their preservation, protection or management.

In 1998, two pieces of domestic legislation were enacted regarding Taiwan's sovereignty, sovereign rights and jurisdiction over different

¹⁴ Authorized by the Act, the Bureau of Cultural Heritage of the Ministry of Culture commissioned one of the co-authors to organize an inter-university team to draft nine subordinate regulations, and they were all issued by the Bureau in 2016.

¹⁵ The nine sets of regulations are: *Enforcement Rules of the Underwater Cultural Heritage Preservation Act* (水下文化資產保存法施行細則), *Regulations on the Management of Activities Directed at the Underwater Cultural Heritage* (以水下文化資產為標的之活動管理辦法), *Regulations on the Organization of the Underwater Cultural Heritage Review Committee* (水下文化資產審議會組織辦法), *Regulations on the Survey and Management of the Underwater Cultural Heritage prior to the Exploitation and Utilization in Waters* (水域開發利用前水下文化資產調查及處理辦法), *Regulations on the Notification and Management of Activities Involving Seabed or Subsoil* (涉及海床或底土活動通知及管理辦法), *Regulations on Rewards and Subsidy appertaining to the Underwater Cultural Heritage* (水下文化資產獎勵補助辦法), *Regulations on the Promotion and Encouragement of Preservation Education concerning the Underwater Cultural Heritage* (水下文化資產保存教育推廣鼓勵辦法), *Regulations on the Capacity Building concerning the Underwater Cultural Heritage Professionals* (水下文化資產專業人才培育辦法), and *Regulations on the Zoning and Management concerning the Underwater Cultural Heritage Protection Zone* (水下文化資產保護區劃設及管理辦法). The English translated version of the *UCH Preservation Act 2015* can be found at the official website of the Laws and Regulations Database of The Republic of China (全國法規資料庫), available at (<https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=H0170102>). The nine regulations are available only in Chinese version at that website.

¹⁶ The original provision stipulates that "once the applicant salvages the property. The property or material salvaged shall be handed over to the authority of cultural heritage by the undertaking agency if the property or material is to be available for academic, art, archeological or historic research." (申請人掘發打撈獲得財產時, 足供學術、藝術、考古或歷史研究之財產或資料, 應由執行機關轉交文化資產相關主管機關) The Regulations are established through the authorization by the *State-owned Property Act* (國有財產法) and is available only in Chinese version.

¹³ See Jonathan Benjamin et al. [15].

maritime zones, namely the *ROC Territorial Sea and Contiguous Zone Act* of 1998 (中華民國領海及鄰接區法) and the *ROC Exclusive Economic Zone and the Continental Shelf Act* of 1998 (中華民國專屬經濟海域及大陸礁層法). Article 16 of the *ROC Territorial Sea and Contiguous Zone Act* of 1998 stipulates that “[a]ll objects of a historical nature or relics found in the territorial sea and the contiguous zone of the Republic of China, while undertaking archeological and scientific research, or other activities, shall belong to the Republic of China and be administered by the Government in accordance with relevant laws and regulations.” The so-called “relevant laws and regulations” were basically referred to the two articles of the CHPA mentioned above.

Unfortunately, these two relevant provisions in the previous CHPA versions were deleted from its 2005 full-scale amended version which left Article 16 of the *ROC Territorial Sea and Contiguous Zone Act* of 1998 without legal basis for the disposal of historic objects or relics found in the territorial sea or the contiguous zone of the ROC. Similar gaps remain in the *ROC Exclusive Economic Zone and the Continental Shelf Act* of 1998 since nothing in this particular Act ever refers to or makes claims to the UCH found in the ROC EEZ or on its continental shelf.

Any extended application of the CHPA over UCH would have resulted in further legal ambiguities, if not conflicts. For example, among the provisions in Chapter One “General Provisions”, Article 3 of CHPA as of 2005 defined 7 categories of ‘cultural properties’ without expressly referring to any matter of ‘submerged’ or ‘underwater’ nature, and limits ‘cultural properties’ to those being designated or listed only. Article 4 confers administrative jurisdiction in relation to the ‘cultural properties’ on both the Central Government agencies and the local Governments and Article 5 provides for a settlement mechanism in relation to cross-jurisdictional issues on ‘cultural properties’ between or among two or more local Governments. In the authors’ view, all UCH should be preserved, protected and properly managed without confining protection to only those being designated or listed. Furthermore, UCH found in the seas are not subject to any local Government’s administrative jurisdiction that will further limit the application of Articles 4 and 5 to such items of UCH. Such inherent flaws remained despite attempts at further amendments to the CHPA by revising its objective and/or operative provisions or even by adding a new chapter specifically for UCH. Such inherent flaws made one of the co-authors believe that drafting a new specific law for UCH was inevitable and imperative.

The existing laws and regulations mentioned above were all incapable of dealing with the preservation, protection and management of UCH. To deal with such a legal vacuum and gaps, and to apply other existing domestic laws and regulations more effectively for the purposes of UCH preservation, protection and management, one of the co-authors of this paper took an “umbrella legislation approach” in constructing Taiwan’s UCH legal regime and in developing Taiwan’s UCH specific legislation. The purposes and principles enshrined in the UNESCO UCH Convention as well as the provisions of the UCH Convention were to be incorporated into Taiwan’s UCH legislation, while the letter and spirit of the Annexed Rules of the UCH Convention as well as the UNESCO-published *Manual for Activities Directed at Underwater Cultural Heritage*¹⁷ were to be incorporated into the bylaws or regulations authorized by the to-be-enacted Taiwan UCH specific legislation. Such UCH specific legislation and its bylaws were taken as the central axis of the domestic UCH specific legislation, or the “shaft of an umbrella” of Taiwan’s UCH legal regime. Meanwhile, the provisions or rules of other existing non-UCH related domestic laws and regulations (such as *Fisheries Act*, *Harbour Act*, and others) were referred to as the “ribs of an umbrella” that support the umbrella fabric so as to form a canopy to “cover” the subject matter or the issue area of the entire UCH legal regime for the preservation, protection and management of UCH (see Fig. 1) [27].

¹⁷ The Manual for Activities Directed at Underwater Cultural Heritage (2013) and other legal documents, like the negotiation materials were all scrutinized in the legislative process of the *UCH Preservation Act 2015*.

Preceding and during the drafting process of Taiwan’s *UCH Preservation Act 2015*, two fact-finding trips were made to the U.S. by one of the co-authors of this paper. In these trips, many consultations with officials and practitioners at the National Oceanic and Atmospheric Administration (NOAA), National Park Service, other federal agencies, State governments, NGOs and maritime archeologists from leading universities were held in the U.S. First-hand legislative experience of the original UCH Convention drafter¹⁸ and foreign experts in relation to the UCH Convention were also drawn upon through an international conference held in Taiwan. Apart from such international engagements, numerous domestic consultations with academia, government agencies and stakeholders were arranged. The twenty years legislative history was a lengthy but deliberate preparation.

3.2. Overview of structure and key provisions of the *Underwater Cultural Heritage Preservation Act 2015*

Taiwan’s *UCH Preservation Act 2015* is divided into 7 chapters with a total of 44 articles. The topics of the 7 chapters follow the logical sequence of the UCH operation, from General Provisions to Attribution of Rights and International Cooperation, Activities Directed at UCH, *In Situ* Preservation of UCH, Excavation, Punitive Provisions, and Miscellaneous Provisions. Most of the principles as well as provisions of the UCH Convention were incorporated into the Act. The definition of UCH in the UCH Convention was to a large extent adopted with minor revisions so as to fit into the historical context and requirements of the Republic of China, especially the relaxation of the 100-year time frame for any traces of human existence to fall within the definition of UCH as defined by the UCH Convention [28].¹⁹ Also, the objectives and general principles, including but not limited to, international cooperation, in situ preservation as the first option, restriction on commercial exploitation, proper respect for human remains and responsible non-intrusive access were adopted. Most of the rights, jurisdiction and duties regime over various maritime zones, including the State cooperation system, were incorporated into the Act. Border control, sanction regimes, public awareness, training, and information sharing were also adopted. The Annex Rules were incorporated into both the *UCH Preservation Act 2015* and its nine sets of regulations.

Furthermore, a dual system/regime of “activities directed at UCH” (drawn from the UCH Convention directly) and “activities not directed at UCH” (taken from the original term “incidentally affecting” of the UCH Convention) was conceived by one of the co-authors of this paper and then written into the Act and its regulations. The distinction between these two sets of activities carries administrative significance since those “activities directed at UCH” will fall into the sole administrative jurisdiction of the Ministry of Culture while those “activities not directed at UCH” are the ones subject to the administration of other government agencies. From field experience, it is clear that those activities incidentally affecting UCH warrant our close attention and precaution since people and/or other government agencies undertaking

¹⁸ Here, we mean specifically the person who drafted the original text of the UCH Convention Professor Patrick J. O’Keefe.

¹⁹ Article 1 paragraph 1(a) of the UCH Convention sets up “at least 100 years” as the timeframe for “all traces of human existence having a cultural, historical or archeological character which have been partially or totally under water, periodically or continuously” to fall into the definition of “underwater cultural heritage.” However, the WWII battlefields in and around Taiwan and the withdrawal of 300,000 people along with the Central Government of the ROC from Mainland China to Taiwan during 1949–1950 when the ROC Government forces were defeated by the CCP in the civil war, all resulted in a huge number of sunken military and civilian vessels and aircraft in the waters surrounding Taiwan. Those vessels and craft meaningfully mark and witness a period of time in the modern ROC history and, thus, should be recognized and categorized as UCH without being limited by the 100-year timeframe as defined by the UCH Convention.

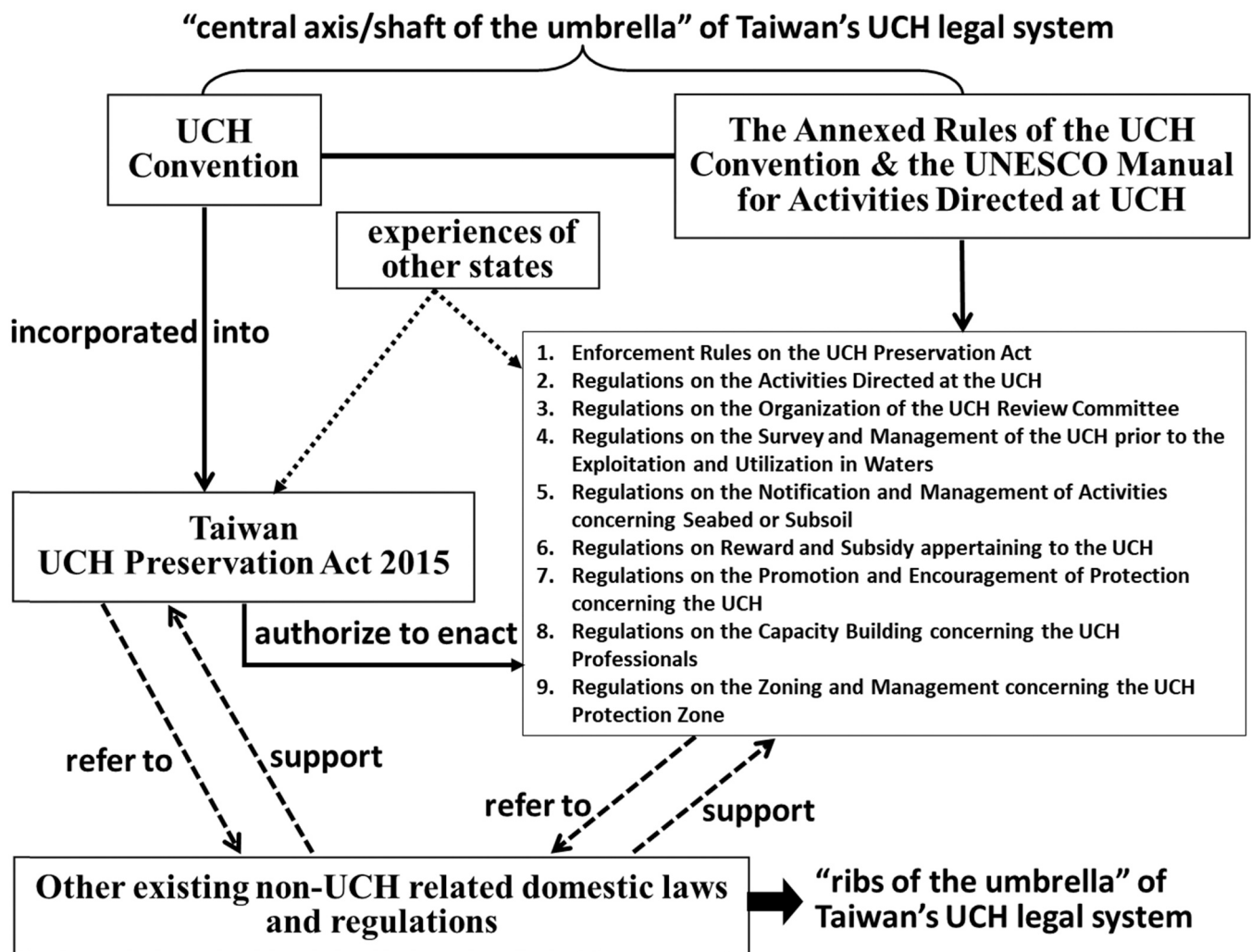


Fig. 1. The conceptual framework of Taiwan’s UCH legal regime based on the “umbrella legislation approach” to incorporating the UCH Convention into Taiwan’s UCH specific legislation.

Source: Nien-Tsu Alfred Hu, *A Study on UCH Operational Rules (水下文化資產作業準則之研究)* (Taichung: Bureau of Cultural Heritage, Ministry of Culture, 2012), p112.

those activities are not UCH experts and may not have the necessary sensitivity and skills in terms of protecting UCH.

In order to better preserve UCH and manage those “incidentally affecting UCH” activities more effectively,²⁰ Taiwan adopted a “double precautionary approach”. First, where an environmental impact assessment is required for an exploitation activity, or where a governmental agency or state-owned enterprise plans or approves plans with respect to exploitation and utilization in certain waters, a prior survey shall be conducted to confirm or exclude any potential existence of UCH. Notifications of any discovery of alleged existence of UCH shall be submitted to the competent authority for further detailed survey and confirmation. Second, when other government agencies are approving activities involving seabed or subsoil, e.g., laying submarine pipelines or cables, commercial or scientific drilling, they shall notify the competent authority for scrutinization in advance of any such activities approval proceeding (Fig. 2).

While the spirit and letter of the UCH Convention are to a large

extent incorporated into Taiwan’s *UCH Act*, some differences remain between these two legal instruments. First, as mentioned previously, with the historical and abrupt changes in modern ROC history in mind, especially the results of World War II bringing the Japanese colonial period of Taiwan to an end in 1945 and the historical transition from a Mainland nation to an island nation following the ROC Government’s withdrawal from Mainland China to Taiwan in 1949, there are many items of UCH of great historical or cultural significance less than 100 years old in Taiwan’s waters which illustrate and testify such changes [29].²¹ Thus the 100-year requirement of the UCH Convention for the definition of UCH was eventually not adopted in Taiwan’s *UCH Preservation Act* after careful consideration.

Secondly, the word and notion of “heritage” (遺產) used in the UCH Convention was changed to “property” (資產) in the Chinese version (or the authoritative version) of the *UCH Preservation Act 2015*, with its

²⁰ Article 5 (Activities incidentally affecting underwater cultural heritage) stipulates that “Each State Party shall use the best practicable means at its disposal to prevent or mitigate any adverse effects that might arise from activities under its jurisdiction incidentally affecting underwater cultural heritage.”

²¹ For instance, the Japanese military ship “*Yamafuji Maru*” was constructed in 1920 and sank in 1942 in Penghu Island waters. It was allegedly sunk by an American submarine during WWII when Taiwan and Penghu were still under the colonial occupation and rule of Japan and now it is located in the waters that Taiwan enjoys sovereignty over. Among the six shipwrecks enlisted and protected by the Bureau of Cultural Heritage of the Ministry of Culture of Taiwan Government, the “*Yamafuji Maru*” shipwreck is presently the only one less than 100 years.

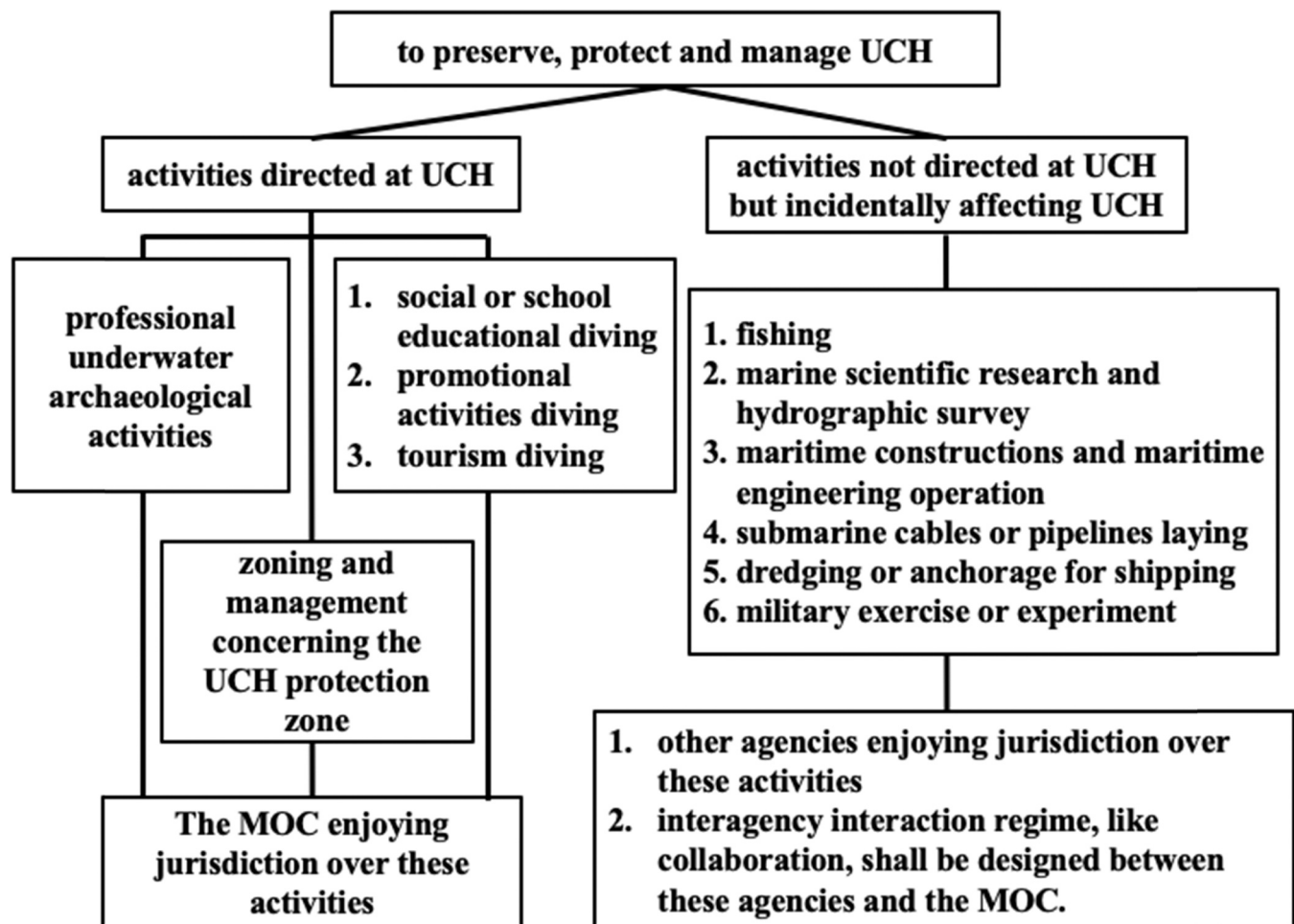


Fig. 2. The original rationale and structure of the dual regime for UCH-related activities designed for the UCH Preservation Act 2015.

Source: Nien-Tsu Alfred Hu, *A Study on the Re-examination on the Articles of the Draft Underwater Cultural Heritage Preservation Act (水下文化資產保存法 (草案) 條款文字之再檢視研究)* (Taichung: Bureau of Cultural Heritage, Ministry of Culture, 2014), p 11.

English translated version remaining “heritage”.²² In drafting the legislation, one of the co-authors strived to discard the traditional notion of “property” widely used in Taiwan’s legal system by arguing that UCH is a “legacy” from the past and should be appreciated by future generations while “property” carrying the notion of material goods with private ownership. However, the term “property” was maintained eventually in the *UCH Preservation Act 2015* due to administrative concerns about possible legal inconsistency with the term “property” used in the earlier CHPA.

A third difference relates to UCH as it relates to the philosophy of the “cultural heritage of humanity” and “common heritage”²³ and the applicability of the law of salvage and law of finds to UCH. UCH found in the internal, territorial and contiguous zone waters is State owned

property as defined by Article 16 of the *ROC Territorial Sea and Contiguous Zone Act*, or by Article 15 of the *UCH Preservation Act 2015* (short of contiguous zone waters) and Taiwan thus positioned such UCH as State heritage. Along with such a philosophical notion of State owned property or State heritage, in order to exclude any potential looting, salvage or other unlawful commercial exploitation of UCH, and the associated assertion of occupational or proprietary rights, the application of any domestic laws relating to finds and salvage and with relevance to the UCH was expressly excluded from the *UCH Preservation Act 2015*. This is in contrast to the UCH Convention which still allows for the application of law of salvage and law of finds in a very limited legal circumstance as specified in Article 4 subparagraphs (a) and (b) and (c) of the UCH Convention.

Fourthly, several provisions in the original draft texts, as proposed by one of the co-authors, relating to international or foreign-related nature and concerning Taiwan’s treaty responsibilities, rights and jurisdiction under the UCH Convention in particular and international law in general, were removed during the draft review process by the Administration due to the misconception of the Legal Affairs Committee of the Executive Yuan (行政院法規會) that “such international or foreign-related affairs shall not be stipulated in domestic laws” [30]. Such misconception led to the exclusion of some significant activities that Taiwan could execute as outlined below.

One, if *reporting* of discovery of UCH located in the Area or the *reporting* of an intention to engage in activities directed at UCH in the Area by nationals or a master of the vessels flying the flag of a State is crucial to the protection of UCH located in the Area, then all States,

²² The Chinese version of the *UCH Preservation Act 2015* is the authoritative version of the legislation while the official website, the Laws & Regulations Database of the Republic of China, of the Ministry of Justice also provides an English translated version of the legislation. However, in the opinion of one of the co-authors, such English version does not fully and precisely reflect the Chinese version. The Laws & Regulations Database of the Republic of China also warns the readers by stating that “[i]n case of any discrepancy between the English version and the Chinese version, the latter shall prevail.”

²³ The Preamble of the UCH Convention stipulates that “Acknowledging the importance of underwater cultural heritage as an integral part of the cultural heritage of humanity and a particularly important element in the history of peoples, nations, and their relations with each other concerning their common heritage.”

regardless whether or not they are Parties to the UCH Convention, should be encouraged to fulfill such a reporting responsibility as envisaged by Article 11 paragraph 1 of the UCH Convention.²⁴ This vision was shared by the original drafter of Taiwan's UCH legislation who proposed to introduce similar language into the original draft text, even though he understood that Taiwan might have difficulties executing paragraph 2 of the same Article by notifying the Director-General of the UNESCO and the Secretary-General of the International Seabed Authority of such discoveries or activities reported to the Taiwan Government. However, such provisions were removed during the Administration's review process and this in turn led to Taiwan's domestic legislation on UCH not requiring Taiwanese nationals or the master of the vessels flying its flag to report their discovery of UCH or intention to engage in activities directed at UCH in the Area.

Two, furthermore, the only article having relevance to the discovery of and/or undertaking activities directed at UCH in the Area is Article 17 of the *UCH Preservation Act 2015*. However, as was pointed out above, rather than making nationals and/or masters of the vessels flying its flag as the legal subjects, this Article unwisely makes the UCH "competent authority" of Taiwan as the legal subject, for the discovery of and/or undertaking activities directed at UCH in the Area, and further links itself through "*mutatis mutandis*" approach to Article 16 paragraph 2 for the responsibilities of being a Coordinating State. Such a legal arrangement will create a legal vacuum for the reporting responsibility supposedly sought to be imposed upon nationals and/or masters of flag vessels for the discovery of and/or undertaking activities directed at UCH in the Area. Without the reporting of such discovery or activities by its nationals and/or masters for discovery of and/or undertaking activities in the Area, Taiwan's UCH competent authority will have no knowledge to: (1) 'notify' the Director-General of the UNESCO and the Secretary-General of the International Seabed Authority of such discoveries or activities and; (2) more importantly to Taiwan, to discharge the duties of protecting those items of UCH found in the Area (as called for by Article 149 in particular and Article 303 paragraph 1 in general of the UNCLOS) with other like-minded interested States by performing the role as a Coordinating State.

Three, the first half of Article 13 of the UCH Convention relaxes the reporting obligations of warships, public vessels and military aircraft with sovereign immunity, operated for non-commercial purposes, undertaking their normal mode of operations, of discoveries of UCH under Articles 9, 10, 11 and 12 of the Convention. The second half of the same Article requires that States Parties shall adopt appropriate measures, not impairing the operations or operational capabilities of those warships or public vessels or military aircraft, to comply as far as reasonable and practicable, with Articles 9, 10, 11 and 12 of the Convention.²⁵ Although Taiwan may face difficulties notifying the Director-General of the

UNESCO and the Secretary-General of the International Seabed Authority of discoveries or activities concerning UCH, it still can through domestic legislation require its warships, public vessels and military aircraft to report their discoveries or activities concerning UCH to its Government. However, Taiwan's *UCH Preservation Act of 2015* is silent on both of these aspects for its operating warships, government ships or military aircraft.

Four, while Article 2 paragraph 8 of the UCH Convention respects the rules of international law and State practice pertaining to sovereign immunity or any State's rights with respect to its State vessels and aircraft,²⁶ Taiwan's *UCH Preservation Act 2015* is silent on sovereign immunity of its sunken State vessels and aircraft found within and beyond its jurisdiction. While Taiwan has a unique political status in the international community in terms of its statehood, it would be in its national interest to establish a strong legal basis for the assertion of sovereign immunity in relation to sunken warships, public vessels and/or military aircraft through its UCH domestic legislation, just like the United States has done with its "*Sunken Military Craft Act*" [31] which applies to sunken U.S. military ships and aircraft wherever located around the world. This U.S. legislation also applies to sunken foreign craft in U.S. waters that are defined to include the internal waters, territorial sea, and contiguous zone (up to 24 nautical miles off the U.S. coast). It preserves the sovereign status of sunken U.S. military vessels and aircraft by codifying both their protected sovereign status and permanent U.S. ownership, regardless of the passage of time, aiming to protect U.S. sunken military vessels and aircraft and the remains of their crew from unauthorized disturbance [32].

In conclusion, Taiwan has to a large degree incorporated the main principles and most provisions of the UCH Convention into its *UCH Preservation Act 2015*. The incorporation of the UCH Convention into the *UCH Preservation Act 2015* itself demonstrates not only a legal achievement of Taiwan but also a solemn commitment to the international community as a whole to the principles contained in the UCH Convention, even though Taiwan is not a State Party to that treaty.

3.3. Historical background to Australia's enactment of the *Underwater Cultural Heritage Act 2018*

In the following discussion we examine the historical origins of the Australian legislation in detail. We believe an examination of the historical origins of the Australian legislation is important as it helps explain how the legislation has been shaped by that historical experience and Australia's internal constitutional dynamics. As we outline below this demonstrates the important role international engagement with interested States has been. This is a key feature of Australia's approach since the early 1970s which offers lessons for other States.

The protection of Australia's UCH has been recognized as priority of government at Commonwealth (i.e. national) and state (i.e. provincial) levels for decades. A report commissioned by the Australian Department of the Environment in 1997 highlights several key reasons why protection of UCH is so important to Australia. These include the archaeological, historic and scientific significance of UCH such as shipwrecks, which offer valuable insights in to the lives of our ancestors [33].²⁷ Shipwrecks have particular esthetic or romantic connotations and are

²⁴ Article 11 paragraph 1 of the UCH Convention stipulates that "States Parties have a responsibility to protect underwater cultural heritage in the Area in conformity with this Convention and Article 149 of the United Nations Convention on the Law of the Sea. Accordingly, when a national, or a vessel flying the flag of a State Party, discovers or intends to engage in activities directed at underwater cultural heritage located in the Area, that State Party shall require its national, or the master of the vessel, to report such discovery or activity to it."

²⁵ Article 13 "Sovereign immunity" of the UCH Convention reads: "Warships and other government ships or military aircraft with sovereign immunity, operated for non-commercial purposes, undertaking their normal mode of operations, and not engaged in activities directed at underwater cultural heritage, shall not be obliged to report discoveries of underwater cultural heritage under Articles 9, 10, 11 and 12 of this Convention. However States Parties shall ensure, by the adoption of appropriate measures not impairing the operations or operational capabilities of their warships or other government ships or military aircraft with sovereign immunity operated for non-commercial purposes, that they comply, as far as is reasonable and practicable, with Articles 9, 10, 11 and 12 of this Convention."

²⁶ Article 2 paragraph 8 of the UCH Convention stipulates that "Consistent with State practice and international law, including the United Nations Convention on the Law of the Sea, nothing in this Convention shall be interpreted as modifying the rules of international law and State practice pertaining to sovereign immunities, nor any State's rights with respect to its State vessels and aircraft." and Article 12 paragraph 7 further stipulates that "No State Party shall undertake or authorize activities directed at State vessels and aircraft in the Area without the consent of the flag State."

²⁷ See Kenderdine [33].

therefore valued by the community.²⁸ As dive sites shipwrecks are also of value for recreation and adventure tourism, not the least because they also have become spectacular habitats for marine biota.²⁹

However, these very values of UCH are threatened by those who seek to profit from salvaging the cargo often carried by these vessels. The VOC vessels in particular were often known to carry valuable cargo including valuable jewelry, gold and silver coins. Thus, the *Batavia*'s cargo included a casket of jewels valued at 58,000 Dutch Guilders as well as a gem known as the "great cameo" made by the painter Rubens [34]. Likewise, the *Vergulde Draeck* contained eight chests of silver coins amounting to some 78,600 Dutch Guilders [35]. These and many other vessels also carried cargo of precious porcelain and numerous other artefacts of value such as cannons etc [36].

The discovery of the *Batavia* and the *Vergulde Draeck* occurred before access to UCH was regulated in Australia. Then the only legislation of significance was the *Navigation Act 1912 (Cth)*. Part VII of the *Navigation Act 1912 (Cth)* dealt primarily with the salvage and disposal of shipwrecks conferring certain powers in relation to dealing with shipwrecks on the Receiver of Wrecks. However, the *Navigation Act 1912 (Cth)* provided no mechanisms for the preservation or protection of shipwrecks and associated UCH [37].

Uncontrolled looting and treasure hunting involving the wrecks of the *Batavia* and the *Vergulde Draeck* and other shipwrecks widely reported in the media led to demands from the community for the Western Australian Government to take greater action to protect such shipwrecks [38]. Of particular concern were widespread reports of the use of explosives on vessels such as the *Batavia* and Australia's oldest shipwreck the *Tryal* by reckless treasure hunters, who seemingly cared nothing about the archeological value of these vessels [39].

Public outcry at the destruction of such historically important shipwrecks and a series of damning articles, editorials and cartoons in Western Australian newspapers led the government of Western Australia to enact changes to the law through a series of amendments to existing legislation relating to museums, culminating most significantly in the enactment of the *Museum Act 1969 (WA)* to protect shipwrecks [40]. In particular the *Museum Act 1969 (WA)* included provisions vesting several named historic wrecks (including the *Tryal*, the VOC vessels the *Batavia*, the *Vergulde Draeck*, the *Zuytdorp* and the *Zeewyk*) in the Western Australian Museum.³⁰ The *Museum Act 1969 (WA)* also made provision for any shipwrecks to be discovered in future to be vested in the Western Australia museum on recommendation of the Director and Trustees of the museum, if in the Directors opinion such a historic wreck is "of national or local historical interest or is of scientific, archeological, educational or other special national or local interest."³¹ The legislation included a range of provisions relating to the protection of shipwrecks and artefacts and the prohibition of sale and handling of artefacts. Breaches of a number of provisions of the Act constituted criminal offenses. The *Museum Act 1969 (WA)* was further amended by the *Museum Act Amendment Act 1973 (WA)*.

Attempts by the Western Australian government to exercise stricter control over UCH, and the prosecution of a number of divers who removed artefacts from shipwrecks, lead to a constitutional challenge to the validity of the Western Australian legislation. In a decision handed down in *Robinson v Western Australian Museum* [41] in 1977 the High Court of Australia ruled on constitutional grounds that the Western Australian legislation was invalid because it was "beyond the legislative competence of the Western Australian legislature" to pass such laws [42]. Jurisdiction instead rested with the Commonwealth government.

The decision of the High Court in *Robinson v Western Australian Museum* did not come as a surprise to either the Western Australian

government or the Commonwealth government. As far back as the initial Parliamentary debates in the Western Australian Parliament in 1964 concerns were raised as to whether the legislation "would be wrecked on the battlefield of the High Court" [43] with some members of parliament urging the Western Australian government to approach the Commonwealth government to take over control of shipwrecks under the Navigation Act.³² However, there was a reluctance on the part of the Commonwealth government to assume responsibility for protection of shipwrecks. In part this initial reluctance on the part of the Commonwealth government was given support by a legal opinion provided to the government by then Attorney-General Garfield Barwick who argued that the provisions of the *Navigation Act* were adequate to deal with any issues relating to shipwrecks [44]. It should not go unnoticed that several years later as Chief Justice of the High Court Garfield Barwick was part of the majority that held the Western Australia legislation invalid in *Robinson v Western Australian Museum*.

The legal position was made more complicated by rights asserted by the Dutch government, as successor of the VOC, to the VOC shipwrecks and any artefacts recovered from such vessels. Upon becoming aware of the discovery of the first of the VOC shipwrecks (the *Vergulde Draeck*) the then Acting Dutch Consul-General in Western Australia laid claim to the possession of the vessel on behalf of the Netherlands government as successor to the Dutch-East India Company [45]. Subsequently in a *Note Verbal* [46] the Netherlands Embassy in Canberra advised the Australian government that it was "taking an active interest" in an emerging dispute between competing claimants to the shipwreck, the Western Australian government and the Receiver of Wrecks under the *Navigation Act*. Curiously some 6 years earlier the Dutch Consul-General in Perth had previously given authorization to one of the claimants to continue the search for the *Vergulde Draeck* and to "take possession of any cargo or merchandise thereon" on behalf of the Dutch [47]. Although authorization was later revoked by the Dutch government [48].

Subsequently on 25 November 1964 the Netherlands Embassy in Canberra notified the Australian Government that it formally claimed "legal ownership" in relation to VOC shipwrecks off the Australian coast [49]. Perhaps more importantly the *Note Verbal* then went on to state:

"However, in view of the interest shown in Western Australia, and in particular on the part of the Western Australian Museum at Perth, in obtaining the articles recovered from the wrecks concerned, the Netherlands government are prepared to transfer any legal claim they might have to ownership of wrecks of Dutch East India company ships, and of articles contained therein, found of the western coast of Australia, to the government of the Commonwealth of Australia."³³

It was over 6 years before the Australian government responded to the offer from the Netherlands government. By this time the competing claims of the various parties that claimed rights to the vessels (including the Western Australia Museum) were making their way through the courts, and ultimately to the High Court (as noted above). It is evident from Australian government documents held in the National Archives in Canberra that concerns about the invalidity of Western Australian legislation and the pending judgment in the High Court lent some urgency to the negotiations between the Netherlands and Australia. By this time the Netherlands offer to transfer all rights in relation to the vessels was seen by the Western Australian government, the Western Australia Museum and the Commonwealth government as the best solution to the uncertainty surrounding both the West Australian legislation, and the competing claims of various parties to legal rights with respect to the VOC shipwrecks and associate artefacts of archeological and monetary value.

The negotiations between the Netherlands and Australia in relation

²⁸ Ibid.

²⁹ Ibid.

³⁰ *Museum Act 1969 (WA)*, section 40(3).

³¹ Ibid, section 40(1).

³² See Mr. Lewis [43].

³³ See the *Note Verbal*, Embassy of the Netherland in Australia to the Australian Government [50].

to the VOC shipwrecks resulted in the conclusion of the *Agreement between Australia and the Netherlands concerning Old Dutch Shipwrecks* (the “ANCODS Treaty”).³⁴ Pursuant to Article 1 of the ANCODS Treaty the Netherlands as successor to the property and assets of the VOC transferred all its right, title and interest in the VOC shipwrecks to Australia which also accepted such transfer.³⁵ The transfer of title also included all artefacts from such vessels.³⁶ While title to shipwrecks and artefacts was transferred to Australia, the ANCODS Treaty also expressly recognized that the Netherlands “has a continuing interest, particularly for historical and other cultural purposes” in articles recovered from the vessels.³⁷ Accordingly the ANCODS Treaty also provided for a Committee to be established composed of experts appointed by the Netherlands and the Australian governments to decide how artefacts were to be divided between Australia, the State of Western Australia and the Netherlands.³⁸ An annex to the ANCODS Treaty set out guiding principles on how the Committee was to undertake its work. Over following years the Committee operated precisely as envisioned and the artefacts from the VOC vessels were divided as envisioned by the treaty without controversy.

However, for the ANCODS Treaty to be given effect under Australian domestic law, specific domestic legislation needed to be enacted. The need for specific new Commonwealth legislation protecting UCH was also recognized by the Parliamentary Committee of Inquiry on Museums and National Collections established by the Commonwealth in 1975 (known as the “Pigott Committee” after its Chair Peter H. Pigott). In its report published in 1975 the Pigott Committee expressed concerns that the law as it stood in 1975 could not “protect historic shipwrecks in Australia from indiscriminate looting” [50] and noted how “scores of significant shipwrecks [had been] pillaged, damaged or disturbed by amateur archeologists and treasure hunters”³⁹ over the prior two decades.

In response, the *Historic Shipwrecks Act 1976 (Cth)* was enacted by the Commonwealth parliament prior to the High Court handing down its decision in *Robinson v Western Australian Museum*. Although the High Court decision held the Western Australian legislation was unconstitutional, this had no impact on the validity of either the ANCODS Treaty or the *Historic Shipwrecks Act 1976 (Cth)*. While the High Court decision was predominantly concerned with the constitutional validity of the Western Australian legislation, both Chief Justice Barwick and Justice Murphy expressed obiter dicta suggesting they regarded the enactment of the *Historic Shipwrecks Act 1976 (Cth)* as a valid exercise of Commonwealth legislative power [51].

Thus, even though the Western Australian legislation was held to be unconstitutional, the end result of both the entry into force of the ANCODS Treaty and the *Historic Shipwrecks Act 1976 (Cth)* was that the VOC shipwrecks were vested in Australia and their associated artefacts were shared between Australia and the Netherlands. As the result of the enactment of the *Historic Shipwrecks Act 1976 (Cth)* Australia had a truly nationally consistent legal regime for the protection and preservation of UCH associated with the VOC shipwrecks and numerous other significant sites and artefacts of UCH across the country. Despite a High Court challenge, negotiation of the ANCODS Treaty, and enactment of the *Historic Shipwrecks Act 1976 (Cth)*, controversy surrounding the discovery of the VOC shipwrecks continued to linger well into the 1990s as to who was entitled to a reward for the discovery of the VOC shipwrecks. This only subsided in 1994 with the conclusion of a Western Australian parliamentary inquiry examining who discovered the vessels which

made recommendations on *ex-gratia* payments by the state of Western Australia to competing claimants [52].

3.4. Structure and key provisions of the *Underwater Cultural Heritage Act 2018 (Cth)*

Subsequent to the enactment of the *Historic Shipwrecks Act 1976 (Cth)* the UCH Convention was negotiated. Australia played an active part in negotiations for the UCH Convention, however, as noted above, has not yet ratified the UCH Convention. While some observers suggest ratification of the UCH Convention is not far off this is by no means certain. Ratification has been under consideration by successive governments since 2009 but in 2021 government policy remains unclear. The authors have been unable to locate a clear statement of policy from the current government that a decision has definitely been made to ratify the Convention and when such a decision will be made or implemented. Indeed our examination of the parliamentary debates for the *UCH Act 2018 (Cth)* suggests only that the intention of enacting the new legislation is to align Australian law with the Convention should government make a decision to ratify. The most recent official statements issued by the Australian Government that we can identify re-enforce this ambiguity on Australia’s approach [53].⁴⁰

After some 30 years of operation, the Commonwealth government established in 2009 a review of the *Historic Shipwrecks Act 1976 (Cth)* with a view to considering changes that might be required to the legislation and importantly the requirements that might arise from Australia’s ratification of the UCH Convention. As part of this process, the Commonwealth issued a Discussion paper for public consultation [54].

Following this review, the Commonwealth, States and the Northern Territory negotiated the *Australian Underwater Cultural Heritage Intergovernmental Agreement* [55] which sets out roles and responsibilities of the Commonwealth, State and Northern Territory Governments with respect to the identification, protection, management, conservation and interpretation of Australia’s UCH. Significantly the Intergovernmental Agreement made clear that the parties were committed to achieving “international best practice management of Australia’s UCH as outlined in the Rules and Annex”⁴¹ to the UCH Convention. The Intergovernmental Agreement also committed all parties to “undertake all necessary activities to enable the Commonwealth to determine whether it should ratify” the UCH Convention.⁴²

Following the Review of the *Historic Shipwrecks Act 1976 (Cth)* and consistent with the provisions of the Intergovernmental Agreement, the *Historic Shipwrecks Act 1976 (Cth)* was replaced by the *UCH Act 2018 (Cth)* which entered into force on 1 July 2019. The *UCH Act 2018 (Cth)* was enacted to modernize “the regulatory framework to protect Australia’s UCH and includes measures to align the legislation with current international best practice standards for the protection and management of UCH as defined by the” UCH Convention.⁴³

The application of the *UCH Act 2018* is much wider than just shipwrecks and now covers two key issues identified as gaps in the law by the review of the existing legislation, namely aboriginal UCH and underwater aircraft remains. Pursuant to section 15 of the *UCH Act 2018 (Cth)* UCH under Australian law is now defined as meaning “any trace of

³⁴ *Agreement between Australia and the Netherlands concerning Old Dutch Shipwrecks*, 1972 18 Australian Treaty Series, entered into force 6 November 1972 (hereinafter ANCODS Treaty).

³⁵ Ibid, Article 1.

³⁶ Ibid, Article 2.

³⁷ Ibid, Article 4.

³⁸ Ibid, Article 4.

³⁹ See the Australian Government [51].

⁴⁰ For example, the Department of Agriculture, Environment and Water in its website explanation of the new legislation states only that the new legislation provides a “modernized framework for protecting and managing Australia’s underwater cultural heritage and enable the Government to progress consideration of ratification”. One cannot assume that consideration of ratification by government necessarily means government will ratify, especially given how long this ‘consideration’ has been ongoing. See Australia Department of Agriculture, Environment and Water [53].

⁴¹ *Intergovernmental Agreement*, Preamble.

⁴² Ibid, clause 3.

⁴³ *Underwater Cultural Heritage Bill 2018* Explanatory Memorandum, 2.

human existence that... has a cultural, historical or archeological character...and that is located under water.”⁴⁴ A “trace of human existence includes: (a) sites, structures, building, artefacts and human and animal remains, ...; and (b) vessels, aircraft and other vehicles or any part thereof...; and articles associated with vessels, aircraft or other vehicles”, as well as the archeological and natural context of each of these items.⁴⁵ However, pipeline and cables and other installations placed on the seabed (still in use) are specifically excluded from the definition of UCH.⁴⁶

The *UCH Act 2018 (Cth)* distinguishes between two broad categories of UCH: UCH that is automatically protected, and UCH that may be declared to be protected. Pursuant to section 16 of the *UCH Act 2018 (Cth)* articles of UCH that are automatically protected are all remains of vessels and articles associated with vessels that have been in Australian waters for at least 75 years, and all remains of aircraft and every article associated with such aircraft that have been in commonwealth waters for at least 75 years.⁴⁷ Thus, like Taiwan, Australia has adopted a shorter time period for eligibility for protection than the 100 year requirement of the UCH Convention. These provisions also reflect separation of responsibilities between the Commonwealth, State and Territory Governments with respect to aircraft as previously agreed in the 2010 Australian Underwater Cultural Heritage Intergovernmental Agreement [56].

The legislation also confers power on the Minister administering the legislation to subsequently declare any other article as protected UCH if the Minister is satisfied that the article is of heritage significance.⁴⁸ In determining whether an article is of heritage significance, the Minister is required to have regard to criteria relating to heritage significance set out in the *Underwater Cultural Heritage Rules 2018 (Cth)*.⁴⁹ These criteria were formulated using the principles of the *Australia ICOMOS Charter for Places of Cultural Significance*, *The Burra Charter 2013*, and having regard to existing criteria prescribed by Commonwealth, State and Northern Territory heritage legislation [57]. In addition, the legislation grants power to the Minister to declare an area containing protected UCH to be a protected zone.⁵⁰ In declaring a protected zone, the legislation also sets out specific matters the Minister must have regard to in considering whether or not to issue such a declaration.⁵¹

If an article of UCH is protected, a range of activities involving the article is prohibited without a permit. This includes any conduct which has or is likely to have an adverse impact on the article including disturbing or damaging or removing an article of UCH.⁵² In addition, the mere possession of protected UCH without a permit is prohibited and is a criminal offense.⁵³ Likewise, supplying or offering to supply protected UCH is prohibited without a permit.⁵⁴ Advertising protected UCH for sale without a permit is also prohibited.⁵⁵ The legislation also prohibits both importing and exporting of protected UCH.⁵⁶ It is also a criminal offense to import cultural heritage of a foreign country without a permit.⁵⁷ A number of other offenses relating to producing permits when requested,⁵⁸ and disobeying directions from the Minister about custody or protected UCH are also included.⁵⁹

Section 40 of the *UCH Act 2018 (Cth)* also imposes an obligation to notify the Minister in writing when a person finds an article of UCH in Australian waters which appears to be of an archeological character.⁶⁰ Failure to notify the Minister is also an offense.⁶¹

A number of different penalties apply for the commission of any act under the *UCH Act 2018* that constitutes an offense including a term of imprisonment of up to 5 years, a fine, or a civil penalty.⁶² In addition, where a person is convicted of an offense or a civil penalty is imposed for contravention of the *UCH Act 2018* the court can also order the forfeiture to the Commonwealth of any vessel, equipment or article used in the commission of the offense.⁶³ This includes any article of UCH to which the offense relates.⁶⁴

Consistent with the ANCODS Treaty, the legislation also gives the Minister specific power to declare ownership of specific Dutch shipwrecks and associated articles or relics in a specific authority of the Commonwealth, Western Australia, a specified authority of Western Australia or the government of the Kingdom of the Netherlands.⁶⁵ Similar powers are granted to the Minister to vest other UCH in the Commonwealth, a specified authority of the Commonwealth, a specified State or Territory, a specified authority of a State or Territory; the government of a foreign country or any other specified person.⁶⁶

4. Comparative analysis: similarities and differences between Taiwan and Australia's UCH Acts

While both Taiwan and Australia have not ratified the UCH Convention, both have incorporated elements of the UCH Convention in their legislation. The following discussion considers the similarities and differences in approach and in content between both these non-Parties to the UCH Convention.

4.1. on-state Parties to the UCH Convention

The incorporation of elements of the UCH Convention in domestic legislation by Taiwan and Australia in recent years has demonstrated that being a Party to the UCH Convention is not necessarily a precondition to implementing measures in line with the UCH Convention. Furthermore, the practice of Taiwan and Australia in enacting their respective domestic UCH Act has effectively responded to the global issues or concerns raised by UNESCO: “Why is legal protection necessary?” and “Why are national laws insufficient?” [58] With different origins as well as prior domestic legal contexts to start with, Taiwan and Australia have both made the main principles and provisions contained in the UCH Convention effective domestically through their own respective UCH legislation.

4.2. Convergence and deviation on the definition of UCH

After the incorporation of elements of the UCH Convention in their legislation, Taiwan and Australia have adopted definitions of UCH that to a large degree align with that in the UCH Convention. For instance, human remains, shipwrecks and aircraft remains are on an equal footing with respect to their archeological significance and level of protection. Similarly, pipelines, cables and other like in-use installations are excluded from the operation of legislation in both nations. Both the UCH legislation in Taiwan and Australia acknowledge the importance of protecting UCH much younger than the 100 year benchmark established

⁴⁴ *Underwater Cultural Heritage Act 2018 (Cth)*, section 15 (1).

⁴⁵ *Ibid*, section 15(2).

⁴⁶ *Ibid*, section 15(4).

⁴⁷ *Ibid*, section 16.

⁴⁸ *Ibid*, section 17(1).

⁴⁹ *Ibid*, section 22. See *Underwater Cultural Heritage Rules 2018 (Cth)*, Section 5 (2).

⁵⁰ *Ibid*, section 20.

⁵¹ *Ibid*, section 21.

⁵² *Ibid*, section 30.

⁵³ *Ibid*, section 31.

⁵⁴ *Ibid*, section 32.

⁵⁵ *Ibid*, section 33.

⁵⁶ *Ibid*, section 34 and 35.

⁵⁷ *Ibid*, section 36.

⁵⁸ *Ibid*, section 37.

⁵⁹ *Ibid*, section 39.

⁶⁰ *Ibid*, section 40.

⁶¹ *Ibid*, section 40(5).

⁶² See provisions for each offense cited above.

⁶³ *Ibid*, section 47(1) and 47(2).

⁶⁴ *Ibid*, section 47(4).

⁶⁵ *Ibid*, section 50.

⁶⁶ *Ibid*, section 51.

by the UCH Convention without time limit and with a 75 year time frame, respectively, which is a major and noticeable deviation from the UCH Convention on the definition of UCH.

4.3. Legislative origins

Although Taiwan and Australia each have incorporated aspects of the UCH Convention in their respective legislation, their origins are very different. In the case of Taiwan, the *UCH Preservation Act 2015* was achieved where a prior legal vacuum specifically for the preservation, protection and management of UCH existed with respect to Taiwan's domestic cultural heritage legal regime. In the case of Australia, the most recent legislation sought to build on nearly 30 years of experience in the implementation of the *Historic Shipwrecks Act 1976 (Cth)*, updated to reflect modern principles contained in the UCH Convention and to lay the foundation for subsequent possible ratification of the UCH Convention by Australia. Furthermore, as a non-Party/Member of the United Nations and UNESCO, Taiwan did not have the opportunity to participate in the development of the UCH Convention, nor to accede to it. Nevertheless, efforts to incorporate the UCH Convention into its domestic legislation were to a very large extent initiated and pursued with scholarly and intellectual input.

4.4. Sovereign immunity

Due to the misconception of the Legal Affairs Committee of the Executive Yuan in the legislative process that international or foreign-related affairs shall not be stipulated in domestic laws, Taiwan's *UCH Preservation Act 2015* does not expressly claim sovereign immunity over its sunken warships, public vessels and aircraft located/found in all maritime zones, including the Area. While it is understood and as stated in the UCH Convention that nothing in the UCH Convention shall be interpreted as modifying the rules of international law and State practice pertaining to sovereign immunities, nor any State's rights with respect to its State vessels and aircraft,⁶⁷ such an omission in Taiwan's UCH domestic legislation may cause issues in future as to whether other States could undertake or authorize activities directed at Taiwan's sunken State vessels and aircraft found in the Area without its express consent.⁶⁸ Another omission arising from the same misconception is that the Taiwan Government is not empowered by the *UCH Preservation Act 2015* to collaborate with other flag States on the protection of State vessels and aircraft of other States found in the EEZ or on the continental shelf of Taiwan.⁶⁹

In contrast, under the Australian legislation sovereignty and ownership over Australian sunken military vessels are claimed unless the government is said to have abandoned them.⁷⁰

4.5. Extraterritorial application

Another similarity between Taiwan and Australia is how each nation's legislation limits the extraterritorial application of their

legislation.

According to Article 16 the *UCH Preservation Act 2015*, Taiwan exerts jurisdiction, including regulating, authorizing, approving and prohibiting, over activities directed at UCH in its contiguous zone, EEZ and on its continental shelf. Furthermore, Article 18 requires Taiwan's nationals or the master of a vessel flying its flag to report the discovery of UCH or intention of conducting activities directed at UCH in the EEZ or on the continental shelf of other States to the competent authority of Taiwan. Apart from the above-mentioned extraterritorial applications, Taiwan does not claim jurisdiction over UCH or activities directed at UCH beyond its continental shelf.

In the case of Australia, the *UCH Act 2018* can have extraterritorial operation beyond Australia's contiguous zone applying to Australian citizens, bodies corporate established under the law of the Commonwealth, a State or Territory and any ship that has Australian nationality regardless where they may undertake activities regulated under the legislation.⁷¹

4.6. Activities physically disturbing or damaging UCH

Activities directed at UCH and those incidentally affecting UCH are separated and parallel in the UCH Convention, and further implementing legislation relating to the latter is left to State Parties.⁷² In drafting Taiwan's *UCH Preservation Act 2015* there was significant opposition from various government agencies, even including the competent cultural property authority, to the regulation of activities incidentally affecting UCH, thwarting and defeating the drafting intention and legal design of the original drafter. Almost all agencies claimed that any activities having the potentiality of incidentally affecting UCH but subject to their administrative jurisdiction or approval power should not be subject to the *UCH Preservation Act 2015* on two grounds: first, these agencies resented what they perceived as "creeping jurisdiction" encroaching onto their business by the cultural property competent agency. Secondly, they perceived that activities under their administrative jurisdiction would not impair any UCH and thus/or such activities were totally irrelevant to UCH. Compromises were reached resulting in an ambiguous content as to what the "activities not directed at UCH" really mean⁷³ which was a huge deviation from the parallel design on activities classification in the UCH Convention.

⁷¹ Ibid, section 7.

⁷² There are only three parts concerning activities incidentally affecting UCH in the Convention. One principle in the Preamble, one definition in Article 1(7) and the last one in Article 5 which stipulates that "Each State Party shall use the best practicable means at its disposal to prevent or mitigate any adverse effects that might arise from activities under its jurisdiction incidentally affecting underwater cultural heritage."

⁷³ The term "activities not directed at UCH" is defined in the current *Underwater Cultural Heritage Preservation Act 2015* by Article 3 subparagraph 3. However, the content or the type of activities which is not directed at UCH but carries incidental effect to the UCH was originally itemized and specified in the draft texts of the subordinate regulations. For instance, there were 18 categories of exploitation and utilization activities in certain waters and 27 categories of activities concerning the seabed or subsoil in the draft regulations. Nevertheless, those categories were eventually simplified into two categories. The former ones are "the following plans directly or indirectly influence the seabed and its subsoil, as well as the terrestrial waterbed and its subsoil: (1) plans subject to the approval of the Executive Yuan concerning significant policy or of inter-agency character, (2) plans subject to the approval of their superior agencies by state-owned enterprises or institutions in accordance with laws." (包括直接或間接影響海床及其底土、陸域內水域水底及其底土環境之下列計畫：一、涉及重大政策或跨機關性質應函報行政院核定之計畫。二、公營事業機構依法須經目的事業主管機關核准之計畫) The latter ones are activities including "(1) to drill, survey, explode, construct, drag, emit, dump on the seabed or subsoil, (2) activities of other nature following the consultations between the competent authority and other affairs-specific competent authorities." (一、於海床或底土鑽探、勘測、爆破、施工、拖曳、排放、傾倒。二、經主管機關與目的事業主管機關協商之其他性質活動)

⁶⁷ Article 2 paragraph 8 of the UCH Convention stipulates that "Consistent with State practice and international law, including the United Nations Convention on the Law of the Sea, nothing in this Convention shall be interpreted as modifying the rules of international law and State practice pertaining to sovereign immunities, nor any State's rights with respect to its State vessels and aircraft."

⁶⁸ Article 12 paragraph 7 of the UCH Convention stipulates that "No State Party shall undertake or authorize activities directed at State vessels and aircraft in the Area without the consent of the flag State."

⁶⁹ Article 10 paragraph 7 of the UCH Convention stipulates that "Subject to the provisions of paragraphs 2 and 4 of this Article, no activity directed at State vessels and aircraft shall be conducted without the agreement of the flag State and the collaboration of the Coordinating State."

⁷⁰ *Supra* note 34, section 52.

In contrast, under the Australian legislation activities both directly and indirectly impacting on UCH are caught by the same regulation.⁷⁴ Thus any activities physically disturbing or damaging UCH is regulated. Such provisions are consistent with the aims of the UCH Convention.

4.7. International aspects of protection of underwater cultural heritage

Taiwan's current diplomatic relationships with many other States are complicated by its and their respective relationship with the PRC. But arguably it might be possible to create viable mechanisms of international collaboration for the protection of UCH. Effective collaborative frameworks have been built on less formal arrangements. Prior to the enactment of the *UCH Preservation Act 2015*, Taiwan's Preparatory Office for the National Cultural Property Preservation Research Center (國立文化資產保存研究中心籌備處) of the Council for Cultural Affairs (行政院文化建設委員會) entered into a four-year administrative agreement concerning underwater archeology with the French Department of Subaquatic and Submarine Archeological Research (DRASSM) in 2007. In 2015, Taiwan's Bureau of Cultural Heritage of the Ministry of Culture signed a four-year memorandum of understanding concerning cultural heritage preservation with the organization "AustHeritage Ltd." established by the Australian government, and the MOU was extended in 2019 for another four year term. Since the enactment of the *UCH Preservation Act 2015*, the Taiwan Government possesses the legal basis required to enter into "bilateral, regional or multilateral agreements or international instruments with other States or international organizations" (Article 21 paragraph 1). Being a "Coordinating State" on the part of Taiwan is another viable option for the preservation, protection and management of UCH found in Taiwan's contiguous zone, EEZ or on the continental shelf and in the Area pursuant to the *UCH Preservation Act 2015* (Articles 16 and 17).

On the contrary, quite apart from the question of whether or not to ratify the UCH Convention, international co-operation has been a significant feature of Australian approaches to protecting underwater heritage. As outlined earlier in this paper the negotiation of the ANCODS Treaty laid the foundation for early Australian legislation, the *Historic Shipwrecks Act 1976 (Cth)*. The success of the ANCODS Treaty showed the possibilities for successful international collaboration in relation to shared UCH. This in turn has been built upon with a number of other collaborative international agreements between Australia and other countries with respect to shared UCH. These include agreements between Australia and several nations including the USA [59], Papua New Guinea [60], Indonesia [61] and the Philippines [62].

5. Conclusion

Both the Taiwanese and Australian UCH legislation, although different in some respects, achieve the same purpose. Both implement detailed protections for UCH in line with the aims and objectives of the UCH Convention without either State having ratified the UCH Convention. Both examples provide useful models for States that wish to protect UCH with or without ratifying or acceding to the UCH Convention.

Countries without proper regulation regarding the preservation, protection and management of UCH could incorporate the UCH Convention into their domestic law. This should include not only those main principles contained in the UCH Convention but also operative clauses, with minor revisions, where necessary and practicable, to fit into their respective historical and cultural contexts and administrative or judicial settings. In contrast, States with existing and developed UCH related legal regimes could look for necessary integration or harmonization of the existing laws and regulations as a whole to reflect the spirit and letter of the UCH Convention. Whichever model is adopted, given the holistic and diplomatic character of the preservation, protection and

management of UCH, international cooperation must be the common language not only between non-State Parties but also between non-State Parties and State Parties to the UCH Convention.

On the part of both Taiwan and Australia, it is conceivable that the Netherlands could be considered as a "potential partner" for collaboration on UCH to link these three parties together. Taiwan has a colonial history involving the Dutch. Taiwan was "the first large, integrated territorial possession over which the VOC claimed sovereignty...in Asia during the seventeenth century" [63]. By the 1630s the Dutch colony in Tayouan (or Taioan in Dutch spelling, 大員 or 臺員 in Chinese) in South-western Taiwan was an important transit port for the VOC's intra-Asian shipping network.⁷⁵ Over following centuries, due to Taiwan's "geographical location and related storm patterns, Taiwan was especially notorious for shipwrecks" [64]. Given this shared history, VOC shipwrecks may still be discovered in Taiwan in the future according to a historical survey, including the *Engel* (wrecked 1620), the *Valk* (wrecked 1623), the *Taiwan* (wrecked 1654), the *Vrede* (wrecked 1654), the *Maarsen* (wrecked 1656), the *Hector* (wrecked 1661), the *Immenhorn* (wrecked 1661) and the *Koudekerke* (wrecked 1661) [65].⁷⁶ Cooperation could then be initiated concerning the survey, excavation and preservation of such shipwrecks in that eventuality. A bilateral agreement between Taiwan and the Netherlands modeled on that between Australia and the Netherlands, or a tripartite agreement between Taiwan, Australia and the Netherlands, may lay the foundation for fruitful international collaboration.

In short, the long and winding road that Taiwan and Australia have taken shows a way to the successful incorporation of the UCH Convention for States striving for the preservation, protection and management of UCH.

CRedit authorship contribution statement

Nien-Tsu Alfred Hu: Conceptualization, Methodology, Draft structuring, Writing – original draft, Writing – review & editing. **David Leary:** Conceptualization, Methodology, Draft structuring, Writing – original draft, Writing – review & editing. **Pei-Fu Wu:** Writing – original draft, Writing – review & editing.

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⁷⁵ See Chiu Hsin-Hui [63].

⁷⁶ Based on a survey commissioned by the Taijiang National Park Headquarters (台江國家公園管理處) in 2012 conducted by Ms. Yu WANG (王瑜) on behalf of the Tree Valley Foundation (樹谷文化基金會), Professor Yi-Chang LIU (劉益昌) strongly believed that there were at least 8 VOC shipwrecks remained undiscovered within the jurisdiction of the National Park, and further surveys as well as excavations should be led by the government actively.

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