INTERNATIONAL EXPERIENCES IN THE LEGAL PROTECTION AND MANAGEMENT OF UNDERWATER CULTURAL HERITAGE AND THEIR POSSIBLE IMPLEMENTATION IN URUGUAY

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Abstract

Uruguay –like other Latin-American States- needs to improve its present underwater cultural heritage (UCH) legal protection and management framework. Limited scope of protection regarding UCH non-scientific interventions, scarce inter-agency coordination, lack of a scheme of coherent regulations, and institutional weakness of the relevant national authority, are some of the features seen in the present national system.

The commercial exploitation of historical shipwrecks, carried out in the last few years between the government and the salvor companies, as well as the inconsistency in the treatment of UCH among the different agencies involved, have led to the destruction and dispersal of archeological sites, among others issues.

Facing such scenario, there appears the general aim of analyzing how Uruguay’s legal and management framework for the protection of UCH, can be improved. In order to achieve this aim, I split my investigation in two parts. Within the first part, I will review international practices in the legal protection of UCH and management tools, by studying relevant cases in two countries: Italy and Spain. Those countries have created specific instruments for the protection, management and spreading of UCH, both nationally and locally. At the same time, I intend to identify successful UCH Public–private partnership experiences, as an additional measure to the public management of this heritage. In the second part of my investigation, and order to provide elements for a juridical reflection within the study of the ratification of the UNESCO Convention 2001, I will analyze whether Uruguayan sovereignty could be affected by the ratification of this instrument. Specifically, I will identify and analyze its legal provisions that could in any way enable the restitution of the UCH located under national territorial waters to the State of origin.

The methodological framework of my this work include the analysis of Spanish and Italian legislation, as well as international instruments as the United Nations Law of the Sea Convention and the UNESCO Convention 2001. In addition, the research includes interviews with experts in Spain and Italy as lawyers and managers at a national, and local level. The different profiles of the interviewees provided me with an integrated image of the same topic.

The results of the investigation, allow us to identify experiences of management and juridical protection that prima facie could be applied in Uruguay, both in a short and a medium term. Moreover, the aim proposed in the second part is achieved, in accordance with the rules of interpretation provided by the Vienna Convention on the Law of Treaties.
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<tr>
<td>CCPL</td>
<td>Code of Cultural Properties and Landscape</td>
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<td>CPC</td>
<td>Code of Public contracts for Works, services, and supplies in implementation of Directives 2004/17/CE and 2004/18/EC.</td>
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<td>CSIGO</td>
<td>Centro Studi Interdisciplinari Gaiola onlus</td>
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<td>DOALOS</td>
<td>Division for Ocean Affairs and the Law of the Sea</td>
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<td>EEZ</td>
<td>Economic Exclusive Zone</td>
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<td>GUP</td>
<td>Gaiola Underwater Park</td>
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<td>HHAL</td>
<td>Historical Heritage of Andalusia Law</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<td>ICOMOS</td>
<td>International Council on Monuments and Sites</td>
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<td>ICUCH</td>
<td>International Committee on the Underwater Cultural Heritage</td>
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<td>MIBACT</td>
<td>Ministry of Cultural Heritage of Italy</td>
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<td>MNL</td>
<td>Maritime Navigation Law</td>
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<td>MUCH</td>
<td>Maritime and Underwater Cultural Heritage</td>
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<td>NAS</td>
<td>Nautical Archeology Society</td>
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<td>NGO</td>
<td>Non-governmental organization</td>
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<td>nm</td>
<td>Nautical Miles</td>
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<td>OGIWHC</td>
<td>Operational Guidelines for the Implementation of the World Heritage Convention</td>
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<td>PPP</td>
<td>Public-private partnership</td>
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<td>SCUBA</td>
<td>Self-Contained Underwater Breathing Apparatus</td>
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<td>SHL</td>
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<td>SHHL</td>
<td>Spanish Historical Heritage Law</td>
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<td>UAC</td>
<td>Underwater Archaeology Center of the Institute of Historical Heritage of Andalusia</td>
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<td>UCH</td>
<td>Underwater Cultural Heritage</td>
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<td>UN</td>
<td>United Nations</td>
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<td>UNESCO</td>
<td>United Nations Educational, Scientific and Cultural Organization</td>
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<td>VAT</td>
<td>Value-Added Tax</td>
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1 Introduction

1.1 Background and Context

Uruguay, like other Latin-American nations, represents a context where the protection of underwater cultural heritage (hereafter: UCH) has gone through years of tension and commercial plundering. This has been caused – among other factors –, by the existence of an old legislation that is far from the present concept of cultural heritage. For that reason, it is necessary for Uruguay to update its legislation with tools that allow the implementation of an efficient protection of UCH. At the same time, there arises the challenge of improving the mechanisms of promotion and sensitization of a heritage, that is unknown to the majority of the population. In this context, the present piece intends to collaborate in the process of strengthening of the legal protection and management of UCH in Uruguay, through the analysis of legislations and experiences of other countries in that issue.

In order to introduce the reader in the content of this piece, I reckon as appropriate to start by explaining the context that originates my proposal, the background, the issues present in Uruguay, as well as the conceptual framework and methodology to be used therein.

1.1.1 Legal definition of UCH.

Let us begin by defining the object of legal protection referred to in the present thesis, that is to say, underwater cultural heritage.

We can find the definition of UCH, within the follow specific international instrument: “The Convention on the protection of the underwater cultural heritage”, UNESCO Paris, November 2\textsuperscript{nd} 2001 (hereafter: CPUCH). It define UCH as: “…all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years such as…”\textsuperscript{1}

Such concept is based on a spatial, material and temporal criterion. The first one corresponds to a conception of archaeology based on the study of the archaeological objects paying attention to where they are, in this case they “have been partially or totally under water”. This would be the object of study of the so-called “Underwater Archaeology”, which partly

differs from the scientific concept of “Maritime Archaeology”, defined “by the subject matter of research, and not by the physical resting place of archeological materials”\(^2\). In this sense, maritime archaeology includes “…the scientific research of past maritime aspects of culture through the physical remains left by human societies, as well as of the change of maritime cultural practices over time”.\(^3\) As a consequence, the notion of maritime cultural heritage allows to include other maritime cultural aspects such as tangible and intangible property both on land and under the sea. Nevertheless, and with the only aim to demarcate the object of this thesis, I shall refer to the definition of UCH provided for by the CPUCH, mainly due to the weak legal protection that Uruguay offers in that issue.

The material criterion of the aforementioned definition, refers to all the features of human existence “having a cultural, historical or archaeological character”. In the understanding that in this way the two great traditions of investigation that have historically protected archaeology are included: the first and more European one, that links it more strongly to history; and the second and more American that links it more intensely to archaeology. More accurately, they are only approaches from different points towards the same place, and both have to do with culture.

Last but not least, the temporal criterion adopted in the definition allows to include those archaeological objects present within coastal space as long as they “have been partially or totally under water, periodically or continuously, for at least 100 years […]”. The logic behind this time framework was devised with practical and flexible proposes\(^4\). It is advisable that the States, within their domestic legislations, extended the protection to UCH dating from less than 100 years; including archaeological remains from the Second World War, for instance.

1.1.2 UCH in Uruguay

Uruguay is located in the south east of South America. The only land border of the country is in the North West border with Brazil. In the west, the border with Argentina is Uruguay River, in the South East the border is the Atlantic Ocean and the River Plate.


\(^3\) Ibid.

In accordance with the “Tratado del Río de la Plata y su Frente Marítimo”\(^5\), and the United Nations Law of the Sea Convention (hereafter: LOSC)\(^6\), the Uruguayan baseline is an imaginary straight line between Punta del Este (Uruguay) and Punta Rasa in Cabo San Antonio (Argentina)\(^7\).

![Figure 1](image)

**Figure 1. Uruguayan maritime zones**

*(Compiled by Francis Coeur de Lion)*

In the almost 700 km maritime front covered by the River Plate and the Atlantic Ocean, there lie more than 350 shipwrecks of historical relevance, whose sinking where reported between 1532 and 1850\(^8\).

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\(^{7}\) Some States object to this, as they consider River Plate not to be the mouth of the river but a bay.

Most of these archaeological sites, historically correspond to vessels from Spain and Portugal from the beginning of their expansionist race, and who were seeking to advance inside the continent in their fight for conquering new territories. Afterwards, other European nations such as France, England and Holland reach these coasts with a view to finishing the Spanish commercial monopoly.

The shipwrecks were mainly due to the morphological characteristics of the Uruguayan coasts, particularly the ones within the land, having a slimy bottom as well as formation of banks dangerous for navigation. Adding to this, the old sailors had to face the strong and sudden winds from the SW and SE, that pushed the vessels towards the coasts. All these causes the majority of shipwrecks to be located in the shallow waters within 12 nautical miles of the coastline, making them easily accessible for anyone to disturb.

1.1.3 Specific Threatens to the UCH.

Commercial exploitation based in the selling of UCH

Even though this topic shall be the object of a greater analysis in Part 2 of the thesis, I consider as appropriate to do a brief introduction to what has been (and to a lesser extent still is) one of the major threatens that UCH has had in Uruguay.

Unfortunately, Uruguay is considered by some authors as commercial exploitation example, based on the selling of UCH as a consequence of government and companies for pure financial gain\(^9\). The latter are usually identified as “salvor companies”, “commercial operators”, or “treasure hunters”. Stainforth, defines treasure hunting activities as “the search for intrinsically valuable objects from archaeological sites for personal profit or private gain”\(^10\).


The activity of the treasure hunters was based on the law known as “sunken hulls” (hereafter: SHL)\(^\text{11}\), and its regulatory decree\(^\text{12}\). The objective of this law passed in 1975 was to give priority to safety in maritime navigation, by means of cleaning the scrap of the Uruguayan ports. In this sense, the SHL, allowed companies to make contracts with the Uruguayan coast guard for finding and recovering the national and foreign ships sunken in places that seriously difficult navigation.\(^\text{13}\) Based on this legal regime, treasure hunters began to sign contracts with the Coastal Guard also to find and recover historical shipwrecks benefiting from the sale of extracted cultural heritage.

This situation encouraged the existence of hundreds\(^\text{14}\) of permit requests for searching and removing shipwreck, with the resulting destruction of the archaeological context due to the application of instruments or access procedures carried out by treasure hunters.

As a consequence and thanks to the request of the national relevant authority and the coastal guard, in 2006 the Executive Power passed a decree according to which, new agreements between the government and the companies that search and rescue historical shipwreck are cancelled. At present, only scientific research projects are allowed, previously approved by the National Heritage Commission. In this sense, the national relevant authority within this new context, requires the observance of “The Rules” signalled by the Annex of the CPUCH for any activity directed on the UCH. In the meantime, the ratification of this

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\(^{11}\) Law-Decree 21 March 1975, n. 14.343, “Prefectura Nacional Naval, Se establecen disposiciones referentes a embarcaciones nacionales o extranjeras hundidas, semihundidas o varadas”, Published in the “Diario Oficial” (suppl to No 19492) 9 April 1975.


\(^{13}\) Sunken hulls law, art. 10 provides:

“Las embarcaciones nacionales o extranjeras hundidas, semihundidas o varadas en lugares que dificulten gravemente la navegación, o aparejen riesgos para la seguridad o para la sanidad nacionales, podrán ser extraídas o desguazadas, sin necesidad de intimación alguna y por el solo dictamen de la Prefectura Nacional Naval y en la forma que ésta determine.

El Poder Ejecutivo cometerá al organismo del Estado o contratará con la persona física o jurídica privada que considere conveniente, las operaciones necesarias para la eliminación o extracción del obstáculo”.

international instrument is still being considered by the Uruguayan Ministry of Foreign Affairs which analyses sovereignty issues.

Development of infrastructure.

The projects of works carried out within maritime zones could damage UCH if the States do not require preventive mechanisms for the protection, such as studies of archaeological impact.

In Uruguay the Environmental Law\textsuperscript{15} provides the Prior Environmental Authorization to those human activities which could damage the cultural conditions of some place. The operational institution to require them is the national environment agency, which depends on the Uruguayan Ministry of Housing, Spatial Planning and the Environment.

The national environment agency, is the competent national authority which decides the requirement of the archeological impact assessment, based on the consultative report prepared by the National Heritage Commission of Uruguay, which evaluates the suitability of the archaeologist proposed by the developer, as well as the targets of the project presented. However, it is necessary to strengthen the control mechanisms of these environmental impact studies, especially concerning the impact of tourism and development projects such as large-scale deep water ports and paper industry, through greater autonomy for the staff of the national heritage technical commission. In spite of the fact that there is a good relationship between the national environment agency and the national heritage commission, its opinion is not binding. A different situation operates in Brazil, where the national relevant authority’s opinion - Instituto do Patrimônio Histórico e Artístico Nacional - is binding with respect to the environmental agency\textsuperscript{16}.

Archaeological empathy

Cultural heritage presents two important factors. One, is the contribution to scientific (archeological, anthropological, historical) and scholarly knowledge. The other one, is the


\textsuperscript{16} Ministry of Environment of Brasil “Portaria interministerial” 26 October 2011, n. 419. “Regulamenta a atuação dos órgãos e entidades da Administração Pública Federal envolvidos no licenciamento ambiental, de que trata o art. 14 da Lei no 11.516, de 28 de agosto de 2007”, art. 6. Published in the “Diário Oficial da União” (suppl to No 208) 28 October 2011.
contribution to the enjoyment of the human being (exercise empathy). In the context of this thesis, I will define archaeological empathy as the need to exhibit the archaeological object or have a “contact” with the original, e.g. sometimes through photographs, sometimes as an act of possession. UCH management, should guide and educate this emotional human and irresistible condition through methods compatible with the conservation of underwater archaeological objects. This is an element to be taken into account by the national relevant authority, when implementing plans for the promotion of UCH. The physical-chemical balance of the underwater archaeological objects should be taken into account, and bear in mind the fact that their being exposed to the environment accelerates the processes of corrosion and decomposition, leading probably to total destruction. Since the general procedure for the conservation and restoration of the archaeological objects is long and onerous, “Public access to in situ underwater cultural heritage shall be promoted, except where such access is incompatible with protection and management.”

In conclusion, archaeological empathy is like the course of a river. Any endeavour directed at stopping it, is destined to failure, yet, at least it is possible to guide it to the desired destination. Consequently, the methodological priority should determine the empathic approach in a way that is compatible with the conservation of UCH, thus ensuring its enjoyment by the public and at the same time its preservation for future generations.

1.1.4 Variables present in Uruguay.

A) Limited scope of protection provided by the current legislation regarding non-scientific and UCH interventions to date. In accordance with the new regime, the new agreements between the Uruguayan government and treasure hunters to finding, recovering and selling historical shipwrecks, are suspended. At present, only scientific maritime archaeologist projects are allowed. However, this status could be changed easily in the future. Indeed, such protection is provided by a Decree of the Executive Power, which means that a new government could easily

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derogate it by means of a regulation and return to the previous system. Owing to this, the legislative improvement must necessarily be by way of the law, either by ratifying the CPUCH, or by creating a new legal frame where selling the UCH is prohibited.

B) Scarce coordination and lack of scheme of coherent regulations, among the competent institutions in the protection and management of such cultural heritage. The Ministry of Education and Culture, the Ministry of Environment, the coastal guard and local governments are some of the institutions with competence in the protection and management of UCH in Uruguay. However, there is scarce coordination between them. For example, the National Heritage Commission is the relevant authority to preserve archaeological sites. In addition to this, at present with the new Decree 306/06, only scientific projects previously approved by the National Heritage Commission are allowed. Now then, in accordance with the National System of Protected Areas Law and its Decree, the environmental agency manages a specific protected area which includes scientific projects on the UCH situated within the “Cabo Polonio” Natural Park. Apart from the fact that there is a conflict of competences between both institutions, there is no mechanism for the coordination that allows to define which one is the relevant authority to regulate the scientific projects directed on the UCH within this area.

For its part, an example of the lack of a scheme of coherent regulations could be identified in the previous legislation regarding non-scientific and UCH interventions. On the one hand, this legislation allowed the contracts between coastal guard and treasure hunters to find, recover and sell historical shipwrecks or its cargo. On the other hand the national heritage commission has competence to declare historical shipwrecks as “historical monuments”, thus prohibiting its alteration. The lack of a scheme of these coherent regulations, was shown in the practice in 1985 through the finding of the treasure of the Spanish vessel “Nuestra Señora de Loreto”, sunk in 1792 within the port of Montevideo by a treasure hunter under a contract with the Uruguayan Coast Guard.

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22 Decree 306/06 art. 4.


Aiming at preserving the integrity of the aforementioned underwater archaeological site, the Executive Power at the request of the National Heritage Commission proceeds to protect is legally by declaring it “Historical Monument”\(^{25}\). Consequently, and being incapable of doing works of rescue and refloating of the sunk hull, the private person files a lawsuit on damages against the Uruguayan State, finally getting an important amount of money\(^{26}\). In conclusion, this is only an example that allows to visualize the lack of a scheme of coherent regulations between the selling of the UCH and its protection. At present, four agreements for searching, rescuing and selling UCH are still in force, which merits consideration with a view to future legal reforms.

**C) Institutional weakness of the relevant national authority concerning human and economic resources.** This is something common in most of the States, especially in developing countries, which obliges the public authority to seek complementary mechanisms to promote the UCH. More specifically, Uruguayan weaknesses are related to environmental impact assessment to control the study of impact carried out by the permit holder *in situ*.

**1.1.5 Main challenges concerning the legal protection and management of the UCH in Uruguay.**

**A) Strengthen the UCH legal protection and management plans.** Firstly, this could be done by ratifying the Convention on the Protection of the Underwater Cultural Heritage 2001. Even though Uruguay ratified the LOSC in 10 December 1992, and had an active participation during the negotiation of the CPUCH, its ratification is still under study by the Ministry of Foreign Affairs which analyses sovereignty issues. Accordingly, and with the purpose of providing arguments for the process of discussion for the ratification of the convention, in chapter two of this paper I will analyze the elements that will allow to answer the following question: Could the Uruguayan sovereignty be affected by the ratification of the Convention on the Protection of the Underwater Cultural Heritage 2001? The question that is being addressed by some national authorities, has to do with the interest of the State of origin to recover their cultural heritage within the jurisdiction of coastal State regardless of where it was found.


A second formula to enhance the present legal framework would be passing a cultural heritage law, containing a definition of UCH, specific mechanisms of protection, as well as the corresponding management plans. The analysis of international experiences in the legal protection and management of UCH will be relevant, not only to the process of creation of this new instrument in Uruguay, but also to those countries that face the same challenges.

**B) Enhancing inter-agency cooperation and coordination mechanisms.** This could be fulfilled e.g. through the creation and management of a National System for the protection of National Cultural Heritage, as a means of application of the national and provincial policies and plans to protect cultural heritage (including underwater). Integrated management of UCH should prompt coherent regulation, and at the same time, would prevent the overlap of competences of the different organisations involved.

**C) Need to develop an additional proposal for public management of cultural heritage**, such as a public-private alliance, as alternative to address the lack of state funds. At present, Uruguay does not have a strategy to recruit, select and capitalize on the result of these alliances. Furthermore, there is no assessment of the impact of such an approach, which would improve the use of this tool for the management of heritage.

### 1.2 Scope and objectives.

**Overall objective:**

Analyze how Uruguay’s legal and management framework for the protection of UCH can be improved.

**General objective of Part I:**

Review international practices in the legal protection of underwater cultural heritage and management tools, by studying relevant cases in two countries: Italy and Spain.

**Specific objectives:**

Identify and analyze the effectiveness in UCH legal protection and management tools present in the Spanish and Italian legislation.

Identify successful UCH Public–private partnership (PPP) policies management.

**General objective of Part II:**

**Specific objective:**

Identify and analyse the legal provisions of the CPUCH, that could in any way enable the restitution of those pieces located under national territorial waters to the country of origin.

**1.3 Methodological framework.**

The research phase of my thesis, will include a survey on the bibliography related to the topic proposed. The survey of documents will include international legal instruments such as the LOSC and CPUCH among others. In addition, I plan to interview experts in Italy and Spain as lawyers and managers at national, and local level. The different profiles of the interviewees will provide me with an integrated image of the same topic.

As for the development of the hermeneutics phase of objective number one proposed in my thesis, I will undertake a comparative analysis of a few cases, in particular a comparative study of law in Italy and Spain. Such method of analysis is in accordance with my thesis, as it encompasses the study of social phenomena of great complexity, such as the analysis of legislation related to protection and management tools.

Both countries, have specific legislation for their internal regions for the protection and management of UCH. For example, Andalusia, a region in Spain, has pioneered the regulation of legal forms of protection of UCH through the Law of Historical Heritage of Andalusia 2007 and its corresponding regulatory decrees.

Sicily, a region of Italy, has been in the vanguard concerning legislation of underwater cultural heritage, having passed the Regional Directive for the protection of archaeological underwater heritage.

Finally, in order to develop the proposed objective in the second part of my thesis, I will analyse the provisions contained in articles 149 and 303 of LOSC, and the CPUCH.

**1.4 Overview of the thesis.**

*Part 1* – Italy and Spain are two countries with a wealth of experience in the fight against looting of UCH, both within and beyond national jurisdictional waters. Moreover, both States have ratified the CPUCH, hence, it is interesting to know what their experience in the
implementation of the different provisions has been. In this sense firstly, I will identify and analyze the effectiveness of Italian and Spanish UCH legal protection tools, such as archaeological areas, property with a cultural interest, present in the different legal instruments.

Coordination is necessary to carry out any endeavour. Enhanced institutional cooperation and coordination is needed in order to ensure effective implementation of policies, and to provide consistency in the treatment of UCH. For this reason, I will analyze the effectiveness of the cultural heritage inter-agency coordination mechanisms, such as under the National Plan for the Protection of Underwater Cultural Heritage in Spain of 2009.

Finally, I will identify and analyze the effectiveness of methods for the promotion of the management of UCH present in Italy and Spain legislation and international legal instruments. Public-private participation will also be subjected to detailed study as an additional measure to the public management of UCH. The possible implementation of some of these experiences in Uruguay, will be analysed in the conclusions hereof.

Part 2 – Another way to enhance the present legal system of protection and management of UCH could be the ratification of the international agreement specific for the protection of underwater cultural heritage by the Uruguayan State, that is the CPUCH.

In Uruguay, the ratification of the abovementioned international instrument is still under study by the Ministry of Foreign Affairs, which is analysing sovereignty issues. One of the main questions that arose in such process has to do with the possibility of Uruguayan sovereignty being affected once the CPUCH is ratified. The doubt specifically arises on the interests and rights conferred under that Convention to the States of origin in the discovered cultural property.

In this second part, I will provide the elements to answer the following question: Could the Uruguayan sovereignty be affected by the ratification of the CPUCH by enabling in some way the restitution of the wreckage located under national jurisdiction to the State of origin?

Firstly, I consider necessary to describe the precedents that led Uruguay to discuss the appropriateness of the ratification of the Convention, this is the experience related to non-scientific and cultural interventions on UCH, the problems generated, and the current status. Also, I will study the concept of sovereignty and its regulation within LOSC and the CPUCH.

Finally, I will describe and analyse the ownership legal framework, the treatment of ownership rights by international law, the Uruguayan case, as well as other elements within the CPUCH currently discussed at national level.
2 Part One. Legal protection and methods for the promotion of the management of UCH. Cases studied: Italy and Spain.

Underwater cultural heritage management, plays a predominant role as a mechanism for assembling the pieces of the puzzle that make up the universe of elements that are involved in this particular cultural heritage. The efficiency of the legal tools used, inter-agency coordination, integrate coastal management, environmental impact assessment, as well as the measures to boost promotion and public awareness of UCH, among others, should be taken
into account in order to ensure effective implementation of policies, international instruments as well as local legislation.

Generally, South American states have no specific instruments on the protection and management of UCH. Furthermore –like most countries- have difficulties to ensure effective implementation of policies, local legislation and international instruments concerning that issue\(^2\), mainly due to a lack of public funds and specialized human resources. In this sense, international cooperation has proved a fundamental tool to promote the protection and conservation of UCH. At the same time, at a local level, it becomes necessary to develop an additional proposal for public management of cultural heritage, such as a public-private alliance, as an alternative make up for the lack of state funds.

At present, Uruguay does not have a strategy to recruit, select and capitalize on the result of these alliances. Furthermore, there is no assessment of the impact of such an approach, which would improve the use of this tool for the management of heritage.

Admitting that law is not a simple tool that could be assessed in terms of efficiency, I still consider as useful to carry out a comparative law study in order to get closer to a representation of such phenomenon, although the fact that there will never be infallible recipes is well known.

On this basis, in Chapter one Section A, I will identify and analyze the effectiveness of Spanish and Italian legislation on the protection of UCH, their models, and legal protection tools. In Chapter one Section B, I will analyze the effectiveness of cultural heritage inter-agency coordination mechanism in those countries, with the objective of have an approach to the basic principles that have to be considerer to develop a good UCH protection policy.

In Chapter two Section A, I will identify and analyze the effectiveness of methods for the promotion of the management of UCH present in Spain and Italy law and international legal instruments. Public–private partnership will be studied in detail in section B of this chapter as an additional measure to public management of UCH.

\(^2\) At the time of writing (July 2014), only Argentina, Ecuador and Paraguay ratified the CPUCH in South America.
2.1 Chapter 1. Italian and Spanish UCH legal protection tools and inter-agency mechanisms of coordination.

2.1.1 Section A. UCH legal protection tools.
Commercial exploitation, development projects, looting, bottom trawling, treasure hunting and even “archaeological empathy”\textsuperscript{28}, are some of the issues that threaten UCH integrity over the world.

In such a scenario, law arise as a tool for the protection, having a dogmatic role, as well as those of interposing and prohibiting\textsuperscript{29}. By being interposed between man and archaeological objects, law intends to protect the UCH from threats through the prohibition technique.

Italy and Spain have created specific instruments for the protection, management and spreading of UCH, both nationally and locally. In the next two paragraphs, I will describe and analyze the Italian and Spanish legal UCH protection tools within legal instruments.

2.1.1.1 Italy.
The Italian model for the conservation and protection of cultural heritage, has characterized by strong centralization of competences assigned to the central government. Constitutional Law Nr 3 of October 18th 2001\textsuperscript{30}, was passed with the purpose of providing the State with a more efficient structure, having as a result a territorial decentralization of the Regions in terms of management and promotion of cultural heritage\textsuperscript{31}. According to arts. 117 y 118 of the Constitution of the Republic of Italy, the State maintains its competence concerning protection, while the Regions and other local entities are in charge of the management and promotion of the cultural heritage. Likewise, the Constitution establishes autonomy for the Regions of Sicily, Trento and Bolzano, which have special statutes regarding artistic and historical heritage, as stated below.

\\textsuperscript{28} The concept of archaeological empathy is explained within the introduction of this piece.

\textsuperscript{29} A. Supiot. Homo Juridicus. Ensayo sobre la función antropológica del derecho (Buenos Aires: Siglo Veintiuno Eds., 2012), 163.

\textsuperscript{30} Constitutional Law 18 October 2001, No 3, “Modifications to Title V of Part II of the Constitution ”, Published in the “Gazzetta Ufficiale della Repubblica Italiana” (suppl to No 248) 24 October 2001.

\textsuperscript{31} M. Vecco, Sguardi incrociati sul patrimonio culturale: Francia-Italia Politiche e strumenti per la valorizzazione del patrimonio culturale (Milano: FrancoAngeli, 2009), 165.
The Code of Cultural Properties and Landscape32 (hereafter: CCPL), is the instrument that regulates, management, protection, and promotion of cultural heritage located both on land and on territorial sea.

The Law defines cultural heritage generically as the personal and real property that has, among others, historical and archaeological interest.

Consequently, the universe of cultural heritage under protection is vast, which makes the actions of the relevant national authority difficult (The Ministry of Cultural Heritage of Italy. Hereafter: MIBACT), to whom the law assigns the following duties: protection of the cultural heritage either directly or in coordination with the regions, evaluation of the archaeological environmental impact assessment, and the classification as historical archaeological interest of the objects under juridical protection. Likewise, the law reserves the scientific investigation of cultural heritage to MIBACT, also reserving the legal authority to grant it to private actors, though always under its control.33

The CCPL also regulates the fortuitous finding of cultural heritage. He who fortuitously finds property of cultural interest, is obliged to inform the competent authorities within 24 hours, being also obliged to ensure the temporary conservation where it was found. Only when the conservation of the object is at stake before the arrival of competent authority, does the law allow the finder to remove the object from where it was, with the help of the public force, in such case. The expenses generated by the custody and removal shall be reimbursed by the Ministry.34

Specifically, “All cultural property found in the subsoil or on the seabed belongs to the state if it cannot be moved, or to the inalienable patrimony of the state if it can”35. That is to say that the underwater archaeological heritage has double protection: on the one side, it is under the control of the relevant national authority (MIBACT), and at the same time it is prohibited to alienate it, as it is included in the state domain property for being restricted property. Such provision is an important tool in the protection of UCH as it discourages every interest treasure hunters may have in coming into legal agreements with the State.

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33 CCPL, art. 4, 12, 26, 88 and 89.

34 CCPL, art. 90.

The regime of fortuitous finding defined in the navigation code\textsuperscript{36}, presents a paradox that is necessary to analyze. On the one side, the regulation rewards the person who makes the discovery and informs of the finding of cultural property before the competent authority within 3 days. The reward could be the payment of a sum of money not surpassing a third of the value of the object found. Far from being a theoretical hypothesis, the local authority of Sicily (Superintendence of Sea), receives an average of three reports of findings weekly\textsuperscript{37}. After a long administrative and bureaucratic process, the administration pays the discoverer the reward and the object is then exhibited in local museums. Then, to what extent is the regime of finding a lucrative activity for people? Could it end up affecting the unity of the patrimony? In addition, the appraisal of cultural heritage presents a series of complexities from the archaeological point of view. How would a cannon, or an amphora, or even treasure that can have economic but principally cultural value be split\textsuperscript{38}

Let us navigate now the area adjacent the Italian sea. Art. 94 of CCPL, mandates that historical and archaeological objects found twelve miles off the external limit of the territorial sea, be under protection in compliance with the “Rules concerning activities directed at underwater cultural heritage” expressed in the Annex of the CPUCH. That is to say, that five years before Italy ratified the aforementioned convention (October 2009), the legislator resorted to the adoption of such rules to manage and protect UCH located in the adjacent maritime area. Many States have resorted to the same practice adopting through legislation or regulation the principles of protection and management provided by the Annex to the CPUCH, independently to its ratification. The present custom reflects the dogmatic function that this instrument has developed since it was created.

Finally, the CPUCH adopted in Paris on 2\textsuperscript{nd} November 2001, was ratified by Italy with law n. 157 dated 23\textsuperscript{rd} October 2009 (hereafter: Law n.157). \textsuperscript{39}

\textsuperscript{36} Royal Decree 30 march 1942, No 327, art. 510, Navigation Code, Published in the “Gazzetta Ufficiale della Repubblica Italiana” (suppl to No 93) 18 April 1942.

\textsuperscript{37} S. Tusa, interview by author, 27 August 2014, Milan, IT, tape recording.


The aforementioned law mandates that interventions upon underwater cultural heritage located within the areas of environmental protection, beyond 24 nautical miles off the line of the base of the territorial Italian sea, be regulated complying with articles 9 and 10 of the CPUCH (information, notification and protection of UCH in the exclusive economic zone and on the continental shelf), and in compliance with the regulations contained in its Annex.

In addition, the mechanism of finding, investigation and protection of the UCH in the exclusive economic zone and on its continental shelf is provided. For that reason, anyone who may discover UCH in those areas is obliged to report the finding before the nearest maritime authority within 3 days. In accordance with this provision and art. 9.3 of the CPUCH, on 29th May 2013, Italy notified the Director-General of UNESCO of the finding of Roman shipwreck located in its continental shelf of the Golfo di La Spezia. Thus, the Director General notified all Parties, so that those who could prove a cultural bond with the aforementioned finding, requested to be consulted so as to ensure an effective protection of the archaeological site. Nevertheless, no State pronounced about it. Apart from the final result, what is remarkable is that for the first time since the adoption of the CPUCH in 2001, Italy has used the mechanism of international cooperation based on a common share of information and a cooperation system.

Law n. 157 also provides that anyone who intends to have an intervention on UCH must have previous authorization by the Ministry of Culture. The maritime authority will be in charge of notifying the report of the finding to the Ministry of Culture or the request for intervention accompanied with the description of the scientific project so as to be evaluated.

Also, Law n. 157 regulates the proceedings for the reporting, notification and protection of underwater cultural heritage found within the exclusive economic zone or on the continental shelf of another State Party, as well as in the Area beyond national jurisdiction.

The national competent authority for the operations of inventory, protection, conservation and management of UCH, is the MIBACT. In the case of war or state vessels,

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40 The areas of environmental protection are a legal instrument of protection and preservation of the maritime environment, which includes UCH. Its came into being by Law No 61, of 8 February 2006, in accordance with arts. 303.1 and 303.2 of LOSC. The areas cover the maritime space from the external limit of the territorial sea to the limit established by bilateral agreements with the States having territory adjacent to Italy. In accordance with this instrument, the north western Mediterranean areas of environmental protection were created by Executive Decree No 209 of 27 October 2011, one within Ligurian Sea and the other in the Tirrenian Sea. The “Italian authority” is the responsible for the control of those instruments; this is, in the first place, the Navy, then the Coast Guard y and the other police force with a jurisdiction on the sea. As from this regulation, Italy was able to establish the limits of the area where they can execute their right as a coastal State in terms of protection and prevention of the UCH.
such operations are carried out in cooperation with the Ministry of Defence. This mechanism will be analyzed in section B, paragraph 1 of this first part.

Finally, Law n. 157 provides a punitive regime of up to two years of imprisonment and economic sanctions of an amount that depends on the infringement committed.

Regional legislation

Sicily is one of the four regions in Italy that have legislative autonomy regarding protection of cultural heritage, and the only one to have a public board with exclusive competence on the protection, management and sensitization for UCH called Superintendency of Sea.

This board works in the sphere of the Regional Agency of Cultural Heritage, Environment and Education, and has competence on investigation, inventory, protection, monitoring, promotion and use of the archaeological underwater heritage in Sicily.

In 2010 and at the request of the Superintendency of Sea, the Region of Sicily issued an order for the protection of the underwater archaeological heritage, inspired on the principles present in the Annex of the CPUCH. The Decree prohibits to: “a. di raccogliere reperti o staccare parte di mosaici e strutture; b. di asportare i sedimenti che ricoprono i beni culturali sommersi.” In addition, trawling is prohibited in the maritime protected areas or in areas where the presence of underwater archaeological evidence is suspected.

The Superintendency of Sea directly controls the fulfilment of these regulations through its officials, in coordination with Coast Guard. It also implemented a successful method of

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41 The Law No 157 art. 8.


43 Soprintendenza del mare, Regional Law 29 December 2003 No 21, Finance Law, art. 28, Published in the “Gazzetta Ufficiale della Regione Siciliana” (suppl to No 57) 30 December 2003.

44 Decree Interassessoriale of Sicilian Region 11 August 2010 No 36, Guidelines for the protection of underwater archaeological heritage (hereafter: DTPAS).

45 DTPAS art. 1.2 prohibits “a. collect artefacts or eliminate part of the mosaics and structures; b. eliminate sediments covering the underwater cultural heritage”

46 DTPAS art. 1.7 provides:

“Nel corso delle battute di pesca si raccomanda di adottare un comportamento il più possibile rispettoso dell’ambiente e del patrimonio archeologico.

Si dispone, pertanto, che nelle aree marine protette o nelle zone dove si sospetta la presenza di evidenze archeologiche sottomarine non si usino reti a strascico o fucili per la pesca subacquea.”

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control through a Local Network with a diving club enabled to develop underwater cultural tourism. Indeed, such legislation provides that for the development of diving tourism the use of local guides will be needed. The Superintendence of the Sea’s concession, gives local diving clubs the right to develop cultural tourism in places where there is UCH. In return, the regional relevant authority requires control of underwater sites during dives.

Every year, or at the request of the Superintendence of Sea, diving operators are obliged to send a photographic register of the underwater site; they are obliged to report the cases of looting as well. At the same time, the Superintendence carries out regular inspections in order to verify the integrity of the archaeological site.

As stated by the Superintendence of Sea, Prof. Sebastiano Tusa\(^47\), since the system was implemented 10 years ago, no cases of looting have been registered out of a total of 16 protected sites. This success is mainly due to the fact that private actors have understood that Sicily may compete in the international diving touristic circuit, offering not only natural resources, but also showing cultural heritage. Thus, the Superintendence of Sea has found a way to promote cultural tourism, and at the same time protect UCH.

Marine archaeological areas. Case studies: “Baia” and “Gaiola” underwater parks.

Finally, it should be noted that Italy has the Marine Protected Areas “Gaiola” and “Baia” Underwater Parks, which include marine biology and UCH protection\(^48\). These instruments for management and protection, will be analyzed in section B, paragraph 2 of the first part.

2.1.1.2 Spain.

In this paragraph, I will describe and analyze the effectiveness of the legal protection tools within the Spanish legislation. The objective is to provide a guidance on how to implement best practices on this issue, taking into account the specific context where they are develop.

Unlike the Italian, the Spanish Constitution\(^49\) possesses a model for the protection of cultural heritage that is strongly decentralized. The competence of the State is limited to the

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\(^{47}\) S. Tusa, interview by author, 27 August 2014, Milan, IT, tape recording.

\(^{48}\) Institution of Underwater Park situated on water of Baia in the Pozuoli Golf, Executive Decree of 7 August 2002 (hereafter: Executive Decree of Baia), Published in the “Gazzetta Ufficiale della Repubblica Italiana” (suppl to No 288) 9 December 2002, and Institution of Underwater Park situated on water of Gaiola in Napoli Golf, Executive Decree of 7 August 2002 (hereafter: Executive Decree of Gaiola), Published in the “Gazzetta Ufficiale della Repubblica Italiana” (suppl to No 285) 5 December 2002.

\(^{49}\) Spanish Constitution (hereafter: SC), Published in the “Boletín Oficial del Estado” (suppl to No 311) 29 December 1978.
export and exploitation\textsuperscript{50} of archaeological property, as well as executing and subscribing international agreements and defending the Spanish archaeological interests beyond its political borders. Furthermore, the Constitution grants competence to the State concerning the protection of the archaeological heritage appointed to public services managed by the administration of the State\textsuperscript{51}, for instance, the wreckage located in the ports of the navy, and to a lesser extent in the State ports.

The main role regarding the protection of the Heritage is the one of the Autonomous Communities as established by the Spanish Constitution and Law 16/1985 of 25\textsuperscript{th} June, on the Spanish Historical Heritage (hereafter: SHHL)\textsuperscript{52}.

The SHHL comes out previous to the creation of the regulations of the Autonomous Communities. The legal protection of the cultural heritage, is characterized by an “Ad Hoc” register system, with legal concepts of protection designed mainly for the archaeological objects located on land, although generically they also include underwater sites. Specifically, the most relevant underwater archaeological sites are entitled to be declared “Bienes de Interés Cultural”\textsuperscript{53}, within the specific category of “Zona Arqueológica”\textsuperscript{54}, defined as “…el lugar o paraje natural donde existen bienes muebles o inmuebles susceptibles de ser estudiados con metodología arqueológica, hayan sido o no extraídos y tanto si se encuentran en la superficie, en el subsuelo o bajo las aguas territoriales españolas”\textsuperscript{55}.

For their part, the cultural property regional laws have been inspired on SHHL, and have incorporated their protection tools such as the “archaeological areas” mentioned before. For instance, at the time of writing (September 2014), the Department of Education, Culture and Sports, of the Valencian Community, as established by the Law of Cultural Heritage of

\textsuperscript{50} Law 16/1985, art. 4, of 25th June 1985, of the Spanish Historical Heritage (hereafter: SHHL), Published in the “Boletín Oficial del Estado”, on 29 June 1985, defines as plundering “…any action or omission that causes risk of loss or destruction of the whole or some of the property that is part of the Spanish Historical Heritage or that impedes the compliance of its social function”.

\textsuperscript{51} SC, art. 149.

\textsuperscript{52} SC, art. 148.1.16ª y SHHL art. 6.

\textsuperscript{53} “Property of Cultural Interest”, SHHL art. 9.

\textsuperscript{54} “Archaeological Area”, SHHL art. 15.5.

\textsuperscript{55} SHHL, art. 15.5 defines archaeological area as: “the place or natural location where there exists real estate or personal property subject to study with an archaeological methodology, whether they have been extracted or not, and either if they are on the surface, the underground or under the territorial Spanish water”. 
Valencia 56, on 8th July 2014, decided to “Incoar expediente para declarar Bien de Interés Cultural, con la categoría de zona arqueológica, el yacimiento arqueológico subacuático del pecio Bou Ferrer, sito en la costa frente al término municipal de Villajoyosa (Alicante)…” 57. The main advantage of this system, is that the legal protection of such property comes into effect as from the moment when the administrative process is started. Consequently, any action taken in the archaeological area or surroundings must be previously authorized mandatorily by the competent authority (General agency of culture).

Another of the most advanced autonomous communities from the point of view of the legal protection of UCH is Andalusia. The latest Law of the Historical Heritage of Andalusia of 2007 (hereafter: HHAL) 58, mainly governs the protection of UCH before development projects that may potentially affect it.

The HHAL maintains the preventive precept in the Area of Archaeological Easement provided by the previous regime 59. This tool allows the protection of UCH located in areas where the existence of archaeological wreckage of interest is presumed and it is necessary to take steps to adopt precautionary measures. 60 This is one of the advantages that this legal concept has regarding the “archaeological areas” provided in the SHHL 61, as well as in the previous Andalusian Law from 1991, which are only applied on Spanish territorial waters where the existence of UCH is effectively confirmed. The founded presumption can derive from the study of documentary and oral sources. This tool allows to protect a vast maritime

56 Law of Cultural Heritage of Valencia, 11 June 1998 No 4 arts. 27 y 28 Published in the “Diari Oficial de la Comunitat Valenciana” (suppl to No 3267) 18 June 2014.

57 Decision of the Council of Education, Culture and Sport of the Community of Valencia, dated 8th July 2014, by which proceedings are initiated to declare Property of Cultural Interest with the category of archaeological area, the underwater archaeological site of the wreckage of Bou Ferrer, located on the coast opposite the municipality of Villajoyosa (Alicante), and the period of public information is opened, Published in the “Diari Oficial de la Comunitat Valenciana” (suppl to No 7331) 4 August 2014. It article one provides: “Initiate proceedings to declare Cultural Interest Property, with the category of archaeological area, the underwater archaeological site of the Bou Ferrer wreckage, located in the coast opposite the municipal area of Villajoyosa (Alicante)…”.


60 HHAL, art. 48.1

61 SHHL, art. 15.5.
area, within which there is founded presumption (though not certainty) of the localization of a certain site. For instance, the mouth of the Guadalquivir River in Andalusia, has been declared “Area of Archaeological Easement”, owing to the existence of documents that register ship wrecks in this maritime area especially difficult for the arrival of ships. Furthermore, the sandy seabed of that maritime area ends up covering the archaeological sites, which prevents the existence of wreckage from being identified accurately.

The relevant local authority, is the one competent to declare the Areas of Archaeological Easement on their own initiative or at the founded request of any person. At the time of writing the present work, the Governmental Board of Andalucía has filed 56 properties of cultural interest, which are in the category of archaeological area in the General Catalogue of Andalusian Historical Heritage, and has proceeded to declare 42 areas of archaeological easement located in the Andalusian maritime areas.

The system of Area of Archaeological Easement, implies that one competent authority be notified in advance about the development of building works that entail the removal of the sea bottom in the area. Such authority, may mandate archaeological prospecting in the area as a precautionary measure, as well as proceed to the inspection of the works being carried there.

The HHAL also mandates that the competent authority be notified of any accidental discovery of archaeological objects, at the same time prohibiting its removal by the discoverer.

The competent public authority, is also entitled to authorize the archaeological activities of excavation or prospecting to public or private individuals, as long as they comply with the technical requirements mandated in HHAL, such as sufficient registration and proved experience of the person directing the works. Scientific works have to respect the special conditions imposed by the competent authority. In particular, the director of the archaeological activity has to comply with several obligations, such as stay in the site of the works, except in the case of a justified reason, having in such case to delegate their responsibility on a person with the same technical suitability and justified experience.

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62 Consejería de Educación, Cultura y Deporte, Instituto Andaluz del Patrimonio Histórico.

63 Decree of the Council of the Government of Andalusia 23 June 2009 No 285 Published in the “Boletín Oficial de la Junta de Andalucía” (suppl to No 129) 06 July 2009.

64 Order of the Council of Culture de 20 April 2009, Published in the “Boletín Oficial de la Junta de Andalucía” (suppl to No 101) 28 May 2009.

65 HHAL, art. 48 y 49.

66 HHAL, arts. 51-57.
One of the virtues of the HHAL, was to entitle the local authority with the power to demand precautionary measures of protection of the UCH to the developers of the works. Before the law of 1991, the local authorities had to recour to other instruments to find the tools for the protection of the UCH, for instance, environmental regulations, or the Law of State Ports and Merchant Navy\textsuperscript{67}.

At present, there is an effective control of maritime archaeological impact on the projects of works. The developers have to put aside an item in their budgets with funds assigned to archaeological monitoring. Furthermore, they may have to face the suspension of the works for a maximum period of two months not being liable to compensation, plus the cost of the excavation before a possible find of UCH.

The competent local authority is the one who decides the authorization of the works, based on the consultative report prepared by the Andalusian Historical Heritage Institute, which evaluates the suitability of the archaeologist proposed by the developer, as well as the targets of the project presented.

Moreover, the Delegation of Culture, together with the technical assistance of the Center of Underwater Archaeology of the Andalusian Historical Heritage Institute, supervises the compliance to the obligations during the development of the works. The archaeologist in charge of the works, previous to the beginning of the activity, has to collect at the local office a daybook which have to sign with the inspector of the works. In any event, the archaeologist in charge has to register the event in the daybook and report it to the inspection team of the Administration immediately.

The development of the following real case, reveals the efficiency of the so-called “Area of Archaeological Easement”. In accordance with this legal concept, the relevant local authority of Andalusia demanded the authority of the port of the Cadiz Bay the presentation of the project of preventive archaeology. At the beginning, the precautionary measure was to demand the developer the presence of an archaeologist in the dredger. In that area, where initially the existence of underwater sites was suspected, three ship wrecks were found at about seven meters depth under the seabed, of which two have already been excavated. Probably, without this legal concept for the protection those sites would have been destroyed. In addition,

\textsuperscript{67} Real Decreto Legislativo 5 September 2011 (suppl to No 2) “Texto Refundido de la Ley de Puertos del Estado y de la Marina Mercante (Vigente hasta el 25 de Septiembre de 2014)”, Published in the “Boletín Oficial del Estado” (suppl to No 253) 20 October 2011.
such discovery allowed to identify the sedimentation of the maritime area, and consequently the relative dating of the archaeological sites found under the seabed.

Thus, through these original legal concepts for the protection the existence of maritime and underwater archaeology is acknowledged. Indeed, the category of archaeological area had been systematically applied on the land, but not to protect the UCH. At present, a balance between the protection of the heritage on land and under water is beginning to be observed.

The control over the protected areas, is done by the Andalusian Historical Heritage Institute in coordination with the local Civil Guard. The success of the system is fundamentally based on the personal character of those in charge of the institutions. Moreover, actions are coordinated with Central Operative Unit of the Civil Guard in Madrid on the topics related to the looting of UCH.

The punitive system present in the Spanish legislation deserves a brief analysis. In practice, it is difficult to prove the commission of the crime provided in art. 323 of the Spanish Penal Code\textsuperscript{68}, let alone when the archaeological site is under water.

What activities can damage an archaeological site? For the time being the activities of prospecting do not damage the UCH. However, prospecting without authorization from the administration such as the one that can be carried out by treasure hunters, or uses of metal detectors on land, is an activity that is prohibited in several autonomous legislations in Spain. In those cases, if the author is not caught “in fraganti” destroying the archaeological site, the penal punishment is not applicable due to lack of proof.

The administrative sanctions are severe, but, do they perform their function of deterring? For instance, at the time of writing (August 2014), the Subsidiary General Office for the Protection and Conservation of the Community of Madrid, has already initiated 17 files on violations to the land cultural heritage, of which 7 are use of metal detectors in archaeological areas without administrative authorization\textsuperscript{69}. The economic fine could go from 60,000 to 300,000 Euros\textsuperscript{70}. At the end of the day, the efficiency of the fine will depend on the proof

\textsuperscript{68} Law 23 November 1995 No 10 Penal Code, Published in the “Boletín Oficial del Estado”, (suppl to No 281) 24 November 1995. art. 323 punishes with a prison sentence of one to three years he who causes damage on an archaeological site.

\textsuperscript{69} L. Lafuente Batanero, interview by author, 9 September 2014, Madrid, ES, tape recording.

\textsuperscript{70} Law 18 June 2013 No 3 art. 44.1.b, Historical Heritage of the Community of Madrid, Published in the “Boletín Oficial de la Comunidad de Madrid”, 19 June 2013.
obtained concerning the effective use of the device. On the contrary, it is likely that the administrative decision that determines the sanction be revoked by a court.

To finish the present paragraph, I would like to highlight the ratification of the CPUCH on 6th June 2005 by Spain71. The coordination of the competent institutions in the management and protection of UCH, is one of the challenges posed since then. In the next chapter, the systems of coordination implemented in Italy and Spain shall be analyzed, as well as the results obtained, intending to suggest some explanatory factors that could serve as a basis for future experiences.

2.1.2 Section B. UCH inter-agency mechanisms of coordination.
Coordination for the protection and management of UCH is one of the main challenges for those States which have different public institutions having competences in the issue. In theory, the development of mechanisms for the coordination and collaboration would allow to maximise the scarce resources present in public administration, and make them more effective. Furthermore, the coordination of national and regional plans and policies for the protection of cultural heritage, would provide a practical tool to avoid overlapping competences among the organisations involved, thus promoting the coherence of regulations within the legal system.

In this section, I will identify and analyse the best practices on inter-agency coordination mechanisms for the co-operation of the UCH preservation in Italy and Spain.

2.1.2.1 Interagency coordination mechanisms in Italy.
In Italy, the role of management on the preservation and protection of the UCH, is an issue that involves the activities of many institutions as the MIBACT, Ministry of Defence, Ministry of Economy and Finances, National and Regional relevant cultural authorities, environmental agency, universities, etc.

The coordination of the activities of those boards was done by Law or Decrees, based on which specific agreements to regulate the forms of cooperation are entered into.

In Italy, one of the strongest experiences on the cooperation for the protection of the UCH has been developed between the Ministry of Cultural Heritage and the police forces, responsible for the protection of the national heritage.

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71 Instrument of ratification Published in the “Boletín Oficial del Estado”, (suppl to No 55) 5 March of 2009.
In 1989 through the Decree passed by the Italian Executive Power, the Ministry of Cultural Heritage and the Italian Navy, established a mechanism of cooperation for the UCH protection\textsuperscript{72}, by means of enhancing human and logistic resources.

On the one hand, the Italian Navy acts in the protection of the maritime areas of archaeological interest through the military staff (Coast Guard). On the other hand, the Ministry of Cultural Heritage provides them with courses on the UCH management and legal protection.

This agreement is an example of inter-agency coordination among organisms that share the same competence on the same territory and that, far from disputing and overlapping, unite resources as well as experiences in favour of the protection of the UCH. For the coordination of such activity a committee is provided, formed by both parties and chaired by an administrative judge appointed jointly, with authority conferred to advise and make proposals in the issues related to the aforementioned regulation.

Finally, the decree establishes that the Italian Navy offers the results of the underwater research within the territorial sea to the Ministry of Cultural Heritage so as to individualize the UCH, delegating the forms of collaboration for the development of research of mutual interest to future conventions.

Certainly, this target was crystalized in 2004 through the creation of the “Archeomar Project”, the major register of underwater archaeological sites in Italy.

The Project was an example of inter-agency coordination. It was coordinated by the Italian Ministry of Cultural Heritage, and undertaken in close collaboration with the Superintendence responsible for each of the Italian regions and the police forces, responsible for the protection of the national heritage (The Carabinieri force, Carabinieri Unit for the protection of the National Heritage, Harbor Authority Unit Coast Guard, Finance guard and Navy).

The first phase of the project was carried out in the Regions of Campania, Calabria, Basilicata and Puglia between 2004 and 2007. The second phase started in 2009 and covered the Regions of Lazio and Toscana. Nowadays, the project has been postponed awaiting new funds.

The Archeomar Project involved four steps. The first one, consisted of preliminary research on archives, libraries, fishermen, and divers. Secondly, the development of activities that were carried out: in-shore and off-shore operations. The third phase of the research, was

\textsuperscript{72} Executive Decree 12 July 1989, Published in the “\textit{Gazzetta Ufficiale della Repubblica Italiana}” (suppl. to No 175) 28 July 1989.
the data organization and interpretation (preliminary database) and geographic information system creation. Finally, some of the information was intended for public diffusion, and other for internal use of the Navy and Ministry of Heritage Culture for security reasons.

Another example of coordination between Italian Navy and Ministry of Cultural Heritage, was Law n. 78 of 2001 called "Protection of the historical heritage of the First World War".73 The Law applies to both land and sea.

In accordance with this instrument, the Project Census of First World War cenotaph monuments was created, whose aim was the preparation of an inventory and the on line spreading of the UCH related to the First World War.

For the development, the coordination and collaboration of The Italian Navy History Office, and the Institute for Cataloguing the Documentation of the Ministry of Cultural Heritage is necessary.

In addition, the work of inventoring and researching is done jointly while military tasks are carried out by the Navy, such as localization of underwater mines by mine sweeper ships. Through this mechanism of coordination both institutions continue their collaboration for the protection, census and investigation of UCH.

The MIBACT also coordinates actions for the protection of UCH with the “Carabinieri Unit for the protection of the National Heritage”. That is a body that depends on the Ministry of Defence, but is functionally inserted and in direct collaboration with the MIBACT, having competence in security and preservation of the cultural heritage of the nation through the prevention and repression of violations to the law of protection of cultural heritage and landscapes.

The unit is formed by soldiers specially qualified through courses on the protection of the cultural heritage, organized in coordination with MIBACT, with jurisdiction within all Italian territory.

Another example of inter-agency coordination, is the one between the MIBACT and the “Finance Guard”. This is a special police force that depends on the Ministry of Economy and Finance, having competence in the control of economic and financial illicit activities on sea, as drug trafficking, smuggling of foreign tobacco, illegal immigration and trafficking of toxic waste. Thus, the Finance Guard cooperates with MIBACT on the UCH looting control during the development of their regular activities.

73 Law 7 March 2001 No 78, “Protection of the historical heritage of the First World War” Published in the “Gazzetta Ufficiale della Repubblica Italiana”, (suppl to No 75) 30 March 2001.
Finally, The Code of Public contracts for Works, services, and supplies in implementation of Directives 2004/17/CE and 2004/18/EC (hereafter: CPC)\(^{74}\), with reference to works of preventive archaeology of public works, necessarily entail the inter-agency coordination. Such instrument, as the CCPL, establishes that the local cultural authority (Superintendence), is entitled to request the execution of a survey of preventive archaeology in areas of archaeological interest where public works are intended. The public body that performs the works will be in charge of the expenses. The implementation of this mechanism for the protection necessarily requires the coordination of activities among the different public bodies involved, favouring the consistencies in the treatment of UCH.

Cooperation between national and local authorities.

Art 117 of the Constitution of the Republic of Italy entitles the State with legislative competence regarding the protection of cultural heritage, with the exception of the Regions of Sicily, Cerdeña, Trentino-Alto Adige/Südtirol y Valle de Aosta/Vallée d’Aoste, which have private forms and conditions of autonomy.\(^{75}\)

Furthermore, art. 118 establishes that state law will regulate the forms of agreement and coordination regarding the cultural patrimony between the State and the Regions. In this respect, the CCPL provides the obligation of cooperation between the Regions and the Central Government in executing the protection of the UCH.\(^{76}\)

As stated by Dr. Annalisa Zarattini, responsible for the *Servizio di Archeologia Subacquea* of the MIBACT, there is good coordination between the Central Government and the Regions\(^{77}\). The limited number of archaeologists that work for public institutions in (only 5 to the date of the present document), as well as the professional affinity among them, make the coordination of activities and consultation between the Regions and the Central Government much easier.

Finally, it is worth mentioning that despite the existence and functioning of all the mechanisms of coordination, some inconsistencies that affect the management and protection

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\(^{74}\) Code of Public contracts for Works, services, and supplies in implementation of Directives 2004/17/CE and 2004/18/EC (hereafter: CPC), Legislative Decree 12 Abril 2006 No 163, Published in the “Gazzetta Ufficiale della Repubblica Italiana” (suppl to No 02) May 2006.

\(^{75}\) Constitution of the Italian Republic, art. 116

\(^{76}\) CCPL art. 5.

\(^{77}\) A. Zarattini, interview by author, 28 July 2014, Rome, IT, tape recording.
of UCH can be identified. One of those, affects the cooperation of the public management of the cultural patrimony between the Central Government and the Autonomous Region of Sicily. It has to do with the impossibility of the officials of the Soprintendenza del Mare di Sicilia to be transferred to other public institutions in Italy and vice versa. This fact limits the quality of the management of the officials managing the cultural patrimony in Sicily, as claimed by the Superintendent of the Sea of the Region of Sicily, Dr. Sebastiano Tusa78.

Another problem, concerns the professional practice of the maritime archaeologist, regarding the difficulty in getting a diving license required by the maritime authority. This is due to both the high cost and the long hours entailed. As in France or Spain, it would be advisable that the Italian legislation consider three types of diving license: professional, scientific and touristic.

2.1.2.2 Interagency coordination mechanisms in Spain.

In this paragraph, I will describe and analyse the interagency coordination mechanisms developed in Spain, its system, and the role of the organisations in charge of the coordination of the activities of the institutions which have competences in the management and protection of UCH in Spain.

The coordination of the different institutions competent in the management of UCH is one of the challenges present in the Spanish legal system.

Within paragraph 2, section A, chapter 1 of this part, I described the distribution of the competences that the Spanish constitution grants to the state and the autonomous communities. It is worth mentioning again that the autonomous communities shall be in principle the competent administrations concerning the protection of UCH, except for specific cases where the magna carta grants competence to the state, for instance, regarding the defense against illicit export, the plundering, and the property of the Spanish historical heritage, among other competences.79

In addition, there are other institutions that have a direct or indirect intervention in the management of UCH. One of those is the Ministry of the Interior, through the Maritime Service of the Civil Guard, referring the custody of the archaeological sites against plundering. Another body that has an influence on the UCH is the Ministry of Defense. On the one hand, it possesses information from documents and military historical files which are very useful for drawing

78 S. Tusa, interview by author, 27 August 2014, Milan, IT, tape recording.

79 SC, arts. 148 and 149, SHHL art. 6, Sentence of the Constitutional Court 17/1991.
archaeological charts. On the other hand, it also has competence in the protection of the underwater sites located in the ports of the Navy. In this sense, the Ministry of Defense could come into agreements with the Ministry of Culture, for the development of scientific activities for the protection of UCH, through the resources that the Navy possesses (vessels, technology, experts).

In turn, the Ministry of Promotion has competence concerning the management of the waters in the State ports. As a result, it should coordinate activities with the Ministry of Culture for the protection of UCH located in its jurisdiction.

The General Direction of the Coast, is the agency in the Ministry of Environment that manages the activities developed in the public maritime-land domain, such as regeneration of beaches, laying underwater wires, etc. The control that this agency carries out is of utmost importance in order to prevent possible damage to UCH.

Finally, the existence of the Historical Heritage Council is worth mentioning. Such body, dependent on the Ministry of Culture, carries out the coordination of the actions related to the Spanish historical heritage among administrations of the State and the autonomous communities.

In October 2007, the Heritage Council passed the National Plan for the Protection of the Spanish Underwater Cultural Heritage (hereafter: the plan), created by the Ministry of Culture.

The general purpose of the plan was to promote a general reflection on the basic outlines that should be adopted to carry out an efficient policy of protection of the Spanish underwater archaeological heritage

The plan contained a decalogue of measures to be taken in coordination among all the public agencies implied in the protection, through the adoption of concrete measures for the safeguard, conservation and sensitization of this heritage. Among them, the need to take actions for the documentation and inventory through the creation of the underwater archaeological map along the Spanish coast was emphasized. Moreover, previous activities of physical and legal protection of the archaeological sites, as well as the sensitization of underwater cultural heritage, among others.

Finally, the plan included the creation of an interdepartmental committee to coordinate the actions in the territorial sea or continental shelf that the competent institutions carried out regarding UCH, establishing a protocol for archaeological action for the infrastructure works in ports, and the creation of a cooperation agreement between the Ministry of Defense and the Ministry of Culture for the protection of the underwater heritage.

Aiming at developing the points established in the above mentioned decalogue of measures, the heritage committee decided, on 12 December 2007, the creation of a work team of experts from the Ministry of Culture, the Autonomous Communities, the universities, museums, as well as the staff of the Navy and the Security Corps of the State. This work team finished its work on 14 May 2009, expressing its results in a document called “Green Paper”\textsuperscript{81}, approved by the Heritage Council on 16 July 2009.

The document identifies the main lacks and weaknesses of the UCH in Spain, defining at the same time the necessary public policies to remedy those deficiencies. All these within the frame of a common and coordinated policy of defense of that heritage, between the Ministry of Culture, the Autonomous Communities and the rest of the organizations implied.

There follows the mechanism of coordination used during the process of creation of the plan and the work team of Green Paper, and in the end the analysis of results.

The mechanism implemented for coordinating the enquiries among the different organizations involved in the creation of the plan, was developed in compliance to what is established by Law n. 111\textsuperscript{82}.

The main body in charge of conducting the process of work was the President of the Heritage Council, that is, the General Director of Fine Arts and Files of the Ministry of Culture\textsuperscript{83}. The plan started with a draft written by the President of the Council of Culture, which included the structure and the original script. Later, the abovementioned document was negotiated among all those implied mainly through successive bilateral meetings.

The first bilateral meetings were carried out between the Ministry of Culture and the Navy. The respective roles of each agencies were revised, as well as the need to coordinate actions so as to maximize the knowledge and the tools for the protection of the underwater

\textsuperscript{81} Ministry of Culture of Spain, Green Paper, National plan for the protection of underwater cultural heritage (hereafter: Green Paper) [book on line] (Spain: Ministry of Culture, 2010, accessed 20 July 2014); available from http://es.calameo.com/read/000075335015cc9543e0f; Internet.

\textsuperscript{82} Law 111, arts. 1-6.

\textsuperscript{83} Law 111, art. 4.a.
cultural heritage. The discussion on the ownership of the heritage was an obstacle to be overcome at the beginning of the process.

After the first stage, the negotiations of the plan continued between the Ministry of Culture and the Autonomous Communities. In those meetings, they started working on the results obtained in the meetings with the Navy. In addition, the Autonomous Communities proposed ideas that were presented again to the Navy, successively.

On November 30th 2007, and after two years of negotiations, the Council of Ministers of Spain approved the plan drawn by the Ministry of Culture.

From then on, the work team started and finished with the creation of the Green Paper in 2009. During this second stage the system of coordination was the same as the one implemented for the creation of the national plan, that is to say, through bilateral meetings between the members of the work team always with the direction of the Ministry of Culture.

Let us now analyze the results obtained regarding the aims proposed in the Green Paper, as well as the mechanism of coordination developed as from 2009.

In my opinion, the main virtue of the plan was its aim, that is, the development of a common and coordinated policy between the Ministry of Culture, the Autonomous Communities and the rest of the agencies involved, as well as the identification of the main necessary measures for the protection of UCH.

The first conclusion that can be obtained from the investigation is that the origin of the national protection plan is the consequence of a specific current situation: this is the case of the looting of the frigate “Nuestra Señora de las Mercedes” sunk in 1804, and its recovery by the Spanish State after a litigation maintained in the American courts against the company Odyssey Marine Exploration, Inc. Had it not been for the impact in the media, politics and law that this particular fact had, it is at least worth wondering if the plan would have been started.

In practice, the experience of the plan was subjected to the personal initiatives of certain people who were responsible for most of the actions of coordination and work.

As time went by, most of the important members of the group of entrepreneurs abandoned the Project, this having a consequence on the efficiency of the projects stated in the plan and on the system of inter-institutional coordination.

Beyond the legal existence of an inter-institutional mechanism of coordination, it is difficult to identify a space for exchanging ideas and defining the general policies of protection

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84 L. Lafuente Batanero, interview by author, 9 September 2014, Madrid, ES, tape recording.
of UCH. Everything seems to summarize to a policy of reaction against particular events. For instance, the exhibition carried out in Madrid at the Archaeological National Museum and the Naval Museum that showed the coins recovered by Spain after obtaining a favorable decision before the American courts against the company Odyssey Marine Exploration, Inc.

During the implementation of this plan, problems in the system of information and participation of the actors involved were found, which arose suspicion on the procedure. The scarce multilateral meetings that were carried out from the beginning of the plan could have been one of the causes of such result.

In addition, during the process of coordination some conflicts of competence arose, related to ownership and investigation of the State vessels. Some differences were solved within the work team. Others, on the contrary, still exist to this date. The Maritime Navigation Law (hereafter: MNL) recently passed, poses a new political and juridical discussion on the competent agency in terms of the protection of UCH, which could probably be settled before the Constitutional Court.

In conclusion, the investigation of the National plan for the Protection of the UCH allows to confirm the complexity of the coordination of activities among the different institutions that have a competence on UCH.

Regarding strictly the system of coordination implemented, in my opinion carrying out a greater number of multilateral meetings as a means to improve the communication among the parts involved, could have had a positive effect.

In conclusion, the efficiency of the system of coordination responds to the personal initiatives of the representatives of the institutions. The conflicts of interests among the different agencies, end up affecting the original purpose of the plan, that is the joint and coordinated management for the protection and promotion of UCH public access.

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86 At the beginning of this paragraph we saw that art. 148 and 149 of the SC grant competence to the Autonomous Communities regarding the protection of UCH, except some specific cases. At the same time, art. 20.3 MNL grants competence to the maritime agency to limit or restrict the underwater activities “out of conservation of maritime biodiversity or underwater cultural heritage reasons for the prevention of illicit activities”. Moreover art. 382 provides:

“The operations of exploration, trawling, localization and extraction of ships and vessels of the Spanish State wrecked or sunk shall require the authorization of the Navy, which has full competences for their protection, notwithstanding the provisions of the legislation of cultural and historical heritage, if any”.

-34-
2.2. Chapter 2. Tools for promoting the management of UCH.

In this chapter, I will study the different tools contemplated by Italian and Spanish legislation for the promotion of the management of UCH, with a special emphasis on public-private participation as an additional proposal for public management.

2.2.1. Section A. Management tools for promoting the management of UCH present in national and international instruments

In this section, I will analyze the main tools for the promotion of the management and promotion of UCH present in the legislations of Italy and Spain, as well as in some international instruments. My purpose is to suggest some explanatory considerations in terms of the efficiency of such tools, and at the same time offer evidence as a “quasi-experimental test”\(^{87}\), through a comparative analysis of these two cases.

2.2.1.1 National instruments.

Let us begin by identifying and analysing the main tools provided by the Italian legislation to promote the management of UCH.

Tax exemption. - Recently, on 31.05.2014 the Italian parliament passed the law n. 83 “Misure urgenti per la tutela del patrimonio culturale della nazione e per lo sviluppo della cultura” (hereafter: Art Bonux)\(^{88}\), that contains new measures for the promotion of the protection of cultural heritage, the development of culture, and the improvement of tourism.

The old regime of sponsorship proved to be an inefficient tool, mainly due to the scarce tax incentives offered (19% tax credit)\(^{89}\), and also to its complex bureaucratic procedure. The Art Bonux intends to encourage the form of cultural sponsorship -mecenatismo culturale- by means of a tax credit of 65% applicable to donations in cash for interventions of maintenance, protection y restoration of public cultural heritage, among others.

Another reform installed by the new regime, refers the exemption of the payment of the levy provided for the reproduction of cultural property, on the activities carried out by non-profit private actors that aim at the promotion of the cultural heritage. In the previous regime

\(^{87}\) M. S. Valles, Técnicas cualitativas de investigación social (Madrid: Síntesis ed., 2007), 364.

\(^{88}\) Law 31May 2014 No 83, "Urgent provisions for the protection of cultural heritage, the development of culture and the reactivation of tourism." (hereafter: Art Bonux), Published in the “Gazzetta Ufficiale della Repubblica Italiana” (suppl to No 83) 30 July 2014.

\(^{89}\) Executive Decree 22 december 1986 No 917, Approval of the consolidated income tax, art. 13-bis, comma 1, lettere h) e i), Published in the “Gazzetta Ufficiale della Repubblica Italiana” (suppl to No 302) 31 December 1986.
of CCPL\textsuperscript{90}, only public actors could benefit from such exemption. Moreover, after the reform a new exemption in the payment of the aforementioned levy is created. This time, activities whose aim is spreading images of cultural property, legally acquired, whose reproduction is non-profit, even indirectly, are specifically exempted.

The recent legislation promotes and encourages the participation of private actors, such as civil associations and foundations, on a non-profit basis in the promotion of UCH. Such method is currently being developed and promoted by the “Soprintendenza di Napoli” and the “Soprintendenza del Mare” in Sicily. Their experience will be analyzed in section B, paragraph 2 of part one.

The taxing regime for cultural heritage, also provides an exemption in the payment of Value-Added Tax (VAT), for operators of the area of cultural heritage. The Decree of Executive Power n. 633 of 26 October 1972,\textsuperscript{91} provides the exemption of such tax to “le prestazioni proprie delle biblioteche, discoteche e simili e quelle inerenti alla visita di musei, gallerie, pinacoteche, monumenti, ville, palazzi, parchi, giardini botanici e zoologici e simili;”\textsuperscript{92} Thus, for instance, authorized diving clubs, as well as private actors authorized to manage underwater parks in Italy, are exempted in the payment of VAT for properties and services offered to tourists in their visits.

\textbf{Inter-agency cooperation.}

As expressed in chapter 1, section B, inter-agency collaboration is usually another method used to promote the “in situ” protection of UCH.

In accordance with Rule 29 of the Annex of CPUCH\textsuperscript{93}, “An environmental policy shall be prepared that is adequate to ensure that the seabed and marine life are not unduly disturbed.”

Based on this provision, MIBACT and the Italian environmental agency, enter into bilateral agreements of collaboration in the protection of both marine environment and UCH.

\textsuperscript{90} CCPL, art. 108.

\textsuperscript{91} Executive Decree n. 633 of 26 October 1972, Istituzione e disciplina dell'imposta sul valore aggiunto, Published in the “Gazzetta Ufficiale della Repubblica Italiana” (suppl to No 292) 11 November 1972.

\textsuperscript{92} Executive Decree n. 633 of 26 October 1972, art 10.22 provides the exemption of VAT to: “the benefits typical of libraries, records, and similar and those inherent to visits to museums, art galleries, monuments, villas, palaces, parks, botanical gardens, zoos and similar”.

\textsuperscript{93} Ratified by Law n. 157 of 23 October 2009, Published in the “Gazzetta Ufficiale della Repubblica Italiana” (suppl to No 262) 10 November 2009.
As this text is being written, the Italian Ministry of Environment, together with the Coast Guard Service, are implementing the “Mampira” programme, whose aim is to improve the surveillance and monitor the 16 marine protected areas all around the country. The Archaeological Superintendence of Napoli works together with them for the implementation of the programme in the Marine Protected Areas of “Gaiola and Baia” Underwater Parks, through the installation of a video surveillance system, control stations located in the centres for visitors in the parks, and communication infrastructure for video transmission from the monitoring station in the Comando Carabinieri for the environmental protection of Napoli. The project is possible thanks to the 20 million euros financing from the European Union.

Development projects.

Preventive archaeology, is another tool not only for protection but also for the promotion of UCH.

Development projects may constitute a threat to the UCH to the extent that legislation does not include archaeological impact assessments prior to its implementation. But at the same time, they can become an important source of revenue for public agencies responsible for management, supervision and research.

In Italy, the CCPL and the CPC, regulate the activities of preventive archaeology regarding public works.

The CCPL provides that the local cultural authority (Superintendence), shall be entitled to require a survey of preventive archaeology in the areas of archaeological interest where public works are intended. The expenses of the archaeological works shall be in charge of the public agency that orders the works.

This tool has been widely used both by MIBACT and the Region of Sicily. For instance, while the works of preventive archaeology were carried out in the construction of an off-shore plurimodal terminal in the coast of Veneto (Region of Veneto), wreckage dating from the Roman era could be identified and investigated. In this case all the works were financed by the Italian Ministry of Infrastructure and Transport.

Thus, by means of the works of preventive archaeology, the Italian Ministry of Culture receives the necessary funds for the development of its investigations. In addition, it is an

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instrument for the cooperation among governmental bodies, which helps to provide consistence in the treatment of UCH.

There follows the efficiency of the measures for the promotion of UCH, provided if the Spanish legislation.

Title VIII of the SHHL\(^95\), provides several measures for the promotion of the cultural heritage in general, where the main actor is the state before a private sector that is offered little incentive for the participation.

Subsidy, is an administrative tool developed for the promotion in order to promote a particular line of political action in the protection of heritage. For instance, the central government grants public funds for the National Plan for the Protection for the Underwater Heritage to the Autonomous Communities so that they prepare archaeological maritime charts. Here we are before a policy of promotion that depends exclusively on public incentive.

Official credit is another form of subsidy provided in SHHL\(^96\) that entails lower expenses for the public administration. Through official credit, the promoter of a project may have access to a loan with a zero financial cost. For instance, the state may offer loans to companies for carrying out underwater archaeological projects in areas declared as property of cultural interest. In this case, the financial cost of the loan is assumed by the Spanish Ministry of Culture. Here, there is a certain promotion for the private sector and at the same time the state assumes as cost a smaller percentage than in the previous paragraph. This norm has proved to be inefficient in practice, due to the programmatic aspect of its phrasing: “the Government shall provide”, “will be entitled”, and also to how indeterminate some of its terms are, such as preferential access to official credit\(^97\).

Another measure for the promotion provided in SHHL\(^98\), is the so called one per cent (1%). One per cent of the budget assigned to each public work done by the State is assigned to certain actions for the conservation and protection of heritage. In Spain, this is usually used for restoration of monuments. There have also been cases of archaeological excavations on land

\(^95\) SHHL arts. 67-74.

\(^96\) SHHL art. 67.

\(^97\) L. Lafuente Batanero, Las medidas de fomento. Aplicación de la nueva Ley de Mecenazgo en los museos, Revista de la Subdirección General de Museos Estatales, no. 0 (2004): 102-117.

\(^98\) SHHL art. 78
sites, though, there has never been a case in underwater archaeology. For example, this measure was used in Madrid to subsidize the investigation of a site in “Carpetania”. It has also been used for the development of centers if interpretation in important archaeological sites, such as the one in Altamira, or to build temporary exhibition rooms in museums. In this measure, there is not a private initiative but budget transfer from the Ministry of Transport and Public Works to the Ministry of Culture. Therefore, here there is no private initiative either.

A promotion on private participation is observed in the system of fiscal incentives to the cultural sponsorship, provided in Law 49/2002, dated 23rd December 2002 (hereafter: Patronage Law)\textsuperscript{99}. In compliance with that law, tax payers of personal income tax are entitled to deduce 25\% of the monetary donations done in favor of some particular nonprofit entities, the State, the Autonomous Communities, State Universities, among other institutions. Companies are entitled to deduce 35\% of the value of the donations above mentioned from the corporation tax. In fact, such percentages have proved to be unattractive for the private sector. Some priority activities of patronage provided in the Law of General Budget of the State\textsuperscript{100} create greater interest, such activities being entitled to increase in up to five per cent, the percentages and limits of the above mentioned deductions\textsuperscript{101}. The Law enumerates the priority activities of patronage, namely: conservation, restoration, or rehabilitation of the properties of the Spanish historical heritage, among others. Each Autonomous Community may propose property located within its territory so that it is included in such list, nevertheless, to this date there are no maritime archaeological areas.

Cultural patronage in Spain is mainly found in well-known institutions such as “Museo Nacional del Prado”, “Museo Thyss-Bornemisza” and “Museo Nacional Centro de Arte Reina Sofía”. Nevertheless, it is not efficient regarding the promotion of projects of investigation and conservation related to UCH.

In conclusion, I reckon that in Spain the source of financial help will presumably continue in the State until there is more incentive to the system of cultural patronage. Thus, the


\textsuperscript{100} Law 30 December 2002 No 52, of State General Budget for 2003, Published in the “Boletín Oficial del Estado” (suppl to No 313) 31 December 2002.

\textsuperscript{101} Patronage Law, art. 22.
results obtained in the recent system of patronage passed in Italy (“Art Bonux”)\textsuperscript{102} will serve as a reference for the implementation of coming regulations in Spain.

\textbf{2.2.1.2 International instruments.}

In the previous paragraph, the efficiency of some of the mechanisms of promotion for the management of UCH that are found within the domestic legislation of a State were analyzed. Let us now see some of the international instruments that include systems of international cooperation and assistance aimed at supporting States technologically and economically for the management, conservation and spreading of UCH.

\textbf{The 2001 UNESCO Convention}

Although CPUCH will be discussed in part 2 of this document, I will refer here to the specific board of collaboration between states parties provided within it.

The UNESCO Convention on the Protection of Underwater Cultural Heritage was adopted in 2001, and entered into force on 2\textsuperscript{nd} January 2009. It represents the specific international treaty to fight looting and destruction of UCH worldwide.

In order to accomplish this aim, it instrument encourages international cooperation among the States Parties, regarding scientific assistance, guidance in the management, conservation and sensitization of UCH.

One of its specific spheres of cooperation is the “Scientific and Technical Advisory Body”\textsuperscript{103}, created in the “First Meeting of the States Parties of the CPUCH” (Paris, 26-27\textsuperscript{th} March 2009). This body comprises twelve expert members from all over the world who have a well-known scientific, professional and ethical background in the national and/or international sphere, including maritime archaeologists, conservators, and lawyers, among other sciences.

The objective of this body is “appropriately assist the Meeting of States Parties in issues of a scientific or technical nature regarding the implementation of the Rules”\textsuperscript{104}.

\textsuperscript{102} It is worth mentioning that the recent system of patronage passed in Italy, grants a fiscal credit of 65\% for the year 2014 applicable to monetary donations for interventions in maintenance, protection and restoration of public cultural patrimony.

\textsuperscript{103} CPUCH, art. 23.4

\textsuperscript{104} CPUCH, art. 23.5
Also, the Scientific and Technical Advisory Body provides State Parties scientific support in conferences on UCH, assistance in museum development and technical advisors regarding specifics cases.

Indeed one of the current lead projects of this body is the “Santa Maria Advice”, which represents an example of successful international assistance on the protection of UCH.

On May 14th of this year, an American underwater explorer named Bill Clifford announced to have identified the wreck of the “Santa Maria”, which is believed to have sank on 25th December 1492, within Haitian territorial sea. Moreover, he reported the pillage of the wreckage on the supposed absence of one of the cannons registered years before by other explorers.

As a result of this, in June this year the Ministry of Culture of Haiti, asked the Scientific and Technical Advisory Body to send experts to examine this archeological site105.

The UNESCO mission was made up of experts from Spain and France, among other States. Those specialists went to Haiti basically with the objective of analyzing the current state of the site, identifying the origin of the archeological objects and possibly develop measures to protect it, among others.

At the time of writing (August 2014) the results of this mission are not published, but the important aspect to highlight is that it was the first time that this scientific body could provide assistance to a developing country on the protection of a specific archeological site within its territorial sea. All these, thanks to the fact that Haiti ratified the CPUCH in November 2009.

Technical and scientific assistance, could arise also from the participation in the meetings of the States Parties of the CPUCH, of the regional meetings, as well as its training programs, all of which are moments which usually address issues as legal protection, cooperation in research, responsible public access and awareness, as well as fund-raising among others.

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Moreover, the Convention encourages the international cooperation and the shared use of the information among the State Parties through bilateral, regional or other multilateral agreements.106

In compliance with such legal and scientific frame of cooperation, in June 2014, Spain and Mexico subscribed a “Memorandum of understanding (…) for the cooperation in the identification, management, investigation, protection, conservation and preservation of resources and sires of underwater cultural heritage”.

This is a soft law instrument, which stipulates that the activities of cooperation may include exchanges of historical, archaeological and technical information, participations in seminars, conferences, training courses as well as workshops on different areas related to UCH, lending equipment and personal availability, specialists, advisors and other resources for the programs and/or projects.

In addition, the creation of a coordinator body co-presided by the subscribers is provided, with a view to propose, monitor and evaluate the specific projects to be developed.

Summarizing, through these agreements, the States make the programmatic regulations included in the CPUCH related to international cooperation more effective, specifically

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106 CPUCH arts. 6, 19 and Annex Rule 8 provides: “International cooperation in the conduct of activities directed at underwater cultural heritage shall be encouraged in order to further the effective exchange or use of archaeologists and other relevant professionals.”
regulating the activities to be developed, as well as the necessary mechanisms for its implementation.

**World Heritage Convention.**

The Convention Concerning the Protection of the World Cultural and Natural Heritage (hereafter: WHC)\(^{107}\), provides a system of financial and technical help to promote the international management and protection\(^{108}\), of the natural and cultural heritage included in the World Heritage List.

Within the aforementioned list, property sites with an outstanding universal value could be included as long as they comply at least with one of the criteria contained in the “Operational Guidelines for the Implementation of the World Heritage Convention” (hereafter: OGIWHC)\(^{109}\). Specifically, the UCH sites could be included as “an outstanding example of a traditional human settlement, land-use, or sea-use which is representative of a culture (or cultures), or human interaction with the environment especially when it has become vulnerable under the impact of irreversible change”\(^{110}\).

The WCH States Parties “may request international assistance for property forming part of the cultural or natural heritage of outstanding universal value situated within its territory”\(^{111}\). Thus, they will be entitled to propose the World Heritage Committee the inclusion in the World Heritage List, any Cultural, Maritime and Underwater Heritage located within their internal waters and territorial sea.

The assistance offered by the World Heritage Committee, may consist of a diagnosis of the situation of cultural heritage in question, sending experts to ensure the good execution of the project approved, training specialists on related areas, providing equipment, granting

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\(^{108}\) In accordance with the WCH art. 7 “international protection of the world cultural and natural heritage shall be understood to mean the establishment of a system of international co-operation and assistance designed to support States Parties to the Convention in their efforts to conserve and identify that heritage.”.


\(^{110}\) OGIWHC, paragraph 77 (v).

\(^{111}\) WHC art. 19
loans with a reduced interest, with no interest or long-term reimbursable, and even granting non-reimbursable subsidies in exceptional and specially motivated cases. Such benefits are conditional upon the full compliance with the conditions established in the agreement subscribed by the interested State and the aforementioned committee.

Within the World Heritage List, we can identify the following sites that include underwater cultural heritage: “Red Bay” (Canada); “Prehistoric Pile dwellings around the Alps” (transboundary property of Austria, France, Germany, Italy, Slovenia, and Switzerland), and “Bikini Atoll Nuclear Test Site” (Marshall Islands), among others.

Furthermore, there exist other UCH cases that are currently in the Tentative List to be considered for nomination, as the “Insular area and bay of Colonia del Sacramento” (Uruguay), and “Alexandria, ancient remains and the new library” (Egypt).

Professional non-governmental organizations
The States are also entitled to receive technical assistance, resources, training, and help in general, through certain non-governmental professional organizations such as Nautical Archeology Society (NAS).

Another organization which promotes international cooperation in the protection and management of underwater cultural heritage is the International Committee on the Underwater Cultural Heritage (hereafter: ICUCH). This institution comprises international experts in underwater cultural heritage from all over the world. ICUCH advises the International Council on Monuments and Sites (hereafter: ICOMOS) on regulations as well as on issues related to this cultural heritage, among other functions.

The ICUCH developed a charter to guide the management and protection of underwater cultural resources which became known as the International Charter on the Protection and Management of Underwater Cultural Heritage, adopted by ICOMOS in 1996, known as the “Sophia Charter”. One aspect to highlight here, is the fact that how the regulations of this soft law document, end up being incorporated into a hard law instrument such as the Annex of the CPUCH.

This phenomenon shows how important the principles of maritime archaeology incorporated in the Sophia Charter are for the international community, as the standard guide

112 WCH art. 22.

to the ethics and practices of underwater cultural heritage management. In accordance with Supiot, this is an example of what he considers as the dogmatic function of law\textsuperscript{114}.

Moreover, as seen in part one, chapter one, section A, paragraph 1, many States implement the “Rules concerning activities directed at underwater cultural heritage” within “The Annex” in their legislations, independently to the ratification of the aforementioned treaty.

2.2.2 Section B. Public–Private Partnership management tool
Generally, State funds aimed at financing the management, protection and promotion of UCH, are a limited part of the annual budget. Even the budget assigned to the cultural sector is normally and mainly used for the promotion of cultural heritage in land, which is, more easily accessible to the public.

Such reality obliges the relevant national authorities to find alternatives ways of financing their duties. Thus, one of the tools with incipient development, is the Public-Private Partnership (PPP), too often forgotten, badly managed, or dependent on the personal impulse of the authorities of the moment.

In this section, I will study UCH-PPP, as an additional proposal for public management, describing and analysing case studies in Italy and Spain. The objective is to approach some elements that could help to define strategies to recruit, select and capitalize on the result of the UCH-PPP.

2.2.2.1 Strategies to recruit, select and capitalize on the result of the PPP.
As a result of all the aforementioned, we could conclude that the Italian model of cultural policy is still characterized by a strong public intervention\textsuperscript{115}, directly regulating, financing, managing and researching UCH, mainly through preventive archaeological works in public works.

Notwithstanding, in the last ten years there has been a bigger openness to cooperation between the public and private sector\textsuperscript{116}, on the protection, research and management of the UCH.

\textsuperscript{114} A. Supiot. Homo Juridicus, 163.


\textsuperscript{116}The United Nations Economic Commission for Europe, refer PPP in a broad sense as:

“innovative methods used by the public sector to contract with the private sector, who bring their capital and their ability to deliver projects on time and to budget, while the public sector retains the responsibility
In part one, chapter one, section A, paragraph one, we dealt with the fact that the Superintendence of Sea in Sicily, has managed to gather a successful network with local diving clubs in the 16 protected sites they possess, meanwhile Archaeological Superintendence of Naples has been jointly managing the Marine Protected Areas “Gaiola and Baia Underwater Parks”, together with non-governmental organizations since 2005. These cases will be dealt with in chapter 2, section B, paragraph 2.

All these cases, constitute original ways to implement the collaboration between the public and private sector, the latter being “the economic entities which are not controlled by the State, i.e. a variety of entities such as private firms and companies, corporations, private banks, non-governmental organizations, etc.”.\(^\text{117}\)

The challenge that is present in the social (e.g. the protection and spreading of UCH), involves finding the mechanisms to achieve an economic advantage on a product that is not commercial. Consequently, in the social PPP, private actors (mainly non-profit organizations) normally obtain support from the government through contributions in cash, in kind, or tax exemption. The recent measures towards the encouragement of the protection and development of cultural heritage present in the Law “Art Bonux” are an example of that.

The CCPL of Cultural Property and Landscape, provides the possibility of collaboration public-private regarding the promotion and research of cultural heritage in several regulations (arts. 6.3, 89, 115 y 120).

Sponsorship has been one of the most used tools for the promotion and research of UCH both by the Central Government and the Region of Sicily. The Guidebook on promoting good governance in public-private partnerships, from United Nations provides the following concept of sponsor: “A party wishing to develop and finance (with own equity or subordinated debt and other project finance) a project”.

Through the sponsorship contract, the cultural authorities receive a rendering of services and goods for carrying out cultural activities. Likewise, the private actor manages to

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\(^{117}\) Ibid. 90.
promote its name, brand or image respecting the historical aspect and the proper standard of the object under tutelage and promotion.

Nowadays, “in situ” identification and protection of underwater archaeological objects are frequently the target of the projects of investigation proposed by the Ministry of Cultural Heritage to the sponsor. Among them, the underwater sites at a depth of more than 100 metres prove to be of great attraction to the private investors.

Sponsors manage to spread their image through the support to scientific projects related to maritime archaeology of the classic period. Most of them come from abroad: United States of America, Australia, Arabic Countries, Switzerland, Germany, and Russia, among others, normally foundations or universities.

The MIBACT does not receive money from the private sector, but contributions in kind, such as logistics and technology aiming at implementing scientific projects for the identification, protection and making public the wreckage found, e.g. through the collocation of robs spreading imagines on line.

The agreements of sponsorship entered into between MIBACT and privates regularly last for a year, being entitled to renovation according to the result of the procedure. The spreading of the results of the investigation is done jointly by both parties. Thus, the State obtains cultural development and the private sector the improvement of its image promoting the social responsibility of the companies.

Likewise, the Superintendence of the Archaeological Heritage of the Province of Naples (technical body of the MIBACT locally responsible for the protection of cultural heritage), has been implementing a mechanism of PPP through the concession118 of the management of the Maritime Protected Areas “Gaiola” and “Baia” underwater parks, to non-governmental non-profit organizations since 2005. Such instrument will be developed in depth in the following paragraph. Nevertheless, I would like to make a brief reference in this paragraph to the criteria and process of selection used by the public authority in the selection of the private actor.

As for the criteria chosen for the selection of the private actors, the regulation provides with a priority the participation of legal residents and local businesses in carrying out economic activities related to the park.

118 The United Nations Economic Commission for Europe, define Concession agreement as “An agreement or contract made between a host government and a project company or sponsor to permit the construction, development, and operation of a particular project, through which the government is delegating its monopoly or other unique rights.” Ibid. 89.
Thus intending to encourage a socio-economic development compatible with the historic-naturalistic and landscape of the area, and at the same time privilege the local activity\textsuperscript{119}. Local actors know the needs and the opportunities of the area better than anyone else, this situation favouring the implementation of effective rules in the management and protection of AMP, as well as the cooperation among the different institutions involved.

The process of selection of the private agent in charge of the management of AMP is the responsibility of a commission appointed by the Superintendence, which studies the curriculum vitae of the members of each NGO candidate. After that, the Superintendence chooses the final awardee of the management of the park, with whom they enter into a one-year agreement, after which they are issued a certificate of assessment that will serve as a precedent for future public bids. A way of capitalizing a satisfactory management by the private agent is the possibility to renew the contract, in the event that the Superintendence produces a satisfactory assessment.

Let us analyze now the experiences on “in situ” sensitization of underwater sites carried out in Spain through the PPP. The following research is based on the experiences of the Underwater Archaeology Center (hereafter: UAC) of the Institute of Historical Heritage of Andalusia. Since 1997, this public agency has been carrying out activities of investigation, protection, conservation and sensitization of underwater cultural heritage, all these justifying my choice as a case for study.

According to the Director of the UAC –Carmen García--, the projects produced by private sector for the “in situ” awareness of UCH have only been a few, vague and alien to the principles of underwater archaeology\textsuperscript{120}.

Up to date, the great challenge for the regional relevant authority is to create a form of management for the control and sensitization of UCH. Indeed, one of the weaknesses observed in the legislation of Andalusia has to do with the absence of regulation of public access to the underwater archaeological sites. This has greatly promoted the looting of this underwater cultural heritage.

The situation mentioned, has led UAC to develop a theoretical project in which the feasibility of a model of management of PPP for the control and sensitization of archaeological sites in the coast of Andalusia was analyzed. In addition, the study intends to comply with what

\textsuperscript{119} Executive Decree of Baia and Gaiola, art. 3.1.f.

\textsuperscript{120} C. García, interview by author, 12 September 2014, Cádiz, ES, tape recording.
is stated in the CPUCH: “Public access to in situ underwater cultural heritage shall be promoted, except where such access is incompatible with protection and management”\textsuperscript{121}.

The methodology used in the work mentioned before, consisted of a comparative study of cases concerned mainly with the management of maritime areas of environmental protection, principally about the mechanisms used for the control of the anthropic pressure. Once the work was finished, the conclusion was that certainly there could be a similar formula to manage the zones with an underwater historical heritage value.

The model to be developed would consist of a protection “ad hoc” of certain underwater archaeological sites through the legal concept of “archaeological area”, provided in HHAL\textsuperscript{122}. To commence file proceedings for an archaeological area implies the introduction of specific provisions of usage\textsuperscript{123}. Since that usage of specific provisions was written, certain types of actions in the archaeological areas, such as the navigation of vessels, the prohibition to anchor, as well as the limitation of the access to the sites to a maximum of ten people, could be organized, controlled or prohibited. Furthermore, the administration could request the private a periodical report on the number of visitors, alterations or damage to the site, as well as the report to the civil guard of unauthorized people in the protected area.

The selection of the private actor would be done through a public tender, where their suitability, experience, and guaranties presented among other requests, would be analyzed.

The above mentioned project also takes into account which underwater sites to promote. On the one side, the importance of the archaeological site from the point of view of the heritage is taken into account, choosing the promotion of the regular sites, not the exceptional ones. Another aspect to be taken into account, is the capacity of control existing over such site, that is to say, efforts would be made not to promote a site that is far from the coast where the presence of a civil guard is more difficult, installing video cameras, etc.

After this method of work was finished, which underwater archaeological sites are feasible of promotion or not according to their particular characteristics, would be decided.

As a counterpart to the management of the promotion and protection of the site, the private would receive the whole of the income produced by the cultural tourism in the area.

\textsuperscript{121} CPUCH, Annex, art. 7.

\textsuperscript{122} HHAL, art. 26.5 defines the archaeological areas as: “…those zones clearly restricted where there is proof of the existence of archaeological or paleontological remains of relevant interest with the history of mankind”.

\textsuperscript{123} HHAL, art. 31.a.
As expressed by the work team of UAC, the model created is feasible from a theoretical point of view of management. The results will be known once it is put into practice by the corresponding authority after a juridical control of the project.

In the next paragraph, two experiences of PPP for the management, investigation, control and sensitization carried out in the coast of Naples, Italy, the underwater parks of “Baia” and “Gaiola”, will be analyzed.

### 2.2.2.2 UCH-PPP examples.

At the end of paragraph one, section A, of chapter one, and in the previous paragraph, I mentioned the existence of the Marine Protected Areas of “Gaiola” and “Baia” situated in the region of Campania, Italy. The purpose of this paragraph, is to expose these two cases as successful examples of PPP management on the protection of the UCH.

Situated in the Golf of Napoli and Pozzuoli, the Marine Protected Areas “Gaiola” and “Baia” underwater parks were created as institutions by the two Executive Decrees passed in 7 August 2002, by the Ministry of environment and the Ministry of Cultural Heritage in agreement with region of Campania.

The maritime area comprised by both parks, possesses roman structures of great archaeological interest, which are currently submerged no more than three metres deep, due to a geological phenomenon called “bradyseismic”.

The main objectives of those instruments, are the marine biological and archaeological protection, and the promotion of the ecology, marine biology and UCH knowledge of the area, among others.

For the fulfilment of these objectives, the regulation prohibits any activity that could affect the underwater cultural heritage located within the park, particularly: the removal, manipulation and total or partial damage as well as the spill of any substance that might affect the characteristics of the marine environment or that of the UCH.

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124 The competent authority in the Autonomous Community of Andalucía is the “Secretaría General de Cultura, de la Consejería de Educación Cultura y Deporte” dependent on the “Junta de Andalucía”.

125 Executive Decree of Baia and Gaiola, art. 1.


127 Executive Decree of Baia and Gaiola, art. 4.1.
More specifically, different areas of protection are provided: zone A- Integral Protection, zone B- General Reserve and zone C- Partial Reserve (existing only in “Baia” underwater park). Bigger protection is given to zone A, by means of certain prohibitions to the public, such as swimming, diving, with or without Self-Contained Underwater Breathing Apparatus equipment, with the exception of those that have been authorized by the managing agent, navigation, stopping, mooring, and anchoring of any type of vessel. Protection decreases in zones B and C according to the better state of conservation of the heritage present in the archaeological structures. As for the punitive system, the regulation provides administrative and criminal punishment for breaking the regulations provided for each protected area.

The management of underwater parks is the responsibility of a committee formed by the Ministry of the Environment, Ministry of Cultural Heritage, the Region of Campania, with representation of the environmental organizations. The aforementioned Decree, at the same time granted provisional management of the park to the local governmental authority “Special Superintendence for the Archaeological Heritage of Naples” (hereafter: Superintendence). Such management is carried out through combined methods. On the one side, the Superintendence manages certain activities for the protection and maintenance directly, such as the maritime and land signs in the area, the development of a web page for the parks, training courses for underwater instructors authorized to carry out sea tours with visitors. On the other side, the Superintendence grants no-profit civil associations the management of the visitors centre, the control, the spreading and scientific research of the natural and cultural heritage present in the parks.

Case Study: “Baia” underwater park.

The “Baia” underwater park is located in the Golfo di Pozzuoli, comprising a total area of 176.6 hectares, along 3.7 km of sea-shore.  

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On April 2013, the Superintendence entered into an agreement with a local NGO “Fillirea”, where the management of “Baia” underwater park was granted for a year with an option to renew it. The main functions attributed include the protection and sensitization of the natural and cultural heritage in the area.

The function of protection of the underwater park is carried out by the NGO, in collaboration with the Coast Guard service. In addition, the diving centres authorised to work in the park are responsible for the integrity of the UCH during the guided visits they carry out. The only way to visit the underwater sites is through the diving centres authorised by the Superintendence. The NGO is responsible for the coordination and control of the number of dives that are done in the park, which cannot be more than fifty a day. The purpose of this regulation is to avoid excessive damage to the natural and cultural heritage in the park.
Moreover, the NGO is developing different projects for wide spreading the UCH located in the park, both on land and in the sea.

Such experience of collaboration PPP has produced social and economic benefits for both parts. The NGO has been able to carry out projects of scientific development thanks to the exclusive concession granted by the Superintendence. At the same time, the promotion of the park had an effect by increasing local tourism, with which diving clubs are benefitted by means of the guided tours. In addition, the Superintendence receives a 10% royalty for each diving done through local operators, while it has also been able to delegate to the NGO the functions of control and coordination on the number of divings. The expenses of the association are reimbursed annually by the Superintendence, as long as they are directly related to the projects of spreading and scientific research. A way to cover the expenses by themselves is by financing their projects through private actors, as well as the sale of books, etc. The NGO must register such incomes and use them again for financing its projects.

Furthermore, the protection of the park was reinforced by a joint and coordinated activity by the NGO and the Coast Guard. Such result was only possible after months of joint effort. The actions for the control carried out by the coast guard of the park are spread in social networks by the NGO, with a view to discourage future infringements. The Coast Guard applies economic sanctions and in some cases takes the necessary steps for the confiscation of those vessels that intrude in the protected areas.

Case Study: Marine protected area “Gaiola” underwater park.

The marine protected area “Gaiola” underwater park (GUP), was established in 2002 by means of an Executive Decree passed on 7th August of, 2002\(^{129}\). It takes up a total area of 41.6 hectares, 2 km along the shore. The regime of protection is the same as that applied in the “Baia” underwater park, with the exception that in this case the maritime protected area is divided into one zone “A” of integral protection, and a zone “B” of less restrictive general protection.

\(^{129}\) Executive Decree of Gaiola, art. 1.
The Superintendence, since 2005, carries out the management of the park jointly with the non-profit civil association named “Centro Studi Interdisciplinari Gaiola onlus” (hereafter: CSIGO), through an agreement renewable every three years.

On the one side, the Superintendence, carries out some activities such as front-office, management of the web site, management of the calendar of the authorized guided tours in the protected area, cultural events, and production of material for the promotion of the support to the activity of the visitors centre.

On the other side, CSIGO, formed by an interdisciplinary group of voluntary specialists and young people carry out the control, research\textsuperscript{130}, training, didactic activities, guided tours, and awareness of the general public of the underwater park.

\textsuperscript{130} M. Simeone, P. Masucci, Analisi geoarcheologiche nell’area marina protetta Parco Sommerso di Gaiola (Golfo di Napoli), Il Quaternario, Italian Journal of Quaternary Sciences 22, n. 1 (2009): 25-32. Also, M. Simeone, and
In order to regulate the control of the area, on 6th August 2010, the Archaeological Superintendence of the local authority, passed a Decree with a series of restrictions such as the public entering the visitors centre in the opening times, with a maximum of 100 people in zone A (of integral protection).131

The report done by the NGO in 2013, mentions that after the application of the aforementioned regulation, the anthropic pressure was greatly reduced, as well as offenses and damage done to the area of the reserve, these producing an improvement in the general condition of GUP.132

Notwithstanding, controlling the anthropic pressure present in the area, CSIGO has a security guard in charge of controlling the entrance to the park as well as the rest of the regulations. The control on the park is reinforced by volunteers that monitor the area with kayaks provided by the association. Although there is good extent of coordination with the “Capitaneria de Porto”, more patrolling is required at night, as stated by the president of the association, Mr. Maurizio Simeone.

Even though the park receives public funds form the Ministry of Environment and the Ministry of Cultural Heritage, the CSIGO has had a policy of economic self-financing, which has enabled it to a great extent to carry out its activities for almost ten years. For instance, the NGO has been doing activities to promote the spreading and the scientific research on cultural and natural heritage in the area, cleaning, and they have even restored and put back to work the building of the visitors centre, among others. All these with their own human and economic resources, from the tickets sold for the diving activities, snorkel, boat rides, merchandising, etc. The Superintendence also receives a percentage of those incomes. Since 2010 the number of visits to the park has increased steadily, through the participation of schools, guided tours, and organization of events. In 2013, the activities that registered a greater increase were the guided tours of Snorkelling/Diving, and the boat “Aqua Vision”.133

In conclusion, the experiences in public-private management carried out in “Gaiola” and “Baia” underwater parks proved to be widely positive with a social and economic benefit.

131 Executive Decree of the Archeological Superintendence of Napoli of 6 August 2010, n. 43.
133 Ibid. 25.
The NGOs referred to have improved the protection and promotion of the protected marine areas, promoting the “in situ” of UCH, in coordination with the Coast Guard service, and with the funds of the Superintendence and the Ministry of the Environment.

In the case of marine protected area of “Baia”, the civil association is in charge of the coordination and control of the cultural divings carried out by the companies authorized by the Superintendence. Those are the ones that receive a profit on the sale of tickets of each person who dives, having to give a percentage of its cost to the Superintendence.

Within “Gaiola” underwater park, it is the NGO itself that is in charge of the guided tours on land and sea, receiving an income for that. A percentage of the price of the tickets is given to the Superintendence and another to the financing of the Association for carrying out its activities.

All this allows to close the development cultural tourism, economic advantage, local culture development and heritage advantage.

Nevertheless, it is necessary to solve some issues that have an impact on the management of the park, such as controlling the existing anthropic pressure, increasing the surveillance on the maritime area, as well as the support to the activities for the sensitization that the NGO carries out. Moreover, a greater involvement of the Superintendence in the area that allow to improve the coordination of the activities with the local administrative authorities.

Accordingly, two new measures that will probably help improving such situation have been implemented in Italy. The first one, being project “Mampira”, mentioned in chapter 2, section A, paragraph 1 of part one, whose purpose is to improve the surveillance on 16 protected maritime areas in Italy\textsuperscript{134}, by means of installing a system of video surveillance and control stations. The second one, are the recent measures for the promotion of the protection and sensitization of the cultural heritage included in Law “Art Bonux”, described in chapter 2, section A, paragraph 1 of part one. Both instruments could result in the improvement on the protection and management of both parks.

\textsuperscript{134} Source: Newspaper “Il Mattino di Napoli”, p. 16, 27 June 2014.
3 Part Two: The articulation of the sovereignty of Uruguay within the CPUCH.

One of the main concerns of the coastal States, is the admitted interest of some of the States of origin to recover their underwater cultural heritage regardless of where it may have been found\textsuperscript{135}.

At present, Uruguayan competent authorities are studying the adoption of the CPUCH. One of the questions under analysis, has been the likelihood of that international instrument affecting Uruguayan sovereignty, by enabling in some way the restitution of the wreckage located under national jurisdiction to the country of origin.

In this second part, I will provide the elements that could answer the question posed in the second part of this paper: Could the Uruguayan sovereignty be affected by the ratification of the CPUCH by enabling in some way the restitution of the wreckage located under national jurisdiction to the country of origin?

Firstly, I consider necessary to begin by describing the precedents that led Uruguay to discuss the appropriateness of the ratification of the CPUCH, this is the experience on non-scientific and cultural interventions on UCH, the problems generated, and the current status. Moreover, I will study the concept of sovereignty and UCH provisions within LOSC Convention.

Secondly, I will describe the provisions of the CPUCH that make reference to states sovereignty in order to answer the proposed question, as well as some issues discussed in Uruguay.

Finally, I will analyze the treatment of ownership rights by international law and other elements discussed in Uruguay, as the concept of “cultural heritage of humanity” and “the seizure regime”, to finally answer the question posed in this second part.

3.1 Chapter 1. Background and context.
In this chapter, I will describe the precedents that led Uruguay to discuss the appropriateness of the ratification of the CPUCH, this is the experience on non-scientific and cultural interventions on UCH, the problems generated, and the current status. In addition, I will study

the concept of sovereignty and UCH provisions within LOSC and the CPUCH. Finally, I will describe the provisions within CPUCH that make reference to States sovereignty, as well as some elements discussed in Uruguay.

3.1.1 Section A. Legal framework in Uruguay

3.1.1.1 The evolution of the UCH Legal framework in Uruguay

"No venderé el rico patrimonio de los orientales, al bajo precio de la necesidad"\textsuperscript{136}

—José Gervasio Artigas (1764-1850)

Previous to the study of the question posed in this second part, I consider it pertinent to expose the reader the precedents that lead Uruguay to analyze the convenience of the ratification of the CPUCH. In this paragraph, I will describe and analyse the evolution of the Uruguayan legal framework specifically in relation to one of the main problems affecting UCH in Uruguay, this is, the non-scientific and cultural interventions on it.

Unfortunately, Uruguay is considered by some authors\textsuperscript{137} as a commercial exploitation case, based on the selling of UCH as a consequence of government participation with companies. This is true at least until 2006 when, by means of a legal change those activities are suspended, currently being accepted only scientific interventions on UCH.

Treasure hunters found in Uruguay a fertile field to develop their activities thanks to the existence of a legal system created with a purpose that is far from the protection of UCH, this is the SHL.

The objective of this law passed in 1975, was to give priority to safety in maritime navigation through cleaning the scrap off the Uruguayan ports. This instrument does not refer in any way to the investigation, management and public awareness of the underwater cultural heritage. On the contrary, the SHL, allowed companies to come into contracts with the Uruguayan Coast Guard, to find and recover the national and foreign ships sunken in places that seriously make navigation difficult.\textsuperscript{138}

\textsuperscript{136} “I will not sell the rich heritage of our land, at the low price of necessity”

\textsuperscript{137} Sarah D., Underwater Cultural Heritage and International Law, 224.

\textsuperscript{138} Sunken hulls law, art. 10.
Based on this legal system, treasure hunters began to sign contracts with the Uruguayan Coastal Guard also to find and recover historical shipwrecks benefiting from the sale of extracted cultural heritage. The agreements on search and recovery signed, provided a system of profit where the material recovered or the product of the sale was divided into equal shares, between the Uruguayan Coastal Guard and the companies.

The SHL, also establishes the regime of property of the foreign vessels sunken within the national jurisdictional waters. In this sense, such law establishes that all the vessels that might have sunk previous to 31st December 1973, shall be considered as abandoned in favour of the Uruguayan State. This issue will be analyzed in Section B, Chapter 2, of this part.

It is clear that UCH legal protection was not taken into account when the SHL was sanctioned. We should also bear in mind the fact that the degree in anthropology was only created in Uruguay in 1976, consequently, in those times people were not aware of the real dimension of the cultural value that this kind of heritage represented for mankind. On the contrary, reality has proved that this instrument created to provide safety in maritime navigation, turns out to be a mechanism of financial income for treasure hunters either, through the sale of underwater archaeological objects or as a result of a number legal proceedings started against the State under contractual liability. As far as the Uruguayan State is concerned, the financial outcome was negative, as shown in the next paragraph.

As time went by and as requested by the Uruguayan Coast Guard, the Executive Power passed Decree 692/86 to regulate the SHL regarding the finding and recovering of historical shipwrecks.

Far from prohibiting the activities of the treasure hunters on historical shipwrecks, Decree 692/86, regulates the search and recovery of “Buques antiguos”, defined as “todos aquellos hundidos, semi hundidos o varados en aguas de jurisdicción nacional antes de 31 de diciembre de 1973.” Thus, the commercial exploitation of UCH is regulated through the sale of underwater archaeological objects.

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139 Sunken hulls law, art. 15.

140 “Antique vessels”.

141 Executive Decree 692/86 art. 1, defines antique vessels as: “…all those sunken, half-sunken or aground in jurisdictional national waters before December 31st 1973.”
The Constitution of the Republic of Uruguay, provides that “Toda la riqueza artística o histórica del país, sea quien fuere su dueño, constituye el tesoro cultural de la Nación; estará bajo la salvaguardia del Estado y la ley establecerá lo que estime oportuno para su defensa”\(^{142}\). Although this escapes the topic of the present thesis, the annulment of Decree 692/86 should be at least considered, as it clearly contradicts the contents of article 34 of the Uruguayan Magna Carta, concerning the “defence” of the historical wealth of the country, among which the underwater archaeological sites located in internal waters or territorial sea are included.

In accordance with this Decree, the responsibilities of the National Heritage Commission are counseling and controlling the Works that might affect antique vessels, being the decisions concerning the authorization of the permits for searching and rescuing, in the hands of the coastal guard. The national relevant authority started to mandate the presence of archaeologists in the activities carried out by treasure hunters, among other requirements, based on the fact that historical shipwrecks represent archaeological sites, and considering the best way to access that property in order to interpret the information they contain and to ensure its proper preservation. In my opinion, the purpose of such requirement was to limit the activities of treasure hunters mainly appealing to the professional ethics of the archaeologists, who would in theory refuse to take part in activities where the selling of cultural heritage was implied. Unfortunately, such mechanism did not succeed and treasure hunters activities continued through the contracts of national and foreign archaeologists, many of whom were not even professional. This situation encouraged the existence of “hundreds”\(^{143}\) of applications for the search and removal of wreckage, granting the permit holders vast maritime areas, causing the spreading of the archaeological context due to the application of their instruments of intervention.

Owing to the above mentioned and thanks to the constant report of the national relevant authority, together with the coastal guard, in 2006 the Uruguayan Executive Power passed Decree 306/06, by which the reception of new applications for searching that could be presented under the SHL is suspended. Another factor that benefitted the aforementioned change in the legislation, was the development of the first maritime archaeology project carried

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\(^{142}\) The Constitution of the Republic of Uruguay, art. 34 provides that “All the artistic or historical heritage of the country, whoever its owner, constitutes the cultural heritage of the Nation; shall be under the safeguard of the State, and the law shall establish as appropriate for its defence.”

\(^{143}\) E. Martínez, and J. Silveira, Patrimonio Cultural Subacuático en Uruguay, 103.
out in Uruguay which incorporated only archaeologists from Uruguay, the U.K. and Mexico, without any kind of previous connection with treasure hunting companies. This experience developed in 2005 helped to change the UCH conception of public and politicians, showing the real significance and value of this specific cultural heritage, not as a selling object, but as an important component to understand the maritime history of past cultures, and also to prove that “it is indeed possible to undertake maritime archaeology in Uruguay.”

In accordance with this new legal framework, only scientific research projects are allowed, previously approved by the National Heritage Commission. In this sense, the national relevant authority requires the observance of “The Rules” signalled by the Annex of the CPUCH, for any activity directed on the UCH. Thus, Uruguay starts to adapt its domestic regulations according to the provisions and terminology present in such international instrument prior to its ratification. From the point of view of cultural management, Decree 306/06 turns out to be a fundamental tool. Firstly, it has protected the remnant surviving the removal activity. Then, it has allowed to demarcate the seriousness of the problem, mainly established in the judicial sphere and in the technical solutions for the conservation. Indeed, at present survive fewer than a dozen contracts for search and rescue under the previous system, and these will be allowed to extend their period once.

At present, the Uruguayan National Heritage Commission is still working in order to find a solution to the surviving problems from the regime previous to 2006, both in the juridical and in the technical sphere. Moreover, the efforts for the sensitization of the UCH that began in 1995 are still being made, trying to install a new way of understanding based on public exhibitions, conferences, training courses as well as joint proceedings with the different agencies involved in the management of this specific cultural heritage.

However, the current legislation regarding non-scientific and UCH interventions could be easily modified in the future by passing a new Executive Power Decree, allowing again the selling of archaeological underwater objects. That is why it is necessary to improve the legislation by the ratification of the CPUCH.


145 Ibid. 66.

146 Decree 306/06 art. 3.
In spite of the fact that Uruguay played an active role in the process of writing of the abovementioned Convention, in the last minute Uruguay abstained from voting in the General Conference due to instructions from the Ministry of Foreign Affairs. At present, the ratification of this international instrument continues under study by the Uruguayan Ministry of Foreign Affairs which is analysing sovereignty issues. One of the questions under analysis has been the likelihood of that international instrument affecting Uruguayan sovereignty, by enabling in some way the restitution of the wreckage located under national jurisdiction to the country of origin. This question will be answered in Chapter 2 of this part.

3.1.1.2 Some problems.
In this paragraph, it is of utmost importance to point out the unfavourable results derived from the experience caused by the legislation referred to in the previous paragraph until 2006. Many of the following problems can be identified in other countries as well. Anyway, the Uruguayan experience will work as a precedent for any State when implementing a system of legal protection of UCH, mainly in terms of what not to do.

Inter-agency conflict of interests
As expressed in the previous paragraph, the SHL and specifically its regulatory decree\textsuperscript{147} allowed salvors to develop a direct commercial exploitation of the archaeological and heritage property present in the historical shipwreck, benefitting with part of the sale. Unfortunately, in this way Decree 692/86 made official a legitimate profit in such activity.

Along twenty years, Uruguayan coast guard granted dozens of contracts for searching and rescuing in the Uruguayan coasts, in which people, associations and companies, both national and international took part.

This situation led in 2002 to the granting of vast maritime zones of the Uruguayan coast to privates for searching and possibly rescuing historical shipwreck. At the same time, Decree 692/06 provided a system of renovation of such licenses with no definite time, which contributed to extend the activities of treasure hunters in the maritime zones assigned.

All these circumstances together, set conflicts of interests in the territorial regulation as well as in the development of projects of exploitation of mineral and natural resources such as fishing. Different public agencies related to the management of maritime and oceanic activities, found their faculty to act in their spaces of competence impeded, having to take into account

\textsuperscript{147} Decree 692/86.
the rights granted to salvors. An example of the latter were the works of extension of the container terminal and wharf of the Montevideo Port carried out by the Company “Terminal Cuenca del Plata S.A.” between 2004 and 2006.

**UCH being affected**

From the point of view of the heritage being affected, lengthy interventions were carried out at different scales for the removal and extraction of cultural objects in dozens of archaeological and historical sites. Thousands of artifacts and tons of cultural material were removed during that period.

![Figure 5. Canon recovered from the "Salvador" wreck by a commercial operating company](http://www.conceptopunta.com/thumbnail.aspx?ForceAspect=False&Width=640&height=480&image=noticias/fotos/44_3.jpg, October 2014)

In some cases, the intervention of salvors companies involved archaeological sites including human remains, as in the shipwreck corresponding to Spanish frigate “Salvador” known as “El triunfo” sunk in 1812, and the English slave ship “Sea Horse” wrecked in 1728 near the Gorriti Island, in Maldonado Bay.

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Based on the principle of profit and financial return applied as an interest in the interventions, most of the affected sites and the materials removed are currently in a state of abandonment and objective decay.

Figure 6. The “Admiral Graf Von Spee” rangefinder recovered from the wreck by commercial operating company.

At present exhibited at Colonia’s port, Uruguay.
(Source: http://www.deutschland-class.dk/admiral_graf_spee/gallery/gallgrafspeesalvage.html, October 2014).

Legal proceedings started by treasure hunters against the State
The lack of a scheme of coherent regulations within Decree 692/86, led to the existence of legal proceedings started by treasure hunters against the State. Indeed, on the one hand this Decree allowed the contracts between the coast guard and treasure hunters to find, recover and sell historical shipwrecks or their cargo. On the other hand, the national heritage commission has competence to declare historical shipwrecks as “historical monuments”, thus prohibiting their alteration. The lack of a scheme of coherent regulations, was evident in the practice in 1985 through the finding of the Spanish vessel “Nuestra Señora de Loreto”, sunk in 1792 within the Port of Montevideo, by a treasure hunters holding a contract with the Uruguayan coastal guard. In order to preserve the integrity of the abovementioned underwater archaeological site, the Executive Power, at the request of the National Heritage Commission proceeded to protect it legally, by declaring it “Historical Monument”. Consequently, and realizing the impossibility of carrying out works for rescuing and refloating the sunk hull, the private person started legal proceedings against the Uruguayan State on damages, finally being granted a considerable amount of money\textsuperscript{149}.

\textsuperscript{149} Sentence of the Supreme Court of Justice of Uruguay 26 April 2004, n. 117, "COLLADO, RUBEN - Ejecución de sentencia - PIEZA SEP. DE "COLLADO, RUBEN C/ ESTADO (A.N.P.) - DAÑOS Y PERJUICIOS, FICHA
On another case, the Uruguayan justice acknowledged a rescuer the holding of a right of credit on the benefit of the 50% of the bulk removed as holder of contracts for searching and rescuing with the National Coastal Guard, connected with the recovery of the eagle and rangefinder of the German battleship “Admiral Graf Von Spee”\textsuperscript{150}. In the event of the State not paying the 50% of the value of the objects recovered, as agreed in the contract, the rescuer announced that they would be willing to file a lawsuit on breach of contract against the Uruguayan Coastal Guard\textsuperscript{151}.

These are two examples of a long list of lawsuit filed against the State\textsuperscript{152}, and that the State has had to bear from those who have paradoxically been its partner in the search and rescue of several historical shipwrecks. Although most of these legal claims have been dismissed by the Uruguayan justice, the State has had to invest money, time and human resources (lawyers, archaeologists, guards and managers of UCH), in order to face these disputes, neglecting other more relevant issues. Likewise, the excavations carried out by rescuers placed the State in the responsibility of assuming an important financial expenditure, since it is its duty to preserve, dispose of and guard a considerable part of the cultural property removed. Decree 692/06, gave priority to the initiatives of private interest in the scale of intervention, not providing a measure for limiting them, and not considering the obligations that the State has to assume afterwards in its capacity of custodian of the property.

Faced with these facts and twenty-eight years after passing Decree 692/86, there is room for considering to what extent rescuing historical shipwrecks becomes a mechanism of financial income for the State as it was once thought. Undoubtedly, the financial balance is negative. That is also claimed by the Uruguayan Coast Guard itself, who was paradoxically the partner in the aforementioned agreements with treasure hunters:


\textsuperscript{152} As an example I quote the following sentences: Supreme Court of Justice of Uruguay 23 April 2014 No. 442; 05 May 1997 No. 150/1997; 17 August 1998 No. 157/1998; Tribunal Apelaciones Civil 1\textsuperscript{T} 06 February 2013 No. 3-000004/2013, Tribunal de lo Contencioso Administrativo 8 April 2010 No. 189, among others.
El tiempo y los recursos que la Institución [Prefectura Nacional Naval] debió dedicarle a estos temas, desde su máxima jerarquía hasta el personal destinado a la custodia de los trabajos de búsqueda y rescate, no ha resultado compensado con beneficios que permitieran una mejora en los servicios ni tampoco con un mayor enriquecimiento del acervo cultural del Estado, hasta el momento.\textsuperscript{153}

I would like to add that since then (1995) to date, the financial balance is still negative for the Uruguayan State, including the strong probability of having to face another lawsuit for a millionaire amount in dollars, as stated before in this paragraph.

**Substantive incompatibility of maritime archaeology and commercial exploitation based on the selling of the UCH.**

The Uruguayan experience, is also useful to prove that the development of maritime archaeology is completely incompatible with the activities of treasure hunters.

When Decree 692/86 was passed, the National Heritage Commission assumed competences in advising and controlling the works that might affect the antique ships, being the competence of the coastal guard to decide on the authorization of licenses for searching and rescuing. Due to the fact that such legislation allowed the commercial exploitation of UCH, the national relevant authority intended that such activities were carried out with some scientific control. In this sense, and as an attempt to limit the activities of treasure hunters, the national relevant authority started to make the presence of archaeologists mandatory in their interventions.

Even though the introduction of this requirement contributed to many rescue companies abandoning their activities, others decided to hire national and foreign archaeologists. Faced to such situation, an ethical professional debate started in the national union of archaeologists on the meaning of working in treasure hunter activities whose main aim was selling UCH. Unfortunately, in that moment there was no position stated on the situation. Some archaeologists directly did not accept to work for treasure hunters, while others claimed that the State would never be able to subsidize those interventions and that anyway it

\textsuperscript{153} Captain Carlos Ormaechea and Dr. Sergio Robles, “Problemática de la Arqueología Subacuática en el Uruguay. Arqueología en el Uruguay: 120 años después,” In. Anales VIII Congreso Nacional de Arqueología Uruguaya, eds. M. Consens, J. M. López Mazz, M. Curbelo (Montevideo: Surcos, 1995), p. 392. “The time and resources that the institution [Coastal Guard] had to spend on these issues, from its highest hierarchies to the staff aimed at guarding the works of search and rescue, have not been compensated with benefits that allowed for an improvement in the services or with an enrichment of the cultural heritage of the State, so far”
was possible to carry out a scientific project “mientras que los inversores acaten las directivas del arqueólogo”\textsuperscript{154}. Likewise, the materials removed were thought to be better preserved and repaired by the rescuers themselves than by the State institutions.\textsuperscript{155}

Time proved the first group of archaeologists right, who from the beginning refused to take part in the activities of treasure hunters. Some of the people who worked with them, ended up resigning due to the pressures received by the businessmen which affected their work on the heritage\textsuperscript{156}. That is to say that in reality the role of those archaeologists was reduced to a simple formal compliance, dependent on the orders of the treasure hunters\textsuperscript{157}.

Those who claimed that Uruguay was not capable of developing maritime archaeology without treasure hunters activities, were also wrong. The first maritime archaeology project carried out in Uruguay which incorporated only archaeologists from Uruguay, the U.K. and Mexico, without any kind of previous connection with treasure hunting companies\textsuperscript{158}, was a proof of that. This experience developed in 2005, helped to change the UCH conception of public and politicians, proving that “it is indeed possible to undertake maritime archaeology in Uruguay”\textsuperscript{159}.

In conclusion, Decree 692/06 ended up being a big mistake, showing that commercial interests sustained in the sale and distribution of archaeological property turns out to be incompatible with the natural interests of archaeology as a science interests. Likewise, the Uruguayan experience allows us to confirm that an archaeological project as well as an archaeology being mandatory are not enough to ensure good practices of heritage management. Above all, the principles to which the methodology is subject and the instrumental aspects of the excavation should be taken into account. The substantive aspects or principles that govern maritime archaeology, should be prioritized over the instruments of procedures to access the

\textsuperscript{154} E. Martínez and J. Silveira. Patrimonio Cultural Subacuático en Uruguay, p. 107, “as long as the investors follow the directions of the archaeologists”.

\textsuperscript{155} Ibid.

\textsuperscript{156} Fermín Méndez, “UN MUNDO INFINITO: arqueólogos subacuáticos, piratas y patrimonio” Revista Lento no. 11 (February 2014): 38-44.

\textsuperscript{157} At the 1996 Meeting of Experts for the Draft Convention on the Protection of Underwater Cultural Heritage, Paris, 22-24 May 1996 (UNESCO doc. CLT-96/CONF.605/6), paras. 45-52, some arguments were in favour of the possibility that archaeologists could monitor the works of salvors.

\textsuperscript{158} Jonathan Adams and others, Maritime Archaeology in Uruguay: Towards a Manifesto. p. 57–69.

\textsuperscript{159} Ibid. 66.
UCH of which treasure hunters boast about. Prior to any intervention, what phenomenon is to be studied and why it needs to be known should be established. Thus, if the methodological priority determines the empathetic approach to UCH, its conservation, knowledge and widening of the scope of empathetic enjoyment will be guaranteed. If, on the contrary, the procedures of access to UCH are prioritized over the principles of theoretical archaeology, the result will be the splitting of the archaeological site and the destruction of UCH.

Considering the set of problems stated in this paragraph, Uruguay should make progress in the juridical protection of UCH. Although Decree 306/06 meant a positive change by cancelling the granting of new search and rescue contracts, we should not hinge on a regulation passed by the Executive Power that could easily be abrogated in the future. The competent authorities should consider the access and awareness of UCH as a fundamental human right. The Uruguayan experience has been useful to show the world that the model of commercial management and exploitation through the sale of this heritage has failed in every sense. The ratification of the CPUCH will allow us to integrate to an instrument that impede the transaction and dispersal of UCH, and promote the inter-institutional, technical and knowledge support among the State parties, among other issues.

3.1.2 Section B. Sovereignty and archaeological objects within LOSC.
After presenting the background of the Uruguayan legal and management framework, I consider it pertinent to start focusing on the question studied in this second part. For that, I shall start by defining the theoretical categories that play a part in the question posed: Could the CPUCH affect the Uruguayan sovereignty, by enabling in some way the restitution of the wreckage located under national jurisdiction to the country of origin?

It is worth remembering that Uruguay deposited LOSC instrument of ratification with the Secretary-General of the United Nations on 10 December 1992. In this sense, I shall start studying the concept of sovereignty, jurisdiction and sovereign rights in different maritime areas according to this instrument, to then devote the second paragraph to the analysis of their specific provisions concerning archaeological objects.

3.1.2.1 Sovereignty and sovereign rights within LOSC.
Prior to answering the question posed in this part, we should understand the concept and scope of the theoretical categories that play a role in the problem, so I shall devote the present

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paragraph to briefly study the concept of sovereignty, jurisdiction and sovereignty rights according to the present Uruguayan legal framework in the matter, this is the LOSC.

Sovereignty and jurisdiction, are two concepts that are closely related within international law\(^{161}\), and have a different meaning depending on the context or legal instrument where they are.

Within the domestic field of a State, sovereignty is an attribute inherent to it, a legitimate force that operates exclusively within its borders and that arises from its inhabitants, who, with the purpose of guaranteeing their rights, decide to submit themselves to an only and supreme body, capable of taking the final decisions. The State shall be the one that, within its territory, shall carry out its mission as deemed appropriate and in compliance with what was decided by its inhabitants. In order to accomplish the latter, it shall exercise its jurisdiction on persons and property within its territory, with the exceptions provided for by international law, such as the right of innocent passage of foreign-flagged ships within coastal states territorial sea\(^{162}\).

According to some authors, the concept of territorial sovereignty would be the claim of the State that the foreign states should refrain from penetrating and acting in their own territory\(^{163}\). This shall be the concept of sovereignty that I shall use to solve the question posed in this part, due to the fact that it is the one that most corresponds to its context. Indeed, the possibility of forced restitution of the historical vessels wrecked in territorial sea of coastal State to the State of origin, would be a form of foreign action within its territory.

Regarding the concept of sovereignty the Permanent Court of Arbitration has stated that\(^{164}\):

Sovereignty in the relationships among states means Independence. Independence in relation to a part of the Earth is the right to execute, excluding other states, the functions inherent to a State. The development of national organization of the States during the last few centuries, and as a corollary, the development of international law, have conferred this principle of exclusive competence of the State over its own

\(^{161}\) S. Dromgoole, Underwater Cultural Heritage and International Law, 18.

\(^{162}\) LOSC art. 17.


\(^{164}\) Decision of the Permanent Court of Arbitration 4 April 1928, extended from Huber as sole arbitrator in the dispute between the Netherlands and the United States of America to the Island of Palmas.
territory such an important character that it has turned into the starting point towards the solution of several problems concerning international affairs.... Territorial sovereignty, as said, implies the exclusive right to carry out an activity that is typical of the State\textsuperscript{165}.

The exercise of such absolute authority of the State within its territory is called “jurisdiction”\textsuperscript{166}. As stated before, sovereignty and jurisdiction are two interrelated concepts within international law. According to it, the States are capable of executing their sovereign acts, or “effectivités”, understood as the behavior of the administrative authorities as proof of the effective exercise of territorial jurisdiction in a certain geographical space.\textsuperscript{167} The modes of “effectivités” might vary from the legislative and administrative control, the application and execution of penal and civil laws, the regulation of immigration, fishing, naval patrols, oil concessions, public works, etc., these are all measures to be considered as actions taken “à titre de souverain”\textsuperscript{168}. The effectivités developed by the States within a territory, show their intention and willingness to act as sovereign, and constitute a deployment of authority (jurisdiction) over a certain territory\textsuperscript{169}.

Now then, in the sphere of the relationships maintained by the states the meaning of sovereignty takes on a different sense. Here we are standing before relationships ruled by coordinating principles inherent to Public International Law, such as the principle of sovereign equality of the States, where there is no supremacy of one over the other, but independence and coordination.

A State that freely decides to relate with fellow states in favor of the defense of human rights, such as the access to UCH awareness, shall be submitted to certain juridical rules, that will have to abide by in good faith, that not meaning compromising its sovereignty. On the contrary, it will have the right to take direct part in the decision taking in all the stages of the legal system created, either in its formulation, inspection or passing; all that within the aforementioned frame of coordination.

\textsuperscript{165} N.U. Recueil des sentences arbitrales, II, p. 838, 839 in Ibid. 5.

\textsuperscript{166} T. Scovazzi and others, Diritto Internazionale II, 5


\textsuperscript{168} Ibid. 233

\textsuperscript{169} Ibid. 234
In any case, the submission that operates in that sphere, takes place between a sovereign State and the international legal system of which it has freely decided to be part, as its peers.

**Sovereignty within maritime zones**

Next, I shall briefly refer to the general system of sovereignty of coastal States within their maritime zones, in order to devote the next paragraph to the particular study of the specific provisions of UCH.

Nowadays, the Law of the Sea, roughly, is the one granted in LOSC, recognized by most of the international community as the “Constitution for the Oceans”. Such instrument has taken on the features of a fundamental change, almost revolutionary regarding the Law of the Sea then in existence.

One of the main general consensus reached in the Third Conference of the United Nations on the Law of the Sea, on 30th April 1982, has been the system of sovereignty provided in the different maritime areas. In those, the legal authority, rights and duties of the States are regulated, harmonized, based on fundamental balances as protection and control of coastal states versus navigational rights of maritime states, among others.

The general principle granted in LOSC, provides that the sovereignty of the coastal State progressively decreases as the coast is further away. Thus, and as from terra firma, there are five successive maritime spaces with their respective legal regulations: a) internal waters; b) territorial sea; c) contiguous zone; d) exclusive economic zone – all of them under national jurisdiction of coastal State-; and e) the area –beyond national jurisdiction of any State-.

As a general principle, waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State\(^{170}\). Within internal waters, the State exercises its sovereignty as widely as in its land territory, with only one exception.\(^{171}\)

Regarding the territorial sea, the aforementioned instrument provides that “The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as

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\(^{170}\) LOSC art. 8.1

\(^{171}\) LOSC art. 8.2 provides “Where the establishment of a straight baseline in accordance with the method set forth in article 7 has the effect of enclosing as internal waters areas which had not previously been considered as such, a right of innocent passage as provided in this Convention shall exist in those waters”.
the territorial sea. Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines.

The International Court of Justice (hereafter: ICJ), has stated that the maritime right arise from the sovereignty of the coastal States over the land, this being a principle that can be summarized as “the land prevails over the sea”. In this sense, and according to Jiménez de Aréchaga, the territorial sea would be “territorio sumergido del Estado”. The sovereignty that rules in this zone, is the consequence of the one the State has over the land territory.

In accordance with the Treaty of the “Río de La Plata y su Frente Marítimo”, and the LOSC, the Uruguayan baseline is an imaginary straight line between Punta del Este (Uruguay), and Punta Rasa of Cabo San Antonio (Argentina), as from which 12 nautical miles (NM) of territorial sea are defined.

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172 LOSC art. 2.1

173 LOSC art. 3.


175 E. Jiménez de Aréchaga and others, Derecho Internacional Público Tomo III (Montevideo: Fundación de Cultura Universitaria, 1992), 228, “underwater territory of the State”.

176 El Tratado del Río de la Plata y su Frente Marítimo, signed in 19 November 1973 between Argentina and Uruguay, came into in forcé on 12 February 1974.

177 LOSC, art. 9. As I mentioned within the introduction, this position is not accepted by some States as they consider the River Plate is not the mouth of the river but a bay.
Figure 1. Uruguayan maritime zones

(Compiled by Francis Coeur de Lion)

The most relevant limitation to the sovereignty of the Coastal State in territorial sea, is the Right of innocent passage that all vessels from other States have.\textsuperscript{178}

One other of the maritime zones provided in LOSC with a different legal regulation is the so-called contiguous zone. This one runs up to a maximum of 24 nautical miles (hereafter: nm) from base line, being part of the economic exclusive zone (hereafter: EEZ). The powers of inspection that the coastal State has within this zone, are very specific and can only be exercised to the maximum referred to in the previous sentence. They comprise prevention of certain violations and enforcing police power regarding customs, tax, immigration and sanitary laws. If necessary, coastal States could arrest and detain violators\textsuperscript{179}. Coastal States can also take measures to control traffic in UCH\textsuperscript{180}. This specific topic will be analyzed in the next paragraph.

\textsuperscript{178} LOSC art. 17
\textsuperscript{179} LOSC art. 33
\textsuperscript{180} LOSC art. 303.2
The Exclusive Economic Zone, is defined as “an area beyond and adjacent to the territorial sea”\textsuperscript{181} that “shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured”\textsuperscript{182}.

Within EEZ coastal States have limited sovereign rights for exploring, exploiting, conserving and managing all natural resources, living or non-living to be found in the water or on the seabed and its subsoil. Also, they have sovereign rights for other activities for economic exploration and exploitation of the zone such as the production of energy from the water, currents and winds\textsuperscript{183}. Coastal States also have the jurisdiction with regard to marine scientific research and the protection and preservation of the marine environment. According to Jiménez de Aréchaga, the use of different words in art. 56 only seems to be caused by the use of the expression “sovereign rights” to be applied to the resources and “jurisdiction” referring it to activities, but that does not reduce the sovereign rights of the Coastal State\textsuperscript{184}.

For its part, the LOSC defines the Continental Shelf of a Coastal State as: the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance\textsuperscript{185}.

Within it continental shelf, coastal State has sovereign rights over non-living resources, and living resources (sedentary species attached in the seabed as crustaceans. Fish is excluded).

Finally, LOSC provides the existence of the Area, this is the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction. Its resources are defined as all solid, liquid, or gaseous mineral resources “in situ” in the area at or beneath the seabed. The Area and its resources are the common heritage of mankind, so that they should not be subject to appropriation and sovereign claims by any State or company\textsuperscript{186}.

\textsuperscript{181} LOSC art. 55

\textsuperscript{182} LOSC art. 57

\textsuperscript{183} LOSC art. 56. 1 (a)

\textsuperscript{184} E. Jiménez de Aréchaga and others, Derecho Internacional Público Tomo III, 260.

\textsuperscript{185} LOSC art. 76.

\textsuperscript{186} LOSC arts. 133, 136, 137.
3.1.2.2. Analysis of the provisions concerning archaeological objects in LOSC.

After defining the concept of sovereignty to be used in the course of the present research, and also after reviewing the general system of sovereignty within the different maritime zones, in this paragraph I shall analyze the specific provisions of UCH within LOSC, in order to understand the present legal framework that rule in Uruguay, as well as its main characteristics.

Even though LOSC is recognized by the international community as a real “Constitution for the oceans”, specifically its system of protection of UCH is limited, ambiguous, contradictory and even counterproductive in some aspects. The aforementioned presents only two articles that are included in two different parts of the art. 149 (in Part XI—The Area) and Art. 303 (in Part XVI-General Provisions). As we will see next, both provisions are conceptually contradictory, also it “can be interpreted as a covert invitation to the looting of the underwater cultural heritage”187, in accordance with a private law approach to historic wreck salvage.

Let us begin by analyzing the provisions referring UCH located in maritime zones near the coast. Art 303 of LOSC -Archaeological and historical objects found at sea-, presents four paragraphs with different target and scopes.

The first paragraph, mentions the obligation of the States parties to protect UCH found at sea, and to cooperate for that purpose: “States have the duty to protect objects of an archaeological and historical nature found at sea and shall cooperate for this purpose”. Nevertheless, it does not distinguish how such protection will have to become effective.

Furthermore, and according to the aforementioned regulation, a State that deliberately destroys UCH, and/or repeatedly refuses to negotiate with other States on the ways to cooperate with the protection of UCH, could be responsible “for a breach of an international obligation”188.

As seen in the previous paragraph, according to LOSC regime, the coastal State has full sovereignty within its internal waters and territorial sea, but specifically regarding UCH and in accordance with art. 303.1, will always be obliged protect it and to cooperate with other States for that purpose.

Paragraph 2 of art. 303, provides a kind of archaeological contiguous zone:


In order to control traffic in such objects, the coastal State may, in applying article 33, presume that their removal from the seafloor in the zone referred to in that article without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article.

Even though this provision allowed Coastal States to prevent and penalize the removal of UCH between 12 and 24 nm from the baseline of the territorial sea, it does not include the hypothesis of its “in situ” destruction that, for instance, can be the result of bottom trawling activities.

Regarding the rest of the EEZ—this is between 24 and 200 nm from the baseline of the territorial sea—LOSC regime does not provide specific mechanisms for the protection of UCH. As seen in the previous paragraph, in accordance with art. 56 of LOSC activities directed to UCH are not subjected to direct coastal State control. It only provides some limited sovereign rights as exploring, exploiting, preserving and managing all natural resources, living or non-living to be found in the water or on the seafloor and its subsoil.

Considering this legal gap, some authors resort to the flexibility of interpretation of some of the existing mechanisms in LOSC, such as alternative tools for the protection of the UCH within EEZ. According to Dromgoole: “If shipwreck hunting activities were categorized as MSR (Marine Scientific Research189), this would enable a coastal State to regulate these activities when they are undertaken by foreign salvors on its continental shelf or in its EEZ”190.

While the ingenuous character of the proposal, I believe that in agreement to the rules on the interpretation of the treaties191, and upon the reading of the text of the LOSC, we can conclude that both the maritime scientific research and the protection and preservation of the marine environment referred to in art 56, are clearly related with the living -e.g. fish and marine mammals- and non-living -e.g. minerals- natural resources. Consequently, the concept of “natural resources” would not cover the underwater cultural heritage. Indeed, when LOSC referred to UCH, it was expressly in two of its provisions -art. 149 y 303-. Moreover, “It seems

189 “Words added”.


too artificial to assume that archaeological and historical objects which are found embedded in the sand or encrusted with sedentary living organisms can be linken to natural resources”\textsuperscript{192}.

This legal gap, could be filled using art 59 of LOSC, providing that conflicts between coastal States and other states within the EEZ, should be solved “taking into account the respective importance of the interest involved to the parties as well as to the international community as a whole”. This last reference, could be used as a defense tool against the UCH commercial sale.

However, this mechanism is really difficult to put into practice due to the provisions of paragraph 3 of art 303 of LOSC: “Nothing in this article affects the rights of identifiable owners, the law of salvage or other rules of admiralty, or laws and practices with respect to cultural exchanges”.

The expression “the rights of identifiable owners” refers to the question of ownership and it will be addressed in chapter 2 section B of this part.

This provision gives an “overarching status” to a body of rules that cannot provide any effective means for the protection of the UCH\textsuperscript{193}. This is the “law of salvage and other rules of admiralty”. According to the provision mentioned before, if there were conflict between the general aim to protect UCH provided in paragraph 1 and the provisions of the salvage law and other rules of admiralty, the latter would prevail.

Since there is no express reference in LOSC concerning the meaning of “the law of salvage and others rules of admiralty”, it will be determined by the applicable domestic law. In many States, the notion of salvage refers only to the attempts to salvage a vessel from imminent danger on behalf of its owner. In Uruguay, for instance, the notion of salvage refers to “todo acto o actividad efectuada para asistir o disponer sobre embarcación, artefacto naval o bien en peligro o siniestrado en aguas de jurisdicción o de soberanía nacional o puertos de la República”\textsuperscript{194}. A general interpretation of this provision, could be applied to the regimen of

\begin{enumerate}
\item \textsuperscript{192} T. Scovazzi. The Law of the Sea Convention and Underwater Cultural Heritage, 757.
\item \textsuperscript{194} Law 21 June 1999, No 17121, “Competencias de la Armada Nacional a través de la Prefectura Nacional Naval, en aguas de jurisdicción o de soberanía nacional o puertos de la República. Coordinación y control de la actividad de asistencia y salvamento de embarcaciones, artefactos navales o bienes deficientes en peligro o siniestrad os”, Published in the “Diario Oficial” (suppl to No 25306) 5 July 1999. In accordance with art. 2 the notion of salvage refers to “every act or activity carried out to assist or dispose of a vessel, naval artifact, either in danger or wrecked in waters of national jurisdiction or sovereignty or ports in the Republic”.
\end{enumerate}
salvage law for historical shipwrecks where, far from being in danger of wreckage, have been definitely lost for centuries.

For its part, in some common law countries (e.g. United States), the concept of salvage law, has been applied by some courts to historical shipwrecks, granting hunters the property of the objects found\textsuperscript{195}. This regimen “disguise as ‘first-come-first-served’ or ‘freedom-of-fishing’ approach, based on the exploiting underwater cultural heritage for the purpose of private interests or for the finder’s personal gain”\textsuperscript{196}. According with the principle of freedom of the seas:

...any person on board any ship could explore the continental shelf adjacent to any coastal state, bring any archaeological and historical objects to the surface, become their owner under domestic legislation (in most cases, flag state legislation, including states granting flags of conveniences), carry the objects into certain countries and sell them on the private market\textsuperscript{197}.

Thus, the system provided by 303.3 tends more to favor the UCH commercial sale, than to protect the underwater archaeological sites according to the principles of maritime archaeology.

The last paragraph of art 303\textsuperscript{198}, leaves an open possibility for the implementation of future international agreements referring UCH protection. Based on this provision, and aiming at providing a better legal frame for the protection of this cultural heritage, on 6 November 2001, the CPUCH was signed in Paris with UNESCO. This international instrument will be analyzed in the next chapter.

Finally, the LOSC has a specific article regarding UCH within the Area:

All objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being


\textsuperscript{196} T. Scovazzi, “Protection of the underwater cultural heritage”, 295.

\textsuperscript{197} Ibid., 298

\textsuperscript{198} LOSC art. 303.4 provides: “This article is without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature”.

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paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin\textsuperscript{199}.

Regarding the protection of this specific heritage, on the one hand this article provides it be preserved “for the benefit of mankind as a whole”, which results positive, as it allows to exclude activities of a private interest directed to the sale of UCH at own profit. On the other hand, it is not clear what “the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin” are, and how they can be used for its preservation or disposition for the “benefit of mankind as a whole”.

To conclude, and specifically referring to the system of UCH, the practice of the States has proved that art. 303 of LOSC, turned out to be a proper system for its looting\textsuperscript{200}. In this sense, the CPUCH is a mechanism of help to face the contradictory and counterproductive effects of the aforementioned system. One of the main measures for the defense presented by CPUCH, are the elimination of the effects of the law of salvage and finds for the heritage found on the continental shelf, and the promotion of regional cooperation.

After a while, on 24 December 2011, the United Nations General Assembly made a reference to the CPUCH and “calls upon States that have not yet done so to consider becoming parties to that Convention, and notes in particular the rules annexed to that Convention\textsuperscript{201}”.

Thus the importance of an instrument designed specifically to protect and manage UCH is recognized, correcting the contradictions of the LOSC system of UCH, and at the same time in a manner consistent with the rights, jurisdiction and duties of States under this instrument.

3.2 Chapter 2. The articulation of Uruguayan sovereignty under the CPUCH.

The CPUCH, is based on the need to protect and manage UCH responsibly and compatibly with the principles that rule maritime archaeology. At the same time, this means this instrument was created as a defensive tool against looting beyond territorial sea, through the implementation of an international cooperation system. Moreover, CPUCH provides the basic principles for the protection of UCH, as the prohibition of its commercial sale, and its

\textsuperscript{199} LOSC art. 149.

\textsuperscript{200} See cases on the negative effects of the law of salvage and the other rules of admiralty law on the protection of UCH, in R. Garabello, and T. Scovazzi, eds., The Protection of the Underwater Cultural Heritage, 19-80

\textsuperscript{201} United Nations General Assembly Resolution adopted by the General Assembly on 24 December 2011, No 66/231, At para 8.
preservation in situ as the first option “before allowing or engaging in any activities directed at this heritage”\textsuperscript{202}.

In order to accomplish these aims, there was a long process of negotiation in which numerous efforts were made to reach a reasonable compromise, reaching consensus in most of its provisions. The General Conference of the United Nations Educational, Scientific and Cultural Organization, meeting in Paris from 15 October to 3 November 2001, adopted the CPUCH on 2 November 2001, which came into in force on 2nd January 2009 and at present (October 2014) has 48 States Parties.

In spite of the fact that Uruguay participated actively in the process of creation of the aforementioned instrument, with a position in favor of its ratification, finally in the 31\textsuperscript{st} Session of the General Conference of the UNESCO (Commission IV), and by order of its chancellor's office, Uruguayan delegates voted to abstain. There follows the transcription of the main part of the arguments presented in such occasion:

...creemos que no se salvaguardan adecuadamente en esta convención, los legítimos intereses de los países ribereños, y en segundo término porque los derechos concedidos a través de esta convención, no son suficientemente compatibles con los derechos adquiridos preexistentes\textsuperscript{203}.

To this day, I have not read or heard any juridical argumentation that allows at least to give foundations to such assertions. Instead, they do seem to reflect a supposed opposition between the interest of humanity in UCH, and the interest of the coastal state. I could claim that such argumentations are founded on a materialistic theory of Law, and that according to it, the CPUCH is understood to be but a technic power at the service of the powerful, that is to say, to the benefit of traditional maritime powers in order to recover the “treasures” removed from the colonized continent. This way, the doubt would be based on the likelihood of that international instrument affecting Uruguayan sovereignty, by enabling in some way, the restitution of the wreckage located under national jurisdiction to the State of origin.

\textsuperscript{202} CPUCH art. 2.5 and Rule 2 of the Annex.

\textsuperscript{203} Source: Personal notes taken during this meeting by one delegate who attended it. “…we believe that in this convention the legitimate interests of the coastal states are not properly safeguarded, and secondly because the rights granted through this convention are not compatible enough with preexistent acquired rights”.

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Not only Uruguay, but also other countries expressed their doubts regarding a possible affectation of the ownership of UCH -Chile-\textsuperscript{204}, or the sovereignty of the coastal States - Colombia-\textsuperscript{205}, in the 31st Session of the General Conference of the UNESCO (Commission IV).

In order to provide considerations for a juridical reflection on those topics, in this chapter I will develop the elements that could answer the question posed in the introduction of this paper: Could the Uruguayan sovereignty be affected by the ratification of the CPUCH by enabling in some way the restitution of the wreckage located under national jurisdiction to the State of origin?

To answer this question, I consider necessary to start in Section A, mentioning the general objectives of this convention, to continue by analyzing its provisions that make reference to States sovereignty.

Finally, in Section B, I will describe the legal framework on UCH restitution of property to the country of origin, to ending by answer the propose question.

3.2.1. Section A: The CPUCH and its sovereignty provisions.

Prior to the analysis of the questioned posed in this second part, we should understand what the object and purpose of the CPUCH is, since as a general rule and in compliance with the Vienna Convention on the Law of Treaties (hereafter: VCLT)\textsuperscript{206} –of which Uruguay is a State Party\textsuperscript{207}–, “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”\textsuperscript{208}.

\textsuperscript{204} There follows the transcription of the remarks made by the Chilean delegation included in the report of the Commission IV:

“The Chilean delegation once again abstains due to the fact that, after the latest meeting of experts, the authorities of Chile, studied the Project for the International Agreement and unfortunately found some incompatibilities with our legislation, concerning particularly property law (...) which did not allow us to support such project in this occasion.”

\textsuperscript{205} There follows the transcription of the remarks made by the Colombian delegation included in the report of the Commission IV “Colombia (...) still has doubts on several article of this [CPUCH], questioned by the controlling bodies of the State and other entities that could compromise the national jurisdiction and sovereignty”.


\textsuperscript{207} Law Decree 19 October 1981, n. 15.195, Published in the “Diario Oficial” (suppl to Tomo: 1, Semestre: 2, Año: 1981, Página: 1414) 06 November 1981.

\textsuperscript{208} VCLT, art. 31.
In this sense, in paragraph one, I will analyze the overall objective of the Convention, to continue in the second one studying the provisions that make reference to States sovereignty, and those that could hypothetically affect the coastal States sovereignty by enabling in some way the restitution of the wreckage located under national jurisdiction to the State of origin.

3.2.1.1 Overall objective of the CPUCH.
During the process of elaboration of the CPUCH, specifically in the Second and Third Meeting of Experts (Paris; April 1999, and July 2000), several preconceptions or “myths” 209 were reflected in the speeches of some negotiators. Both the nature of the Convention and the object under its protection were examples of that. The elaborations on the ownership of the underwater cultural property, or the attempts to apply the salvage law system to this heritage, did not take into account the fact that the purpose of the discussion was no other than finding a mechanism to stop the looting of cultural property at sea.

As time went by, those myths o preconceptions were gradually abandoned. A proof of that, was the majority positions reached on this issues in the second part of the Fourth Meeting of Experts (Paris; July 2001), which enabled the passing the Convention by the General Conference of UNESCO in November that year. Specifically concerning cultural property:

there was a tacit recognition that referring to issues of property in the text of the convention was not a way out of the negotiating deadlock: it was more useful, instead, to imagine practical arrangements under which a State having a verifiable link to a given underwater cultural heritage should not be excluded from decisions regarding the protection of such heritage210.

What is then the purpose of the convention? By reading its text we can clearly see that it is to ensure and strengthen the protection of underwater cultural heritage, through the cooperation among the States Parties with a view to its preservation “for the benefit of humanity in conformity with the provisions of this Convention”211.

The CPUCH is part of the international law, created in compliance with the framework of LOSC, and with the purpose of improving specifically the UCH system provided in it.

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211 CPUCH art. 2.
In this sense, one of the main achievements is establishing as a general rule, the elimination of the effects of the law of salvage and finds. As seen in the previous paragraph, it could be understood as “the right of anyone to recover and take commercial profit from any cultural object discovered in the sea and not having any identifiable owner”\footnote{A. W. González, “Negotiating the Convention on Underwater Cultural Heritage: Myths and Reality, 86.}

As a general rule, the CPUCH expresses that the law of salvage or law of finds will not apply to any activity relating UCH. It can only be applied when three simultaneous conditions are fulfilled, namely: it is authorized by the competent authorities, it is in full conformity with this Convention, and it ensures that any recovery of the underwater cultural heritage achieves its maximum protection\footnote{CPUCH art. 4.}. This exception was the form found to achieve a compromise among those who seek to eliminate the application of this system to UCH –most delegations-, and those countries that refused to accept its total prohibition. Indeed, although this provision could have interpretative problems as the identification of “competent authorities”, at least the aforementioned exception greatly limits the actions of salvors.

The Convention also provides other measures against looting of UCH, especially the prohibition of its commercial exploitation\footnote{CPUCH art. 2 para. 7 and all the rules contained in the Annex which is an integral part of the CPUCH, specially Rule 2 of the Annex.}. In accordance with the context of the aforementioned instrument, not all commercial exploitation is banned, but only that one related to trading, speculation or its irretrievable dispersal\footnote{CPUCH Annex Rule 2.}. Profitable activities such as cultural diving guidance, or the sale of tickets for museums where UCH is exhibited to the public, shall be allowed provided that they are performed in compliance with the provisions of the convention.

Another of the defensive tools of CPUCH, is the exclusion of what according to some authors is called a “First come, first served” or “Freedom of fishing”\footnote{T. Scovazzi, The Law of the Sea Convention and Underwater Cultural Heritage, 757.} approach for the heritage found on the continental shelf, commented in the previous paragraph. The main objective of this Convention was to find a mechanism to control and punish UCH looting within those maritime areas where States have no full sovereignty or sovereignty rights, those being the EEZ, the continental shelf, and the Area. To fulfil this objective, the challenge was to
achieve a balance between the maritime powers, which wanted to extend the jurisdiction of the coastal State to the UCH found on the continental shelf or in the EEZ, and those which thought that this measure would have altered the sovereignty and jurisdiction regime provided within LOSC.

After many attempts and discussions, the final proposal adopted—without consensus—was based, without extension of the jurisdiction of the coastal state, on a procedural mechanism of: 1) reporting; 2) consultations and 3) urgent measures, based on the cooperation among the States Parties linked to the UCH217.

Regarding the mechanism of reporting, the CPUCH provides that all States Parties shall require from their national vessels or a vessel flying their flag, the report of a discovery or activity directed at UCH located in their exclusive economic zone. According to this provision, on 29th May 2013, Italy notified the Director-General of UNESCO of the finding of Roman shipwreck located in its continental shelf of the Golfo di La Spezia. Thus, the Director General notified all Parties, so that those who could prove a cultural link with the aforementioned finding could requested to be consulted so as to ensure an effective protection of the archaeological site218.

When the discovery or the activity carried out is in the EEZ or on the continental shelf of another State Party the CPUCH provides two alternative solutions:

“(i) States Parties shall require the national or the master of the vessel to report such discovery or activity to them and to that other State Party:

(ii) Alternatively, a State Party shall require the national or master of the vessel to report such discovery or activity to it and shall ensure the rapid and effective transmission of such reports to all other States Parties.219”

At the moment of the deposit of the instrument of ratification, acceptance, approval or accession, a State Party shall declare the manner in which reports will be transmitted220.

The interpretation of the “State Party” mentioned in sub-para. (ii) “is to be understood as the State to which the ‘national’ belongs or the State of which the ‘vessel’

217 CPUCH art. 9 and 10.
218 CPUCH arts. 9.4 and 9.5.
219 CPUCH art. 9.1.b.
220 CPUCH art. 9.2.
flies the flag\textsuperscript{221} and not understood as the coastal State. From the preparatory works of the CPUCH this interpretation is deduced\textsuperscript{222}.

Regarding the second-step procedure –consultations- the CPUCH provides that the coastal State, shall consult all other States Parties which have declared an interest based on a verifiable link, on how best to protect the underwater cultural heritage located within its EEZ or continental shelf\textsuperscript{223}. The verifiable link, is the most sophisticated concept within the Convention. It was not defined within this instrument, since such an enterprise would mean and extremely difficult exercise. Not being an absolute concept, it was preferred to grant it certain flexibility in its interpretation under certain parameters: “especially a cultural, historical or archaeological link, to the underwater cultural heritage concerned\textsuperscript{224}.”

The coastal State shall coordinate such consultations as “Coordinating State”, unless it expressly declares that it does not wish to do so, in which case the States Parties which have declared and based on a verifiable link, shall appoint a Coordinating State\textsuperscript{225}. The coordinating State, shall implement measures of protection which have been agreed by the consulting States, which include the Coordinating State, unless the consulting States, including the Coordinating State, agree that another State Party shall implement those measures\textsuperscript{226}.

Regarding the third-step, the CPUCH provides the right of the coordinating State to adopt urgent measures to prevent immediate danger to the underwater cultural heritage if necessary prior to consultations\textsuperscript{227}. It is about extreme cases where it is necessary to act quickly to tackle the specific threats on UCH. In consequence, it is logically understood that coastal States are in the best position to ensure the protection of objects on their continental shelf.

In any case, the Coordinating State in coordinating consultations, taking measures, conducting preliminary research and issuing authorizations, shall act on behalf of the States Parties as a whole, and not in its own interest. Any such action shall not constitute in itself a

\textsuperscript{221} R. Garabello, and T. Scovazzi, eds., The Protection of the Underwater Cultural Heritage, 12.


\textsuperscript{223} CPUCH art. 10.3 and 9.5.

\textsuperscript{224} CPUCH art. 9.5.

\textsuperscript{225} CPUCH art. 10.3.b.

\textsuperscript{226} CPUCH art. 10.5.

\textsuperscript{227} CPUCH art. 10.4.
basis for the assertion of any preferential or jurisdictional rights not provided for in international law, including the LOSC.\(^{228}\) Such reference to “act on behalf of States Parties as a whole” anticipates the fact that the Convention does not address issues of exclusive rights as ownership of UCH. On the contrary, it does address issues of rights, exclusive on not exclusive, to regulate and authorize activities directed at this heritage.

Also, the CPUCH allowed States Parties to enter into regional agreements\(^{229}\), to ensure better protection than the general regime granted within this instrument. As a consequence, this new agreements could considerer the protection of UCH dating from fewer than 100 years from sinking or a particular kind of this heritage.

Last but not least, to fulfil the strengthened protection of the UCH, the CPUCH provided a standard guide to the ethics and practices of underwater cultural heritage management, as originated from a wider and technical international consensus on methodologies and objectives of UCH expressed within ICOMOS, known as “Sophia Charter”.\(^{230}\) These rules are contained in the Annex of the Convention, and have the same hierarchical level and are equally mandatory as the Convention itself. Two of the main principles are the aforementioned prohibition of the UCH commercial exploitation, and the priority of “in situ” conservation of this heritage.\(^{232}\) The latter due to three factors: 1) the physical and chemical balance the underwater archaeological objects are in; 2) the decay they are exposed to once in contact with the land environment;\(^{233}\) and 3) the onerous expenses implied by the general process of conservation and restoration once removed.

### 3.2.1.2 Provisions of the CPUCH that make reference to coastal States sovereignty.

In the previous paragraph, we saw the concern expressed by some coastal States as to the probability of their sovereignty being affected by States third parties once the CPUCH ratified. In this sense, I will analyze the provisions of the Convention related to sovereignty of coastal

\(^{228}\) CPUCH art. 10.6.

\(^{229}\) CPUCH art. 6.

\(^{230}\) See part one, chapter 2, section A, paragraph 2.

\(^{231}\) CPUCH art. 33.

\(^{232}\) CPUCH art. 2.5

States, which could limit the exercise of archaeological sovereignty by the coastal State by this convention.

As seen in chapter one, section B, paragraph one of this part, the sovereignty of a State involves not only the effective exercise of power of the government of a State independently of any intervention of another subject of the international community, but also its form and content. Likewise, we saw that the sovereignty of a state reaches not only its territory in a strict sense, but also its internal waters, territorial sea\textsuperscript{234}, and some specific rights within the contiguous zone.

The CPUCH, refers to the sovereignty of States Parties in its various provisions.\textsuperscript{235}

The first one reads: “No act or activity undertaken on the basis of this Convention shall constitute grounds for claiming, contending or disputing any claim to national sovereignty or jurisdiction”\textsuperscript{236}. According with the preparatory work of the CPUCH, this provision must be interpreted in a restrictive meaning, that is as a reference to territorial disputes\textsuperscript{237}.

The second CPUCH provision expressly refers to the relationship between this Convention and the LOSC\textsuperscript{238}. This was the most discussed topic during the whole process of the negotiation of CPUCH. The discussion was focused on defining the scope of such relationship, which, in the end would define its nature. On the one side, some delegations\textsuperscript{239} considered the need to ensure strict consistency between both instruments. Such stance set the new Convention aside as a mere appendix of the LOSC regime, without the possibility to add


\textsuperscript{235} Preamble, art. 2.11.

\textsuperscript{236} CPUCH art. 2.11.


\textsuperscript{238} CPUCH art. 3 provides:

“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”.

\textsuperscript{239} Poland, the Netherlands, Norway, the Russian Federation, the United Kingdom and the United States.
any improvements. On the other side, countries such as Italy defended the autonomous character of the new international instrument, based on the fact that should the previous criterion be accepted, the legal gaps present within LOSC would not be solved. It is worth pointing out that art 303.3 in particular, was considered to encourage the looting of the UCH within continental shelf and the area. Finally, the plenary approved the present provision without reference to the “full conformity” with LOSC, which leads me to the interpretation that the criterion adopted grants priority to the creation of mechanisms of protection of UCH – especially regarding looting-, against any balance that could have been established by this Convention. With this purpose, I shall analyze next the relationship between CPUCH and the sovereignty regime of coastal States, in maritime zones provided in LOSC.

Concerning UCH in internal waters, archipelagic waters and territorial sea –zones where in general most of this heritage is located – the CPUCH expressly grants respect to the exercise of sovereignty in the coastal States regarding their “exclusive right to regulate and authorize activities directed [to this heritage]”. All this in compliance with the provisions contained in the chapter “Rules” of the Convention (mentioned in the previous paragraph), with a view to its preservation for the benefit of humanity as a whole. The “authorization” granted in this article, refers to a juridical power typical of the State sovereignty, that “allows an individual or legal entity, private or public entity to exercise a pre-existing juridical power or right”. In such case, it is a discretionary facultative and unilateral act of the coastal State that authorizes or dismisses the request for activities directed UCH within its internal waters and territorial sea. Prior to pronouncing its final resolution, the coastal State must carry out a study of legality concerning the project produced before it – e.g. its compliance with the provisions of the “Rules” of the CPUCH-. The coastal State could also revoke the authorization granted whenever public interest is affected, for instance, if destruction of UCH is observed, also imposing the corresponding penalties.

240 See previous paragraph.


242 CPUCH art. 7.1

243 The mandatory application (“shall apply”) of the Rules of the Annex was approved in order to apply common archaeological standards in all States Parties.

244 Enrique Sayagués Laso, Tratado de Derecho Administrativo, Tomo I, 7ª edición, (Montevideo: FCU, 1998), 345.
Therefore, I do not notice any possibility that the two first paragraphs of art 7 could affect the sovereignty of the coastal State, as it is the Convention itself that prohibits any other State to regulate and authorize activities on the underwater cultural heritage located both in internal waters, and in the territorial sea. In the same sense, some authors expressed that “the first two paragraphs of this Art. 7 were not contentious, as they reflect accepted principles of international law, such as the sovereignty of a State in its internal waters, archipelagic waters and territorial sea”\textsuperscript{245}. I shall reserve the analysis of art. 7, paragraph 3 for the next section.

Regarding the UCH situated in the contiguous zone, the CPUCH provides that:

Without prejudice to and in addition to Articles 9 and 10, and in accordance with Article 303, paragraph 2, of the United Nations Convention on the Law of the Sea, States Parties may regulate and authorize activities directed at underwater cultural heritage within their contiguous zone. In so doing, they shall require that the Rules be applied\textsuperscript{246}.

How can this provision work with the rights of a Coastal State granted in art. 303.2 LOSC\textsuperscript{247}? The phrase “without prejudice to” is controversial leads to two different interpretations.

On the one hand, the reference to the cooperative system created for the EEZ and the continental shelf –arts. 9 and 10 seen in the previous paragraph - could be interpreted in the sense that the coastal State must necessarily consult other interested states before acting in compliance with art 8, and thus would “diminishes the rights, which the coastal State already enjoys in this area under article 303 (2) of the LOS Convention\textsuperscript{248}”.

A literal interpretation of this last article would lead to the understanding that any State intending to remove from the seabed of the contiguous zone historical or archaeological

\textsuperscript{245} R. Garabello “Negotiating History of the Convention” In R. Garabello and T. Scovazzi, eds. The Protection of the Underwater Cultural Heritage, 133.

\textsuperscript{246} CPUCH art. 8.

\textsuperscript{247} Let us remember that art 303.3 reads: “In order to control traffic in such objects, the coastal State may, in applying article 33, presume that their removal from the seabed in the zone referred to in that article without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article”

\textsuperscript{248} This was the argument of Greece on the vote during Commission IV on Culture (29 October 2001, 31st Session of the General Conference), which had led it to abstain. See: R. Garabello “Negotiating History of the Convention” in R. Garabello and T. Scovazzi, eds. The Protection of the Underwater Cultural Heritage, 138. Also in accordance with Strati, art. 8 ‘superimposes the system of consultations envisaged for the continental shelf/EEZ on the contiguous zone’: Greece (2nd edn) in S. Dromgoole (ed.), The Protection of the Underwater Cultural Heritage: National Perspectives in Light of the UNESCO Convention 2001 (Leiden and Boston: Martinus Nijhoff Publishers, 2006), 121.
objects, must previously have the exclusive authorization of the coastal State. Now then, it is worth bearing in mind the fact that the rights of the coastal State—according to the aforementioned art 303.2—, are only ‘in order to control traffic’ in archaeological and historical objects, but it cannot carry out any activity to ensure the protection of such objects.249"

On the other hand, in accordance with some authors,250 a coastal State has the priority over other states to regulate and authorize the “Activities directed at underwater cultural heritage,” requiring the application of annexed Rules. Such interpretation is mainly based on a “constant practice in favour of the existence of a crystallised customary rule recognizing, as a matter of law, legislative and enforcement rights in favour of coastal States for the protection of underwater cultural heritage in the contiguous zone.”251

Regarding the CPUCH regimen within EEZ and on the Continental Shelf, coastal States’ sovereignty on such zones is not limited since, as seen in the previous paragraph, in those maritime zones they have limited powers, mainly referred to the exploration for and exploitation of living and non-living resources. On the contrary, they could have more powers on the basis of the system foreseen for the cooperative scheme created in those maritime zones, particularly with regard to the rights of the “coordinating State’s,” taking into account the fact that they always will be acting “on behalf of the States Parties as a whole and not in its own interest.”252

Finally, CPUCH253 provides a system of reporting, notification and protection of underwater cultural heritage in the Area. As we saw in the previous paragraph, in this zone the States have no jurisdiction, with the exception of the vessels that fly their flag. In this sense,

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251 CPUCH art. 1.6 defines ‘Activities directed at underwater cultural heritage’ as “activities having underwater cultural heritage as their primary object and which may, directly or indirectly, physically disturb or otherwise damage underwater cultural heritage”. Consequently, they would not only include activities of removal but also the in situ destruction of UCH.

252 Ibid. 45.

253 CPUCH art. 10.5. Also art. 10.3.b) provide that any other consulting State can be appointed as coordinator, if coastal State so wishes.

254 CPUCH art. 10.6. on the scope of this provision, see previous paragraph.

255 CPUCH arts. 11 and 12.
the system of international cooperation provided in CPUCH for the protection of UCH in the Area, is compatible with the notion of international sovereignty seen in chapter one, section B, paragraph one of this part. Indeed, the decision-taking provided in the aforementioned system is carried out in coordination by the interested State Parties\textsuperscript{256} by means of a Coordinator State, which “shall act for the benefit of humanity as a whole, on behalf of all States Parties\textsuperscript{257}” and not in its own interest.

Summarizing, in the first place we can conclude that the purpose of CPUCH is the protection and preservation of UCH for the benefit of humanity. This is clearly deduced from the integral reading of the instrument referred to. The reference to “the benefit of humanity” anticipates the fact that this Convention does not address issues of exclusive rights as ownership of UCH. On the contrary, it does address issues of rights, exclusive on not exclusive, to regulate and authorize activities directed at this heritage. In any case, this expression will be analyzed in section B of this chapter.

Moreover, and in compliance with the rules of interpretation of treaties provided in VCLT, from what I have analyzed so far, I can conclude that initially the CPUCH respects the sovereignty of the coastal States provided in LOSC in all maritime zones. Regarding its internal waters and territorial sea, the aforementioned convention does not contain any provision imposing the obligation on coastal States to accept the action of States parties. Regarding the regime granted for the contiguous zone, only a literal interpretation of art 8 of CPUCH could finally claim that there exists a decrease in the rights which the coastal States already enjoy in this area under article 303 (2) of the LOSC, this is the right to prevent and punish the removal of UCH from the sea-bed of this zone. The reference to the cooperative system created for the EEZ and the continental shelf, could be interpreted in the sense that the coastal State must necessarily consult other interested states before acting in compliance with article 8.

On the contrary, given the ambiguous character of the wording of the aforementioned article, in order to understand its meaning, we must resort to the practice subsequently followed by the states concerning the protection of UCH in the contiguous zone. Likewise, there arises a general trend among States to expand their rights to the general protection of this heritage up to 24 nm. This would allow to conclude that coastal States within their contiguous zone have

\textsuperscript{256} CPUCH art. 11.4. In order to be consulted on how to ensure an effective protection of UCH located in the area, a State Party must show an interest based on a verifiable link to the underwater cultural heritage concerned, particular regard being paid to the preferential rights of States of cultural, historical or archaeological origin.

\textsuperscript{257} CPUCH art. 12.6
a priority –over other States- to regulate and authorize the activities directed at underwater cultural heritage, requiring the application of the Rules within the Annex of the CPUCH.

Finally, the system of international cooperation provided in CPUCH for the protection of UCH in EEZ, Continental Shelf, and the Area is compatible with the notion of international sovereignty, since the decision-taking is done in coordination by the interested State Parties through a State Coordinator, which shall act for the benefit of humanity as a whole, on behalf of all States Parties, and not in its own interest.

Precisely, the notion of “interest of humanity”, and fundamentally the regime of ownership of UCH, will be analyzed in the next section to finish answering the question posed in this part: Could the UNESCO Convention affect the Uruguayan sovereignty, by enabling in some way the restitution of the wreckage located under national jurisdiction to the country of origin?

3.2.2 Section B. Treatment of ownership rights by international law and other elements discussed in Uruguay.

As seen in the previous paragraph, the possibility of CPUCH allowing in some way the forced restitution of UCH located in jurisdictional waters of a coastal State to the State of origin, was one of the argumentations expressly or indirectly mentioned by some countries to base their abstention on. In that sense, doubts arise regarding the possible interpretation of some of its provisions and general concepts, specially “the interest of humanity”. So as to supply elements that allow to answer the question posed in the second part, in paragraph one I shall study the treatment of such ownership by CUPCH with particular reference of the Uruguayan case. In the second paragraph, I shall study the special interest recognized by this convention, this is the “interest of humanity”, as well as a particular feature of its provisions which could be related with the question posed in this second part, namely: could the CPUCH affect the Uruguayan sovereignty, by enabling in some way the restitution of the wreckage located under national jurisdiction to the country of origin?

3.2.2.1 Treatment of ownership rights by international law and the Uruguayan case.

In the previous section we appreciated how the issue of the ownership of UCH was present in the speeches of some negotiators of the CPUCH. The first drafts made an attempt to apply the Convention only to material that had been “abandoned”, notwithstanding the fact that serious difficulties arose when trying to define clearly the scope of abandonment, mainly concerning

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258 See Part 2, Chapter 2 preamble.
the temporary criterion to be used as well as the payment of compensation, among others. In addition, maritime States expressed against any provision within the CPUCH that could 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.

Based on all these difficulties, the only way to fulfil the adoption of the abovementioned instrument was making “no references to ownership at all”. Consequently, in the absence of any guidance from the CPUCH, the pragmatic way adopted was to leave ownership as a matter to be determined by the domestic law and national courts. So, what is the Uruguayan UCH ownership legal framework?

Specifically regarding sunken vessels and their cargos, we must take into account the provisions of the “sunken hulls” law passed in 1975:

Las embarcaciones, objetos o restos de cualquier naturaleza, tanto nacionales o extranjeras, así como las cargas y enseres pertenecientes a los mismos, que se hubieren hundido, semihundido o varado en aguas de jurisdicción nacional (…), con anterioridad al 31 de diciembre de 1973 y cuya extracción, remoción o demolición no fuere comenzada antes de los cuatro meses después de publicada esta ley, serán considerados automáticamente abandonados a favor del Estado, cesando de hecho en su bandera, si fuese extranjera…

The aforementioned article deserves several considerations. Firstly, as we mentioned in the introduction, the “sunken hulls” law was passed with the original intention of giving priority to the security of maritime navigation, by means of cleaning the scrap of the Uruguayan ports. In this sense, the "sunken hulls" law, allowed companies to make contracts with the Uruguayan coast guard for finding, and recovering the national and foreign ships sunken in places that seriously make navigation difficult. Nevertheless, based on the abovementioned

259 S. Dromgoole, Underwater Cultural Heritage and International Law, 116.


261 Sunken Hulls law, art. 15 provides:

“Vessels, objects and remains of any nature, both national and foreign, as well as the cargo and equipment belonging to them, that might have sunk, half-sunk or aground in jurisdictional national waters (…), prior to December 31st, 1973 and whose extraction, removal or demolition did not begin four months before the publication of this law, shall be automatically considered as abandoned in favour of the State, ceasing the facto its flag, if foreign…”
article, in 1986 the Uruguayan Executive Power passed Decree 692/86, which allowed salvor companies to come into contracts with the Coastal Guard also to find and recover historical shipwrecks, benefiting from the selling of the extracted cultural heritage.

Secondly, the abovementioned article uses the abandonment as the way of acquisition of ownership rights. According to Dromgoole, for abandonment to occur there must be “some form of positive intention on the part of the owner to relinquish its rights of ownership”. Such intention – the author adds –, could be expressly or implicitly manifested inferring from the circumstances. When would then the implicit abandonment of foreign vessels discovered in Uruguayan jurisdictional waters work? Basically, when the corresponding Consular Office has learned of the finding of a state national flag vessel, and there is a failure to take action within a reasonable time. The learning could have occurred through the media, or as from the express notification of the finding by the Uruguayan Coast Guard, in compliance with the provisions of the law.  

Finally, what happens in the case of sunken warships and other state vessels engaged in public service? Are they included under the sunken hulls law regime? The law does not make a difference between foreign used for government non-commercial or commercial purposes, so in accordance with art. 17 of the Uruguayan Civil Code, it is a principle that “wherever the Law does not make a difference, the interpreter must not distinguish”. In this sense, in April 2014 the Uruguayan Supreme Court of Justice upheld the decision of the Court of Appeal, recognizing the Uruguayan State the ownership of the archaeological property recovered by a commercial salvage operator within decree 692/06. In this case, the salvor company filed a judicial claim for the ownership of three archaeological objects recovered from

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262 Sunken Hulls law, art. 16.

263 Law 19 October 1994, n. 16.603, “Código Civil”, Published in the “Diario Oficial” (suppl to No 24177) 21 November 1994. art. 17 provides: “Cuando el sentido de la ley es claro, no se desatenderá su tenor literal, a pretexto de consultar su espíritu. Pero bien se puede, para interpretar una expresión oscura de la ley, recurrir a su intención o espíritu, claramente manifestados en ella misma o en la historia fidedigna de su sanción”.


265 Sentence of the Uruguayan Supreme Court of Justice 06 August 2014, n. 732.

266 Let us remember that Decree 692/86 regulated until 2006 the search and recovery of “ancient vessels”, through contracts between the Uruguayan government and companies, sharing the benefit of the value of the object recovered. For more information about Decree 692/86 see chapter one, section A, paragraph one of this part.
German warship “Admiral Graf Von Spee”, sunk in 1939 within Uruguayan internal waters, at
the beginning of the Second World War: a Nazi bronze eagle, a range finder, and a cannon. The sentence of the above mentioned Court of Appeal, has no mention regarding State Vessel sovereign immunity; only refers to the question of ownership rights. It expressed: “De acuerdo con la normativa vigente no cabe duda de que los restos del “Admiral Graf Von Spee” deben reputarse “abandonados a favor del Estado” uruguayo y, por ende, éste es su único propietario”²⁶⁷.

The LOSC does not address whether or not the principle of sovereign immunity continues to apply to a state craft after it has sunk. Most of maritime powers consider that ownership rights in their sunken vessels “cannot be abandoned unless there has been express relinquishment: until such time, they insist that these wrecks remain the property of the flag state”²⁶⁸. At the same time they claim that those vessels are entitled to sovereign immunity and are subject to the exclusive jurisdiction of the flag State. Even though both claims are related, the first one is more related with ownership and the second with questions about jurisdiction. On the other hand, some authors argue that immunity does not continue after a warship has sunk²⁶⁹. From that moment it is not a warship any longer, since it loses the capacity to navigate²⁷⁰, hence, it no longer retains its immunity. According to this position, a flag State could not impede that a company or State perform a salvage action on its sunken warships.

Regarding treatment of sunken State vessels and aircraft by the U.S. federal admiralty courts, in two recent cases involving historic warships, Spain was upheld. In the case of The Juno and La Galga -two Spanish naval frigates sunken off the coast of Virginia in 1750 and 1802 respectively-, the Fourth Circuit Court of Appeals, granted Spain the ownership of certain

²⁶⁷ Sentence of the Uruguayan Civil Court of Appeal n. 1, 17 July 2013, n. sef 0003-000112/2013, “Etchegaray Carvallido, Alfredo y otros c/ Ministerio de Defensa – Cesación de condominio” I.U.E.2-1793/2011, http://bjn.poderjudicial.gub.uy/BJNPUBLICA/busquedaSimple.seam?searchPattern=&cid=453, (October 2014), provides: “In compliance with the regulations in force there is no doubt that the remains of ‘Admiral Graf Von Spee’ must be considered as abandoned in favour of the Uruguayan State and, as a consequence, that is the only owner”.

²⁶⁸ S. Dromgoole, Underwater Cultural Heritage and International Law, 106.


²⁷⁰ Regarding warships art. 29 of LOSC suggest that to be warship a ship must be “under…command” and “manned”, which is not possible once they have sunk.
archaeological objects recovered by a commercial salvage operator (Sea Hunt, Inc.). The decision referred to was based on the fact that Spain could assert its title, and prove the absence of express abandonment of its shipwrecks and cargoes271.

In the case of Las Mercedes the claim of Spain was based on sovereign immunity. In 2007, the treasure hunter company Odyssey Marine Exploration, Inc. removed from the bottom of international waters, 17 tons of gold and silver coins, apart from other materials, some 100 miles west off the Straits of Gibraltar, later taking them to the USA (Florida). Once there, the aforementioned company, based on salvage law, initiated legal proceedings in a US district court in order to obtain the ownership of the cargo recovered. In the face of this fact, Spain intervened in these proceedings finally obtaining the ownership of the war frigate “Nuestra Señora de las Mercedes” and its cargo, based on the fact that at the moment of its sinking, it “was a sovereign owned Spanish vessel, subject to sovereign immunity272”.

In the same case, Peru intervened claiming the ownership of the cargo of the frigate adducing that the coins were manufactured with raw materials obtained in the mines that are currently in Peruvian territory. Such claim was based on the concept of State succession, by which the right of the State Successor (Peru) is privileged over the right of the State predecessor (Spain). Before such claim, Spain adduced that “the express and agreed terms of cession made at the time of Independence, which did not include property that was then outside the territory of Peru (including that sunk at sea)273”. Finally, the Eleven Circuit admitted Spain was right but not in the understanding that the coins were theirs, but based on the fact that the sovereign immunity of the shipwreck also applied to any cargo it was carrying.

Can we consider that there is a constant practice in favour of the existence of a crystallized customary rule recognizing, as a matter of law, in favour of flag States for the sovereignty immunity of their sunken ships, and the assertion that title of the flags State may be lost only through express relinquishment? In accordance with Dromgoole “it is doubtful that this is the case, despite the considerable efforts of the USA in recent years to encourage consistent state practice”274. According to the aforementioned author, most doubts observed on

271 S. Dromgoole, Underwater Cultural Heritage and International Law, 147.


273 Ibid. 101.

274 Ibid. 153.
accepting non-interference with sunken state vessels and aircraft are when those are located within territorial sea of coastal states. The abovementioned and recent Uruguayan case regarding the ownership of the German warship “Admiral Graf Spee”, constitutes an example of this position.

Beyond this case, the refusal by coastal States to accept the sovereign immunity of the flag States with regard to their sunken ships and aircraft within territorial sea, was reflected in the negotiations for the CPUCH. On the one hand, the Group of 77 rejected all proposals that suggested some sort of obligation upon the State in whose water a foreign state lies. On the other hand, some maritime powers were more in favour of a prohibition of action by the coastal State without the collaboration of the flag State. Finally, with a view to reaching consensus the formula “should inform” was adopted, leaving to the coastal States “even more powers than those it actually enjoys by practice: it is not even obliged to inform the flag State that it will recover a sunken foreign military vessel in its territorial waters. Regarding internal waters, the provision makes no mention to this maritime zone. In accordance with Blumberg, this omission “creates a negative implication that flag states have no rights at all over their vessels in these areas.”

Regarding the State vessels and aircraft regimen within EEZ, the CPUCH provides:

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275 CPUCH art. 7.3 provide:

Within their archipelagic waters and territorial sea, in the exercise of their sovereignty and in recognition of general practice among States, States Parties, with a view to cooperating on the best methods of protecting State vessels and aircraft, should inform the flag State Party to this Convention and, if applicable, other States with a verifiable link, especially a cultural, historical or archaeological link, with respect to the discovery of such identifiable State vessels and aircraft.

The art. 1(8) of the CPUCH defines States vessels and aircraft as:

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

276 R. Garabello “Negotiating History of the Convention” In R. Garabello and T. Scovazzi, eds. The Protection of the Underwater Cultural Heritage, 135. The above mentioned author describes several agreements between the coastal State and the flag State involving more than simple information or consultation, inspired in the spirit of cooperation promoted by the CPUCH.

Subject to the provisions of paragraph 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\textsuperscript{278}

Although this article recognizes the right of flag States to authorize any intervention on their State vessels and aircraft, at the same time it points out it has to be done with the collaboration of the Coordinating State that, firstly would be the coastal State. According to Dromgoole,

this may give an impression that the coastal state or other coordinating state could prevent the flag state from determining the fate of its own sunken state craft located in the EEZ or on the continental shelf and to that extent could be regarded as a further extension of coastal state rights regarding UCH beyond the terms of the LOSC\textsuperscript{279}.

On the other hand, the reference in a broad sense to the EEZ –including the Contiguous Zone-, could be interpreted as diminishing the rights, which the coastal States already enjoy in this area under article 303 paragraph 2 of the LOSC.

Finally, regarding the state vessels and aircraft regimen within the Area the CPUCH upholds the flag state position regarding consent\textsuperscript{280}.

To sum up, beyond the fact that initially coastal States are not obliged to report the discovery within territorial waters to the vessels and aircraft flag states, the principle of cooperation governing CPUH, applies to any kind of vessel included in the definition of UCH, regardless of where it is located. The reference within art. 7.4 to “shall” in the cooperation of the protection of the UCH -and mostly the lack of financial resources in developing countries-, involve necessarily the working together between States parties. The purpose of such works, shall be the object of specific agreements between coastal and flag States, taking into account the Rules within the Annex of CPUCH including “in situ” conservation as the first option. Should an agreement not be reached on the deposit of the property possibly recovered, the fact that within the territorial sea of a coastal state this state shall always have the right to authorize any activity directed to UCH should be taken into account.

\textsuperscript{278} CPUCH art. 10.7

\textsuperscript{279} S. Dromgoole, Underwater Cultural Heritage and International Law, 158.

\textsuperscript{280} CPUCH art. 12.7 provides: “No state Party shall undertake or authorize activities directed at State vessels and aircraft in the Area without the consent of the flag State”.

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Finally, I consider as premature to say that at present the practice and policy of the maritime powers on asserting their rights over state sunken vessels located within territorial sea of coastal States reflects effectively rules of international law. Indeed, as seen before, the position of the Group of 77 within the preparatory works of CPUCH and the final provision adopted—Art. 7.3—reflects the strength of the opposite position. Hence, more time will be necessary to confirm the international practice of the maritime States regarding this issue.

3.2.2.2 Other elements within CPUCH discussed in Uruguay: “the cultural heritage of humanity” and “the seizure regime”.

In Uruguay during the process of discussion of the ratification of CPUCH, some authorities expressed certain mistrust concerning the interpretation of some of its general concepts, in the sense that through them the States of origin might claim the restitution of UCH located within the coastal States jurisdiction. Fundamentally, the general doubts that arise are based on the interpretation given to “the cultural heritage of humanity” and “the seizure regime” provided in the aforementioned convention. In this sense, and with the purpose of collaborating with the process of discussion of the ratification of the CPUCH, the elements referred to are analysed in this paragraph based on the rules of interpretation of the treaties, in compliance with the provisions of VCLT.

The cultural heritage of humanity

According to the VCLT and as a general rule, “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”281.

The CPUCH does not contain an express definition of “cultural heritage of humanity”. Nevertheless, within its text, preamble and annex, there are several provisions that help us understand its meaning.

There appears a first reference to the interest of humanity in art. 2, para. 3, of the CPUCH: "States Parties shall preserve underwater cultural heritage for the benefit of humanity in conformity with the provisions of this Convention”. This provision is compatible regarding the current concept of heritage. The notion of heritage has evolved from being family property linked to material possessions to transform itself in a set of properties destined to be passed on

281 VCLT, art. 31.
in order to favor the process of identification of a group. At the same time, the concept of “appropriation” evolved from the physical possession to a concept of moral appropriation, to promote participation in cultural life. Such evolution changes the perception of heritage and the way in which to benefit from it.\footnote{Vecco M., Sguardi incrociati sul patrimonio culturale: Francia-Italia, 39.} In this sense, the CPUCH grants UCH a special importance “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”\footnote{CPUCH Preamble Para. 3 and 5.}. At the same time, the preamble of the above mentioned instrument contains certain provisions that refer to the public character of this heritage, on the access, appreciation, and recreational benefit of UCH “in situ” on the seabed\footnote{R. R. Manteca, El patrimonio cultural subacuático: un patrimonio para la humanidad. Algunas precisiones jurídicas” (IKUWA V diss., Cartagena, 2014), 13.}. In this sense, and in accordance with some authors, the concepts of cultural heritage of humanity and of benefit of the whole humanity present in the CPUCH refers to a human right of access and enjoyment of the cultural heritage\footnote{S. Dromgoole, Underwater Cultural Heritage and International Law, 127.}.

The CPUCH does not provide a specific institution to act in the name of humanity, that is why the international cooperation is the way chosen for the achievement of the aims of the convention.

According to Dromgoole, the universal approach of “common heritage” of UCH leads to the fact that in “fulfilling their duties under the Convention, states parties must act in the interests of humanity as a whole, not simply those of their own nationals”\footnote{Ibid.}. The aforementioned author adds that “Where ownership rights persist under the applicable national law, the framework of the Convention is such that the interest of ‘humanity’ will inevitably take precedence”\footnote{CPUCH art. 2.7.}. In what way? In my opinion, according to the use and purpose of UCH, this is the prohibition of the UCH commercial exploitation, and the “in situ” preservation as

\begin{itemize}
\item[282] Vecco M., Sguardi incrociati sul patrimonio culturale: Francia-Italia, 39.
\item[283] CPUCH Preamble
\item[284] CPUCH Preamble Para. 3 and 5.
\item[286] S. Dromgoole, Underwater Cultural Heritage and International Law, 127.
\item[287] Ibid.
\item[288] CPUCH art. 2.7.
\end{itemize}
the first option for its protection. In accordance with art. 2, para. 3, those principles for the protection must be applied in all the maritime zones where there is UCH.

Now then, could the interest of humanity be alleged by some State with a verifiable link to claim the restitution of UCH located within coastal State jurisdiction? According with some authors and in compliance with the context of the CPUCH we can infer that “soft” language has been chosen to refer to the States with a verifiable link in many provisions. E.g. a State with a verifiable link “has no right to be informed of the discovery of a warship (...) in the territorial sea or archipelagic waters of another State; simply it ‘should’ be informed of such discovery.” Certain doubts could arise regarding the question posed, in the context of seizure, which will be analyzed below.

The seizure regime
Some authors suggest the possibility that the regime of seizure provided in the CPUCH could allow the disposition of the property seized to the States with a verifiable link.

In accordance with art. 18.1 of CPUCH “Each State Party shall take measures providing for the seizure of underwater cultural heritage in its territory that has been recovered in a manner that is not in conformity with this Convention”. The concept of territory used in this paragraph, could include the contiguous zone since the hypothesis of seizure is assimilated to the activities of inspection provided in art 303 para. 2 of LOSC. Concerning the temporary criterion, the CPUCH does not mention the regime of retroactivity of its provisions, consequently, in compliance with the provisions of VCLT, the obligations related to the seizure States operate from the moment of the entry into force of the treaty for that State.

All the material seized should be registered, protected and stabilize by the Seizure State. In addition, the national relevant authority shall notify the Director General of

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289 CPUCH art. 2.5

290 S. Dromgoole, Underwater Cultural Heritage and International Law, 129

291 Ibid. 130 CPUCH art. 7.3 Comments.

292 S. Dromgoole, Underwater Cultural Heritage and International Law, 331.

293 VCLT art. 28

294 CPUCH art. 18.2
UNESCO on the UCH seizure in compliance with the provisions of the CPUCH, as well as any other State with a verifiable link, especially a cultural, historical or archaeological link.295

In accordance with Dromgoole296, paragraph four of art. 18 could lead to the possibility that the States with a verifiable link may claim the restitution of the UCH seizures to the coastal state. The abovementioned provision reads:

A State Party which has seized underwater cultural heritage shall ensure that its disposition be for the public benefit, taking into account the need for conservation and research; the need for reassembly of a dispersed collection; the need for public access, exhibition and education; and the interests of any State with a verifiable link, especially a cultural, historical or archaeological link, in respect of the underwater cultural heritage concerned.

Firstly, we should point out that it would be too onerous for the seizure State to implement the measures provided in this paragraph, even more for a developing country. That would lead the national relevant authority of the Seizure State to request the cooperation and assistance of the State with a verifiable link to implement those measures for the public benefit.

Secondly, the above mentioned paragraph provides no guidance regarding the rights of the seizure state or the state with a verifiable link in the seized material. According to Dromgoole “There is nothing in the Convention to suggest that is envisaged that seized material will necessary remain in the seizing state”297. The author believes that probably the seizure state will have little cultural connection with the cultural seizing. She also adds that the fundamental requirement according to art 18.4 is that the seized material be at the disposal of “public benefit”, bearing in mind certain factors, such as “the interests of any State with a verifiable link”. Considering the high cost that the implementation of the measures provided in the above mentioned article would imply, the author considers as probable that the seizure state welcomes the offer of the state with verifiable link to receive, care and ensure the disposition of seized material for the public benefit, especially if it is a State party.

On the other hand, the same author considers that in accordance with art 18.3 Seizure State is obliged to inform the state with a verifiable link of the existence of any seizure of UCH, that has been made under the CPUCH. Adding that:

295 CPUCH art. 18.3

296 S. Dromgoole, Underwater Cultural Heritage and International Law, 331.

297 Ibid, 332.
even here the right to be informed leads to nothing further than to having its interest taken into account when the seizing state determines the disposition of the UCH. The seizing state has the power to determine that disposition and the interest of any linked states are just one of the factors that must be taken into account when it does so.  

To sum up, and in answer to the question posed in this part, we have to consider that any rule of International Law limits in some way States activities and, in this sense affects national sovereignty. For instance, if Uruguay decides to ratify the CPUCH, the principles within it Annex shall apply, as the UCH "in situ" preservation, as well as the prohibition of its trading or irretrievable dispersal. These measures have the objective of preserving the underwater cultural heritage for the benefit of humanity. In this sense, I think that the CPUCH refers to “the cultural heritage of humanity” as a human right of access and enjoyment of a cultural heritage of exceptional importance for all the peoples of the world, regardless of the State it belongs to or where it is located. For this reason, the Convention promotes the cooperation among States to achieve the protection, enjoyment and knowledge of UCH in favor of all humanity. According to VCLT, this is the reasonable sense of assign the expression “underwater cultural heritage as an integral part of the cultural heritage of humanity”, since this is the one that arises from reading the entire text of the CPUCH. It is also worth bearing in mind, that this is not a new word that Uruguay is unaware of, since it is present in the WHC –which allowed Uruguay to include the historic district of “Colonia del Sacramento” in the list of World Heritage in 1995-. Any other interpretation intending to give a special sense to the expression “Heritage of the Humanity” – for instance one implying a intention of another State over its ownership - , entails for the one who alleges the burden of “proving convincingly that the term has been used in that special sense” this being the reason why I conclude there is no room for it in this context.  

The ratification of the CPUCH does not enable the restitution of the wreckage located under national jurisdiction to the State of origin. Regarding the possibility that art 18.4 allows the state with a verifiable link to claim the restitution of the material seized to the seizing state, we should distinguish two situations with different results. Where it has been illicitly exported,  

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298 Ibid, 130.  
299 VCLT art. 31.1.  
those States that have ratified the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property\textsuperscript{301}, shall restitute, upon the request of the State of origin Party to this Convention any cultural heritage stolen or illegally imported\textsuperscript{302}.

Where the seized material has been recovered contrary to the Convention, for instance, product of looting activities within internal waters, territorial sea or contiguous zone, a possible claim on the restitution by the state with a verifiable link, would be based on ownership rights, hence regulated by domestic legislation. In this sense, and regarding Uruguay, it is worth bearing in mind the provisions of art. 15 of the “sunken law”, concerning the abandonment in favor of the Uruguayan State of the vessels and their cargo sunk in national jurisdictional waters before 1973\textsuperscript{303}.

In any case, we should bear in mind that the main purpose of art. 18 is to ensure that the “disposition be for the public benefit”. In this sense, “sites are discovered and protected, or looted and destroyed, at the local level and in the context of surrounding communities’ attitudes toward their past”\textsuperscript{304}. Thus, people responsible for the protection and management of UCH have the chance and responsibility to make the local inhabitants and other communities aware on the importance of the UCH around them.


\textsuperscript{302} CMPPIETOCP, art. 7 b) ii). See also T. Scovazzi, La restituzione dei beni culturali rimossi con particolare riguardo alla pratica italiana (Milano: Giuffrè Editore, 2014), 103.

\textsuperscript{303} See part two, chapter 2, section B, paragraph 1.

\textsuperscript{304} UNESCO, Manual for Activities directed at Underwater Cultural Heritage, p. 309.
4 Conclusion

The moment has come to expose the main conclusions of the case, based on the targets posed in the introductory chapter. In this sense, I shall start by assigning the first few pages to underline the successful practices regarding UCH legal protection and management tools, present in the Spanish and Italian legislation, including public private partnership experiences. Secondly, regarding the specific aim of part two, I shall answer the questions posed in the second part of my thesis, this is, could the CPUCH affect the Uruguayan sovereignty, by enabling in some way the restitution of the wreckage located under national jurisdiction to the country of origin? Thirdly, I will draw some conclusions on what is the best way for Uruguay to enhance the legal and management framework for the protection of UCH situated in its jurisdictional waters. Finally, I will comment how my work might be developed further.

Regarding the UCH legal protection and management tools, I would like to underline the effectiveness of the “Archaeological Areas”, and mainly the “Area of Archaeological Easement” within the different Spanish instruments. The practice of autonomous communities, has proved such categories efficient as tools for the protection of UCH mainly facing the possible impact of the development projects.

The category of “archaeological areas” is applied to the archaeological sites effectively discovered. The main advantage of this system is that the legal protection of such property comes into effect as from the moment when the administrative process is started. Consequently, any action taken in the archaeological area or surroundings must be previously authorized mandatorily by the competent authority.

For its part, the category of “Area of Archaeological Easement”, allows the protection of UCH located in areas where the existence of archaeological wreckage of interest is presumed -though not certain-, and it is necessary to take steps to adopt precautionary measures. The founded presumption can derive from the study of documentary and oral sources.

One of the virtues of those tools, was to entitle the relevant authority with the power to demand precautionary measures of protection of the UCH to the developers of the works. At present, there is an effective control of maritime archaeological impact on the projects of works. The developers have to put aside an item in their budgets with funds assigned to archaeological monitoring. Furthermore, they may have to face the suspension of the works for a maximum period of two months not being liable to compensation, plus the expenses related to the excavation before a possible find of UCH. Thus, by means of the works of preventive
archaeology, the national relevant authority receives the necessary funds for the development of its investigations.

Apart from preventive archaeology works, I could detect other tools used in Spain and Italy for the promotion of UCH management. Even though most of them come from public funds, in the last few years Italy has committed to the encouragement of private participation as an additional measure to the public management of UCH. Regarding the public promotion tools, in addition to preventive archaeologic works, another public measure for the promotion of the cultural heritage is the so called one per cent (1%)\textsuperscript{305}. This means that one per cent of the budget assigned to each public work done by the State is assigned to certain actions for the conservation and protection of heritage.

A promotion on private participation is observed in the system of fiscal incentives to the cultural sponsorship. Spanish and Italian experiences show that for a patronage cultural regime to be attractive for the private sector, it should at least provide 50% to deduce of the monetary donations done in favor of some private nonprofit entities, the State, or universities, among other agencies. In this sense, the recent measures included in the Italian Law “Art Bonux” -described in Chapter 2, Section A, Paragraph 1 of Part one- could be effective tools for the promotion of the protection and sensitization of the cultural heritage in a broad sense. Further study of the results of this new instrument will help to define its efficiency.

Regarding public private partnership experiences, the Superintendence of the Sea in Sicily and the Archaeological Superintendence of Napoli have managed to gather a successful network with local diving clubs and non-governmental organizations since 2005. All these cases, constitute original ways to implement the collaboration between the public and private sector for the control and sensitization of UCH. At the same time, those experiences intend to promote the public access to in situ UCH, in accordance with the CPUCH. In spite of the fact that those experiences involve delegating certain activities of the State to the private sector, in these social PPP, private actors (mainly non-profit organizations) normally obtain support from the government through contributions in cash, in kind, or tax exemption. Thus intending to encourage a socio-economic development compatible with the historic-naturalistic and landscape of the area, and at the same time privilege the local activity present in the area. Local actors know the needs and the opportunities of the area better than anyone else, this situation favouring the implementation of effective rules in the management and protection of AMP, as

\textsuperscript{305} LSHH art. 78
well as the cooperation among the different institutions involved. The transparency of the
process of selection of the private agent in charge of the management of AMP is one of the
main requirements in this field. In this sense, a clear publication by the relevant authority on
the criterion of selection of the candidates as well as of the final results and their foundations
becomes necessary. The relevant authority must study the curriculum vitae of each candidate,
as well as the purpose of the project proposed. A way of capitalizing a satisfactory management
by the private agent, is the possibility to renew the contract, in the event that the
Superintendence produces a satisfactory assessment. Finally, the national relevant authority
must take into account which underwater sites will be promoted. In this sense, the regular sites
must be have a preference before the exceptional ones. Another aspect to be taken into account,
is the existing capacity to control over such site, that is to say, efforts would be made not to
promote a site that is far from the coast where the presence of a civil guard is more difficult,
installing video cameras, etc. In summary, the PPP experiences developed by the
Superintendence of the Sea in Sicily and the Archaeological Superintendence di Napoli, allows
to close the development of cultural tourism, economic advantage, local culture development
and heritage advantage. At the same time, such experiences prove it is possible to conduct the
archaeological empathy in a way that is compatible with the conservation of UCH, thus
ensuring its enjoyment by the public, and at the same time, its preservation for future
generations.

Regarding the interagency coordination mechanisms analyzed in this research, I come
to the following conclusions. The first one, is the complexity of the coordination of activities
among the different institutions that have a competence on UCH. The actors involved should
understand that the plan for the management of the protection of UCH does not imply
modifying their competences; on the contrary, it is about joining forces to achieve that aim.
Secondly, it is important to agree on a system of coordination from the beginning, to make it
clear which organization is going to carry out the process, as well as an agenda of meetings.
Nevertheless, above all it is necessary that the actors feel included and informed throughout
the process, and for that the existence of periodical multilateral meetings to evaluate the
execution of the plan and valuate the contribution of all its parts, is pertinent.

I shall now present the main conclusions regarding the question posed in the second
part of this investigation, this is, could the CPUCH affect the Uruguayan sovereignty, by
enabling in some way the restituti

Firstly, and in compliance with the rules of interpretation of treaties provided in VCLT,
I can conclude that the CPUCH respects the sovereignty of the coastal States provided in LOSC
in all maritime zones. Regarding their internal waters and territorial sea, the aforementioned convention does not contain any provision imposing the obligation on coastal States to accept the action of States third parties. Regarding the regime granted for the contiguous zone, only a literal interpretation of art 8 of CPUCH could finally lead to the conclusion that there exists a decrease in the rights which the coastal States already enjoys in this area under article 303 (2) of the LOSC, this is the right to prevent and punish the removal of UCH from the sea-bed of this zone. The reference to the cooperative system created for the EEZ and the continental shelf, could be interpreted in the sense that the coastal state must necessarily consult other interested states before acting in compliance with article 8 of the CPUCH. On the contrary, taking into account the State practise concerning the protection of UCH in the contiguous zone, there is a general trend among States to expand their rights to the general protection of this heritage up to 24 nm. This would allow to conclude that Coastal States within their contiguous zone have a priority –over other States- to regulate and authorize the activities directed at underwater cultural heritage, requiring the applying of the Rules within the Annex of the CPUCH. For its part, the system of international cooperation provided in CPUCH for the protection of UCH in EEZ, Continental Shelf, and the Area, is compatible with the notion of international sovereignty since the decision-taking is done in coordination by the interested State Parties through a State Coordinator, which shall act for the benefit of humanity as a whole, on behalf of all States Parties, and not in its own interest.

The purpose of CPUCH is the protection and preservation of UCH for the benefit of humanity. This is clearly deduced from the integral reading of the instrument referred to.

Moreover, in accordance with the preparatory works of the CPUCH we can clearly infer that the only way to fulfil the adoption of it, was making no references to ownership at all. The exclusion within the aforementioned convention of the regime of law of salvage and law of finds, sovereign immunities, or any State’s rights with respect to its State vessels and aircraft, as well as the reference to “the benefit of humanity” confirm such postulate. There does not exist a contradiction between the interests of the coastal state and the interests of humanity on the protection of UCH. By preserving the UCH located in coastal states, human right of access and enjoyment of a cultural heritage of importance for all the peoples of the world is ensured. Consequently, in the absence of any guidance from the CPUCH, the pragmatic way adopted was leaving ownership as a matter to be determined by the domestic law and national courts.

Regarding the regime of seizure and disposition of underwater cultural heritage provided by art. 18, paragraph 4, I think that the seizing state has the power to determine that the disposition of the UCH be for the public benefit, and taking into account several factors,
among them, the interests of any State with a verifiable link. This conclusion complies with the ordinary meaning of the term “shall ensure” provided in the aforementioned paragraph. Wherever the seized material has been recovered contrary to the Convention, for instance, product of looting activities within internal waters, territorial sea or contiguous zone, a possible claim on the restitution by the state with a verifiable link, would be based on ownership rights, hence regulated by domestic legislation. In this sense, and regarding Uruguay, it is worth bearing in mind the provisions of art. 15 of the “sunken law”, and the recent sentence of the Uruguayan Supreme Court of Justice, recognizing to the Uruguayan State the ownership of the foreign vessels and their cargo sunk in national jurisdictional waters before 1973.

Summing up, in accordance with the rules of interpretation provided by the VCLT, I can conclude that the CPUCH does not affect the Uruguayan sovereignty, by enabling in some way the restitution of the wreckage located under national jurisdiction to the country of origin. Indeed, the conformity of CPUCH respects the sovereignty of the Coastal States provided in LOSC in all maritime zones, the reference to “the benefit of humanity”, the exclusion of the regime of law of salvage and law of finds, as well as the sovereign immunities, and the power of seizure States to determine that the disposition of the UCH be for the public benefit are some of the main factors that confirm the present postulate.

So, how can Uruguay’s legal and management framework for the protection of UCH be improved?

Throughout the present investigation, I have been able to identify some tools and instruments that prima facie could be applied in Uruguay, both immediately and in a medium term.

In the short term, it is possible to resort to national instruments of environmental protection that include UCH. The National System of Protected Areas includes the protected area called "Cabo Polonio" located within the territorial sea of the department of Rocha in the coast of the Atlantic Ocean. This protected area includes historical shipwrecks, nevertheless, at present there does not exist a plan for the valuation in situ of UCH with adequate technical methodological foundations. In this sense, I consider as viable the implementation of collaboration projects between the public and private sector for the control and sensitization of UCH, such as those developed in “Gaiola” and “Baia” underwater parks in Naples. At present, the area is managed by the National Commission for the cooperation of the development of the protected area “Cabo Polonio” created on 27th August 2007, formed by the environmental agency, Ministry of Livestock, Agriculture and Fisheries, Ministry of Tourism, among other agencies. Thus, the National Heritage Commission could take part in the aforementioned
system as a competent actor in the conservation of UCH, contributing with ideas connected to the formulation of the plan for the management of the area connected the protection and promotion of the public access to in situ UCH. Undoubtedly, the experiences obtained in the different mechanisms of inter-agency coordination in Spain and Italy seen before, will prove of great help for the good relations among the different actors taking part in the plan for the Management of “Cabo Polonio” protected area. The favorable results obtained in the “Gaiola” and “Baia” underwater parks, allow us to confirm that education is the best tool to achieve protection and sensitization of UCH. However, at the same time it is necessary to establish a series of regulations and prohibitions with economic and penal sanctions in order to impede the plundering of UCH. Their being effective will depend on the in situ control carried out by the competent authorities. Given the scarce staff assigned to such areas, I think that most of the energy should be focused on the efforts for the promotion started in 1995 by the Uruguayan National Heritage Commission, trying to install a new form of understanding UCH, based on public exhibitions, conferences, training courses, and instances of national and international cooperation with different competent organizations.

Another short term measure, could be reinforcing the inter-institutional cooperation and coordination especially with the Uruguayan Coast Guard, for the elaboration of archaeological charts. In this sense, the register of underwater archaeological sites developed in Italy in 2004 called “Archeomar Project”, could be a good example to follow. In addition, through international bilateral or multilateral agreements, common coordinated investigations could be carried out, particularly in bordering zones.

The ratification of CPUCH is the main target to improve the protection and management of UCH in Uruguay on a medium term. Firstly, it would impede the commercial exploitation of underwater cultural heritage for trading or its irretrievable dispersal. Secondly, it would allow the correction of the negative effects of the regime of LOSC, by means of the elimination of the effects of the law of salvage and finds for the heritage found on the continental shelf and the promotion of regional cooperation. Thirdly, it would allow Uruguay to join an international cooperation mechanism to the protection of sites located in maritime zones where at present there is a lack of protective powers – this is beyond contiguous zone -. Fourth, it would allow the adoption of basic principles for the protection of UCH as the in situ preservation as the first option. In this sense, public access to in situ underwater cultural heritage shall be promoted, and for that, the experiences of the Maritime Protected Areas “Gaiola” and "Baia" Underwater Parks, will be a good example to follow as well as the experiences developed by the Superintendence of the Sea of Sicily with the local network with diving clubs. Moreover, the
ratification of CPUCH would allow Uruguay to count on the inter-institutional, technical and knowledge support among the states parties, as well as the technical and scientific assistance provided by the Scientific and Technical Advisory Body. In this sense, it is worth highlighting the assistance given to the government of Haiti by the aforementioned board regarding the “Santa María” advice, carried out this year (2014). Finally, the ratification of the CPUCH would allow to raise the practical regulations for the investigation of UCH present in its Annex to the rank of legal source. At present this Rules are mandatory by the national relevant authority based on regulatory decree 306/06.

Additionally to the adoption of CPUCH by Uruguay, it would be necessary to update the legislation regarding cultural heritage. In order to do so, it would be advisable to create a law with tools that include the protection of UCH such as the abovementioned “Archaeological Areas”, and “Area of Archaeological Easement” regulated by the Historical Heritage Law of Andalusia. The application of the former would be after the creation of the maritime archaeological chart, or on the underwater archaeological sites identified at present. For its part, the “Area of Archaeological Easement” could perfectly be applied to those maritime areas where fundamentally there is a presumption of the existence of UCH, based on the existing documentary and oral sources.

As a way of strengthening the national relevant authority regarding the control in situ of the environmental impact assessments, the new law could provide a mechanism similar to the one established in CCPL of Italy, regarding activities of preventive archaeology of public works. In this sense, we could establish that the expenses of the archaeological works shall be in charge of the public body that orders the works. Thus, the national relevant authority could count on the funds to monitor and control in situ the studies of impact, as well as the development of investigations.

The measures to strengthen the present legal framework and the management of UCH, will involve a logical increase in the financing and workload of the national competent authority. However, those are expected to be limited if Uruguay takes advantage of the present control of illegal activities or development projects. For instance, in accordance with art. 76 of LOSC, Uruguay submitted to the Commission on the Limits of the Continental Shelf the relevant information to obtain the extension of its continental shelf. Should the final recommendation be favorable to the Uruguayan petition, the national coast guard will have to invest in the purchase of new vessels for the control of the new maritime area. Thus, a mechanism of cooperation for the creation of an archaeological chart and control of possible
UCH located in the new maritime zone, akin to the one developed in Italy between the Ministry of Cultural Heritage and the police forces could be developed.

Regarding future works, I consider that it could be useful to continue with the analysis of the States practices in the UCH legal protection and management mainly in developing countries. Moreover, it would be necessary to continue analyzing States practices regarding sunken vessels states and the principle of sovereign immunity to confirm the existence of a crystallized customary international law in this matter.

I also recommend an in depth study of the best practice on public private partnership experiences to the promotion of the public access to in situ UCH developed in other States, especially in those characterized by a greater openness to the private sector. Finally, the lack of State Practice on the implementation of the CPUCH limited in some way the results of my investigation, mainly concerning the mechanism of reporting of UCH within the different maritime zones. Perhaps this issue, more precisely, deserves further revision in meetings of the States Parties of the CPUCH. I assume that time passing by and the practice of the states will help solving misunderstandings on the application of CPUCH general concepts, such as “States with a verifiable link”, and the preservation of UCH “for the benefit of humanity”.

Finally, I would like to highlight the fact that none of the tools suggested in the present work could be implemented as long as there is no politic willingness which is needed to start the transformation. The most important change, is about understanding that the model of management based on the sale of UCH between government and salvor companies, is totally incompatible with the principles ruling Maritime Archaeology and public interest. In that sense, the Uruguayan experience has been useful to show the world that the model of commercial management and exploitation through the sale of this heritage has failed in every sense. This is fundamentally due to the fact that the interests of treasure hunters do not represent the interests of the Uruguayan society nor those of humanity, but their own only based on the intention of personal profit.

An effective implementation of the CPUCH by the State Parties, will help solving misunderstanding on the application of its general concepts, as “States with a verifiable link”, and the preservation of UCH “for the benefit of humanity”. It is my hope that the present work has collaborated in such sense.
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