

A non-member State's practice on the incorporation of the UCH Convention: Taiwan's experience

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Abstract

The United Nations Organization for Education, Science and Culture (UNESCO) adopted the Convention on the Protection of the Underwater Cultural Heritage in 2001 which entered into force in 2009. In order to preserve, protect and manage underwater cultural heritage, State Parties should preserve underwater cultural heritage and take actions accordingly. The R.O.C. has followed the developments afore mentioned since 1999, and a specific legislation "Underwater Cultural Heritage Preservation Act" was enacted and entered into force in 2015 while facing various challenges along the way, even the R.O.C. is not a member of the UNESCO nor a Party to the Convention. The emergence, evolution, and practice in terms of the incorporation of the Convention into domestic legislation warrants the necessity of in-depth studies and further theorization since such experience relates to the success or failure of policies with respect to the incorporation of international conventions into domestic legislation. This paper provides an analytical assessment on the approaches that the R.O.C. incorporated the Convention through applying or modifying relevant theories regarding the incorporation of international conventions into domestic laws, and suggestions on confronting similar challenges.

Key words: UNESCO, Convention on the Protection of the Underwater Cultural Heritage, incorporation into domestic legislation

I. Forward

The adoption and ratification of the UNESCO Convention on the Protection of the Underwater Cultural Heritage (hereinafter referred to as the UCH Convention) have had an impact on the international community, including Taiwan. Taiwan is not a UNESCO Member State nor a party to the UCH Convention and has no international law duty to sign, approve or

comply with the UCH Convention. In response to this change, under the commission of the Ministry of Culture (hereinafter referred to as the MOC and its predecessor Cultural Affairs Council, hereinafter referred to as the CAC) and supervision of scholars, the author has participated in this academic research and bill drafting, namely the permanent “Underwater Cultural Heritage Preservation Act” (hereinafter referred to as the UCHPA), the “Rules for the Implementation of the Underwater Cultural Heritage Preservation Act,” the “Guidelines for Underwater Archaeological Work,” and the “Rules for the Management of Activities directed at Underwater Cultural Heritage.” The adoption and implementation of the UCHPA not only demonstrates Taiwan’s political will in participating this international affair, but it also affects the agency authority, legal regimes, and marine affairs management domestically.

The experiences mentioned above may cast new light on Taiwan’s incorporation of other international instruments in the future, even more for other smaller countries like Taiwan with respect to UCH issues. The author exams Taiwan’s relevant laws regarding UCH, and takes an overlook on the incorporation of the UCH Convention, particularly related bill-drafting processes. Finally, some preliminary observations are illustrated.

II. Taiwan’s incorporation process

According to surveys conducted by the Academia Sinica group headed by Academician Chent-Hwa Tsang, at least fifteen shipwrecks have been confirmed surrounding the waters of Taiwan, and part of them have been listed on the national register.¹ Besides, some UCH were discovered in inland waters. These UCH continue to face a threat from man and nature, and such danger should be reflected in national policies and legislations for their preservation, protection, and management.

The Cultural Heritage Preservation Act (hereinafter referred to as the CHPA) is the core of Taiwan's legal protection of cultural heritage. However, the CHPA is dominated by inland concept, with extremely limited sea or underwater notion or almost non-existent. In the 2002 amendment of the CHPA, it was stipulated that "*res nullius* antiquities" and "*res nullius* ancient monuments" in submerged water are state-owned, and finders would be rewarded accordingly. These provisions were deleted in the 2005 amendment, leaving only that international investigations and excavations of sites within the territorial sea of the R.O.C. are regulated and authorized. This removal led to an insufficient linkage between the CHPA and the preservation, protection, and management of UCH. Nor can it be the foundation for the MOC as the competent authority in charge of UCH. Legally speaking, the CHPA can no longer be the basis for the preservation, protection, and management of UCH, nor it be part of the so called "relevant laws and regulations" in the "Law on the Territorial Sea and the Contiguous Zone of the Republic of China (hereinafter referred to as the LTS)."

Other laws directly regarding UCH are unavailable to be applied as a groundwork for the preservation, protection, and management of UCH. Article 16 of the LTS states:

'The historical relics or monuments found in the archaeological, scientific research, or any other activities in the territorial sea and the contiguous zone of the Republic of China shall be owned by the Republic of China and shall be disposed of by the relevant laws of the Republic of China.'

The provision was delivered by the Legislative Yuan (namely the Congress) in the bill review process, not the Executive Yuan (namely the Cabinet). The Congress raised the article based on articles 33 and 303 of the United Nations Convention on the Law of the Sea² focusing on State ownership or disposition, without taking into account the shortcomings of

the Convention at the time of its adoption of the two articles, and the international law in which the international community was engaged in the UCH issues. The LTS could not be the appropriate legal foundation for the preservation, protection, and management of the UCH.

Given the general needs of Taiwan to promote her national marine policy, a scholar advocated the position and function of the UCH legal regime from the policy and maritime legislation perspective and drafted a UCH bill. The initiative is the initial driving force for Taiwan's incorporation of the UCH Convention. In 1997, under the commission of the Ministry of the Interior, scholars submitted a report themed as "Strategic Arrangements Regarding Maritime Legislations." They proposed that maritime legislations should be carried out to push forward the national marine policy, including an "Underwater Cultural Heritage Act" (Hu, 1997). Afterward, in 1998, scholars drafted the first "Bill of the Protection of the Underwater Cultural Heritage, Republic of China" for the CAC (Hu, 1999). However, the draft bill was not submitted to the Congress. The reasons behind deserve a detailed discussion.

In 1997, the CAC invited scholars and relevant agencies to review the provisions of the CHPA. The academic representatives supported the regulation of UCH in the CHPA and had only different opinions on its practices, such as abstract or a particular chapter. The scholar who drafted the LTS called for a particular legislation regarding UCH. Officials are conservative on the issue. The CAC delegation expressed his doubt about the necessity of developing a particular bill regarding UCH. The delegation from the Ministry of Education stated that it was immature to deal with the theme. The Ministry of the Interior said that at the present stage, due to coordination difficulties, unless the MOC is established in the future and exercises authority over ancient antiquities as well as

monuments, the government should act in accordance with the CHPA. They reached the final resolutions as follows:³

Before the MOC is established, the primary task of the CAC falls mainly on cross-agency coordination and consultation. In principle, the CAC respects the authority of the Ministry of Education and the Ministry of the Interior. Some of the relevant standards regarding the protection of UCH provided in this meeting are incorporated from the UCH Convention, and others are from draft bills. However, whether it is mature to incorporate these norms into our local law should be reconsidered. These international norms must be quite mature enough to be incorporated. It is significant to protect UCH, and the government should pay more attention and collect information. Most of the relevant problems regarding UCH could be solved according to article 16 of the current LTS. When it comes to amending the CHPA, some issues need to be reconsidered: how to rule UCH in the CHPA? Is there an immediate need? How about the maturity of the international norm (draft)? Even if we take the terms of the license clauses, the scope of the mandate will also involve the issue of legal retention, and the concept of *res nullius* seems to have not yet reached a consensus domestically.

The case is proposed to maintain the status quo, and relevant agencies shall collect more information on this topic and have in-depth analysis, as soon as the overall structure and concept are mature, the amendment of the CHPA or a particular legislation is available.

The CAC has commissioned the National Sun Yat-sen University (The Center for Marine Policy Studies) in June 1999 to complete a research program and put forward a particular bill for legislation⁴. The report has been delivered to the relevant agencies for reference. Before the establishment of the MOC, the Ministry of Education command the

preservation as well as maintenance of archaeological relics, and the CAC should fully collaborate with the Ministry of Education.

In fact, it is difficult to solve most of the related problems mentioned above by the LTS. The government exercises jurisdiction over UCH in the territorial sea and contiguous zone of R.O.C. only, and the maritime jurisdiction is less than that by the CHPA. The comprehensive application of the laws results in a lack of jurisdiction over UCH in the contiguous zone and beyond. Furthermore, the LTS only stipulates ownership over UCH with other aspects of UCH preservation, protection, and management blank, especially international cooperation. Legal vacuum undoubtedly impedes the protection of UCH.

Since 2006, the CAC commissioned various research programs regarding UCH issues (Hu, 2006). In 2008, the scholars resubmitted an “Underwater Cultural Heritage Preservation, Protection and Management Act (Draft)” to the CAC, that is, the predecessor of the UCHPA (Hu, 2008). In 2012 the MOC commissioned scholars to submit the “Guidelines for Underwater Archaeological Work (draft)” which was then incorporated into the permanent “Rules for the Management of Activities directed at Underwater Cultural Heritage” (Hu, 2012).

In addition to the efforts of the MOC, scholars have continued to promote relevant work in different areas and levels, such as the introduction of the UCH Convention (Hu and Wu, 2009), the organization of international conferences and visits, initiatives carrying out in the Council of Marine Affairs Advancement, Executive Yuan. The UCHPA was passed in 2015 by the Congress with several revisions. In response to the changes and a significant number of statutory authorization requirements, the MOC once again commissioned scholars a research program to draft nine regulations or rules accordingly (Hu, 2016). The drafts were completed in 2017, and

the MOC initialed them all in the same year. From the academic initiative to the full completion of the UCH legal regime, twenty years have elapsed.

III. Taiwan's practice of incorporation of the UCH Convention

The incorporation process and the success acquired have shown some considerable signs, worthy continuing to carry out legislative policy research in the future.

First, from the legislative policy perspective, through the development of the UCHPA and its reference to other existing laws and regulations, a complete UCH legal regime was established. UCH issues involve authorities, duties, and functions of almost all agencies of the Cabinet. To effectively adapt to the inter-disciplinary and inter-agencies nature, the government incorporated the UCH Convention into the UCHPA and incorporated the contents of the Annex Rules of the UCH Convention into the subordinate ordinance authorized by the UCHPA with Taiwan's national conditions thoroughly considered. The UCHPA apply to all UCH issues with priority. Any rules or norms in contradiction with the spirit of the UCHPA shall be amended in due course gradually in the future.

Second, national interests are the primary considerations of Taiwan's incorporation of the UCH Convention. According to the official statements, the CAC formed its perception regarding the preservation, protection, and management of UCH based on international and domestic factors. The former is the worldwide value on the preservation and protection regarding UCH. The latter is Taiwan's promotion and implementation of her national marine policy. The significant principles and spirits of the UCH Convention were not timely implemented in the domestic legal regime. The current law could not be fully applied to the preservation, protection, and management of UCH. The lack of norms regarding UCH resulted in the lack of jurisdiction over the conservation of UCH. Meanwhile, nation-wide precise rules regarding UCH are absent for interest groups or

stakeholders, especially the fishing and diving communities. Thus, private salvage and incidental damage are unavoidable. The lack of specific awarding incentives over UCH discoveries led to investigation difficulties.

Positively, the government assessed that although the annual required administrative costs would up to about NT\$ 20 to 50 million after the adoption of the draft (UCHPA), Taiwan would be benefited from an output value conservatively estimated NT\$ 120 billion each year. And it would bring other non-economic benefits or values, such as that UCH is fully protected and managed. The authority would learn more about the preservation, protection, and management of UCH. Public access would enrich social education as well. Since 2006, the CAC has been planning to promote a series of medium and long-term projects regarding UCH, including general survey, regulations research and billing, historical research, preservation of excavated UCH, personnel training, educational promotion and international cooperation. The CAC envisaged in cultivating underwater archaeology with Taiwan characteristics and developing Taiwan's marine culture in line with the "Prosperity with the Ocean" policy.

Third, native scholars played a significant role in the legislative process. The incorporation was initiated by a small number of academics out of national interests, rule-legitimacy, and other factors. They followed and introduced the international development of the UCH issue domestically. By the cooperation with the government, internal administrative self-interpretation of the UCH Convention and awareness were raised. The academic community actively called on the Congress to pay close attention to the issue and put forward the draft respectively. Eventually, the bill was soon adopted than expected. It is no doubt that domestic

driving force, especially elites from the academic community, influenced more than international or external pressure.

Fourth, the incorporation of the UCH Convention is still in progress. There are still many opportunities and challenges ahead, especially capacity building. The preservation, protection, and management of UCH in Taiwan involve the management of activities directed and incidentally directed at UCH, as well as law of salvage and law of finds, territorial sovereignty, and maritime jurisdiction disputes. These controversies comprehend cultural (heritage), maritime law, admiralty law and other different legal areas. The author's drafting experiences over the past years indicate that the preservation, protection, and management of UCH at least comprehend half of the agencies of the Cabinet. Meanwhile, the adoption of the UCHPA has impacted these organizations, especially their authority, duties, and functions individually. The process of drafting the UCHPA also showed strong cross-agency coordination and cooperation nature. The interdisciplinary feature has made the issue more dependent on higher and direct political support from the Cabinet itself. Before the Cabinet are empowered directly to coordinate the issue by the UCHPA, the MOC and even the future Marine Affairs Council (or the Ministry of Marine Affairs) will be responsible for cross-agency cooperation and coordination.

Apart from this, drafting the particular bill regarding UCH is one of the priorities of the incorporation of the UCH Convention. Much of the work in the broad sense has yet to be pursued and at the same time constitute opportunities as well as challenges for Taiwan. International factors played a limited role in Taiwan's incorporation of the UCH Convention. However, we shall never under estimate their influence. There is a great room for Taiwan to utilize international forces aggressively. For example, international collaboration on site excavation, information exchange,

cultural diplomacy or UCH diplomacy are encouraged in accordance with the UCHPA. Disputes over maritime and UCH jurisdiction arose from the UNCLOS and the UCH Convention, coupled with the East China Sea and the South China Sea disputes as well as the potential jurisdiction overlapping over sunken military aircrafts all involve Taiwan's major national interests. It even more provides the government with a window of opportunity to deal with the cross-Strait relations and relevant collaborations with Mainland China. To deal with the issue appropriately, the MOC would need to cooperate actively with the Ministry of Foreign Affairs, the Ministry of Defense, the Mainland Affairs Council, and other agencies.

There is a significant room for future development regarding UCH related foreign affairs. When the Congress passed the UCHPA, a resolution was accompanied by a Congress request for a written report regarding the official strategy in response to the national security need to the Education and Culture Commission of the Congress by the MOC with conciliation with the Ministry of Foreign Affairs, the Ministry of Defense and the Mainland Affairs Council. In the report replied, the MOC defined the scope of UCH related national security issue as "international information and communication security, international criminal cooperation, international information flow, international research cooperation and international exchange cooperation." The definition reflects part of the permanent and future needs of Taiwan, showing that the government may need to offer some fresh insights into the issue to meet the national interests.

The affected interest groups or stakeholders, like fishing and diving communities, had insufficient awareness of the principles of the UCHPA and relevant regulations in the legislative process. Whether the government attains their full support remains uncertain in the future. Public awareness regarding UCH affairs remains in the spirit of

mysterious treasure hunting or legendary commercial exploitation. If the spirit of the preservation, protection, and management of UCH is to be effectively implemented, in-depth public awareness and public access will be indispensable. As a part of marine affairs, the preservation, protection, and management of UCH has a close relationship with other marine affairs and involves duties of different agencies. The implementation of the UCHPA and relevant regulations have a significant impact on those agencies, along with the relatively minor feature of the issue in Taiwan, political will would be essential. As to the judicial implementation of the UCHPA, expertise regarding cross-border cultural heritage crime investigation, return, and restitution needs to be cultivated.

Table 1: Some features of Taiwan's incorporation of the UCH Convention.

Level	Opportunity	Challenge
The public	minority nature	1. inadequate public awareness and public access 2. minority nature
The academic community	1. academic enthusiasm and expertise 2. lobbying and voicing in different occasion	position integration difficulties among scholars from different fields
The Cabinet	1. major resources 2. political will and power on inter-agency coordination and cooperation	capacity building (budget, personnel, expertise)
The Congress	understanding and support from particular political elites with academic backgrounds	inadequate understanding and support from most political elites
The judicial system	1. potential to deal with the issue 2. rule of law	capacity building (expertise, international collaboration)

IV. Conclusion

The experience and observation over the past twenty years indicated that long-term internal academic concern and government efforts devoted regarding UCH legislation for national interests eventually acquired fruitful success. With coordination and cooperation among different agencies, especially the Cabinet itself and the Congress, Taiwan finished her initial legal construction regarding the preservation, protection, and management of UCH comparable to international standards.

In the future, Taiwan has a long way to go on this issue, whether she is a member of the United Nations and UNESCO or not. As an indispensable part of the world marine culture and human history, in addition to strengthening capacity building, Taiwan needs to devote more on UCH related foreign affairs, so that can properly preserve, protect, and manage this common heritage of mankind, and ultimately achieve the universal goal of world peace.

Endnotes

¹The Bureau of Cultural Heritage, Ministry of Culture, "Time Capsule on the Seabed: Taiwan's Underwater Cultural Heritage," https://zh-tw.facebook.com/permalink.php?story_fbid=800518620050069&id=440130549422213, June 10, 2016 (accessed June 15, 2016).

²Article 33 of the UNLCLOS states:

1. In a zone contiguous to its territorial sea, described as the contiguous zone, the coastal State may exercise the control necessary to: (a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea; (b) punish infringement of the above laws and regulations committed within its territory or territorial sea.

2. The contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured.

Article 303 of the UNLCLOS states:

1. States have the duty to protect objects of an archaeological and historical nature found at sea and shall cooperate for this purpose.

2. 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.

3. 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.

4. 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.

³The 9th meeting record on the re-amendment regarding the amendment of the CHPA was issued by the CAC on Oct. 15, 1998, by a letter referenced as Wen-Jian-E-Tzu(文建壹字) No. 06770. It is on file with the author.

⁴Nien-Tsu Alfred Hu, 1999. Report on the Preliminary Study on the Domestic Legislation Regarding UCH, commissioned by the Cultural Affairs Council. In the report delivered to the CAC, scholars drafted the first "Bill of the Protection of the Underwater Cultural Heritage, Republic of China.

References

Nien-Tsu Alfred Hu, 2016. *Report on the Research on the Legal Regime with Respect to UCHPA*, commissioned by the Ministry of Culture.

Nien-Tsu Alfred Hu, 2012. *Report on the Research on the Guidelines for Underwater Archaeological Work*, commissioned by the Cultural Affairs Council.

Nien-Tsu Alfred Hu, Pei-Fu Wu, 2009. The 2001 UNESCO UCH Convention and the Practices of Its Contracting Parties in Terms of the Incorporation of the Convention into Domestic Legislations. In Wen-Yan Chiau (Eds.), *The Ocean and Taiwan Conference*, Taiwan Research Foundation, Taipei: 192-230.

Nien-Tsu Alfred Hu, 2008. *Report on the Bill-drafting Regarding UCH*, commissioned by the Cultural Affairs Council.

Nien-Tsu Alfred Hu, 2006. *Report on the Research on the Utilization of UCH and the Arrangement of International Conferences*, commissioned by the Cultural Affairs Council.

Nien-Tsu Alfred Hu, 1999. *Report on the Preliminary Study on the Domestic Legislation Regarding UCH*, commissioned by the Cultural Affairs Council.

Nien-Tsu Alfred Hu, 1997. *Report on the Strategic Arrangements Regarding Maritime Legislations*, commissioned by the Ministry of the Interior.

The Cultural Affairs Council, 1998. The 9th Meeting on the Re-amendment Regarding the Amendment of the CHPA. *Official Letter*, Wen-Jian-E-Tzu(文建壹字) No. 06770.

