

International Environmental Law Committee Newsletter

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MESSAGE FROM THE CHAIR

Jane Luxton
King & Spalding LLP

Greetings to members of the International Environmental Law Committee. It is an honor to introduce myself as the 2006-07 chair of the Committee and to welcome you to the first issue of the IELC Newsletter produced by our new Newsletter vice chair, Jim Rubin, with assistance from our Membership vice chair, Tom Redick, and several committee members. Jim, Tom and I, along with a distinguished and diverse group of vice chairs, began our tour of duty in August 2006.

I hope you will visit our committee's Web site, which has been partially updated with more to come, thanks to the hard work of our Technology vice chair, John Spinello. The Web site can be accessed at www.abanet.org/environ/committees/intenviron. There you will find information about the programs and public service projects organized by our Programs and Public Service vice chairs, respectively, Carlos Fernandez and Teresa Maurea Faria. In the coming months, you will see the work of our *Year in Review* vice chair, Lakshman Guruswamy, and additional contributions from our vice chairs at large: Bill Thomas, David Hunter, Ken von Schaumburg and Vail Thorne. We are all enthusiastic about our roles in the leadership of the committee. We are also very interested in your input on proposals for programs, newsletter articles, public service projects and member outreach, so I

encourage you to contact any of us with your feedback and ideas (our e-mail addresses are displayed on the website). International environmental law is an exciting and growing field, and I urge you to join the committee and become part of our list serve if you have not already done so.

And now, a few words about this issue of the newsletter. The Fall newsletter reviews important developments in several related areas of increasing significance: marine resources conservation, multilateral/regional trade matters relating to the marine environment and biotechnology. These areas are experiencing significant economic growth and receiving greater regulatory focus around the world—particularly in the European Union (EU)—and in multilateral fora. Authors from the government and private sectors provide timely and informative reports on these important subjects.

Russell Lamotte analyzes new developments in the international protection of marine genetic resources and efforts to address destructive fishing practices such as bottom trawling. Issue editor Brett Grosko traces two important and recent developments in international fisheries policy—World Trade Organization (WTO) negotiations to discipline fish subsidies and the EU's reform of its Common Fisheries Policy. Craig Thorn and Jillie Richards discuss the relationship between the WTO and the Biosafety Protocol, and the significance of the recent WTO panel decision regarding the EU's regulation of biotechnology. And Peter Oppenheimer and Ole Varmer describe the recent international and

mandate will be extended as part of the annual resolution on oceans and law of the sea. Those with an interest in the various intersecting issues raised in the working group—including marine scientific research, genetic research, access and benefit-sharing and intellectual property, and protection of marine resources and fisheries issues—will no doubt have an interest in following this emerging issue as the work in this area deepens.

A modified version of this article first appeared in Metropolitan Corporate Counsel.

IMPLEMENTING THE INTERNATIONAL AGREEMENT TO PROTECT RMS *TITANIC*

**Peter H. Oppenheimer
Ole Varmer
NOAA**

Historical, Cultural and Iconic Interests

RMS *Titanic* is perhaps the most famous shipwreck of modern popular culture. She was a British flagged steamship and the largest and most luxurious passenger ship of her time. Owned by the White Star Line, she was reported to be unsinkable.

On April 10, 1912, RMS *Titanic* set sail on her maiden voyage from Southampton, England, to New York City with 2,227 passengers and crew aboard. Determined to break the record for a trans-Atlantic journey, the captain of RMS *Titanic* ordered her to steam as fast as possible despite repeated warnings about icebergs. RMS *Titanic* was traveling at near top speed of about 20.5 knots when at 11:40 p.m. on April 14, 1912, she struck an iceberg. Less than three hours later, RMS *Titanic* sunk, taking more than 1,500 men, women and children with her.

Since her sinking on April 15, 1912, RMS *Titanic* has captivated the interest of people around the world. The tragic accident resulted in governmental investigations in the United States and the United Kingdom. The sinking also influenced the development of international maritime law. It was the catalyst for the negotiation of the first International Convention for the Safety of Life at Sea (1914), as well as for the establishment of what was to become the International Maritime Organization. The maritime tragedy also has been the inspiration for expeditions, research, books, movies and television shows. RMS *Titanic* and the story of her fated voyage are known world-wide. In many ways, she has become a cultural icon.

Discovery of the Wreck and Concern about Disturbing the Site

The wreck of RMS *Titanic* was discovered on Sept. 1, 1985, by a joint French-American expedition



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Like to Write?

The International Environmental Law Committee welcomes the participation of members who are interested in preparing this newsletter.

If you would like to lend a hand by writing, editing, identifying authors or identifying issues, please contact the editor James W. Rubin at (202) 955-1611 or jrubin@hunton.com.

Visit the committee's Web page at www.abanet.org/environ/committees/intenviron/home.html for back issues of the newsletter and other useful information including contact information for the committee's chair and vice chairs and the committee's 2006-07 action plan.

led by Jean-Luis Michel of the French Ocean Institute (IFREMIR) and Dr. Robert Ballard of the Woods Hole Oceanographic Institution. The wreck was found approximately 340 nautical miles (nm) off the Canadian coast of Newfoundland in international waters two miles below the ocean surface (depth of 12,500 ft or 3,800 m). Shortly after the discovery, Dr. Ballard testified before the U.S. Congress to encourage the enactment of legislation to designate the wreck as a maritime memorial. In July 1986, a plaque was placed on RMS *Titanic* recording its discovery the previous year and calling for the wreck to be left undisturbed in memory of those who perished aboard her. In 1987, a U.S. company working with IFREMIR returned to the wreck and began to salvage artifacts from the debris field.

U.S. Acts to Address the Threats of Misguided Salvage of RMS *Titanic*

In 1986, Congress passed and the president signed into law the RMS *Titanic* Maritime Memorial Act (1986 Act) to protect the wreck from potential harm caused by misguided salvage. *See* 16 U.S.C. §§ 450rr – 450rr-6. Congress recognized that while it had a significant interest in protecting RMS *Titanic*, the United States needed the cooperation of other interested nations. Thus, the 1986 Act directed the Department of State to enter into negotiations with interested nations to establish an international agreement to designate the wreck as a maritime memorial and to protect it from looting and unscientific salvage. Negotiations with Canada, France and the United Kingdom began in 1997 and the text of the *International Agreement to Protect the Shipwrecked Vessel RMS Titanic* (International Agreement) was finalized in 2000. The United Kingdom signed the International Agreement in November 2003 and, at the same time, enacted implementing legislation. The United States signed the International Agreement on June 18, 2004, subject to acceptance. Once necessary domestic implementing legislation is enacted, the United States intends to deposit its acceptance and the International Agreement will enter into force and become effective for the United States.

The 1986 Act also directed the National Oceanic and Atmospheric Administration (NOAA) to consult with interested nations in the development of guidelines for the exploration, research and, if determined appropriate, salvage of artifacts from the wreck site. NOAA did so, and proposed these guidelines for public comment on June 2, 2000. *See* 65 Fed. Reg. 35,326. Final guidelines were published on April 1, 2001 (NOAA Guidelines). *See* 66 Fed. Reg. 18,905.

The NOAA Guidelines, International Agreement and Annexed Rules

The NOAA Guidelines and the rules annexed to the International Agreement (Titanic Rules) are essentially the same as the Annexed Rules to the UNESCO Convention on the Protection of the Underwater Cultural Heritage (2001) (UNESCO UCH Convention). The Annexed Rules of the UNESCO UCH Convention are considered by the United States to embody the international standard for professional maritime archaeological research and recovery. The Annexed Rules of the UNESCO UCH Convention, the NOAA Guidelines and the Titanic Rules all incorporate a preferred resource management policy of *in situ* preservation that disfavors salvage. The International Agreement requires that each Party take all reasonable measures to ensure that any artifacts recovered from RMS *Titanic* by those subject to their jurisdiction are conserved and curated consistent with the Titanic Rules and are kept together and intact as project collections. Each Party must also take the necessary measures, in respect of its nationals and vessels flying its flag, to regulate entry into the hull sections of RMS *Titanic* so that they, other artifacts and any human remains, are not disturbed, and to regulate activities aimed at artifacts from RMS *Titanic* found outside the hull in the debris field so that all such activities are, to the maximum extent practicable, conducted in accordance with the Titanic Rules.

Proposed Legislation to Implement the International Agreement

The 1986 Act directed the Department of State to submit the International Agreement to Congress along with proposed implementing legislation. On June 9, 2006, the Department of State did so. Consistent with

the 1986 Act and the International Agreement, the Administration's proposed implementing legislation designates RMS *Titanic* as an international maritime memorial and gravesite to those aboard her who perished in 1912. It also implements the International Agreement by prohibiting potentially harmful activities directed at RMS *Titanic* and by establishing a NOAA-administered permit system to manage any research, exploration or recovery and salvage activities directed at RMS *Titanic* by U.S. nationals and others subject to U.S. jurisdiction. In general, the proposed implementing legislation does not cover activities directed at RMS *Titanic* by foreign nationals outside of U.S. territory, territorial sea or contiguous zone.

Unless authorized by a permit, the proposed implementing legislation prohibits engaging in an activity that disturbs, removes or injures, or attempts to disturb, remove or injure, the wreck or artifacts at the site; entering the hull sections; engaging in an activity at the site that poses a significant threat to public safety; and selling, purchasing, importing or exporting artifacts. These prohibitions recognize the historical and cultural significance of RMS *Titanic*, and reflect the preferred resource management policy of *in situ* preservation. They are consistent with international law, including the UN Convention on the Law of the Sea. They are also consistent with the judicial orders in the matter of *R.M.S. Titanic, Inc. v. The Wrecked and Abandoned Vessel*, Civil Action No. 2:93-cv902 (E.D. Va., filed 1993) (orders prohibiting the U.S. company with salvage rights to RMS *Titanic* from entering the hull portions of the wreck and selling individual artifacts, and orders requiring the company to keep together recovered artifacts as an intact collection for public access).

The proposed implementing legislation requires vessels subject to U.S. jurisdiction to provide advance notice to NOAA if they intend to stop within a specified maritime zone above the wreck site. One purpose of this notice provision is to ensure that NOAA has prior knowledge of the timing and purpose of the presence of a vessel in this zone so that the agency can determine whether a permit is required. Another purpose is to facilitate fulfillment of certain coordination requirements with other parties to the International

Agreement. The notice provision will help the United States to protect the wreck site and manage activities directed at RMS *Titanic*.

The proposed implementing legislation authorizes a full range of enforcement options to deter noncompliance and allow for the imposition of sanctions commensurate with any damage a violation may cause to the wreck. These options include civil administrative penalties of up to \$250,000 per day, civil judicial penalties of up to \$500,000 per day, criminal fines and imprisonment. Also authorized are liability damage actions, seizure and forfeiture.

Conclusion

The International Agreement was negotiated to protect the most well known shipwreck of our time. Because the wreck lies in international waters, the International Agreement was carefully crafted to be consistent with international law, in particular the UN Convention on the Law of the Sea. The administration's proposed implementing legislation satisfies the letter and spirit of the International Agreement and, once enacted, will allow the agreement to enter into force. RMS *Titanic* will then benefit from greater protection from misguided salvage, and enjoy the long-warranted designation as an international maritime memorial.

*Mr. Oppenheimer is senior counselor in NOAA's Office of General Counsel for International Law. Mr. Varmer is an attorney-advisor in the same office. As part of a federal interagency working group, they both helped to develop the administration's proposed legislation to implement the "International Agreement Concerning the Shipwrecked Vessel R.M.S. Titanic." This article is partially based on one authored by Mr. Varmer and published by the International Council of Monuments and Sites (ICOMOS). See www.international.icomos.org/risk/2006/ for a special edition of the ICOMOS series on Underwater Cultural Heritage at Risk, including articles on the RMS *Titanic*, the USS *Monitor* and the World War II Japanese midget submarine recently discovered outside Pearl Harbor.*