The Centenary Impact Since RMS Titanic Sank upon Universal Regulation of Underwater Cultural Heritage in International Waters, and the Necessity of New Law-Making in Japan

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Abstract

2012 is Centennial since Royal Mail Ship (*RMS) Titanic* sunk. The *Titanic* was found in 1985, as early as 1986 United States of America (USA) enacted the *RMS Titanic Maritime Memorial Act*. It aimed at the conclusion of international agreement for the conservation of the *Titanic* by states concerned. The agreement was started drafting in 1997 and adopted in 2000. It was USA, France, England and Canada that adopted *Agreement concerning the Shipwrecked Vessel RMS Titanic* (the *Agreement*). On the other hand *United Nations Educational, Scientific and Cultural Organization (UNESCO) 2001 Convention on the Protection of the Underwater Cultural Heritage* (2001 Convention) was made through four diplomatic conferences since 1998, and entered into force in 2010. Thanks to 2001 Convention, the term "Underwater Cultural Heritage" (UCH) has been well-known to people around the world. Be that as it may, to be an UCH needs passage of 100 years; the *Titanic* will be an UCH next year. Although the importance of 2001 Convention has recently attracted considerable attention, its new trend toward *universal* regulation has just started emerging from international society. It is the Article 9.2 of the *Agreement* that attention should be paid. It provides, "If a general multilateral Convention on the protection of underwater cultural heritage enters into force for all Parties, they shall consult to discuss the relationship between this Agreement and that Convention." Assuming an appropriate coordination of them gives rise to a new trend, it appears more desirable to foresee the near future and timely accede to 2001 Convention after the preparation of domestic laws in Japan referring to 2001 Convention.

Introduction

Next year is Centennial since *RMS Titanic* sank. According to the definition of Article 1.1.a of *Convention on the Protection of Underwater Cultural heritage* (*2001 Convention*) the *Titanic* will be an Underwater Cultural Heritage (UCH). While large projects at Southampton (Bates 2009) are being prepared toward the day, a wide variety of plans are also being pondered all the world. Since 1985 United States of America (USA) and France joint-party, led by Robert Ballard, found the *Titanic* and, some 6,000 artifacts have been raised (Murphy 2002). As early as 1985, Nancy

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Foster, former assistant administrator of the National Oceanic and Atmospheric Administration (NOAA) Ocean Service, testified before Congress on a house Resolution to protect the *Titanic*. Ballard also stated that the most desirable option for the conservation of the *Titanic* be to take separate measures among cooperating states as it was located in international waters. *R.M.S. Titanic Maritime Memorial Act of 1986*（*1986 Act*）was enacted.

The *Agreement concerning the Shipwrecked Vessel RMS Titanic* (the *Agreement*) drawn up by USA, United Kingdom (UK), France and Canada states, "the *agreement* shall enter into force on the date on which two states have indicated their consent to be bound" (Art. 11.2). Signing the *Agreement* and enacting new legislation in November 2003, the UK set up the legal institution no. 2496 *Merchant Shipping, Casualties, Wreck and Salvage, The Protection of Wrecks (RMS Titanic) Order 2003*, [Dft 13155], (no.2496), which entails summary conviction to a fine not exceeding the statutory maximum (£5,000) or conviction to an limited fine to the salvage in unconformity with the criteria in the *Agreement* (Art. 6.1 and 6.2).

On April 12th 2001 NOAA published the *Guidelines for Research, Exploration and Salvage of RMS Titanic*, 66 Fed.Reg. 18905, 18908-09 (Fed.Reg. 18905) according to *1986 Act*. Moreover a *Draft Charter for a Titanic Preservation Alliance* (the *Alliance*) was drawn up to make it clear the standard of explorations of the *Titanic.* In 2003 and 2004, NOAA conducted scientific research with various partners. On June 2004, Ballard with NOAA carried out research which surveyed how the *Titanic* has deteriorated since its discovery. This progress of research resulted in the *Return to Titanic* (directed by Tracy Barry and Peter Schnall, 7th June 2004) and was put on publicly accessible media throughout the world. This campaign induced the USA to sign the *Agreement* on 18th June 2004.

RMS Titanic Inc. (RMST) has exclusively explored the *Titanic,* recovering and conserving some 5,500 artifacts. RMST has fascinated more than 25 million people through many exhibitions. In 2010, RMST carried out the latest survey in conjunction with NOAA, Woods Hole Oceanographic Institution and the USA National Park Service (http://www.rmstitanic.net/about-us.html). How the entry into force of the *Agreement* impacts upon a series of the *Titanic* litigations in USA admiralty courts will be examined. In fact, the USA movement toward the entry into force has made steady progress. Taking universal publicity into account, it seems the *Agreement* will be approved by Congress which was transmitted Bill titled *R.M.S. Titanic Maritime Memorial Preservation Act of 2009* (re-amendment of *1986 Act*) around 15th April 2012, the *Titanic's* 100th anniversary. The day has two implications, the fact that the *Titanic* becomes UCH in 2012, and the turning point of shifting salvage law to cultural heritage law.

Two Trends in USA: 1986 Act and Admiralty Court

The Trend of *1986 Act*

Ballard has not raised artifacts that he found on the *Titanic* as it is considered a non commercial and scientific research (Ballard and Sweeney 2004: 72-73). The location was not precisely proclaimed so as not to be plundered (Ballard and Michael 1985: 704). *1986 Act* attempted to make the *Agreement* among states concerned, to enact national law in accordance with the *Agreement*. *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 protect it from looting and unscientific salvage. UK is a flag state, France is the joint finding state and has Cherbourg port of call on her route, and Canada is the nearest coastal state from the shipwrecked point. USA continuously offered a consultation to other states. Also Russia and Japan are expected to participate in the *Agreement* to make it more effective (Dromgoole 2003:7). The Russian submersibles *Mir* Ⅰ and Ⅱ built in 1987 are able to explore efficiently in cooperation with each other, having researched the *Titanic* 41 times from 1991 to 2003. Japan Marine Science and Technology (JAMSTEC) upgraded the *Shinkai 2000* built in 1981 to the *Shinkai 6500* built in 1990, which exceeded the 1000th dive in 2007.

While *1986 Act* was not in support of others, French Research Institute for Exploitation of the Sea (IFREMER) which knew the location of the shipwreck site undertook an independent exploration. Taking advantage of the circumstance, RMST (since 1987) set up with a view to profiting from artifacts. IFREMER raised more than 800 artifacts since the first 1987 exploration. The USA promptly enacted the *Abandoned Shipwreck Act* against such actions, which stated, “it would prohibit the import with a view to the proceeds through the recovering from the *Titanic* and further, such measures would be maintained until the *Agreement* comes into force”. On the contrary, RMST has continuously carried out the explorations chartering the *Nautile* and raised some 4,000 artifacts over seven expeditions.

Since 1997 the draft of the *Agreement* has the purpose of controlling non-regulated salvage and other harmful activities over the *Titanic*. The Fed.Reg. 18905 is essentially almost the same as the annexes attached to both the *Agreement* and 2001 Convention based mainly on the 1996 *Charter on the Protection of the Underwater Cultural Heritage* (for details see Craig 2008:3). The *Annex* attached to 2001 Convention is established as the international criteria of underwater research (Oppenheimer and Varmer 2006:15). However there is room for flexible interpretation of salvage law, while continuing to observe strict scientific, cultural and historical significance. The *Agreement* generally does not conceive RMST to be the sole

salvor-in-possession. Implementing the *Agreement*, the sole salvor-in-possession will be obliged to collaborate with the admiralty court and/or NOAA.

USA Admiralty Court

The shipwreck is located at high seas, RMST raised a number of artifacts and brought a part of them to the USA admiralty court; maritime affairs belong to the jurisdiction of the federal court. While the court upheld RMST as the legal salvor-in-possession, Ballard was not *legally* supposed to be the finder of the *Titanic* (Garabello and Scovazzi 2003:73-75). Even though the court actually awarded RMST the exclusive rights of the *Titanic,* USA courts can only enforce their law on USA nationals, France has carried artifacts back to its territory since 1987. British Deep Ocean Expeditions (DOE) carried tourists to the *Titanic* in 1988. RMST notified DOE of its unauthorized underwater cruising. One of the tourists with DOE filed an action suit to USA district court for declaration of access and photograph rights to the site. The court had already issued an injunction barring all visitation to the *Titanic* including photographing it without permit by RMST in 1998. DOE had planned an expedition to view and photograph the *Titanic* in the late summer of 1998, and Christopher Haver had planned to be a passenger. Haver filed a declaratory judgment action in the district court to challenge the 1998 judgment. The court held that the right of divers and tourists aiming at visiting and photographing the *Titanic* belonged solely to RMST (April 28th 1999: 171 F.3d 942-943, 958-959, 970). DOE filed an intervention as co-party with Haver in response to the judgment. During the lawsuit, DOE ignored the order of USA court and continued underwater cruising (Nafziger 1999: 315).

The appeal court held that while RMST has the exclusive right of raising artifacts, the exclusive rights do not involve visiting, viewing and photographing the site. In a series of the *Titanic* litigations, RMST represented its intention to raise funds through artifact exhibitions (selling tickets, replica licenses, and product rental fees, etc.). These actions were a way of recovering costs and keeping the share prices up because the USA courts would only uphold RMST as sole salvor-in-possession as long as they did not sell artifacts. In the following year, the appeal and supreme courts held that RMST had not ever directly owned artifacts only the trustees (Murphy 2002).

1989 Salvage Convention and Four States

International Convention on Salvage, 1989 (1989 Convention) was concluded in London on 28th April 1989 and came into force on 14th July 1996. It has 62 State

parties (as of July 2011). USA, France, UK and Canada are all State parties (for details on definition see Browne this volume) to 1989 Convention. It indirectly provides the salvage of historic wreck in the form of reservation provision. Nothing is referred to the relationship between law of salvage and UCH law in 1989 Convention. The provision simply allows a State to reserve the right not to apply 1989 Convention, “when the property involved is maritime cultural property of pre-historic, archaeological or historic interest and is situated on the sea-bed.” (Art. 30.1.d). Since USA and France did not make reservations to this provision, they are able to salvage UCH. Negotiations commenced. In the process of drawing up the 1989 Convention France attempted to exclude UCH. The attempt resulted partially in Article 30.1.d.

United Nations Convention on the Law of the Sea (UNCLOS) and 2001 Convention: Coastal Jurisdiction

Apart from two trends in USA mentioned above, the movement of regulating underwater antiquities was in rapid progress in the late 1970’s. UNCLOS (Art. 149 and 303) only provided *lex lata* (existing law) including maritime law and international agreements regarding the protection of objects of an archaeological and historical nature in parallel outside the Contiguous Zones (24 nautical miles from the shoreline) except in deep sea bed, the Area (outside Continental Shelf, at 350 nautical miles to the maximum from the shoreline, of every country). The European Council drew up the *Draft of European Convention on Underwater Cultural Heritage* in 1984 based upon *Recommendation 848* in 1978 (Roper 1978), the draft did not enter into force. However International Law Association deliberated “the draft of Convention on Underwater Cultural Heritage” in 1994 based on the draft of the European Convention. From 1996, through the governmental experts meeting (1998-2001), 2001 Convention was adopted by UNESCO’s 31st General Assembly on the 2nd November 2001.

Be that as it may, the international regulation of actions directed at underwater cultural heritage, at present, is mixed with Law of the Sea, Maritime Law and Cultural Heritage Law. As 2001 Convention coherently emphasizes UCH, “shall not be subject to the law of salvage or law of finds” (Art. 4), and “shall not be commercially exploited" (Art. 2.7). On the other hand 2001 Convention grants the competence to coastal states to make 2001 Convention effective as an aspect of UNCLOS (Art. 9 and 10). USA, France and UK are in favor of the aspect of cultural heritage law, while in disfavor of the aspect of UNCLOS. USA proposed that a certain commercial action is permitted subject to the scientific criteria of 2001 Convention (Nafziger 2000: 88).

The universality and effectiveness of 2001 Convention in international society

remains to be clear since, amongst others, the USA, France and UK's salvage laws do not comply. On the other hand *Rules concerning Activities Directed at Underwater Cultural Heritage (Annex)* embodies the protection and conservation of UCH in accordance with the regime provided in the 2001 Convention. This shows that the universality of international norms concerning standards of underwater archaeology is shifting to the establishment of Standard Practice. For example, Fed.Reg. 18905 and the annex attached to the *Agreement* are almost alike.

The Adoption of Titanic Agreement and Its Effect

Consulting from 1997 to 2000, the *Agreement* was adopted on 5th January 2000. While the *Agreement* regulates the shipwrecked site and prefers *in situ* preservation. The *Agreement* forbids illegal exploration and selling of recovered artifacts. However the *Agreement* does not apply to some 6,000 already recovered artifacts. The *Agreement* regards the shipwrecked site as scientific, cultural and historical memorial. In breach of articles of the *Agreement* and its annex (*Rules),* each party is given enforcement jurisdiction including civil and/or criminal sanction. A glance on the *Agreement* tells us how each provision were drawn up in an effort to be reconciled with 2001 Convention, and how the *Agreement* carefully paid attention to 2001 Convention. This means how USA, France, UK and Canada consent to the aspect of cultural heritage law (Dromgoole 2003: 8).

Article 3 of the *Agreement* states that each party shall take all reasonable measures to conserve and curate artifacts in recognition of *Rules, specifically* for them to be kept together and intact as project collections. Article 4 of the *Agreement* states that each party shall take the necessary measures, to regulate through a system of project authorizations of entry into the hull sections of the *Titanic* so that they, other artifacts and any human remains are not disturbed. It is noteworthy that the *Agreement* refers to salvage law. The draft of article 4.3 is the product which USA negotiation team tried to insert the fact that USA admiralty court granted RMST the salvor-in-possession into the *Agreement*. However the attempt resulted in the provision so as to secure non-intrusive access to the site. It seems counteractive against judgments of USA admiralty court which kept granting salvors the exclusive right. The *Agreement* does not so much exclude application of salvage law as permits salvage activities in conformity with *Rules*.

In a series of *Titanic* litigations concerning RMST's salvage, RMST instituted a lawsuit to the Secretary of State, the Secretary of Commerce and NOAA in September 2000 so as not to adopt the *Agreement* because it was unconstitutional. The subject matter is that (1) an effort to promote making the *Agreement* deprives

USA admiralty court of the jurisdiction, (2) Implementing the *Agreement*, the right of recovery or ownership of RMST will not be compensated by USA. The court rescinded the claim since RMST was able to appeal again when the *Agreement* enters into force. In the public hearing of district court over the *Titanic*, it is interesting that the court states the exclusive status of RMST must be appraised even though the *Agreement* comes into force (2004: 323F. Supp.2d 724, 741).

Finally Article 9.2 of the *Agreement* provides, “If a general multilateral Convention on the protection of underwater cultural heritage enters into force for all Parties, they shall consult to discuss the relationship between this Agreement and that Convention.” Canada is most likely to join 2001 Convention compared with USA, France and UK. A general multilateral convention probably suggests 2001 Convention. If all four states join it in the future, Canada will be favorably presumed its ownership including the *Titanic* in the context of relationship between the *Agreement* and 2001 Convention. The fact that the paradigm shift from salvage law to cultural heritage law in Canada might also induce USA, France and UK to shift the similar paradigm through consultation.

Prospect

Annex, *Rules*, Fed.Reg. 18905 and the *Alliance* will be replaced with salvage law in principle. It seems to me that these instruments are highly appraised as code of conducts taken away provisions of so-called creeping jurisdiction of 2001 Convention, therefore such norms are also acceptable to USA, France, UK and Canada. While the system of 2001Convention has been gradually pervaded to international society, the rigid application of underwater archaeology to UCH in the *Agreement*, prior to the issue of coastal jurisdiction, will make it possible to prevent loss of artifacts and promote the dissemination of knowledge gained from UCH to people around the world. The approval of USA Congress is expected during the anniversary events of the *Titanic* around 15th April 2012. The time might be a symbol of shifting from salvage law to cultural heritage law.

On reflection, from a series of research of Lake Biwa and so forth, the forerunner of underwater archaeologist in Japan, OE Yoshio had insisted on the necessity of underwater archaeology since 1960’s (OE 1971: 266-269; OE 1982: 236-238). Although the tendency of underwater archaeology actually rose up in the early of 1980’s (OE *et al*. 1980: 23-87), symbolically as seen in *A Special Issue* written by the leading person including OE at that time, the *systematic* mapping method of UCH subsidized by Nippon Foundation (from 1st April 2009 to 31st March 2012) has just started by Non Profit Organization, Asian Research Institute of Underwater

Archaeology (ARIUA) established in 12th August 2005, the former Kyushu-Okinawa Research Institute of Underwater Archaeology established in 1991. Every product of research divided into four coastal regions will be gradually opened on the web (http://www.ariua.org/database/). Nevertheless Agency for Cultural Affairs is not necessarily positive for the strenuous and steady effort of ARIUA in both legal and financial aspects. The report attached to a tentative translation of 2001 Convention in July 2002 by Ministry of Education, Culture, Sports, Science and Technology reads; "Whereas it seems that the purposes and effects of the Convention is generally valid, our political decision making system will be reconsidered" because the Convention addresses primarily legal systems of extra-territorial waters (*Report Technology* 2002). The circumstance simply leads to *lacuna* of underwater cultural heritage related laws in Japan. The basic standard that OE sought is almost the same as provisions in the *Rules*. OE states;

> It is deeply hoped that the necessity of archaeological research of sea-bed be understood by underwater archaeologists as well as ordinary people, the research system demands much closer cooperation internationally and mobilize to each site in any case (OE 1977: 337).

Utilizing Centenary of the *Titanic* to great extent as the best chance that the paradigm shift of regulations of UCH is certain to arise in international waters, Japan should promptly establish its own national underwater cultural legal system as the first step of international cooperation. Using the *Sinkai 6500* effectively enable Japan to contribute to underwater archaeology even in international waters.

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