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Utilizing Tradition and Custom in Decision Making (Panel 7)

International Law and the Development of the Rights of Indigenous Peoples (Panel 8)

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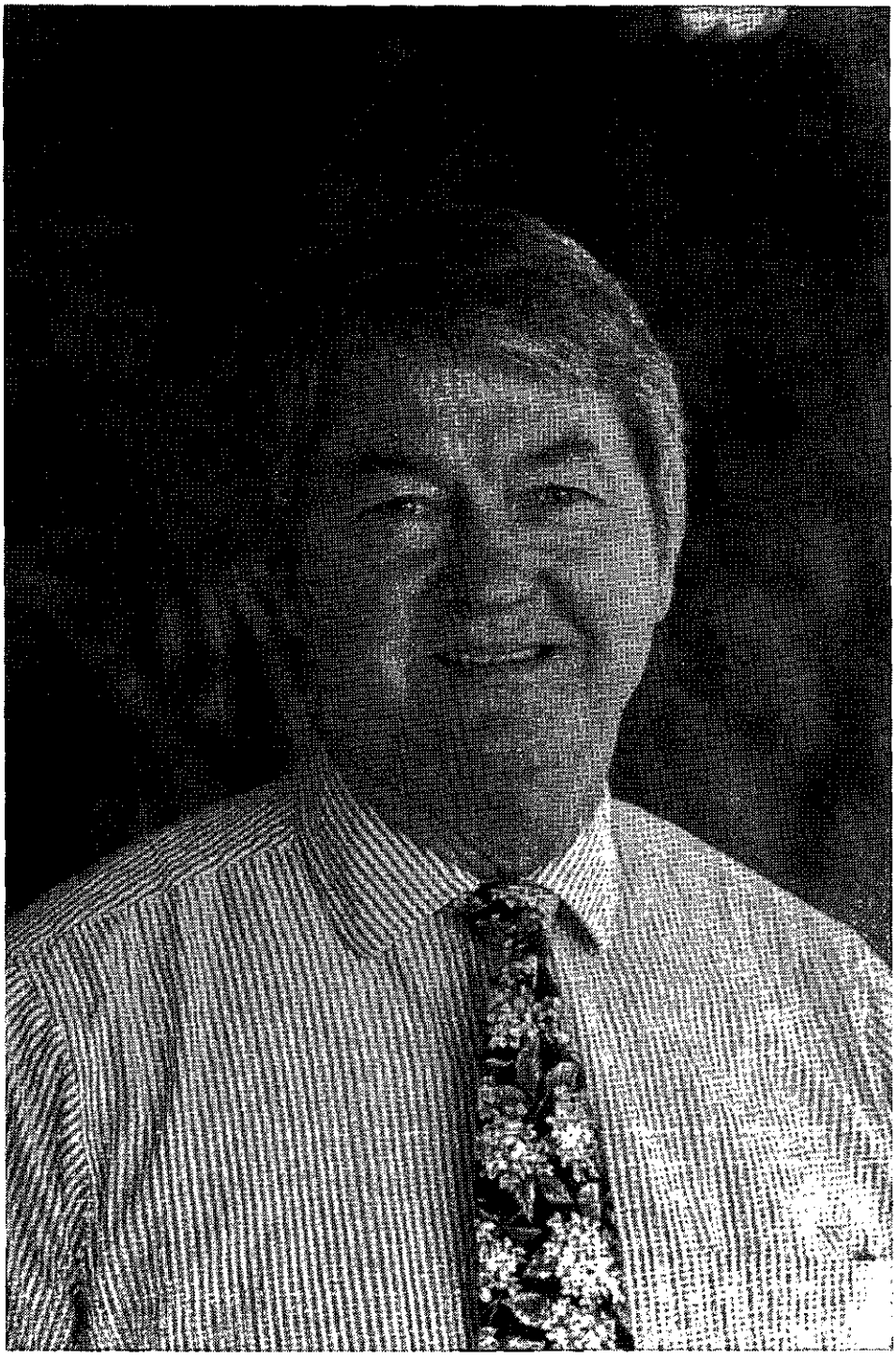

Professor Jon Van Dyke

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We strive to view issues pertinent to Hawai'i through a broader global lens. We balance provocative articles on contemporary legal issues with practical articles that are in the vanguard of legal change in Hawai'i and internationally, particularly on such topics as military law, sustainability, property law, and native rights.

Kūlia mākou e kilo i nā nīnau i pili iā Hawai'i me ke kuana'ike laulā. Ho'okomo mākou i nā 'atikala e ulu ai i ka hoi e pili ana i nā nīnau kū kānāwai o kēia wā a me nā 'atikala waiwai e ho'ololi ana i nā mea kū kānāwai ma Hawai'i a ma nā 'āina 'ē, me ke kālele 'ana i nā kumuhana like 'ole e like me nā kānāwai pū'ali koa, ka mālama 'āina, nā kānāwai ona 'āina, a nā pono o nā po'e 'ōiwi.

Translation by Pauahi Ho'okano

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The University of Hawai'i Law Review would like to express its appreciation to the administration, faculty, and staff of the William S. Richardson School of Law. Special thanks to Ms. Julie Suenaga.

Introduction

Onaona P. Thoene & Wayne R. Wagner*

Professor Van Dyke was somehow both a quiet man and a mighty voice. Perhaps this can best be explained by the way in which he emphasized listening to others as much as delivering his own powerful point of view. In this way, wherever Professor Van Dyke went, listening thrived.

To those who had the pleasure of knowing Professor Van Dyke, it is little surprise that people listened so carefully to him. He was, as Professor Harry Scheiber's contribution to this Issue details, a prodigious scholar, effective litigator, not to mention a lovely person. Whether communicating in person or on paper, Professor Van Dyke did so with a clarity that made listening easy, and an optimism that made listening desirable.

What may be a surprise, however, is the care with which Professor Van Dyke listened to others. When you began to speak, he had a habit of turning to face you, leaning in ever so slightly to look you straight in the eye, then listening patiently even if your thoughts had to straggle to completion. On such occasions, Professor Van Dyke's body language communicated that it was important for you to be heard and he would take the time to do so. Listening in this way was just a part of his good nature. And it lent forceful credibility to the idea that his work on behalf of many peoples issued not from condescending visions but from a deep respect for others. So it seemed only natural to honor Professor Van Dyke by continuing the good-natured conversations that he encouraged and oftentimes initiated. And so, on January 31 and February 1, 2013, the University of Hawai'i Law Review in conjunction with the Jon Van Dyke Institute of International Law and Justice hosted "*He Hali'a Aloha No Jon*: Memories of Aloha for Jon."

The Symposium brought together forty esteemed scholars, jurists, and attorneys from around the world to discuss such topics as: Strategies for Peaceful Resolutions in the Northeast Asian Seas, Climate Change and Sea Level Rise, International Nuclear Law, Human Rights in Asia, Indigenous Tradition and Custom in Decision Making, and the Development of the Rights of Indigenous People. Weaved into the substantive discussions on such topics were numerous personal anecdotes that highlighted the myriad of wonderful qualities Professor Van Dyke demonstrated throughout his distinguished life. The Symposium was quite a success, an energetic celebration of listening. This is the issue commemorating that event.

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* Class of 2013, William S. Richardson School of Law, University of Hawai'i at Mānoa; Co-Editors-in-Chief, Volume 35, University of Hawai'i Law Review.

There are many individuals and organizations whom we would like to recognize for their vital contributions to both the Symposium and this Issue. Our sincerest thanks go to Professor Sherry Broder, wife of Professor Van Dyke and Director of the Jon Van Dyke Institute for International Law and Justice, whose help in planning this Symposium was instrumental; to our advisors, Professors David Callies, Justin Levinson, and Jill Ramsfield for your constant support and guidance; to Deans Aviam Soifer, Denise Antolini, and Cynthia Quinn for donating the law school's facilities to this event and encouraging us at every step; to Julie Suenaga for your administrative assistance; and to the editorial board and staff of Volume 35 for your willingness to go above and beyond. Thank you also to each and every panelist and moderator for the gift of your time and expertise in presenting at the Symposium, writing the papers that comprise this Issue, and perpetuating Professor Van Dyke's legacy.[1]

Wanting to celebrate a person's life and contributions is one thing, figuring out how to carry on his legacy is another. We hope the Symposium and this Issue play a small but vibrant role in our continuing attempts to accomplish both goals. As members of Professor Van Dyke's last constitutional law class, this editorial board is honored to present this special Symposium Issue. Please enjoy.

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[1] Thank you to **Prof. Jerome Cohen**, New York Univ. (NYU) Law School; **Prof. Harry N. Scheiber** & **Jane Scheiber**, Berkeley Law School; **Hon. Jin-Hyun Paik**, International Tribunal for the Law of the Sea; **Prof. Seokwoo Lee**, Inha Univ. Law School; **Prof. Julia Xue**, Ocean Univ.; **Yann-huei Song**, Academia Sinica; **Prof. Peter Dutton**, U.S. Naval War College; **Prof. Joon-Soo Jon**, Sogang Univ.; **Prof. Naoki Idei**, Daito Bunka Univ. Law School; **Prof. Sherry P. Broder**, William S. Richardson School of Law (WSRSL); **Prof. David VanderZwaag**, Dalhousie Univ.; **Prof. Maxine Burkett**, WSRSL; **Durwood J. Zaelke**, Secretariat of the International Network for Environmental Compliance and Enforcement; **Prof. David Freestone**, George Washington Univ.; **Richard Wallsgrove**, Blue Planet Foundation; **John Briscoe**, Briscoe, Ivester & Bazel, LLC; **Prof. Clive Schofield**, Univ. of Wollongong; **Prof. Anastasia Telesetsky**, Univ. of Idaho College of Law; **Prof. Jae-Hyup Lee**, Seoul National Univ.; **Prof. Nilufer Oral**, Istanbul Bilgi Univ.; **Steve Roady** and **Erika Rosenthal**, Earthjustice; **Elias Blood-Patterson**, NYU; **Duncan Currie**, Globalaw; **Prof. Ved P. Nanda**, Sturm College of Law; **Prof. Alison Conner**, WSRSL; **Prof. Carole Petersen**, WSRSL; **Prof. Yoonkyeong Nah**, Yonsei Univ.; **Prof. Tae-Ung Baik**, WSRSL; **Prof. David Caron**, Berkeley Law School; **Hon. Richard Pollack**, Hawai'i Supreme Court; **Prof. Melody K. MacKenzie**, WSRSL; **Hon. Arthur Ngiraklsong**, Palau Supreme Court; **Hon. Robert J. Torres, Jr.**, Guam Supreme Court; **Prof. D. Kapua'ala Sproat**, WSRSL; **Hon. Richard Clifton**, U.S. Court of Appeals for the Ninth Circuit; **Prof. Dinah L. Shelton**, George Washington Univ.; **Prof. Charles Norchi**, Univ. of Maine School of Law; **Prof. James Anaya**, James E. Rogers College of Law.

A Jurisprudence of "Pragmatic Altruism": Jon Van Dyke's Legacy to Legal Scholarship

Harry N. Scheiber*

Writing of a senior colleague in international law whom he greatly admired, Jon Van Dyke referred to him as a dreamer—but a dreamer "many of [whose] dreams have come true."[1] It would be impossible to conjure up a better description of Jon himself. In a brilliant career of teaching, research, and activism, he made an enormous number of lasting contributions to the advancement of both legal scholarship and the public weal. While the sheer volume of his writings lends him special distinction among his contemporaries in his several research fields, it is more important that we remember what made him nearly unique: it was the extraordinary range and scope of his research accomplishments. In any assessment of his legacy to legal scholarship, as I attempt in this study, one must get beyond these quantitative and "wingspan" aspects of his contributions, however, and remember that the transcendent characteristic of his work was its scholarly excellence. Jon's legacy to legal scholars—or, more accurately, his several legacies—consists of writings that will long stand in the literature as enduring contributions to both local and global discourses, speaking to key issues of law, policy, and ethics.

I. THE WRITINGS

A recapitulation of the range and scope of subject matter in Jon's corpus of work can serve as our starting point. Prominent among the topical areas in which he wrote was the jurisprudence of international law, and especially subjects within the broad spectrum of topics under heading of "Law of the Sea." He also devoted a sustained effort over many years to the analysis and advancement of human rights law, including especially scholarship on (and litigation of) the rights of indigenous peoples. Among his most widely cited writings is a large set of important works relating to topics in state, national and international environmental law. In addition, he produced important analyses of contemporary policy innovations in fisheries management law and

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[1] Jon Van Dyke, *Louis B. Sohn and the Settlement of Ocean Disputes*, 33 GEO. WASH. INT'L. REV. 31, 32 (2001-2).

implementation, including whaling regulation and the special legal issues involved in the international law of highly migratory species. His contributions and scholarly style in his ocean law studies will be treated at length in Sections IX and X, below, but it needs to be noted here that he was especially influential in his role as an expositor and champion of the precautionary principle, and as an authoritative commentator on both marine boundary delimitation and East Asian ocean issues.

In fact, an important regional emphasis is found throughout much of Jon's career in research. In articles, chapters and books he addressed the legal and policy questions posed by the difficult, and often-tragic, resource-use challenges and environmental conservation issues specific to the vast Pacific Ocean area—a region where he travelled extensively to the small island nations that he came to know so well. Also specific to the Pacific area were his studies of maritime and security conflicts in the South China Sea. Law and society of Korea, and also that country's international maritime relations, provided the focus of many of his later writings. He visited Korea more than forty times, and he formed close academic connections there, especially with Inha University-Incheon.

Special note must be taken of Jon's exceptional expertise in the complex law of maritime boundaries. He concentrated much of his attention on international law respecting jurisdiction and navigation in straits; and he gave much study to the law of islands (including the many rocks spuriously claimed as islands, a focus of some intensive debates in the literature!). Once he had taken up residence and embarked on new lines of work in Hawai'i, he began on a parallel career of research, litigation, and public advocacy on constitutional and environmental issues in Hawai'i state law. His monumental book on the Hawai'i Crown Lands is only one product of his devotion to protection and advancement of native rights, but it also stands as a work of special authoritativeness in the historical literature of America's record in the Pacific.[2]

Jon's commitment to all these studies was sustained over many years. It seems as though he never entirely dropped a problem or situation that he found interesting. Thus, typically he returned at varied intervals (ranging from a few weeks to a decade or more) to write yet another essay reconsidering or sharpening earlier insights, or else to put together a new monographic article analyzing a newly emergent problem—often ingeniously identifying an

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[2] JON VAN DYKE, WHO OWNS THE CROWN LANDS OF HAWAI'I? (2007). It is beyond the scope of the present Article to provide a suitable appreciation and analysis of all his work relating to Hawai'i law, culture, and environment; this aspect of his career is represented in the bibliography of his writings available in this symposium issue. *See The Scholarship of Jon M. Van Dyke: A Bibliography*, 35 U. Haw. L. Rev. 1013 (2014); see especially his articles cited in note 45 *infra*.

opening that he used to champion what he felt would be a useful legal or policy innovation.[3]

The sheer volume of his scholarly work—some 120 articles and chapters, in addition to his several books—was produced while Jon meanwhile was pursuing often-arduous litigation, and often was playing the role of leading voice and organizing genius in numerous public causes. He did so sometimes on his own but more often in partnership with his wife, Sherry Broder, in the academic, judicial, and public arenas of environmental law, civil liberties, native rights, and governmental reform. Jon was also a dedicated citizen of his university. He was revered as a professor at Hastings College of the Law and later during his long career at the William S. Richardson School of Law. For his part he rendered distinguished service to the Richardson School as faculty leader, institution-builder, administrator, and liaison with the alumni, the Hawai'i bar, and, more generally, the citizenry and governmental institutions of Hawai'i.[4]

He was also a stalwart in the leadership group of the Law of the Sea Institute during the long period when the Institute was based at his own university in Hawai'i. He never flagged, however, in his devotion to the Institute after the organization's headquarters was moved in 2002 to Berkeley and was reorganized as a unit of the UC Berkeley School of Law. My co-director of the Institute, Professor David Caron, and I could always rely on Jon's readiness to offer his time, effort, and wise counsel. He also contributed from several of his research projects to every one of our publications in the last decade, and in addition he co-edited two of the books in the Institute's ocean law series.[5]

It needs to be mentioned too that Jon was one of the leaders in the 1990s in the founding and the conference program of an active inter-university group of scholars, the Ocean Governance Study Group. This group, after its initial meeting at the University of Hawai'i, undertook the serious interdisciplinary

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[3] His practice of revisiting highly diverse themes, for example, the rights of students in public schools, nuclear activities regulation, or South China Sea issues, is evident in the bibliography of his writings available in this issue.

[4] Many of Van Dyke's contributions to public life and to important causes in state and federal litigation were highlighted in some of the many tributes that were posted on a memorial website just after his unexpected death in November 2011; the site is currently available at http://www.surveymonkey.com/sr.aspx?sm=asSuIUcv3rOXkRMAxqhTmkG8g8Wby2GtUSDsPDsETCQ_3dotos/InMemoriamJonVanDyke02.

[5] One of these two books is MARITIME BOUNDARY DISPUTES, SETTLEMENT PROCESSES, AND THE LAW OF THE SEA (Seoung-Yong Hong & Jon M. Van Dyke eds., 2009); and the other is GOVERNING OCEAN RESOURCES: NEW CHALLENGES AND EMERGING REGIMES, A TRIBUTE TO JUDGE CHOON-HO PARK (Jon Van Dyke, Sherry P. Broder et al., eds. 2013). For a full listing of the book series of the Law of the Sea Institute-UC Berkeley, see the organization's website at http://www.law.berkeley.edu/5898.htm.

study of ocean and coastal policy issues while also sponsoring briefings on ocean issues for legislators; the group also engaged in advocating both integrated coastal management and the cause of a comprehensive national oceans policy review.[6]

II. FIRST BOOK: ON U.S. WAR STRATEGY IN VIETNAM

Over the years, Jon won a position of great standing among ocean law experts—a small, exceptionally congenial international cohort that is tightly interconnected and linked by both international institutional and personal relationships. It was in this context that I knew him best, both as colleague and great friend over more than thirty years' time. Therefore, it was an astonishing discovery for me when I learned—indeed, only after commencing on work for the present Article—that Jon's first research publication was not in the field of ocean law at all. It was, rather, a book entitled *North Vietnam's Strategy for Survival*.[7] Published in 1972, this ambitious work was an expansion and revision of research that he had embarked upon some five years earlier for a seminar paper in a Harvard Law School class co-taught by Henry Kissinger (a figure, it is intriguing to contemplate, whose philosophy of international relations can be fairly described as an almost perfect reverse image of Jon's own!).[8]

The book provided a painstakingly detailed account of the massive American air-bombing campaign against the North during the Vietnam War—and the failure of the bombing strategy to crush the resistance of the people and government that were its target. Jon's writing style here was in a pervasively low-key tone, leaving the impression of determined, objective detachment. This, of course, is in contrast to the passionate engagement that one might expect of Jon on such a subject given the explicit—and often passionately stated—moral conviction (or, at minimum, the well delineated normative conclusions) found in most of his writings. Instead, the book may be fairly described as a "documentary" work, intensely factual in both content and presentation,

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[6] The other members of the organization's steering committee included the eminent marine policy scholars Robert Knecht and Biliana Cicin-Sain of the University of Delaware; and also David D. Caron and the present writer, of UC Berkeley School of Law. The group's agitation for a policy review was joined by many other marine policy groups, and it successfully produced action in Congress and a parallel effort by the Pew Foundation, to produce their separate famous "ocean reports." For the Pew Oceans Commission 2003 report, see http://www.pewtrusts.org/our_work_detail.aspx?id=130.; for the national commission's 2004 report, see http://govinfo.library.unt.edu/oceancommission/.

[7] JON M. VAN DYKE, NORTH VIETNAM'S STRATEGY FOR SURVIVAL (1972).

[8] Kissinger and his co-instructors chose the seminar paper for permanent deposit in the Widener Library at Harvard, commending it for its distinction of scholarly research (Information from Jon Van Dyke's C.V. and bibliography of writings, unpublished manuscript, and family papers on file with Attorney Sherry Broder (Apr. 19, 2013)).

falling more readily into the category of "national security study" than a work on law, or on law and society. Unrelenting, however, is the laying out of the bare facts (which Jon compiled through research in depth, in widely diverse sources). Told in stunning detail is a recapitulation of the bombing campaign in all its dimensions, vividly conveying how devastating it was in the damage that it wrought to life, property, and environment: There were more than 100,000 bombing missions in a total of 350,000 sorties during February 1965 to November 1968, we are told; and a total of nearly three million tons of explosives was rained down on North Vietnam, with the attacks continuing until 1971 while their range was also expanded to hit additional targets in Laos and Cambodia.[9]

The enormity of the particulars is difficult for one to absorb and fully comprehend: for example, a million pounds of explosives dropped in a single raid on a September day in 1968. Jon reconstructs the story of the forced evacuation and dispersal of North Vietnamese civilians in response to the bombing; and then the reader is taken through the facts as to how dikes and irrigation complexes were destroyed and agricultural capacity decimated, with inundation and destruction of fields and villages.[10] He also documents the record as to how North Vietnam's industrial plants were relocated and production levels astonishingly revived.[11]

The resistance mounted by North Vietnam in the face of this devastation, as a resilient civilian population cooperated with the harsh strategies imposed by their own determined government, is set forth in this book with great clarity. The large story is framed against the essential irony of the American strategy—which is that, despite the incessant bombing, and despite the associated tremendous losses of planes and the casualties suffered by the U.S. armed forces, North Vietnam successfully endured, but the U.S. government was seemingly immoveable. Jon underlined this irony by recounting how the top U.S. generals and Defense Department officials periodically admitted what became the main conclusion of his book, viz., that the bombing completely failed in its objective of bringing North Vietnam down or even shortening the duration of the war.[12]

Coming away from this book, the reader is left to draw moral lessons independently. The empirical data for making a judgment are abundant: it offered a massive quantity of hard evidence drawn from government sources, including North Vietnam's own publications (presumably in translation from U.S. government sources); the reports of French, American and other war journalists

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[9] *See* Van Dyke, *supra* note 7, at 240-42, 247.

[10] *See id.* at 240, 126-59, 184-85 *et passim.*

[11] *See id.* at 189-215.

[12] *See id.* at 22-23, 29, 34-35, 208.

on the ground; and congressional hearings and Department of Defense documents. The overall effect of this enormous trove of data was assessed by the eminent Asian affairs expert Edwin Reischauer (professor at Harvard and one-time ambassador to Japan), who praised the book as providing "the clearest picture the general public has as yet had" of the U.S. strategy. Beyond that, he asserted, Jon's research was "a major contribution toward the continuing reassessment of America's policies in East Asia."[13]

This first book was a remarkable achievement for a neophyte academic. It was to be only a precursor, however, of writings of similarly high quality—but in a different style—that Jon would start producing almost immediately after its publication. These writings would prove to be only the first burst of scholarship and commentary in what became a prodigious flow of new work that he turned out in the nearly forty years to follow.

III. SCHOLARLY WORK AMIDST THE WINDS OF CHANGE

By the time his book on the Vietnam bombings appeared in 1972, Jon had taught on the law faculty of Catholic University for two years, following his graduation in 1967 with the JD *cum laude* at Harvard; had participated in a summer 1986 seminar on human rights law at the School of Law, UC Berkeley; and had clerked for Chief Justice Roger B. Traynor during 1969-70, then held a one-year research appointment at the Center for the Study of Democratic Institutions at Santa Barbara. He was in the midst of his initial year of a new appointment on the faculty of the Hastings College of the Law in San Francisco, and was teaching courses in constitutional law, administrative law, and international law.

These early years of his academic life were a period of dramatic changes in American society and in the nation's politics. The rush of dramatic events reflected or instigated new racial tensions and interracial violence, political radicalism that arose in reaction to the Vietnam War and especially its impact on the nation's youth; and then came angry, often-repressive responses to this radicalism mobilized by both centrist and right-wing elements in the private sector and, in the Johnson and Nixon years, from the government itself. The Watergate scandal and the Nixon impeachment intensified and broadened an existing mood of crisis in governance and impelled new constitutional debates. Also influencing domestic change were the Cold War confrontations of the superpowers, including the threats of their nuclear arsenals and missile strength, and the destabilizing impact of anti-colonialism and emergence of third world nations as a major force in international diplomacy. And as is now well

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[13] Edwin O. Reischauer, *Foreword* to JON M. VAN DYKE, NORTH VIETNAM'S STRATEGY FOR SURVIVAL at 7 (1972).

recognized, in retrospect, deep cultural changes were more than transitory phenomena; for decades to come, they would challenge many of the longest-held traditional social norms in both Europe and America.[14]

Domestically, many of these tensions and challenges became the stuff of famous litigation that placed the state and federal courts in the eye of the cultural storm. A parade of high-profile cases involved school desegregation strategies, church-state relations, claims against agency discretion (especially with regard to welfare program administration) that were being advanced in the name of individual dignity and autonomy, and advocacy of a radically expanded right of privacy. Campaigns for no-fault divorce legislation and community property in marriage law; conflicts over the constitutionality of the regulations of students' behavior alleged to be in violation of freedom of speech; various expansions of regulatory agencies' jurisdiction and enforcement powers, especially in the advent of environmental protections; and a revisiting of the rights of persons enmeshed in criminal process, the rights of prisoners; and yet more: It was a formidable list, building up at a time of turmoil and challenge. In these years, the politics and direction of legal change in some states of the federal union reached a peak of "legal liberalism," yet there was also a powerful conservative response at every level of politics and in every arena of discourse and power.[15]

As a real-life context for teaching law, all this was an unsettling environment. The cool tone and relentlessly factual approach of Jon's book on Vietnam, suggesting a preference for distancing himself from what might seem a polemical engagement in controversy fraught with contested moral content, would be put aside in Jon's new writings, even before his book had gone to press.

IV. MORAL CONTENT BROUGHT TO THE FOREFRONT OF ANALYSIS

The first of Jon's new writings to appear was an article, "The Laws of War—Can They Ever Be Enforced?" published in mid-1971 in *The Center Magazine*, a journal issued by the Center for the Study of Democratic Institutions, where Jon held his research appointment as a visiting fellow during 1970-71.[16] He provided in this article a systematic accounting—or,

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[14] *See, e.g.*, RICHARD POLENBERG, ONE NATION DIVISBLE: CLASS, RACE, AND ETHNICITY IN THE UNITED STATES SINCE 1938 (1991); RICHARD M. ABRAMS, AMERICA TRANSFORMED: SIXTY YEARS OF REVOLUTIONARY CHANGE, 1941-2001 (2006).

[15] *See,* inter alia,, LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM (1998); EARL WARREN AND THE WARREN COURT (Harry N. Scheiber ed., 2007); THE BILL OF RIGHTS IN MODERN AMERICA (David Bodenheimer & James Ely, Jr. eds., 2008).

[16] Jon Van Dyke, *The Laws of War—Can They Ever Be Enforced?*, THE CENTER MAGAZINE, July 1971, at 22.

more to the point, systematic indictment—of actions by the American military in the Vietnam War that he argued were violations of customary international law and, more specifically, of the Geneva Conventions of 1949 and predecessor humanitarian treaties codifying what has traditionally been termed more generally "the law of civilized nations."

Jon's new focus on international human rights law, and the international conventions that addressed war crimes, was evident in virtually every line of this new study. His sense of outrage, it may be said, was now finding full expression. Thus he deplored the American violations of a wide set of the norms for protection of civilians; he condemned the U.S. government for war crimes for many of the very same features of the disastrous bombing strategy that he had catalogued in his book so methodically but without legal or ethical comment; and he recounted the findings of several international initiatives and informal tribunals that had addressed the war crimes issue in Vietnam. His focus was on the United States and its allies, and so he did not choose to explore the question of policies of the Viet Cong that I think he would have deemed to be similarly in violation of humanitarian precepts of customary law.

Special focus was given to the notorious My Lai Massacre, in which an entire village of civilians, including women and children, were brutally murdered by a U. S. Army unit, a disaster paralleled by a series of massacres perpetrated by a South Korean unit allied with the American forces. The officers and foot soldiers responsible for the My Lai outrage were long protected, as Jon pointed out, by the Army in an elaborate cover-up. Only Lieutenant William Calley, unit commander on the ground, was brought to trial and convicted; and then almost immediately President Nixon reduced his sentence to house arrest.

Taking the My Lai tragedy and its sorry legal aftermath as a case in point, Jon pushed his analysis a significant step forward by turning to the general question of how best to implement legal instruments in the field of human rights. He proposed the need for trials and punishment of the high-level officials of the U.S. military and of civilian government who, he contended, should be seen as ultimately responsible for the decisions and policies that permitted such a massacre to occur in the ground half a world away. Such trials, however, must be conducted at an international level: Experience had clearly shown, he maintained, that a belligerent government could never be trusted to impose just punishments for such violations in time of war.

Such was his answer to the question (as posed in the title of the article) as to whether the laws of war could be enforced. His confidence in international institutions, empowered to "give teeth" to norms and treaty requirements—essentially an endorsement of the jurisprudence legitimized by the Nuremberg

trials—would become a recurring theme in Jon's later writings.[17] Both the strongly moral tone and his preference for exercise of institutionalized, supranational legal authority seem now to have moved to the very core of Jon's jurisprudence. Hence his early book on the bombing campaign can best viewed, in retrospect, as an anomalous beginning in Jon's overall record of scholarly contributions. The moral and ethical dimension of his systematic marshaling of evidence for war crimes by America in the Vietnam War, as he constructed it in his 1971 article, revealed a new research priority and foretold accurately the intellectual style of his future scholarship.

V. UC BERKELEY SEMINAR ON HUMANITARIAN LAW, SUMMER 1986

How did he come to adopt this new normative and judgmental style? There seems little doubt that an important influence on him, impelling this shift in his scholarly stance, was his participation a few years earlier in a summer seminar at the School of Law in the University of California, Berkeley. The seminar was held in 1986 and was devoted to the subject of human rights law. It had the stated and very specific goal of drafting a set of rules for implementation of the recently concluded International Convention for the Elimination of All Forms of Discrimination.[18] Organized by Frank Newman, a Berkeley professor of administrative law and former law school dean, and funded by a foundation grant, the seminar brought together a small group of law students and early-career scholars, including Jon as visiting scholar. They were introduced to human rights law by several distinguished visiting consultants and special lecturers who had written important studies of Europe's experience with implementation of human rights law. The participants undertook an intensive program of readings on humanitarian law, and then they went on to collaborate in developing a paper with two purposes. The first was to identify and analyze the types of issues that would most likely come up in implementation of the Convention; the second was to construct a set of detailed procedural rules for the international committee of experts that was established to oversee the process.

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[17] Late in his career, for example, he would similarly become a strong proponent for establishing the International Tribunal for the Law of the Sea (ITLOS), praising its formation as a step forward in giving teeth to customary law—that is, in obtaining just and effective dispute resolution among nations confronting one another in dangerous situations on the world's oceans. Van Dyke, *supra* note 1. Similarly in his many and varied writings on the international conflicts in East Asian ocean waters, he counseled privately and insisted in publications that referring disputes to ITLOS, or the International Court of Justice (ICJ), or arbitral tribunals was a clear imperative if fair resolution of disputes and an atmosphere of peaceful relations were to be achieved.

[18] The International Convention for the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969).

Professor Newman published the resulting document, under his name as author, in the 1968 volume of the *California Law Review*.[19]

Two of the UC Berkeley Law School students who participated with Jon in this seminar are today among the world's leading experts in human rights law. They are Professors Dinah Shelton of George Washington University and David Weissbrodt of the University of Minnesota.[20] According to their recollections, the seminar—the first to be organized in a law school west of the Mississippi River, as they recall—had a catalytic effect on their academic focus and career goals, as it did on Jon's. Professor Shelton has remarked that, when asked how she became interested in human rights law, she routinely answers that she was "in the right place at the right time, and the right place was Berkeley."[21]

An interesting sidelight on the Berkeley seminar is that Professor Newman—who would later become one of the giants internationally in the human rights field, both as activist and in his academic pursuits—was initially introduced to the field, and became committed to it, as the result of the seminar.[22] There is little reason to doubt that Jon's consuming interest and enthusiasm for advancing the cause of human rights (which came to a strong focus later, for him, on indigenous peoples' rights) and its pursuit through the development of international law, similarly owed much to the seminar. In any case, we know from the record of his subsequent scholarship and activities in public life that this interest blossomed into a passionate commitment that never dimmed during the rest of his life.

VI. CLERKSHIP WITH CHIEF JUSTICE TRAYNOR

A second experience in this initial period of Jon's career that arguably influenced in a profound way his view of the law—and helped shape his concept of how he might best contribute to legal development in his own future work—was his service during 1969-70 as judicial clerk to Chief Justice Roger B. Traynor of the California Supreme Court. Traynor was one of the nation's most respected state judges, renowned for his learning in the law, but also for his activist posture as a judge. The hallmark of his jurisprudence was his willingness to innovate boldly when he deemed it necessary to protect and advance the public interest in response to changing social and economic conditions. He regarded it as unrealistic, ultimately as damaging, and in every respect insupportable, for courts

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[19] Frank Newman, *Rules of Procedure for the New Tribunal: A Proposed Draft*, 56 CAL. L. REV. 1569 (1968).

[20] *See* Dinah Shelton, *The Inter-American Human Rights Law of Indigenous Peoples*, 35 U. Haw. L. Rev. 937 (2014); *see also* DAVID S. WEISSBRODT, THE HUMAN RIGHTS OF NON-CITIZENS (2008).

[21] Private communication to the author.

[22] In separate private communications to the author, both Professor Weissbrodt and Professor Sheldon recalled this distinct change in Newman's personal agenda.

to adhere slavishly to inherited doctrines without assessing them continuously in the light of contemporary changes in community values.[23]

Traynor had been at the forefront in the California court's leading role nationally in shaping the "tort revolution" in the common law, a famous (and as it proved, enduring) shift in the premises and doctrines of liability. He was similarly ahead of his times in applying the imperatives of equal protection doctrine, in several areas of law well ahead of the Warren Court's egalitarian decisions. A well-known example of Traynor's jurisprudential style was his court's invalidation of the California "miscegenation law," which had forbade interracial marriage; this decision was handed down almost twenty years before the U.S. Supreme Court adopted, in *Loving v. Virginia*, the same view of such discriminatory laws.[24] In their often-dramatic expansion of constitutional rights in criminal process, too, Traynor's opinions enshrined basic new doctrines in state law well ahead of the federal judiciary's own innovations—as, for example, in applying the exclusionary rule to admissibility of evidence in state court trials.

In an insightful summarizing of Traynor's jurisprudence, an historian of California law has written: "His concern for the powerless, his tendency toward social egalitarianism, his fear of the 'police state,' and his pro-consumer policy orientation resonated with contemporary liberalism. He unabashedly articulated policy-based justification for legal reform giving clear indications of his conception of the public interest and the values that shaped it."[25]

During the period of Jon's service in Traynor's chambers, the Court decided the landmark case of *Gion v. Santa Cruz,*[26] mandating another great change in California law. In their unanimous decision in *Gion,* the Justices denied the right of a recent purchaser of oceanfront land to exclude the public from a beach property to which the public had long enjoyed unchallenged access. The court drew from common law concepts, constitutional language, and legislative history

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[23] For documentation and full citations in support of the following brief summary of Traynor, see, for example, the excellent study of Traynor's jurisprudence by BEN FIELD, JUSTICE ROGER TRAYNOR AND HIS CASE FOR JUDICIAL ACTIVISM (2000); see also *Rationality and Intuition in the Process of Judging:* Roger Traynor, in G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES (3rd ed. 2009). Traynor's accomplishments as creative judicial innovator in the law are usefully compared with the renowned contributions of Chief Justice Lemuel Shaw in a classic article by Edmund Ursin, *Judicial Creativity and Tort Law,* 49 GEO. WASHINGTON L. REV. 229 (1980-81).

[24] 338 U.S. 1 (1967). The opinion by J. Traynor declaring the California statute unconstitutional is Perez v. Lippold, 198 P.2d 17 (Cal. 1948).

[25] FIELD, *supra* note 23, at 18.

[26] Gion v. Santa Cruz, 465 P.2d 50 (Cal. 1970).

to rule that a "strong public policy" required protection of general access.[27] The language of this decision expressed in powerful terms the strength of this court's concept of public interest and public rights, as against claims of private property that had to be subordinated to the higher good of the community.

Jon retained in his law school office files until his tragic death in November 2011 his manuscript drafts of the court's opinion in *Gion,* containing notes on the authorities that he identified either on his own, at Traynor's direction, or by following leads from references in the briefs. It is impossible to say with any certainty, on the evidence at hand, to what extent the final opinion incorporated specific analysis or language that originated with Jon. What can be said confidently, however, is that he was witness at close hand to an historic moment in American property law.

There seems little question, moreover, that the confrontation between private claims to the state's natural resources and what the court regarded as in the imperative public interest—the issue faced so explicitly in the *Gion* litigation—foreshadowed in a general way issues that would be prominent in litigation that Jon would conduct in future years in Hawai'i, in his cases on water law and environmental protection. And it is evident, too, that Jon's posture with regard to the judiciary's proper role in upholding public policy and the public interest, even when critics might decry *Gion*-style "judicial activism," expressed principles that had been creatively articulated in the exciting environment of the Traynor Court.[28]

Perhaps his experience as Traynor's clerk in fact served merely to reinforce a principled liberalism that Jon already had considered and already held dear. Even if that were so, his work on the *Gion* decision and, more generally, the environment of judicial innovation that prevailed in the court, seem to have had a vital influence on his personal philosophy and his later scholarship. One must think that his clerking year served to strengthen and energize Jon's personal commitment to the brand of "legal liberalism" and progressive jurisprudence that Traynor and his colleagues had impressed on the landscape of American state law, just as the Warren Court was doing in the larger national context.[29]

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[27] *Id.* at 59. On the deep historical roots of public rights jurisprudence, see Harry N. Scheiber, *Public Rights and the Rule of Law in American Legal History,* 72 CAL. L. REV. 217 (1984).

[28] References to his notes on the case and drafts of the opinion, in the Van Dyke office files at the Richardson School, were located and generously provided by Sherry Broder.

[29] The phrase "legal liberalism" is used here as it has been analyzed by Professor Laura Kalman. *See* KALMAN, *supra* note 15.

VII. RESEARCHES ON THE JURY SYSTEM: LAYING DOWN A MARKER

Jon had embarked, meanwhile, on yet another and distinctly different line of research during this early phase of his career: a set of studies of the American jury system. He published an article, "The Jury as a Political Institution," in *The Center Magazine* in March 1970, a year before his war crimes article appeared. It was a stunning work, for the forcefulness of his style of argumentation and for the content of his policy recommendations.

The trial jury, he contended, was the only element in criminal process in which there was no discretion as to the legitimacy or applicability of a law: the police had discretion to arrest; the prosecutor had discretion to decide whether to charge; and the trial judge, who controlled day-to-day process, enjoyed full discretion in giving his or her interpretation of the relevant law in the charge to the jury. Only the trial jury itself had no discretion in this regard; it was required to obey the judge's instructions on the law. There was no constitutional imperative that juries should be subordinated in this way to a judge's view of the law under which defendants were tried, Jon argued. Juries should be free to act as "the conscience of the community," acting in defense of "community values," and in that way to assure that justice according to those values should prevail. He wanted to enshrine jury nullification in the very fabric of criminal process. The power to nullify, in his view, was a logical element in the essential justification for having juries at all.

But he went further, in an intellectual move that would become the hallmark of his style in addressing issues of law and policy: *He lay down a marker,* placing that marker well out at the farther boundaries of the mainstream, or even beyond the outer limit of reformist discourse. Students of modern ocean law will recognize immediately this strategy of argument—and of reform—in Jon's work in their field.[30] In this instance, regarding juries, Jon proposed that in addition to accepting that jury discretion as to the law would be legitimate, judges should actually be required to *instruct* juries that they had the authority to nullify! This proposal brought criticism down on him, of course, with a bevy of eminent scholars warning that Jon's position on juries would simply produce "anarchy" both in the courts and in the jurisprudence of criminal process.[31] But Jon found such criticism misplaced, and he was unmoved by it.

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[30] *Cf.* Van Dyke, *infra* notes 53, 54 & 56 (with regard to Jon's views on the precautionary principle and on South China Sea issues).

[31] The scholarly criticisms and the concern about "anarchy" in particular are discussed in Alan W. Scheflin & Jon Van Dyke, *Merciful Juries: The Resilience of Jury Nullification*, 48 WASH. & LEE L. REV. 165, 165-66. Sanford Kadish of the University of California, Berkeley, law faculty, and a leading figure in study of criminal law, was among the critics. It is instructive that Professor Kadish, serving as editor of a major scholarly encyclopedia of

The boldness of his views on the jury—the marker he laid down—expressed what may fairly be called the radical-reformist aspect of Jon's emergent intellectual posture on the law. He had become convinced, as is revealed by his later writings, that bold proposals, explicitly asserting moral imperatives and expressing ideas that others might deem utopian, could make a difference in the world. This conviction became an article of faith for him; and I think he never deviated from speaking or acting on that faith in later years.

In the years that closely followed publication of that first article of 1970 on the jury, Jon went on to write on other aspects of jury functions. The major focus of his research now shifted, however, to the discrete problem of jury selection. During the five-year period 1975 to 1980, he produced a series of monographic articles presenting analyses of his own and other scholars' empirical field-research to document what he declared was systematic bias in jury selection working against the inclusion of women, minorities, and low-income persons. Although the U.S. Supreme Court had taken notice of selection bias and its effects in the racially segregated South, Jon contributed a persuasive body of empirical data from a broad cross-section of the country. Again, a pervasive theme in his argumentation was the issue of how juries could perform the function that he regarded as essential, that is, protection and assertion of "the values of the community."[32]

This sustained line of new research culminated in 1977 with publication of a major book, *Jury Selection Procedures: Our Uncertain Commitment to Representative Panels*.[33] This study won wide attention and was much admired in the academic field of criminal process studies. Only by adopting procedures to assure that juries would be representative, Jon declared in the book's concluding passages, could "a stamp of democratic legitimacy" be achieved in the decision making that led to trial verdicts. To tolerate jury selection as it was widely

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criminal law, nonetheless later selected Jon to contribute the article "Jury Trial." This does not suggest that Professor Kadish changed his mind on jury nullification, but it is intriguing evidence of how well respected Jon had become for the depth of his research on jury procedures and performance. The article is Jon M. Van Dyke, *Jury Trial, in* 3 ENCYLOPEDIA OF CRIME AND JUSTICE 932-941 (S. Kadish ed., 1983).

[32] He did not overlook the counter-argument that community sentiment could be tyrannical, as, for example, when an all-white middle and upper class jury, representing the prevailing community racial prejudices among whites, passed judgment on poor black or other minority defendants. In such case, he pointed out, federal courts had already moved in to monitor such situations and had begun to intervene when prejudice had been manifest; and in any event, even a single minority person on an otherwise all-white jury could prevent an unjust verdict.

[33] JON. M. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS (1977).

practiced in America, he wrote, would be to deny "the community's norms and collective conscience" their proper influence in criminal justice.[34]

VIII. THE CENTER AT SANTA BARBARA AND THE NEW CHALLENGES IN OCEAN AFFAIRS

Jon's resident fellowship during 1970-71 at the Center for the Study of Democratic Institutions in Santa Barbara—an interim year between the clerkship with Traynor and his appointment at Hastings—provided him with a stimulating academic milieu. In the case of the Center, it was a milieu with a distinctly progressive-liberal bent that reflected the political and ideological orientation of the Center's leadership.[35] With its core of resident fellows, with visiting fellows from several academic fields, journalism, and public life, and with its energetic program of international conferences, the Center provided a fertile ground for Jon's expanding academic and activist interests. It was an environment of debate and discourse in which normative analysis and the systematic application of moral standards were encouraged. And as such, it would have been a setting in which the trajectory of Jon's values as a scholar would be given new impetus.

During his residency at the Center, he advanced the preparation of his first book for publication. He also composed his 1971 "Law of War" article, which, as we have noted already, announced his entry into the arena of moral discourse about the war and forcefully raised questions about the need to enforce international humanitarian norms.[36] He also joined with other lawyers in signing on to an amicus brief in the case of *Massachusetts v. Laird*, in which the state government unsuccessfully challenged the constitutionality of the Vietnam War policies and actions.[37] His concentrated work on the subject of juries apparently lay ahead, however, since his next study on the subject was not published until 1975; but in

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[34] *Id.* at 219.

[35] The Center was founded in 1959 by Robert Hutchins, former president of the University of Chicago, and its board members included Justice William O. Douglas, the journalist Harry Ashmore (who would later become director), and other figures known for their liberal views on domestic issues and their internationalist approach to foreign affairs. *See, e.g.*, Michael Redmon, *Center for the Study of Democratic Institutions,* SANTA BARBARA INDEPENDENT (May 28, 2009), *available at* www.independent.com/news/2009/may/28/center-study-emocratic-institutuions/.

[36] Van Dyke, *supra* note 16.

[37] 400 U.S. 886 (1971); Anthony A. D'Amato, *Brief for Constitutuional Lawyers' Committee on Underclared Wars as Amicus Curiae,* Massuchusetts v. Laird, 17 WAYNE L REV. 67-151 (1971) (where the brief was published).

1971 he did author a major article on the right to counsel in California's parole revocation proceedings.[38]

The most prominent specific result of his residence at the Center, however, was that it set him on his course toward preeminence in the field of ocean law and policy. The catalyst was his colleagueship there with Elisabeth Mann Borghese, who was one of the senior academic researchers on the core research staff. Borghese was then becoming an important voice in ocean law debates, and she would soon exercise a major influence internationally on the developments leading to the UN Convention on the Law of the Sea (UNCLOS). In 1968 she wrote a proposed "statute" (setting forth core principles plus detailed rules and procedures to be included in a global treaty) for the peaceful uses of the oceans. This study, perhaps better termed a manifesto, was published by the Center and evoked wide discussion in the United States and internationally among diplomats and international lawyers.[39]

Borghese's activity in this cause of a treaty for a universal law of the sea was at an intensive pitch by the time Jon arrived at the Center. The moment was ripe for Borghese's campaign, for in 1970-71 the UN General Assembly was moving quickly in a process of initiating positive steps to organize a global conference on the subject.[40] In December 1970 the General Assembly passed, by a vote of 108 to 0, with 15 abstentions, UNGA Resolution 2749, entitled "A Declaration of Principles Governing the Sea-bed and Ocean Floor Beyond the Limits of National Jurisdiction," adopting the principle that resources of the seabed under the high seas were the "common heritage of mankind."[41] Shortly afterward, the General Assembly formally called for the convening of the long-contemplated

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[38] *See* Jon M. Van Dyke, *Parole Revocation Hearings in California: The Right to* Counsel, 59 CAL. L. REV. 1215 (1971). This article was used by Justice Tobriner in his opinion in *In re Tucker*, 5 Cal. 3d 171, 186, 486 P.2d 657, 666 (1971) (dissenting opinion), and was cited by Justice Douglas in his opinion in *Morrissey v. Brewer*, 408 U.S. 471, 498 (1972) (dissenting opinion) and by Justice Powell in the majority opinion written for *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973). While serving on the Hastings faculty, Jon also was active in the public activities of the Bar and in focused law reform studies.

[39] *See* Betsy Baker, *Uncommon Heritage: Elisabeth Mann Borhese*, INTLAW GRRLS, (Feb. 8, 2012), *available at* http://www.intlawgrrls.com/2012/02/uncommon-heritage-elisabeth-mann.html.

[40] An authoritative and succinct historical study of the UN conferences to frame a treaty on law of the sea, in the context of other contemporary developments, is provided in LAWRENCE JUDA, INTERNATIONAL LAW AND OCEAN USE MANAGEMENT: THE EVOLUTION OF OCEAN GOVERNANCE 138-243 (1996).

[41] Declaration of Principles Governing the Seabed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiciton, G.A. Res. 2749 (XXV), U.N.Doc.A/RES/2749 (Dec. 17, 1970).

conference on law of the sea. The terms of this further resolution, as to agenda, went beyond seabed questions to embrace the entire range of issues left outstanding after failure of the 1960 conference in Geneva to satisfactorily resolve deeply rooted conflicts of legal opinion (and the conflicts of national interests in the Cold War world).[42]

With the Center's financial resources at her disposal, Borghese was then sponsoring a stream of seminars, lectures, and consultants' visits on oceans policy—events that captured Jon's attention and concern. These contacts were a superb source of education, and inspiration, on ocean affairs; and they served Jon well, as events proved, when, later in his career, he would make a serious commitment to the field. Borghese, a colleague much admired by Jon, recruited him as an enthusiastic (and professionally well-credentialed) ally in her campaign. The larger goal of advancing internationalist and global approaches to problem-solving and the attainment of world peace, the objective that framed her position on ocean law, was, as those who knew Jon personally can attest, entirely consistent with his own position on the moral basis and essential purpose of legal ordering. Borghese never wavered from a demand that the world community honor the famous concept voiced by Ambassador Pardo in a Malta resolution before the General Assembly in 1967—that the seabed was a "common heritage" and should not be susceptible of capture and ownership by any State or other entity. It became for her (as it was ultimately enshrined in the text of the UNCLOS of 1982) the core principle for the legal ordering of the oceans more generally.[43]

Jon was thus drawn into an active role in assisting Borghese in a project for organizing a high-level international conference to be held in Rhodes and entitled *Pacem in Maris*. He aided the project in its organizing phase, in the development of agenda statements, and then in his personal participation in the conference, one presumes in the capacity of an assistant to Borghese in administration. It was an ambitious enterprise in its scale, notable for the prestige of participants; and it received abundant publicity

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[42] ANNE L. HOLLICK, U.S. FOREIGN POLICY AND THE LAW OF THE SEA 234-39 (1981); Jon Van Dyke & Christopher Yuen, *"Common Heritage" vs."Freedom of the High Seas": Which Governs the Seabed? in* THE LAW OF THE SEA AND OCEAN DEVELOPMENT: ISSUES IN THE PACIFIC BASIN: PROCEEDINGS OF THE LAW OF THE SEA INSTITUTE, FIFTEENTH ANNUAL CONFERENCE, OCT. 5-8, 1981, HONOLULU, HAWAI'I 206, 221-26 (Edward L. Miles and Scott Allen eds., 1981), also published under same title and authorship, in 19 SAN DIEGO L.REV. 493 (1981).

[43] I rely upon personal discussions with Jon Van Dyke over many years, and with Sherry Broder, April 2013, for this description of how Borghese and the Center residency affected Jon's expansion of the scope of his interests; and upon correspondence with Dr. Betsy Baker on Borghese's career during the time period referred to here.

when it met in Rhodes during the last weeks of Jon's formal association with the Center.[44] As soon as it had ended, Jon needed to move his residence from Santa Barbara north to San Francisco, where he would immediately take up his new teaching appointment at Hastings.

Almost ten years would pass, however, before Jon would return in earnest to the subject of ocean law and policy. Presumably he followed closely the progress of the momentous debates in the UN conference's negotiations on the subject during 1973-81; but his attention as teacher and research scholar was focused on other things. These other projects included two collaborations, written soon after he moved to Hawai'i, that issued in major studies on water rights and of constitutional issues relating to growth management policies. Both of the latter were prepared for the Hawai'i Department of Budget and Finance, signaling Jon's entrée in 1977 into the arena of Hawai'i state policy and state constitutional law—an arena in which he would maintain a high-profile presence through the thirty years' time that remained to him.[45]

IX. REASSERTED FOUNDATIONS OF THE VAN DYKE LEGACY IN OCEAN LAW SCHOLARSHIP

When Jon decided to rededicate his research focus to embrace ocean law, around 1980 or 1981, it marked a dramatically new beginning for his scholarship. The shift back to ocean law was significant in itself; but at the time, few even of his friends or colleagues could have imagined how wide a swath he would cut through nearly all the subfields of ocean law with his important scholarly writings in the years to follow.

It was especially appropriate that it was in 1982, the very year when UNCLOS was opened to signature and ratification, that Jon's wife and colleague in the law, Sherry Broder, co-authored Jon's first article on marine boundaries.[46] This is an excruciatingly technical area of ocean law, one that has roiled the doctrinal waters in the International Court of Justice, the learned treatises, and briefs and opinions in diverse arbitral awards. The

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[44] Baker, *supra* note 39.

[45] Jon Van Dyke, Williamson B.C. Chang, Nathan Aipa, Kathy Higham, Douglas Marsden, Linda Sur, Manabu Tagamori, & Ralph Yukumoto, *Water Rights in Hawaii*, *in* LAND AND WATER RESOURCE MANAGEMENT IN HAWAII 141-333 (Hawaii Dept. of Budget and Finance, 1979); Carl M. Selinger, Jon Van Dyke, Riki Amano, Ken Takenaka, & Robert Young, *Selected Constitutional Issues Related to Growth Management in the State of Hawaii,* 5 HASTINGS CONST. L. Q. 639-714 (1978), *reprinted in* GROWTH MANAGEMENT ISSUES IN HAWAII 129-201 (Hawaii Dept. of Budget and Finance, 1977).

[46] Sherry P. Broder & Jon Van Dyke, *Ocean Boundaries in the South Pacific,* 4 U. HAW. L. REV. 1 (1982).

field became for Jon a subject in which he worked assiduously over the years, and in which by the 1990s he had become a world-class authority.[47]

Especially appropriate, as well, was the *regional* focus of the coauthored 1982 article—entitled "Ocean Boundaries in the South Pacific"—in the sense that it foretold Jon's perduring interest in the life, law, and socio-cultural issues in the Pacific region. This interest, too, would be expressed in many of his most influential later writings. By the mid-1980s, he had also embarked on a project for analysis of the baffling conflict of legal views over "islands" and "rocks" (as each was defined in arbitral and judicial decisions, and in the UNCLOS). This analysis bore on a crucial issue in both the academic debates and the geopolitics of ocean law, since whether such mid-ocean structures were entitled to a 200-mile EEZ would be at issue. In 1982-83 he coauthored with Robert Brooks two articles on international law relating to uninhabited islands—yet another variant of boundary issues in this daunting subfield of international law.[48]

After the conclusion and opening for signature of the UNCLOS in 1982, there was ever-rising public discussion of the Convention's merits and potential impact. This was evidenced in debates within many countries over whether to sign and ratify. They were accompanied by a wave of new scholarship, articles in popular publications, a proliferation of conferences, and the appearance of journalistic and political commentary regarding the treaty and its proposed innovations in law. A "North-South" division over implications for the post-colonial economies of the new coastal economic zones; the fundamental coastal vs. distant-water fishing interest views on the high seas area and the law of highly migratory species; innocent passage vs. the concept of free transit; military and scientific activities that might be constrained and limited; and other important points—cutting across them, of course, the Cold War alignment of the great powers—lent great urgency

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[47] Sherry Broder also was coauthor of numerous later works in this and allied areas of ocean law and policy; and she also was the co-litigator with Jon in numerous human rights cases, including the famous 1986 tort suit on behalf of the victims of the Marcos regime's torture and killings in the Philippines. *See, e.g., Trajano v. Marcos*, 978 F.2d 493 (9th Cir. 1992)), *cert. denied*, 508 U.S. 972 (1993); *Hilao v. Marcos*, 25 F.3d 1467 (9th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995), and 103 F.3d 762 (9th Cir. 1996); *Merrill Lynch, Pierce Fenner and Smith, Inc. v. ENC Corp.*, 464 F.3d 885 and 467 F.3d 1205 (9th Cir. 2006); *Republic of the Philippines v. Pimentel*, 553 U.S. 851 (2008). *See also* Van Dyke, *The Fundamental Right of the Marcos Human Rights Victims to Compensation*, 76 PHIPP. L. JNL. 169-93 (2001).

[48] Jon M. Van Dyke & Robert E. Brooks, *Uninhabited Islands: Their Impact on the Ownership of the Oceans' Resources*, 12 OCEAN DEV. AND INT'L L. 265 (1983); Jon M. Van Dyke & Robert E. Brooks, *Uninhabited Islands and the Ocean's Resources: The Clipperton Island Case, in* LAW OF THE SEA: STATE PRACTICES IN ZONES OF SPECIAL JURISDICTION, 13 L. Sea Inst. 351-92 (T. Clingan ed., 1982).

to the debates.[49] Jon became a leading voice in this discourse. Two of the research fields in which he quickly established a major position internationally were, first, the law of seabed mining under terms of UNCLOS, and, second, the regulation of nuclear activities on the world's oceans.

Regarding seabed mining, he pursued the basic issue: On what basis should States and private parties have access to engage in exploitation of the seabed in the "high seas," that is, the vast oceans area beyond the outer limits of coastal States' claims to sovereignty or of special jurisdiction? This had been an intensely contested issue since the possibility of mining valuable nodules from the seabed first captured attention from industry and academe in the 1960s; and the debate of principles and specific rules continued even after the signing of UNCLOS in 1982.[50] For Jon, as it had been for other deeply committed internationalists, the proper legal and moral perspective on this problem was clear: it held that the seabed, as had been so famously proposed by the Malta delegation in the UN General Assembly, was part of "the common heritage" of humankind. To permit its resources to be captured by the first successful prospectors, whether they be nations, companies, or individuals, was for him in violation of this basic precept—and in violation, as well, of the essential spirit of what the UNCLOS had been intended to accomplish. As Jon viewed the doctrine of "freedom of the seas" (a fine sounding phrase, suggesting idealism, as he conceded), it was a concept that provided rhetorical cover for a host of rudely exploitative activity that damaged resources and disadvantaged the poorer nations. And so, in a presentation in 1981 to the Law of the Sea Institute annual meeting, revised for publication in the *San Diego Law Review* the next year, Jon and coauthor Christopher Yuen (his third-year JD student at the time) published a seminal study, setting forth a

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[49] *See, e.g.*, HOLLICK, *supra* note 42.

[50] The terms of the original 1982 Convention were so unacceptable to the United States and other industrial nations that it was not until 1994 that a compromise was reached and a new agreement concluded that downgraded the jurisdiction and powers of the UN Seabed Authority as formulated in the Convention, and substituted a version more congenial to the interests and ideological position of private companies and some of the States with a stake in the exploitation of seabed minerals and hydrocarbons. *See* HOLLICK, *supra* note 42, at 340-398; Bernard Oxman, *The 1994 Agreement relating to the Implementation of Part XI of the UN Convention on the Law of the Sea, in* ORDER FOR THE OCEANS AT THE TURN OF THE CENTURY 15-36 (Davor Vidas & Willy Østreng eds., 1999). The terms of the seabed debate in its initial phase are captured well in presentations to the first Law of the Sea Institute (LOSI) annual meeting, held in February 1965. *See* the proceedings of that meeting, in THE LAW OF THE SEA: OFFSHORE BOUNDARIES AND ZONES 160-86, 302-9 (Lewis M. Alexander ed., 1967) [hereafter *LOSI Proceedings*]; and readings in OCEANS: OUR CONTINUING FRONTIER 162-71 (William Menard and Jane L. Scheiber eds., 1976).

comprehensive position on the basic ethical and legal issues that were at stake in the seabed-law debate.

Their paper, entitled *"'Common Heritage' vs. 'Freedom of the High Seas': Which Governs the Seabed?"*[51] was at the time of its publication, and remains today, a model of carefully crafted and brilliantly creative legal argumentation. (Indeed, I often have assigned it, for that reason, as the introductory reading on my syllabus for students in my ocean law seminar class at Berkeley.) In support of their interpretation of the "common heritage," the authors draw upon the history of customary law, the formal resolutions of the UN General Assembly, assertions of principle drawn from arbitral awards, assessment of "economic realities" of how seabed mining could affect developing countries, policy statements by U.S. administrative and elective officers, and International Law Commission (ILC) commentaries. The logical anatomy of the arguments on either side is put under the microscope, starting with the historic seventeenth-century doctrine of "freedom of the seas" and ending with the varied contested views of their own day.

Very typical of Jon's approach to this type of important doctrinal issue, he and Yuen phrase the objective as determining "if any of the attitudes [*sic*] that have developed have risen to the level of legal obligations."[52] This transitional moment in the argument is a smooth one, indeed sedulously so: "attitudes" can morph into "legal obligations." The authors do concede it is not a seamless process; and to the conservative legal mind, their invocation of "attitudes," rather than the more established formal concept *opinio juris*, would seem rather evasive. But Jon had once again put out a "marker" that could not be ignored by any thoughtful participant in the debate: it was a challenge to readers to consider whether an accretion of "attitudes" expressed in a wide range of varied sources can be said plausibly to have created new *hard law*, which is to say, created *legal obligations*. In what represented yet another thread running through much of Jon's later work in a reformist bent, on the subject of the "common heritage of mankind" concept, Jon and his coauthor concluded:

> Although the concept has its ambiguities, it does impose some legal duties. Nations are not free to do as they please on the seabed; they are not free to pretend that the 'common heritage' is an empty phrase without meaning. They are bound by the common heritage principle to provide meaningful sharing of

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[51] Van Dyke & Yuen, *supra* note 42, also published in 19 SAN DIEGO L. REV. 493-551 (1982); it was reprinted in Jon's own collection, FREEDOM FOR THE SEAS IN THE 21ST CENTURY: OCEAN GOVERNANCE AND ENVIRONMENTAL HARMONY (J. Van Dyke, D. Zaelke, & G. Hewison, eds., 1993) and other publications; and it is widely used by scholars and teachers of law.

[52] *LOSI Proceedings*, *supra* note 50, at 220.

> the benefits of the seabed with other nations, particularly the developing nations.[53]

Not to be overlooked here, we must note in a parsing of this paragraph, is the further "marker" that it puts down: the claim that commonality of ownership requires sharing, and that sharing, in turn, requires attention to "particularly the developing nations." To be sure, the argument here is grounded in the specific issue of the seabed mining controversy, and the UN debate included discussion as to whether revenues should be allocated to poorer nations unable themselves to finance such mining ventures. But Jon's concern to advance the resource-sharing idea, in which was embedded the special consideration to developing nations (and small island nations), would broaden greatly over time: It became an integral feature especially in his later writings on the precautionary principle, regional fishery management programs, and the economic possibilities of bilateral and multilateral "sharing" arrangements in areas of disputed marine space and resources.[54]

X. THE ETHIC OF "PRAGMATIC ALTRUISM" AND OCEAN LAW

From his fresh re-commitment to oceans studies in 1981-82, Jon moved on to produce a rich corpus of work in ensuing years. Specific aspects of his scholarly contributions are well recognized and appreciated, as in various articles by other authors in the present symposium issue of the *Review*.[55] Viewed in a chronological framework, Jon's inaugural moves in

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[53] Van Dyke & Yuen, *supra* note 42, at 551.

[54] To cite only one example, consider Jon Van Dyke, *Sharing Ocean Resources—In a Time of Scarcity and Selfishness, in* THE LAW OF THE SEA: THE COMMON HERITAGE AND EMERGING CHALLENGES 3-36 (Harry N. Scheiber ed., 2000).

[55] *See*, inter alia, David VanderZwaag, *The ICJ, ITLOS and the Precautionary Approach: Paltry Progressions, Jurisprudential Joustings*, 35 U. Haw. L. Rev. 617 (2014) (praising Jon's advocacy of the precautionary principle); Maxine Burkett, *A Justice Paradox: On Small Island Developing States and the Quest for Effective Legal Remedy*, 35 U. Haw. L. Rev. 633 (2014) (discussing Jon's scholarship on climate change); David Freestone, *Can the UN Climate Regime Respond to the Challenges of Sea Level Rise?*, 35 U. Haw. L. Rev. 671 (2014) (referencing Jon's attention to sea level rise); Yann-huei Song, *Conflicting Outer Continental Shelf Claims in the East and South China Seas: Proposals for Cooperation and Peaceful Resolution*, 35 U. Haw. L. Rev. 485 (2014) (lauding Jon's contributions to the development of ocean law and the study of the East and South China Sea disputes); James Anaya, *The Human Rights of Indigenous Peoples: United Nations Developments*, 35 U. Haw. L. Rev. 983 (2014) (acknowledging Jon's pioneering work in the areas of international law and indigenous rights); and Sherry P. Broder, *Responsibility and Accountability for Harm Caused by Nuclear Activities*, 35 U. Haw. L. Rev. 575 (2014) (paying tribute to and adopting Jon's calls for a more robust international nuclear liability and compensation regime).

the 1980s into new topical areas included research on the threats of nuclear waste and the carriage of ultra-hazardous cargoes in ocean shipping; on U.S. law and Pacific island legal rights; and on the merits of modes of collaboration and initiatives for new treaty-based environmental protections in the Pacific islands. In the 1990s decade, he continued work on these lines, analyzing new developments on a range of nuclear issues, on boundary delineation, and on the South China Sea. A book, jointly authored, also appeared in 1997 on conflicts and the possibilities for their resolution in the latter, chronically troubled, ocean region.[56]

Jon enjoyed a close friendship with Dr. Choon-ho Park of Korea, who as a young scholar held an appointment at the East-West Center in the University of Hawai'i and later became the leading figure in bringing studies of ocean issues in East Asia into the orbit of scholarly work in international law. Jon was an enthusiastic recruit for this cause as well; and throughout a career that carried Dr. Park first to a distinguished professorial post in Korea and then appointment as a judge on the ITLOS bench, he and Jon kept in constant touch on scholarly and policy issues. Their mutual and intersecting interests reinforced the intensity of Jon's expansion of research scope in his studies of the Pacific area.[57]

From 2000 onward, Jon's outpouring of work on ocean law continued apace. In the space of a decade, he continued—alone and with coauthors and the help of carefully credited research assistants—to publish new, original analyses of navigation rights, hazardous cargo at sea, sustainability of marine resources, human rights—especially in connection with the Marcos tort suit—and Native Hawaiian rights. However, he also opened up two new research fronts that have proven to be especially noteworthy. One was a set of important studies on international tensions and ocean law in the East Asian ocean area. He addressed in particular the political confrontations, threats of military engagements at sea, and issues generated by legally questionable (or patently spurious, but emotionally charged) claims centering on rocks *qua* islands, the assertions by several States of "historic rights" and rights from "first occupation" often impossible to

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[56] MARK VALENCIA, JON VAN DYKE, & NOEL LUDWIG, SHARING THE RESOURCES OF THE SOUTH CHINA SEA (1997, reprint ed. 1999).

[57] *See* Harry N. Scheiber, *Judge Choon-ho Park the Law of the Sea Institute and Modern Scholarship in Ocean Law, in* GOVERNING OCEAN RESOURCES: NEW CHALLENGES AND EMERGING REGIMES, A TRIBUTE TO JUDGE CHOON-HO PARK 17 (Jon Van Dyke, Sherry P. Broder et al., eds. 2013). Judge Park and Jon were involved in its activites at every critical juncture in the history of the Law of the Sea Institute, and in recent years both of them were instrumental in shaping a new program of LOSI collaboration in research and publication with Inha University and, more recently, the policy studies staff of the Korean Institute for Ocean Science and Technology.

support plausibly, and, above all, the claim made by China for some 80 per cent of the South China Sea on the basis of a unilaterally redrawn map (the "Dotted Line" map). This map-based claim dated from the last years of the Nationalist regime in the late 1940s and was ignored until recent times by the successor Communist government of the People's Republic of China (PRC) and almost everyone else. Jon also became increasingly bold in articulating his criticisms of Japanese claims, the intransigent opposition of the PRC to multilateral modes of agreement or adjudicated solutions through international courts or arbitral bodies, and these governments' tolerance and/or encouragement of militant nationalism that fueled the political tensions. In this area of research, culminating in some of his last writings before his death, Jon joined forces with his teacher at Harvard Law School forty years earlier, Professor Jerome Cohen of New York University, one of the world's leading authorities on Chinese law and governance.[58] On the conflict between Japan and Korea over control of Dokdo in the Sea of Japan/East Sea, in individual writings and in collaboration with Professor Seokwoo Lee, he came down in support of the Korean claim—but at the same time he sought to emphasize that the overarching desideratum was not to force surrender of sovereignty claims but to create joint development zones for collaborative economic uses and sharing of benefits.[59]

The other especially notable area of his sustained work was dedicated to articulation and advancement of the "precautionary principle." He was out ahead of most international lawyers and diplomats in recognizing the potential of this principle (also variously termed a "doctrine" or, especially by its detractors, as an "approach") for the protection and sustaining of resources. To be sure, in the 1980s and early 1990s there were other strong champions of the principle, especially in the environmental NGOs and in small corners of the diplomatic offices of many States. The idea came into its own, however, with incorporation into the language of the Rio Conference and the Biodiversity Convention in 1992.[60] Here again, as the

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[58] *See* Jon Van Dyke, *What's at Stake in the South China Sea?, in* SHARING AND DISTRIBUTING OCEAN RESOURCES 107 (Jin-Hyun Paik & Seokwoo Lee eds., 2012); and Jerome A. Cohen & Jon Van Dyke, *China and the Law of the Sea, in* REGIONS, INSTITUTIONS, AND LAW OF THE SEA: STUDIES IN OCEAN GOVERNANCE 245-56 (Harry N. Scheiber & Jin-Hyun Paik eds., 2013). Professor Cohen has informed the present author that he maintained a friendship with Jon and his family throughout the long intervening years, but only in the last few years did he and Jon re-connect in a research context and begin on their collaborative writing.

[59] Seokwoo Lee & Jon Van Dyke, *The 1951 San Francisco Peace Treaty and Its Relevance to the Sovereignty over Dokdo,* 9 CHINESE JNL. OF INT'L LAW 741 (2010).

[60] Convention on Biological Diversity, June 5, 1992, 31 I.L.M.,818 (entered into force Dec. 29, 1993). For aspects of the complementarity of this Convention with UNCLOS; *see*

idea moved closer to the core of mainstream thought, Jon laid out markers ahead of the trend. He leapt on the opportunity offered by the Rio meeting to declare that there should be a formal requirement of an environmental impact assessment, as an essential element of the precautionary principle as applied, when resource exploitation or other activities potentially endangering to the environment were proposed. Moreover, States should not be seen, he argued, as "the only relevant international decision makers;" indigenous peoples, certainly, and animals too "deserve to be heard from." He also drew out from the basic concepts an expanded theory of precaution, with elements integral to it beyond duty to cooperate as a generalization: He contended for the matrix of these elements to include the "polluter pays" principle, a liability and compensation regime ("crucial, of course, for any commercial activity"), linked with a strict liability standard, long periods of liability in statutes of limitations, compulsory insurance requirements, and the like—all of these elements consistent with, or mandated, by provisions of UNCLOS.[61]

Framing these arguments, and others on parallel lines in other writings, was Jon's insistence that the foregoing precepts "are not mere idealistic mantras, but are important and practical principles that the world must embrace . . . ." It was this generation's greatest challenge "to make *that ethic of pragmatic altruism* meaningful so that the common resources will remain available to us and to those who follow."[62]

XI. JUDGMENTS

At some crucial junctures in the present analysis of Jon's scholarship and his ethical values, it has been necessary for me to speculate on the sources of inspiration that set his research trajectory and infused its normative content with meaning for him. Without minimizing for the reader the limitations of the Article in these regards, we do have some excellent evidence from two of Jon's own writings that help one to judge the reliability of the interpretations that I have ventured. Each of these writings

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Harry N. Scheiber, *The Biodiversity Convention and Access to Marine Genetic Materials in Ocean Law*, *in* ORDER FOR THE OCEANS AT THE TURN OF THE CENTURY 187-200 (Davor Vidas & Willy Østreng eds., 1999).

[61] Van Dyke, *Ocean Transport of Radioactive Fuel and Waste*, *in* THE OCEANS IN THE NUCLEAR AGE: LEGACIES AND RISKS 160, 166; and Van Dyke, *supra* note 54, at 35. Again with an eye to the interests of developing nations, he contended that when regional fishery management organizations imposed regulatory regimes that might serve to exclude new entrants, "developing nations from the region would appear to have a greater right to enter the fishery than would developed nations from outside the region." *Id.*

[62] Van Dyke, *supra* note 54, at 36.

presented Jon's evaluation of the scholarly legacy of a giant in international law, each of his subjects an individual who left a large footprint on the literature and on twentieth century jurisprudence.

One of these studies was an appreciation—though not merely an uncritical tribute—of Louis B. Sohn, one of the most prominent and respected leaders of the international movement that led to successful negotiation of the UNCLOS. Jon's focus, in this piece, was on what he termed his subject's "great contribution to the field of international law," viz., an "unrelenting effort to confirm that it is a real and enforceable body of sound legal principles," and to advance the formation of permanent organizations and dispute-settlement bodies that will assure that violators would be punished and victims compensated.[63]

The basic principles and objectives of policy that Jon singles out from his review of Sohn's scholarship give us a window through which to view Jon's own values. *First*, there was Sohn's contention that there had been an acceleration of legal development, so that in legal analysis "The old theories of customary law evolving over a long period of time no longer apply."[64] Jon was impatient with the old-style concept that recognition of a rule of customary law must be the product of decades, or for some substantial rules even centuries, of state practice. We have noted already the ways in which Jon put down markers out ahead of mainstream or at the outer margins of reformist thought, both in regard to juries and later, in his ocean law writings, especially as to the seabed question and as to the precautionary principle, contending that there was abundant evidence that customary law, and hence legal obligation, had taken mature and binding form. In these various arguments, Jon's use of precedent mirrored what Sohn had contended was legitimate under modern conditions of accelerating change in the international legal and institutional order. Change on all dimensions has been going forward with great rapidity (just as technological change, population growth, and resource crises have accelerated the pressures for change).[65] Reflecting Sohn's contentions, Jon believed that non-binding resolutions of international bodies, dissenting opinions in arbitrations, diverse writings by legal commentators,

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[63] Van Dyke, *supra* note 1, at 31. Other references to Sohn's ideas in the paragraphs following here are from *id. 31-47.*

[64] Sohn, *Dispute Settlement, in* THE UNITED STATES WITHOUT THE LAW OF THE SEA TREATY: OPPORTUNITIES AND COSTS 126, 126, *quoted in* Van Dyke, *supra* note 1, at 32 n.4.

[65] *See, e.g.*, Harry N. Scheiber, *Economic Uses of the Oceans and the Impacts on Marine Environments: Past Trends and the Challenges Ahead, in* THE WORLD OCEAN IN GLOBALISATION: CLIMATE CHANGE, SUSTAINABLE FISHERIES, BIODIVERSITY, SHIPPING, REGIONAL ISSUES 65-98 (Davor Vidas and Peter Johan Schei, eds. 2011).

accumulating in the record of speeded-up life in the global order, could and should be cited as evidence in identifying creation of new "customary law."

For some colleagues, Jon sometimes seemed willing to cast too wide a net, indeed a large-mesh conceptual net. Though my own values and view of legal methodology were aligned with Jon's in almost all regards, I confess, I occasionally suggested to him, albeit collegially, that at least he should leave the adjective *"emerging"* in place before flatly declaring one of his dearly held values or causes to be "customary law."

A second theme in Sohn's work that was reflected in Jon's career and scholarship was an indomitable optimism about what careful analysis and dedicated advocacy could achieve. The odds were clearly against an international conference producing a comprehensive treaty, applicable universally, covering a huge spectrum of ocean uses and points of legal doctrine, when Sohn took a leading role in the American arena in the 1950s through the 1970s, campaigning for the UN (and the United States Government) to act on the idea. In the same spirit of admiration he expressed for Sohn, that "relentless" campaigning could produce meaningful change, one can say of Jon himself that he, too, was relentless in pursuit of his own causes.

Finally, Jon regarded the creation of the International Tribunal for the Law of the Sea as something close to a personal triumph for Sohn. He shared Sohn's keen satisfaction that compulsory mechanisms for settlement of ocean law disputes had become a central feature of the UNCLOS agreement, but where Sohn was cautiously optimistic about future performance Jon went further, as was his wont: He set forth a hypothetical case for the ITLOS tribunal, one in which a small nation's interest was pitted against that of a larger, richer nation. If ITLOS were to uphold the poorer nation's cause, "then the rights and duties of all states would be enunciated and international law would take greater shape." His optimism that this happy result could be realized in future adjudication before ITLOS was buttressed, it appears, by his evaluation of the slender record of three cases which had been decided to the date of his writing. He did concede that in one of those cases, the Tribunal disappointed by declining to reach the merits.[66] Nonetheless Jon deemed the results in the other two cases to be ample evidence on which to celebrate that "the Tribunal is prepared to act boldly and decisively with regard to highly contentious disputes." His optimism was indeed indomitable, a point on which other commentators too have remarked! It was twenty years ago, after all, that he announced that

[66] This was what he termed the "crabbed conclusion" of the arbitral tribunal to which the case was referred, that it could not reach the merits. Southern Bluefin Tuna cases (N.Z. v. Japan; Austl. v. Japan), Cases Nos. 3 & 4, Order of Aug. 27, 1999, 3 ITLOS Rep. 280.

"we may be on the threshold of an era in which the goal of universal respect for human rights is at hand."[67] We do well to keep in mind, as was remarked in the first sentence of this paper, that many of Jon's dreams have actually come true.

To the foregoing observations on Jon's own style in scholarship and advocacy, it may be said again that his efforts to advance rule of law also had a powerful regional focus in the Pacific. He was respectful of the cultures and needs of the Pacific island communities, and on important occasions served as counsel in their internal and international legal activities. One of his last major projects was to document and evaluate the record of judicial reform and legal development in the island states; and he worked closely with leaders of the U.S. federal judiciary in developing collaborative projects with the bench and bar in the Pacific area. In this element of his career, too, optimism and devotion to making judicial institutions effective—parallel to his and Sohn's concern with building international institutions—were constant features of his work.[68]

A second major figure in international law on whom Jon wrote an appreciative essay was Shigeru Oda, the great ICJ judge and leader of legal scholarship in his native Japan. Judge Oda positioned himself in a conservative stance on doctrine as reliably as Jon did in a reformist stance. Yet, as Jon generously asserted in this study, both he and Judge Oda, each in his own way, was committed to the common cause of trying to advance the rule of law.[69] Jon praised Judge Oda for his dedication to careful, scholarly analysis in constructing the historical and juridical foundation of his ICJ opinions. He placed his fellow judges and the field in his debt, Jon stated, for the way in which he offered constructive criticism of colleagues' views, helping to clarify the issues before them; his opinion on those issues had to be taken into account, even if they did not prevail. In this regard, Judge Oda "assumed the important role of being the 'conscience' of the ICJ in . . . boundary cases," Jon stated, and thus "*played the role of the canary in the mine shaft,* providing warnings when his colleagues on the ICJ have strayed too far from the moorings of traditional customary law."[70]

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[67] Jon Van Dyke & Gerald W. Berkley, *Redressing Human Rights Abuses,* 20 DENVER J.INT'L L. & POL'Y 244, 266 (1991-92).

[68] Jon Van Dyke, *The Pacific Judicial Conference: Strengthening the Independent judiciary and the Rule of Law in the Pacific,* 22 WESTERN LEGAL HISTORY 127 (2009) (providing a historical review and analysis of such efforts, in many of which Jon himself was actively involved).

[69] Jon Van Dyke, *Judge Shigeru Oda and Maritime Boundary Delimitation, in* 2 LIBER AMICORUM JUDGE SHIGERU ODA 1197-1203 (Nisuke Ando, E. McWhinney, & Rüdiger Wolfrum eds., 2002).

[70] *Id.* at 1197 (emphasis added).

Jon Van Dyke also played the indispensable role of "the canary in the mine shaft." Judge Oda sounded the alarm when he believed his court was betraying the established principles and rules of customary law—law in the mode that Professor Sohn had announced could no longer be legitimately sustained. Jon sounded the alarm when, instead, he believed that progress toward humane goals and rule of law was being blocked and impaired by misguided orthodoxies. Respect for, and adherence, when appropriate, to the inherited doctrines and the limited jurisdictions and structures of inherited institutions were not scorned or abandoned by Jon. But his legacy to legal scholarship was to raise challenges; and he called on his students and his colleagues to look forward, instead of routinely giving to the "stability" of law, so valued by conservatives, priority over what he regarded as paramount humane values. The challenges he poses for us will long be heeded, just as respect for his learning will be enduring, and the memory of his friendship will long be treasured in all the many circles in which he was so illustrious a presence.

Internal Security, the "Japanese Problem," and the Kibei in World War II Hawai'i*

Jane L. Scheiber[1]

I. INTRODUCTION

Only a few hours after Japanese planes rained destruction on Pearl Harbor on December 7, 1941, the governor of the Territory of Hawai'i, Joseph Poindexter, issued a proclamation placing the entire territory under martial law. He suspended the writ of *habeas corpus* and requested the Commanding General, Walter Short, to exercise all the powers normally exercised by the governor and "by judicial officers and employees" of the

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* The phrase "the Japanese problem" was used, alternatively with "the Japanese menace," by the Hawai'i Emergency Labor Commission in its brief on "Hawai'i and the Japanese" for Congressional hearings in 1921. Testimony before Congress linked the Japanese problem with national security. "Hawai'i and the Japanese," Governor Farrington Files, Territorial Departments, Labor Commission, Hawai'i State Archives; *see also* K. D. RINGLE, RINGLE REPORT ON JAPANESE INTERNMENT (1941) [hereinafter RINGLE REPORT], *available at* www.history.navy.mil/library/online/jap%20intern.htm.

[1] This paper is based on research and writing conducted jointly with Harry N. Scheiber, who is coauthor of a book in progress titled *Bayonets in Paradise*. We wish to express our gratitude to our dear friend and colleague, the late Jon Van Dyke, for his interest in, and encouragement of, this project from its inception. Fuller treatment of the subject and more detailed documentation can be found in Harry N. Scheiber, Jane L. Scheiber & Benjamin Jones, *Hawaii's Kibei under Martial Law: A Hidden Chapter in the History of World War II Internments*, 22 WESTERN LEGAL HISTORY (2009). For a more general treatment of martial law in Hawai'i, see Harry N. Scheiber & Jane L. Scheiber, *Bayonets in Paradise: A Half-Century Retrospect on Martial Law in Hawai'i, 1941-1946*, 19 U. HAW. L. REV. 477 (1997). Like all scholars in this field, I am indebted to Roger Daniels for his path-breaking explorations of the treatment of Japanese Americans. *See especially* CONCENTRATION CAMPS USA: JAPANESE AMERICANS AND WORLD WAR II (1971), PRISONERS WITHOUT TRIAL (1993), and AMERICAN CONCENTRATION CAMPS (Daniels ed., 1989).

Territory until "the danger of invasion is removed."[2] In a separate but simultaneous proclamation, General Short announced that he had assumed the position of "military governor of Hawai'i" and had "taken charge of the government of the Territory."[3] Acknowledging that the "imminence of attack by the enemy and the possibility of invasion make necessary a stricter control of your actions than would be necessary or proper at other times," he warned that those who disobeyed his ordinances "will be severely punished by military tribunals or will be held in custody until such time as the civil courts are able to function."[4]

Thus quickly imposed, the martial law regime lasted, with some modifications, until October 24, 1944. It affected every resident of the Territory, alien and citizen alike. In its scope, its duration, and the number of people it affected, it was without precedent in U.S. history. The story of martial law in Hawai'i is the story of the clash between American guarantees of civil liberties and the need for internal security in wartime. While all residents of Hawai'i were stripped of such basic rights as freedom from search and seizure without a warrant and the right to jury trial, the ethnic Japanese did not suffer the mass removals and imprisonment that occurred on the mainland. However, persons of Japanese, and, to a lesser extent, of Italian and German, ancestry were also subject to investigation, interrogation, incarceration, and evacuation. One subgroup of Japanese Americans in particular—the American-born, Japanese-educated Kibei[5]—was singled out as the focus of security measures.

In declaring martial law, Governor Poindexter, with President Roosevelt's approval, had acted in accord with the Organic Act of 1900 that established the Territory of Hawai'i.[6] Section 67 of that act provided that "the governor may in case of invasion or imminent danger thereof . . . suspend the writ of habeas corpus and place the territory or any part thereof, under martial law until communication can be had with the President and his decision thereon made known."[7] Just how long the Hawaiian Islands

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[2] Text of proclamation is reproduced in J. GARNER ANTHONY, HAWAI'I UNDER ARMY RULE 127 (Stanford University Press, 1955).

[3] *Id.* at 128.

[4] *Id.*

[5] "A son or daughter of issei parents who is born in America . . . and educated largely in Japan." *Kibei definition*, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/kibei (last visited May 26, 2013).

[6] Organic Act, Ch. 339, 31 Stat. 141, § 67 (1900).

[7] *Id.* The language of the Organic Act was a departure from the ruling on martial law in the famous case of *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), which declared: "[M]artial law cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration."

remained in "imminent danger of invasion" would become the subject of controversy and indeed of litigation as the war dragged on. In the immediate aftermath of the Pearl Harbor attack, however, there was little opposition to the transfer of executive, legislative, and judicial functions to the Commanding General, whose discretionary power as Military Governor was essentially absolute.

II. MARTIAL LAW AND THE "JAPANESE PROBLEM"

Poindexter would later cite "the large Japanese population we have in Hawai['']i" as the main reason advanced by the military for martial law.[8] Indeed, the martial law regime that was implemented on December 7th was the culmination of more than two decades of planning by the U.S. War Department as tensions grew between Japan and the United States. From the start, martial law in Hawai'i was regarded as a measure for internal security and the solution to what was called, in the military and political discussions of the time, "the Japanese problem"—the presence of large numbers of Japanese who might side with the enemy in case of war.

Japanese workers had first been imported to Hawai'i in significant numbers in 1886 as an inexpensive source of plantation labor. Their numbers grew rapidly in succeeding years, augmented by the importation of picture brides, and many workers left the plantations and entered the skilled trades, where they were in direct competition with *haoles*. By 1900, the year of the Hawai'i Organic Act, the Japanese in Hawai'i constituted nearly 40 percent of the total Hawaiian population.[9] Their numbers and success, combined with widespread racial prejudice and fears of "the yellow peril" in the United States generally, created a wave of anti-Japanese sentiment in the years following the 1905 Russo-Japanese War.[10] Although racial hostilities in Hawai'i were not as strong as they were in the mainland, the Japanese in Hawai'i, and their American-born children, were increasingly

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[8] HONOLULU STAR-BULLETIN, May 4, 1946, and Pearl Harbor Report, Part 23, at 820, *quoted in* ANTHONY, *supra* note 2, at 9.

[9] U.S. CENSUS BUREAU, HISTORICAL CENSUS STATISTICS ON POPULATION TOTALS BY RACE, 1790 TO 1990, AND BY HISPANIC ORIGIN, 1790 TO 1990, FOR THE UNITED STATES, REGIONS, DIVISIONS, AND STATES (2002), *available at* http://www.census.gov/population/www/documentation/twps0056/twps0056.html; *see also* Eleanor C. Nordyke & Y. Scott Matsumoto, *The Japanese in Hawaii: A Historical and Demographic Perspective*, HAWAIIAN JOURNAL OF HISTORY 11, 165 (1977), *available at* http://evols.library.manoa.hawaii.edu/bitstream/handle/10524/528/JL11174.pdf?sequence=2.

[10] The anti-Asian sentiment in the United States culminated in the Immigration Act of 1924, Pub. L. 68-139, 43 Stat. 153 (1924). Also known as the "Asian Exclusion Act," this legislation prohibited immigration of persons ineligible for citizenship, and since only whites and blacks could become citizens, Asians were ineligible.

viewed not only as an economic, political and social threat, but also as a security threat, especially as U.S. defense plans against the Japanese fleet began to center on Pearl Harbor.[11]

In 1917, a naval officer in Pearl Harbor gave voice to a theme that was to dominate U.S. military thinking right through the early years of World War II:

> For the defense of Oahu, the present greatest menace to our security is the large proportion of population of foreign birth and sympathies who are very liable to turn against this country. . . . There are fair hopes of making good citizens of all of the white population, but with the Japanese this can probably never be done.[12]

A bitter labor strike against the plantation owners in 1920 was viewed by the popular press and the military as an attempt by the local Japanese to gain dominance in Hawai'i. In 1921, both Army and Navy intelligence reported that the Japanese constituted a security threat and warned against the danger of sabotage. Joined by the FBI, they started to keep lists of potentially dangerous Japanese.

Beginning in the 1920s, the War Plans Division began shaping strategies that presaged the actual measures taken in 1941, including the declaration of martial law and the arrest of Japanese leaders and those on the surveillance lists. These plans were refined over the years. As tensions with Japan increased in the 1930s, President Roosevelt himself was among those who feared fifth-column activities, writing in 1936:

> One obvious thought occurs to me—that every Japanese citizen or non-citizen on the Island of Oahu who meets these Japanese ships or has any connection with their officers or men should be secretly but definitely identified and his or her name placed on a special list of those who would be the first to be placed in a *concentration camp* in the event of trouble.[13]

Army and Navy top brass also feared sabotage. As the Secretary of the Navy would later testify, General Short "felt the most imminent danger to the army was the danger of sabotage, because of the known presence of large numbers of alien Japanese in Honolulu."[14] Ironically, just ten days

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[11] For a detailed history, see GARY Y. OKIHIRO, CANE FIRES: THE ANTI-JAPANESE MOVEMENT IN HAWAII, 1865-1945 (Temple University Press, 1991).

[12] Memorandum from Lt. C. C. Windsor to Commandant Fourteenth Naval District (July 20, 1917), *quoted in* MICHAEL SLACKMAN, TARGET: PEARL HARBOR 35 (University of Hawai'i Press, 1990).

[13] Memorandum from Franklin Delano Roosevelt, President of the U.S., to Chief of Operations, U.S. Navy (Aug. 10, 1936), Papers of Franklin D. Roosevelt, PSF Confidential file, Box 106, Franklin D. Roosevelt Library, Hyde Park, N.Y. (emphasis added).

[14] REPORT BY THE SECRETARY OF THE NAVY TO THE PRESIDENT, U.S. CONGRESS JOINT

before the Japanese attack on O'ahu, Short had ordered the bunching together of planes on the island's airfields to better protect them against sabotage by Japanese agents—thereby making them more vulnerable to air attack.[15]

By the time war with Japan was imminent, the ethnic Japanese in Hawai'i numbered nearly 158,000, or 37 percent of the total population of some 423,000.[16] (By contrast, there were fewer than 104,000 Caucasians.) About one-fourth of the residents of Japanese ancestry, or 37,000, were Issei;[17] barred by law from becoming citizens, most of them remained culturally Japanese, and many spoke little or no English. Three-fourths of the ethnic Japanese, some 121,000, were Nisei and Sansei, second and third-generation Japanese Americans who were U.S. citizens by virtue of their birth on American soil.[18]

Many thousands of the Nisei were also dual citizens of Japan and the United States.[19] And many of those who held dual citizenship—an estimated 5,000—were Kibei, American-born children whose parents had sent them to live with relatives in Japan and to receive schooling there.[20] Some were sent for cultural reasons, others for economic reasons because both parents had to work and there was no one to take care of the children.

COMMITTEE ON PEARL HARBOR ATTACK, Exhibit 49, Hearings, part 24, 1750 (1946).

[15] The order to group the planes was issued on November 27, 1941. THE ARMY AIR FORCES DURING WORLD WAR II: PLANS AND EARLY OPERATIONS, JANUARY 1939–AUGUST 1942, VOL. 1, 194 (W.F. Craven & J.L. Cate eds., 1948).

[16] U.S. CENSUS BUREAU, *supra* note 9.

[17] A Japanese immigrant. *Issei definition*, MERRIAM-WEBSTER.COM, http://www.merriam -webster.com/dictionary/issei (last visited May 20, 2013).

[18] Samuel W. King article, HONOLULU ADVERTISER, March 23, 1941 (noting that approximately 50,000 of the Japanese-American citizens were under the age of 16 and therefore regarded as posing no security risk).

[19] Prior to 1924, Japan considered all children born to Japanese citizens abroad to be subjects of the Japanese Emperor. After that date, only children registered with the Japanese consulate within two weeks of their birth were considered Japanese citizens. Estimates are that fewer than 1 in 5 Nisei and Sansei were so registered in Hawai'i, but there is wide discrepancy on estimates of the total number of dual citizens. Lt. Comdr. M. C. Partello, District Intelligence Office, Fourteenth Naval District to Capt. E. B. Nixon, Office of Naval Intelligence (April 4, 1940); and attachment, "Report on the Nisei Situation in Hawaii," March 30, 1940, RG 165, NA. This report examines several different estimates in drawing its conclusions that dual citizens constituted somewhat over 60 percent of the Nisei population or 17 percent of the total population of Hawai'i. An FBI report of 1939 places the total number of dual citizens at 10,000-20,000 (less than 5 percent of the total population). J. Edgar Hoover, Director Federal Bureau of Inv., to A. A. Berle, Asst. Sec. of State (November 16, 1940), and attachment, "The Japanese in Hawai'i," R.G. 165, NA.

[20] It is difficult to know with any certainty the total number of Kibei, as they were not distinguished from other Nisei in the census records. For more detailed discussion of varying estimates and their sources, see Scheiber, Scheiber & Jones, *supra* note 1.

The word "Kibei" comes from *ki*, to return to, and *bei*, America. Speaking little English upon their return to Hawai'i, the Kibei were ostracized by the more Americanized Nisei. More important for their fate, the Kibei were regarded with great suspicion by the military and the FBI as likely harboring disloyal sentiments and therefore a danger to internal security because of their Japanese education, which included emperor worship and, for the older youth, military training. Some Kibei had even served in the Japanese armed forces. Despite their small numbers, from the start of the war until its end, the Kibei were singled out by the military and FBI for closer scrutiny and for harsher treatment than the rest of the Japanese Americans in Hawai'i. They were systematically subjected to racial profiling and denied even a semblance of due process under the martial law regime.

Although President Roosevelt, Secretary of the Navy Frank Knox, and others in Washington initially urged that the army should segregate all alien Japanese on one of the islands other than O'ahu or place them in concentration camps in case of war, the local military leaders and FBI regarded such plans as logistically impractical, economically crippling (given the essential role of ethnic Japanese in the economy), and unfair to the vast majority of aliens who were loyal. The army and FBI therefore decided to concentrate their efforts on surveillance of those of doubtful loyalty, while preparing for fifth-column activity and martial law.

In the months prior to the Pearl Harbor attack, the FBI in Honolulu strengthened its activities under the leadership of Robert Shivers. He worked closely with the Military Intelligence Division ("MID"), Office of Naval Intelligence ("ONI"), and a newly formed espionage unit in the police department that was directed by John A. Burns, who would later become the territorial delegate to Congress and then serve as Governor of Hawai'i from 1962-1974. Relying on its own network of confidential informants for its intelligence, the FBI concluded that the second-generation Japanese Americans, the Nisei, would be predominantly loyal to the United States. Nor, in the FBI's view, was there much to fear from the vast majority of the first generation, the Issei, who were elderly and had spent most of their lives in Hawai'i. Suspicion focused on about 1,000 leaders of the Japanese community, and, as with the earlier war plans, the FBI proposed to intern these individuals at the outbreak of war. The FBI also recommended an Americanization campaign aimed at the Nisei.[21]

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[21] Memorandum, Federal Bureau of Investigation (Nov. 15, 1940), FBI Records 65-286-61, *reprinted in* CWIRC Papers, p. 19456 (reel 17, p.9), *quoted in* OKIHIRO, *supra* note 11, at 182, and GREG ROBINSON, BY ORDER OF THE PRESIDENT 62 (Cambridge, 2001).

Military intelligence officers in Hawai'i agreed with the FBI strategy, which Shivers outlined in its final form just three days before the Pearl Harbor attack. Citing the large numbers of Japanese and American citizens of Japanese ancestry that made mass internments impossible, Shivers concluded:

> Therefore the seizure of Japanese aliens in Hawaii is a matter of *selectivity* . . .
>
> [I]t is the considered opinion of this office and the Office of Military Intelligence in Hawaii that if the leadership of the Japanese alien population is seized, that, of itself, will break the backbone of any Japanese alien resistance. . . . Those aliens who have been listed for custodial detention comprise the alien leadership in Hawaii in every branch of alien activity, namely: businessmen, consular agents, Japanese language school teachers and principals, Buddhist and Shinto priests, and others of no particular affiliation who by reason of their extreme nationalistic sentiments would be a danger to our security as well as others who have seen Japanese military service.[22]

The last group included, in the view of those responsible for security, particularly the Kibei. In designing these plans, Shivers went on, the Commanding General of the Hawaiian Department and military intelligence sought "to preserve and maintain the respect of the alien populace in the constituted authorities and to maintain the loyalty of the vast majority of the second and third generation Japanese."[23]

III. MILITARY GOVERNMENT AND EMERGENCY MEASURES

Meanwhile, within the office of the Commanding General, the army's chief legal officer, judge advocate Lt. Colonel Thomas H. Green, began to work on the administrative and legal measures for security in case of an emergency.[24] He drafted not only the proclamations for martial law, but also detailed general orders to cover all emergency measures should martial law be declared.

Thus, on December 7, everything was in readiness for the declaration of martial law and its implementation. The Office of the Military Governor ("OMG") assumed responsibility for internal security as well as almost all

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[22] Memorandum from Robert Shivers to FBI Director Hoover (Dec. 17, 1941) (on file with the Japanese Cultural Center of Hawai'i ("JCCH"), Honolulu) (emphasis added).

[23] *Id.*

[24] OFFICE OF THE CHIEF OF MILITARY HISTORY, UNITED STATES ARMY FORCES, MIDDLE PACIFIC AND PREDECESSOR COMMANDS DURING WORLD WAR II, 7 DECEMBER 1941-2 SEPTEMBER 1945: CIVIL AFFAIRS AND MILITARY GOVERNMENT, *microformed in* Hawai'i War Records Depository, Hamilton Library, University of Hawai'i, Mānoa, S10010 2996 [hereinafter CIVIL AFFAIRS].

government operations. The day to day operations and supervision over most policy issues was under the direction of Green himself, who assumed the title of "executive" and established himself in 'Iolani Palace, the seat of the civilian government.

He exercised his control through more than 250 general orders that controlled virtually every aspect of civilian life.[25] Most intrusive on civilians' traditional liberties were the curfew, blackout, and censorship of all newspapers, radios, cables, and of personal mail and telephone calls. All residents except very young children were fingerprinted and issued ID cards. All Japanese language schools were permanently closed, and everything from food and liquor sales to traffic and prostitution fell under army control. The OMG also controlled the "alphabet agencies" that on the mainland were responsible for labor, war production, and price controls. The administration of labor was especially onerous, as the OMG allocated workers to jobs and more than half the workforce was frozen in their jobs for the duration of the war. Absenteeism and switching jobs without permission brought stiff penalties in the form of fines or jail sentences of up to two months' time.[26]

Such violations of general orders, as well as other crimes, were tried before military courts, which replaced the civilian courts that were closed on December 7. Less serious offenses were tried in provost courts, where the average trial lasted less than five minutes and civilians were denied such basic due process as warrants for arrest, freedom from search and seizure, written charges, and the right to confront witnesses against them. The provost courts tried more than 55,000 cases, with a 99 percent conviction rate.[27] More serious crimes, involving capital offenses or sedition, were tried before military tribunals.[28] Although the civil courts were permitted to

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[25] COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CITIZENS, PERSONAL JUSTICE DENIED (Washington, D.C., 1982), *available at* http://www.nps.gov/history/history/online_books/personal_justice_denied/chap11.htm [hereinafter CWIRC, PERSONAL JUSTICE DENIED]. For a detailed description of Hawaii's civilians under martial law, see GWENFREAD ALLEN, HAWAII'S WAR YEARS, 1941-1945 (Honolulu, 1950), and ANTHONY, *supra* note 2.

[26] General Orders No. 38 (Dec. 20, 1941) and No. 91 (Mar. 31, 1942), copies in Hawai'i War Records Depository, University of Hawai'i Library. General Orders Nos. 38 and 91 are also reproduced in ANTHONY, *supra* note 2, at 141 & 155.

[27] Letter from General Robert Richardson to the Judge Advocate General (Dec. 4, 1945), Assistant Secretary of War Files (McCloy Files), War Department Records, Record Group 107, National Archives.

[28] Only eight such trials were held during the war, the most publicized being the trial of Otto Kuehn and his wife for espionage. OFFICE OF THE CHIEF OF MILITARY HISTORY, CIVIL AFFAIRS, *supra* note 24, at 3219-23. *See also* FBI RECORDS, Bernard Kuehn File, Bernard Julius Otto Kuehn Part 01 of 04, *available at* http://vault.fbi.gov/bernard-julius-otto-

reopen early in 1942, their jurisdiction was limited to such matters as divorce and property claims. The right to jury trials remained suspended until August 1942, because in the view of the military racially mixed juries could not be fair, and even then their jurisdiction was restricted.[29] The provost courts continued to prosecute violations of military orders, and *habeas corpus* remained suspended until martial law was ended by presidential proclamation on October 24, 1944.[30]

Since martial law had been imposed primarily to control the ethnic Japanese residents, it is not surprising that they were subjected to additional race-based restrictions. Aliens could not travel or change residences or meet in groups of ten or more without permission. They could not possess firearms, flashlights, radio transmitters, cameras, or anything that could be used in espionage. Japanese fishermen, who comprised nearly the entirety of the fishing fleet, were banned from going to sea, creating severe hardships. Japanese were also banned from certain areas of O'ahu, causing many farmers to suffer heavy losses and others to lose long-held jobs.[31]

Nevertheless, the fact remains that the vast majority of the ethnic Japanese population in Hawai'i remained free to pursue their lives and, in most cases, their livelihoods, as before the war, but subject, like other civilians, to the strict controls of martial law. Their fate contrasted sharply with that of the Issei and Japanese-American citizens on the west coast of the mainland, who were removed from their homes and incarcerated en masse without any attempts to separate the loyal from the disloyal.

Those responsible for the security of Hawai'i, however, believed that the presence of such a large ethnic Japanese population posed a continuing threat of sabotage and espionage, or even the possibility of aiding the enemy in case of a Japanese invasion, which, in the immediate aftermath of the Pearl Harbor attack, appeared likely. On December 7, President Roosevelt had signed Presidential Proclamation No. 2525, declaring "all natives, citizens or subjects of the Empire of Japan" living in the U.S. and not naturalized to be "liable to be apprehended, restrained, secured, and

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kuehn/bernard-julius-otto-kuehn/view (last visited June 28, 2013); IN THE MATTER OF—THE CONFINEMENT OF BERNARD JULIUS OTTO KUEHN, A PERSON CONVICTED OF VIOLATING SECTIONS 31, AS AMENDED, 32, AND 34, TITLE 50, UNITED STATES CODE ANNOTATED (Nov. 7, 1942), *available at* http://ibiblio.org/pha/congress/Army%20Board%20Exhibits/Exhibit%2052.pdf.

[29] Letter from General Delos Emmons to Assistant Secretary John J. McCloy (July 1, 1942), Hawai'i Military Government Records, Record Group 338, National Archives.

[30] PRESIDENTIAL PROCLAMATION 2627, *reproduced in* ANTHONY, *supra* note 2, at 134.

[31] *See* ANDREW W. LIND, THE JAPANESE IN HAWAII UNDER WAR CONDITIONS 3, Paper No. 5 (Honolulu and New York: American Council, Institute of Pacific Relations, 1943); ALLEN, *supra* note 25.

removed as alien enemies."[32] The army and the FBI in Hawai'i interpreted this authorization to include dual citizens, including, of course all Kibei. (The authorization was formally amended on December 11 to include dual citizens.)[33] Accordingly, on the evening of December 7, without even waiting for the declaration of war, and without presenting charges and often without warrants, the FBI and army, assisted by the police, moved quickly to pick up at gun-point those who had already been identified as suspect and were on their detention lists—mainly leaders of the Japanese community.[34] Many were told they would be questioned for a few hours, but they were in fact detained for the remainder of the war.

Similar proclamations were issued regarding German and Italian aliens on December 8, and similar raids were conducted against all German and Italian aliens and citizens of those ancestries who were on the detention lists. By December 9, a total of 473 persons had been arrested: 345 Issei, twenty-two Nisei, seventy-four German nationals, eleven Italian nationals, nineteen citizens of German ancestry, and two citizens of Italian ancestry.[35] Included were some who had been identified as consular agents but who, in reality, were helping Japanese Americans with their paperwork—in some cases even helping them to expatriate from Japan.[36] By early February 1942, the number of persons being held in detention in Hawai'i had grown to 518.[37] In addition to the pain of confinement, they suffered from not

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[32] FRANKLIN D. ROOSEVELT, PRESIDENTIAL PROCLAMATION, *available at* http://www.foitimes.com/internment/Proc2525.html (last visited Mar. 29, 2013); NATIONAL PARK SERVICE, WWII VALOR IN THE PACIFIC NATIONAL MONUMENT TULE LAKE UNIT, *available at* http://www.nps.gov/tule/planyourvisit/upload/WWII_%20JA_timeline_2010.pdf (last visited Mar. 29, 2013).

[33] Radiogram from Adams (War Department) to Commanding General, Fort Shafter, U.S. District Court Case No. 730, Exhibit C, RG 21 (Dec. 11, 1941), National Archives, San Bruno, CA.

[34] FEDERAL BUREAU OF INVESTIGATION, Memorandum on Pearl Harbor Attack and Bureau's Activities Before and After, Volume 1, 212, Folder FBI-L (Dec. 6, 1945), Japanese Internment and Relocation Files, Hamilton Library, University of Hawai'i at Mānoa, Honolulu, Haw. [hereinafter JIR].

[35] FBI Memorandum, File No. 100-2-20-x, FBI Files, Washington, DC (Dec. 9, 1941), *quoted in* TETSUDEN KASHIMA, JUDGMENT WITHOUT TRIAL: JAPANESE AMERICAN IMPRISONMENT DURING WORLD WAR II 72 (University of Washington Press, 2003).

[36] Reverend Yamada, STRUGGLING WITHIN A STRUGGLE (memoir of a Nisei Protestant minister's activities on Maui during the war period) 5-6, in JERS files, Reel 171, Bancroft Library.

[37] Headquarters Hawaiian Dep't to Adjutant General (Feb. 8, 1942), *in* AMERICAN CONCENTRATION CAMPS: A DOCUMENTARY HISTORY OF THE RELOCATION AND INCARCERATION OF JAPANESE AMERICANS, 1942-1945, VOL. 8: JAPANESE OF HAWAII (Roger Daniels ed., 1989) [hereinafter AMERICAN CONCENTRATION CAMPS].

knowing why they had been arrested, where they would be taken, or for how long they would be away. Some even feared for their lives.

IV. MASS REMOVALS VS. SELECTIVE DETENTION

These initial arrests did not go far enough for President Roosevelt and some of his top military advisors. Although General Delos C. Emmons, who succeeded the disgraced General Short as Commander of the Hawaiian Department and Military Governor on December 17, had assured the residents of Japanese ancestry that there was "no intention on the part of the Federal authorities to operate mass concentration camps,"[38] in fact Secretary of the Navy Knox had urged the mass removal from O'ahu of all ethnic Japanese, citizens and aliens alike, as early as December 19.[39] In January, the War Department asked Emmons about the "practicability of concentration of local Japanese nationals" on an island other than O'ahu.[40] And in February, General George C. Marshall, Army Chief of Staff, recommended that "[a]ll Japanese residents of the Hawaiian Islands (whether U.S. citizens or aliens) be transported to the U.S. mainland and placed under guard at a concentration camp in such locality as is most suitable."[41] President Roosevelt approved such a plan, writing to Knox on February 26:

> Like you, I have long felt that most of the Japanese should be removed from Oahu to one of the other islands. . . . I do not worry about the constitutional question—first, because of my recent order [Executive Order 9066] and, second, because Hawaii is under martial law. The whole matter is one of immediate and present war emergency.
>
> I think you and Stimson can agree and then go ahead and do it as a military project.[42]

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[38] Honolulu Star Bulletin, Dec. 22, 1941, *quoted in* YUKIKO KIMURA, ISSEI: JAPANESE IMMIGRANTS IN HAWAII 222 (1988); *see also* Honolulu Advertiser, Dec. 22, 1941, at 1, 6, *quoted in* CWRIC, PERSONAL JUSTICE DENIED, *supra* note 25, at 1 & 6.

[39] CWRIC, PERSONAL JUSTICE DENIED, *supra* note 25.

[40] Radiogram (Provost Marshal General's Office) to Commanding General, Hawaiian Dept., Jan. 10, 1942, *in* AMERICAN CONCENTRATION CAMPS, *supra* note 37.

[41] Joint U.S. Chiefs of Staff, Hawaiian Defense Forces, JCS 11 (Feb. 12, 1942), copy in FDR Library. PSF, PCF (Hawaii), report *in* CWIRC Papers, at 3664-3665 (reel 3, pp. 639-640); *see* ROBINSON, *supra* note 21, at 148.

[42] Memorandum from President to the Secretary of the Navy (Feb. 26, 1942), PSF Confidential File, FDR papers (on file with Franklin D. Roosevelt Library, Hyde Park, NY); Executive Order 9066, signed February 19, authorized the exclusion of persons from prescribed military areas and their removal to relocation centers, *available at* http://www.archives.gov/historical-docs/todays-doc/?dod-date=219 (last visited May 26,

General Emmons, however, was steadfast in his resistance to all such suggestions for mass removals, which he stated would be "dangerous and highly impractical" and would lead to shortages of shipping and of labor that were vital to the defense effort. Further, in his view, "[a]ny evacuation plan would have serious repercussions on loyalty of citizens of Japanese ancestry."[43] In March 1942, Assistant Secretary of War John McCloy, who was in charge of security in Hawai'i and had direct authority over the Office of the Military Governor, visited the Territory; he came away convinced that mass evacuation was, indeed, impractical, and that the policy of selective detention and evacuation was best.

Although Knox and Roosevelt did not abandon the idea of mass removals, General Emmons successfully resisted such a strategy. They compromised on a plan to evacuate (in addition to those who had been picked up on suspicion of disloyalty) several thousand residents of Japanese descent, who

> are not necessarily disloyal to the United States. This group will comprise those residents who might be *potentially* dangerous in the event of a crisis, yet they have committed no suspicious acts. It is impossible to determine whether or not they are loyal. In general the evacuation will remove persons who are least desirable in the territory and who are contributing nothing to the war effort.[44]

In the military's view, the Kibei figured prominently among the "least desirable" persons, while those who were not contributing to the war effort included mainly unemployed fishermen and families of those who had already been interned.[45]

While the Hawaiian population of Japanese ancestry as a whole thus narrowly escaped the fate of the West Coast Japanese and Japanese Americans, the policy of selective detention and evacuation resulted in severe hardships, and undoubtedly in flagrant injustices, to the small minority who were suspect, especially the Kibei. Persons of Japanese descent, and to a far lesser degree of German and Italian descent, were investigated, arrested, interned, paroled, and released throughout the war. In all, some 10,000 persons were identified and investigated as to their

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2013).

[43] Radiogram from Emmons to Adjutant General (Jan. 12, 1942), *copy in* JIR, *supra* note 34.

[44] Letter from General Delos Emmons to Secretary Henry Stimson (Nov. 2, 1942), Folder A-22 (emphasis added), *copy in* JIR, *supra* note 34.

[45] Community Analysis Section, War Relocation Authority, Tule Lake Center, Newell, California, Field Report #18: Problems Connected with Internal Security: Three Sample Interviews, Interview with the Assistant to the former Chief of Internal Security, October 26, 1943, RG 210, Box 24, Folder 108, *copy in* JIR, *supra* note 34.

loyalty. Some 6,000 of them were Nisei who had volunteered for armed services or who were eligible for the draft.[46] Some 1,500 others were picked up and then brought before hearing boards, where they were interrogated and their loyalty was assessed. If found to be a security risk, they were incarcerated, either in Hawai'i or in Department of Justice or War Relocation Authority camps in the mainland. A total of 1,874 persons, including dependents of internees and those who were deemed to be a drain on the economy, were evacuated to the mainland, away from the active theater of war.[47] Eventually, all the detainees were paroled or released, but some not until months after the war had ended.

At every step of the way—investigation, detention, interrogation, and incarceration—the Kibei were subjected to special scrutiny and faced particular challenges.

V. INVESTIGATION

As noted above, military and naval intelligence, as well as the FBI, had been investigating the ethnic Japanese population for nearly two decades, with efforts intensifying as the tensions with Japan intensified. Two intelligence reports—one on the eve of the war at the President's behest by Curtis Munson, and one by Lt. Commander K. D. Ringle of Navy Intelligence, a few weeks after the Pearl Harbor attack—both predicted that the vast majority of the ethnic Japanese population would remain loyal, and both singled out the Kibei as a possibly disloyal element. Ringle, Navy Intelligence's chief expert on Japanese Americans, concluded:

> [I]n short, the entire "Japanese Problem" has been magnified out of its true proportion . . . ; that it is no more serious than the problems of the German, Italian, and Communistic portions of the United States population, and, finally that it should be handled on the basis of the individual, regardless of citizenship, and not on a racial basis.[48]

However, regarding the Kibei he stated:

> [T]he most potentially dangerous element of all are those American citizens of Japanese ancestry who have spent the formative years of their lives, from

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[46] Historical Sub-section, G-2, U.S. Army, HISTORY OF UNITED STATES ARMY FORCES MIDDLE PACIFIC AND PREDECESSOR COMMANDS DURING WORLD WAR II, 7 DECEMBER 1941-2 SEPTEMBER 1945, Vol. 14, Part VIII, CIVIL AFFAIRS AND MILITARY GOVERNMENT, Appendix 1, PLANS AND MEASURES FOR THE CONTROL OF CERTAIN ELEMENTS OF THE POPULATION 16.

[47] There are discrepancies in statistics of the military, the WRA, and the FBI, but this figure is widely used.

[48] RINGLE REPORT, *supra* note *.

> 10 to 20, in Japan and have returned to the United States to claim their legal American citizenship within the last few years. *These people are* essentially *and inherently Japanese and may have been deliberately sent back to the United States by the Japanese government to act as agents.* In spite of their legal citizenship and the protection afforded them by the Bill of Rights, they should be looked upon as enemy aliens and many of them *placed in custodial detention.*[49]

Although Ringle was writing about the Kibei on the West Coast, the views of this Navy officer were presumably not restricted to California.

Such prejudicial views against the Kibei were shared by senior military officers and set the tone for the treatment of the Kibei until the war was over. For example, General John DeWitt, in charge of the mainland's Western Command and the chief proponent of the relocation of West Coast Japanese, regarded all Kibei as *ipso facto* loyal to Japan; he wanted them stripped of their U.S. citizenship and sent back to Japan.[50] Similarly, General Robert C. Richardson, who succeeded Emmons as Military Commander and Military Governor in July 1943, said of the Kibei:

> Despite the fact that so many have made statements of loyalty to the United States, it is my opinion based on findings of Hearing Boards and intelligence reports that they are dangerous to the security of the United States and that their utterances of loyalty are inconsistent with their backgrounds and training in Japan.[51]

The investigations by MID, ONI and the FBI continued throughout the war, and tips also poured into FBI headquarters from ordinary citizens, who reported short-wave radios and "suspicious activities."[52] As a result, additional suspects were picked up even as late as 1945, although civilian government had been partially restored in March 1943 and martial law had been terminated in October 1944.

Most of the ethnic Japanese in Hawai'i who were eventually interned or evacuated, however, were picked up in the early weeks of the war. There were relatively few arrests, especially of the Issei, after mid-1942, when the Battle of Midway ended any real threat of a Japanese invasion. Nonetheless, the Kibei were an exception to this pattern.[53] The military

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[49] *Id.* (emphasis added).

[50] ROBINSON, *supra* note 21, at 182.

[51] Richardson to Asst. Sec'y of War John McCloy (Feb. 2,1944), *in* AMERICAN CONCENTRATION CAMPS, *supra* note 37.

[52] FBI Honolulu Field Division, Running Log, December 7-12, 1941, Record Group 65, National Archives and Records Administration II.

[53] From January 1943 through June 1944, 670 cases of American citizens were heard, resulting in 220 individuals being interned; in the same period, 359 cases of aliens were heard, with 180 individuals being interned. ORIGINAL ACTION: RELEASES, INTERNMENTS,

command continued to view the Kibei as a security threat, and in the fall of 1942, military intelligence officers began investigating *all* Kibei in Hawai'i who had not yet been arrested or detained. According to one young Kibei who later volunteered for military service:

> I was really surprised they knew so much. I mean, I was only a sixteen-year-old young punk that just came back from Okinawa two years before the war. And why they were keeping dossier on me, I don't know. Because I didn't do anything, outrageous things in the two-year period. Somehow, they keep track of me, I guess. They know some of the things I don't remember, I forgot. That really shake me.[54]

Despite the fact that the searches of Kibei homes produced no evidence of anti-American activities, just having been educated in Japan was, in the military's view, reason enough to be suspect. One Kibei eloquently expressed the dilemma faced by these citizens, whose Japanese education was, after all, their parents' decision, not their own. He recalled that no specific reason was given for his arrest:

> Just that I received my education in Japan. But I didn't have a choice in receiving my education in Japan. My parents returned to Japan and took me with them. I told them [the Hearing Board] that but they said didn't you receive military training while attending school there? That military training was compulsory. . . . Wasn't that the same as taking ROTC here? Yet they said I received military indoctrination.[55]

He disputed the assumption that all Japanese language teachers were pro-Japanese:

> At Japanese school I was teaching for the sake of America. I didn't teach them to go and die for the Emperor of Japan. They were bowing to the American flag. . . . Just because we were teaching Japanese language school does not mean that we were pro-Japan. I think it was because of this training in Japanese school that enabled the 100th and 442nd to accomplish the feats that they did. They learned how to honor and respect the country through those instructions.[56]

Despite his protestations, he was incarcerated until April 1946.

PAROLES, REHEARINGS WITHIN THE HAWAIIAN GROUP, ORDERED BY THE COMMANDING GENERAL, CENTRAL PACIFIC AREA, 7 DECEMBER 1941–JUNE 1944, Record Group 494, National Archives.

[54] Interview of Takejiro Higa, *in The Hawai'i Nisei Story: Americans of Japanese Ancestry During WWII*, CENTER FOR ORAL HISTORY, UNIVERSITY OF HAWAI'I (2006), *available at* http://nisei.hawaii.edu.

[55] Interview with Iwao Kasaka, *in* JIR, *supra* note 34, File 237.

[56] *Id.* at 3. References are to the highly decorated all-Nisei fighting units.

VI. INTERROGATION: THE HEARING BOARDS, RACIAL PROFILING, AND LOYALTY REVIEWS

Having decided that selective detention would provide the best security for the Territory of Hawai'i, General Emmons, and later his successor, General Richardson, and their legal staffs had to determine how best to make that selection. An elaborate process of hearings and reviews was established, along with an interrogatory protocol that today would be termed racial profiling.

Following arrest, but sometimes days or even weeks later, each suspect was brought before a hearing board composed of three civilians and an army officer. The hearing board's recommendations then went to an Intelligence Reviewing Board consisting of representatives of military and naval intelligence and the FBI. This Board's recommendations, in turn, went to the Military Governor's Reviewing Board for final action by the Military Governor.[57] Beginning in 1943, the Military Governor's Reviewing Board held re-hearings on those who had been interned earlier as well as reviewing new cases.[58]

The provost marshal's office set forth general guidelines for the hearing boards that emphasized "CITIZENSHIP, LOYALTY, and the INTERNEE'S ACTIVITIES. . . . Keep in mind that these hearings are informal; that the Internee is not heard as a matter of his rights and that it is desired that these records be expedited."[59] The hearings varied in scope and duration, with some lasting several minutes and some several days, but many internees later testified that they were intimidated and that protestations of loyalty were disregarded. The detainees were not allowed to examine the evidence against them, and access to legal counsel was limited. They were questioned about friends and relatives in Japan, any participation in Japanese consular activities or social events, and whether they had made donations of money, food, or clothing to Japan. They were also asked which side they wanted to win the war, if they would shoot at the enemy if they invaded Hawai'i, or if they would follow orders to bomb the Imperial Palace if the Emperor was there. Among the adverse factors in determining loyalty were leadership roles in the Japanese community, membership in Japanese organizations, having received education in Japan, registration of children in Japan, and failure to speak English or expatriate from Japan if a dual citizen.[60]

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[57] CONTROL OF CIVILIAN INTERNEES AND PRISONERS OF WAR, *in* JIR, *supra* note 34; HAWAIIAN DEPARTMENT ALIEN PROCESSING CENTER, *in* JIR, *supra* note 34.

[58] *Id.*

[59] *Quoted in* ALLEN, *supra* note 25, at 135.

[60] *See* CONTROL OF CIVILIAN INTERNEES AND PRISONERS OF WAR IN THE CENTRAL

Here again, the Kibei were at a disadvantage because of their Japanese education, their generally poor command of English, the fact that they had relatives in Japan, and their status as dual citizens. The questioning could be harsh:

> [T]he FBI and military officers question[ed] me. They put their guns on the table in plain view, like a threat. I felt they were interrogating me as though I were a spy—but I was not. The FBI and military officers told me that since America was at war with Japan and because I was raised in Okinawa, Japan and regardless that I was an American citizen, I was an internee (P.O.W.).[61]

Another internee poignantly described the dilemma for the Kibei:

> He asked me if my parents were attacking, would I shoot them. I told him I couldn't do it. Sitting at the next desk over was a Japanese FBI agent. He told me that it was because of people like me that the rest of the Japanese in Hawaii would suffer. . . . It was enough that they asked me if I would shoot my parents, but to tell me I was wrong in saying that I would not, was too much. . . . If I said I would shoot my parents you would know it was a lie. I think they used that kind of questioning as a trick to send us to Sand Island.[62]

In making its case against a detainee, as recorded in archived files of the interviews, the government often started out with "Subject is a Kibei," or "Subject is a dual citizen." Perhaps most revealing of all was the phrase, "No evidence of any subversive activities was presented. However, this is a typical Kibei case."[63] Such a finding was a shorthand way of saying that the subject was not to be trusted and, at best, was potentially disloyal, despite the lack of any concrete evidence of such. According to one intelligence official, because of their "possible relationship with certain Japanese authorities" before they returned home to Hawai'i, the Kibei are "necessarily suspicious" and "their mission [sic] in the United States is not clear and must be regarded with suspicion."[64] A Navy Intelligence Office manual of 1943 explicitly stated that "Kibei will display far more pro-

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PACIFIC AREA, Record Group 338, *copy in* JIR, *supra* note 34, Folder 212. These lists of questions and of adverse and positive factors are drawn from the author's investigation of hundreds of cases of internees, reported in the Minutes of the Internee Review Board, (Military Governor's Reviewing Board) June 1943-Dec. 1944. The Review Board documentation summarizes the findings of earlier interviews and hearings.

[61] Testimony by Mitsunobu Miyahira *quoted in* CWRIC, PERSONAL JUSTICE DENIED, *supra* note 25.

[62] *See* Interview with Iwao Kasaka, *in* JIR, *supra* note 34, File 237.

[63] Meeting Minutes of the Internee Review Board; April 1944-August 1944, Record Group 338, National Archives (Case of Masami Furukawa, Aug. 5, 1943; Case of Rikio Naito, Dec. 9, 1943; Case of Kiyoto Hamamoto, Dec. 16, 1943).

[64] E.J. CRANE, HQ, MAUI SERVICE COMMAND (Oct. 27, 1942), *quoted in* KASHIMA, *supra* note 35, at 81.

Japanese sentiment than will other Nisei. It is of interest to note that the Japanese community itself considers the Kibei to be the most dangerous class in their midst."[65] The manual went on to state that it is important to uncover false protestations of loyalty.

In the re-hearings of those who had been interned, their resentment of the way they had been treated was also grounds for continued confinement. One case examined by the author is illustrative: Shikatsu Kagesa, a Kibei, had been taken to Japan in 1897, at age eight, and returned to O'ahu in 1912. Despite having served in the Hawai'i National Guard and in the U.S. Army in 1918-19, he was deemed a security risk in part because he ran a hotel that was frequented by military personnel so that he could have overheard their conversations. He maintained he was a loyal American citizen, but he was "interned for fifteen months for no reason . . . and I lost my pride as an American citizen. They should not intern any American citizen, so I am quite confused."[66] He stated that he preferred continued internment to going back to Japan. The hearing board concluded: "Despite the fact that the internee professes loyalty to the United States it is the opinion of this office that subject's loyalty statements are merely self-serving."[67]

In sum, those who were detained were judged not on hard evidence but rather "on personalities and their utterances, criminal and credit records, and probably nationalistic sympathies."[68] General Emmons later admitted, "In Hawaii, we were taking no chances, and we used the expression 'potentially dangerous' in a very liberal way, . . . a very broad way . . . . In the case of any doubt of any kind, we had the man interned."[69]

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[65] Manual prepared for persons attached to the District Intelligence Office, Fourteenth Naval District, RG389, entry 480, box 1722, National Archives. The manual bears no date, but its internal references to an earlier manual and to events and memoranda make it likely that it was issued in August 1943.

[66] Minutes of the Meeting of the Internee Review Board, April 1944-August 1944, Record Group 338, National Archives (Case of Shikatsu Kagesa, June 22, 1944).

[67] *Id.*

[68] U.S. CONGRESS, JOINT COMMITTEE ON THE INVESTIGATION OF THE PEARL HARBOR ATTACK, 79th Cong., 1st and 2d sess., 1946, part 35, at 570, *quoted in* ALLEN, *supra* note 25, at 35.

[69] Deposition of Gen. Delos Emmons, taken at San Francisco (May 18, 1949), *in* Zimmerman v. Poindexter et al., box 157, Case Files for the U.S. District Court for the District and Territory of Hawai'i, National Archives (Pacific Region), San Bruno, California.

VII. INCARCERATION

Most of those who were determined, in this highly subjective process, to be a security risk were sent to Sand Island, a former quarantine center at the entrance to Honolulu Harbor that was converted into an internment camp when war began. Other detention facilities were used on the other islands: Kīlauea Military Camp on the Big Island, Haiku Internment Camp on Maui, and the Kalāheo Stockade on Kaua'i. There they were held under army control, in legal status as "internees" under martial law policies.[70]

Starting in February 1942, the army began shipping the internees, both citizens and aliens, to the mainland. While aliens could be transferred under legislation dating back to 1798, War Department officials soon realized that the army lacked any such legal authority to forcibly remove citizens and intern them on the mainland.[71] Further, once on the mainland, the Kibei and other Nisei internees from Hawai'i could sue for *habeas corpus*, thus challenging the legitimacy of their incarceration and of the military government itself.[72] As Secretary of War Stimson wrote in his diary:

> As the thing stands at present, a number of them have been arrested in Hawaii without very much evidence of disloyalty, have been shipped to the United States, and are interned there. McCloy and I are both agreed that this was contrary to law; that while we have a perfect right to move them away from defenses for the purpose of protecting our war effort, that does not carry with it the right to imprison them without convincing evidence.[73]

And so, to avoid legal complications, the Kibei and other citizens were returned to Hawai'i in August 1942. From then on, the Japanese-American citizens were interned in Hawai'i, first in rather primitive conditions at Sand Island and, after March 1943, at the newly constructed camp at Honouliuli.[74]

More than 300 of the Kibei internees, however, were transferred from Hawai'i to the mainland in the formal status of "evacuees," along with the families of aliens who were already interned there and others who were a drain on the economy. Altogether, 1,040 persons were evacuated, in part as a token political offering to those advocating much broader removals of

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[70] CWRIC, PERSONAL JUSTICE DENIED, *supra* note 25, at 278.

[71] Lerch to Adjutant General (Mar. 3, 1942), *in* AMERICAN CONCENTRATION CAMPS, *supra* note 37; CWRIC, PERSONAL JUSTICE DENIED, *supra* note 25, at 277.

[72] CWRIC, PERSONAL JUSTICE DENIED, *supra* note 25, at 271.

[73] Stimson diary (Apr. 7, 1942), *quoted in id.*

[74] CWRIC, PERSONAL JUSTICE DENIED, *supra* note 25, at 278.

Japanese Americans from Hawai'i.[75] According to General Richardson, those who were evacuated, other than women and children, were mainly "dual citizens who were considered at that time to be potentially dangerous to the military security of the Territory of Hawaii, but not to the United States as a whole."[76] The internees thus evacuated between November 1942 and March 1943 were technically released on parole as they boarded the ships for the mainland, but not before they were coerced into signing waivers of their right to sue the government for detention. Military personnel, in what appears to be a case of blatant lying, had led the Kibei to believe that they would gain their freedom on the mainland.

> Voluntary (or non-voluntary, as you wish) relocation of citizen internees and their families has been, in most cases, after a conference between the internee and his wife resulting in their joint decision to be evacuated. The internee's case is then considered in view of the recommendation for release on the mainland before evacuation by this office.[77]

Instead of being in fact *released*, the "paroled" evacuees were sent to WRA camps, where once again they were incarcerated behind barbed wire, watched over by armed guards, and deprived of their basic liberty.[78]

At the WRA camps, the Japanese Americans were subjected to additional tests of loyalty. Early in 1943 the Army administered loyalty questionnaires for those Nisei wanting to volunteer for the newly approved all-Nisei division. Shortly thereafter, the WRA decided on a similar questionnaire to determine the loyalty of all the adult camp residents, men and women, citizens and aliens alike.[79] Many of the questions were similar to those asked by the hearing boards, and were similarly problematic for the Kibei. Particularly troublesome were questions 27 and 28. Question 27 asked, "Are you willing to serve in the Armed Forces of the United States on combat duty, wherever ordered?" Question 28 was even more difficult and asked, "Will you swear unqualified allegiance to the United States of America and faithfully defend the United States from any and all attack by foreign or domestic forces, and foreswear any form of allegiance or

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[75] *Id.* at 274.

[76] Memorandum from Richardson to CIC, Pacific Oceans Area (Mar. 23, 1945), Record Group 210, National Archives.

[77] Memorandum from Blake to Bicknell, Review of Evacuee Transfer (Dec. 1, 1942), Record Group 210, National Archives.

[78] WAR RELOCATION AUTHORITY, Summaries of the Activities of Persons of Japanese Ancestry, since Arriving on the Mainland after Evacuation from Hawaii, Who Are Not Residing at Tule Lake Center, Newell, California (Apr. 24, 1945), Record Group 210, NA; Jane Scheiber & Harry Scheiber, *Martial Law in Hawaii*, DENSHO ENCYCLOPEDIA (May 3, 2013), *available at* http://encyclopedia.densho.org/Martial%20law%20in%20Hawaii/.

[79] CWIRC, PERSONAL JUSTICE DENIED, *supra* note 25, ch. 7.

obedience to the Japanese emperor, or any other foreign government, power or organization?"[80] For Kibei who attended school in Japan, who likely had relatives there, some of whom may have been fighting in the Japanese Army, there were no easy answers. Nor was there room to express the ambiguity felt by many of those who had been incarcerated despite their protestations of loyalty. Bitterness at having been interned was in itself held against the internee.[81]

Many Kibei and other dual citizens refused to answer Question 28 or else answered negatively, resulting in yet another set of hearings. Once again, the outcome of such hearings was highly subjective. As an attorney for the WRA wrote, "I heard every kind of approach and noted wide variations in the treatment by different interviewers of the same conduct and the same responses by different kibei."[82] Those who did not reverse their position were sent to Tule Lake Camp, which was designated a segregation center for those who had requested repatriation to Japan and "all individuals appearing to have pro-Japanese sympathies."[83]

Of the total 1,037 residents of Hawai'i who had been evacuated to the mainland in late 1942 and early 1943 and had been confined at WRA camps, 340—approximately one-third—were transferred to the Tule Lake Segregation Center. Of this number, 131 requested repatriation or expatriation to Japan, 180 were sent because of their answers to the loyalty question, and 9 "for other reasons." Three hundred twenty-seven of the segregants from Hawai'i (260 males and 67 females) were U.S. citizens, presumably mainly Kibei and their families.[84] Additional transfers of Hawaiian Japanese Americans brought the total to 656 by July 1944.[85]

Yet another group of Nisei internees was transferred as martial law ended. In early 1944, there were still 135 Kibei interned in Hawai'i, held under martial law. As the threat of invasion from Japan receded and legal and political challenges to martial law mounted, General Richardson feared

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[80] *Id.*

[81] *See supra* text accompanying note 60; author's research *in* Minutes of the Meeting of the Internee Review Board, April 1944-August 1944, *supra* note 60.

[82] Edgar Bernhard, principal attorney, to Philip M. Glick, War Relocation Authority (Apr. 13, 1943), *microformed on* JERS Collection, reel 170 (on file with Bancroft Library, University of California, Berkeley).

[83] DILLON S. MYER, UPROOTED AMERICANS: THE JAPANESE AMERICANS AND THE WAR RELOCATION AUTHORITY DURING WORLD WAR II 75 (1971).

[84] Memorandum from Myer to Farrington (Nov. 22,1943), Record Group 210, National Archives.

[85] SEGREGANT POPULATION OF TULE LAKE AS OF JULY 1944 BY AREA OF PRE-WAR (Dec. 1, 1941) RESIDENCE COMPARED TO 1940 CENSUS OF JAPANESE, AND BY PLACE FROM WHICH SEGREGATED, WDC-CAD-Research Branch (Sept. 4, 1944), *microformed on* JERS files, reel 170 (on file with Bancroft Library, University of California, Berkeley).

both the end of martial law and the possibility of *habeas* suits in which the government could mount no hard evidence against the Kibei.[86] It is telling that the chief of the legal section of the OMG, who had been the officer in charge of many of the assessments of loyalty, proposed that federal legislation should be passed that would strip Kibei of their American nationality by virtue of years spent in Japan.[87] This proposal was not backed by the War Department in Washington. The army still believed that it was unsafe to parole the Kibei, but it was denied permission to send them to the WRA camps. Richardson therefore decided instead on a policy of "exclusion." President Roosevelt acceded to Richardson's request, and on October 24, 1944—the very day on which martial law was terminated—the president signed Executive Order 9489, giving Richardson the power to declare Hawai'i a military area from which individuals could be excluded.[88] Although this authorization was similar to the one that had resulted in the exclusion of all ethnic Japanese from the West Coast, Richardson continued Emmons' policy of selectivity and excluded only a total of 73 Nisei, mostly Kibei, the last of whom were transferred to the Tule Lake camp in July 1945.[89]

The fact that a significant number of the Kibei requested repatriation was taken by some government officials and intelligence officers as proof that the Kibei were, indeed, disloyal and had posed a real threat to security. But other observers pointed to the circumstances to which the Kibei and others had been subjected—their internment, their denial of American constitutional rights, and the military's refusal to accept their attestations of loyalty. Added to this was, in the words of the assistant project director at Tule Lake, the frustration brought about by living

> abnormal, regimented lives in an abnormal, regimented government center; the crowded, dismal barracks; the unpalatable food . . . ; lack of privacy in the community lavatories and laundry rooms; the "concentration camp"

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[86] Richardson to Assistant Secretary John McCloy (Feb. 2, 1944), *copy in* JIR, *supra* note 34, folder A30.

[87] R.W. Flournoy to Hackworth, Disloyal Japanese Americans: Proposed Measures for Their Expatriation and Deportation, Conference with Colonel King and Colonel Slattery (Sept. 6, 1944), Record Group 494, entry 22, box 148, National Archives.

[88] Memorandum to Brigadier General William R. C. Morrison from Major Robert B. Griffith, Exclusion Procedure in the Territory of Hawaii Military Area (Nov. 13, 1945), Record Group 494, Entry 22, Box 148, NA.

[89] Memorandum from Dillon S. Myer, Director, War Relocation Authority, to Assistant Secretary of War Davidson Sommers (Aug. 3, 1945), Record Group 494, Entry 11, Box 32, NA.

> atmosphere of the daily routine; and the feeling that the "rights of man" as applied to other citizens and other aliens did not apply to them.[90]

Undoubtedly, a few Hawaiian Kibei had been pro-Japanese from the start, and some of them participated in the violent gangs of pro-Japanese Nisei at Tule Lake that tried to intimidate others into renouncing their American citizenship.[91] But other Hawaiian Kibei were the hapless victims not only of such gangs, but also of the pervasive suspicion in which the military government held all Kibei as it tried to assure internal security. This suspicion continued until the end of the war, despite the fact that Nisei, including Kibei, volunteered in record numbers for the armed services when the opportunity was made available and served with distinction.

Even after the war had ended, the U.S. government discriminated against the Kibei. When some of the renunciants sought to reverse their decision and remain in the United States, the Department of Justice reluctantly agreed to hold "mitigation hearings"; but being a Kibei was taken as *prima facie* evidence of disloyalty.[92] A civil liberties lawyer, Wayne Collins, agreed to take the cases of the renunciants to court. There followed a long and complex litigation that went to the Ninth Circuit Court, which ruled that each case must be judged individually.[93] Although citizenship was finally restored to most of the renunciants desiring it, the last case was not decided until 1968.[94]

VIII. CONCLUSION

There is little doubt that the military government in Hawai'i was successful in maintaining internal security. But was the abrogation of civil liberties, especially as applied to the ethnic Japanese, really necessary? From the beginning of the war to its end, thousands of Japanese and Japanese Americans in Hawai'i had been investigated and cleared without being taken into custody. Fewer than 2,000 ethnic Japanese in Hawai'i were incarcerated—less than one percent of the population of Japanese ancestry. Of these, one-third were American citizens, mainly Kibei. A

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[90] DONALD E. COLLINS, NATIVE AMERICAN ALIENS: DISLOYALTY AND THE RENUNCIATION OF CITIZENSHIP BY JAPANESE AMERICANS DURING WORLD WAR II 136 (1985) (quoting the 1945 affidavit of Harry L. Black, Assistant project director of Tule Lake Center).

[91] See *id.* for a useful summary of the violence at Tule Lake.

[92] JACOBUS TENBROEK, EDWARD N. BARNHART, AND FLOYD W. MATSON, PREJUDICE, WAR AND THE CONSTITUTION 182 (Berkeley, 1954).

[93] COLLINS, NATIVE AMERICAN ALIENS, *supra* note 90 .

[94] John Christgau, *Collins versus the World: The Fight to Restore Citizenship to Japanese American Renunciants of World War II*, 54 PAC. HIST. R. 1, 1-31 (1985).

total of 1,874 residents of Hawai'i, mostly Japanese and Japanese Americans, had been removed from the Islands and placed in Department of Justice or War Relocation Authority camps on the mainland, some in detention, and some as dependents of those in detention. Some were technically internees, some evacuees, and some excludees. All were held behind barbed wire enclosures and deprived of their liberty, livelihoods, and in many cases, their families. Other persons were held in Army camps in Hawai'i.

It is impossible to say with certainty exactly how many of those who were detained were Kibei, but at a minimum it was 300-400.[95] According to a postwar report of the Provost Marshal General, a total of 712 aliens, plus a few Kibei who requested repatriation, were sent to mainland internment camps under the provisions of the Enemy Aliens Act; 306 Nisei, mostly Kibei, were evacuated in late 1942 and early 1943; and an additional 73 Nisei, again mainly Kibei, were excluded after martial law ended in 1944, for a total of 379 Nisei.[96] The author's analysis of WRA records reveals a total of 324 Kibei from Hawai'i were in the WRA camps.[97] That means that more than 80 percent of the Nisei who were torn from their homes, interrogated, incarcerated and evacuated to the mainland were Kibei. And yet Kibei comprised, at an outside estimate, less than 5 percent of the adult Nisei population in Hawai'i. Whatever discrepancy there is in statistics, one thing seems certain: the Kibei were disproportionately represented among the Hawai'i residents who were interned, evacuated, or excluded.

We know from transcripts of the Military Governor's Review Board hearings that many of the Kibei swore allegiance to the United States, but

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[95] Robert Shivers, head of the FBI in Honolulu, states that a total of 1,441 ethnic Japanese were detained, of whom 879 were aliens and 534 were citizens. Of this group, 468 were Kibei. ROBERT L. SHIVERS, COOPERATION OF RACIAL GROUPS IN HAWAI'I DURING THE WAR 3 (1943). However, there is a discrepancy in the figures provided by the military, the FBI, and the War Relocation Authority.

[96] A.M. Tollefson, Provost Marshal General's Office, Persons Evacuated from the Territory of Hawai'i Military Area Presently Residing on the Mainland (Oct. 9, 1945), Record Group 210, NA. Other estimates differ. *See* text accompanying *supra* note 95, re discrepancy of statistics.

[97] The author's analysis of the WRA database, "Japanese-American Internee Data File, 1942–1946, Record Group 210" (available from the National Archives at http://www.archives.gov) shows almost 10 percent of the Hawaiian Kibei who were in the WRA camps were female, some having received as many as eleven years of schooling in Japan. Some of them were single women, but most of them were married. The most common occupations for the women were teachers, seamstresses, clerks, and maids. The analysis was performed by selecting from the database all persons born in Hawai'i whose last known address was Hawai'i and who had received more than one year of schooling in Japan.

others were admittedly pro-Japanese or at best neutral. Even those who requested repatriation after having been deprived of American civil liberties and incarcerated without evidence were not, however, necessarily security risks. According to General Emmons, "Undoubtedly mistakes were made. We leaned over backward in interning people in order to achieve as much security as we possibly could."[98] Certainly many Japanese Americans were held on the basis of the flimsiest of evidence and subjective opinions. As General Emmons admitted after the war:

> We had information in the form of gossip, hearsay and conclusions, and so on, that I would distinguish from evidence. What I mean is that had we presented in court what we had, and what the FBI had, on these people, the court would not [have] accepted it. . . . At least, I never saw any [such tangible evidence] . . . . Had we had such evidence, we would have tried them before a military commission.[99]

In the absence of such evidence, it is likely that many of the Kibei and others who were incarcerated as security risks were in part the victims of racial prejudice, exacerbated by virulent but totally unfounded rumors of widespread Japanese espionage leading up to the Pearl Harbor attack. And in part they were victims of the army's zeal to maintain security (and perhaps its own power) in the face of possible legal challenges to the martial law regime. In the end, not a single *habeas* case was brought by a Japanese American, nor was a single one of the detainees found guilty of attempted sabotage or fifth-column activities. Was this because, as the military claimed, the strict control imposed by the martial law regime prevented such acts? Or, as is likely, were the detainees not really a threat to security in the first place?

The larger question of the legitimacy of military powers over a civilian population in time of war—of which the Kibei story is a relatively small part—was brought before the Supreme Court in the case of *Duncan v. Kahanamoku*,[100] four years to the day after the Pearl Harbor attack. The Supreme Court ruled that in substituting military for civilian courts, the martial law regime in Hawai'i had exceeded its powers under the Hawai'i Organic Act.[101] The ruling was on narrow statutory grounds and did not address the legality of incarcerating hundreds of U.S citizens on a primarily racial basis. In a concurring opinion, however, Justice Frank Murphy found

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[98] Deposition of Gen. Delos Emmons, *supra* note 69.

[99] *Id.*

[100] 327 U.S. 304 (1946).

[101] *Id.*

"especially deplorable" the "use of the iniquitous doctrine of racism"[102] to justify the military government's imposition of military trials.

> Racism has no place whatever in our civilization. The Constitution as well as the conscience of mankind disclaims its use for any purpose, military or otherwise. . . . We must be on constant guard against an excessive use of any power, military or otherwise, that results in the needless destruction of our rights and liberties.[103]

In the words of the late Jon Van Dyke:

> The rulings and opinions of the U.S. Supreme Court in *Duncan v. Kahanamoku* thus stand as eloquent reminders of the principles of freedom that have guided the United States. During the martial law period, . . . [t]he ugly specter of racism led the military and executive decision makers to impose harsh military justice on the civilian population of the islands, leading to arbitrary action and suffering for many.[104]

It was not until the Civil Rights Act of 1988 that the United States finally issued a formal apology and offered some measure of restitution to all surviving internees, from Hawai'i as well as from the West Coast.

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[102] *Id.* at 334 (Murphy, J., concurring).

[103] *Id.*

[104] Jon M. Van Dyke, *"Duncan v. Kahanamoku," in* Hawai'i Under Martial Law: A Humanities Exhibit 19 (Honolulu, Haw., Judiciary History Center, 1991).

Time and the Public Trust Doctrine: Law's Knowledge of Climate Change

David D. Caron[1]

I. INTRODUCTION

The Danish physicist, Niels Bohr, reportedly once said: "Prediction is a difficult thing, especially if it is about the future." It is precisely for this reason that the law hesitates to take account now of what the future holds. The exact shape of the future turns on many forces and in particular on many choices still to be made. Yet, where a chain of physical causation is

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[1] Dean, The Dickson Poon School of Law, King's College London.

This article was originally delivered as a luncheon address at a conference in memory of Professor Jon Van Dyke on February 1, 2013 at the University of Hawai'i. At that time, the author was a member of the law faculty at Berkeley Law, University of California. The author thanks his research assistant, Amber Phillips JD '14, for her excellent assistance and expresses his appreciation for support from Berkeley Law. The author thanks Professor Harry N. Scheiber, John Briscoe and Judith Knapp '90 for their comments, although errors remain those of the author.

A valuable backdrop to themes raised in this article can be found in Harry N. Scheiber, *Public Rights and the Rule of Law in American Legal History*, 72 CALIF. L REV. 217 (1984). For a further discussion of aspects of this article, see Tim Eichenberg Sean Bothwell and Darcy Vaughn, *Climate Change and the Public Trust Doctrine: Using an Ancient Doctrine to Adapt to Rising Sea Levels in San Francisco Bay*, 3 GOLDEN GATE U. ENVTL. L.J. 243 (2010); and Robin Kundis Craig, *Adapting to Climate Change: The Potential Role of State Common-Law Public Trust Doctrines*, 34 VT. L. REV. 781 (2010).

clear, the law on occasion does incorporate now the end of a chain that has still to occur. In 2008, for example, the polar bear was listed by the U.S Fish & Wildlife Service ("FWS") as a "threatened species" under the Endangered Species Act. The FWS found that:

> Polar bear habitat—principally sea ice—is declining throughout the species' range, that this decline is expected to continue for the foreseeable future, and that this loss threatens the species throughout all of its range. Therefore, we find that the polar bear is likely to become an endangered species within the foreseeable future throughout all of its range.[2]

The polar bear was "threatened" not because its population was dangerously low at present but rather because climate change and melting arctic sea ice would in a time yet to come destroy the niche habitat on which it depends.

Climate change challenges humanity in many ways. It likewise challenges the law and in particular challenges the capacity of law to incorporate into present day reasoning and doctrine those aspects of climate change that are already in the pipeline, that already are a part of our collective future. In this article, I honor the Van Dyke tradition of "putting out markers"[3] by considering how the law builds into itself an appreciation, a knowledge, of the coming effects of climate change. Certainly statutes may be—and indeed have been—drafted so as to require, for example, in planning decisions that consideration be given to the future changes in the climate.[4] This article considers whether a particularly significant common law doctrine sometimes codified, namely the public trust doctrine, likewise gives consideration now to the yet to be realized consequences of climate change.

This article reaches a surprising conclusion. Ordinarily, the question is posed as whether the public trust doctrine can anticipate change yet to be realized. A close analysis of the doctrine as it is applied in my view reframes the question dramatically. The question is not whether the

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[2] Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the Polar Bear (*Ursus maritimus*) Throughout Its Range, 95 Fed. Reg. 28212, 28212 (May 15, 2008) (to be codified at 50 C.F.R. pt. 17).

[3] *See* Harry N. Scheiber, *A Jurisprudence of "Altruistic Pragmatism": Jon Van Dyke's Legacy to Legal Scholarship*, 35 U. HAW. L. REV. 385 (2014).

[4] For a discussion of both local planning laws and cases interpreting those laws in Australia, see Jacqueline Peel and Lee Godden, *Planning for Adaptation to Climate Change: Landmark Cases from Australia*, 9 SUSTAINABLE DEV. L. & POL'Y 37 (Winter 2009). *See also* Daniel A. Farber, *The Challenge of Climate Change Adaptation: Learning from National Planning Efforts in Britain, China, and the USA*, 23 J. ENVTL. L. 359 (2011); and Victor B. Flatt, *Adapting Laws for a Changing World: A Systemic Approach to Climate Change Adaptation*, 64 FLA. L. REV. 269 (2012).

doctrine can anticipate change yet to be realized, I conclude it clearly does. The issue actually is whether the future can be known with adequate certainty.

Part II describes the public trust doctrine as it exists in United States law, while Part III summarizes what we have learned over the last three decades about the prospect for a rise in sea level as a consequence of climate change. Finally, Part IV brings these two subjects together and analyzes how time plays into the public trust doctrine and how that doctrine may come to anticipate the impacts that we know with substantial certainty will be experienced.

II. THE PUBLIC TRUST DOCTRINE

The public trust doctrine may be found in the laws of many, if not all, of the several states of the United States. This Part describes the widely accepted contours of the doctrine and then outlines the expansion of the doctrine as a part of the environmental movement of the last four decades, noting also the controversy surrounding that expansion. To observe that aspects of the expansion have been controversial is not intended as an endorsement of those criticisms, but rather as an acknowledgement of the political environment in which the analysis in this article is offered. Indeed, the critical point to be made regarding such criticism is to stress that the doctrine is present in state law of virtually all states, sometimes in their Constitutions, sometimes in statute, and almost always in the common law. This article's reliance on the law of the State of California rests neither on the most conservative, nor the most progressive, form of the doctrine.[5]

A. The Widely Accepted Contours of the Doctrine

> By the law of nature these things are common to mankind—the air, running water, the sea and consequently the shores of the sea. (Institutes of Justinian 2.1.1.) From this origin in Roman law, the English common law evolved the concept of the public trust, under which the sovereign owns "all of its navigable waterways and the lands lying beneath them 'as trustee of a public trust for the benefit of the people.'"[6]

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[5] *See* Alexandra B. Klass, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards*, 82 NOTRE DAME L. REV. 699, 715 (2006) (detailing the incorporation of strong public trust provisions in the state constitutions of Pennsylvania, Montana, Alaska, Hawai'i, and Louisiana).

[6] Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 718 (Cal. 1983) (citations omitted).

The public trust doctrine is the subject of much scholarship and some controversy. The critical scholarship is partly historical, looking at the pedigree of the doctrine; partly instrumental, urging that legislation is a more coherent integrated approach to promoting environmental values than fragmented deployment of the public trust doctrine through litigation; and partly ideological, reflecting the tension present between the value of protecting the environment and the value of protecting private property. But even as this range of argument is acknowledged, it is simultaneously crucial to see that there is a core of the doctrine that is both quite clear and widely accepted in state law.

1. Historical Roots

The historical pedigree commonly cited is that United States inherited the public trust doctrine from the English common law, often also noting that the roots of the doctrine stretch back to ancient Rome and the Justinian Code. Under the English system, the public trust consisted of the Monarch's enduring right of sovereignty over waterways and shorelines.[7] When the United States gained sovereignty over the colonies from England following the Revolutionary war, this aspect of sovereignty passed to individual states, with the Supreme Court ruling in 1845 in the case of *Pollard's Lessee v. Hagan*[8] that the Constitution reserved shorelines and the land under navigable waters to the states, not the federal government, and that new states were granted sovereignty over the navigable waterways within their borders upon entry to the Union.[9] Inevitably, differences in state property law have resulted in different shades of the public trust doctrines, but rulings by the Supreme Court have established a number of common fundamentals.

2. Scope of The Trust

While English common law restricted the public trust doctrine to lands under waters subject to the ebb and flow of the tide and lands below the high water mark,[10] the Supreme Court in *Barney v. Keokuk* extended the doctrine to cover all waters which were "navigable in fact."[11] This included major lakes and rivers as "the great passageways of commerce and

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[7] Klass, *supra* note 5, at 702-03.
[8] 44 U.S. 212 (1845).
[9] *Id.* at 230.
[10] Shively v. Bowlby, 152 U.S. 1, 11 (1894).
[11] Barney v. Keokuk, 94 U.S. 324 (1876).

navigation."[12] In *Phillips Petroleum Co. v. Mississippi*, its most recent consideration of the public trust doctrine, the Supreme Court affirmed that states could use both the ebb-and-flow test and the navigable-in-fact test when determining which lands are subject to the public trust.[13] For the purposes of federal law, the ebb-and-flow test and the Commerce Clause test of navigability are applied to the geography of a state's waterways at the time the state entered the Union, as this was when the Federal Government formally granted title.[14] However, while federal law may fix the initial boundary line, "the State's title . . . vests absolutely . . . and is not subject to later defeasance by operation of any doctrine of federal common law."[15] States are therefore free to develop and apply their own property law concerning subsequent erosion, alluvion, and navigability. The interpretation of the navigable-in-fact test is flexible and differs from state to state. This flexibility has allowed many states to extend the public trust over smaller and shallower waters to meet developing needs of the public.[16]

3. Purposes of The Trust

In its 1892 opinion in *Illinois Central Railroad v. State of Illinois*, the Supreme Court defined the public trust doctrine as protecting the public's right to navigation, commerce and fishing.[17] This trinity forms a baseline, but some state courts, notably California, have interpreted the protections of the public trust to adapt with the changing needs of the public.[18] Under this theory, the doctrine has been extended incrementally to protect wildlife habitats, open spaces, groundwater, swimming and boating rights,[19] ecological value and scenic value.[20]

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[12] *Id.* at 338.

[13] 484 U.S. 469, 470 (1988).

[14] Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 370-71 (1977) (citing Wilcox v. Jackson, 13 Pet. 498 (1839)).

[15] *Id.*

[16] Jan Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right*, 14 U.C. DAVIS L. REV. 195, 202 (1980).

[17] 146 U.S. 387, 452 (1892).

[18] *See* Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971) (concluding that the "public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs").

[19] Charles Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 ENVTL. L. 425, 425-26 (1989).

[20] *See* National Audubon Soc'y v. Superior Court, 658 P.2d 709, 712 (Cal. 1983).

4. Alienation of Public Trust Resources

The relationship of the state to land and waterways under the public trust doctrine is distinct from the title granted to the state in that land by the Submerged Lands Act.[21] Under that act, states are granted "title to navigable waters, tidelands (to mean high tide), and submerged lands (generally to three miles offshore[])."[22] This title can be transferred to private parties, and ownership of long stretches of coast along San Francisco Bay, Lake Michigan, and other major waterways have been sold by the state.[23] However, the Supreme Court held in *Illinois Central* that "[t]he State [cannot] abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties."[24] The State retains an enduring interest in those lands; any grant or sale of the land is "necessarily revocable, and the exercise of the trust . . . can be resumed at any time."[25] In others, title may be transferred, but subject to the trust.[26] The legal basis in *Illinois Central* for the enduring restraint on alienability of the trust in such submerged lands is unclear, and has been complicated by the subsequent rejection in *Erie Railroad Company v. Tompkins*[27] of most federal common law.[28] However, state courts have repeatedly used the Supreme Court's ruling in *Illinois Central* "to justify rejecting or at least carefully scrutinizing . . . legislative attempts to convey into private hands critical coastal or inland waterway resources."[29] Tellingly, no state has taken steps to abolish the doctrine,[30] and removal of lands from the public trust is generally restricted to small parcels and requires a showing by the state legislature that either there is some public benefit in the alienation or that the lands are no longer useful to the public.[31]

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[21] 43 U.S.C. §§ 1301(a)–1301(h) (2006).

[22] Tim Eichenberg et al., *Climate Change and the Public Trust Doctrine: Using an Ancient Doctrine to Adapt to Rising Sea Levels in San Francisco Bay*, 3 GOLDEN GATE U. ENVTL. L.J. 243, 263 (2010).

[23] *Id.* at 254; Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 433 (1892).

[24] *Ill. Cent. R.R. Co.*, 146 U.S. at 453.

[25] *Id.* at 454.

[26] *Id.* at 457.

[27] *See* 304 U.S. 64, 78-79 (1938).

[28] Klass, *supra* note 5, at 729.

[29] Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 640 (1986).

[30] Klass, *supra* note 5, at 729.

[31] City of Long Beach v. Mansell, 476 P.2d 423, 440 (Cal. 1970).

B. The Doctrine in Action

The public trust doctrine primarily arises in the modern context of environmental law in two ways. First, it can protect the State against liability under the Takings Clause of the Fifth Amendment for restrictions on the use of private land, allowing regulatory agencies to impose strict environmental standards on private land in coastal and wetland areas.[32] Under the Takings Clause, the Government must provide just compensation where it "takes" land from private individuals.[33] The Fourteenth Amendment extends this obligation to state governments.[34] The compensation requirement is not restricted to physical takings, but can also extend to cases where regulations and restrictions by the government, such as environmental restrictions, eliminate the economic value of private land.[35] In *Lucas v. South Carolina Coastal Council*,[36] the Supreme Court addressed the availability of state defenses against regulatory takings claims.[37] In that case, South Carolina acted under its Beachfront Management Act to deny a private landowner permission to build a beach house on shoreline property, allegedly rendering the property essentially worthless.[38] While holding that regulations which deny the property owner all "economically valuable use of his land" fall into the category of takings which would require compensation,[39] the Supreme Court also held that compensation is not required where the restrictions imposed by the State "inhere in the title itself" and in "background principles of the State's law of property[.]"[40] While the Court in *Lucas* did not define what was meant by "background principles," subsequent lower court opinions, as well as legal scholars, have argued that the public trust doctrine is one such background principle of state property law.[41] Most notably, the Ninth Circuit held in *Esplanade Properties, LLC v. City of Seattle* that *Lucas*

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[32] ROGER FINDLEY & DANIEL FARBER, ENVIRONMENTAL LAW IN A NUTSHELL 279, 291-92 (8th ed. 1991).

[33] U.S. CONST. amend. V.

[34] U.S. CONST. amend. XIV, § 1.

[35] Julia K. Bramley, *Supreme Foresight: Judicial Takings, Regulatory Takings, and the Public Trust Doctrine*, 38 B.C. ENVTL. AFF. L. REV. 445, 449-50 (2011).

[36] 505 U.S. 1003 (1992).

[37] *Id.*

[38] *Id.* at 1007-09.

[39] *Id.* at 1016.

[40] *Id.* at 1029.

[41] Bramley, *supra* note 35, at 455, 459-460; *see, e.g.*, David L. Callies & J. David Breemer, *Selected Legal and Policy Trends in Takings Law: Background Principles, Custom and Public Trust "Exceptions" and the (Mis) Use of Investment-Backed Expectations*, 36 VAL. U. L. REV. 339, 361 (2002).

"effectively recognized the public trust doctrine" as a background principle of state property law.[42]

Second, the public trust doctrine has been used as a "source of positive state duties" to protect public lands and waterways for the use and enjoyment of the public.[43] The Supreme Court held in *Illinois Central* that, while the States have wide latitude to improve public trust lands by, for example, building harbors and piers to serve the public, they cannot abdicate their responsibility to protect those lands and waterways for the use of the public.[44] States can therefore be held accountable to their citizens for failure to protect public trust lands and waterways from environmental hazards.[45] As the California Supreme Court stated in the *Mono Lake* case, discussed *infra*:

> [T]he public trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust.[46]

C. Voices For and Against The Public Trust

The debate over the public trust doctrine has generated a voluminous and diverse range of scholarship, with both proponents and critics of environmental regulation advocating changes to the doctrine. On the one hand, Joseph Sax, in his seminal 1970 article, argued for the expansion of the public trust doctrine into a non-substantive theory of judicial construction.[47] Under this view, the doctrine would be an additional tool for courts to examine actions by state and federal governments that impact public lands.[48] Sax argues that this approach makes the doctrine more flexible to the changing needs of the public, as opposed to enforcement under property law that relies on historical restrictions on title.[49] Similarly, Michael Blumm argues that the public trust doctrine can be used as "a

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[42] 307 F.3d 978, 986 (9th Cir. 2002); *see also* McQueen v. S. C. Coastal Council, 580 S.E.2d 116, 150 (2003) (holding that compensation was not required for the plaintiff's takings claim because the land was subject to the public trust and the doctrine qualifies as a background principle of South Carolina property law).

[43] D.C. v. Air Florida, Inc., 750 F.2d 1077, 1083 (D.C. Cir. 1984).

[44] Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 453 (1892).

[45] *See* Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 724 (Cal. 1983).

[46] *Id.*

[47] Joseph Sax, *Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

[48] *Id.* at 474.

[49] *Id.* at 485.

democratizing force—preventing monopolizing of trust resources and promoting decision making that is accountable to the public."[50]

On the other hand, critics of the public trust doctrine argue that it has already expanded far beyond what its historical roots should have allowed.[51] Where courts enforce the doctrine against private parties, this has been criticized as a judicial taking.[52] Where courts enforce the doctrine against state legislatures, this has been criticized as anti-majoritarian.[53] Some critics favor the use of state statutes and constitutions for environmental protection over a common law doctrine, and indeed more than thirty of the fifty state constitutions reflect some form of state duty towards the environment, although issues of standing and self-execution undermine environmental enforcement efforts under those provisions.[54]

III. CLIMATE CHANGE AND THE COMING RISE IN SEA LEVEL

Although there is increasing certainty of the effect of higher levels of greenhouse gases upon the earth's climate, knowledge of specifically where many of the impacts of climate change will be felt remains elusive. There is one consequence of climate change, however, where its global impact is understood. All agree that a rising sea level will impact all coastal areas.[55] The only question is how much, and how fast, the level of the sea will rise.

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[50] Michael Blumm, *Public Property and the Democratization of Western Water Law: A Modern View of the Public Trust Doctrine*, 19 ENVTL. L. 573, 573 (1989).

[51] *See* James L. Huffman, *Speaking of Inconvenient Truths—A History of the Public Trust Doctrine*, 18 DUKE ENVTL. L. & POL'Y F. 1 (2007).

[52] *See* Bramley, *supra* note 35, at 453-54. The defense of takings based on the public trust doctrine rests in large part on the characterization of the doctrine as a background principle of state property law, which would satisfy the Supreme Court's test in *Lucas*. *Id.* at 455. This characterization has not yet been addressed directly, however, by the Supreme Court. *Id.*

[53] Barton H. Thompson, Jr., *The Public Trust Doctrine: A Conservative Reconstruction & Defense*, 15 SOUTHEASTERN ENVTL. L.J. 47, 54-55 (2006). In a sense, Joseph Sax himself characterized the "doctrine as just a 'technique' or 'name' courts used to 'mend perceived imperfections in the legislative and administrative process' or the 'democratic process' generally." Lazarus, *supra* note 29, at 643.

[54] Dinah Shelton, *Environmental Rights in the State Constitutions of the United States*, *in* V.V.O.R. report 2007/2: CONSTITUTIONAL RIGHTS TO AN ECOLOGICALLY BALANCED ENVIRONMENT 106-134 (Isabelle Larmuseau ed., 2007), *available at* www.omgevingsrecht.be/sites/default/files/2007_the_right_to_an.pdf.

[55] The author has explored the question of a rising sea level and its relationship to maritime boundaries in previous writings, a fuller account of the phenomenon may be found there. *See* David D. Caron, *When Law Makes Climate Change Worse: Rethinking the Law of Baselines in Light of a Rising Sea Level*, 17 ECOLOGY L.Q. 621 (1990); David D. Caron, *Climate Change, Sea Level Rise and the Coming Uncertainty in Oceanic Boundaries: A*

As to how much the sea level will rise, predictions focus on two mechanisms: thermal expansion of surface waters (the "steric effect"); and the continued breakup and melting of land ice (meaning, the Greenland ice sheet and glaciers).[56] The Intergovernmental Panel on Climate Change ("IPCC") in its 2007 Fourth Assessment Report estimated a range of 0.38 to 0.59 meter rise in the sea level by the year 2100.[57] At the same time, numerous scientists note that the IPCC methodology, for understandable reasons, is conservative in its estimations.[58] An example recognized in the IPCC report itself is that its model for the melting of glaciers does not fully track the speed with which they appear to be in fact breaking down.[59] Predictions from scientists studying the melting of the Greenland ice sheet, in particular, raise their estimation of sea level rise to one meter, if not more, by the year 2100.

Although for some readers, it might sound implausible that the oceans of the entire world could rise one meter, it is clear from geologic records that the sea level has been much higher in the past than it is today. "When the last glacial period ended approximately 12,000 to 16,000 years ago, the sea was about 100 meters lower than it is today because the oceans were colder

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Proposal to Avoid Conflict, in MARITIME BOUNDARY DISPUTES, SETTLEMENT PROCESSES, AND THE LAW OF THE SEA 1-17 (Seoung-Yong Hong & Jon M. Van Dyke eds., 2009). As to the boundary question, see also Charles Di Leva & Sachiko Morita, *Maritime Rights of Coastal States and Climate Change: Should States Adapt to Submerged Boundaries?*, LAW & DEVELOPMENT WORKING PAPERS SERIES NO. 5 (2008), *available at* http://www.preventionweb.net/files/9194_LDnumber51.pdf.

[56] Jim Hansen, *The Threat to the Planet*, *in* THE NEW YORK REVIEW OF BOOKS 12, 13 (July 13, 2006), *available at* http://www.nybooks.com/articles/archives/2006/jul/13/the-threat-to-the-planet/?pagination-false (writing that the "greatest threat of climate change for human beings, I believe, lies in the potential destabilization of the massive ice sheets in Greenland and Antarctica."). Estimates for at least the next century tend to assume, although not exclusively, that there will not be a sufficient rise in temperature to require consideration of a third potential cause of sea level rise, the significant breakup or melting of the Antarctic ice sheets. Caron, *Climate Change, supra* note 55, at 6.

[57] Intergovernmental Panel on Climate Change [IPCC], Climate Change 2007: Synthesis Report, at 45 (Nov. 2007) [hereinafter Fourth Assessment Report], *available at* http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr.pdf.

[58] Fred Pearce, *But Here's What They Didn't Tell Us*, NEWSCIENTIST 7 (Feb. 10, 2007); *see also Consensus Is Not Enough*, NEWSCIENTIST 3 (Feb. 9, 2007); Bill McKibben, *Warning on Warming*, *in* THE NEW YORK REVIEW OF BOOKS 44 (Mar. 15, 2007) (reviewing Climate Change 2007–The Physical Science Basis: Summary for Policymakers–Contribution of Working Group I to the Fourth Assessment Report of the IPCC (2007)). The Fifth Assessment Report is expected in 2014.

[59] Pearce, *But Here's What They Didn't Tell Us*, *supra* note 58 (stating the "[c]urrent climate models assume that the ice sheets will melt only slowly, as heat works its way down through ice more than two kilometers thick. But many glaciologists no longer believe this is what will happen.").

and great amounts of water were stored in enormous ice sheets covering much of North America and Europe."[60] But at the peak of the last interglacial period some 120,000 years ago, the oceans were approximately six meters higher than today's level.[61] The perspective afforded by this range demonstrates that over long periods of time the sea level can fluctuate dramatically.

Another reaction might be that a one-meter rise is not that significant, but two things need to be emphasized. First, in certain areas of the world, a one-meter rise will result in very significant flooding. For example, seventeen percent of Bangladesh's land mass would be flooded by such a rise.[62] Similarly, Bill McKibben writes that "a couple of feet is . . . enough to inundate many low-lying areas and drown much of the earth's coastal marshes and wetlands."[63] Second, it must be remembered that climate change will result in more than simple sea rise. Climate change is expected to also result in more intense storms and storm surges, thereby exacerbating local changes in coastlines, such as erosion, that already take place.[64] It has not taken climatically driven sea level rise to alter, and even threaten, low lying islands and the communities that live, for example, in the Ganges River delta. Changes are already occurring.[65] Climate change will exacerbate these already visible changes and facilitate new ones.[66] Working Group II of the IPCC in the Fourth Assessment Report summarized the situation in this way: "Sea-level rise is expected to exacerbate inundation, storm surge, erosion and other coastal hazards, thus

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[60] Caron, *When Law Makes Climate Change Worse*, *supra* note 55, at 624-25 (citing James G. Titus & Michael C. Barth, *An Overview of the Causes and Effects of Sea Level Rise*, *in* 1 GREENHOUSE EFFECT AND SEA LEVEL RISE 5 (Michael C. Barth & James G. Titus, eds., 1984)).

[61] *See, e.g.*, John F. Marshall & Bruce G. Thom, *The Sea Level in the Last Interglacial*, 263 NATURE 120 (1976) (noting two to nine meters above present sea level).

[62] *Those in Peril by the Sea*, THE ECONOMIST, Sept. 9, 2006, at 6, 8, *available at*, www.economist.com/node/7852884.

[63] Bill McKibben, *Warning on Warming*, THE N.Y. REV. OF BOOKS 44-45 (Mar. 15, 2007), *available at*, www.nybooks.com/articles/archives/2007/mar/15/warning-on-warming/ ?pagination=false.

[64] Marlene Cimons, *Perfect Storm: Climate Change and Hurricanes*, LIVE SCIENCE (Apr. 15, 2013), http://www.livescience.com/28489-sandy-after-six-months.html.

[65] Somini Senguputa, *Sea's Rise in India Buries Island and a Way of Life*, N.Y. TIMES (Apr. 11, 2007), http://www.nytimes.com/2007/04/11/world/asia/11india.html?pagewanted=all&_r=0.

[66] *Id.* (reporting on a recent study by Sugata Hazra of Jadavpur University finding that "in the last 30 years, nearly 31 square miles of the Suandarbans have vanished entirely" and more than 600 families have been displaced).

threatening vital infrastructure, settlements and facilities that support the livelihood of island communities."[67]

IV. TIME AND THE PUBLIC TRUST DOCTRINE

The public trust doctrine is closely attuned to change over time. A thesis of this article is that the doctrine self adapts to change and even more looks forward to change to come. The issue is not whether it does so, but rather whether the future can be known with the requisite degree of certainty. In many instances, the future cannot be known. But one circumstance in which the doctrine can anticipate the future is that of a rising sea level.

A. The Edge is Tied Not to a Place, But Rather to the Trust

Rights and obligations sometimes adapt to changing circumstances.[68] For example, some private contracts will contain escalator clauses to accommodate and thereby automatically adapt the business plan to changing commodity prices.

Similarly, the boundary of the public trust in terms of tidal waters is tied in the majority of the several states to the high water mark.[69] Thus, as sea level rises, the right and obligations of a state self-adjust because the edge of trust will correspondingly increase or decrease in terms of the area covered.[70] In this sense, the doctrine is tied not to a place but rather to the object of the trust. Thus although the doctrine recognizes that the trust occupies a place, the entire trust may shift location as in the case of a river which shifts its course.[71]

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[67] Nobuo Mimura et al., *Small Islands*, *in* CLIMATE CHANGE 2007: IMPACTS ADAPTATION AND VULNERABILITY. CONTRIBUTION OF WORKING GROUP II TO THE FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 687, 689 (Gillian Cambers & Ulric Trotz eds., 2007), *available at* http://www.ipcc-wg2.gov/AR4/website/16.pdf.

[68] A related concept in the management, as opposed to law, field is adaptive management. For a discussion, see J.B. Ruhl, *Regulation by Adaptive Management—Is It Possible?*, 7 MINN. J. L. SCI. & TECH. 21 (2005).

[69] *See generally* Mackenzie S. Keith, *Judicial Protection for Beaches and Parks: The Public Trust Doctrine Above the High Water Mark*, 16 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 165 (2010).

[70] Generally, the opposite is true where water levels fall. Shoreline property owners in most states acquire title to additions resulting from accretion or reliction. *See* Richard C. Ausness, *The Use and Legal Significance of the Mean High Water Line in Coastal Boundary Mapping*, 53 N.C. L. REV. 185, 226 (1974-75).

[71] As to place based approaches, see RICHARD G. HILDRETH, *Place-based ocean management: Emerging U.S. law and Practice*, 51 OCEAN & COASTAL MGMT. 659 (2008).

Importantly, the Ninth Circuit in its 2009 decision in *United States v. Milner*[72] took this self-adjusting capacity of the trust a step further, holding homeowners liable for federal trespass where their shoreline defense structures prevented erosion and the natural expansion of the tidal boundary line. In other words, the Court held that areas that would be subject to the public trust but for constructions that hold back the rising sea are nonetheless are subject to the public trust.[73]

But in all these instances, the law calls for change in rights and duties only as the foreseeable change is realized. To approach the question of whether the doctrine also anticipates change not yet realized, we need to examine the shadow that the trust places on lands adjoining the trust.

B. The Shadow of the Trust

The notion that the duty of the state to the public trust may cast a shadow over adjoining lands is apparent in the law of at least several states.

Consider for example the controversy surrounding Mono Lake, a high plain lake in California that sank in size and grew in salinity because in 1940 the Division of Water Resources, the predecessor to the present California Water Resources Board, granted a division of the city of Los Angeles "a permit to appropriate virtually the entire flow of four of the five streams flowing into the lake."[74] By 1970, diversions and tunnels had been completed that would allow virtually all of the water in these four tributaries to be diverted.[75]

An action was brought to enjoin these appropriations of water by the City of Los Angeles on the theory that Lake Mono is subject to the public

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[72] 583 F.3d 1174, 1189 (9th Cir. 2009).

[73] *Id.* at 1187. The October 12, 2009 Newsletter of the firm Briscoe, Ivester & Bazel summarized the holding thusly:

> The mean-high-water line—this country's principal waterfront property boundary, and too the jurisdictional limit of the Corps of Engineers under the Rivers and Harbors Act—is not where it lies on the ground, the Ninth Circuit ruled last Friday, October 9. For legal purposes, the Court held, the line lies where it would lie, if shore-defense structures such as levees and seawalls had never been built and water allowed to flow unconstrained onto the land. Much of the San Francisco Bay Area (especially the South Bay) has subsided. All of the Delta has. The new "legal" mean-high-water line thus lies in many cases landward—far landward—of where it had been thought to be. As sea level continues to rise, the mean-high-water line will continue to encroach ever farther landward.

John Briscoe, *The Mean-High-Water Line is Not Where it is, but Where it Would be—If Seawalls and Levees had Never been Built, the Ninth Circuit Rules*, BRISCOE IVESTER & BAZEL LLP NEWSLETTER (Oct. 2009), *available at* http://briscoelaw.net/10-12-09/.

[74] Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 711 (Cal. 1983).

[75] *Id.*

trust.[76] Indeed, there is no question that Mono Lake is navigable and therefore subject to the public trust doctrine under California State law.[77] However, it is also the case that the four tributaries for which the City of Los Angeles had a permit are non-navigable and therefore not subject to the public trust. The question presented was therefore whether the public trust limits conduct affecting non-trust waters where that conduct subsequently harms trust property. The court held in the affirmative, stating:

> The state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible. Just as the history of this state shows that appropriation may be necessary for efficient use of water despite unavoidable harm to public trust values, it demonstrates that an appropriative water rights system administered without consideration of the public trust may cause unnecessary and unjustified harm to trust interests.[78]

Moreover, the State's duty is not discharged even though an earlier appropriation is made.[79] The Court maintained that the State has an ongoing duty to monitor its regulatory decisions and their impact on the public trust.[80] Specifically, the court held:

> The public trust imposes a duty of continuing supervision over the taking and use of the appropriated water. In exercising its sovereign power to allocate water resources in the public interest, the state is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs. The state accordingly has the power to reconsider allocation decisions even though those decisions were made after due consideration of their effect on the public trust. The case for reconsidering a particular decision, however, is even stronger when that decision failed to weigh and consider public trust uses.[81]

The shadow that a trust places over adjacent land can be seen also in a 1969 decision of the New Hampshire Supreme Court.[82] New Hampshire has a regulation requiring landowners to give notice to the Port Authority before filling "any bank, flat, marsh, or swamp in and adjacent to tidal waters."[83] The Port Authority can deny permission for the fill or require protective measures to prevent fill runoff into tidal waters or to protect

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[76] *Id.* at 712.

[77] *Id.* at 732.

[78] *Id.* at 728.

[79] *Id.* (noting that "the public trust imposes a duty of continuing supervision over the taking and use of the appropriated water.").

[80] *Id.*

[81] *Id.*

[82] Sibson v. State, 259 A.2d 397 (1969).

[83] *Id.* at 398.

marine fisheries and wildlife.[84] That regulation was challenged in *Sibson v. State*[85] where owners of a parcel next to Rey Harbor State Park were denied permission to fill the land because of the detrimental effect it would have on fisheries in nearby waterways.[86] The New Hampshire Supreme Court stated that:

> [T]he rights of littoral owners on public waters are always subject to the paramount right of the State to control them reasonably in the interests of navigation, fishing and other public purposes. In other words, the rights of these owners *are burdened with a servitude in favor of the State* which comes into operation when the State properly exercises its power to control, regulate, and utilize such waters.[87]

C. The Element of Time in the Shadow of the Public Trust

In the Mono Lake decision, the California Supreme Court, knowing the present condition of the Lake, looked back in time to a 1940 decision to grant a division of the city of Los Angeles "a permit to appropriate virtually the entire flow of four of the five streams flowing into the lake."[88] As stated above, the Court held: "The state accordingly has the power to reconsider allocation decisions even though those decisions were made after due consideration of their effect on the public trust."[89] There are several ideas contained in this holding. First, that in 1940, the permit granting authority of the State was to have given due consideration to the "effect" of the allocation decision on the public trust.[90] But, of course, to consider the effect of an act is to make some projection into the future of the consequence of the decision. In this sense, the Court appears to hold that if the permitting authority in 1940 had been presented with studies showing to a high degree of certainty that diversions of certain flows of water would result in the changes that indeed later came about in Mono Lake, then that permitting authority would have been justified in

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[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *Id.* at 399 (citing Colberg, Inc. v. State, 432 P.2d 3 (Cal. 1967)) (emphasis added). The Court ultimately ruled in favor of the landowners, on the grounds that the phrase "in and adjacent to tidal waters" limited the scope of the regulation to littoral owners only (the plaintiff's land was apparently a bit too far removed to count). *Id.* at 400. But it supported the notion that the state could use these type of regulations to restrict private property "in contact with" tidal waters, which would cover the property most likely to be affected by sea level rise. *Id.* (citing State v. Downs, 59 N.H. 320 (1879)).

[88] Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 711 (Cal. 1983).

[89] *Id.* at 728.

[90] *See id.* at 729.

anticipating such effects in its decision. Second, this conclusion appears consistent with the Court's further recognition of the power of the permitting authority to reconsider its decisions as current knowledge improves. A power to reconsider might be taken to say that a permitting authority need not rush to limit the granting of a permit given that it may limit that permit instead tomorrow when the effect is better understood, but it may also be taken conversely that the authority should limit the granting of a permit today given that it may always increase the range of the permit tomorrow when the effect is better understood.

The crucial point to take away from the holding is that the permitting authority of course may look at effect over time, perhaps even a substantial period of time. The issue is neither the power to look across time, nor the power to anticipate the future. The doctrine allows for foresight. The question is whether the future is known sufficiently well.

D. The Context of Sea Level Rise

How might the public trust doctrine apply to rising sea levels, the bay, the marshlands and adjacent dry land? As certain as it is that the sea level will rise, it is also certain that there will be a case that presents this issue.

For example, as the sea level rises, particularly as it rises slowly, the natural tendency of marshlands will be that their edge migrates inwards,[91] which as stated above will in turn expand the geographic scope of the public trust. But let us assume that a property owner adjacent to a marsh area, believing in sea level rise and seeking to preserve his property for his grandchildren, decides to build a seawall 100 feet back from the present edge of the marsh. He balances the possibility that he will be perceived by his peers to be foolish, with the possibility of his being appreciated by his heirs.

The private land in our hypothetical is not subject to the public trust when the wall is built. But, it is the case that land will be submerged in time and become subject to the trust. The question thus is whether the public trust doctrine can be applied now to prevent, should be given due consideration so as to shape, the construction of the seawall. If the doctrine were so applied, then the law would anticipate the change to come, precisely as our wise hypothetical property owner (and property market) anticipates the change to come.

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[91] *See* Brian Helmuth, *Forecasting the Impacts of Climate Change on Coastal Ecosystems: How Do We Integrate Science and Policy*, 16 SOUTHEASTERN ENV. L. J. 207, 215-16 (2007).

On the one hand, the public trust may be underserved if property owners without due consideration of that public trust are allowed to construct barriers to the migration of marsh areas subject to the public trust. On the other hand, the overall public interest and the public trust as well may be promoted if property owners after due consideration of that public trust are allowed to construct barriers to the migration of marsh areas subject to the public trust. Even more, the protection of the public trust may require that marshlands not encroach on private lands without remedial measures to the land. For example, there may be serious environmental implications where tidelands extend into non-trust lands that contain contaminants and other hazards because earlier state zoning and appropriation decisions did not anticipate future sea level changes. The common denominator in these scenarios is that knowledge of a certain future indicates there should be due consideration of the adjacent public trust today.

IV. CONCLUSION

The public trust doctrine has built into it a measure of flexibility that accommodates environmental changes. While states differ in whether they set the boundary of the public trust at the high tide mark, low tide mark or at the vegetation line (California is a high tide state, Hawai'i uses the vegetation line),[92] all of these measures are ambulatory and take into account changes in water levels. In virtually all states, the boundaries of the public trust follow the eroding shoreline.[93] This flexibility takes into account sea level changes as they happen. The current public trust doctrine, however, does not explicitly discuss how it might address those situations where science and forethought tell us that non-trust private lands will be submerged and subject to the trust in the future. Implicitly, a careful review of public trust analysis, particularly in the *Mono Lake* case, indicates that the issue is not whether the doctrine requires or allows consideration of the future, but rather whether the future to be weighed and considered is sufficiently certain. And regrettably, if anything is certain at this point, it is that the sea will rise.

It is sometimes said that the law is a living thing. On the one hand, the law in its totality may be conceived in this way because it changes through legislation and judicial construction, it changes as a result of imaginative argumentation and it reflects society's changing values. On the other hand,

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[92] Hawai'i Cnty v. Sotomura, 55 Haw. 176, 182, 517 P.2d 57, 62 (1977).

[93] James G. Titus, *Rising Seas, Coastal Erosion and the Takings Clause: How To Save Wetlands and Beaches Without Hurting Property Owners*, 57 MD. L. REV. 1279, 1368 (1998).

particular laws necessarily are artifacts. Given that these laws were made with past circumstances in mind, it is possible that they do not suit the needs of today. The world may change in ways that were never contemplated when particular legal choices were made, and therefore the law ideally should change accordingly, it should continue to grow and adapt. But given the slow pace of legal evolution, there is inevitably a period of time when the law has not yet changed to reflect modern realities and in that period it often fails to promote either wise policy or just outcomes.

Jon Van Dyke was someone who saw clearly the difference between what justice demanded and what law provided, between wise policies that would promote an environment embracing all life and outdated laws that fell short of such policies. Jon pressed not at the ceiling of law's role, but pulled at the floor of society's efforts and the legal community's imagination.

Maritime Disputes in Northeast Asia and Escalation of the Sino-Japan Islands Dispute: Implications and Prospects

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This tiny contribution to regional peace is dedicated to Professor Jon Van Dyke (1943-2011) for his tireless care to the region and boundless passion to the people.

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I. INTRODUCTION

In Northeast Asia, there exist a number of long-simmering unsolved disputes with the potential to flare up and pose threats to the peace and stability of the region. This is particularly the case in China and Japan, which are deeply trapped in almost every set of disputes presenting in the region, and have challenged international law and regional security to the greatest extent. In recent years, the dispute between the two states over the sovereignty of Diaoyu/Senkaku Islands has escalated to a new record and appears to be more daunting than ever, and the chances for solving these issues slimmer.

Against this background, this paper reviews the enduring maritime disputes of Northeast Asia and examines the escalation of the islands dispute between China and Japan to illustrate points of contention and challenges presenting the two maritime neighbors and the region. By so doing, the paper attempts to highlight the implications and prospects of the disputes and to point out the fact that political and other relevant factors have hindered cooperative steps toward potential legal resolution. The paper also underscores the available policy initiatives that could pave the way toward a solid law enforcement and peaceful order among the neighboring states.

Keywords: United Nations Convention on the Law of the Sea, maritime dispute, Northeast Asia, China, Japan

II. CONTEXTUAL SETTING

The Northeast Asian states are situated in a relatively small geographical space, opposite and/or adjacent to each other across a chain of enclosed or semi-enclosed seas with numerous disputes among the neighboring states.[3] The geographical proximity of the narrow seas, the significance of ocean space to national security, and the value of marine resources to economic prosperity, mixed with political and other factors, such as historical legacy and strengthened nationalism, have made the state of affairs of the region a flashing point and complicated "troubled waters" with numerous disputes.[4] Among the long simmering disputes, the contested sovereignty claims over

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[3] *See* Suk Kyoon Kim, *Understanding Maritime Disputes in Northeast Asia: Issues and Nature*, 23 INT'L J. MARINE & COASTAL L. 213 (2008). "The seas include the Yellow Sea . . . and the East China Sea, encompassing 362,000 nm^2 and East Sea of Korea (or the Japan), 44,500 nm^2, and the Sea of Okhotsk, 614,000 nm^2. *Id.* at 215 n.3.

[4] For discussions, see Mark Valencia, *Northeast Asia: Petroleum Potential, Jurisdictional Claims, and International Relations*, 20(3) OCEAN DEV. & INT'L L. J. 35 (1989).

islands are particularly intense and complex, including the disputes in the Northern Territory/Kuril Islands between Japan and Russia, Dokdo/Takeshima between Japan and South Korea, and Diaoyu/Senkaku Islands between China and Japan (technically, also including Taiwan).

Since the United Nations Convention on the Law of the Sea ("UNCLOS") was signed on December 10, 1982, the extended maritime zone concept has been widely accepted and the Exclusive Economic Zone ("EEZ") regime firmly established.[5] By the time UNCLOS finally came into force on November 16, 1994,[6] more and more states had started to extend their maritime zones up to 200 nautical miles ("nm") and a further extension of the continental shelf up to 350 nm from the baselines, and started negotiations on maritime boundaries with neighbours. In Northeast Asia, the coastal states have also made unilateral assertions of jurisdiction over extensive areas of offshore waters, including full 200 nm EEZs.[7] However, most of their bordering seas are less than 400 nm in width. Any claim of a full EEZ, or continental shelf, would create substantial overlaps and trigger disputes between the neighbouring states, especially in areas of economic potential.

In extending national jurisdictional zones beyond traditional three nm of territorial seas,[8] with different interpretations to the UNCLOS provisions and maximization of national claims and interests, plus the regional geography, delimitation of maritime boundaries is inevitable between adjacent and opposite states.[9] Conflicts over natural resources are frequent, and the existing territorial disputes over some uninhabited islands complicated and intensified.[10] The cases concern not only the sovereignty over offshore islands that are valuable to the owners because of their location rather than their physical usefulness, but also the fact that the state

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[5] For the text of UNCLOS and details on relevant implementation agreements of related institutions, see U.N. Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3, *available at* http://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm [hereinafter UNCLOS].

[6] For discussion on UNCLOS regime, see ROBIN R. CHURCHILL & ALAN V. LOWE, THE LAW OF THE SEA (3d ed. 1999).

[7] All Northeast Asian states except North Korea have ratified the 1982 UNCLOS. For ratifications, see *Chronological Lists of Ratifications of, Accessions and Successions to the Convention and the Related Agreements as at 23 January 2013* (last updated Jan. 23, 2013), *available at* http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm#.

[8] For a discussion on the establishment of maritime order in the Northeast Asia under UNCLOS, see HEE KWON PARK, THE LAW OF THE SEA AND NORTHEAST ASIA: A CHALLENGE FOR COOPERATION 13-37 (2000).

[9] *See generally* Choon-ho Park, *Fishing Under Troubled Waters: The Northeast Asia Fisheries Controversy*, 2 OCEAN DEV. & INT'L L.J. 93 (1974).

[10] *See* Choon-ho Park, *supra* note 9.

that gets the islands would gain enormous rights over the surrounding seas by establishing an EEZ.[11]

The difficult situation has obstructed the cooperative development of marine resources. The Northeast Asia states including China, Japan, and South Korea have made noticeable efforts to conclude bilateral fisheries agreements based on the new concept set forth by the UNCLOS.[12] However, the overall situation in the region has not been improved to a satisfactory phase. On the contrary, the intensification of the existing disputes and the boundary delimitation conflicts have stirred up intimidating actions at sea over marine resources including oil, gas, and fisheries, and challenged the regional security. Indeed, the advent of the UNCLOS regime, redistribution of marine rights, interests, and existence of institutional gaps, have worsened the disputes and brought about more challenges to the regional states. It is necessary to review these disputes and assess the aspects and implications, and most importantly, point out possible mechanism to avoid the escalation of tensions into military conflicts.

III. MAJOR MARITIME DISPUTES IN NORTHEAST ASIA

The Northeast Asian region boasts abundant natural resources, advanced technology, and hardworking people. However, it contains strong-willed and powerful states with a long history of animosity toward each other.[13] They have remarkable disputes over the ownership of some islands and rocks, and confrontational military situations in the Korean Peninsula and the Taiwan Strait, though the latter has relaxed to some extent in recent years.[14] They have competitions over fisheries and hydrocarbon resources with great potential.[15] To lay out the foundation for later analysis, this part will review the major maritime disputes in the region with particular reference to the Diaoyu/Senkaku Islands dispute between China and Japan.

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[11] For an overall view of boundary issues, see Jon M. Van Dyke, *The Republic of Korea's Maritime Boundaries*, 18 INT'L J. MARTINE & COASTAL L. 509 (2003).

[12] For a discussion on the fisheries agreements between China, Japan, and South Korea, see GUIFANG XUE, CHINA AND INTERNATIONAL FISHERIES LAW AND POLICY 152-203 (2005).

[13] PEACE IN NORTHEAST ASIA: RESOLVING JAPAN'S TERRITORIAL AND MARITIME DISPUTES WITH CHINA, KOREA AND THE RUSSIAN FEDERATION 1 (Thomas J. Schoenbaum ed., 2008).

[14] *Id.* at 26-29.

[15] *See* Choon-ho Park, *supra* note 9.

A. Enduring Sovereignty Disputes over Islands and Rocks

Among the series of complex disputes of the Northeast Asian states, the major ones include the competing claims between Japan and Russia over Northern Territories/Kuril Islands, between South Korea and Japan over Dokdo/Takeshima, and between China and Japan over the Diaoyu/Senkaku Islands.[16] Since much has been written about them, this section will briefly point out these controversies to offer some perspectives on the tension escalation between China and Japan.

1. The Northern Territories/Kuril Island.

The Northern Territories/Kuril Islands dispute between Russia and Japan has been the most contentious and festering territorial dispute concerning a group of small islands, including Etorofu, Kunashiri, Habomai, and Shikotan to the north of Hokkaido, controlled by Russia, but claimed by Japan as an essential part of its core national territory.[17] These islands were occupied by the Soviet Union after WWII, based on the 1951 San Francisco Peace Treaty, in which Japan "renounced all claims to the Kuril Islands."[18] However, Japan protests that it is not covered by this phrase, as these were not among the islands Japan had acquired in 1875 in exchange for Sakhalin, and that historically they were part of Japan.[19]

Compromise has been attempted, but tensions seem to be rising higher in recent years due to various actions from both sides.[20] Japan regards resolving this territorial dispute as one of its main political goals, and is trying to seek U.S. support.[21] Russia takes high regards on the strategic

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[16] For more details on disputes concerning these islands, see Toshio Okuhara, *The Territorial Sovereignty Over the Senkaku Islands and Problems on the Surrounding Continental Shelf*, 15 JAPANESE ANN. INT'L L. 97 (1971); Kanae Taijudo, *The Dispute Between Japan and Korea Respecting Sovereignty Over Takeshima*, 12 JAPANESE ANN. INT'L L. 1 (1968); Kimie Hara, *New Light on the Russo–Japanese Territorial Dispute*, NATIONAL LIBRARY OF AUSTRALIA (May 1995), http://ips.cap.anu.edu.au/ir/pubs/work_papers/95-1.pdf.

[17] Jon M. Van Dyke, *North-East Asian Seas—Conflicts, Accomplishments and the Role of the United States*, 17 INT'L J. MARINE & COASTAL L. 397, 401 (2002).

[18] Seokwoo Lee, *The 1951 San Francisco Peace Treaty with Japan and the Territorial Disputes in East Asia*, 11 PAC. RIM L. & POL'Y J. 63, 103 (2002).

[19] For the 1875 Treaty of Saint Petersburg between Russia and Japan, see Masami Ito, *Russian-held Isles: So Near, So Far*, JAPAN TIMES, Jan. 18, 2011, at 3. *See generally* Kimie Hara, *Norms Structures, and Japan's "Northern Territories" Policy*, *in* NORMS, INTERESTS, AND POWER IN JAPANESE FOREIGN POLICY 71 (Yoichiro Sato & Keiko Hirata eds., 2008).

[20] Serge Korepin, *Japan and Russia: What Will It Take to Overcome Their Territorial Dispute?*, CENTER FOR STRATEGIC & INTERNATIONAL STUDIES (July 20, 2011), http://csis.org/blog/japan-and-russia-what-will-it-take-overcome-their-territorial-dispute.

[21] *Russo-Japanese Territorial Dispute Deadlock Hard to Break the U.S. Intervention*

importance of the islands in its national economy and warships' free access to the Far East through the Sea of Okhotsk and the Pacific Ocean.[22] The waters off the islands are productive fishing grounds, but due to the dispute and a lack of proper arrangement, they have become a source of fishery conflicts, such as shootings and detentions of Japanese fishing boats and crew.[23] Although Japan and Russia have made several rounds of negotiation, they have only agreed to solve the issue by establishing strategic partnership and proposing a treaty of peace.[24]

2. Dokdo/Takeshima Islands.

The dispute over the Dokdo/Takeshima Islands has been a long conflict between Japan and South Korea with occasional stir-ups.[25] The South Korean government asserts a strong and uncompromising position over its sovereignty and control of Dokdo/Takeshima with defensive occupation. The Japanese, unable to assert full claim over the islands,[26] believe that it has a title via acquisition by prior occupation and historical recording as its territory.[27] Japan also insists Allied Command granted Takeshima to Japan after WWII, yet there was no mention of Dokdo/Takeshima in the Peace Treaty, leaving the issue unsettled.[28] Although the islands are barely habitable, the surrounding EEZ has rich fisheries resources and possible reserves of natural gas.[29] With great strategic and economic value, hostile actions over these islands have happened frequently in recent years, and

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Tantamount to Fueling, XINHUANET (Feb. 20, 2011), http://news.xinhuanet.com/world/2011-02/20/c_121100956.htm.

[22] *See* Dmitri Trenin & Yuval Weber, *Russia's Pacific Future: Solving the South Kuril Islands Dispute* (Dec. 11, 2012), http://carnegieendowment.org/2012/12/11/russia-s-pacific-future-solving-south-kuril-islands-dispute/esoi#.

[23] *Japan to Propose Collective Solution to Territorial Dispute with Russia*, KYODO NEWS SERVICE (July 14, 2001).

[24] *Japan's Northern Territories*, MINISTRY OF FOREIGN AFFAIRS OF JAPAN, http://www.mofa.go.jp/region/europe/russia/territory/pamphlet.pdf.

[25] The island in this dispute is called *Dokdo* in Korean, *Takeshima* in Japanese, and Liancourt Rocks in English. For the dispute, see Mark S. Lovmo, *The Territorial Dispute Over Dokdo*, http://www.forthenextgeneration.com/dokdo/dokdo_01.htm (last visited Apr. 5, 2013); *see also Dokdo-Takeshima Island*, HISTORICAL FACTS ABOUT KOREA'S DOKDO ISLAND, http://www.dokdo-takeshima.com (last visited Apr. 5, 2013).

[26] Jon Van Dyke, *Legal Issues Related to Sovereignty Over Dokdo and Its Maritime Boundary*, 38 OCEAN DEV. & INT'L L. 157, 165 (2007).

[27] *Id.* at 167-68.

[28] *See* Myung-Ki Kim, *A Study on Legal Aspects to Japan's Claim to Tokdo*, 28 KOREA OBSERVER, 359, 361-63 (1997).

[29] *Dokdo-Takeshima Island*, HISTORICAL FACTS ABOUT KOREA'S DOKDO ISLAND, *supra* note 25.

caused wide international attention.[30] In April 2006, South Korea submitted a declaration to the United Nations to remove itself from the compulsory dispute settlement mechanism, in case Japan brings the case into international courts.[31]

3. The Diaoyu/Senkaku Islands.

The *Diaoyu* in Chinese and *Senkaku* in Japanese island group is situated at the southeastern edge of the East China Sea between Taiwan and Ryukyu Island,[32] composed of eight tiny insular formations, five of which are small volcanic islands and three barren rocks.[33] With a total area of approximately seven squared kilometers, none of the islets are currently inhabited or have had any kind of reported human economic activity, but they are believed to be sitting near significant oil and natural gas deposits.[34]

Japan claims that it discovered and incorporated the islands in 1895 when they were *terra nullius* (unclaimed).[35] China and Taiwan both agree that Chinese discovered the islands during the Ming Dynasty (1368-1644) and subsequently used them as navigational aids.[36] The islands were integrated into China's coastal defenses by 1562 and on maps and documents of areas covered by Ming Dynasty defenses.[37] The Qing Dynasty (1644-1911) went further and placed them under Taiwan's jurisdiction.[38]

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[30] *See* Justin McCurry, *South Korea and Japan Face Off Over Disputed Islands, President Lee Myung-bak Visits Takeshima/Dokdo Chain, Centre of Territorial Rankles for Decades, Despite Tokyo Protests*, THE GUARDIAN (Aug. 10, 2012), http://www.theguardian.com/world/2012/aug/10/south-korea-japan-disputed-islands.

[31] United Nations Convention on the Law of the Sea: Declarations Made Upon Signature, Ratification, Accession or Succession or Anytime Thereafter, Republic of Korea, Apr. 18, 2006, 1833 U.N.T.S. 3, *available at* http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#RepKorea%20after%20ratification.

[32] *Diaoyu* means "fishing platform" in Chinese, while *Senkaku* means "pinnacle islands" in Japanese. Joyman Lee, *Senkaku/Diaoyu: Islands of Conflict*, HISTORY TODAY 65 (2011), *available at* http://www.historytoday.com/joyman-lee/senkakudiaoyu-islands-conflict; Barbara Demick, *The Specks of Land at the Center of Japan-China Islands Dispute*, L.A. TIMES (Sept. 24, 2012), http://articles.latimes.com/2012/sep/24/world/la-fg-china-japan-islands-20120925.

[33] Barbara Demick, *supra* note 32.

[34] *See* Kevin Voigt, *Dangerous Waters: Behind the Islands Dispute*, CNN (Sept. 24, 2012, 6:19 AM), http://www.cnn.com/2012/09/24/world/asia/china-japan-dispute-explainer.

[35] Japan claims that in 1895 the Japanese Emperor approved an Imperial Ordinance annexing the Senkaku Islands to Japan as uninhabited and "showed no trace of having been under the control of China." *Japan-China Relations: Current Situation of Senkaku Islands*, MINISTRY OF FOREIGN AFFAIRS OF JAPAN (Mar. 2013), http://www.mofa.go.jp/region/asia-paci/senkaku.

[36] Peter N. Upton, *International Law and the Sino-Japanese Controversy Over Territorial Sovereignty of the Senkaku Islands*, 52 B.U. L. REV. 763, 767 (1972).

[37] Tao Cheng, *The Sino-Japanese Dispute Over the Tiao-yu-tai (Senkaku) Islands and*

China and Taiwan argue that Japan used its victory of the 1894-1895 Sino-Japanese War and through the Maguan (Shimonoseki) Treaty, annexed them with Taiwan (Formosa) and all its appertaining islands.[39] As the Treaty did not specifically mention the islands, Japan maintains that the incorporation was not under the Shimonoseki Treaty, and cites the development activities in the islands by its nationals from 1897 until WWII and American administration under Article 3 of the 1951 San Francisco Peace Treaty.[40] China and Taiwan rejected Japan's position and argue that the intent of the Allied declarations at Cairo and Potsdam during WWII was to restore to China territories taken from it by Japan through military aggression.[41] They should have been returned after WWII, under provisions of the 1943 Cairo Declaration, 1945 Potsdam Proclamation, and Article 2 of the San Francisco Treaty.[42] However, when Japan relinquished authority over Taiwan in October 1945, it did not specifically mention the disposition of the Diaoyu/Diaoyutai.[43] After the period of U.S. control, the islands were reverted to Japan under the Okinawa Revision Treaty in 1971.[44] Japan views the 1971 Ryukyu (Okinawa) reversion agreement with the U.S. as validating its sovereignty.[45] This triggered protests by the Chinese people.[46]

Overall, the disputes over small islands and rocks among the Northeast Asian states have been sensitive and contentious. They provide a window

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the Law of Territorial Acquisition, 14 VA. J. INT'L L. 221, 260 (1974).

[38] *See* Zheng Hailin, *Historical Evidence Shows Japan's Claim Groundless*, CHINA DAILY (June 3, 2013), http://www.chinadailyasia.com/opinion/2013-06/03/content_15075286.html.

[39] *Id.* ("The Qing court was defeated in the Sino-Japanese War and forced to sign the unequal treaty of Shimonoseki and cede to Japan 'the island of Formosa (Taiwan), together with all islands appertaining or belonging to the said island of Formosa'.[sic]")

[40] MARK E. MANYIN, CONG. RESEARCH SERV., R42761, SENKAKU (DIAOYU/DIAOYUTAI) ISLANDS DISPUTE: U.S. TREATY OBLIGATIONS 3 (2013).

[41] For their respective arguments, see *Statement of the Ministry of Foreign Affairs of the People's Republic of China*, MINISTRY OF FOREIGN AFFAIRS OF THE PEOPLE'S REPUBLIC OF CHINA (Sept. 10, 2012), http://www.fmprc.gov.cn/eng/topics/diaodao/t968188.htm; *The Diaoyutai Islands: An Inherent Part of the Territory of the Republic of China (Taiwan)*, MARITIME INFORMATION SERVICE CENTER (Apr. 9, 2012), http://maritimeinfo.moi.gov.tw/marineweb/LayFromE0.aspx?icase=T02&pid=0000000516.

[42] *The Diaoyutai Islands: An Inherent Part of the Territory of the Republic of China (Taiwan)*, *supra* note 41.

[43] *Id.*

[44] VICTOR PRESCOTT & CLIVE SCHOFIELD, THE MARITIME POLITICAL BOUNDARIES OF THE WORLD 277 (2d ed. 2005).

[45] MINISTRY OF FOREIGN AFFAIRS OF JAPAN, *Recent Developments in Japan-China Relations: Basic Facts on the Senkaku Islands and the Recent Incident* (Oct. 2010), http://www.mofa.go.jp/region/asia-paci/china/pdfs/facts1010.pdf.

[46] *See* Wei-chin Lee, *Troubles Under the Water: Sino-Japanese Conflict of Sovereignty on the Continental Shelf in the East China Sea*, 18 OCEAN DEV. & INT'L L. 585, 586 (1987).

into the regional problem that may be intensified any time by any reason. The territorial disputes not only related to the vital interests of the parties concerned, but also to the peace and stability of the region with global consequences.

B. Intensifying Conflicts over Maritime Boundaries

In addition to the bitter and worrisome disputes over the ownership of islands and rocks, Northeast Asia is also heavily loaded with disputes relating to boundary delimitations of EEZ and the continental shelf.[47] New tension points and conflicting claims have arisen regarding employment of straight baselines, historical waters claims, applicable principles, and precise boundaries of national jurisdiction.[48] These issues have made the region full of controversies and contention.

In the Yellow Sea, both China and South Korea ratified UNCLOS in 1996, and proclaimed their EEZ up to 200 nm, resulting in extensive overlapping areas across their bordering sea, and no maritime boundaries have been established. Their conflicting positions came into focus when South Korea argues for the median line in the Yellow Sea and part of the East China Sea, but relies on the doctrine of natural prolongation in the northeastern part of the East China Sea because it extends 200 nm beyond the baseline of its territorial sea.[49] The difference of EEZ delimitation principle has made their fishing grounds uncertain and conflicts intensified.[50] In the western South Korean islands, the two Koreas also face complications in delimiting their maritime boundaries.[51] The most complex picture is presented in the South Yellow Sea and East China Sea where offshore islands and disputed maritime zone claims of Korea, China, and Japan come into play.

In the East China Sea, the negotiations between China and Japan have been blocked up by three major issues: the principle of international law to be employed in boundary delimitation, the geophysical nature and legal

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[47] For a discussion, see HEE KWON PARK, *supra* note 8, at 77-119.

[48] For a detailed account, see Jon M. Van Dyke, *supra* note 17, at 402-09.

[49] *Id.* For issues on the Sea of Japan (East Sea of Korea), see Mark J. Valencia, *Sea of Japan: Transnational Marine Resource Issues and Possible Cooperative Responses*, 14 MARINE POL'Y 507, 508 (1990). *See also S. Korea Submits Formal Claim on East China Sea Shelf to U.N.*, YONHAP NEWS AGENCY (Dec. 27, 2012), http://english.yonhapnews.co.kr/national/2012/12/26/96/0301000000AEN20121226009200315F.HTML.

[50] Richard Weitz, *China and South Korea: Convergence or Conflict of Interests?*, SECOND LINE OF DEFENSE (Nov. 11, 2012), http://www.sldinfo.com/china-and-south-korea-convergence-or-conflict-of-interests.

[51] For details, see Jonathan I. Charney, *Central East Asian Maritime Boundaries and the Law of the Sea*, 89 AM. J. INT'L L. 724, 740-41 (1995).

status of the Okinawa Trough, and the sovereignty dispute over the Diaoyu/Senkaku Islands and their effects in the delimitation.[52] The huge gap between China and Japan lies in the debate on the application of different principles to their own advantage, including entitlement given to Diaoyu/Senkaku Islands.[53] China adheres to the doctrine of natural prolongation of its land territory toward Japan and argues that the Okinawa Trough disrupts the unity of the East China Sea continental shelf, and constitutes a natural boundary between Japan on the one hand, and China and Korea on the other.[54] In contrast, Japan denied this characteristic and insists that the Okinawa Trough is a casual indent and does not constitute a break in the shelf and insisted on the application of the equidistance principle.[55] China argues the existence of geology, landform, the ecology or other important factors that should result in a fair delimitation outcome rather than the equidistance principle.[56] To reinforce its stance, China submitted preliminary information to the Commission on the Limits of the Continental Shelf ("CLCS") in May 2009 indicating its extended continental shelf of the area.[57] On September 17, 2012, China made a full submission to the CLCS with respect to the outer limits of its extended continental shelf as far as to the western slope of the Okinawa Trough, including the Diaoyu Islands.[58]

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[52] *See id.* at 739-40.

[53] The dispute over the Diaoyu/Senkaku Islands could affect 40,000 square kilometers of surrounding *continental* shelf/EEZ area. Japan has denied the presence of the islands dispute and grants them full effect in the construction of its median line. To some extent, these islets are the biggest hurdles to be overcome in the solution of the dispute. China and Japan have held some consultations on the boundary delimitation, but no progress achieved. *See Maritime Demarcation and Bilateral Fisheries Affairs*, THE MINISTRY OF FOREIGN AFFAIRS OF THE PEOPLE REPUBLIC OF CHINA (July 9, 2001), http://www.fmprc.gov.cn/eng/wjb/zzjg/tyfls/tyfl/2626/2628/t15476.shtml.

[54] *See* CHOON-HO PARK, EAST ASIA AND THE LAW OF THE SEA 29-30 (1983); Suk Kyoon Kim, *supra* note 3, at 222–26.

[55] Suk Kyoon Kim, *supra* note 3, at 223.

[56] *Id.* at 225.

[57] *See Preliminary Information Indicative of the Outer Limits of the Continental Shelf Beyond 200 Nautical Miles of the People's Republic of China*, UNITED NATIONS (May 11, 2009), http://www.un.org/Depts/los/clcs_new/submissions_files/preliminary/chn2009preliminaryinformation_english.pdf; *see also* James Manicom, *China's Claims to an Extended Continental Shelf in the East China Sea: Meaning and Implications*, CHINA BRIEF, July 9, 2009, at 9, *available at* http://www.jamestown.org/uploads/media/cb_009_23.pdf.

[58] *China's Continental Shelf Proposal Covers Diaoyu Islands* (Jan. 7, 2013), http://epaper.usqiaobao.com:81/qiaobao/html/2012-09/17/content_724370.htm.

C. Ongoing Competition for Marine Natural Resources

These semi-enclosed Northeast Asian seas provide not only a unique social and political environment, but also distinctive ecosystems and abundant fisheries resources. The region has a long fishing tradition and fisheries as important economic activity play an important role to state relations.[59] China, Japan, and South Korea, the major regional fishing states, are among the world's top exporters and importers of fishery products.[60] The fisheries industry contributes considerably to their national economies and international trade, and more than sixty-six percent of the world's total fish supply is produced in this region.[61]

Nevertheless, the geographical proximity and the competition over the exploitation of the shared resources have made the relations among the states complex.[62] The confluence of a myriad of social and political factors, including historical legacy, different social systems and ideology, and international politics, have made the relationships among the states complex over the last century.[63] As Valencia observes, the region "is especially complicated in that it is surrounded or used by states sharing a similar historical and cultural background, but differing in internal political systems, external political and economic alignment, and levels of economic development."[64] In the 1970's, fishing in the region was so dangerous and depressing that the waters were regarded as "Troubled Waters."[65]

The shared nature of fish stocks necessitates the participation of all states in the region to initiate a cooperative and effective management framework, but this is extremely difficult because of their complex relations.[66] As a result, the marine living resources have long been depleting and the marine environment deteriorating.[67] Over the years, the states have made a number of efforts to address fisheries issues by bilateral agreements, but the

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[59] *See* Choon-ho Park, *supra* note 9.

[60] *See* Joon-Suk Kang, *The United Nation Convention on the Law of the Sea and Fishery Relations Between Korea, Japan and China*, 27 MARINE POL'Y 111, 143 (2003).

[61] *See* John M. Gates & Jung-Hee Cho, *The Benefits from Korean-Japanese Cooperative Management of Transnational Fisheries Resources*, 30 KOREA OBSERVER 623 (1999).

[62] *See* XUE, *supra* note 12, at 152.

[63] Mark J. Valencia, *The Yellow Sea: Transnational Marine Resource Management Issues*, 12 MARINE POL'Y 382 (1988).

[64] *Id.*

[65] *See* Choon-ho Park, *supra note* 9.

[66] *See* D.J. Dzurek, *Prospects for Development of the Yellow Sea Regime*, *in* THE REGIME OF THE YELLOW SEA-ISSUES AND POLICY OPTIONS FOR COOPERATION IN THE CHANGING ENVIRONMENT 189, 190 (C. Park et al. eds., 1990).

[67] *Effective Dispute Resolution: A Review of Options for Dispute Resolution Mechanisms and Procedures*, CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW (Sept. 1999), http://www.ciel.org/Publications/effectivedisputeresolution.pdf.

situation has not improved.[68] The current agreements are only for bilateral regulation, and none are binding on all the states or users; nor is any state a party to all the agreements.[69] In recent years, conflicts often occurred in the disputed EEZs.[70] The exploitation of the shared resources often, if not always, generates conflicts and tensions associated with boundary and/or territorial disputes.[71] Numerous incidents have occurred in recent years, including military intimidation where fishing vessels have been fired upon or sunk.[72] "It is not unusual for fishing vessels to be escorted by naval vessels when fishing in disputed waters[, a]nd these conflicts make it difficult to maintain harmonious and stable regional relations."[73]

The territorial disputes and overlapping maritime zone claims are also linked to seabed petroleum. Since 1969, China, Japan and South Korea have disputed the continental shelf of the East China Sea with overlapping unilateral proclamations to the seabed resources.[74] In 1974, Japan and South Korea reached an agreement, but the effort was denounced by China, Taiwan and North Korea and only ratified by Japan in 1977.[75] The East China Sea has become the principal area of contention over the seabed because of its broad, shallow continental shelf and rich offshore oil potential.[76]

In the first decade of the 2000s, China and Japan attempted to pursue a bilateral agreement over the hydrocarbon resources.[77] In their negotiations, both sides sought to make a distinction between their territorial dispute over the Diaoyu/Senkaku Islands and the rights to develop the undersea

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[68] For details, see Hee Kwon Park, *supra* note 8; XUE, *supra* note 12.

[69] Mark J. Valencia & Yong Hee Lee, *The South Korea-Russia-Japan Fisheries Imbroglio*, 26 MARINE POL'Y 337-43 (2002).

[70] In 2011, the South Korean Coast Guard seized 430 Chinese fishing boats for fishing in the disputed area of the Yellow Sea. For clashes between Chinese fishermen and the South Korean Coast Guard in recent years, see *id.*; *see also Clashes Between Chinese Fisherman and South Korea Coast Guard in Recent Years (7)*, PEOPLE'S DAILY ONLINE (Oct. 17, 2012, 1:10PM), http://english.people.com.cn/102774/7980298.html.

[71] Valencia, *supra* note 63.

[72] *See* Van Dyke, *Northeast-Asian Seas—Conflicts, Accomplishments, and the Role of the United States*, *supra* note 17, at 408.

[73] XUE, *supra* note 12, at 166.

[74] *See* Phiphat Tangsubkul, *Potential for Conflicts Over Resources: Fisheries and Oil/Gas*, *in* MARITIME SECURITY AND COOPERATION IN THE ASIA-PACIFIC TOWARD THE 21ST CENTURY 109, 109-11 (D. Kim et al. eds., 2000).

[75] *See* Barry Buzan, *Maritime Issues in North-East Asia: Their Impact on Regional Politics*, 3 MARINE POL'Y 190, 194 (1979).

[76] *See generally* Choon-ho Park, *Oil Under Troubled Waters: The Northeast Asia Sea-Bed Oil Controversy*, 14 HARV. INT'L L.J. 212, 219 (1993).

[77] Chang Zuo Liu, *The Continental Shelf Dispute of Sino-Japan in East China Sea and the Prospect Under International Law*, SOCIAL SCIENCE RESEARCH PAPER (Master Degree Thesis of Dalian Maritime University) (June 3, 2012).

hydrocarbon fields.[78] They announced an agreement in June 2008 on joint exploration for oil and gas in two of the fields close to or straddling the "median line" claimed by Japan as the correct boundary between the two sides.[79] However, the two sides have different expectations and interpretations on joint development and the location of the JDZ.[80] Indeed, this difference is deeply rooted in their conflicting positions on maritime delimitation, and no progress has been made in implementing the 2008 agreement.[81]

IV. THE ESCALATION OF THE SINO-JAPAN DISPUTE

In the Diaoyu/Senkaku Islands dispute, both claimants use historical evidence to bolster the legal strength of their claims.[82] However, the two claimants cannot come to terms on the critical issues regarding the ownership and the return of the islands.[83] With regard to the question of who owns sovereignty over the islands, China and Japan disagree on whether the islands were *terra nullius* (land unclaimed) and free for the taking by Japan in 1895 when Japan claimed sovereignty, and how Japan obtained control in that year.[84] China and Japan also dispute whether the islands were traditionally associated with Taiwan or Okinawa before 1895, whether Japan returned the islands to China after the Japanese defeat in WWII, and what the implications of various peace treaties and the 1971 Ryukyu Reversion Agreement are.[85]

Since the 1970s, the dispute between China and Japan has dragged along with occasional flare-ups. Recently, the disagreements have flared into potentially violent incidents that could erupt at any time. This part reviews the escalation of the tensions in the past decades.

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[78] Guifang Xue & Yuanda Chi, *Brief Discussion on the Joint Development of the East China Sea* (in Chinese), 2 J. OCEAN UNIV. CHINA (SOC. SCI. ED.) 4 (2009).

[79] *Id.*

[80] *Id.*

[81] Manyin, *supra* note 40, at 7.

[82] *Id.* at 2.

[83] *Id.*

[84] Jielong Duan, *Japan's Defence of Islands Ignores the Written Word*, THE AUSTRALIAN (Jan. 14, 2013, 12:00AM), http://www.theaustralian.com.au/opinion/world-commentary/japans-defence-of-islands-ignores-the-written-word/story-e6frg6ux-1226553096447.

[85] Masahiro Kohara, *Islands Must Not Come Between Japan and China*, THE AUSTRALIAN (Jan. 03, 2013, 12:00AM), http://www.theaustralian.com.au/opinion/world-commentary/islands-must-not-come-between-japan-and-china/story-e6frg6ux-1226546733682.

A. From Defused Dispute to Resurged Tensions during the 1970-1990s

China considers the 1971 Reversion Agreement backroom deals between the United States and Japan concerning Diaoyu Islands, and objected and protested strongly its illegal and invalid nature.[86] In October 1978, the then China's Vice Premier, Deng Xiaoping, suggested a *modus vivendi* to both governments to shelve the sovereignty issue for future resolution.[87] The crisis was defused for some years due to the exercise of provocative steps from both sides. For examples, in 1992, China adopted the Law on the Territorial Sea and Contiguous Zone, which explicitly specifies the "Diaoyu Islands" as its territory, but it did not include the Diaoyu islands in its straight baseline announcement.[88] When establishing EEZs in 1996, they avoided explicitly delimiting the outer limits and calls for negotiating boundaries in overlapping areas.[89] Nevertheless, the situation did not substantially improve, and the shelved dispute and hidden tension resurged periodically through the 1990s and beyond.[90]

In the 1990s, a series of events by Japanese individuals and non-governmental organizations brought the longstanding dispute to a boil, and threatened to wrest the dispute from governmental control. The flare-up was ignited on July 14, 1996 when a Japanese ultranationalist group landed on one of the islets and built a five-mile high, solar-powered, aluminum lighthouse.[91] The Taiwan and Hong Kong Chinese responded with demonstrations and one Hong Kong protester drowned near the islands when he attempted to swim from the small protest boats to an islet.[92] Diplomatic notes were lodged and the Chinese government warned Japan

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[86] *Diaoyu Dao, an Inherent Territory of China*, *supra* note 41.

[87] *See Set Aside Dispute and Pursue Joint Development*, MINISTRY OF FOREIGN AFFAIRS OF THE PEOPLE'S REPUBLIC OF CHINA (Nov. 17, 2000), http://www.fmprc.gov.cn/eng/ziliao/3602/3604/t18023.htm.

[88] *See Law of the Peoples Republic of China on the Territorial Sea and the Contiguous Zone* (1992) Art. 2, *in* COLLECTION OF THE SEA LAWS AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA 201-05 (State Oceanic Administration, Beijing ed., 2001) [hereinafter COLLECTION OF THE SEA LAWS].

[89] *See Decision of the Standing Committee of the NPC of the PRC on Ratification of the UNCLOS* (1996), *in* COLLECTION OF THE SEA LAWS, *supra* note 88, at 199; *see also Declaration of the PRC on the Baselines of the Territorial Sea* (1996), *in* COLLECTION OF THE SEA LAWS, *supra* note 88, at 206.

[90] Daniel Dzurek, *The Senkaku/Diaoyu Islands Dispute* (Oct. 18, 1996), http://www-ibru.dur.ac.uk/resources/docs/senkaku.html.

[91] Zhongqi Pan, *Sino Japanese Dispute Over the Diaoyu/Senkaku Islands: The Pending Controversy From the Chinese Perspective*, 12 CHINESE POL. SCI. 75 (2007) (China).

[92] *Id.*

about provoking China, and Japan explained that it had no plans to recognize the lighthouse.[93]

The inflamed passions did little to shed light on the sovereignty issue. Since then, physical confrontations and clashes between Japanese right-wing groups and Chinese protesters and diplomatic wangles between the two governments have been repeatedly reported.[94] Each time, China denounced the actions as "illegal" and "serious violation[s] of China's territory sovereignty."[95] Japan, in return, reiterated its "fundamental position" while declaring that the government was not behind such activities and did not offer any support.[96] However, since 2000s, the Japanese government gradually shifted its position from behind the scene to the front stage and started to take control of the competing islands. The Sino-Japan territorial dispute entered a new phase.

B. Escalation of the Dispute since the 2000s

Japan announced on February 9, 2005 that it had placed under state control and protection a lighthouse erected by Japanese right-wing activists in 1988 on the largest of the Diaoyu Islands.[97] The unexpectedly bold action marked a departure of the Japanese government from its previous "tolerance but no support" attitude to its right-wing groups' activities. In April 2005 Japan decided to handle applications of the enterprises the right to oil and gas test drilling in the waters east to the "median line" of the East China Sea.[98] This has started a new round of tension between the two governments, and led to frequent conflicts between Chinese fishing boats and Japanese administrative forces in the disputed areas.[99]

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[93] *Id.*

[94] *Id.*

[95] Steven Wei Su, *The Territorial Dispute over the Tiaoyu/Senkaku Islands: An Update*, 36 OCEAN DEV. & INT'L L. 45 (2005) (citing *Japanese Legislator Landson Disputed Islands*, CNN (May 6, 1997), http://www.cnn.com/WORLD/9705/06/china.japan/.

[96] *Id.*

[97] *Japan Action Violation of Chinese* Sovereignty, CHINA DAILY (Feb. 12, 2005), http://www.chinadaily.com.cn/english/doc/2005-02/12/content_416200.htm.

[98] The "median line" was proposed by Japan unilaterally, but China refused to accept. *See Foreign Ministry Spokesperson Qin Gang's Remarks on Japan Granting Its Enterprises Right to Oil and Gas Test-drilling in the East*, CHINA SEA (Apr. 15, 2005), http://www.fmprc.gov.cn/eng/xwfw/s2510/t191718.htm.

[99] One of such cases occurred on June 10, 2008, a fishing vessel of Taiwan sank due to a collision with the Japan Coast Guard vessel in the disputed waters. Japan detained the captain and passengers but later released them. *See* Sofia Wu, *President Reasserts Claim to Tiaoyutais, Seeks Peaceful Solution*, ROC CENTRAL NEWS AGENCY (June 17, 2008); *see also Taiwan Fishing Boat Sunk by Japanese Frigate*, CHINA POST (June 11, 2008), http://www.chinapost.com.tw/taiwan/national/national%20news/2008/06/11/160421/Taiwan-fishing.htm.

Since 2010, the maritime disputes between China and Japan in the East China Sea have increasingly become a flare point. Evidence of this kind include the collision on September 7, 2010 of a Chinese fishing boat with Japan Coast Guard ships within twelve nm of the Diaoyu/Senkaku Islands.[100] This resulted in the Japan Coast Guard arresting the captain of the Chinese trawler and charging him with obstructing officers by ramming the two Japan Coast Guard ships.[101] The episode sparked a diplomatic dispute and threatened to affect every aspect of their relations, and the conflict ultimately came to an end with the release of the Chinese captain by Japan in consideration of their future relations.[102] Incidents involving fishing boats have not been uncommon and have usually caused reactions from foreign ministries of both sides.[103]

Most recently, tensions have flared in 2012. This round started from a visit conducted by two Japanese Diet members, the first visit of Japanese national politicians since 1997, and they suggested nationalizing those islands.[104] Another irritating action was made on January 16, 2012 when Japan announced the names of thirty-nine previously unnamed, uninhabited islets including four in the disputed Islands, and China responded immediately and emphasized its indisputable sovereignty over the Islands.[105] Japan completed its naming in March 2012, and China responsively announced its own names to these previously unnamed islets and urged Japan to recognize the complexity and sensitivity of issues and properly handle them based on the overall interests of bilateral relations.[106]

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[100] Austin Ramzy, *China-Japan Tensions Grow After Shipping Collision*, TIME (Sept. 13, 2010), http://www.time.com/time/world/article/0,8599,2017768,00.html.

[101] *High-seas Collisions Trigger Japan-China Spat*, ENERGY DAILY (Sept. 7, 2010), http://www.energy-daily.com/reports/High-seas_collisions_trigger_Japan-China_spat_999.html.

[102] Roland Buerk, *Japan Frees Chinese Boat Captain Amid Diplomatic Row*, BBC (Sept. 24, 2010), http://www.bbc.co.uk/news/world-11403241.

[103] Xiuping Sun & Linlin Liu, *China Warns Japan Over Trespassing in Waters Off Diaoyu Islands*, GLOBAL TIMES (July 5, 2011, 1:46 AM), http://www.globaltimes.cn/DesktopModules/DnnForge%20-%20NewsArticles/Print.aspx?tabid=99&tabmoduleid=94&articleId=664582&moduleId=405&PortalID=0; *Chinese Fighters Fly Again Over Disputed Diaoyu Islands*, THE WATCHTOWERS (Sept. 7, 2011), http://thewatchtowers.com/chinese-fighters-fly-again-over-disputed-diaoyu-islands/.

[104] *See Two Diet Members Survey Isles*, JAPAN TIMES (Jan. 23, 2011), *available at* http://www.japantimes.co.jp/news/2012/01/23/national/two-diet-members-survey-isles/#.UWIYFxkvmlZ; *see also Foreign Ministry Spokesperson Hong Lei Expressed Solemn Position on Japanese Right-Wing Activists' Landing on the Diaoyu Islands*, MINISTRY OF FOREIGN AFFAIRS OF CHINA (Jan. 13, 2012), http://www.fmprc.gov.cn/eng/xwfw/s2510/2535/t892708.htm.

[105] *China 'Unwavering' on Diaoyu Islands*, PEOPLE'S DAILY (Jan. 17, 2012), http://english.peopledaily.com.cn/90883/7706973.html.

[106] *Chinese FM Urges Japan to "Fully Recognize" Sensitivity to History*, XINHUANET (Mar. 6, 2012, 11:48AM), http://news.xinhuanet.com/english/china/2012-03/06/c_1314494

China also started to send maritime patrol vessels to the Diaoyu Islands and announced the move as to safeguard its territorial integrity, and Japan lodged an official protest.[107]

In April 2012, Tokyo governor Shintaro Ishihara, known as a nationalist, announced his intention to lead a movement to purchase three of the eight islands from their private owner and raised nearly $20 million through an online campaign.[108] In a move it said was designed to prevent Ishihara or other nationalists from acquiring the islands, Japan's central government purchased on September 12, 2012 the three islands for ¥2.05 billion (about $16 million at an exchange rate of ¥78:$1) to bring them under state control.[109]

C. Scene of Increased At-Sea-Conflicts

Since Ishihara's speech in April 2012, the islands have been the scene of increased activity, sometimes direct encounters, between activists, fishermen, and maritime vessels of all three claimants. On July 4, coastguard vessels from Taiwan and Japan collided in waters near a disputed island while the Taiwanese vessel was escorting activists to the area.[110] The same happened on August 15 to vessels carrying activists from Hong Kong trying to approach the islands and they were stopped and detained by the Japanese authorities.[111] On August 18, a group of four boats carrying about 150 Japanese activists organized by a right-wing group arrived at the islands to commemorate Japanese WWII deaths and raised Japanese flags.[112] China and Taiwan protested the move, and across China

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92.htm.

[107] Yang Jingjie, *China Defends Surveillance Near Diaoyu Islands*, GLOBAL TIMES (Mar. 17, 2012, 1:20AM), http://www.globaltimes.cn/NEWS/tabid/99/ID/700705/China-defends-surveillance-near-Diaoyu-Islands.aspx.

[108] Antoni Slodkowski & Junko Fujita, *Island Plans by Tokyo's Nationalist Governor May Stoke Fresh China Tensions*, REUTERS (Oct. 3, 2012, 11:42PM), http://www.reuters.com/article/2012/10/04/us-japan-china-islands-idUSBRE89307E20121004.

[109] *Government Offering Senkakus Owner ¥2 billion for Contested Isles*, JAPANESE TIMES (Aug. 27, 2012), *http://www.japantimes.co.jp/news/2012/08/27/national/government-offering-senkakus-owner-2-billion-for-contested-isles/#.UWIdkBkvmIY.*

[110] *Taiwan, Japan Coastguards Collide Near Islands*, INTERAKSYON (July 4, 2012, 7:06PM), http://www.interaksyon.com/article/36527/taiwan-japan-coastguards-collide-near-disputed-islands.

[111] Sheila A. Smith, *Why Japan, South Korea, and China Are So Riled Up Over a Few Tiny Islands*, THE ATLANTIC (Aug. 16, 2012, 11:40AM), http://www.theatlantic.com/international/archive/2012/08/why-japan-south-korea-and-china-are-so-riled-up-over-a-few-tiny-islands/261224/.

[112] *Rightwingers Land on Senkakus, Hoist Flags*, JAPAN TIMES, Aug. 20, 2012, at 1, *available at* http://www.japantimes.co.jp/news/2012/08/20/national/rightwingers-land-on-senkakus-hoist-flags/#.uuu1lzfxd8Q.

large-scale anti-Japanese protests erupted, some of which resulted in violence.[113]

Tensions rose higher since the Japanese government "purchased" three of the Senkaku Islands, and China embarked a series of responding actions including daily weather forecast of Diaoyu Islands.[114] China submitted a nautical chart on September 13 to the United Nations with baselines of the territorial sea of the Islands.[115] With more Chinese fishing vessels approaching the disputed islands,[116] China increased the number of maritime surveillance and fishery monitoring vessels and aircrafts, and constantly patrols waters around the Islands.[117] Since January 2013, both China and Japan have sent fighters to the area,[118] and exchanged warning signals to each other to leave the territorial waters claimed by both.[119] Taiwan also became involved and increased the chance of at sea conflicts.[120] Japanese officials have raised alarms regarding the increased Chinese activities.[121]

Apparently, the longstanding flare-ups over the Diaoyu/Senkaku Islands between China and Japan have escalated with the repeated claiming actions and counteractions from both sides.[122] Japan's formal nationalization of the three islands has made the dispute complicated, particularly when it is

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[113] In September 2012, citizens from as many as eighty-five Chinese cities, including Shanghai, Shenyang, Zhengzhou, Hangzhou, as well as Hong Kong, participated in protest marches and called for a boycott of Japanese products. *See China-Japan Island Dispute Fuels Protests,* L.A. TIMES, Aug. 20, 2012, at 1, *available at* http://articles.latimes.com/2012/aug/20/world/la-fg-japan-china-20120820.

[114] *China's Latest Salvo in Senkaku Storm: Weather Forecasts*, WALL ST. J. (Sept. 18, 2012), http://stream.wsj.com/story/china-japan-dispute/SS-2-58300/SS-2-58449.

[115] M. Taylor Fravel, *Drawing Lines in the Water*, DIPLOMAT (Sept. 14, 2012), http://thediplomat.com/china-power/drawing-lines-in-the-water.

[116] Chico Harlan, *Six Chinese Ships Enter Japanese Waters Near Disputed Islands,* WASH. POST (Sept. 14, 2012), http://articles.washingtonpost.com/2012-09-14/world/35494337_1_chinese-ships-diaoyu-china-and-japan.

[117] *See China Strengthens Senkakus Flotilla; Taiwan Ships Arrive*, ASAHI SHIMBUN (Sept. 22, 2012), http://ajw.asahi.com/article/behind_news/politics/AJ201209220025.

[118] *China Launches Fighters amid Japan Dispute*, S. CHINA MORNING POST (Jan. 11, 2013), *http://www.scmp.com/news/china/article/1125765/china-launches-fighters-amid-japan-dispute.*

[119] *See generally* MANYIN, *supra* note 40.

[120] One of the incidents happened on January 24, 2013—a boat dispatched from Taiwan carrying activists attempted to land on the Islands to place a statue to Mazu, the Goddess of the Sea, and was intercepted and diverted by Japanese patrols. *See* Hilary Whiteman, *Japan Repels Taiwan Activists Near Disputed Islands*, CNN (Jan. 30, 2013, 9:56AM), http://www.cnn.com/2013/01/24/world/asia/japan-taiwan-diputed-islands.

[121] Michael Cole, *US to Deploy Drones Over Diaoyutais*, TAIPEI TIMES (Aug. 8, 2012), http://www.taipeitimes.com/News/front/archives/2012/08/08/2003539722.

[122] MANYIN, *supra* note 40, at 5.

entangled with the competition for marine natural resources and demarcation issue over the maritime boundary.[123]

V. IMPLICATIONS AND PROSPECTS

The manners in which the Diaoyu/Senkaku Islands dispute has unfolded in the past months have made a series of crises in the Northeast Asia that threaten to lose control. In short of tangible concessions on the maritime dispute, and in the absence of mutual trust, the reshaping of maritime landscape renders regional issues more complicated and will likely increase difficulties for individual states, such as China and Japan to handle the case. The questions have to be pondered upon include what are the implications of this crisis, what is at stake for the states and the region, and what may be suggested to wind down the crisis?

A. Implications For the States and the Region

The conflicts over maritime interests in Northeast Asia and difficulties in reaching an effective regime to resolve them has frustrated and challenged the states to a great extent.[124] Despite a growing interdependence among these states, emotional uneasiness still exists toward each other, derived mainly from the legacy of colonial history, which also serves as a barrier to concerted efforts to address the disputes.[125] Additionally, rising nationalism across the region promotes an emotional approach to maritime disputes and widens the gaps among the people of the region. Many observers worry that an accident escalated in armed conflict between Japan and China could have profound implications not only for the states involved, but also for the deeply troubled region.[126]

1. Worsening State Relations and Mounting Risks of Conflict

To a great extent, the dispute over the Diaoyu/Senkaku Islands, which has brought China and Japan into a bitter dispute for many decades, is detrimental to bilateral relations.[127] The two states are key trade partners,

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[123] *Id.*

[124] C.I. Chee, *The 1982 Convention on the Law of the Sea: A Korean Perspective, in* OCEAN AFFAIRS IN NORTHEAST ASIA AND PROSPECTS FOR KOREAN-CHINESE MARITIME COOPERATION 3-22 (Dalchoong Kim et al. eds., 1994).

[125] Kim, *supra* note 3, at 243.

[126] Koh Swee Lean Collin, *Tensions in the East China Sea: Time to Contain Naval Stand-offs*, THE NATION (Feb. 19, 2013, 1:00 AM), http://www.nationmultimedia.com/opinion/East-China-Sea-tensions-time-to-contain-naval-stan-30200255.html.

[127] Cheng Tao, *The Sino-Japanese Dispute Over the Tiao-yu-tai (Senkaku) Islands and*

but their political relations have often frayed over their shared history.[128] As the historical background of the island dispute has obviously demonstrated, its implications on their relations are unequivocally negative. However, the situation has never been so serious in the post-war period in terms of the risk of militarized conflict. The two sides have had periodic deteriorations in bilateral ties before, and usually found a way to settle, if not resolve, differences. Moreover, in the past there was never really any risk of armed conflict. The situation is thus serious, with a risk of the militarization, escalation of tensions, and implications of many aspects.

First, the dispute is very implicative to both China's and Japan's dealing with their other similar maritime territorial disputes. Neither side wants the settlement of this dispute to set an unfavorable precedent for the resolution of other similar troubles. For China, the sovereignty of the Diaoyu Islands has a strong implication for its concern in the South China Sea.[129] It is clear that if China softens its posture over the Diaoyu Islands, it might be considered as softening of its position on the Spratly and Paracel islands disputes in the South China Sea. For Japan, the Senkaku Islands dispute also implies its attitude toward the territorial disputes with Russia over the "Northern Territories," and with Korea over the Dokdo/Takeshima Island. Any softening on the Diaoyu/Senkaku Islands dispute might undermine both of Japan's claims. Since international credibility is taken into account, it is difficult for either side to avoid attaching great significance to their claims. While standing adamant and steadfast to this dispute, the price they have to pay is the worsening of state relations and mounting risks of conflict.

Second, the bilateral relation between the two states is the worst it has been in decades. Japan's decision to nationalize three of the islands in the Diaoyu/Senkaku group, despite Chinese opposition and protests, indicates that Japan's effort to end its post war pattern of "apology diplomacy" has moved out of the symbolic mode, and entered the domain of more tangible policies.[130] For China, this nationalization claim as a provocation action

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the Law of Territorial Acquisition, 14 VA. J. INT'L L. 221, 248-60 (1973-74); Victor H. Li, *China and Off-Shore Oil: The Tiao-yu Tai Dispute*, 10 STAN. J. INT'L STUD. 143, 151-53 (1975).

[128] Mark J. Valencia, *The East China Sea Dispute: Context, Claims, Issues, and Possible Solutions*, 31 ASIAN PERSP. 127, 165-66 (2007).

[129] For an overview on the South China Sea disputes, see Yann-Huei Song, *The Overall Situation in the South China Sea in the New Millennium: Before and After the September 11 Terrorist Attacks*, 34 OCEAN DEV. & INT'L L. 229 (2003).

[130] Max Fisher, *Japan's No-apology Diplomacy: Why a Small Tokyo Shrine is Causing Big Trouble in Asia*, WASHINGTON POST (Apr. 23, 2013, 11:52 AM), http://www.washingtonpost.com/blogs/worldviews/wp/2013/04/23/japans-no-apology-diplomacy-why-a-small-tokyo-shrine-is-causing-big-trouble-in-asia/.

was a serious step in the direction of changing the status quo of the islands. Although China consistently advocates resolving territorial disputes through dialogue and consultation, it indicates China's unambiguous determination and capability to safeguard its territorial sovereignty.[131] Beijing has made it clear that Tokyo has to abandon the idea that China will one day accept the islands as Japanese. The activities of Chinese vessels around the Diaoyu Islands do not seem to have declined in the increasing turbulence, suggesting that China will do whatever is necessary to assert its islands sovereignty.

Third, from the perspective of domestic legitimacy, the dispute is not as single or simple as indicated. Instead, what is directly in dispute and the other factors behind the dispute, is not only controversies over the ownership and return of the Islands, but the essential problem stems also from the disagreements concerning the demarcation of maritime boundary, as well as many other divergences and implications. Obviously, the question of sovereignty also raises nationalism in an irreconciled regional environment. Besides, this escalation is driven by national interests by both sides, because the dispute over the islands is also linked to the rights to exploit natural resources.

Due to a host of implications, the territorial dispute, as a multifaceted and complicated issue interrelated and entangled with other problems in bilateral relations, challenges the wisdom and perception of both China and Japan. It also constrains the ability of both states' leaders to pursue compromise, but increases the threat to regional stability even global security.

2. Complicating Maritime Disputes and Threatening Regional Security

Maritime issues are relatively minor in the context of global economic and political priorities, but crucial among the Northeast Asian states in balancing the chaotic inter-state relations, and may drastically influence, or even change, the basic pattern of the relations.[132] The regional states have had sensitive territorial disputes for decades, and are most cautious in handling maritime issues and strategic when making their claims because of their direct effect on national and regional interests.

The emergence of extended maritime zone regimes and competition for marine resources have intensified their disputes and made them extra

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[131] *China Security Report 2012*, NAT'L INST. FOR DEFENSE STUD. 2-18 (2012), *available at* http://en.calameo.com/read/000009779fdd4d2a63da1.

[132] Jin-Hyun Paik, *The U.N. Convention on the Law of the Sea and Boundary Delimitation Issues in East Asia*, 24 KOREAN J. COMP. L. 125, 145 (1996).

problematic.[133] With rapid economic development, marine resources become more vital, and the contest has increasingly become a source of conflict and a key determinant in state relations and implementation of international law. The regional states, except Russia and China, mostly have limited land resources and largely rely on marine or imported resources. Thus what is hiding behind the claims over islands and maritime zones is an intensifying fight for hydrocarbon, mineral and fishery resources.[134] Concerning large and important resources, the disputes are frequently magnified by their occurrence in clusters and by the existence of bad relations among the states. They tend to be triggered by factors, and there is certainly no lack of military capability in the region to back up claims and threats.

Besides conflicts over islands and resource interests, the regional states have made various unilateral claims that cause friction between them. Several lines have been drawn to address different types of ocean use, such as military control and other maritime related purposes.[135] These lines or boundaries often cause maritime conflicts that complicate relations among the states throughout the region.[136] This situation makes the maritime disputes intrinsically interrelated to each other as "mixed disputes," and challenges regional security to the greatest extent.

On top of these issues, with regard to the volatile scenario of the islands dispute between China and Japan, it may be readily assumed that any further provocation or major misstep may push the territorial dispute over the brink and cause chain reactions across the region. As the largest economies in the world, China and Japan have nothing to gain and everything to lose in such an armed conflict, and the region and the world at large would suffer disastrous consequences.

B. Prospects for Possible Cooperative Steps

Distinctively, cooperation is a common way among disputing parties to develop maritime resources without prejudice to the status of disputed areas. However, in the Northeast Asia, conflicts have been more the rule than cooperation.[137] The deeply divided state relations and competing

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[133] For China's boundary issues, see CHOON-HO PARK, EAST ASIA AND THE LAW OF THE SEA, *supra* note 54, at 245-70.

[134] *See* Choon-ho Park, *Oil Under Troubled Waters: The Northeast Asia Sea-bed Oil Controversy*, *supra* note 76, at 34-39.

[135] *See* Jon M. Van Dyke, *The Republic of Korea's Maritime Boundaries*, *supra* note 11.

[136] *See* Michael W. Lodge, *The Fisheries Regimes of Enclosed and Semi-Enclosed Seas and High Seas Enclaves*, *in* DEVELOPMENTS IN INTERNATIONAL FISHERIES LAW 193, 201-03 (Ellen Hey ed., 1999).

[137] *See generally* Mark J. Valencia, *Domestic Politics Fuels Northeast Asian Maritime*

maritime interests have affected cooperative steps, and impacted their resolution on much wider political import. Given the seriousness of the escalated scene between China and Japan, and that swift resolution to the dispute is unlikely, the most pressing immediate task is to seek feasible mechanisms to manage them and forestall any escalation of incidents. Therefore it is time for greater courage, wisdom and vision to prevent any further acceleration of tension and to build greater peace, stability, and reconciliation.

1. To Contain the Crisis by Setting up Cooperative Mechanisms

Given the complexities, escalations, and difficult Sino-Japanese relations, a breakthrough or a compromise over the islands dispute would appear very hard to achieve. It is even challenging for China and Japan to break the deadlock and initiate a solution-finding process, let alone to reach a permanent solution to the problem. Perhaps, maintaining the status quo is the most likely prospect of the dispute in the foreseeable future. In order to calm the disputes, China and Japan could possibly try taking some cooperative steps while searching for solutions.

First, concerning the effect of the Diaoyu/Senkaku Islands on maritime boundary delimitation, Japan argues that the islands are entitled to generate maritime zones and use them as base points for continental shelf and EEZ claims in the East China Sea.[138] China has not provided any official view. The fact is the Diaoyu/Senkaku Islands are small, uninhabited, and cannot sustain economic life of their own and thus not entitled to an EEZ and continental shelf, as provided for in Article 121(3) of the UNCLOS. The islands should not be used as a basis for EEZ or continental shelf claims.[139] If the two parties can agree on this, the sovereignty issue may be separated from the boundary issue so as not to hinder the negotiation progress.

Second, it is necessary for China and Japan to negotiate a cooperation area to be divided into different portions, and negotiated them separately based on different principles, criteria, and degree of difficulty or complexity

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Disputes, 43 ASIA PAC. ISSUES 1 (2000), *available at* https://scholarspace.manoa.hawaii.edu/bitstream/handle/10125/3848/api043.pdf?sequence=1.

[138] *See* Suk Kyoon Kim, *China and Japan Maritime Disputes in the East China Sea: A Note on Recent Developments*, 43 OCEAN DEV. & INT'L L. 296, 297 (2012); *see generally* Guoxing Ji, *Similarities and Differences Between the Korean-Japanese Dokdo Disputes and the Sino-Japanese Diaoyudao Disputes*, *in* DOKDO: HISTORICAL APPRAISAL AND INTERNATIONAL JUSTICE 189, 205 (Seokwoo Lee & Hee Eun Lee eds., 2011).

[139] *See* Guoxing Ji, *Sino-Japanese Jurisdictional Delimitation in East-China Sea: Approaches to Dispute Settlement*, *in* MARITIME BOUNDARY DISPUTES, SETTLEMENT PROCESSES, AND THE LAW OF THE SEA 77, 100 (Seoung-Young Hong & Jon M. Van Dyke eds., 2008).

in resolving the issues. For example, the two sides may agree to a twelve nm territorial sea enclave around the islands and to designate that area either as a "no-go" zone or for joint use and future settlement.[140] By isolating the sensitive sovereignty disagreement, the complexity and difficulty in handling the dispute may be greatly reduced.

Third, a large part of the problem stems from the competition for resources and lack of cooperative mechanism.[141] Under the tit-for-tat circumstance, in order to achieve the common goal of exploitation of the resources in the disputed areas, it may be wise for China and Japan to reach a consensus that no matter where the boundary is located, both sides should retain a share of the resources, either known or unknown. This may offer some certainty and reduce the anxiety for being disadvantaged.

2. To Limit Expectations by Abiding by International Laws

The Northeast Asia seas are likely to remain as a potential source of conflict, and there is no ready solution to the longstanding stalemate. Coastal state cooperation is hardly existent in this part of the world, or at least not sufficient to the needs. With the competing national maritime interests, plus the historical, political and a number of other critical factors involved, the complexity of the issues will only be greater.

Such complexity and difficulties, however, should not hinder the efforts in searching for dispute settlement rather than waiting for the outcome of zero-sum game. There must be some endeavor to deal with the reality of the regional issues and the threat to the security of the peoples. Ultimately, the states should try every effort to seek a solution to put aside and to prevent the disputes from escalating into a military conflict. To this end, the UNCLOS should be respected and implemented on a priority basis to facilitate the resolution of jurisdictional issues in the Northeast Asian region in general, and China and Japan in particular.

The UNCLOS provisions are somewhat vague to settle these overlapping claims,[142] and often lead to different interpretations, with two or more parties disputing different wording in their favor.[143] It is a vast and comprehensive area of international law, and all the states rely on the

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[140] Mark J. Valencia, *The East China Sea Dispute: Context, Claims, Issues, and Possible Solutions*, *supra* note 128, at 159.

[141] Suk Kyoon Kim, *China and Japan Maritime Disputes in the East China Sea: A Note on Recent Developments*, *supra* note 138, at 297.

[142] For a comprehensive discussion, see Jin-Hyun Paik, *supra* note 132.

[143] For a holistic view, see David M. Ong, *The Dispute Settlement Mechanism of the 1982 U.N. Convention on the Law of the Sea: Implications for East Asia*, *in* UN CONVENTION ON THE LAW OF THE SEA AND EAST ASIA 206 (Dalchoong Kim et al. eds., 1996).

UNCLOS to defend their national claims. These states have ratified the UNCLOS and are obliged to accept and implement its provisions with ultimate efforts.

Bordering a chain of semi-enclosed seas, the Northeast Asian states may have to come to practical terms with courage and good faith to limit their excessive expectations when dealing with disputed claims. These competing states should be encouraged to abide by the settled rules and framework of the UNCLOS for the resolution and settlement of their disputes, at least not to escalate the state of affairs to direct military conflict, as neither side can afford to relax its vigilance. Meanwhile, a realistic way to solve the maritime disputes must be searched positively on a basis that might contribute to the resolution of disputes.

VI. CONCLUDING REMARKS

The sovereignty disputes and issues of maritime rights and interests are complicated ones relating to different fields and levels. It can be argued that the sets of disputes in Northeast Asia are the most extensive and serious ones. The political relations between the disputing states and various issues involved have all mixed together and affected each other. This has attributed to the uniqueness of the regional issues and made it the most challenging tasks to address.[144] The situation has generated a large amount of literature on almost every aspect of the maritime disputes, but no silver bullet has been offered.

Cooperation should be the desired solution and ultimate goal, but the variety and complexity of the mixed disputes have become political barriers among the regional states, and has affected the development of cooperative mechanisms. States need to realise that they have to make a common effort towards cooperative steps. This is not a magical process, nor can it rely on a single state. Each state must do its utmost to fulfil its role in achieving this goal.

Regarding the deadlocked disputes over the islands ownership and divided stances on boundary delimitations, they are unlikely to be solved in the near future, and could even become more intense. While China and Japan could not agree on the exact principle governing their maritime boundary delimitation, they could think about alternatives or a similar solution-finding program at non-governmental level, in particular the academic level, or through a track two channel. While political deadlock is

[144] For a discussion on the conflicts of the region and possible solutions, see Jon M. Van Dyke, *Northeast Asian Seas—Conflicts, Accomplishments, and the Role of the United States*, *supra* note 17.

difficult to break, the two disputants could jointly exploit the economic resources of the Diaoyu/Senkaku Islands. In the interests of amity and international cooperation, both sides would be best served by calming down and building up a conflict avoidance and coordination facilitating regime.

In light of the complexity of the regional condition and substantial tensions between Japan and China, they should continue to practice mutual self-restraint to avoid military conflict and any flare-ups. The goal for both sides should be to regulate the operations of their maritime agencies through the adoption of conflict-avoidance mechanisms and institutionalized risk-reduction measures. China and Japan should be urged to keep the issue at the lowest level of tension possible, to find a way to shelve their differences and to focus on issues where they can cooperate, at least to agree not to send military aircraft into the airspace above the islands. They should also be urged to pay great attention to the importance of political dialogue, and raise the level of diplomatic communications to a leadership summit of both sides. Only by facing the future and putting the handling of the dispute back on the right track, can progress toward gradual resolution of this pending dispute be made.

Conflicting Outer Continental Shelf Claims in the East and South China Seas: Proposals for Cooperation and Peaceful Resolution

Yann-huei Song*

Tensions have erupted over some barren rocks in the Pacific that you may never have heard of, but stay tuned—this is a boundary dispute that could get ugly and some day have far-reaching consequences for China, Japan, Taiwan and the United States.

Nicholas D. Kristof[1]

Governance of the South China Sea presents challenges. The countries of the region as well as those with interests in these regions must work together to manage and protect these shared ocean spaces for the benefit of present and future generations.

Jon M. Van Dyke[2]

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[1] Nicholas D. Kristof, *Look Out for the Diaoyu Islands*, N.Y. TIMES (Sept. 10, 2010), http://kristof.blogs.nytimes.com/2010/09/10/look-out-for-the-diaoyu-islands/.

[2] Jon M. Van Dyke, Professor, William S. Richardson School of Law, University of Hawai'i at Mānoa, Regional Maritime Cooperation in the South China Sea, Address at the Int'l Conference on Major Law and Policy Issues in the South China Sea: European and American Perspectives (Oct. 7, 2011). *See also* Jon M. Van Dyke & Sherry Broder, *Regional Maritime Cooperation in the South China Sea, in* MAJOR LAW AND POLICY ISSUES IN THE SOUTH CHINA SEA: EUROPEAN AND AMERICAN PERSPECTIVES (Yann-Huei Song & Keyuan Zou eds., forthcoming Jan. 2014).

I. INTRODUCTION

The first quoted statement was written by Nicholas D. Kristof in the midst of rising tension and saber rattling between China and Japan in September 2010 when a Chinese fishing boat captain was arrested by the Japanese coast guard in the disputed waters near the Diaoyutai/Senkaku Islands in the East China Sea. The second quoted statement was the recommendation given by Professor Jon Markham Van Dyke when he attended a law of the sea meeting held in Taipei, Taiwan in October 2011. Professor Van Dyke made the same recommendation during his talk at the Third International Workshop entitled "The South China Sea: Cooperation for the Regional Security and Development," that was held in Hanoi, Vietnam in early November 2011.[3]

As tensions continue to escalate in both the East and South China Seas, there have been some negative effects on the development of relationships among the countries that border these two semi-enclosed seas. These tensions threaten to disrupt peace and stability in the Asia-Pacific region and thus adversely affect U.S. national interests in East Asia. Correctly and wisely recommended by Professor Van Dyke, the East Asian countries, as well as those with interests in the East and South China Seas, "must work together to manage and protect these shared ocean spaces for the benefit of present and future generations."[4] This is particularly relevant at a time when sovereignty and maritime disputes in these two seas have emerged as

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[3] Jon M. Van Dyke, Professor, William S. Richardson School of Law, University of Hawai'i at Mānoa, Address at the South China Sea: Cooperation of the Regional Security and Development (Nov. 2011). *See also* Jon M. Van Dyke, *Regional Cooperation in the South China Sea*, EAST SEA (SOUTH CHINA SEA) STUDIES (Feb. 2, 2012), http://nghiencuubiendong.vn/en/conferences-and-seminars-/the-third-international-workshop-on-south-china-sea/667-regional-cooperation-in-the-south-china-sea-jon-m-van-dyke (last visited Dec. 29, 2012).

[4] *Id.*

two of the most troublesome flashpoints in the Asia-Pacific region[5] and tensions continuously flare up at the time of this writing.[6]

The dispute in the East China Sea is between the People's Republic of China (hereafter referred to as PRC or China), the Republic of China (hereafter referred to as ROC or Taiwan), and Japan over the uninhabited island group, called Diaoyu Dao by China, Diaoyutai Islands by Taiwan, and Senkaku Islands by Japan.[7] Tensions in the East China Sea have risen since April 2012 when the former Japanese Tokyo governor Shintaro Ishihara announced his plan to purchase the disputed islands in Washington at the Heritage Foundation.[8]

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[5] Other disputes exist in the region, including disputes between Japan and the Russian Federation over the four southern Kuril islands in the Sea of Okhotsk; between Japan and Korea over a cluster of rocks called Dokdo/Takeshima (Liancourt Rocks) in the middle of the Sea of Japan/East Sea; between China and Japan, and between Korea and Japan over Okinotorishima (Douglas Reef) southeast of Japan in the western Pacific; between China and Korea over the submerged rock called Suyan/Ieodo (Socotra Rock) in the East China Sea. *See* Patrick M. Cronin, *Contested Waters: Managing Disputes in the East and South China Seas*, East and South China Seas Bulletin 6, CENTER FOR A NEW AMERICAN SECURITY (Dec. 2012), http://www.cnas.org/ files/documents/publications/CNAS_Bulletin_Cronin_ ContestedWaters.pdf.

[6] On December 28, 2012, for example, Japan submitted a diplomatic note to the U.N. Secretariat to oppose the Chinese submission concerning the outer limits of the continental shelf beyond 200 nautical miles in part of the East China Sea and reaffirmed that it owns the disputed Diaoyutai/Senkaku Islands, and that there involves no disputes whatsoever over the ownership of the Diaoyutai/Senkaku Islands. *See* Letter from The Permanent Mission of Japan to the U.N. to the Secretariat of the U.N. (Dec. 28, 2012), *available at* http://www.un.org/Depts/los/clcs_new/submissions_files/chn63_1.pdf. On the same day, the government of the Philippines opposed the announcement by China that its patrol ship *Haixun 21* will be dispatched to the disputed waters in the South China Sea in support of its maritime claims in the waters encircled by the nine-dashed line. *See* Fatima Reyes, *Philippines Blasts China Anew Over Patrol in West Philippine Sea,* PHILIPPINE DAILY INQUIRER (Dec. 28, 2012), http://globalnation.inquirer.net/60575/philippines-blasts-china-anew-over-patrol-in-west-philippine-sea. On January 2, 2013, the Ministry of Foreign Affairs of the Republic of China (Taiwan) lodged a strong protest against the entry into force of Vietnam's Law of the Sea on January 1, 2013, which declares the Vietnamese sovereignty over the Paracel Islands and the Spratly Islands that belong to Taiwan. On January 7, 2013, China urged the Philippines not to complicate the situation in the South China Sea, as recent media reports have stated that the country may build infrastructure on the Spratly Islands. For the ROC statement, visit http://www.mofa.gov.tw/official/Home/Detail/d5a4b aa1-c7ec-4e67-a3cd-aecf35914fde?arfid=2a16455d-0b58-4440-81e8-fc318cdb0ff6&opno= 9b985598-f84c-4e10-8b77-a3fb8ac72342 (in Chinese) (last visited Jan. 2, 2013). For the Chinese response, see *China Urges Philippines to Avoid Complicating South China Sea Issue*, GLOBAL TIMES (Jan. 7, 2013), http://www.globaltimes.cn/content/754276.shtml.

[7] Mark E. Manyin, CONG. RESEARCH SERV., R42761, SENKAKU (DIAOYU/DIAOYUTAI) ISLANDS DISPUTE: U.S. TREATY OBLIGATIONS (2013).

[8] Yuka Hayashi, *Tokyo Chief Plots to Buy Disputed Islands*, WALL ST. J. (Apr. 17,

The dispute in the South China Sea is between the five countries of Southeast Asia (namely the Philippines, Vietnam, Malaysia, Brunei, and Indonesia),[9] China, and Taiwan. Tensions in the South China Sea have also been on the rise since April 2012 when the government of the Philippines dispatched its warship to detain fishing vessels from China in the waters near the disputed Scarborough Shoal.[10]

Aiming to support their respective sovereignty and/or maritime claims, the claimant countries are strengthening their civil and military capacities. Efforts have been made, in particular, by the governments of Japan, the Philippines and Vietnam to seek more support from the United States to help check with the increasingly perceived threat from China both in the East and the South China Seas.[11] In response to the rising tensions in the region and increasing domestic call for more actions to safeguard Taiwan's sovereignty over the Diaoyutai/Senkaku Islands, the ROC government proposed a five point East China Sea Peace Initiative on August 5, 2012.[12] As far as China is concerned, it has stepped up pressure on Japan, the Philippines, and Vietnam over who owns the disputed islands in the East and South China Seas[13] and continuously asked the United States to stay outside the disputes.[14]

2012, 9:24 AM), http://online.wsj.com/article/SB10001424052702304818404577348610456930238.html.

[9] Indonesia is involved in no territorial disputes, but may be involved in overlapping Exclusive Economic Zones in the disputed waters in the South China Sea. *See South China Sea,* U.S. ENERGY INFORMATION ADMINISTRATION, http://www.eia.gov/countries/regions-topics.cfm?fips=SCS (last visited Apr. 16, 2013).

[10] *Philippine Warship, Chinese Boats in Standoff Near Shoal*, TAIPEI TIMES (Apr. 12, 2012), http://www.taipeitimes.com/News/front/archives/2012/04/12/2003530121.

[11] The United States and the Philippines signed a Mutual Defense Treaty on August 30, 1951. *See* The Mutual Defense Treaty Between the United States and the Republic of the Philippines; August 30, 1951, *available at* http://avalon.law.yale.edu/20th_century/phil001.asp (last visited Apr. 16, 2013). The United States and Japan signed a Treaty of Mutual Cooperation and Security on June 19, 1960. *See* Treaty of Mutual Cooperation and Security between Japan and the United States of America, U.S.-Japan, Jan. 19, 1960, *available at* http://www.mofa.go.jp/region/n-america/us/q&a/ref/1.html. On August 1, 2011, The United States and Vietnam signed a Statement of Intent on Military Medical Cooperation. *See U.S., Vietnam establish Formal Military Medical Partnership*, AMERICA'S NAVY (Aug. 1, 2011, 7:47 AM), http://www.navy.mil/submit/display.asp?story_id=61899.

[12] *See infra* Part IV; *see also East China Sea Peace Initiative*, MINISTRY OF FOREIGN AFFAIRS REPUBLIC OF CHINA (TAIWAN), http://www.mofa.gov.tw/EnOfficial/Topics/TopicsIndex/?opno=cc7f748f-f55f-4eeb-91b4-cf4a28bbb86f (last visited Dec. 19, 2012).

[13] On November 23, 2012, China reproduced the South China Sea maps on its newly revised passports that show the nine dashed lines as the Chinese territory. The moves received strong protests from Vietnam and the Philippines. *See China Passports Claim Ownership of South China Sea and Taiwan*, THE GUARDIAN (Nov. 23, 2012), http://www.guardian.co.uk/world/2012/nov/23/china-passports-ownership-sea-taiwan. This

This paper, prepared as a tribute in memory of the late Professor Jon M. Van Dyke, who is one of the world's well-known ocean law and policy experts, a leading authority on the study of the East and South China Sea disputes, a strong supporter of Taiwan's democracy and human rights, and a mentor and long-time good friend of this writer, examines the conflicting outer continental shelf claims in the East and South China Seas and the proposals for maritime cooperation as well as peaceful resolution in these two important bodies of water in East Asia. Some recommendations are offered by the writer at the end of the paper.

II. GEOGRAPHICAL BACKGROUND OF THE TWO SEAS

The East China Sea, a part of the Pacific Ocean covering an area of 1,249,000 km², is bounded on the East by the Kyushu and Ryuku Islands, on the South by Taiwan, and on the West by Mainland China. It is connected with the South China Sea by the Taiwan Strait and with the Sea of Japan by the Korea Strait; it opens in the North to the Yellow Sea. Territories with borders on the sea (clockwise from north) include: South Korea, Japan, Taiwan, and Mainland China.[15]

The South China Sea is also a part of the Pacific Ocean, encompassing an area from the Singapore and Malacca Straits to the Taiwan Strait of around 3,500,000 km². This sea is located South of mainland China and Taiwan; West of the Philippines; North West of Sabah (Malaysia), Sarawak

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was followed by a report on November 29, 2012 that police in the southern Chinese island province of Hainan will board and search ships which illegally enter what China considers its territory in the disputed South China Sea. *See Chinese Police Plan to Board Vessels in Disputed Seas*, REUTERS (Nov. 29, 2012), http://www.reuters.com/article/2012/11/29/us-china-seas-idUSBRE8AS05E20121129. On December 13, 2012, a small twin-propeller aircraft from China's State Oceanic Administration swooped low over the waters close to the disputed Diaoyutai/Senkaku Islands in the East China Sea, which was considered a move by China to increase the pressure on Japan over who owns the uninhabited island chain. Jane Perlez, *China Steps Up Pressure on Japan in Island Dispute*, N.Y. TIMES (Dec. 15, 2012), http://www.nytimes.com/2012/12/16/world/asia/china-steps-up-pressure-on-japan-in-island-dispute.html?_r=0. On January 7, 2013, four Chinese maritime surveillance ships entered Japanese clamed territorial waters around the disputes Diaoyutai/Senkaku Islands in the East China Sea. *4 Chinese Ships Enter Japan's Territorial Waters Near Senkakus*, KYODO NEWS (Jan. 7, 2013), http://english.kyodonews.jp/news/2013/01/202843.html.

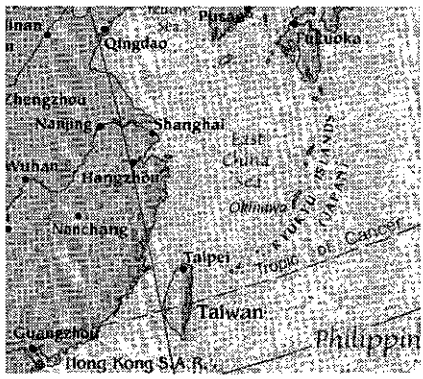
[14] Guy Taylor, *China to U.S.: 'Shut up,' Butt Out of Territorial Disputes*, THE WASH. TIMES (Aug. 8, 2012), http://www.washingtontimes.com/news/2012/aug/8/china-tells-us-shut-butt-out-territorial-disputes/?page=all.

[15] *See generally* International Hydrographic Organization, *Limits of Oceans and Seas*, at 31 Special Publication No. 23 (3d ed. 1953).

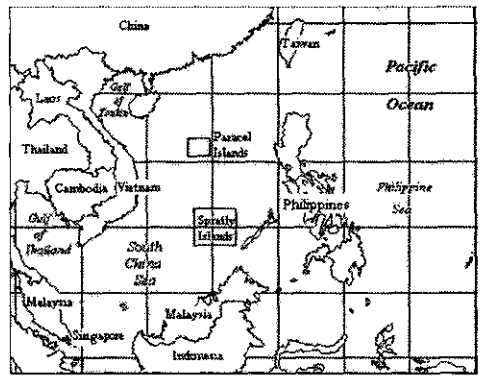
(Malaysia) and Brunei; North of Indonesia; North East of the Malay peninsula (Malaysia) and Singapore; and East of Vietnam.[16]

The East and South China Seas are two of the world's 64 large marine ecosystems ("LME"), which are natural regions of ocean space encompassing coastal waters from river basins and estuaries to the seaward boundary of continental shelves and the outer margins of coastal currents.[17] Fish and other living resources are heavily exploited in these two LME, which are also facing serious environmental and pollution problems as a result of rapid economic development and a growing population in the coastal areas of the bordering countries.

East China Sea[18]



South China Sea[19]



The East and South China Seas are also two of the world's semi-enclosed seas, which are "surrounded by two or more States and connected to

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[16] *Id.* at 30-31.

[17] *See generally* S. Heilman, *VIII-15 South China Sea: LME #36*, NATIONAL OCEANIC & ATMOSPHERIC ADMINISTRATION, http://www.lme.noaa.gov/index.php?option=com_content&view=article&id=82:lme36&catid=41:briefs&Itemid=72 (last visited Dec. 17, 2012); S. Heilman & Q. Tang, *X-22 East China Sea: LME #47*, NATIONAL OCEANIC & ATMOSPHERIC ADMINISTRATION, http://www.lme.noaa.gov/index.php?option=com_content&view=article&id=93:lme47&catid=41:briefs&Itemid=72 (last visited Dec. 17, 2012).

[18] *East China Sea*, U.S. ENERGY INFORMATION ADMINISTRATION, http://www.eia.gov/countries/regions-topics.cfm?fips=ECS (last visited Dec. 18, 2012) [hereinafter *East China Sea*].

[19] *South China Sea*, U.S. ENERGY INFORMATION ADMINISTRATION, http://www.eia.gov/countries/regions-topics.cfm?fips=SCS (last visited Apr. 16, 2013) [hereinafter *South China Sea*].

another sea of the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States."[20] Since all of the countries that border the East and South China Seas, with the exception of Taiwan and Cambodia, are parties to the 1982 United Nations Convention on the Law of the Sea ("UNCLOS"),[21] they are under an obligation to cooperate with each other in the exercise of their rights and in the performance of their duties under this Convention.

Under Article 123 of the UNCLOS, the bordering countries of these two semi-enclosed seas are required:

> (a) to coordinate the management, conservation, exploration and exploitation of the living resources of the sea;
>
> (b) to coordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment;
>
> (c) to coordinate their scientific research policies and undertake where appropriate joint programmes of scientific research;
>
> (d) to invite, as appropriate, other interested States or international organizations to cooperate with them for the implementation of the provisions of this article.[22]

The East and South China Seas are important fishing grounds for the surrounding countries. The livelihood of millions of people relies on these two bodies of water for a sustainable source of marine production. In addition to fisheries resources, these two semi-enclosed seas are believed to hold huge oil and gas reserves beneath their seabed.[23] In 1969, a report was published by the Committee for Coordination of Joint Prospecting for Mineral Resources in Asian Offshore ("COOP"), one of the committees under the United Nations Economic Commission for Asia and the Far East ("ECAFE"), indicating that there were significant petroleum deposits in the continental shelf of its surrounding waters in the Yellow Sea and the East China Sea.[24] The report triggered the development of sovereignty and

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[20] United Nations Convention on the Law of the Sea, art. 122, Dec. 10, 1982, 1833 U.N.T.S. 397, *available at* http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf [hereinafter *UNCLOS*].

[21] As of August 7, 2013, 166 countries and the European Union had ratified the UNCLOS Convention. *Overview—Convention & Related Agreements,* UNITED NATIONS, http://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm (last visited Sept. 1, 2013).

[22] UNCLOS, *supra* note 20, art. 123.

[23] *See generally South China Sea, supra* note 19; *East China Sea, supra* note 18.

[24] K.O. Emory et al., *Geological Structure and Some Water Characteristics of the East China Sea and the Yellow Sea,* 2 TECHNICAL BULL. 3, 39-40 (1969).

maritime disputes in the East and South China Seas since the early 1970s until today.[25]

The main sea routes of the East and South China Seas are heavily used by the bordering countries to ship goods to Southeast Asia, and through the Straits of Malacca, to the Indian Ocean and to the Atlantic coast.[26] The trade routes of the Far East-North America, North Europe-Far East, and Far East-Mediterranean, which include routes of the East and South China Seas, provide thirty percent of the global shipping services that enable goods to move between ports around the world.[27] China and Japan, the first and fifth largest energy consumers in the world,[28] rely on the routes of the South China Sea to ship crude oil imports from the Middle East. Because the shipping routes in these two East Asian seas are so important to the global trade, even countries outside the area, such as the United States, India, and Australia have expressed increasing concerns about shipping and maritime security, freedom of navigation, and, in general, peace and stability in the area.[29]

III. SOVEREIGNTY DISPUTES IN THE EAST AND SOUTH CHINA SEAS

A number of islands and island groups situated in the East and South China Seas are contested by the bordering countries. Such bordering countries include China, Japan, Taiwan, the Philippines, Brunei, Malaysia, and Vietnam. Tensions have been on the rise both in the East and the South China Seas because of disputes over territorial sovereignty and maritime rights and interests, in particular since April 2012.[30]

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[25] *See generally* RONALD O'ROURKE, CONG. RES. SERV., R42784, MARITIME TERRITORIAL AND EXECUTIVE ECONOMIC ZONE (EEZ) DISPUTES INVOLVING CHINA: ISSUES FOR CONGRESS 14 (2012).

[26] *China Sea*, ENCYCLOPEDIA BRITANNICA, www.britannica.com/EBchecked/topic/112224/china-sea (last visited Feb. 23, 2013).

[27] *Trade Routes*, WORLD SHIPPING COUNCIL, http://www.worldshipping.org/about-the-industry/global-trade/trade-routes (last visited Dec. 19, 2012).

[28] *Global Energy Statistical Yearbook 2012*, ENERDATA, http://yearbook.enerdata.net (last visited Feb. 15, 2013).

[29] BEN DOLVEN ET AL., CONG. RES. SERV. R42930, MARITIME TERRITORIAL DISPUTES IN EAST ASIA: ISSUES FOR CONGRESS (2013).

[30] Tensions in the East China Sea have risen since April 2012 when the former Japanese Tokyo governor Shintaro Ishihara announced his plan to purchase the disputed islands. *See* Yuka Hayashi, *Tokyo Chief Plots to Buy Disputed Islands*, WALL ST. J. (Apr. 17, 2012, 9:24 AM), http://online.wsj.com/article/SB10001424052702304818404577348610456930238.html. Tensions in the South China Sea have also been rising since April 2012 when the government of the Philippines dispatched its warship to detain fishing vessels from China in the waters near the disputed Scarborough Shoal. *See Philippine Warship, Chinese Boats in Standoff Near Shoal*, *supra* note 10.

The Daioyutai Islands/Senkaku Islands consist of five uninhabited islets and three barren rocks. This island group is claimed by China, Japan, and Taiwan. Japan claims that on January 14, 1895, its government erected markers on the Diaoyutai/Senkaku Islands to formally incorporate them into the territory of Japan.[31] Therefore, Japan argues, "[t]he Diaoyutai/Senkaku Islands are not part of Formosa (Taiwan) and the Pescadores Islands that were ceded to Japan from the Chinese Qing Dynasty in accordance with Article II of the Treaty of Shimonoseki, concluded in April 1895."[32] The Japanese territorial claim has been rejected by the governments of Republic of China (Taiwan)[33] and the People's Republic of China on the ground that the Diaoyutai island group was first discovered, named, and used by the Chinese hundreds of years before the government of Japan decided to incorporate the islands into its territory in January 1895. The Diaoyutai island group was not *terra nullius* (land without owner), which makes the Japanese act illegal and invalid.[34]

Japan argues that the Diaoyutai/Senkaku Islands have been under its valid control since 1972 when the United States returned the administrative rights to Japan and that "[t]here is no doubt that the Senkaku Islands are clearly an inherent territory of Japan, in light of historical facts and based upon international law."[35] The government of Japan has been taking the position that there exists no issue of territorial sovereignty to be resolved concerning the Diaoyutai/Senkaku Islands.[36]

There are four large groups of archipelagos situated in the South China Sea, namely, the Pratas Islands, Paracel Islands, McClesfied Bank, and Spratly Islands. The Paracel Islands consist of about 130 islets, sandbanks and reefs.[37] The sovereignty over Paracel Islands is disputed by China, Taiwan and Vietnam.[38] The Spratly Islands are a group of more than 750 reefs, islets, atolls, cays and islands. Brunei, China, Malaysia, the

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[31] *Senkaku/Diaoyutai Islands*, GLOBALSECURITY.ORG, http://www.globalsecurity.org/military/world/war/senkaku.htm (last visited Feb. 23, 2013).

[32] *Q&A on the Senkaku Islands*, MINISTRY OF FOREIGN AFFAIRS OF JAPAN, http://www.mofa.go.jp/region/asia-paci/senkaku/qa_1010.html#qa01 (last visited Dec. 19, 2012) [hereinafter *Q&A on the Senkaku Islands*].

[33] *The Diaoyutai Islands An Inherent Part of the Territory of the Republic of China (Taiwan)*, MINISTRY OF FOREIGN AFFAIRS REPUBLIC OF CHINA (TAIWAN), http://www.mofa.gov.tw/EnOfficial/Topics/TopicsArticleDetail/fd8c3459-b3ec-4ca6-9231-403f2920090a (last visited Dec. 20, 2012).

[34] *Id.*

[35] *Q&A on the Senkaku Islands*, *supra* note 32.

[36] *Id.*

[37] *Paracel Islands*, ENCYCLOPEDIA BRITANNICA, http://www.britannica.com/EBchecked/topic/442423/Paracel-Islands (last visited Feb. 23, 2013).

[38] *Id.*

Philippines, Taiwan, and Vietnam all are involved in disputes over, wholly or partially, the ownership of the Spratly Islands.[39]

Brunei's claim is limited to its Exclusive Economic Zone ("EEZ"), which extends to one of the southern reefs of the Spratly Islands.[40] Malaysia's claim is limited to the boundaries of its EEZ and continental shelf.[41] It occupies five islands of the Spratlys, including Layang Layang Island/Danwan Jiao (Swallow Reef) where a scuba diving resort is built. The Philippines claims ownership of more than 50 land features of the Spratly Islands, known as the Kalayaan island group ("KIG"), but occupy only nine of them. China claims all of the Spratly Islands, and occupies eight with its military. Taiwan also claims all of the Spratly Islands, but only occupies Itu Aba (Taiping Dao), the largest of the Spratly archipelago.[42] In 2000, personnel from Taiwan's Coast Guard Administration were dispatched to Taiping Dao to replace military personnel.[43] In 1974 and 1988, respectively, armed conflicts at sea broke out between China and Vietnam over the ownership of the Paracel and Spratly Islands.[44] Since 1974, the Paracel Islands have been under the effective control of China, but contested by Vietnam and Taiwan.

IV. OBLIGATIONS TO SETTLE DISPUTES BY PEACEFUL MEANS

Since all of the countries that border the East and South China Seas are members of the United Nations, with the exception of Taiwan, and also are parties to the UNCLOS, except Taiwan and Cambodia, sovereignty and maritime disputes in these two East Asian seas raise a number of important international law questions that are closely related to the treaty obligations under the Charter of the United Nations and the UNCLOS with regard to settlement of disputes by peaceful means.

All of these countries are required under Article 2 of the U.N. Charter to "settle their disputes by peaceful means so that international peace, security and justice are not endangered."[45] They should also "refrain in their

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[39] *Spratly Islands,* CENTRAL INTELLIGENCE AGENCY (Nov. 15, 2012), https://www.cia.gov/library/publications/the-world-factbook/geos/pg.html (last visited Feb. 23, 2013).

[40] Omar Saleem, *The Spratly Islands Dispute: China Defines the New Millenium*, 15 AM. U. INT'L L. REV. 527, 542-43 (2000).

[41] *Id.*

[42] *South China Sea*, *supra* note 19.

[43] DOLVEN, *supra* note 29, at 10.

[44] Jane Perlez, *Vietnam Law on Contested Islands Draws China's Ire,* N.Y. TIMES (June 21, 2012), http://www.nytimes.com/2012/06/22/world/asia/china-criticizes-vietnam-in-dispute-over-islands.html?_r=0 (last visited Feb. 23, 2013).

[45] U.N. Charter art. 2, para. 3.

international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations."[46] In accordance with Article 279 of the UNCLOS, they should "settle any dispute between them concerning the interpretation or application of this Convention by peaceful means in accordance with Article 2, paragraph 3, of the U.N. Charter, and to this end, shall seek a solution by the means indicated in Article 33, paragraph 1, of the Charter,"[47] which include "negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice."[48] Under Article 301 of the UNCLOS, in exercising their rights and performing their duties under this Convention, the countries that border the East and South China Seas should "refrain from any threat or use of force against the territorial integrity or political independence of any country, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations."[49]

V. INCREASING U.S. CONCERNS AND INVOLVEMENT

As tensions escalate in the East and South China Seas, U.S. involvement in the maritime issues in the region is also increasing. In September 2010, in the midst of serious conflicts between China and Japan caused by the arrest of a Chinese fishing boat captain in the disputed waters near the Diaoyutai/Senkaku islands by the Japanese Coast Guard, the U.S. government issued a statement, confirming that the Diaoyutai/Senkakau Islands "fall within the scope of Article 5 of the 1960 U.S.-Japan Treaty of Mutual Cooperation and Security"[50] and the United States would fulfill its alliance responsibilities.[51]

At the 17th ASEAN Regional Forum, held in Hanoi in July 2010, U.S. Secretary of State Hillary Clinton stated that the United States, "like every nation, has a national interest in freedom of navigation, open access to Asia's maritime commons, and respect for international law in the South

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[46] *Id.* para. 4.

[47] UNCLOS, *supra* note 20, art. 279.

[48] U.N. Charter art. 33, para. 1.

[49] UNCLOS, *supra* note 20, art. 301.

[50] Press Availability, Hillary Rodham Clinton, Secretary of State, *Joint Press Availability with Japanese Foreign Minister Seiji Maehara*, U.S. DEP'T OF STATE (Oct. 27, 2010), http://www.state.gov/secretary/rm/2010/10/150110.htm.

[51] *Id.*; *see also* Blake Hounshell, *Senkaku, Diaoyu; Diaoyu, Senkaku; Let's Call the Whole Thing Off*, FOREIGN POLICY (Oct. 30, 2010), http://blog.foreignpolicy.com/posts/2010/10/30/senkaky_diaoyu_diaoyu_senkaku_let_s_call_the_whole_thing_off.

China Sea."[52] In addition, the Secretary said that although the United States does not take sides on the sovereignty and maritime disputes over the islands in the South China Sea, "claimants should pursue their territorial claims and accompanying rights to maritime space in accordance with the UN Convention on the law of the sea."[53]

Also in July 2011, Secretary Clinton, in a press statement referencing the agreement between ASEAN and China concerning confidence building measures in the South China Sea, stated:

> We also call on all parties to clarify their claims in the South China Sea in terms consistent with customary international law, including as reflected in the Law of the Sea Convention. Consistent with international law, claims to maritime space in the South China Sea should be derived solely from legitimate claims to land features.[54]

In September 2012, concerned about the rising tensions in the East and South China Seas, and the potential for disrupting peace and stability in East Asia and the Pacific region, Kurt Campbell, Assistant Secretary, Bureau of East Asian and Pacific Affairs, U.S. Department of State, testified before the Senate Foreign Relations Committee Subcommittee on East Asian and Pacific Affairs, reiterating that the United States does not take a position on the ultimate sovereignty of the disputed islands in the Sea of Japan, the East China Sea, and the South China Sea.[55] He said that "the claimants should address their differences peacefully."[56] The United States "has an interest in peaceful relations among all of its Northeast Asian partners and allies, and has nothing to gain from seeing the situation escalate."[57]

In response to the further escalation of tensions between China and Japan in the East China Sea in December 2012, Assistant Secretary Campbell stated in Kuala Lumpur, Malaysia that the U.S.-Japan security treaty

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[52] Press Availability, Hillary Rodham Clinton, Secretary of State, *Remarks at Press Availability*, U.S. DEP'T OF STATE (July 23, 2010), http://www.state.gov/secretary/rm/2010/07/145095.htm.

[53] *Id.*

[54] Press Statement, Hillary Rodham Clinton, Secretary of State, *The South China Sea*, U.S. DEP'T OF STATE (July 22, 2011), http://www.state.gov/secretary/rm/2011/07/168989.htm.

[55] Testimony Before the Senate Foreign Relations Committee Subcommittee on East Asia and Pacific Affairs, Kurt M. Campbell, Assistant Secretary, Bureau of East Asian and Pacific Affairs, *Maritime Territorial Disputes and Sovereignty Issues in Asia*, U.S. DEP'T OF STATE (Sept. 20, 2012), http://www.state.gov/p/eap/rls/rm/2012/09/197982.htm.

[56] *Id.*

[57] *Id.*

"applies to any provocative set of circumstances."[58] However, the United States encourages all parties concerned "to take appropriate steps so that there will be no misunderstandings, no miscalculations that could trigger an environment that would be antithetical to the maintenance of peace and stability."[59] In addition, the assistant secretary stressed the importance of Asia to the global economy and U.S. national interests, and therefore "we cannot afford provocative steps to undermine the peace and stability on which the remarkable prosperity of Asia and the wider world is based."[60] On December 17, 2012, in a speech at the National Press Club in Washington, U.S. Defense Secretary Leon Panetta said that the United States is to deploy the F-35 stealth fighter at the U.S. Air Force base in Iwakuni in Japan by 2017, which is a part of the U.S. new policy of enhancing its presence and capability in the Asia-Pacific region.[61] The deployment of the fighter will provide U.S. power projection to cover the disputed Diaoyutai/Senkaku Islands.

More recently, the Conference Report to accompany H.R. 4310 (National Defense Authorization Act for Fiscal Year 2013) was agreed to in the United States Senate and House of Representatives in December 2012.[62] Under Section 1281 of the bill, Congress expresses its concerns about the situation in the Diaoyutai/Senkaku Island and makes it clear that "the United States has national interests in freedom of navigation, the maintenance of peace and stability, respect for international law, and unimpeded lawful commerce"[63] in the East China Sea. Congress urges the parties to the territorial and jurisdictional disputes in the East China Sea to exercise self-restraint in the conduct of activities that would complicate or escalate disputes and destabilize the region. It is the view of Congress that differences between the parties should be handled in a constructive manner consistent with universally recognized principles of customary international law.[64] In addition, it is the sense of Congress that "the United States supports a collaborative diplomatic process by claimants to resolve

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[58] Remarks, Kurt M. Campbell, Assistant Secretary, Bureau of East Asian and Pacific Affairs, *Remarks in Malaysia*, U.S. DEP'T OF STATE (Dec. 13, 2012), http://www.state.gov/p/eap/rls/rm/2012/12/201682.htm.

[59] *Id.*

[60] *Id.*

[61] United Press International, *US Planning to Deploy F-35 at Japan Base*, MILITARY.COM (Dec. 19, 2012), http://www.military.com/daily-news/2012/12/19/us-planning-to-deploy-f35-at-japan-base.html (last visited Jan. 1, 2013).

[62] National Defense Authorization Act for Fiscal Year 2013, H.R. 4310, 112th Cong. (2d Sess. 2012), *available at* http://docs.house.gov/billsthisweek/20121217/CRPT-112HRPT-705.pdf.

[63] *Id.* § 1286(5), at 1043.

[64] *Id.* § 1286(2), at 1043.

territorial disputes without coercion, and opposes efforts at coercion, the threat of use of force, or use of force by any claimant in seeking to resolve sovereignty and territorial issues in the East China Sea."[65] Moreover, the Congress reaffirms the position of the U.S. government that while taking no position on the ultimate sovereignty of the disputed Diaoyutai/Senkaku Islands, the United States acknowledges the administration of Japan over the islands, and therefore if an armed attack against Japan in the territories under its administration, the United States, under Article V of the Treaty of Mutual Cooperation and Security, must help defend Japan.[66] China strongly opposed the bill, but on January 2, 2013, President Obama signed it into law.[67]

On January 18, 2013, when meeting with the Japanese Foreign Minister Fumio Kishida in Washington, Secretary Clinton reiterated longstanding American policy on the DIG/SIG issue and US treaty obligations.[68] She said, "although the United States does not take a position on the ultimate sovereignty of the islands," it acknowledges that the Senkaku Islands are under the administration of Japan.[69] In addition, the U.S. "oppos[es] any unilateral actions that would seek to undermine Japanese administration."[70] The U.S. "urge[s] all parties to take steps to prevent incidents and manage disagreements through peaceful means."[71]

VI. THE NINE-DOTTED LINE AND HISTORIC RIGHTS CLAIM

Sovereignty and maritime disputes in the South China Sea are much more complicated and difficult to resolve than the disputes in the East China Sea because of the claims made by China and Taiwan to the so-called U-shape line, nine-dashed line, or nine-dotted line, and historic rights.[72] Before December 2005, Taiwan claimed that the waters encircled by the U-shaped line were its historic waters and that it owned all of the land features within the line, including the Pratas Islands, Paracel Islands, McClesfield Bank, and the Spratly Islands. While Taiwan suspended its

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[65] *Id.* § 1286(6), at 1043-44.

[66] *Id.* § 1286(3) & (7), at 1043-44.

[67] *Obama Signs Defense Authorization Act*, XINHUANET.COM (Jan. 4, 2013), http://news.xinhuanet.com/english/world/2013-01/04/c_124178254.htm.

[68] Remarks, Hillary Rodham Clinton, Secretary of State, *Remarks With Japanese Foreign Minister Fumio Kishida After Their Meeting*, U.S. DEP'T OF STATE (Jan. 18, 2013), http://www.state.gov/secretary/rm/2013/01/203050.htm.

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] Masahiro Miyoshi, *China's "U-Shaped Line" Claim in the South China Sea: Any Validity under International Law?*, 43 OCEAN DEV. & INT'L L. 1, 1-2 (2012).

claim to the entire waters encircled by the U-shaped line as its historic waters in December 2005, it continues to make claims to the ownership of all land features within the U-shaped line in the South China Sea.[73] China is also taking the same position that it owns all of the land features within the nine-dashed line and the legal status of the waters encircled by the line is interpreted in accordance with the theory of "sovereignty + UNCLOS + historic rights."[74] Accordingly, Beijing's position is that:

> China enjoys sovereignty over all the features within this line, and enjoys sovereign right and jurisdiction, defined by the UNCLOS, for instance, EEZ and continental shelf when the certain features fulfill the legal definition of Island Regime under Article 121 of UNCLOS. In addition to that, China enjoys certain historic rights within this line, such as fishing rights, navigation rights and priority rights of resource development.[75]

It is suggested that China will continue to make the same claim based on the nine-dotted line.[76] However, on January 22, 2013, the government of the Philippines initiated arbitral proceedings against China with regard to the dispute over the maritime jurisdiction of the Philippines in the South China Sea in accordance with Article 287 and Annex VII of the UNCLOS.[77] Among other things, the Philippines asked the arbitral tribunal, if established, to issue an award to declare that China's maritime claims in the South China Sea based on the "nine dash line" are contrary to the UNCLOS and therefore invalid.[78]

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[73] *See Ministry of Foreign Affairs of the Republic of China (Taiwan) Reiterates its Position on the South China Sea*, MINISTRY OF FOREIGN AFFAIRS, REPUBLIC OF CHINA (TAIWAN) (Aug. 11, 2011), http://www.mofa.gov.tw/official/Home/Detail/8ead9c15-967f-4ebc-a9b8-ba05f3a8268d?arfid=8f8092a6-b477-4f92-bf94-031da11665cd&opno=0ab69338-b476-449c-8554-2c7d26534828.

[74] Hong Nong, *Interpreting the U-shape Line in the South China Sea*, CHINA & U.S. FOCUS (May 15, 2012), http://chinausfocus.com/peace-security/interpreting-the-u-shape-line-in-the-south-china-sea/.

[75] *Id.*

[76] *Id.*

[77] Dapo Akande, *Philippines Initiates Arbitration Against China Over South China Seas*, EJIL: TALK! (Jan. 22, 2013), http://www.ejiltalk.org/philippines-initiates-arbitration-against-china-over-south-china-seas-dispute/.

[78] Statement, Albert del Rosario, Secretary of Foreign Affairs, Republic of the Philippines, Statement on the UNCLOS Arbitral Proceedings against China to Achieve a Peaceful and Durable Solution to the Dispute in the WPS, DEP'T OF FOREIGN AFFAIRS, REPUBLIC OF THE PHILIPPINES (Jan. 22, 2013), http://www.gov.ph/2013/01/22/statement-the-secretary-of-foreign-affairs-on-the-unclos-arbitral-proceedings-against-china-january-22-2013/.

VII. UNCLOS AND MARITIME LEGISLATIONS OF THE BORDERING COUNTRIES

All of the countries that are bordering the East and China Seas had signed and ratified the UNCLOS with the exception of Cambodia and Taiwan.[79] All of the countries that are involved in the sovereignty and/or maritime disputes in these two seas are also parties to the UNCLOS, with the exception of Taiwan.[80]

In the East China Sea, Korea signed the Convention on March 14, 1983 and ratified it on January 29, 1996.[81] The Convention entered into force for Korea on February 28, 1996. Japan signed the UNCLOS on February 7, 1983 and ratified it on June 20, 1996, which entered into force for Japan on July 20, 1996. China signed the UNCLOS on December 10, 1982 and ratified it on May 15, 1996. The Convention entered into force for China on July 7, 1996.

In the South China Sea, Brunei signed the UNCLOS on December 5, 1984 and ratified it on November 5, 1996. Indonesia signed the Convention on December 10, 1982 and ratified it on December 31, 1985. The Convention entered into force for Indonesia on February 3, 1986. Malaysia signed the Convention on December 10, 1982 and ratified it on October 14, 1996. The Philippines signed the treaty on December 10, 1982 and ratified it on May 8, 1984. The UNCLOS entered into force for the Philippines on November 16, 1994. Vietnam signed the Convention on December 10, 1982 and ratified it on June 23, 1994.

Table 2 shows that all of these bordering countries have made claims to territorial sea, fishing zone, EEZ, and continental shelf in accordance with the 1958 Convention on the Continental Shelf[82] and the UNCLOS. The focus of this part is on the extended continental shelf claims in the East and South China Seas.

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[79] *See infra* Table 1.

[80] *Id.*

[81] Republic of Korea, Executive Summary, Partial Submission to the Commission on the Limits of the Continental Shelf Pursuant to Article 76 Paragraph 8 of the United Nations Convention on the Law of the Sea, UNITED NATIONS (Dec. 2012), http://www.un.org/Depts/los/clcs_new/submissions_files/kor65_12/executive_summary.pdf.

[82] The Convention on the Continental Shelf, signed April 29, 1958 in Geneva, entered into force on June 10, 1964. *See* Convention on the Continental Shelf, Apr. 29, 1958, 499 U.N.T.S. 311.

Table 1: Signature and Ratification of the UNCLOS, the ECS and SCS Bordering Countries[83]

Countries	**Signature**	**Ratification**
Brunei Darussalam	Dec. 5, 1984	Nov. 5, 1996
Cambodia	July 1, 1983	(Not yet)
China	Dec. 10, 1982	June 7, 1996
Indonesia	Dec. 10, 1982	Feb. 3, 1986
Japan	Feb. 7, 1983	June 20, 1996
Malaysia	Dec. 10, 1982	Oct. 14, 1996
Philippines	Dec. 10, 1982	May 8, 1984
Rep. of Korea	Mar. 14, 1983	Jan. 29, 1996
Singapore	Dec. 10, 1982	Nov. 17, 1994
Taiwan (ROC)	N/A	N/A
Thailand	Dec. 10, 1982	May 15, 2011
Viet Nam	Dec. 10, 1982	July 25, 1994

All of the bordering countries have enacted domestic maritime legislations in accordance with the legal regimes that are codified in or established by the UNCLOS, which give rise to disputes over sovereignty, sovereign rights, and jurisdiction in different maritime zones drawn by the coastal states in these two semi-enclosed seas, which include territorial sea, contiguous zone, archipelagic waters, EEZ, continental shelf, and outer continental shelf.

Article 2 of the Chinese Territorial Sea and Contiguous Zone Law of February 25, 1992 provides that:

> The PRC's territorial sea refers to the waters adjacent to its territorial land.
>
> The PRC's territorial land includes the mainland and its offshore islands, Taiwan and the various affiliated islands including Diaoyu Island, Penghu Islands, Dongsha [Pratas] Islands, Xisha [Paracel] Islands, Nansha (Spratly) Islands and other islands [such as the Scarborough Shoal] that belong to the People's Republic of China.
>
> The PRC's internal waters refer to the waters along the baseline of the territorial sea facing the land.[84]

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[83] *Chapter XXI: Law of the Sea* § 6, U.N. TREATY COLLECTION, *available at* http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXI~6&chapter=21&Temp=mtdsg3&lang=en (last visited Mar. 29, 2013).

[84] Law on the Territorial Sea and the Contiguous Zone of 25 February 1992, art. 2 (Feb. 25, 1992), http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/CHN_1992_Law.pdf.

Under Article 2 of the 1998 Law on the Exclusive Economic Zone and the Continental Shelf of the People's Republic of China, the Chinese EEZ covers the area beyond and adjacent to its territorial sea, extending to 200 nautical miles ("nmi") from the baselines from which the breadth of the Chinese territorial sea is measured. The Chinese continental shelf comprises the sea-bed 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 nmi 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.[85]

Table 2: Claims to Territorial Sea, Fishing Zone/EEZ, and Continental Shelf by the ECS and SCS Bordering Countries[86]

Countries	**Territorial Sea Claim**	**Fishing Zone/EEZ Claim**	**Continental Shelf Claim**
Brunei Darussalam	Feb. 1983	July 1993	1954
Cambodia	July 1982	July 1982	July 1982
China	Feb. 1992	June 1998	June 1998
Indonesia	July 1962	Oct. 1983	Feb. 1969
Japan	June 1996	June 1996	June 1996
Malaysia	Aug. 1969	1984	Sept. 1958, May 1966, 1984
Philippines	June 1961	June 1978	Mar. 1968
Rep. of Korea	July 1996	Sept. 1996	Jan. 1952
Singapore	1878	Apr. 1966	17 Nov. 1994
Taiwan (ROC)	Jan. 1998	Jan. 1998	Jan. 1998
Thailand	Oct. 1966	Feb 1981	May 1973
Viet Nam	Jan. 1980	May 1977	May 1977

Immediately after becoming a party to the UNCLOS in June 1996, Japan amended its Law on the Territorial Sea and the Contiguous Zone[87] and

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[85] *See* Law on the Exclusive Zone and the Continental Shelf of the People's Republic of China, (promulgated by the Standing Comm. Nat'l People's Cong., Jun. 26, 1998, effective Jun. 26, 1998) 1998 Standing Comm. Nat'l People's Cong. Gaz. 6 (China), LAWINFOCHINA.COM, *available at* http://www.lawinfochina.com/display.aspx?lib=law&id=1767&CGid.

[86] DEP'T OF DEFENSE, *Maritime Claims Reference Manual*, U.S. NAVY JUDGE ADVOCATE GENERAL'S CORPS, http://www.jag.navy.mil/organization/documents/mcrm/MCRM.pdf (last visited Dec. 30, 2012).

enacted the Law on the EEZ and the Continental Shelf.[88] Japan claims that its EEZ comprises the areas of the sea extending from the baseline of Japan, which are measured 200 nmi from the nearest point on the Japanese baseline and its subjacent seabed and its subsoil. The continental shelf claimed by Japan comprises the seabed and its subsoil to the following areas: (1) the areas of the sea extending from the baseline of Japan "to the line in which every point is 200 nautical miles from the nearest point on the baseline of Japan (excluding from its territorial sea)"; (2) "the areas of the sea adjacent seaward to the areas of the sea referred to" above as prescribed by the Japanese Cabinet Order in accordance with Article 76 of the UNCLOS.[89] In cases of overlapping with the EEZ and the continental shelf claimed by the states with opposite coasts, the problem of maritime boundary delimitation should be resolved by drawing a median line, or the line which "may be agreed upon between Japan and a foreign country as a substitute for the median line."[90]

In January 1998, Taiwan enacted the Law on the Territorial Sea and the Contiguous Zone,[91] and the Law on the Exclusive Economic Zone and the Continental Shelf.[92] In February 1999, the base points and baselines were announced by Taiwan in the first part of the baselines of the territorial sea of the ROC.[93] Taiwan's EEZ and continental shelf claim is identical with that of China's.[94] Article 4 of Taiwan's EEZ law also provides that before reaching agreements with adjacent or opposite countries, Taiwan, in a spirit of understanding and co-operation, may reach a *modus vivendi* with the countries concerned, which however should be without prejudice to the final delimitation.[95]

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[87] *See* BUREAU OF OCEANS AND INT'L ENVIRONMENTAL AND SCIENTIFIC AFFAIRS, U.S. DEP'T OF STATE, PUB. NO. 120, LIMITS IN THE SEAS: STRAIGHT BASELINE AND TERRITORIAL SEA CLAIMS: JAPAN (Apr. 30, 1998), *available at* http://www.state.gov/documents/organization/57684.pdf.

[88] *See* Law on the Exclusive Economic Zone and Continental Shelf (Law No. 74 of 1996), UNITED NATIONS, http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/JPN_1996_Law74.pdf.

[89] *Id.* art. 1, § 2.

[90] *Id.* art. 1, § 2, art. 2.

[91] Law on the Territorial Sea and the Contiguous Zone of 25 February 1992, *supra* note 84.

[92] *See* BUREAU OF OCEANS AND INT'L ENVIRONMENTAL AND SCIENTIFIC AFFAIRS, U.S. DEP'T OF STATE, PUB. NO. 127, LIMITS IN THE SEAS: TAIWAN'S MARITIME CLAIMS (2005), *available at* http://www.state.gov/documents/organization/57674.pdf [hereinafter *Taiwan's Maritime Claims*].

[93] *Decree No. Tai 88 Nei Tze #06161*, EXECUTIVE YUAN GAZETTE (Taiwan), Feb. 10, 1999, at 36.

[94] TAIWAN'S MARITIME CLAIMS, *supra* note 92, at 26-33.

[95] Law on the Exclusive Economic Zone and the Continental Shelf of the Republic of

In March 2008, Japan deposited charts concerning straight baselines and other limits of the territorial sea and a list of geographical coordinates of points as contained in its Enforcement Order of the Law of the Territorial and the Contiguous Zone.[96] In response to this deposit, on May 14, 2008, China submitted a diplomatic note to the U.N. Secretary-General asserting that:

> The chart No. W210 deposited by Japan illegally marks Diaoyu Islands as Senkaku Shoto and delimits their territorial seas. The chart also illegally marks Diaoyu Dao (Diaoyu Island), Huangwei Yu (Huangwei Island) and Chiwei Yu (Chiwei Island) respectively are Utosuri Shima, Kuba Shima and Taisho To.
>
> Diaoyu Islands have been part of the territory of China since ancient time. The illegal marking on those islands and their territorial seas by Japan severely violates the sovereignty of China and the right of China to delimit its territorial sea. These illegal marking run counter to the general principles of international law and the provisions of the *United Nations Convention on the Law of the Sea* and is, therefore, null and void.[97]

Japan responded to the Chinese diplomatic note by sending a letter to the UN Secretary-General on June 20, 2008, explaining its position on the sovereignty over the Diaoyutai/Senkaku Islands as follows:

> In the light of historical facts and based upon international law, there is no doubt that the Senkaku Islands are inherent territories of Japan. As a matter of fact, Japan validly controls these islands. Therefore, there is no territorial dispute to be resolved with respect to the Senkaku Islands and the description of the Senkaku Islands as well as their territorial sea on the chart concerned is legitimate.[98]

On March 10, 2009, the government of the Philippines passed Republic Act No. 9522 that amended certain provisions of Republic Act No. 3046 to

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China (June 26, 1998), UNITED NATIONS, http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/chn_1998_eez_act.pdf.

[96] U.N. Secretary-General, Maritime Zone Notification dated Mar. 18, 208 from the Secretary-General addressing the Deposit by Japan of Charts and Lists of Geographical Coordinates of Points, pursuant to art. 16, para. 2 of the convention, U.N. Doc. 08/101 (Mar. 18, 2008), *available at* http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/mzn_s/mzn61.pdf.

[97] CML/14/2008, New York, May 14, 2008, *in* U.N. DIVISION FOR OCEAN AFFAIRS & THE LAW OF THE SEA OFFICE OF LEGAL AFFAIRS, 28 LAW OF THE SEA INFORMATION CIRCULAR [hereinafter 28 LOSIC] (Oct. 2008), Annex II Communications Received by the Secretary-General 17, *available at* http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/losic/losic28e.pdf.

[98] *See* SC/08/197, New York, June 20, 2008, *in* 28 LOSIC, *supra* note 97, at 18.

define the archipelagic baseline of the Philippines and for other purposes.[99] Under Section 2 of the law, the Philippines claim its right to exercise sovereignty and jurisdiction over the disputed Kalayaan Island Group and Scarborough Shoal (Bajo de Masinloc) in the South China Sea.[100]

Actions have also been taken by Vietnam. On June 21, 2012, the 13th National Assembly of Vietnam promulgated the country's law of the sea.[101] Under Article 1 of the law, Vietnam declares sovereignty over the disputed Paracel and Spratly archipelagos in the South China Sea.[102] Under Article 2(1), the provisions of Vietnam's Law of the Sea "shall prevail in case there are differences between the provisions of this Law and those of other laws in relation to the sovereignty and legal status of Viet Nam's maritime zones."[103] Article 54 provides that this law should have taken effect on January 1, 2013.[104] In response, on June 21, 2012, the PRC Foreign Ministry summoned the Vietnamese ambassador to protest the new law.[105] On December 31, 2012, one day before Vietnam's new law became effective, China's Foreign Ministry issued a statement, urging Vietnam to refrain from taking any actions that complicate and escalate issues between the two countries.[106] In addition, China stressed that it has indisputable sovereignty over the Paracel Islands and the Spratly Islands and their adjacent waters in the South China Sea.[107] The ROC government also lodged a strong protest against Vietnam in early January 2013 when the said law became effective.[108]

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[99] An Act to Amend Certain Provisions of Republic Act No. 3046, as Amended by Republic Act No. 5446, to Define the Archipelagic Baseline of the Philippines and Other Purposes (Republic Act No. 9522/ 2009) (Phil.), *available at* http://www.lawphil.net/statutes/repacts/ra2009/ra_9522_2009.html.

[100] *Id.* § 2.

[101] *See* The Law of the Sea of Viet Nam, VIET NAM NEWS, http://vietnamnews.vn/politics-laws/228456/the-law-of-the-sea-of-viet-nam.html (updated Aug. 7, 2012).

[102] *Id.* art. 1.

[103] *Id.* art. 2, para. 1.

[104] *Id.* art. 54.

[105] Jane Perlez, *Vietnam Law on Contested Islands Draws China's Ire*, N.Y. TIMES (June 21, 2012), http://www.nytimes.com/2012/06/22/world/asia/china-criticizes-vietnam-in-dispute-over-islands.html.

[106] *China Deeply Concerned Over Vietnamese Law of the Sea*, SINA ENGLISH (Jan. 01, 2013, 8:58 AM), http://english.sina.com/china/2012/1231/543695.html.

[107] *Id.*

[108] Statement, *The Republic of China (Taiwan) Protests Vietnam Law Claiming South China Sea Islands*, MINISTRY OF FOREIGN AFFAIRS, REPUBLIC OF CHINA (TAIWAN) (Jan. 07, 2013), *available at* http://www.mofa.gov.tw/EnOfficial/ArticleDetail/DetailDefault/93762c3d-bbab-4fe9-84bd-d3d58f04b07a?arfid=0b12b1ae-64ff-4e4b-b6bd-e20fbf2c7a13&opno=49be2475-017b-4647-8ac1-9a0ec20d892c.

On September 10, 2012, the government of Japan implemented its plan to "nationalize" the disputed Diaoyu Dao/Senkaku Islands.[109] In response, the Chinese government issued a statement, announcing the Chinese baselines of the territorial sea of Diaoyu Dao and its affiliated islands. On September 13, 2012, China deposited the coordinates table and chart of the base points and baselines of the territorial sea of Diaoyu Dao and its affiliated islands with the U.N. Secretary-General in accordance with the requirement under Article 16 of the UNCLOS.[110] Japan responded to the Chinese act by sending a diplomatic communication to the U.N. Secretary-General on September 24, 2012, stating that:

> The People's Republic of China deposited the chart and the list of geographical coordinates on 13 September 2012. Such unilateral action has no ground under international law including within the United Nations Convention on the Law of the Sea. This action by the People's Republic of China concerning the Senkaku Islands, a part of the territory of Japan, is totally unacceptable and legally invalid.
>
> There is no doubt that the Senkaku Islands are an inherent part of the territory of Japan in light of historical facts and based upon international law. The Senkaku Islands are under the control of the Government of Japan. There exists no issue of territorial sovereignty to be resolved concerning the Senkaku Islands.[111]

In response, on September 25, 2012, China's State Council issued a white paper on Diaoyu Dao, reaffirming that "Diaoyu Dao and its affiliated islands are an inseparable part of the Chinese territory in all historical, geographical and legal terms, and China enjoys indisputable sovereignty over Diaoyu Dao."[112]

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[109] Jaiyu Bai, *The Senkaku/Diaoyu Islands: Two Perspectives on the Territorial Dispute (Part II)*, CAMBRIDGE J. INT'L & COMP. L. (Dec. 18, 2012), *available at* http://www.cjicl.org.uk/index.php/cjicl-blog/the-senkakudiaoyu-islands-two-perspectives-on-the-territorial-dispute-part-ii.

[110] U.N. Secretary-General, Maritime Zone Notification Dated Sept. 21, 2012 from the Secretary-General Addressing the Deposit by the People's Republic of China of a Chart and List of Geographical Coordinates of Points, pursuant to art. 16, para. 2, of the Convention, U.N. Doc. M.Z.N. 89.2012.LOS (Sept. 21, 2012), *available at* http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/mzn_s/mzn89ef.pdf.

[111] *See* Permanent Mission of Japan to the United Nations, UNITED NATIONS (Sept. 24, 2012), *available at* http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/communicationsredeposit/mzn89_2012_jpn.pdf.

[112] INFORMATION OFFICE OF THE STATE COUNCIL, WHITE PAPER, DIAOYU, AN INHERENT TERRITORY OF CHINA, CHINAUSFOCUS (Sept. 25, 2012), *available at* http://www.chinausfocus.com/library/government-resources/chinese-resources/documents/white-paper-diaoyu-dao-an-inherent-territory-of-china-september-25-2012/.

Due to the dispute over ownership of islands remains unresolved, there also exist pending issues concerning maritime boundary delimitations in the East and South China Seas, which have created jurisdictional and law enforcement problems in the disputed areas.

VIII. THE RIGHT TO CLAIM CONTINENTAL SHELF AND OUTER CONTINENTAL SHELF

In accordance with Article 77 of the UNCLOS, the East and South China Sea bordering countries exercise sovereign rights over their continental shelves for the purpose of exploration and exploitation of natural resources.[113] These rights are exclusive in the sense that if they do not explore the continental shelf or exploit its natural resources, no other countries may undertake these activities without their express consent.[114] In addition, their sovereign rights "do not depend on occupation, effective or notional, or on any express proclamation."[115] These natural resources are referred to as the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species.[116]

The continental shelves of the bordering countries:

> [C]omprise the seabed and subsoil of the submarine areas that extend beyond their territorial sea throughout the natural prolongation of their land territories 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.[117]

They are required to establish the outer edge of their continental margins wherever the margins extend beyond 200 nmi from the baselines from which the breadth of their territorial sea is measured.[118] In accordance with paragraph 8 of Article 76 of the UNCLOS, the East and South China Sea bordering countries and parties to the Convention are obligated to submit to the Commission on the Limits of the Continental Shelf ("CLCS") information on the limits of their continental shelves beyond 200 nmi from the baselines from which the breadth of their territorial sea is measured.[119] Under Article 4 of Annex II to the Convention, they are required to submit

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[113] UNCLOS, *supra* note 20, art. 77, para. 4.
[114] *Id.* art. 77, para. 2.
[115] *Id.* art. 77, para. 3.
[116] *Id.* art. 77.
[117] *Id.* art. 76.
[118] *Id.* art. 76, para. 4a.
[119] *Id.* art. 76, para. 8.

the outer limits of their continental shelves to the CLCS along with supporting scientific and technical data.[120]

In May 2001, a decision was made at the Eleventh Meeting of States Parties to the United Nations Convention on the Law of the Sea ("SPLOS") that "in the case of a State Party for which the Convention entered into force before 13 May 1999, it is understood that the ten-year time period referred to in article 4 of Annex II to the Convention shall be taken to have commenced on 13 May 1999."[121] This was followed by another decision made in June 2008 at the 18th SPLOS meeting to allow submission of preliminary information indicative of the outer continental shelf to satisfy the deadline requirements under Article 4 of the UNCLOS and SPLOS/72.[122] The 18th SPLOS meeting also decided that:

> [T]he preliminary information submitted by a coastal State in accordance with subparagraph (a) is without prejudice to the submission made in accordance with the requirements of article 76 of the Convention and with the Rules and the Guidelines of the Commission, and the consideration of the submission by the Commission.[123]

IX. CONFLICTING OUTER CONTINENTAL SHELF CLAIMS IN THE EAST CHINA SEA

Due to the fact that the width of the East China Sea is less than 400 nmi, there exist overlapping areas, which, under Articles 74 and 83 of the LOS Convention, obligate Japan and China to enter into negotiation to reach agreement to delimit their overlapping maritime boundaries. There are also on-going disputes between China and the Republic of Korea ("ROK") in the East China Sea over the extent of their respective EEZs and continental shelves.

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[120] *Id.* Annex II, art. 4.

[121] Meeting of States Parties, Eleventh Meeting, Decision regarding the date of commencement of the ten-year period for making submissions to the Commission on the Limits of the Continental Shelf set out in article 4 of Annex II to the United Nations Convention on the Law of the Sea, May 14-18, 2001, ¶ (a), U.N. Doc. SPLOS/72 (May 29, 2001), *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N01/387/64/PDF/N0138764.pdf?OpenElement.

[122] Meeting of States Parties, Eighteenth Meeting, Decision regarding the workload of the Commission on the Limits of the Continental Shelf and the ability of States, particularly developing States, to fulfill the requirements of article 4 of annex II to the United Nations Convention on the Law of the Sea, as well as the decision contained in SPLOS/72, paragraph (a), June 13-20, 2008, ¶ 1(a), U.N. Doc. SPLOS/183 (June 20, 2008), *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/398/76/PDF/N0839876.pdf?OpenElement.

[123] *Id.* para. 1(c).

In the East China Sea, there involves no territorial dispute over Socotra Rock. Both China and South Korea agree that the rock cannot have territorial sea, EEZ, or continental shelf because it is submerged under water at low tide and is not considered an island in accordance with Article 121 of the LOS Convention.[124] Nevertheless they are at odds over the exercise of sovereign rights and jurisdictions in the overlapping EEZ and continental shelf in the East China Sea, where Socotra Rock is situated. China and ROK are taking different approaches to delimit their maritime boundary in the East China Sea, in particular for the continental shelf. China argues that the delimitation should be based on the natural prolongation principle, but the ROK insists on the equidistant approach. In addition, it seems that the ROK government also relies on the principle of geographical proximity, arguing that Socotra Rock is situated in the area much closer to the Korean territory *Jeju* Island.[125] Although the negotiation process between China and Korea began in 1996,[126] they have yet to agree on the maritime boundary delimitation in the waters surrounding Socotra Rock. Pending the agreement, China and Korea should "make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopdarize or hamper the reaching of the final agreement."[127] The unilateral actions taken by both China[128] and Korea in the area concerned can be interpreted as inconsistent with Articles 74 (3), 83(3), and 300 (Good faith and abuse of rights) of the UNCLOS.

Since 2004, Japan has objected to Chinese development of natural gas resources in the East China Sea in an area where the two countries' EEZ claims overlap. The specific development in dispute is China's drilling in the Chunxiao gas field, which is located in undisputed areas on China's side, three or four miles (6 km) west of the median line proposed by Japan. Japan maintains that although the Chunxiao gas field rigs are on China's side of a median line that Tokyo regards as the two sides' sea boundary,

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[124] UNCLOS, *supra* note 20, art. 121, para. 3.

[125] *See* Hiyoul Kim, *The View of International Papers Related to "ieodo,"* 1 IEODO JOURNAL 48-65 (2011); Jon M. Van Dyke, *The Republic of Korea's Maritime Boundaries*, 18 INT'L MARINE & COASTAL 4, 509-40 (2003).

[126] REPUBLIC OF KOREA, PRELIMINARY INFORMATION REGARDING THE OUTER LIMITS OF THE CONTINENTAL SHELF 4 (May 12, 2009), *available at* http://www.un.org/Depts/los/clcs_new/submissions_files/preliminary/kor_2009preliminaryinformation.pdf [hereinafter ROK Preliminary Information].

[127] UNCLOS, *supra* note 20, art. 74, para. 3.

[128] In March 2012, Liu Xigui, chief of China's State Oceanic Administration stated that Socotra Rock lies under China's jurisdictional boundary and the agency has started monitoring vessels and aircraft in the waters surrounding the rock on which the ROK has built a research station. *See S. Korea Vows 'Firm Action' Over China's Claim on Submerged Rock*, JAPAN ECONOMIC NEWSWIRE (Mar. 12, 2012), http://www.lexis.com.

they may tap into a field that stretches underground into the disputed area. Japan therefore seeks a share in the natural gas resources. In July 2004, Japan conducted its own survey in the area near the disputed median line in the East China Sea by chartering a Norwegian seismic survey ship.[129]

For the purpose of managing the conflict arising from China's oil and gas exploration activities in the East China Sea, Tokyo and Beijing agreed to send governmental officials to talk about the issue. The first round of the Sino-Japanese talks took place in October 2004 and ended in June 2008 when the two countries reached the Principled Common Understanding on the East China Sea Issues, in which the Japanese companies are allowed to participate in the development of *Chunxiao* oil and gas field in accordance with the relevant Chinese laws that govern cooperation with foreign enterprises in the exploration and exploitation of offshore petroleum resources. In addition, the two sides agreed to establish a block for joint development in the East China Sea.[130] To carry out this joint development proposal, China and Japan agreed to work to fulfill their respective domestic procedures and arrive at the necessary bilateral agreement at an early date. The two sides also agreed to continue consultations for the early realization of joint development in other parts of the East China Sea.[131] In March 2011, in response to a question raised by a reporter from NHK at a press conference concerning the Sino-Japanese disputes in the East China Sea, the Chinese Foreign Minister Yang Jiechi stated that:

> China and Japan have reached a principled common understanding on the issue of the East China Sea. It is the result of long-term efforts of both sides. It is the result of long-term efforts of both sides. It has not come easily and should be cherished. I believe both countries should observe the spirit in the principled common understanding on the East China Sea and work to foster

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[129] Reinhard Drifle, *Territorial Conflicts in the East China Sea: From Missed Opportunities to Negotiation Stalemate*, 22 THE ASIA PAC. J. JAPAN FOCUS 3 (June 1, 2009), http://www.japanfocus.org/-Reinhard-Drifte/3156.

[130] *See* Pliny Han, *China, Japan reach Principled Consensus on East China Sea Issue*, CHINAVIEW (June 18, 2009), http://news.xinhuanet.com/english/2008-06/18/content_8394206.htm.

The block for joint development is the area that is bounded by straight lines joining the following points in the order listed:

1. Latitude 29°31' North, longitude 125°53'30" East
2. Latitude 29°49' North, longitude 125°53'30" East
3. Latitude 30°04' North, longitude 126°03'45" East
4. Latitude 30°00' North, longitude 126°10'23" East
5. Latitude 30°00' North, longitude 126°20'00" East
6. Latitude 29°55' North, longitude 126°26'00" East
7. Latitude 29°31' North, longitude 126°26'00" East

[131] *Id.*

> favorable conditions for the effective implementation of the common understanding so as to turn the East China Sea into a sea of peace, friendship and cooperation.[132]

The boundaries of the outer limits of the continental shelf in the East China Sea are also contested between China, Japan, Korea, and Taiwan. In 2007, Japan enacted two laws, namely Basic Act on Ocean Policy[133] and Act on the Establishment of Safety Zones around Maritime Structures.[134] Japan plans to set up "safety zones" in its EEZ in the East China Sea, which is allowed by Article 60, paragraph 4 of the UNCLOS.[135] One of the main motivations for enacting these two laws is the Japanese concern about the Chinese development of oil and gas resources on the continental shelf in the East China Sea.[136] In November 2008, Japan, in accordance with Article 76, paragraph 8 of the UNCLOS, submitted an application to the Commission on the Limits of the Continental Shelf for its outer limits of continental shelf beyond 200 nmi, which is not subject to the disputes between Japan and South Korea in the Sea of Japan, and between Japan, China and Taiwan in the East China Sea.[137]

On May 12, 2009, China submitted its preliminary information indicative of the outer limits of the continental shelf beyond 200 nmi. It is the Chinese position that "[b]y reference to all the fixed points obtained through the same method, it can be established that the outer limits of China's continental shelf that extends beyond 200 nmi in the East China

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[132] *Foreign Minister Yang Jiechi Answers Questions from Domestic and Overseas Journalists on China's Foreign Policy*, PERMANENT MISSIONS OF THE PEOPLE'S REPUBLIC OF CHINA TO THE UNITED NATIONS AT GENEVA AND OTHER INTERNATIONAL ORGANIZATIONS IN SWITZERLAND (Mar. 9, 2010), http://www.china-un.ch/eng/bjzl/t662518.htm.

[133] Basic Act on Ocean Policy (Act no. 33 of 2007), *available at* http://www.kantei.go.jp/jp/singi/kaiyou/konkyo5.pdf.

[134] Safety Zones Around Maritime Structures (Act No. 34 of 2007), *available at* http://law.e-gov.go.jp/announce/H19HO034.html.

[135] *See* UNCLOS, *supra* note 20, art. 60, para. 4. Article 60 (4) provides that "[t]he coastal State may, where necessary, establish reasonable safety zones around . . . artificial islands, installations and structures in which it may take appropriate measures to ensure the safety both of navigation and of the artificial islands, installations and structures."

[136] *See* Masahiro Akiyama, *Enacting the Basic Ocean Law–the Process and the Background* (prepared for the IIPS Symposium on Japan's Position as a Maritime Nations) (Oct. 16, 2007), *available at* http://www.iips.org/07mar/07marAkiyama.pdf.

[137] Receipt of the Submission made by Japan to the commission on the Limits of the Continental Shelf, CLCS.13.2008.LOS, UNITED NATIONS (Nov. 19, 2008), *available at* http://www.un.org/Depts/los/clcs_new/submissions_files/jpn08/clcs13_2008e.pdf; *see also* Japan's Submission to the Commission on the Limits of the Continental Shelf pursuant to article 76, paragraph 8 of the United Nations Convention on the Law of the Sea, Executive Summary, *available at* http://www.un.org/Depts/los/clcs_new/submissions_files/jpn08/jpn_execsummary.pdf.

Sea locate on the axis of the Okinawa Trough."[138] China indicated in the preliminary information that it was making preparations for the submission of the information on the outer limits of the continental shelf beyond 200 nmi from the baselines from which the breadth of the Chinese territorial sea is measured. In addition, China reserved its right to make submissions on the outer limits of the continental shelf that extends beyond 200 nmi in the East China Sea and in other sea areas.[139]

The ROK government also submitted its preliminary information on May 12, 2009, in which it claimed that:

> The outer limits of the continental shelf in the East China Sea beyond 200 M from the baselines from which the breadth of the territorial sea of Korea is measured are located in the Okinawa Trough, where the seabed and subsoil of the East China Sea comprises a continuous continental landmass extending from Korea's coast to the limits specified in the [LOS] Convention.[140]

ROK also indicated that it intends to make its submission at an appropriate date.

On December 14, and December 26, 2012, respectively, China[141] and ROK[142] submitted to the CLCS, in accordance with Article 76, paragraph 8, of the UNCLOS, information on the limits of the continental shelf beyond 200 nmi from the baselines from which the breadth of its territorial sea is measured in part of the East China Sea.[143] Both indicated that it was a partial submission concerning the outer limits of the continental shelf beyond 200 nmi in part of the East China Sea and this submission is without prejudice to any future submission on delineation of the outer limits of the continental shelf in the East China Sea and other areas.

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[138] Jian Jun Gao, *The Okinawa Trough Issue in the Continental Shelf Delimitation Disputes with the East China Sea*, 9 CHINESE J. OF INT'L L. 143, 149 (2012).

[139] *Preliminary Information Indicative of the Outer Limits of the Continental Shelf Beyond 200 Nautical Miles of the People's Republic of China*, PEOPLE'S REPUBLIC OF CHINA (May 11, 2009), *available at* http://www.un.org/Depts/los/clcs_new/submissions_files/preliminary/chn2009preliminaryinformation_english.pdf [hereinafter China Preliminary Information].

[140] ROK Preliminary Information, *supra* note 126.

[141] Executive Summary, *Submission by the People's Republic of China Concerning the Outer Limits of the Continental Shelf beyond 200 Nautical Miles in Part of the East China Sea*, PEOPLE'S REPUBLIC OF CHINA (Dec. 14, 2012), *available at* http://www.un.org/Depts/los/clcs_new/submissions_files/chn63_12/executive%20summary_EN.pdf [hereinafter China Executive Summary].

[142] Executive Summary, *Partial Submission to the Commission on the Limits of the Continental Shelf*, REPUBLIC OF KOREA (Dec. 2012), *available at* http://www.un.org/Depts/los/clcs_new/submissions_files/submission_kor_65_2012.htm [hereinafter ROK Executive Summary].

[143] *See infra* Figures 1 & 2.

It is stated in the Chinese submission that:

> The geomorphologic and geological features show that the continental shelf in the East China Sea . . . is the natural prolongation of China's land territory, and the Okinawa Trough is an important geomorphologic unit with prominent cut-off characteristics, which is the termination to where the continental shelf of ECS extends. The continental shelf in ECS extends beyond 200 [nmi] from the baselines from which the breadth of the territorial sea of China is measures.[144]

It is concluded in the Chinese submission that the continental shelf of the East China Sea is the natural prolongation of the mainland of China and the Okinawa Trough is the natural termination of the continental shelf of the East China Sea.

In response to the Chinese and Korean submission of their respective preliminary information on May 12, 2009,[145] Japan submitted a diplomatic communication to the CLCS on July 23, 2009, indicating that the distance between the opposite coasts of Japan and both China and Japan in the area regard to which these two countries submitted their preliminary information is less than 400 nmi and therefore the delimitation of the continental shelf in the said area should be effected by agreements between Japan and China, and between Japan and Korea, in accordance with Article 83 of the UNCLOS. It is Japan's position that "the establishment of the outer limits of the continental shelf beyond 200 nmi in an area comprising less than 400 nautical miles and subject to the delimitation of the continental shelf between the States concerned cannot be accomplished under the provisions of the Convention."[146]

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[144] China Executive Summary, *supra* note 141, at 1.

[145] *See* China Preliminary Information, *supra* note 139; ROK Preliminary Information, *supra* note 126.

[146] Permanent Mission of Japan to the United Nations New York, Letter dated Jul. 23, 2009, from Permanent Mission of Japan to Secretariat of the U.N., U.N. Doc. SC/09/246 (July 23, 2009), *available at* http://www.un.org/Depts/los/clcs_new/submissions_files/preliminary/jpn_re_chn2009e.pdf; Permanent Mission of Japan to the United Nations New York, Letter dated Jul. 23, 2009, from Permanent Mission of Japan to Secretariat of the U.N., U.N. Doc. SC/09/248 (July 23, 2009), *available at* http://www.un.org/Depts/los/clcs_new/submissions_files/preliminary/jpn_re_kor2009e.pdf.

Figure 1[147]*: Submission by China Concerning the Outer Limit of the Continental Shelf beyond 200 nmi in the ECS, December 14, 2012*

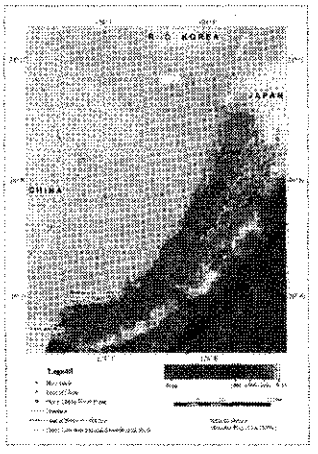
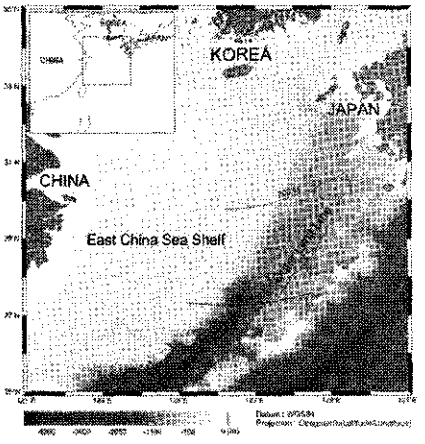


Figure 2[148]*: Submission by South Korea Concerning the Outer Limit of the Continental Shelf beyond 200 nmi in the ECS, December 26, 2012*



On December 28, 2012, Japan responded to the Chinese submission concerning the outer limits of the continental shelf beyond 200 nmi in part of the East China Sea by sending a diplomatic note to the U.N. Secretariat, asking the CLCS not to consider the Chinese submission, on a number of grounds that include: (1) the Diaoyutai/Senkaku Islands are Japan's territory and there exists no territorial dispute over the said islands; (2) the Chinese claimed baselines surrounding the Diaoyutai/Senkaku Islands have no legal ground under international law; and (3) the government of Japan has registered its position against the deposit of a chart and a list of geographical coordinate of points by China with regard to the baselines for the territorial sea of the Diaoyutai/Senkaku Islands to the U.N. Secretary-General on September 24, 2012.[149]

More maritime boundary delimitation disputes between China and Japan in the East China Sea are likely. Beijing is taking the position that the principle of natural prolongation of land territory applies. Tokyo insists

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[147] China Executive Summary, *supra* note 141, at 7.

[148] ROK Executive Summary, *supra* note 142, at 9.

[149] Permanent Mission of Japan to the U.N., New York, letter dated Dec. 28, 2012, from Permanent Mission of Japan to Secretariat of the U.N., U.N. Doc. SC/12/372 (Dec. 28, 2012), *available at* http://www.un.org/Depts/los/clcs_new/submissions_files/chn63_12/jpn_re_chn_28_12_2012.pdf.

that the principle of equidistance or median line should be applied in accordance with Article 83, paragraph 1 of the UNCLOS, which provides that "[t]he delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution."[150]

In ROK's submission, it is stated that:

> In accordance with paragraphs 1 and 3 of article 76 of the Convention, the continental shelf of Korea comprises 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 in the East China Sea.[151]

Korea's claim, just like China's, also extends to the Okinawa Trough. According to a Korean foreign ministry official in charge of the matter, "[c]ompared to our 2009 preliminary report, it is extended up to 125 kilometers toward Japan, some 5 nautical miles away from the Japanese sea border."[152]

Similar to the Chinese submission, the ROK government also indicates that its partial submission was made without prejudice to the questions of delimitation of the continental shelf with the countries concerned in the East China Sea.[153] However, since the Chinese and ROK governments on the one hand, and the Japanese and ROK governments on the other, are taking different approaches to delimit their maritime boundary in the East China Sea, it is likely to give rise to dispute over maritime boundary delimitation between these countries.

X. CONFLICTING OUTER CONTINENTAL SHELF CLAIMS IN THE SOUTH CHINA SEA

The decision made at the 11th SPLOS meeting in May 2001 pushed the coastal states in the South China Sea to take actions in support of their claims to the outer limits of continental shelf where it extends beyond 200 nmi in the disputed waters in the South China Sea. As the May 13, 2009 deadline was approaching, disputes over sovereignty, sovereign rights and jurisdiction in the maritime zones claimed by the bordering countries

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[150] UNCLOS, *supra* note 20, art. 183, para. 1.

[151] ROK Executive Summary, *supra* note 142, at 7.

[152] *S. Korea Submits Formal Claim on East China Sea Shelf to U.N.*, YONHAP NEWS AGENCY (Dec. 27, 2012), http://english.yonhapnews.co.kr/national/2012/12/27/43/0301000000AEN20121227001100315F.HTML.

[153] ROK Executive Summary, *supra* note 142, at 7.

escalated. There was a flurry of outer continental shelf submissions in the region.[154] In response to these submissions, counter-claims to sovereignty, sovereign rights and jurisdiction in the overlapping or disputed South China Sea areas were also made by China, Vietnam, Malaysia, the Philippines, Indonesia, and Taiwan.[155] These claims and counter-claims have made the existing South China Sea disputes become even more complicated and difficult to manage.

China considered that the joint submission by Malaysia and Vietnam,[156] and the submission by Vietnam,[157] to the CLCS concerning the outer limits of the continental shelf beyond 200 nmi in the southern and northern parts of the South China Sea on May 6, 2009 and May 7, 2009, respectively (see *infra* Figures 3 & 4), seriously infringed its sovereignty, sovereign rights and jurisdiction in the South China Sea and therefore asked the CLCS not to consider the submissions.[158] On May 7, 2009, China submitted a *Note Verbale* to the Secretary-General of the United Nations, stating, *inter alia*, that "China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof."[159] A

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[154] Malaysia and Vietnam submitted their joint application (in the southern part of the South China Sea) on May 6, 2009; and Vietnam (in the northern part of the South China Sea) on May 7, 2009. In accordance with the decision made at the Eighteenth Meeting of States Parties to the UNCLOS, China and Brunei submitted their preliminary information indicative of the outer limits of the continental shelf beyond 200 nautical miles on May 11, 2009 and May 12, 2009, respectively. *See Submissions, through the Secretary-General of the United Nations, to the Commission on the Limits of the Continental Shelf, pursuant to article 76, paragraph 8, of the United Nations Convention on the Law of the Sea of 10 December 1982*, UNITED NATIONS, *available at* http://www.un.org/Depts/los/clcs_new/commission_submissions.htm (last updated June 24, 2013) [hereinafter *Submissions*]; *see also Preliminary information indicative of the outer limits of the continental shelf beyond 200 nautical miles*, UNITED NATIONS, *available at* http://www.un.org/Depts/los/clcs_new/commission_preliminary.htm (last updated Dec. 26, 2012).

[155] For Communication to the Secretary-General of the United Nations from China, Vietnam, the Philippines, Vietnam, Malaysia and Indonesia, see *Submissions*, *supra* note 154.

[156] *Continental Shelf-Joint Submission to the Commission by Malaysia and Vietnam*, UNITED NATIONS (May 3, 2011), http://www.un.org/Depts/los/clcs_new/submissions_files/submission_vnm_37_2009.htm.

[157] *Continental Shelf Submission to the Commission by Viet Nam*, UNITED NATIONS (May 3, 2011), http://www.un.org/Depts/los/clcs_new/submissions_files/submission_vnm_37_2009.htm.

[158] *Ban Ki-Moon*, CML/17/2009, UNITED NATIONS (May 7, 2009), *available at* http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mys_vnm_e.pdf; *CML/18/2009*, UNITED NATIONS (May 7, 2009), *available at* http://www.un.org/Depts/los/clcs_new/submissions_files/vnm37_09/chn_2009re_vnm.pdf.

[159] CML/17/2009, UNITED NATIONS (May 7, 2009), *available at* http://www.un.org/

map of the U-shaped claim, with its 9-dashed line in the South China Sea, was attached to the diplomatic note.[160]

On May 8, 2009, Vietnam responded to the Chinese diplomatic notes by stating that "China's claim over the islands and adjacent waters in the Eastern Sea (South China Sea) as manifested in the map attached with the Notes Verbale CLM/17/2009 and CLM/18/2009 has no legal, historical or factual basis, therefore is null and void."[161] Malaysia responded to the Chinese note by arguing that the joint submission "constitute legitimate undertakings in implementation of the obligations of State Parties to the [UNCLOS], which conform to the pertinent provisions of [UNCLOS] as well as the Rules of Procedure of the [CLCS]."[162]

Depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mys_vnm_e.pdf.

[160] *See infra* Map 1.

[161] U.N. Secretary-General, letter dated May 20, 2009 from H.E. Mr. Ban Ki-Moon No. 86/HC-2009 (May 8, 2009), *available at* http://www.un.org/Depts/los/clcs_new/submissions_files/vnm37_09/vnm_re_chn_2009re_vnm.pdf.

[162] U.N. Secretary-General, letter dated May 20, 2009 from H.E. Mr. Ban Ki-Moon U.N. Doc HA 24/09 (May 20, 2009), *available at* http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/mys_re_chn_2009re_mys_vnm_e.pdf.

Figure 3[163]*: Joint CLCS Submission by Vietnam and Malaysia (May 6, 2009)–South Area of SCS*

Figure 4[164]*: CLCS Submission by Vietnam (May 7, 2009)–North Area of SCS*

In its response to the Chinese note, especially the attached "nine-dotted-lines map," Indonesia argued that "those remote or very small features in the South China Sea do not deserve exclusive economic zone or continental shelf of their own,"[165] and that the map "clearly lacks international legal basis and is tantamount to upset the [LOS Convention]."[166] Indonesia pointed out that "[a]llowing the use of uninhabited rocks, reefs and atolls isolated from the mainland and in the middle of the high sea as a basepoint to generate maritime space concerns the fundamental principles of the Convention and encroaches [upon] the legitimate interest of the global community."[167] The Indonesian response to the Chinese maritime claim was followed by a diplomatic note sent by the Philippines to the Secretary-General of the United Nations on April 5, 2011, in which the Philippines

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[163] *MYS_VNM_Joint Continental Shelf Submission*, THE GOVERNMENT OF MALAYSIA AND THE GOVERNMENT OF THE SOCIALIST REPUBLIC OF VIETNAM 5 (May 2009), *available at* http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/mys_vnm2009executivesummary.pdf.

[164] *Vietnam's Continental Shelf Submission*, THE GOVERNMENT OF THE SOCIALIST REPUBLIC OF VIETNAM 5 (Apr. 2009), *available at* http://www.un.org/Depts/los/clcs_new/submissions_files/vnm37_09/vnm2009n_executivesummary.pdf.

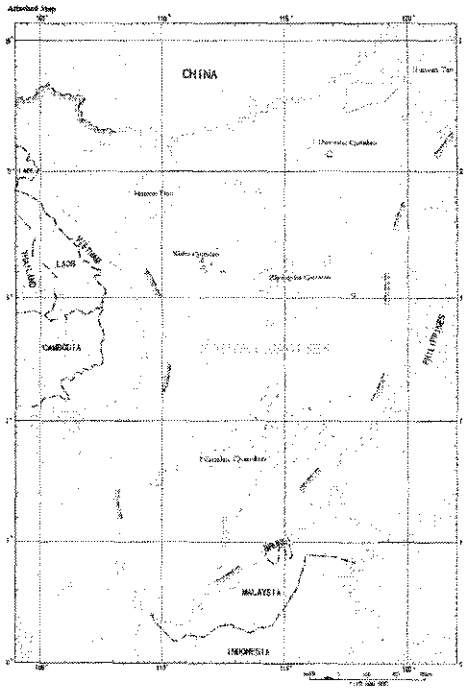
[165] U.N. Secretary-General, letter dated July 8, 2010 from H.E. Mr. Ban Ki-Moon, U.N. Doc. No. 480/POL-703/VII/10 (July 8, 2010), *available at* http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/idn_2010re_mys_vnm_e.pdf.

[166] *Id.*

[167] *Id.*

reaffirmed its sovereignty and jurisdiction over the geological features in the Kalayaan Island Group, which encompasses fifty-three islands, reefs, shoals cays, rocks and atolls of the Spratly archipelago, and challenged the legitimacy of the Chinese claim to sovereignty, sovereign rights and jurisdiction over the islands, "adjacent waters," "relevant waters," and seabed and subsoil encircled by the nine-dashed-lines in the South China Sea.[168]

Map 1[169]*: The U-shaped Line Map attached to the Chinese Note Verbale to the U.N. (May 7, 2009)*



On May 7, 2009, in response to the joint submission by Vietnam and Malaysia to the CLCS concerning the outer limits of the continental shelf beyond 200 nmi in the southern part of the South China, China submitted a *Note Verbale* to the Secretary-General of the United Nations, stating, *inter*

[168] The Philippines Note 11-00494, No. 000228, PHILIPPINE MISSION TO THE UNITED NATIONS (Apr. 5, 2011), *available at* http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/phl_re_chn_2011.pdf.

[169] Permanent Mission of the People's Republic of China to the U.N., CML/18/2009, UNITED NATIONS (May 7, 2009), *available at* http://www.un.org/Depts/los/clcs_new/submissions_files/vnm37_09/chn_2009re_vnm.pdf.

alia, that "China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof."[170] A map of the U-shaped claim, with its 9-dashed line in the South China Sea, was attached to the diplomatic note.

In April 2011, in response to a communication sent by the Philippines to the Secretary-General of the United Nations to challenge the Chinese claim to sovereignty over the Spratly Islands and their "adjacent waters" and sovereign rights and jurisdiction over the "relevant waters as well as the seabed and subsoil thereof" as indicated in the attached U-shaped line map, China submitted a diplomatic note to the U.N. Secretary-General, asserting, among other things, that:

> [U]nder the relevant provisions of the 1982 United Nations Convention on the Law of the Sea, as well as the Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone (1992) and the Law on the Exclusive Economic Zone and the Continental Shelf of the People's Republic of China (1998), China's Nansha Islands [Spratly Islands] [are] fully entitled to Territorial Sea, Exclusive Economic Zone (EEZ) and Continental Shelf.[171]

Since March 2011, there have been a new round of conflicts in the waters around the Paracel and Spratly Islands over the right to develop oil and gas resources.[172] The disputes are found in the areas encircled by China's nine-dashed line in the South China Sea. In March 2011, two Chinese marine surveillance vessels ordered MV *Veritas Voyager*, a Forum Energy Plc ("FEP") survey vessel operating at the Reed Bank, which is near the Spratly archipelago, to leave.[173] The survey ship was chartered by FEP, a UK-based oil and gas company, which had been awarded a contract by the government of the Philippines to conduct seismic studies in the Sampaguita gas field located in the Reed Bank basin in the South China Sea.[174] The government of the Philippines lodged a protest against the Chinese action.[175] In May and June 2011, Chinese vessels were spotted in the area

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[170] Permanent Mission of the People's Republic of China to the U.N., CML/17/2009, UNITED NATIONS (May 7, 2009), available at http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mys_vnm_e.pdf.

[171] Permanent Mission of the People's Republic of China to the U.N., CML/8/2011, UNITED NATIONS (Apr. 14, 2011), *available at* http://www.un.org/Depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2011_re_phl_e.pdf.

[172] Ian Storey, *China and the Philippines: Implications of the Reed Bank Incident*, *in* 11 CHINA BRIEF 6-7 (2011), *available at* http://www.jamestown.org/uploads/media/cb_11_8_03.pdf.

[173] *Id.* at 7.

[174] *Id.*

[175] *Id.*

near Bombay Shoal, Reed Bank and Amy Douglas Bank, reportedly unloading building materials, erecting posts, installing plastic buoys, and placing markers. It was also reported that China planned to install its most advanced oil rig in the disputed areas in the South China Sea.[176]

In response to the Chinese drilling plan, Lt. Gen. Juancho Sabban, who is chief of the Philippines' Western Command, asked Filipino fishermen to be ready to use their boats to block the operation of the Chinese mega oil rig should it show up off the coast of Palawan in the Spratly archipelago.[177] On July 4, 2011, the Chinese Embassy delivered a protest to the government of the Philippines after Manila invited foreign companies to bid for the right to explore oil and gas in fifteen areas northwest of Palawan, claiming that the areas fall under China's incontestable sovereignty.[178]

Actions have also been taken by China to support its claim to sovereign right for the exploration and exploitation of non-living resources in the waters encircled by the nine-dashed line in the South China Sea. In May 2011, a Chinese marine surveillance vessel cut exploration cables of the *Binh Minh 02* of the Vietnam National Oil and Gas Corporation that was operating in a contracted area called Block 148, which is located about 120 km (80 miles) off the south-central coast of Vietnam from the beach town of Nha Trang, and some 600 km (370 miles) south of China's Hainan island.[179] This was followed by another cable cutting incident that occurred in the contracted area called Block 136-03 in the vicinity of Vanguard Bank, which is one of the features in the Spratly archipelago, in June 2011.[180] The government of Vietnam interpreted the incidents as a Chinese plan to make its nine-dashed line claim in the South China Sea a reality.[181]

In October 2011, in response to an oil and gas exploration agreement signed between Vietnam and India in the disputed waters of the South

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[176] Carlyle A. Thayer, *Security Cooperation in the South China Sea: An Assessment of Recent Trends* (2011), *available at* http://southchinaseastudies.org/en/datbase-on-south-china-sea-study/doc_details/195--carlyle-a-thayer-security-cooperation-in-the-south-china-sea-an-assessment-of-recent-trends.

[177] Andrew Higgins, *In South China Sea, a Dispute Over Energy*, WASH. POST (Sept. 17, 2011), http://www.washingtonpost.com/world/asia-pacific/in-south-china-sea-a-dispute-over-energy/2011/09/07/gIQA0PrQaK_story.html.

[178] Jim Gomez, *Philippines Rejects New Chinese Territorial Claim*, THE WASH. TIMES (Nov. 14, 2011), http://www.washingtontimes.com/news/2011/nov/14/philippines-rejects-new-chinese-territorial-claim/.

[179] *Vietnam Demands China Stop Sovereignty Violations*, THANH NIEN DAILY (May 29, 2011, 11:00 A.M.), http://www.thanhniennews.com/2010/Pages/20110530011353.aspx.

[180] *Vietnam Alleges High-Seas Interference*, ISTOCKANALYST (June 10, 2011, 6:08 P.M.), http://www.istockanalyst.com/business/news/5222203/vietnam-alleges-high-seas-interference.

[181] *Id.*

China Sea, China's ministry of foreign affairs stated that "[o]ur position and relevant claim . . . are consistent and clear. We . . . hope all relevant parties contribute more to the peace and stability of the South China Sea."[182] On 26 October 2011, it was reported that the gas discovery of American oil major ExxonMobil off the coast of Vietnam in an area of the South China Sea that is also claimed by China is to add tension in the disputed waters between Beijing and Hanoi.[183]

In early December 2012, "Vietnam accused a Chinese fishing boat of cutting a seismic cable attached to one of its vessels exploring for oil and gas near the Beibu Wan (Gulf of Tonkin), which is located within the Chinese claimed nine-dotted line in the South China Sea."[184] "In retaliation, it would send out new patrols, which would include the marine police, to guard against increasing encroachment by Chinese fishing boats in the South China Sea."[185] "India, which operates several joint ventures with Vietnam's national energy company, Petro Vietnam, said it would consider sending navy vessels to protect its interests in the South China Sea."[186]

XI. MARITIME COOPERATION AND PEACEFUL RESOLUTION OF DISPUTES IN THE EAST CHINA SEA

A. Efforts made by China and Japan

In December 2011, at the China-Japan summit meeting held in Beijing, the Japanese Prime Minister Yoshihiko Noda expressed "six initiatives"[187]

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[182] Liu Weimin, Foreign Ministry Spokesperson, Regular Press Conference, PEOPLE'S REPUBLIC OF CHINA (Oct. 14, 2011), transcript *available at* http://www.fmprc.gov.cn/eng/xwfw/s2510/2511/t868322.htm.

[183] Ben Bland et al., *US Gas Find off Vietnam Adds to China Tension*, THE FINANCIAL TIMES (Oct. 26, 2011), http://www.ft.com/intl/cms/s/0/e5674186-ffe5-11e0-ba79-00144feabdc0.html#axzz1dqfBMYBw.

[184] Jane Perlez, *Dispute Flares Over Energy in South China Sea*, N.Y. TIMES (Dec. 4, 2012), *available at* http://www.nytimes.com/2012/12/05/world/asia/china-vietnam-and-india-fight-over-energy-exploration-in-south-china-sea.html?_r=0.

[185] *Id.*

[186] *Id.*

[187] These initiatives include: (1) Enhancing Mutual Trust in the Political Area; (2) Promoting the Cooperation for making the East China Sea a "Sea of Peace, Cooperation and Friendship"; (3) Japan-China Cooperation in the Wake of the Great East Japan Earthquake; (4) Grading up of Mutually Beneficial Economic Relations; (5) Promoting Mutual Understanding between People in Both Countries; and (6) Strengthening Dialogue and Cooperation on Regional and Global Issues. *See Japan-People's Republic of China Summit Meeting (Summary)*, MINISTRY OF FOREIGN AFFAIRS OF JAPAN (Dec. 25, 2011), http://www.mofa.go.jp/region/asia-paci/china/meeting1112.html [hereinafter *Summit Meeting*

to further deepen diplomatic relations between Japan and China. Among other things, China and Japan shared a basic recognition that it is becoming more important for them to tackle regional and global issues together as partners in accordance with the four basic documents[188] that govern the China-Japan relations. They also agreed to promote the cooperation for making the East China Sea a "Sea of Peace, Cooperation and Friendship."[189] To achieve this goal, they agreed to establish "High-Level Consultation on Maritime Affairs"[190] and made an agreement in principle on the text of "Japan-China Maritime Search and Rescue (SAR) Cooperation."[191] In addition, the Prime Minister urged the early resumption of negotiations on the agreement China and Japan singed in June 2008 on resources development in the East China Sea. In response to this request, the Chinese Prime Minister Wen Jiabao stated that the said agreement should be put into action and that China intends to further communication and to work together with Japan.[192] Japan and China also shared the view that as major countries in the world, they should strengthen dialogues and cooperation concerning regional and global issues. [193]

In May 2012, when attending the Trilateral Summit of Japan, China and the Republic of Korea in Beijing, the Japanese Prime Minister Noda reiterated his "six initiatives" and welcomed the first plenary meeting of "Japan-China High-Level Consultation on Maritime Affairs" that was held in Hangzhou on May 16, 2012.[194] Prime Minister Noda and Prime Minister

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Summary].

[188] These documents include: The 1972 Joint Communiqué of the Government of Japan and the Government of the People's Republic of China; The 1978 Treaty of Peace and Friendship between Japan and the People's Republic of China; The 1998 Japan-China Joint Declaration on Building a Partnership of Friendship and Cooperation for Peace and Development and The 2008 Sino-Japanese Joint Statement on All-round Promotion of Strategic and Mutually Beneficial Relations.

[189] *Summit Meeting Summary*, *supra* note 187.

[190] *Id.*

[191] *Id.*

[192] *Id.*

[193] Weimin, *supra* note 182.

[194] At the meeting, Japan and China introduced the organizations and activities of their respective maritime-related department as well as ongoing cooperation and exchange programs between the two countries. It was agreed to hold the next meeting in the second half of 2012 in Japan and continue to communicate through diplomatic channels. Both countries agreed to establish the Working Group on "the Policy and the Laws of the Seas." The Japanese side explained about the development of making the domestic laws based on the Basic Act on Ocean Policy and the Basic Plan on Ocean Policy as well as Japan's efforts in the fields of laws of sea in terms with the promoting rule of law in the international society. The Chinese side introduced their views and policies on the maritime policies and the laws of sea. Due to the diplomatic standoff between the two countries escalated on

Wen expressed expectations that the consultation would lead to enhancing trust between the maritime-related agencies of the two countries. During the meeting, the two prime ministers expressed their respective position on the status of Diaoyu Dao/Senkaku Islands. Prime Minister Noda said, "it would be undesirable if this issue were to impact adversely on the overall bilateral relations."[195] He also indicated that the active maritime activities by the Chinese in the areas surrounding the disputed islands are giving undesirable influence to the sentiment of Japanese people and therefore he urged China to act with restraint. In addition, Prime Minister Noda stressed the importance of maintaining strategic stability among Japan, the United States, and China, and stated in this connection that it was essential for the three countries to promote dialogue among them.

In response, Chinese Prime Minister Wen said that China was seriously considering the trilateral dialogue.[196] In July 2012, the Japanese Foreign Minister Koichiro Gemba and Chinese Foreign Minister Yang Jiechi met in Phnom Penh, Cambodia on the sidelines of the ASEAN-related Ministers' Meeting. Among other things, they talked about the disputed Diaoyu Dao/Senkaku Islands by repeating their respective basic stand on the issue. They also agreed to promote more cooperation and dialogue. The Japanese Foreign Minister Gemba strongly requested for the early resumption of negotiations for the China-Japan agreement regarding the development of natural resources in the East China Sea. He also stated that the Japanese side hoped for the early start of the Japan-U.S.-China dialogue.

In response, China's Foreign Minister Yang stated that China's position on implementing a principle agreement concerning the East China Sea remained unchanged, and that he would like to continue working-level

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September 11 after the Noda administration finalized the purchase of the disputed Diaoyu Dao/Senkaku Islands, the second round of the "Japan-China High-Level Consultation on Maritime Affairs" was not held during the second half of 2012. However, a Track II international conference entitled "Northeast Asian Cooperation and Integration: Constructing a Peaceful Security Environment in Northeast Asia: Towards an Understanding of the Interplay of Cultural and Material Forces" was organized by Zhejiang University and The Korea Foundation for Advanced Studies ("KFAS"), which was held in Hangzhou, China on December 14-15, 2012. For more information about the first meeting, see The First Round Meeting of Japan-China High Level Consultation on Maritime Affairs (Outline), MINISTRY OF FOREIGN AFFAIRS OF JAPAN (May 16, 2012), http://www.mofa.go.jp/policy/maritime/jchlc_maritime01.html.

[195] Japan-People's Republic of China Summit Meeting (Summary), PRIME MINISTER OF JAPAN AND HIS CABINET (May 31, 2012), http://www.kantei.go.jp/foreign/noda/diplomatic/201205/31jck_e.html.

[196] *See id.*

communications, and that China had been seriously considering the issue concerning the trilateral dialogue.[197]

The call for maritime cooperation between Japan and China and turning the East China Sea into a "sea of peace, cooperation and friendship" was not new.[198] In November 2006 when Chinese President Hu Jintao and Japanese Prime Minister Shinzo Abe met in Hanoi, the two leaders agreed (1) "to speed up consultation on the East China Sea issue in line with the principle of mutual benefit and reciprocity;" (2) to adhere to negotiation and dialogue; (3) to put aside disputes and pursue joint development; and (4) to make East China Sea the "sea of peace, cooperation and friendship."[199]

In April 2007, the Chinese Premier Wen Jiabao paid an official visit to Japan. During the visit, Japan and China reached the following five common understandings on properly addressing the East China Sea issue: (1) Both sides are committed to making the East China Sea a sea of peace, cooperation and friendship; (2) They agreed to carry out joint development based on the principle of mutual benefit as a temporary arrangement pending the final demarcation and without prejudice to the positions of either side on matters concerning the law of the sea; (3) They will conduct consultation at higher level when necessary; (4) They will carry out joint development in larger waters acceptable to them; and (5) They will speed up consultations and hope to submit a detailed plan on joint development to the leaders of the two countries in autumn of 2007.[200]

In December 2007, the Chinese and Japanese leaders reached 4-point new consensus on the East China Sea issue: (1) To continue to adhere to the five-point consensus achieved by leaders of the two countries in April 2007 in a bid to turn the East China Sea into a sea of peace, cooperation and friendship; (2) The two sides have elevated the level of consultation, conducted earnest and substantive consultation on the concrete solution to the issue and made positive progress; (3) To conduct vice-ministerial-level consultation, if necessary, while maintaining the current consultation framework; (4) The solution to the East China Sea issue conformed with the

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[197] Japan-China Foreign Ministers' Meeting (Overview), MINISTRY OF FOREIGN AFFAIRS OF JAPAN (July 11, 2012), http://www.mofa.go.jp/region/asia-paci/china/meeting1207_fm.html.

[198] *Summit Meeting Summary*, *supra* note 187.

[199] *Chinese, Japanese Leaders Call for Maintaining Good Momentum of Bilateral Ties*, PEOPLE'S DAILY ONLINE (Nov. 19, 2006, 11:36 AM), http://english.peopledaily.com.cn/200611/19/eng20061119_323010.html.

[200] *Chinese Premier Advocates Five Principles for Promoting Sino-Japanese Ties*, PEOPLE'S DAILY ONLINE (Apr. 12, 2007 5:52 PM), http://english.peopledaily.com.cn/200704/12/eng20070412_365829.html.

interests of both China and Japan. The two sides agreed to strive for an early solution in the process of developing bilateral ties.[201]

In May 2008, China and Japan issued a joint statement on promoting strategic, mutually beneficial ties. The two sides pledged again "to work together and make the East China Sea a sea of peace, cooperation and friendship."[202] In June 2008, after eleven rounds of serious consultation, China and Japan reached the Principled Common Understanding on the East China Sea Issues. Part I of the Understanding provides that:

> In order to make the East China Sea, of which the delimitation between China and Japan is yet to be made, a "sea of peace, cooperation and friendship," China and Japan have, in keeping with the common understanding reached by leaders of the two countries in April 2007 and their new common understanding reached in December 2007, agreed through serious consultations that the two sides will conduct cooperation in the transitional period prior to delimitation without prejudicing their respective legal positions. The two sides have taken the first step to this end and will continue to conduct consultations in the future.[203]

In accordance with the Understanding, the Japanese companies are allowed to participate in the development of *Chunxiao* oil and gas field in accordance with the relevant Chinese laws that govern cooperation with foreign enterprises in the exploration and exploitation of offshore petroleum resources. In addition, China and Japan agreed to establish a block for joint development in the East China Sea.[204] To carry out this joint development proposal, China and Japan will work to fulfill their respective domestic procedures and arrive at the necessary bilateral agreement at an early date. The two sides also agreed to continue consultations for the early realization of joint development in other parts of the East China Sea.[205]

In addition to the cooperation between China and Japan for joint development of oil and gas in the East China Sea, the two countries also signed a cooperative fisheries conservation and management agreement in

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[201] *Chinese, Japanese Leaders Reach Consensus on East China Sea Issue*, GOV.CN (Dec. 28, 2007), http://www.gov.cn/misc/2007-12/28/content_846359.htm.

[202] *Joint Statement Between the Government of Japan and the Government of the People's Republic of China on Comprehensive Promotion of a "Mutually Beneficial Relationship Based on Common Strategic Interests"*, MINISTRY OF FOREIGN AFFAIRS OF JAPAN (May 7, 2008), http://www.mofa.go.jp/region/asia-paci/china/joint0805.html.

[203] *China and Japan Reach Principled Consensus on the East China Sea Issue*, MINISTRY OF FOREIGN AFFAIRS OF THE PEOPLE'S REPUBLIC OF CHINA (June 18, 2008), http://www.fmprc.gov.cn/eng/xwfw/s2510/t466632.htm.

[204] *Id.*

[205] *Id.*

the East China Sea in 1997 and took effect in 2000.[206] In 1974, Japan and the Republic of Korea also signed the Agreement concerning joint development of the southern part of the continental shelf adjacent to the two countries, which entered into force on June 22, 1978 and remain valid at least until 2028.[207] The agreement established a joint development zone in the East China Sea, which was opposed strongly by China.[208]

B. Efforts Made By Taiwan

Between March 1969 and September 1970, Japan, the Republic of Korea, Taiwan, and Okinawa (which was still under Untied States administration) agreed to try joint development of oil and gas resources in the East China Sea, leaving boundary demarcation aside for future negotiation.[209] Late in 1970, due to China's strong protest, Japan and South Korea signed the joint development agreement in the East China Sea without Taiwan's participation.[210] Since then, no talks about joint development of mineral resources in the East China Sea between Taiwan and Japan have ever been started. However, since 1996, sixteen rounds of fisheries talks between Taiwan and Japan have been held.[211] Taiwan proposed to Japan that a joint management zone be established in waters off the disputed Diaoyutai/Senkaku Islands so both sides can fish in each country's overlapping EEZ, but Japan rejected the proposal.[212]

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[206] For the discussion on the China-Japan fisheries agreement, see David Rosenberg, *Managing the Resources of the China Seas: China's Bilateral Fisheries Agreements with Japan, South Korea, and Vietnam*, THE ASIA-PACIFIC JOURNAL: JAPAN FOCUS (June 30, 2005), http://www.japanfocus.org/-David-Rosenberg/1789.

[207] For the text of the agreement, see Agreement Concerning Joint Development of Southern Part of Continental Shelf Adjacent to the Two Countries, Japan-S.Kor., Jan. 30, 1974, 1981 U.N.T.S. 114, *available at* http://treaties.un.org/doc/Publication/UNTS/Volume%201225/volume-1225-I-19778-English.pdf.

[208] Reinhard Drifte, *Territorial Conflicts in the East China Sea—From Missed Opportunities to Negotiation Stalemate (1)*, THE ASIA-PACIFIC JOURNAL: JAPAN FOCUS (June 1, 2009), http://www.japanfocus.org/-Reinhard-Drifte/3156.

[209] *Id.*

[210] Choon-ho Park, *Seabed Boundary Issues in the East China Sea*, WILSON CENTER, http://www.wilsoncenter.org/sites/default/files/Choon-Ho_Park_1_.pdf (last visited Mar. 29, 2013).

[211] *Japan, Taiwan to Hold Second Preparatory Fish Talks*, THE JAPAN TIMES (Dec. 26, 2012), http://www.japantimes.co.jp/news/2012/12/26/national/japan-taiwan-to-hold-second-preparatory-fishery-talks/#.USIQ;FfshBk [hereinafter *Japan-Taiwan Fish Talks*].

[212] *See* Report prepared by a participant from Taiwan's Ministry of Foreign Affairs, Division of Treaty and Law (Aug. 1, 2005) (classified document, on file with author).

In November 2012, the first preparatory meeting for the 17th round of Japan-Taiwan Fishery Talk was held in Tokyo[213] and the second preparatory meeting was to be held in January or February 2013.[214] The meeting was further postponed because a boat with Taiwanese activists that headed for the disputed waters near Dioayutai/Senkaku Islands but was turned back on January 24, 2013 after coastguard vessels from Japan and Taiwan converged and dueled with water cannon.[215]

In August 2012, mainly in response to the rising tension in the East China Sea, and under increasing domestic political pressures that asked the government to take stronger actions to safeguard Taiwan's sovereignty over the Diaoyutai Islands and protect the right of fishermen to fish in the waters off the disputed islands, President Ma Ying-jeou proposed the five points East China Sea Peace Initiative, calling all parties concerned to:

1. Refrain from taking any antagonistic actions.
2. Shelve controversies and not abandon dialogue.
3. Observe international law and resolve disputes through peaceful means.
4. Seek consensus on a code of conduct in the East China Sea.
5. Establish a mechanism for cooperation on exploring and developing resources in the East China Sea.[216]

The peace proposal, based on the principle of "safeguarding sovereignty, shelving disputes, pursuing peace and reciprocity, and promoting joint exploration and development,"[217] was followed by the implementation guidelines that were announced on September 7, 2012 at one of Taiwan's offshore islands located in the East China Sea.[218]

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[213] *Taiwan, Japan Make Little Progress at Fishery Talks*, WANT CHINA TIMES (Dec. 1, 2012), http://www.wantchinatimes.com/news-subclass-cnt.aspx?id=20121201000074&cid=1101.

[214] *See Japan-Taiwan Fish Talks, supra* note 211.

[215] Amber Wang, *Taiwanese Activists And Japanese Coast Guard Have Water Cannon Duel Near Disputed Islands*, BUSINESS INSIDER (Jan. 24, 2013), http://www.businessinsider.com/taiwanese-activists-and-japanese-coast-guard-have-water-cannon-duel-near-disputed-islands-2013-1.

[216] For the proposal, see *East China Sea Peace Initiative*, MINISTRY OF FOREIGN AFFAIRS REPUBLIC OF CHINA (TAIWAN), http://www.mofa.gov.tw/EnOfficial/Topics/TopicsIndex/?opno=cc7f748f-f55f-4eeb-91b4-cf4a28bbb86f (last updated Nov. 14, 2012).

[217] *Id.*

[218] *East China Sea Peace Institute Implementation Guidelines*, MINISTRY OF FOREIGN AFFAIRS REPUBLIC OF CHINA (TAIWAN) (Sept. 7, 2012), http://www.mofa.gov.tw/EnOfficial/Topics/TopicsArticleDetail/9d66bed6-16fa-4585-bc7c-c0845f2dfc39 [hereinafter *Initiative*].

Taiwan's East China Sea Peace Initiative will be implemented in two stages: (1) Peaceful dialogue and mutually reciprocal negotiation; and (2) Sharing resources and cooperative development. The first stage involves (1) promoting the idea of resolving the East China Sea dispute through peaceful means; (2) establishing channels for Track I and Track II dialogue; and (3) encouraging all parties concerned to address key East China Sea issues via bilateral or multilateral negotiation mechanisms to bolster mutual trust and collective benefit.[219] During the second stage, the main task is to institutionalize all forms of dialogue and negotiation, to encourage all parties concerned to implement substantive cooperative projects, and to establish mechanisms for joint exploration and development of resources that form a network of peace and cooperation in the East China Sea area.[220]

Key issues for the implementation of the peace initiative include fishing industry, mining industry, marine science research and maritime environmental protection, maritime security and unconventional security, and East China Sea Code of Conduct.[221] This is to be done by moving from three parallel tracks of bilateral dialogue (between Taiwan and Japan, Taiwan and China, and Japan and China) to one track of trilateral negotiations (among China, Japan and Taiwan) to realize peace and cooperation in the East China Sea.[222]

On January 1, 2013, at his New Year's Day speech, President Ma reiterated his peace initiative and stated "[w]e look forward to working with the new leaders of mainland China, Japan, and South Korea to ease tensions so that economic cooperation will once again be the main focus of relations in East Asia, as it should be."[223] He also said that ongoing fishery talks between Taiwan and Japan are an "important first step" for tackling territorial and maritime boundary disputes in the East China Sea and turning it into a "sea of peace and cooperation."[224]

Although President Ma's peace initiative has received positive responses and wide support from the countries of the world, it remains to be seen how effective this proposal will be in promoting maritime cooperation and helping resolve disputes in the East China Sea. Strong official support from the governments of Japan, China, and the United States will be the key for a successful implementation of this peace proposal. In January 2013, Richard Bush, Bruce Jones, and Jonathan Pollack recommended that the United

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219 *Id.*

220 *Id.*

221 *Id.*

222 *Id.*

223 *Ma Calls Fishery Talks "Important First Step" Toward Peace in East China Sea*, THE JAPAN TIMES (Jan. 2, 2013), http://info.japantimes.co.jp/text/nn20130102a6.html.

224 *Id.*

States has both the need and the opportunity to facilitate a reduction in the possible military clash between China and Japan in the East China Sea.[225] As they suggested, in the short-term, the Obama administration "should mount a diplomatic effort to encourage the countries concerned to adopt conflict-avoidance mechanisms jointly,"[226] and in the medium term, "it should promote more institutionalized risk reduction measures to regulate the operations of their maritime agencies."[227] These policy recommendations are considered consistent with Taiwan's five-point peace initiative in the East China Sea.

XII. MARITIME COOPERATION AND PEACEFUL RESOLUTION OF DISPUTES IN THE SOUTH CHINA SEA

A number of maritime cooperative agreements were signed between or among the South China Sea bordering countries in the areas such as conservation and management of fisheries resources, protection of marine biodiversity, exploration and exploitation of oil and gas resources, and marine scientific research.

In December 2000, the governments of China and Vietnam signed two agreements: the Maritime Boundary Agreement with delimitation of their territorial sea, the EEZ and continental shelf in the Beibu Bay (Gulf of Tonkin), and the China-Vietnam Fishery Cooperation Agreement in the Gulf of Tonkin.[228]

> In March 2002, scientists from the South China Sea region conducted a major biodiversity expedition to the waters off the Anambas and Natuna Islands, that are located in the South China Sea and belong to Indonesia. The two week expedition obtained over 3000 specimens representing a large diversity

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[225] Richard Bush et al., *Calming the Eastern Seas, in* BIG BETS & BLACK SWANS 37-40, A PRESIDENTIAL BRIEFING BOOK (Martin Indyk et al., eds., 2013), *available at* http://www.brookings.edu/research/interactives/2013/big-bets-black-swans.

[226] *Id.* at 39.

[227] *Id.* at 37.

[228] *See* Zou Keyuan, *The Sino-Vietnamese Agreement on Maritime Boundary Delimitation in the Gulf of Tonkin*, 36 OCEAN DEV. & INT'L L. 13 (2005); *see also* Hong Thao Nguyen, *Maritime Delimitation and Fishery Cooperation in the Tonkin Gulf*, 36 OCEAN DEV. & INT'L L. 25 (2005); Li Jianwei & Chen Pingping, *China-Vietnam Fishery Cooperation in the Gulf of Tonkin Revisited*, EAST SEA STUDIES (July 21, 2011), http://nghiencuubiendong.vn/en/conferences-and-seminars-/second-international-workshop/594-china-vietnam-fishery-cooperation-in-the-gulf-of-tonkin-revisited-by-li-jianwei-a-chen-pingping (presented at the Second International Workshop on the South China Sea, Ho Chi Min City, Vietnam, November 2010).

of plant and animal species. Many were new records for the area, and some were also new to science.[229]

This expedition is a joint project agreed by the participating authorities in the Informal Workshop on Managing the Potential Conflicts in the South China Sea (the SCS Workshop) that was proposed in 1997 and agreed to in March 2001 and implemented in March 2002.[230]

In March 2005, three national oil companies from China, Vietnam and the Philippines signed a landmark tripartite agreement in Manila to jointly prospect oil and gas resources in the disputed South China Sea.[231] During the signing ceremony, it was stressed that their goal was to turn the South China Sea into peace, stability, friendship and cooperation.[232] In 2008, Taiwan proposed a Spratly Initiative, in which former President Chen Shui-bian stated that "only peace, biology and cooperation are the future of the South China Sea,"[233] and therefore he urged all the surrounding countries to give priority to develop the South China Sea into a marine conservation zone in a joint effort to preserve valuable marine resources.[234]

In 2009, a joint marine scientific research project entitled "the Southeast Asian Network for Education and Training" ("SEA-NET") was approved at the SCS Workshop, which was co-sponsored by Taiwan and China. The first stage was implemented in Taiwan in 2010 and in China in 2011.[235] The second stage was also agreed to and implemented in Taiwan in the summer of 2012. The project will be implemented in China in 2013.[236] In April 2012, during his visit to Brunei, Jia Qinglin, chairman of the National Committee of the Chinese People's Political Consultative Conference

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[229] Peter K.L. Ng et al., *Expedition Anambas: An Overview of the Scientific Marine Exploration of the Anambas and Natuna Archipelago, 11-22 Mar. 2002*, 11 THE RAFFLES BULL. OF ZOOLOGY 1 (2004), *available at* http://rmbr.nus.edu.sg/exanambas/rbzs11-ExAnambas/01-Overview(Pg1-17).pdf.

[230] *Id.*; *see also* Yann-huei Song, *A Marine Biodiversity Project in the South China Sea: Joint Made in the SCS Workshop Process*, 26 INT'L J. MARINE & COASTAL L. 119 (2011).

[231] Tan Jingjing & Chang Lu, *China, Vietnam Agree to Promote South China Sea Joint Exploration*, EMBASSY OF THE PEOPLE'S REPUBLIC OF CHINA IN AUSTRALIA (July 20, 2005), http://au.china-embassy.org/eng/xw/t204203.htm

[232] *Id.*

[233] Edwin Hsiao, *Chen Urges Cooperation with 'Spratly Initiative'*, TAIWAN TODAY (Feb. 14, 2008), *available at* http://www.taiwantoday.tw/ct.asp?xItem=29848&CtNode=427.

[234] *Id.*

[235] Li Jianwei, *Cooperation in the South China Sea Region: A Way to Regional Peace, Stability and Prosperity*, EAST SEA (SOUTH CHINA SEA) STUDIES (Feb. 24, 2011), http://nghiencuubiendong.vn/en/conferences-and-seminars-/517-cooperation-in-the-south-china-sea-region-a-way-to-regional-peace-stability-and-prosperity-by-li-jianwei.

[236] *See* Statement of the 19th, 20th, 21st, and 22nd Statement of the Workshop on Managing Potential Conflicts in the South China Sea, 2009-2012 (on file with author).

("CPPCC"), called for pragmatic cooperation between China and ASAEN countries and made the South China Sea "a sea of peace, friendship and cooperation."[237]

In addition to maritime cooperative activities, there have also been a number of official statements that called for peaceful resolutions of disputes in the South China Sea. In fact, since 1995 all member states of ASEAN have publicly and repeatedly agreed to seek a peaceful resolution of the South China Sea disputes, and continue to explore ways and means to prevent conflict and enhance cooperation consistent with the provisions of the relevant treaties, declarations, and international law, including the UNCLOS.[238] In 1995, China and the Philippines, as well as the Philippines and Vietnam, respectively, signed a code of conduct pledging to solve their dispute by peaceful means.[239] China also joined the member states of ASEAN at the 3rd meeting of the ASEAN Regional Forum ("ARF"), held in Jakarta in July 1996, to seek solutions by peaceful means in accordance with international law in general and the LOS Convention in particular.[240]

The political commitment made by ASEAN member countries and China sixteen years ago remains valid today, which appeared in Guidelines agreed upon by China and ASEAN in 2011, saying under point 6: "The decision to implement concrete measures or activities of the DOC should be based on consensus among parties concerned, and lead to the eventual realization of a Code of Conduct."[241] This was further reflected in the Chair's Statement of the 18th ASEAN Regional Forum (July 2011),[242] the Chair's

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[237] *Jia Makes 4-Point Proposal to Further China-Brunei Ties*, XINHUA (Apr. 20, 2012), http://www.china.org.cn/world/2012-04/20/content_25196611.htm.

[238] Bangkok Summit Declaration, ASSOCIATION OF SOUTHEAST ASIAN NATIONS (Dec. 15, 1995), *available at* http://www.asean.org/news/item/bangkok-summit-declaration-of-1995-bangkok14-15-december-1995.

[239] Yann-huei Song, *ASEAN-China Negotiation on South China Sea Regional Code of Conduct and its Possible Impact on Taiwan*, 39 ISSUES & STUD. 4, Annexes 6 & 7, at 34-35 (2000) (article in Chinese, Annexes in English).

[240] *1996 Chairman's Statement of the Third Meeting of the ASEAN Regional Forum*, NATIONAL UNIVERSITY OF SINGAPORE (July 23, 1996), http://cil.nus.edu.sg/rp/pdf/1996%20Chairman%20Statement%20of%20the%203rd%20ASEAN%20Regional%20Forum-pdf.pdf.

[241] *Terms of Reference of the ASEAN-China Joint Working Group on the Implementation of the Declaration on the Conduct of Parties in the South China Sea*, ASSOCIATION OF SOUTHEAST ASIAN NATIONS, http://www.asean.org/asean/external-relations/china/item/terms-of-reference-of-the-asean-china-joint-working-group-on-the-implementation-of-the-declaration-on-the-conduct-of-parties-in-the-south-china-sea (last visited Mar. 29, 2013).

[242] *See* Carlyle A. Thayer, *China-ASEAN and the South China Sea: Chinese Assertiveness and Southeast Asian Responses* (Oct. 2011), http://www.american.edu/sis/aseanstudiescenter/upload/Thayer-Paper-Academia-Sinicia-1.pdf. Paragraph 11 of the 18th ASEAN Regional Forum's Chair's Statement on 23 July 2011 reads *inter alia*:

The Ministers welcomed the recent finalization and adoption of the Guidelines for the

Statement of the 19th ASEAN Summit (November 2011),[243] the Joint Statement of the 14th ASEAN-China Summit (November 2011),[244] the Chairman's Statement of the 6th East Asia Summit (November 2011),[245] the Declaration of the East Asia Summit on the Principles for Mutually Beneficial Relations, adopted at the 6th EAS in Bali, Indonesia on 19 November 2011,[246] and the ASEAN Phnom Penh Declaration, adopted at the 20th ASEAN Summit (April 2012).[247]

At the 6th EAS, that was held in Bali in November 2011, the 18 national leaders or their representatives had recognized that "the international law of the sea contains crucial norms that contribute to the maintenance of peace

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Implementation of the Declaration on the Conduct of Parties in the South China Sea (DOC) at the recent ASEAN PMC+1 with China. The Ministers further reaffirmed the importance and continued relevance of the Declaration on the Conduct of Parties in the South China Sea (DOC) of 2002, as a milestone document between ASEAN Member States and China, embodying their collective commitment to promoting peace, stability and mutual trust and to ensuring the peaceful resolution of disputes in the area, in accordance with universally recognized principles of international law, including the 1982 United Nations Convention on the Law of the Sea (UNCLOS).

[243] *See Chair's Statement of the 19th ASEAN Summit* para. 147, ASSOCIATION OF SOUTHEAST ASIAN NATIONS (Nov. 17, 2011), *available at* http://www.asean.org/archive/documents/19th%20summit/CS.pdf [hereinafter *Chair's Statement of the 19th ASEAN Summit*]. Paragraph 147 of the 19th ASEAN Summit's Chair's Statement on 17 November 2011 reads *inter alia*:

> We reaffirmed the importance of the Declaration on the Conduct of the Parties in the South China Sea (DOC) as a milestone document signed between ASEAN and China embodying the collective commitment to promoting peace, stability, and mutual trust in the South China Sea and to ensuring the peaceful resolution of disputes in this area in accordance with international law, including the 1982 United Nations Convention on the Law of the Sea (UNCLOS).

[244] *See* Full Text of Joint Statement of China-ASEAN Commemorative Summit, para. 10, XINHUA (Nov. 20, 2011, 12:39 AM), http://news.xinhuanet.com/english2010/china/2011-11/20/c_131257696.htm. Paragraph 10 of the Joint Statement of the 14th ASEAN-China Summit to Commemorate the 20th Anniversary of Dialogue Relations, 18 November 2011 reads: "We will cooperate to enhance maritime security, including to ensure freedom of commerce, safety of navigation and maritime traffic, in accordance with international law, including the 1982 United Nations Convention on the Law of the Sea (UNCLOS)."

[245] *See generally Chairman's Statement of the 6th East Asia Summit*, ASSOCIATION OF SOUTHEAST ASIAN NATIONS (Nov. 19, 2011), *available at* http://www.asean.org/archive/documents/19th%20summit/EAS-CS.pdf [hereinafter *6th East Asia Summit*].

[246] *See generally* Declaration on the East Asia Summit on the Principles for Mutually Beneficial Relations, ASSOCIATION OF SOUTHEAST ASIAN NATIONS (Nov. 19, 2011), http://www.mofa.go.jp/region/asia-paci/eas/pdfs/declaration_1111_2.pdf.

[247] Phnom Penh Declaration on ASEAN: One Community, One Destiny, ASSOCIATION OF SOUTHEAST ASIAN NATIONS (Apr. 3, 2012), http://www.asean.org/archive/documents/pp_declaration_3%20April_FINAL.pdf [hereinafter Phnom Penh Declaration].

and stability in the region"[248] and reaffirmed their determination "to promote a democratic and just world order based on the supremacy of principles and norms of international law, and on the need to use relevant multilateral instruments, finding solutions to regional and global problems through concerted efforts."[249] At the 20th ASEAN Summit in April 2012, the ten leaders of the ASEAN member countries agreed to continue:

> [T]o uphold the collective commitments reflected in the [2002 China-ASEAN] Declaration on the Conduct of Parties in the South China Sea (DOC) and the universally recognized principles of international law, including the 1982 United Nations Convention on the Law of the Sea (UNCLOS), and to move for the eventual realization of a regional code of conduct (COC).[250]

They also reaffirmed the importance of the DOC as a milestone document signed between ASEAN and China, which embodies the collective commitment to promoting peace, stability, and mutual trust in the South China Sea and to ensuring the peaceful resolution of disputes in this area in accordance with the U.N. Charter and the universally recognized principles of international law, including the UNCLOS.[251]

At the 45th ASEAN Ministerial Meeting in Phnom Penh, Cambodia, the ministers could not reach consensus and as a result failed to issue the customary Joint Communiqué, which was indeed unprecedented in ASEAN's forty-five years of existence. However, the Chairman's Statement issued after the 19th ASEAN Regional Forum continues to "stress the importance of maintaining peace and stability in the South China Sea, the continued exercise of self-restraint and the non-use of force by all parties concerned, respect for the universally recognized principles of international law," including the UNCLOS.[252] The foreign ministers and representatives of the 19th ASEAN Regional Forum "called upon all parties to undertake peaceful resolution of the disputes in the area in accordance with the recognized principles of international law, including the 1982 UNCLOS."[253]

In November 2012, at the 10th Anniversary of the DOC, the national leaders of China and ASEAN member states agreed "to continue to uphold

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[248] 6th East Asia Summit, *supra* note 245, ¶ 5.

[249] *Id.*

[250] Phnom Penh Declaration, *supra* note 247, ¶ 5.

[251] *Chairman's Statement of the 20th ASEAN Summit*, ASSOCIATION OF SOUTHEAST ASIAN NATIONS (Apr. 2012), *available at* http://asean2012.mfa.gov.kh/documents/Chairman_Statement_20th_ASEAN_Summit_FINAL.pdf.

[252] *Chairman's Statement of the 19th ASEAN Summit*, *supra* note 243, ¶ 147.

[253] *Chairman's Statement of the 19th ASEAN Regional Forum* (July 12, 2012), http://www.presspool.jp/images/asean-arf.pdf.

the spirit and principles of the DOC to contribute to the promotion of peace, friendship, mutual trust, confidence and cooperation between and among ASEAN Member States and China."[254]

"On December 6, 2012, the 1st Meeting of the Maritime Cooperation Committee between China and Indonesia was held in Beijing as a follow-up action to the Memorandum of Understanding on Maritime Cooperation" signed by the Foreign Ministers of the two countries in March 2012.[255] At the meeting, "[t]he two sides agreed that maritime cooperation is a key area in their strategic partnership, and the establishment of the China-Indonesia Maritime Cooperation Committee and the Maritime Cooperation Fund is a new step in further strengthening existing maritime cooperation between the two countries."[256] China and Indonesia would work closely with each other, materialize the commitment of the two countries' leaders, and push for new progress in maritime cooperation. They also agreed to endorse relevant maritime cooperation projects under the framework of the Maritime Cooperation Committee.[257]

On December 27, 2012, China's State Oceanic Administration announced that it would allocate 30 million RMB (U.S. $4.8 million) in 2013 to enhance international cooperation with developing economies in the South China Sea.[258] Zhang Zhanhai, director of the Administration's international cooperation department stated that "[t]erritorial disputes cannot be solved within a short time" and therefore the "disputes should be temporarily put aside" and work on joint development.[259] "He added that strengthening international cooperation over the South China Sea will create a win-win situation, economically and politically."[260] China is also planning to build a South China Sea tsunami consulting center to collect marine environment data and release tsunami risk reports to reduce the impact of such disasters in the South China Sea.[261] In addition, China will allocate another RMB 2 million in funding for more than twenty international students from South China Sea countries for marine-related

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254 *Full Text of ASEAN-China Joint Statement on 10th Anniversary of DOC in South China Sea*, CHINA.ORG.CN (Nov. 20, 2012), http://www.china.org.cn/world/Off_the_Wire/2012-11/20/content_27163485.htm.

255 The 1st Meeting of the Maritime Cooperation Committee between China and Indonesia held in Beijing, EMBASSY OF THE PEOPLE'S REPUBLIC OF CHINA IN THE ARAB REPUBLIC OF EGYPT (Dec. 06, 2012), http://eg.china-embassy.org/eng//zgyw/t996747.htm.

256 *Id.*

257 *Id.*

258 Wang Qian, *China Allocates Fund to Support South China Sea Ties*, CHINA DAILY (Dec. 28, 2012), http://www.asianewsnet.net/home/news.php?id=40744.

259 *Id.*

260 *Id.*

261 *Id.*

studies in China.[262] The government of China is implementing its framework plan [2011-15] that launched in January 2012 for international cooperation in the South China Sea and its adjacent oceans.[263] The main goal of the programme is to strengthen international cooperation with South China Sea countries.[264]

XIII. CONCLUDING REMARKS AND RECOMMENDATIONS

The conflicting outer continental shelf claims in the East and South China Seas have created important policy challenges for both the East Asian countries and the countries outside the region. These claims involve not only with issues concerning territorial sovereignty and maritime rights and interests, but also maritime security and strategy that are important to maintain peace and stability in the Asia-Pacific region. The conflicts in the East and South China Seas involve the world's three largest economies, namely, the United States, China, and Japan.[265] As tensions continue to grow, the risks of an accidental clash or escalation are also increasing, which could lead to direct U.S. involvement in the conflict under its mutual defense treaty obligation. In fact, it is difficult to deny that the East and South China Sea disputes have evolved into a China-U.S. strategic competition. Accordingly, proposals for maritime cooperation and peaceful resolution of the dispute are urgently needed.

For Taiwan, due to its unique political status, the development of continental shelf claims in both the East and South China Sea have also given rise to a number of policy challenges and dilemmas. Because Taiwan is not a member of the United Nations, nor a party to the 1982 LOS Convention, it is very difficult, if not impossible, for its government to submit the disputes to the International Court of Justice or the International Tribunal for the Law of the Sea for judicial settlement. In addition, it is also difficult for Taiwan to submit its application for outer continental shelf beyond the 200-nautical-mile limit in the East China Sea to the CLCS. Moreover, since the claim that Taiwan makes to the ownership of the disputed islands and the accompanied maritime rights and interests in the East and South China Seas is more or less identical with the Chinese claim based on the historical grounds, Taiwan is facing a policy dilemma over taking a position that is close to China or adopting another stand that is preferred to by the United States, Japan, and the ASEAN member states.

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[262] *Id.*

[263] *Id.*

[264] *Id.*

[265] Andrew Bergmann, *World's Largest Economies*, CNN, http://money.cnn.com/news/economy/world_economies_gdp/ (last visited June 29, 2013).

Furthermore, the "One China" issue has made it more complicated and difficult for Taiwan to deal with the sovereignty and maritime disputes in these two East Asian seas.

Taiwan has been barred from participating in the regional Track I security dialogue process that discusses the South China Sea dispute, such as a series of annual meetings organized by ASEAN, including ASEAN Regional Forum, Expanded ASEAN Maritime Forum, ASEAN Defense Ministerial Meeting Plus, and East Asia Summit. Taiwan was not invited to participate in the regional efforts to adopt the DOC and the negotiation process that aims to adopt a regional code of conduct for the South China Sea. The only one Track I & a half meeting that Taiwan has been attending since 1991 is the Indonesian-led Informal Workshop on Managing Potential Conflicts in the South China Sea.

As tensions continue to escalate at the start of 2013, what actions can Taiwan take, in accordance with the stated policy principles on dealing with the East and South China Sea issues, which include: safeguarding territorial sovereignty, putting aside the disputes, promoting regional peace and stability base on reciprocity, and jointly developing resources? The following are a number of unsolicited recommendations from the writer.

First, the government of Taiwan should consider establishing an ad hoc policy group responsible for reviewing and evaluating the effectiveness of the East China Sea Peace Initiative, and then developing a more pragmatic and creative strategy for the implementation of the peace initiative. Members of this group should consist of government officials and experts on ocean law and policy, as well as maritime security and strategy, who are involved in or familiar with the decision-making and development of the initiative.

Second, maritime cooperation between or among China, Japan, and Taiwan is possible in the areas of exploration and exploitation of oil and gas resources in the East China Sea. China National Offshore Oil Corporation ("CNOOC"),[266] Japan Oil, Gas and Metals National Corporation ("JOGMEC"),[267] and Taiwan's CPC Corporation sea[268] might play a role in promoting joint study and development of oil and gas resources in the East China sea.

Third, since Taiwan has been barred from attending the regional security dialogue process for almost two decades in the discussion of the East and

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[266] *See generally* CNOOC LIMITED, http://www.cnoocltd.com/encnoocltd/default.shtml (last visited Feb. 23, 2013).

[267] *See generally* JAPAN OIL, GAS AND METALS NATIONAL CORPORATION, http://www.jogmec.go.jp/english/index.html (last visited Feb. 23, 2013).

[268] *See generally* CPC CORPORATION, TAIWAN, http://www.cpc.com.tw/english/home/index.asp (last visited Feb. 23, 2013).

South China Sea disputes at Track I level because of the "One China" issue, there is a need for the government of Taiwan to approach China, the United States, Japan, and the ASEAN member states bilaterally to find a special way or make a flexible arrangement so that Taiwan can be invited to the official discussing table. It will serve the U.S. national interest if a trilateral code of conduct between China, Japan and Taiwan in the East China Sea is adopted, because it creates a soft law-type first defense line to prevent any of the three parties from taking provocative moves that might trigger the direct American military involvement in the conflict. The second line of defense for deterring any of the three parties from threatening or using force to settle the sovereignty and maritime disputes in the East China Sea is the U.S.-Japan Mutual Defense Treaty, which is an existing treaty-type hard law with a stronger legal effect than the code of conduct. The peace and stability in the East China Sea could be better maintained with this extra second line of defense, i.e., a trilateral code of conduct between China, Japan and Taiwan. The government of Taiwan should convince the U.S. government of the value of this second line of defense so that Washington would take actions to ask the Japanese government to support trilateral code of conduct in the East China Sea.

Fourth, Taipei can also think about proposing a South China Sea Peace Initiative, in which it develops its own version of unilateral code of conduct, and proposes joint conservation and management of fisheries resources and exploration and exploitation of oil and gas resources in the South China Sea.

As far as the United States is considered, the Obama administration might want the U.S. government to play a behind-the-scenes role in breaking the logjams in the East China Sea. This can be done by encouraging China and Japan to adopt a conflict-avoidance mechanism to regulate interaction at sea (12 nmi) and in the skies (such as No-Fly Zone) over the DIG/SIG. In addition, Washington urges the concerned parties to negotiate and adopt a regional Code of Conduct in the East China Sea.

The Mounting Environmental Challenges, the United Nations Environment Programme, and the Reform of the International Environmental Governance Regime

Ved P. Nanda*

I. INTRODUCTION

The international community has failed in effectively addressing the mounting environmental challenges. More than forty years ago, the 1972 UN Conference on the Human Environment[1] adopted the Stockholm Declaration,[2] proclaiming the goal to "defend and improve the human environment for present and future generations."[3] But thirty years later, a 2002 periodic report of the United Nations Environment Programme (UNEP), entitled *GEO 3: Global Environment Outlook*, concluded that

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I had the privilege of knowing Jon Van Dyke for almost four decades and working closely together with him on several projects. His passion for human rights, the environment, justice, and the rule of law was unmatched. As an esteemed colleague and a dear friend, Jon is sorely missed. I wish to express my deep gratitude and appreciation to Professor Sherry Broder, another cherished friend, for her tremendous efforts in organizing this successful symposium in memory of Jon.

[1] Report of the United Nations Conference on the Human Environment, Stockholm, Swed., June 5-16, 1972, U.N. Doc. A/CONF.48/14/andCorr.1 (1972) [hereinafter *Stockholm Report*].

[2] For the text of the Stockholm Report, see *id.* at 3-5.

[3] *Id.* ¶ 6.

"[i]n many areas, the state of the environment is much more fragile and degraded than it was in 1972."[4] It warned that among the three pillars of sustainable development—social, economic, and environmental—which are mutually supportive and essential, the environmental pillar is too frequently neglected and its disintegration "will lead to the inevitable collapse of the other, more charismatic pillars of sustainable development to which policy makers everywhere pay particular attention."[5]

Also in 2002, the Johannesburg Declaration of the World Summit on Sustainable Development had described the environmental challenges faced by the world community:

> The global environment continues to suffer. Loss of biodiversity continues, fish stocks continue to be depleted, desertification claims more and more fertile land, the adverse effects of climate change are already evident, natural disasters are more frequent and more devastating and developing countries more vulnerable, and air, water and marine pollution continue to rob millions of a decent life.[6]

A 2012 UNEP publication entitled *Keeping Track of Our Changing Environment: From Rio to Rio+20 (1992-2012)*[7] reached a sobering conclusion on the failure of efforts to improve the environment: "With limited progress on environmental issues achieved, and few real 'success stories' to be told, all components of the environment—land, water, biodiversity, oceans and atmosphere—continue to degrade."[8]

And the 2012 UNEP *GEO-5* report's *Summary for Policy-Makers*[9] affirmed that unprecedented Earth System changes are occurring because of accelerated human pressure, and, as a result, "several critical global,

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[4] U.N. Env't Programme, *Global Environment Outlook 3*, at 297 (2002), *available at* http://www.unep.org/geo/GEO3.asp.

[5] *Id.* at 402.

[6] World Summit on Sustainable Development, Johannesburg, S. Afr., Aug. 26-Sept. 4, 2002, *The Johannesburg Declaration on Sustainable Development*, ¶ 13, U.N. Doc. A/CONF.199, 200 (2002).

[7] U.N. Env't Programme, *Keeping Track of Our Changing Environment: From Rio to Rio+20 (1992-2012)* (2011), UNEP/GCSS.XII/INF/2, http://www.unep.org/geo/pdfs/KeepingTrack.pdf.

[8] *Id.* at 90. *See also* Ved P. Nanda, *Introduction*, *in* CLIMATE CHANGE AND ENVIRONMENTAL ETHICS 1-13 (Ved P. Nanda ed., 2011) (highlighting the international environmental challenges caused by climate change).

[9] The GEO-5 *Summary for Policy Makers* was negotiated and endorsed at an intergovernmental meeting held January 29-31, 2012, in the Republic of Korea, and launched at a UNEP Governing Council Special Session on February 20, 2012. U.N. Env't Programme, *Global Environment Outlook 5: Summary for Policy Makers, at 6 (2011), available at http://www.unep.org/geo/pdfs/GEO5_SPM_English.pdf.*

regional and local thresholds are close or have been exceeded."[10] Consequently, the report warns, with the passing of these thresholds, the life-support functions of the planet are likely to face "abrupt and possibly irreversible changes . . . with significant adverse implications for human well-being."[11] The report notes that droughts and floods, increased incidences of malaria, the collapse of a number of fisheries, and substantial biodiversity loss, among other changes, have had adverse impacts on human security, food security, health, and the provision of ecosystem services.[12]

There is growing recognition that without placing the environmental dimension of sustainable development at par with the economic and social dimension, the goals of sustainable development will be hard to realize. This recognition seems to have led the Heads of State and Government at the 2012 Rio+20 UN Conference on Sustainable Development (UNCSD) in their Outcome Document, *The Future We Want*,[13] to affirm the need to strengthen international environmental governance within the context of the institutional framework for sustainable development, in order to promote a balanced integration of the economic, social and environmental dimensions of sustainable development as well as coordination within the UN system."[14]

The international environmental regime addressing the environmental challenges suffers from major weaknesses. A 2008 report of the Joint Inspection Unit on "Management Review of Environmental Governance within the United Nations System" aptly identified the weakness of this system: "The current framework of international environmental governance is weakened by institutional fragmentation and specialization and the lack of a holistic approach to environmental issues and sustainable development."[15]

The international community has taken a piecemeal approach to environmental issues in isolation from one another, adding to the

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[10] *Id.* at 6.

[11] *Id.*

[12] *Id.* at 6-7.

[13] Rio+20, U.N. Conference on Sustainable Development, Outcome of the Conference—The Future We Want, Rio de Janeiro, Brazil, June 20-22, 2012, U.N. Doc. A/CONF.216/L.1,(June 19, 2012), http://www.uncsd2012.org/content/documents/727The%20Future%20We%20Want%2019%20June%201230pm.pdf [hereinafter *The Future We Want*].

[14] *Id.* ¶ 87.

[15] Executive Director of the U.N. Joint Inspection Unit, *Management Review of Environmental Governance within the United Nations System*, U.N. Doc. JIU/REP/2008/3; UNEP/GC.25/INF/33, at 4 (2008) [hereinafter *Management Review of Environmental Governance*].

fragmentation of the environmental pillar. As UN Under Secretary General and UNEP Executive Director Achim Steiner stated at the opening of the first universal session of the governing council of UNEP in Nairobi on February 18, 2013, "We cannot continue to 'save the planet,' one species, one ecosystem, one policy, one issue, one law, one treaty, at a time. Our challenge at the beginning of the 21st century has become a systemic one."[16]

Next, in Part II I will review the early efforts at establishing an international environmental governance regime under the auspices of UNEP. Part III provides a discussion of the various governance reforms undertaken over the years. Part IV covers the Rio+20 conference and the developments since the conference. Part V is the concluding section.

II. EARLY INTERNATIONAL ENVIRONMENT GOVERNANCE (IEG) INITIATIVES UNDER UNEP

The UN General Assembly established UNEP[17] following the Stockholm Conference. It consisted of a Governing Council, comprising representatives of fifty-eight governments, to serve as a legislative body; the Environmental Fund, financed by voluntary contributions and used to support the cost of new environmental issues undertaken within the UN system; and the Environmental Secretariat, to serve as a focal point and a catalyst for environmental action and coordination within the UN system.[18] In the post-Stockholm period, mounting concern for the environment, coupled with UNEP's function as a catalyst, led to the establishment of ministries of environment in more than 100 countries, compared to the ten that existed prior to Stockholm.[19] An increasing number of developing states accepted the linkage between development and environmental protection.[20] At the international level, all UN specialized agencies and some UN organs began to include relevant environmental considerations in their policies and programs.

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[16] Executive Director of the U.N. Env't Programme, First Universal Session of the Governing Council of UNEP, Nairobi, Feb. 18, 2013, *Policy Statement*, at 5, *available at* http://www.unep.org/GC/GC27/Docs/ED_POLICY_STATEMENT_2013.pdf [hereinafter *Policy Statement*].

[17] G.A. Res. 2997 (XXVII), 27 U.N. GAOR, 27th Sess., Supp. No. 30, U.N. Doc. A/8730 (Dec. 15, 1972).

[18] U.N. Env't Programme, COMPENDIUM OF LEGISLATIVE AUTHORITY (1978) (containing UNEP official Documents).

[19] *See, e.g.*, J. Donohue, *Earthwatch*, 146 AMERICA 453 (1982).

[20] *See, e.g.*, R. CLARKE & L. TIMBERLAKE, STOCKHOLM PLUS TEN: PROMISES, PROMISES? THE DECADE SINCE THE 1972 UN ENVIRONMENT CONFERENCE (1982).

It was, however, only after the environmental disasters in Bhopal, Chernobyl, and Basel in the mid-1980s[21] and the 1987 discovery of the hole in the ozone layer over the Antarctic[22] that the world community was roused to definitively confront environmental challenges. The recognition grew that concerted global efforts were necessary,[23] and this realization led to an enhanced role for UNEP to work on international environmental problems and threats.

UNEP was envisioned as a vehicle for coordinating the goals of global environmental assessment and environmental management.[24] Pursuant to the Action Plan adopted at Stockholm, which had outlined a three-part functional framework, consisting of Environmental Assessment, Environmental Management, and Supporting Measures,[25] UNEP began performing this task through the coordination of environmental activities of the various UN agencies and the cooperation of governments, international scientific and professional communities, and nongovernmental organizations.[26] It described itself as "the environmental conscience of the UN."[27]

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[21] *See generally* Ved P. Nanda & Bruce Bailey, *Export of Hazardous Waste and Hazardous Technology: Challenge for International Environmental Law*, 17 DENV. J. INT'L L. & POL'Y 155 (1988).

[22] *See* R. W. WATSON, *ET AL.*, *PRESENT STATE OF KNOWLEDGE OF THE UPPER ATMOSPHERE 1988: AN ASSESSMENT REPORT* 18 (1988).

[23] *See generally* Ved P. Nanda, *Stratospheric Ozone Depletion: A Challenge for International Law and Policy*, 10 MICH. J. INT'L L. 482 (1989); Ved P. Nanda, *Global Warming and International Environmental Law: A Preliminary Inquiry*, 30 HARV. INT'L L.J. 375 (1989).

[24] G.A. Res. 2997 (XXVII), U.N. GAOR, 27th Sess., Supp. No. 30, U.N. Doc. A/8730, at 43 (Dec. 15, 1972).

[25] *See Stockholm Report*, *supra* note 1, at 59.

[26] *See* Mark A. Gray, *The United Nations Environment Programme: An Assessment*, 20 ENVTL. L. 291, 294 (1990); ENVIRONMENTAL LAW IN UNEP (UNEP Environmental Law No. 1, 1991); U.N. Env't Programme, *International Conventions and Protocols in the Field of the Environment*, U.N. Doc. A/C. 2/46/3 (1991); U.N. Env't Programme, *Register of International Treaties and Other Agreements in the Field of the Environment*, UNEP/GC. 16/Inf. 4 (Nairobi, 1991); U.N. Env't Programme, *International Legal Instruments in the Field of the Environment*, Decision 15/31 of the Governing Council of the United Nations Environment Programme (May 25, 1989), *reprinted in* UNEP, *Report of the Governing Council on the Work of Its Fifteenth Session*, U.N. GAOR, 44th Sess., Supp. No. 25, Annex I, at 158, U.N. Doc. A/44/25. *See also* Decision 15/33 of the Governing Council of UNEP, *reprinted in GC Fifteenth Session Rep.*, at 160, noting the adoption of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, *opened for signature* Mar. 22, 1989, *reprinted in* 28 I.L.M. 649 (1989) (entered into force May 5, 1992).

[27] *Information and Outreach*, UNEP, http://www.unep.org/newyork/informationoutreach/tabid/52263/Default.aspx (last visited Mar. 15, 2013).

UNEP'S ability to coordinate global environmental efforts and to combat environmental degradation was, however, questioned in the 1990s, primarily on two grounds. First, because of severe underfunding, UNEP had to rely upon individual state contributions as its source of financing,[28] for which reason some doubted that UNEP could have any substantial impact upon the policy development level of international environmental law.[29] Second, because of UNEP's lack of enforcement power, it was unable to compel compliance by violators of its environmental principles, and hence was viewed as lacking teeth.[30]

III. UNEP AND INITIATIVES FOR GOVERNANCE REFORM SINCE THE LATE 1990S

A. Major Developments

During the 1990s, UNEP continued to pursue its mandate as the principal UN body in the environmental field. Toward the end of the decade and into the beginning of the new millennium, however, it underwent a number of changes which were spurred primarily by three factors: 1) a lack of adequate resources; 2) questions about its role, following the establishment of the Commission on Sustainable Development (CSD)[31] to assist in the implementation of recommendations and decisions of the United Nations Conference on Environment and Development, held at Rio de Janeiro from June 3-14, 1992,[32] to mark the 20th anniversary of the Stockholm Conference and to address the North-South environment-development divide; and 3) concerns about its management and institutional structure, which were seen not to be adequately responsive to meet the primary need for addressing environmental problems.

Responding to these concerns, the UNEP Governing Council revised UNEP's mandate by identifying certain specific tasks for the body's focus. The 1997 *Nairobi Declaration*[33] charged UNEP to:

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[28] *See* Gray, *supra* note 26, at 294; *Developments in the Law—International Environmental Law* (Part V., Institutional Arrangements), 104 HARV. L. REV. 1580, 1585 (1991) [hereinafter *Developments in the Law*].

[29] *Id.*

[30] Geoffrey Palmer, *New Ways to Make International Environmental Law*, 86 AM. J. INT'L L. 259, 261 (1992).

[31] *See General Assembly Approves Establishment of Commission on Sustainable Development,* 16 Int'l Env't Rep. (BNA) (Jan. 13, 1993).

[32] United Nations Conference on Environment and Development, Rio de Janiero, Braz., June 3-14, 1992, *Rio Declaration on Environment and Development,* U.N. Doc. A/CONF.151/26/Rev.1 (vol. 1), Annex 1 (Aug. 12, 1992).

[33] Governing Council of the U.N. Env't Programme, 19th Sess., Jan. 27- Feb. 7, 1997,

- assess environmental trends, provide policy advice and early warnings on environmental threats, and catalyze and promote international cooperation and action based on the available scientific and technical capabilities;

- further the development of international environmental law to promote sustainable development, "including the development of coherent interlinkages among existing international environmental conventions";

- advance the implementation of agreed international norms and policies, monitoring and fostering compliance with environmental principles and international agreements, and stimulate cooperative action to respond to emerging environmental challenges; and

- strengthen its role in the coordination of the UN system's environmental activities; and provide policy and advisory services to governments and other institutions in key areas of institution-building.

Subsequently, the UNEP Governing Council adopted the 2000 Malmö Declaration,[34] identifying major environmental challenges of the 21st century and pointing out ways for the international community to address them. In that Declaration, the Council recognized the growing trends of environmental degradation that threaten sustainability, notwithstanding the international community's commitment to halt them, and called for greater coordination and coherence among international environmental law instruments. It noted the discrepancy between commitment and action, and stressed "that the root causes of global environmental degradation are embedded in social and economic problems such as pervasive poverty, unsustainable production and consumption patterns, inequity in distribution of wealth, and the debt burden[.]"[35]

The Council also emphasized that, in order to combat environmental degradation, just as full participation of all actors in society would be required, so also an institutional architecture was required with adequate capacity to effectively address "wide-ranging global threats in a globalizing world."[36] And it urged that actions should be timely and should be taken to implement the political and legal commitment entered into by the

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U.N. Doc. UNEP/G.C. 19/1, Annex I (1997), *available at* http://www.unep.org/Documents.multilingual/Default.asp?DocumentID=96&ArticleID=1458&l=en.

[34] Governing Council of the U.N. Env't Programme, 6th Sess., May 29-31, 2000, U.N. Doc. A/55/25 Annex 1 (2000).

[35] *Id.*

[36] *Id.* ¶ *24.*

international community; and that the outcomes of such actions should be aimed at reversing the present trends of environmental degradation.[37]

In 2001, an open-ended intergovernmental group of ministers was established to undertake a comprehensive, policy-oriented assessment of existing institutional weaknesses of the environmental governance system as well as future needs and options for strengthening it.[38] The Seventh Special Session of the Global Ministerial Environmental Forum adopted the group's report in 2002.[39]

UNEP responded to both the Nairobi and Malmö Declarations by developing a functional approach instead of continuing the fragmented, sectoral approaches it had traditionally followed. In his report on the organization's proposed program of work for the Biennium 2002-2003, then-UNEP Executive Director Klaus Toepfer explained the agency's new seven-part, "functional" focus:

> The functions of environmental assessment and early warning, environmental policy development, policy implementation, regional cooperation and representation, building mutual support, coherence and greater effectiveness among conventions and communications and public information remain at the core of UNEP's programme planning and delivery. Together with the subprogramme on technology, industry and economics, these functions form the seven-subprogramme structure of UNEP's programme of work.[40]

Regarding environmental assessment, UNEP further enhanced and strengthened its capabilities and output by producing five impressive reports on the state of the global environment: *Global Environmental Outlook 1* (GEO-1)(1997),[41] *GEO-2000* (1999),[42] *GEO-3* (2002),[43] *GEO-4*

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[37] *Id.* ¶ 1-2.

[38] U.N. Env't Programme, *Proceedings of the Governing Council at its Twenty-First Session,* at 59, U.N. Doc. UNEP/GC.21/9 (Feb.14, 2001) [hereinafter *Decision 21/21: International Environmental Governance*].

[39] U.N. Env't Programme, *Report of the Governing Council: Seventh Special Session,* New York, NY, Feb. 13-15, 2002, U.N. Doc. A/57/25, Annex I, at 23 [hereinafter *Decision SS.VII/1: International Environmental Governance*].

[40] Executive Director of the U.N. Env't Programme Governing Council/Global Ministerial Environment Forum, *Report of the Executive Director, Programme, The Environment Fund and Administrative and Other Budgetary Matters*, UNEP/GC. 21/16, (Oct. 2, 2000), ¶ 68; *see also* G.A. Res. 56/6 (XII), U.N. Doc. A/56/6/ (Sect. 12) (Apr. 17, 2001), *available at* http://www.un.org/documents/ga/docs/56/a566s12.pdf.

[41] U.N. Env't Programme, *Global Environment Outlook 1: Global State of the Environment Report (1997), available at* http://www.unep.org/geo/geo1/ch/toc.htm.

[42] U.N. Env't Programme, *Global Environment Outlook 2000* (1999), *available at* http://www.unep.org/geo/GEO2000.asp.

[43] U.N. Env't Programme, *Global Environment Outlook 3, supra* note 4.

(2007),[44] and *GEO-5* (2012).[45] These reports have detailed dire assessments of the state of negative environmental change, the lack of progress toward sustainable development, and the need for prompt action. Other significant environmental assessment developments included the formal integration of the World Conservation Monitoring Center into UNEP,[46] enhancement of UNEP's early warning capability through its Global Resource Information Database Centers,[47] and the work of the reformed INFOTERRA, the global environmental information exchange network.[48]

UNEP's work to develop international environmental law is aimed at:

- encouraging international action to address gaps and weaknesses in existing international environmental law;
- responding to new environmental challenges;
- promoting and providing legal advisory services for the development or strengthening of regional and global multilateral environmental agreements;
- assisting governments, particularly those of developing countries and countries with economies in transition, in the developing of legal instruments; and developing and promoting the development of soft law instruments, such as codes of conduct and guidelines.[49]

UNEP's program for the development of environmental law for the first decade of the 21st century[50] focused on three areas: effectiveness of

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[44] U.N. Env't Programme, *Global Environment Outlook 4: Environment for Development* (2007), *available at* http://www.unep.org/geo/GEO4.asp.

[45] U.N. Env't Programm, *Global Environment Outlook 5*, *supra* note 9.

[46] *See* U.N. ENV'T PROGRAMME WORLD CONSERVATION MONITORING CENTRE, http://www.unep-wcmc.org/ (last visited Mar. 29, 2013).

[47] *See* U.N. ENV'T PROGRAMME DEWA/GRID-GENEVA, http://www.grid.unep.ch/ (last visited Mar. 29, 2013).

[48] *See* U.N. ENV'T PROGRAMME INFOTERRA: THE GLOBAL ENVIRONMENTAL INFORMATION EXCHANGE NETWORK, http://www.unep.org/infoterra/ (last visited Mar. 29, 2013).

[49] Progressive *Development of International Environmental Law*, U.N. Env't Programme, http://www.unep.org/delc/progressivedevelopment/tabid/78545/default.aspx (last visited Mar. 15, 2013).

[50] U.N. Env't Programme Governing Council/Global Ministerial Environment Forum, *Report of the Meeting of Senior Government Officials Expert in Environmental Law to Prepare a Programme for the Development and Period Review of Environmental Law for the First Decade of the Twenty-First Century*, UNEP/GC.21/INF/3 (Dec. 15, 2000). The

environmental law,[51] conservation and management,[52] and relationship with other fields.[53] Effectiveness comprises nine subheadings: implementation, compliance, and enforcement; capacity-building; prevention and mitigation of environmental damage; avoidance and settlement of international environment disputes; strengthening and development of international environmental law; harmonization and coordination; public participation and access to information; information technology; and innovative approaches to environmental law.[54] Conservation and management covers eight areas: freshwater resources; coastal and marine ecosystems; soils; forests; biological diversity; pollution prevention and control; production and consumption patterns; and environmental emergencies and natural disasters.[55] Relationship with other fields includes trade, security and the environment, and military activities and the environment.[56]

Regarding environmental conventions and international law, UNEP works on linkages among the various environmental treaty governing bodies and promotes their effective implementation. By its work on regional seas conventions and action plans, it aims at uniting the focus of agencies and conventions. Moreover, UNEP has worked toward strengthening linkages between the regional seas conventions and the chemicals-related conventions (particularly the Basel Convention on Hazardous Wastes, the Rotterdam Convention on Prior Informed Consent, and the Persistent Organic Pollutants (POPs) Convention), and the biologic conventions (the Convention on Biological Diversity, CITES, the Convention on Migratory Species of Wild Animals, and conventions and programs on marine mammals, fisheries, and coral reef ecosystems).[57]

UNEP has played a significant role in the development of multilateral environmental agreements (MEAs), and, as of the beginning of 2012, over 600 were registered with the United Nations–61 related to atmosphere, 155

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document contains the report of the meeting of those experts, UNEP/Env.Law/4/4 (Oct. 31, 2000), *available at* http://www.unep.org/gc/gc21/Documents/gc-21-INF-03/K0000295.E.PDF [hereinafter *UNEP Program for Development of Environmental Law*].

[51] *Id.* § I, ¶¶ 1-9.

[52] *Id.* § II, ¶¶ 10–17.

[53] *Id.* § III, ¶¶ 18-20.

[54] *Id.* § I, ¶¶ *1-9.*

[55] *Id.* § I, ¶¶ 10-17.

[56] *Id.* § I, ¶¶ 18-20.

[57] U.N. Env't Programme Governing Council/Global Ministerial Environment Forum, *Report of the Third Global Meeting of Regional Seas Conventions and Action Plans*, ¶¶ 79–136, UNEP/G.C. 21/Inf/14, Annex, (Jan. 21, 2001), *available at* http://www.unep.org/GC/GC21/Documents/gc-21-INF-14/E-21-INF-14.PDF.

to biodiversity, 179 to chemicals and wastes, 46 to land, and 197 to water.[58] In 2012, it was engaged in preparation of a global legally-binding instrument on mercury.[59] UNEP has also undertaken activities designed to implement the Strategic Approach to International Chemicals Management,[60] which include addressing risks posed to human health and the environment from exposure to lead and cadmium and reducing their human-caused uses in key products and industry.

An especially noteworthy feature of international environmental agreements is their common institutional components—a secretariat, a bureau, advisory bodies, and financial and clearinghouse mechanisms. Their decision-making bodies are Conferences and Meetings of the Parties (COPs and MOPs), with subsidiary bodies on scientific, technical or financial issues, or focused on progress in implementation. It is promising that there has been some closer collaboration in the programs of work between and among the various conventions, although much more needs to be done to promote further collaboration and effectiveness. In addition, NGOs have played a more active role as advisors or observers in the deliberations of many agreements.

The number of MEAs and their scope are indeed impressive. However, in December 2001, UNEP's then-Executive Director Klaus Toepfer made several critical observations. He reported that "the agreements lack coherence with respect to a number of important new environmental policy issues such as the precautionary approach and scientific uncertainty, intergenerational and intra-generational equity, the life-cycle economy, common but differentiated responsibilities, and sustainable development."[61] He noted the lack of adequate coordination among existing MEAs as a major obstacle to implementation of these agreements and to effective international environmental governance.[62] Several problem areas include:

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[58] Executive Director of the U.N. Env't Programme Governing Council, *Discussion Paper by the Executive Director, Background Paper for the Ministerial Consultations–Global Environment Outlook and Emerging Issues: Setting Effective Global Environmental Goals*, UNEP/GCSS.XII/13 (Jan. 5, 2012), *available at* http://www.unep.org/gc/gcss-xii/docs/download.asp?ID=3575.

[59] Executive Director of the U.N. Env't Programme Governing Council, *Report of the Executive Director: Chemicals Management, Including Mercury*, UNEP/GC.26/5/Rev.1, § II (Jan. 25, 2011), *available at* http://www.unep.org/gc/gc26/working-docs.asp.

[60] *Id.*, § III.

[61] Executive Director of the U.N. Env't Programme Governing Counsel, *Global Ministerial Environment Forum, International Environmental Governance, Seventh Special Session*, ¶ 51, U.N. Doc. UNEP/GCSS.VII/2, (Dec. 27, 2001) [hereinafter *Executive Director's 2001 Report*].

[62] *See generally id.* ¶¶ 135-39. For suggestions to cluster MEAs, see also KONRAD VON MOLTKE, *ON CLUSTERING INTERNATIONAL ENVIRONMENTAL AGREEMENTS* (June 2001) *available*

too many MEAs; secretariats for conventions are located in different places, as are the venues for conferences of parties and of their subsidiary bodies; and the large number of meetings causes difficulties in participation, much less implementation, especially for developing countries.[63] Also, the burdensome national reports required by MEAs are frequently either submitted late or not at all. Lack of sufficient finances, uncertainty of appropriate technology transfer, and inadequate alternative dispute resolution mechanisms are among other major causes of ineffective implementation and monitoring.

In his 2001 report, Executive Director Toepfer suggested grouping a number of MEAs in order to promote efficiency and effectiveness, which could be done by clustering those that are related or overlapping at the sectoral level—for example, by grouping together biodiversity-related conventions—or at least clustering the meetings of conferences of parties and their subsidiary bodies. Or they could be clustered together at a functional level, for example, by grouping trade and finance related issues, or on a regional level.[64] Also, their secretariats could work together and their financial arrangements could also be coordinated.[65]

Other suggestions included strengthening the mandates and functioning of UNEP, the Commission on Sustainable Development, and the Global Environment Facility (GEF);[66] enhancing the participation of environmental NGOs; and the role of the UNEP Governing Council/Global Ministerial Environment Forum and Environmental Management Group for setting broad policy guidelines for environmental action on the international level; and developing improved coordination and synergies among the various environment-related organizations and between the World Trade Organization and these organizations.[67]

A major push for reform came following the September 14-16, 2005 World Summit of Heads of State and Government at the United Nations

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at http://www.iisd.org/pdf/trade_clustering_meas.pdf.

[63] *Executive Director's 2001 Report, supra* note 61, ¶ 136. In 2010, there were more meetings than days in the year. *See* Zakri Abdul Hamid, *A world organization for an equitable green economy,* SCI DEV NET (Jan. 5, 2012), http://www.scidev.net/en/science-and-innovation-policy/science-at-rio-20/opinions/a-world-organization-for-an-equitable-green-economy.html.

[64] *Executive Director's 2001 Report, supra* note 61, ¶ 137.

[65] *Id.* ¶ 136.

[66] On the Global Environment Facility, *see generally* Executive Director of the U.N. Env't Programme Governing Counsel, *Amendment to the Instrument for the Establishment of the Restructured Global Environment Facility, U.N.* Doc. UNEP/GC.26/12 (Dec. 7, 2010), *available at* http://www.unep.org/gc/gc26/cow_details-docs.asp?DocID=unep/GC.26/12&CATID=15.

[67] *See generally Executive Director's 2001 Report, supra* note 61, ¶¶ 129–34.

Headquarters in New York. In a resolution adopted by the United Nations General Assembly, entitled "2005 World Summit Outcome," the Heads of State and Government supported the achievement of "stronger system-wide coherence within the United Nations system."[68] Two review processes were initiated, the first resulting in the report, *Delivering As One: Report of the High-Level Panel on United Nations System-Wide Coherence in the Areas of Development, Humanitarian Assistance and the Environment*,[69] and the second leading to the initiation of the Informal Consultative Process on the Institutional Framework for the United Nations Environment Activities.[70]

However, not much happened on the reform front until 2009, when the UNEP Governing Council decided to establish a group of regionally representative ministers or high-level representatives to develop a set of options for improving international governance.[71] In its report, endorsed at the 2010 Eleventh Special Session,[72] the group presented a set of options for improving international governance.[73] They identified five objectives: 1) creating a strong, credible and accessible science base and policy interface; 2) developing a global authoritative voice for environmental sustainability; 3) achieving effectiveness, efficiency and coherence within the United Nations system; 4) securing sufficient and predictable funding; and 5) ensuring a responsive and cohesive approach to meeting the needs of countries.[74]

Subsequently, the Executive Director prepared a report on incremental improvements to international environmental governance for adoption by

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[68] 2005 World Summit Outcome, G.A. Res. 60/1, ¶ 169, U.N. Doc. A/RES/60/1 (Sept. 16, 2005), *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/487/60/PDF/N0548760.pdf?OpenElement.

[69] G.A. Res. 61/583, U.N. GAOR, 61st Sess., Agenda Item 113, U.N. Doc. A/61/583 (Nov. 20, 2006).

[70] U.N. General Assembly *Informal Consultative Process on the Institutional Framework for the United Nations' Environment Activities, Co-Chairs' Options Paper* (June 14, 2007) (Claude Heller Rouassant & Peter Mayer), *available at* http://www.un.org/ga/president/61/follow-up/environment/EG-OptionsPaper.PDF.

[71] Governing Counsel of the U.N. Env't Programme, 25th Sess., Feb. 16-20, 2009, U.N. Doc. UNEP/GC.25/17 , Annex I, ¶ 18 (Feb. 26, 2009) ("Decision 25-4: International Environmental Governance").

[72] Governing Counsel of the U.N. Env't Programme, 26th Sess., Feb. 21-24, 2011, U.N. Doc. UNEP/GCSS.XI/11, Annex I, ¶ 7 (Mar. 3, 2010) ("Decision SS.XI/1: International Environmental Governance").

[73] Governing Counsel of the U.N. Env't Programme, 27th Sess., Feb. 24-26, 2010, U.N. Doc. UNEP/GCSS.X1/4, Annex (Feb. 2010).

[74] *Id.* For incremental reform options see *id.* ¶ 12, and for broader reform options see *id.* ¶ 13.

the Governing Council,[75] an issue considered eventually at Rio+20. The Consultative Group concluded its work at a meeting in Helsinki in November 2010 and presented to the UNEP Governing Council six core options that outline the main "functions and system-wide responses" areas to strengthen international environmental governance, which are: 1) strengthen the science-policy interface; 2) develop a UN system-wide strategy for the environment; 3) realize synergies between multilateral environmental agreements; 4) link global environmental policy making and financing; 5) develop a system-wide capacity-building framework for the environment; and 6) strengthen strategic engagement at the regional level.[76]

In addition, they put forward the following five options for "broader institutional reform": 1) enhancing UNEP; 2) establishing a new umbrella organization for sustainable development; 3) establishing a specialized agency such as a world environment organization; 4) reforming the UN Economic and Social Council and the UN Commission on Sustainable Development; and 5) enhancing institutional reforms and streamlining existing structures.[77]

There is growing recognition that without placing the environmental dimension of sustainable development at par with the economic and social dimension, the goals of sustainable development will be hard to realize. This recognition seems to have led the Heads of State and Government at the 2012 Rio+20 UN Conference on Sustainable Development (UNCSD) in their Outcome Document, *The Future We Want*,[78] to affirm "the need to strengthen international environmental governance within the context of the institutional framework for sustainable development, in order to promote a balanced integration of the economic, social and environmental dimensions of sustainable development as well as coordination within the UN system."[79]

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[75] Executive Director of the U.N. Env't Programme, *Report of the Executive Director: International environmental governance*, U.N. Doc. UNEP/GCSS.XII/3, Annex (Dec. 16, 2011).

[76] Outlined in the CONSULTATIVE GROUP OF MINISTERS OR HIGH-LEVEL REPRESENTATIVES ON INTERNATIONAL ENVIRONMENTAL GOVERNANCE, Nairobi-Helsinki Outcome, ¶ 7(a)-(f),(Nov. 23, 2010), *available at* http://www.unep.org/environmental governance/Portals/8/NairobiHelsinkifinaloutcome.pdf.

[77] *Id.* ¶ 11 (a)-(e).

[78] *The Future We Want*, *supra* note 13.

[79] *Id.* ¶ 87.

B. Appraisal

Several gaps in the current system of international environmental governance have been identified, including the following:

(a) lack of an authoritative voice to guide environmental policy effectively at the global level;

(b) lack of coherence among global environmental policies and programs;

(c) high degree of financial fragmentation;

(d) lack of coherence in the governance and administration of multilateral environmental agreements;

(e) lack of a central monitoring, review and accountability system for commitments made under multilateral environmental agreements;

(f) lack of sufficient, secure and predictable funding; and

(g) implementation gap experienced at the country level.[80]

Although more than 600 MEAs are in place, which is an impressive number, the fragmentation of the system can be witnessed by reviewing how the international community has established and managed the system—a large number of institutions are engaged in environmental issues, including UNEP, the United Nations Development Program, the World Bank, the Global Environment Facility (GEF), and MEAs; science is managed through multiple MEA subsidiary bodies and the GEF's Scientific and Technical Advisory Panel; and capacity-building efforts are undertaken through agencies, programs and MEAs.[81]

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[80] Governing Counsel of the U.N. Env't Programme, 12th Special Sess., Feb. 20-22, 2012, ¶ 2, U.N. Doc. UNEP/GCSS. XII/13/Add.2 (Feb. 22, 2012), *available at* http://www.unep.org/gc/gcss-xii/docs/download.asp?ID=3553.

[81] *See generally* Division of Environmental Law and Conventions (DELC), *Issues Brief # 1: The Environmental Dimension of IFSD: Importance of Environmental Pillar to IFSD, U.N. ENV'T PROGRAMME* (2011), *available at* http://www.unep.org/environmentalgovernance/Portals/8/InstitutionalFrameworkforSustainabledevPAPER1.pdf; *Issues Brief # 2: The Environmental Dimension of IFSD: Fragmentation of Environmental Pillar and Its Impact on Efficiency and Effectiveness, U.N. ENV'T PROGRAMME* (2011), *available at* http://www.unep.org/environmentalgovernance/Portals/8/InstitutionalFrameworkforSustainabledevPAPER2.pdf; *Issues Brief # 3: The Environmental Dimension of IFSD: Country Responsiveness: Implementation and Capacity Support for the Environmental Pillar of IFSD, U.N. ENV'T PROGRAMME (2011), available at* http://www.unep.org/environmentalgovernance/Portals/8/InstitutionalFrameworkforSustainabledevPAPER3.pdf. Much has been written on international environmental governance. For illustrative purposes, see generally Karen N. Scott, *International Environmental Governance: Managing Fragmentation Through Institutional Connection*, 12 MELBOURNE J. INT'L L. 177 (2011); Dr. Maria Ivanova, *Global Governance in the 21st Century: Rethinking the Environmental*

IV. RIO+20 AND SUBSEQUENT ACTIONS

Several of the reform initiatives discussed above were taken in response to these criticisms, and these efforts culminated in the decisions at the Rio+20 Conference on Sustainable Development[82] and the decisions by the UN General Assembly[83] and the Governing Council of UNEP.[84]

In the President's Summary of the Discussions by Ministers and Heads of Delegation at the twelfth special session of the Governing Council/Global Ministerial Environment Forum of UNEP, he said that reform of the system may include "enhanced synergies within multilateral environmental agreement clusters to increase their effectiveness and efficiency[,]"[85] as such synergies "afford an opportunity to realize the more efficient use of resources and to tackle environmental issues more effectively at the national and international levels and in delivering on the ground, among other things."[86]

On the suggested reform regarding UNEP, the President noted the strengthening of the organization by establishing universal membership for its Governing Council and its sustainable funding.[87] He added:

> The strengthening of the environmental component of the institutional framework for sustainable development found broad support among the ministers and other heads of delegation. Many expressed support for the

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Pillar, STAKEHOLDER FORUM (2012), *available at* http://www.stakeholderforum.org/fileadmin/files/IEG%20Paper-Ivanova-Final%20_2_.pdf; Mark Halle & Adil Najam, *International Environmental Governance Reform: Inputs to the African preparatory process*, INT'L INST. FOR SUSTAINABLE DEV. (2011), *available at* http://www.iisd.org/pdf/2011/international_enviro_gov_africa.pdf; Ole Kristian Fauchald, *International Environmental Governance: A Legal Analysis of Selected Options*, FRIDTJOF NANSEN INST. (2010), *available at* http://www.environmentalgovernance.org/wp-content/uploads/2011/06/10.-Fauchald_IEG-A-legal-analysis-of-selected-options-Prof.-Ole-Kristian-Fauchald-Nov.-20103442.pdf; W. Bradnee Chambers, *Commonwealth Heads of Government Meeting on Reform of International Institutions, June 9-10, 2008, Reform of International Environmental Governance: An Agenda for the Commonwealth*, FRIDTJOF NANSEN INST., *available at* http://www.thecommonwealth.org/shared_asp_files/GFSR.asp?NodeID=179774.

[82] *See The Future We Want*, *supra* note 13; *infra* text accompanying note 94.

[83] *See infra* text accompanying note 97.

[84] *See infra* text accompanying notes 89-92, 99, 101.

[85] President's Summary of the Discussions by Ministers and Heads of Delegation at the Twelfth Special Session of the Governing Council/Global Ministerial Environment Forum of the United Nations Environment Programme (advance copy), U.N. ENV'T PROGRAMME ¶ 41 (March 8, 2012), *available at* http://www.UNEP.org/gc/gcss-xii/docs/Decisions_summary_advance.pdf.

[86] *Id.* ¶ 42.

[87] *Id.* ¶ 55.

> establishment of a specialized agency for the environment. Others expressed support for strengthening UNEP but suggested that changing UNEP to a specialized agency could weaken it.[88]

In March 2012, the UNEP Governing Council recognized "the importance of enhancing synergies, including at the national and regional levels, among the biodiversity-related conventions[.]"[89] It encouraged "the conferences of the parties to these conventions to strengthen efforts further in that regard," and asked the Executive Director to undertake activities "to improve the effectiveness of and cooperation among multilateral environmental agreements,"[90] and "to explore the opportunities for further synergies in the administrative functions of the multilateral environmental agreement secretariats administered by the United Nations Environment Programme and to provide advice on such opportunities to the governing bodies of those [MEAs]."[91] The Governing Council also requested the Executive Director to "facilitate and support an inclusive, country-driven consultative process on the challenges to and options for further enhancing cooperation and coordination in the chemicals and wastes cluster in the long term[.]"[92]

At Rio+20, Heads of State and Government decided to strengthen and upgrade UNEP. They identified several specific avenues to do so in the

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[88] *Id.* ¶ 37. The president further stated that there was general agreement at the meeting that the UNCSD must make a clear decision on both the institutional framework for sustainable development and on international environmental governance. He noted that current shortcomings need to be addressed in an overall reform of the system, which should include:

> an anchor organization with universal membership; improving the science-policy interface; providing guidance to and coordinating multilateral environmental agreements; enhanced synergies within multilateral environmental agreement clusters to increase their effectiveness and efficiency; and the development of a United Nations system-wide strategy for the environment that sets priorities, decides on the division of labour and assigns roles to relevant actors . . . and links private investment and public policy. The establishment of a system of assessed contributions for the international environmental governance anchor institution would increase the total volume of available resources.

Id. ¶ 41.

[89] Decisions adopted by the Governing Council/Global Ministerial Environment Forum at its 12th special sess. (advance copy): Decision No. SS.XII/3: International environmental governance (advance copy), U.N. ENV'T PROGRAMME ¶ 1 (March 8, 2012), *available at* http://www.UNEP.org/gc/gcss-xii/docs/Decisions_summary_advance.pdf.

[90] *Id.* ¶ 2.

[91] *Id.* ¶ 3.

[92] Decisions adopted by the Governing Council/Global Ministerial Environment Forum at its 12th special sess. (advance copy): Decision No. SS.XII/5: Enhancing cooperation and coordination within the chemicals and wastes clusters, U.N. ENV'T PROGRAMME ¶ 3 (March 8, 2012), *available at* http://www.UNEP.org/gc/gcss-xii/docs/Decisions_summary_advance.pdf.

Outcome Document,[93] as they invited the UN General Assembly to adopt a resolution providing for:

- the establishment of universal membership in the UNEP Governing Council;
- having secure, stable, adequate, and increased financial resources from the regular budget of the UN and voluntary contributions to fulfill UNEP's mandate;
- enhancing UNEP's voice and its ability to fulfill its coordination mandate within the UN system;
- promoting a strong science-policy interface;
- disseminating and sharing evidence-based environmental information and raising public awareness on critical as well as emerging environmental issues;
- providing capacity-building to countries and supporting and facilitating access to technology;
- progressively consolidating headquarters functions in Nairobi and strengthening regional presence to assist countries in the implementation of national environmental policies; and ensuring the active participation of all relevant stakeholders.[94]

On MEAs, they acknowledged the work already done to enhance synergies among the Basel, Rotterdam, and Stockholm Conventions in the chemicals and waste cluster, and encouraged parties to MEAs "to consider further measures, in these and other clusters . . . to promote policy coherence at all relevant levels, improve efficiency, reduce unnecessary overlap and duplication, and enhance coordination and cooperation among MEAs, including the three Rio Conventions as well as with the UN system in the field."[95]

The Heads of State and Government also decided to establish a universal intergovernmental high level political forum which would replace the Commission on Sustainable Development, and whose format and organizational aspects are to be defined by the General Assembly.[96]

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[93] *See The Future We Want*, *supra* note 13, ¶ 88.

[94] *Id.*

[95] *Id.* ¶ 89.

[96] *Id.* ¶¶ 84-6.

Subsequently, the UN General Assembly adopted Resolution 67/213[97] in December 2012, deciding to strengthen and upgrade UNEP in the manner set out in paragraph 88 of *The Future We Want*[98] and also urging donors to increase voluntary funding to UNEP.

From February 18-22, 2013, the first Universal Session of the UNEP Governing Council met in Nairobi under the theme *Rio+20: From Outcome to Implementation.*[99] At the beginning of that session, Executive Director Steiner urged upon the participants the critical importance of the moment for decisions affecting the future of our environment, as he said:

> Given the current state of the global environment, which continues to be threatened by negative trends, UNEP's effectiveness is more critical than ever. The current framework of international environmental governance is characterized by institutional fragmentation and the lack of a holistic approach to environmental issues, although Member States are working to close the growing implementation gap in relation to environmental commitments and obligations under the MEAs. By leveraging its strengths and harnessing internal synergies, UNEP could do more to support national policy development, build capacity for implementing multi-lateral agreements and catalyze large-scale change at the global level.[100]

Among other decisions, the ministers called for the UN General Assembly to rename the existing UNEP Governing Council the "UN Environment Assembly," to function with the active participation of all relevant stakeholders.[101] At the close, Steiner said that the environment ministers took action in pursuance of the Rio+20 Outcome Document for "building a strong science-policy interface, and strengthening the exercise of environmental laws to fast tracking action on persistent and emerging issues, support for renewable energy under the UN Climate Convention and the decade-long initiative on decoupling natural resource use from economy growth . . . ."[102]

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[97] G.A. Res. 67/213, U.N. Doc. A/RES/67/213 (Dec. 21, 2012).

[98] *See supra* note 13 and text accompanying note 94.

[99] Press Release, U.N. Env't Programme, Press Release on Outcome of GC/GMEF27: UNEP Strengthened and Upgraded to Implement The Future We Want (Feb. 22, 2013), http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=2704&ArticleID=9417&l=en&t=long.

[100] *Management Review of Environmental Governance, supra* note 16, at 17.

[101] U.N. Env't Programme, Press Release, *supra* note 99.

[102] *UNEP Strengthened and Upgraded to Implement The Future We Want: Governments Call for Governing Council to be Transformed into UN Environment Assembly*, U.N. ENV'T PROGRAMME (Feb. 22, 2013), http://www.unep.org/newscentre/default.aspx?DocumentID=2704&ArticleID=9417.

V. CONCLUSION

The existing international environmental governance system has been generally criticized as fragmented, because multiple organizations, governments, and instruments with overlapping functions have been engaged in activities related to global environmental protection. The system is also perceived as lacking common vision, clear goals, and effective coordination. Another line of censure is the system's lack of accountability and coherent performance metrics, with the result that there is no sanction for those who violate the terms of MEAs. Inequitable, inadequate, and ineffective allocation and utilization of financial resources has been another common thread. The system also suffers from an implementation gap and capacity gap at the national level, coupled with the accountability gap mentioned earlier.

The structural changes undertaken at Rio+20 and since then are promising. Also, prior efforts toward ensuring coordination, cooperation, and collaboration among MEAs have set a healthy precedent. However, what has been primarily lacking thus far is not simply the need for structural coherence but effective implementation, compliance, enforcement, and accountability. The question still remains whether a strengthened and upgraded UNEP, with its broad and enhanced mandate and provision of new resources to it, can bridge the wide gaps mentioned above—accountability gap, implementation gap, and capacity gap at the national level.

Facing Mass Nuclear Damage Claims: Challenge of the Japanese Judicial System†

Naoki Idei*

I. INTRODUCTION

The Fukushima Nuclear Power Plant accident was part of the disaster caused by the Great East Japan Earthquake, which occurred on March 11, 2011.[1] The tsunami which followed the earthquake debilitated the cooling

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† This article is adapted from parts of the author's previous work, *The Nuclear Damage Claim Dispute Resolution Center*, JCAA (JAPAN COMMERCIAL ARBITRATION ASS'N) NEWSLETTER, Sept. 2012, at 1, *available at* http://www.jcaa.or.jp/e/arbitration/docs/newsletter28.pdf.

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[1] The earthquake was of magnitude 9.0 and large areas (approximately 560 sq km) were inundated by the tsunami. The disaster claimed over 19,000 human lives. *See generally Fukushima Accident 2011*, WORLD NUCLEAR ASSOCIATION (Mar. 2013), http://www.world-nuclear.org/info/Safety-and-Security/Safety-of-Plants/Fukushima-Accident-2011/#.UUjyHY6xEdI.

system of the nuclear reactors and led to the explosion, melting of the cores and resulting release and spread of radioactive materials.[2]

After the accident, the Japanese government issued orders for evacuation, designating the areas which were anticipated to be exposed to a risk of high level contamination. The accident necessitated more than a hundred thousand people living in Fukushima prefecture to seek refuge, evacuating their residences and business places.[3]

The government declared that the nuclear reactors came to cold shut-down condition in December 2011 and thus the accident itself came to an end.[4] As of the writing of this paper, however, more than a year and half from the accident, there is still large-scale displacement. Many evacuees still cannot, and are not permitted to, return to their home towns/villages, and for many no certain dates for return have been scheduled yet.[5] In March 2012, the government announced that the evacuation areas, the areas from which the government ordered to evacuate, would be re-categorized into three areas: (1) Zone A, where accumulated annual radiation dosage is confirmed to be below 20 milliseiverts (mSv) and ready for lifting of the evacuation order; (2) Zone B, where accumulated annual radiation dosage may exceed 20 mSv and continuation of evacuation would still be requested; and (3) Zone C, where accumulated annual radiation dosage may exceed 20 mSv after five years and would be unable to return at least for five years.[6] However, after eight months from the government's announcement, the government has not completed the re-categorization and therefore it is uncertain for many people when they can return to their home towns/villages.

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[2] The accident was classified at level 7 (highest) on the International Nuclear and Radiological Events Scale (INES). *See* MARK HOLT, ET AL., CONG. RESEARCH SERV., R41694, FUKUSHIMA NUCLEAR DISASTER 2 (2012), *available at* www.fas.org/sgp/crs/nuke/R41694.pdf.

[3] *Fukushima Daiichi Nuclear Power Plant Accident—A Year and a Half Passed*, KAHOKU SHIMPO (Jap.) Sept. 13, 2012, reported that the number of people who evacuated per government order is approximately 160,000 as of September 2012. The number of people who evacuated without government order (voluntary evacuation) is unknown. *Id.*

[4] *See Fukushima Accident 2011*, *supra* note 1.

[5] *Id.*

[6] Council for Nuclear Damage Dispute, *Second Supplement to Interim Guidelines on Determination of the Scope of Nuclear Damage resulting from the Accident at the Tokyo Electric Power Company Fukushima Daiichi and Daini Nuclear Power Plants (concerning Damages related to Review of Evacuation Areas by Government Instructions, etc.)* (Mar. 16, 2012), *reprinted in* Nuclear Energy Agency, Organization for Economic Cooperation and Development [OECD], *Japan's Compensation System for Nuclear Damage*, 173-183, OECD Doc. NEA No. 7089 (2012), *available at* http://www.oecd-nea.org/law/fukushima/7089-fukushima-compensation-system-pp.pdf.

In many towns and villages, whole communities were lost. Also, the damages expanded beyond the evacuee individuals and business enterprises. The rumor of contamination spread well beyond the area the government ordered evacuation. The secondary or indirect damages also spread like a ripple all over Japan, and possibly even abroad.

The impacts of the Fukushima Nuclear Power Plant accident on the Japanese society and economy are huge. Aside from compensation of damages, decontamination, lifting of evacuation orders, restoration and rebuilding of the damaged communities will be the major agenda. Decommissioning of the damaged nuclear reactors will also be an issue. It triggered controversy over the fundamental energy policy Japan has continued since the latter half of the twentieth century, i.e., peaceful utilization of nuclear energy, by casting doubt about the safety of the nuclear power plants.

This paper sheds light on one aspect of such impacts—compensation of nuclear damages caused by the Fukushima Nuclear Power Plant accident—and tries to report on how the Japanese judicial system has been coping with the mass nuclear damage claims. And in doing so, the writer wishes to focus on an alternative dispute resolution system (ADR) established for coping with such mass damage claims.[7]

II. FRAMEWORK OF NUCLEAR DAMAGE COMPENSATION

1. Substantive Laws

(1) Tort Law

Nuclear damage claims are governed by tort law, which provides very generally that a person who has intentionally or negligently infringed any right of others or legally protected interest shall be liable to compensate any damages resulting in consequence.[8]

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[7] There is a precedent of mass damage claims arising from nuclear power plant accident, which was the JCO Tokai Power Plant accident in 1999. *See generally Criticality Accident at Tokai Nuclear Fuel Plant (Japan)*, WISE URANIUM PROJECT (Dec. 14, 2010), http://www.wise-uranium.org/eftokc.html. The accident was classified at level 4 of INES. *Id.* At that time, it was reported that about 7000 damage compensation claims were handled mostly through direct negotiation. Only two cases were handled by the Council for Nuclear Damage Dispute. Eleven cases were litigated in the courts. Approximately 15.4 billion yen was paid for compensation. The JCO Tokai accident, the only precedent for mass nuclear damage claims, is not comparable to the Fukushima Daiichi Nuclear Power Plant accident in terms of accident level, geographical impact as well as the scope and amount of total damages.

[8] Minpō [Minpō] [Civ. C.] art. 709 (Japan).

(2) The Nuclear Damage Compensation Law

The Nuclear Damage Compensation Law sets forth special rules for the nuclear damage, i.e., damage caused by nuclear fission process or damage caused by radiation or toxic effect of nuclear fuel matter.[9] Under the Nuclear Damage Compensation Law, a nuclear power plant operator is liable for the nuclear damage. In the Fukushima Nuclear Power Plant case, the operator Tokyo Electric Power Company ("TEPCO") would be liable for the damages vis-à-vis the victims.

The Nuclear Damage Compensation Law provides for strict liability of a nuclear power plant operator for damages caused by a nuclear power plant accident. The operator is liable for the damages without proving the operator's negligence or fault.[10]

There is an exemption that the power plant operator may be exonerated when the damage resulted from "extraordinarily colossal natural disaster or social upheaval."[11] After the accident, there was a controversy over whether or not the Fukushima Nuclear Power Plant accident caused by the Great East Japan Earthquake falls within this exemption. Although the impact was enormous, the earthquake and tsunami of this scale were not unprecedented looking back through Japanese history. Although this issue has not been tested by Japanese courts, this issue seems to be moot at this stage since TEPCO has not invoked this exemption in the damage compensation processes.[12]

It also provides that the nuclear power plant operator alone is liable for the damage (concentration of liability).[13] In the Fukushima Nuclear Power Plant accident case, the operator TEPCO would be solely liable for the damages vis-à-vis the victims.

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[9] "Nuclear damage" is defined in Article 2, Paragraph 2 of the Nuclear Damage Compensation Law. Nuclear Damage Compensation Law, Act No. 147 of 1961, art. 2, para. 2 (Japan), as amended by Act No. 19 of Apr. 17, 2009.

[10] *Id.* art. 3, para. 1.

[11] *Id.*

[12] According to the Cabinet Secretary General in the Diet on May 2, 2011, the position of the Japanese government is that the Fukushima Nuclear Power Plant accident does not fall within the exemption. *See Japan: No Limits to Tepco Liability in Nuclear Disaster*, THE MALAYSIAN INSIDER (May 2, 2011), http://www.themalaysianinsider.com/business/article/japan-no-limits-to-tepco-liability-in-nuclear-disaster.

[13] Nuclear Damage Compensation Law, art. 4.

(3) Guidelines enacted by the Council

Under the Nuclear Damage Compensation Law, the Council for Nuclear Damage Dispute ("Council") was established.[14] The Council is empowered to provide for general rules governing the resolution of nuclear damage compensation disputes.[15] The Council deliberated for approximately three months and adopted the Interim Guidelines on the Scope of Nuclear Damage Arising from the Fukushima Nuclear Power Plant Accident ("Guidelines") of August 5, 2011.[16]

The Guidelines provided for general rules governing the nuclear damage claims.[17] The Guidelines made it clear that the scope of nuclear damage is no different from what the general tort laws, Article 709 of the Civil Code and the case law developed thereunder, would dictate.[18] The Guidelines said that the damages caused by the accident, directly or indirectly, should be compensated to the extent of proximate causation, including but not limited to the damages suffered by the victims caused by the evacuation as well as the damages triggered by reasonable reactions of the market, such as rumors of products being contaminated. Then, the Guidelines enumerated such damages as: expenses for evacuation including increased daily expenses; consolation money for evacuation; lost revenues and earnings (both from employment and business enterprise operated by victims); expenses for examination of contamination; damages upon properties (including personal properties, cars, lands and buildings, business properties, etc.); rumor damages caused by rumor of contamination; secondary damages suffered by a third party who has a certain economic relationship with the primary victim, etc.[19] On certain categories of damages, the Guidelines set forth an estimated damage amount, such as consolation money.[20] It is important to note that the

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[14] *Id.* art. 18, para. 1. The "Council for Nuclear Damage Dispute" is alternatively translated as the "Dispute Reconciliation Committee for Nuclear Damage Compensation."

[15] *Id.* art. 18, para. 2.

[16] Council for Nuclear Damage Dispute, *Interim Guidelines on Determination of the Scope of Nuclear Damage resulting from the Accident at the Tokyo Electric Power Company Fukushima Daiichi and Daini Nuclear Power Plants* (Aug. 5, 2011) [hereinafter *Interim Guidelines*], *reprinted in* Nuclear Energy Agency, Organization for Economic Cooperation and Development [OECD], *Japan's Compensation System for Nuclear Damage*, 123-161, OECD Doc. NEA No. 7089 (2012), *available at* http://www.oecd-nea.org/law/fukushima/7089-fukushima-compensation-system-pp.pdf.

[17] *Id.*

[18] *Id.* Part 2, para. 1.

[19] *Id.* Part 1, para. 2.

[20] *Id.* Part 3. The standard amount of consolation money for evacuation was determined to be 100,000 yen per person per month. *Id.* In case of evacuation to evacuation shelters,

Guidelines declared that the enumeration is not exhaustive and must not be interpreted to exclude the damages that are not explicitly written in the Guidelines.[21]

On December 6, 2012, the Council adopted the Supplement to the Guidelines, which set forth the rules on the damages suffered by the evacuees who voluntarily, i.e., without government orders, evacuated from certain areas in Fukushima prefecture.[22] On March 16, 2012, the Council adopted the Second Supplement to the Guidelines,[23] which set forth the general rules concerning re-categorization of the evacuation areas as mentioned in Part I above.[24] The Guidelines function as the basis for both direct compensation negotiation between the victim claimants and TEPCO as well as the compensation through ADR.

(4) International Treaties

There are international treaties on nuclear damage compensation, for example, the Paris Convention on Nuclear Damage Compensation[25] and Vienna Convention on Civil Liability for Nuclear Damage of 1963.[26] Japan is a party to neither of them.

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the standard amount is 120,000 yen per person per month. *Id.* The Guidelines made it clear that these are merely benchmarks and the amount of consolation money may be increased depending on the hardships of individual cases. *Id.*

[21] *Id. Foreword.*

[22] Ministry of Education, Culture, Sports, Science and Technology—Japan, *Restoration and Revival following the Great East Japan Earthquake—Creative Recovery, Starting with the Development of Human Resources*, Mext.Go.Jp, http://www.mext.go.jp/b_menu/hakusho/html/hpab201101/detail/1330449.htm (last visited Mar. 22, 2013).

[23] Council for Nuclear Damage Dispute, *Outline of Second Supplement to Interim Guidelines on Determination of the Scope of Nuclear Damage resulting from the Accident at the Tokyo Electric Power Company Fukushima Daiichi and Daini Nuclear Power Plants (concerning Damages related to Review of Evacuation Areas by Government Instructions, etc.)*, (Mar. 16, 2012) [hereinafter *Second Supplement to Interim Guidelines*], *reprinted in* Nuclear Energy Agency, OECD, *Japan's Compensation System for Nuclear Damage*, 169-171, OECD Doc. NEA No. 7089 (2012), *available at* http://www.oecd-nea.org/law/fukushima/7089-fukushima-compensation-system-pp.pdf.

[24] *Id.*

[25] Nuclear Energy Agency, OECD, Convention on Third Party Liability in the Field of Nuclear Energy, opened for signature July 29, 1960, 956 U.N.T.S. 264, *available at* http://www.nea.fr/html/law/nlparis_conv.html [hereinafter *Paris Convention*]. The Paris Convention was originally entered into in 1960, becoming effective in 1968. Amendment Protocol was adopted in 2004, but is not yet effective.

[26] Nuclear Energy Agency, OECD, Vienna Convention on Civil Liability for Nuclear Damage, opened for signature May 21, 1963, 1063 U.N.T.S. 266, *available at* http://www.iaea.org/Publications/Documents/Infcircs/1996/inf500.shtml [hereinafter Vienna Convention]. The Vienna Convention was originally entered into in 1963, becoming

2. Procedures

Overview

The scale of damages was unprecedented. The spread of radioactive materials, number of evacuees (both individuals and enterprises), the scope of damages caused by such radioactive contamination itself, the rumors of contamination, the damages caused by the evacuation and interruption of daily lives and business operations (including secondary or indirect damages triggered by such events), were beyond our imagination.[27] Since the early days following the accident, it had been anticipated that a huge number of damage claims would be asserted against TEPCO. Hotly discussed was how to deal with the huge number and scale of damage claims.[28]

Generally, there are three avenues for pursuing nuclear damage claims:

(i) Direct negotiation with a nuclear power plant operator;

(ii) Adjudication; and

(iii) Alternative dispute resolution (ADR)

(1) Direct Negotiation

From October 2011, TEPCO started payment of damage compensation to the evacuees and others, including evacuation expenses, lost earnings, lost profits, consolation money, etc.[29] TEPCO prepared and distributed claim forms to the known evacuees.[30] The victim claimants filled in these forms and sent them to TEPCO for assessment. In order to cope with mass damage claims, TEPCO set forth its internal criteria for damage

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effective in 1977. Amendment Protocol was adopted in 1997, becoming effective in 2003. *See Civil Liability for Nuclear Damage*, THE ENCYCLOPEDIA OF EARTH (Jan. 5, 2010), http://www.eoearth.org/article/Civil_liability_for_nuclear_damage.

[27] It is to be noted that few direct human damages—loss of life or damage to health caused directly by the nuclear power plant accident—have been reported although there are deaths and damage to health attributed to severe and long-term evacuation.

[28] *See, e.g.*, Eric Zager, *Paying for the Pain*, ROCK THE CAPITAL (May 13, 2011 11:13am), http://www.rockthecapital.com/05/13/paying-pain/.

[29] From April 2011, TEPCO started payment of provisional damage compensation. Compensation claims for property damages have not yet been accepted because the damage assessment would depend on the length of the evacuation periods, which, as mentioned above, has not been determined for many evacuees.

[30] *See TEPCO Starts Sending Out Claim Forms for Compensation*, JAPAN TODAY (Sep. 13, 2011), http://www.japantoday.com/category/national/view/tepco-starts-sending-out-claim-forms-for-compensation.

compensation based upon its own interpretation of the Guidelines and made its own assessment of the damages claimed by the victim claimants. The claimants who were not satisfied with TEPCO's assessment of damages pursue their claims through other dispute resolution mechanisms, discussed below.

(2) Adjudication and ADR

One such dispute resolution mechanisms is litigation in court. However, it was thought that the courts alone cannot handle all these mass damage claims. An alternative dispute resolution (ADR) mechanism that can swiftly and effectively resolve the compensation disputes had thus been called for.

The Nuclear Damage Claim Dispute Resolution Center ("Center") was established in August 2011 to cope with this unprecedented situation and in response to calls for ADR for nuclear damage compensation disputes.[31] Under the Nuclear Damage Compensation Law, the Council was given another power in addition to providing for the Guidelines—to conduct mediation of the nuclear damage compensation disputes.[32] The Center was established based on this function of the Council.

(3) Funding

Under the Nuclear Damage Compensation Law, nuclear power plant operators are required to procure nuclear damage compensation insurance of 120 billion yen per plant.[33] Although it is difficult to make even a rough estimation of the total damage amount to be compensated by TEPCO, the total damage arising from the Fukushima Nuclear Power Plant accident is expected to easily exceed such an amount.

In order to secure and facilitate the nuclear damage compensation by TEPCO, the Nuclear Damage Compensation Facilitation Organization was established in July 2011.[34] The Nuclear Damage Compensation Facilitation Organization makes funding available to TEPCO, providing financing

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[31] Naoki Idei, *The Nuclear Damage Claim Dispute Resolution Center*, JCAA (JAPAN COMMERCIAL ARBITRATION ASS'N) NEWSLETTER, Sept. 2012, at 1.

[32] Nuclear Damage Compensation Law, Act No. 147 of 1961, art. 18, para. 2 (Japan), as amended by Act No. 19 of Apr. 17, 2009.

[33] *Id.* art. 7, para. 1.

[34] *See* Outline of the Nuclear Damage Compensation Facilitation Corporation Act, MINISTRY OF ECONOMY, TRADE AND INDUSTRY (Aug. 2011), *available at* http://www.meti.go.jp/english/earthquake/nuclear/roadmap/pdf/20111012_.nuclear_damages_2.pdf [hereinafter *METI Outline*].

necessary for compensation payments, so that the compensation would be paid to the victims in timely fashion.[35] So far, more than one trillion yen has been provided by the Nuclear Damage Compensation Facilitation Organization to TEPCO.[36] Also, the Nuclear Damage Compensation Facilitation Organization oversees the adequate and timely payment to the victims both through direct negotiation and ADR.

III. OVERVIEW OF THE CENTER

1. Function

The Center is an administrative ADR institution established by the government. The Center handles only the nuclear damage compensation claims arising from the Fukushima Nuclear Power Plant accident. The Center deals with mediation; it does not have the power to adjudicate or arbitrate the disputes.[37]

In this connection, however, it is to be noted that TEPCO announced in November 2011 that it would respect settlement proposals given at the Center.[38] While it is unclear whether or not such an announcement constitutes TEPCO's legally binding obligation, as a matter of fact there have been no cases where TEPCO finally rejected a settlement proposal given by a mediator at the Center.

The mediations are currently conducted by about two-hundred mediators (*Chuukai-Iin*), all of whom are practicing lawyers. The mediators handle the cases alone or by forming a panel of two or three mediators.[39]

2. Organization

The activities of the Center are supervised and headed by the General Committee (*Soukatsu-Iinkai*), comprised of three committee members.[40]

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[35] *Id.*

[36] *Fukushima Accident 2011*, WORLD NUCLEAR ORGANIZATION (Mar. 2011), http://www.world-nuclear.org/info/Safety-and-Security/Safety-of-Plants/Fukushima-Accident-2011/#.UU1BGo6xEdI.

[37] Idei, *supra* note 31, at 1.

[38] *Id.* For a Japanese-language version of the Special Business Plan, jointly adopted by TEPCO and the Nuclear Damage Compensation Facilitation Organization and approved by the Japanese Government as of November 4, 2011, see www.meti.go.jp/press/2011/11/.../20111104002.html.

[39] *Id.*

[40] Mr. Yoshio Otani (Chairperson), attorney and ex-judge; Mr. Isomi Suzuki, attorney; and Mr. Kazuhiko Yamamoto, professor of Hitotsubashi University. *Id.* at 2 n.3.

The General Committee oversees the whole activities of the Center and adopts the rules for the mediation as well as various organizational rules.[41]

The Center has a secretariat, which assists the General Committee as well as supports the mediators in conducting each mediation case.[42] The Center has as of the end of 2012 about ninety research clerks (*Chosa-kan*), who assist the mediators in each mediation case. Currently, all the research clerks are relatively young lawyers who have been in practice for up to eight years or so. The Center has its main office in Tokyo and has five branch offices in Fukushima prefecture.[43]

3. Procedures at the Center

The damage compensation claims are filed with the Center in writing. Once the claim is filed, a mediator and a research clerk in charge are appointed and the claim is forwarded to TEPCO for response.[44] After receiving a response from TEPCO, the mediator holds hearings, listening to both parties' opinions and receives further submissions and evidence. Thereafter, the mediator makes a settlement proposal.

These are the typical processes of the mediation conducted at the Center. There are many cases where the mediator gives a settlement proposal without holding a hearing. There are also cases where claimants withdraw the claim or the mediator concludes the proceedings without giving a settlement proposal (in many cases where the mediator considers unlikely that the claim has merit).

The mediation proceedings are private. However, the result of the mediation, i.e., the settlement, can be made public.[45] The purpose of the publication is that settlements reached at the Center will be a guidance and reference in direct settlement negotiations between potential claimants and TEPCO.

4. Rule-Oriented ADR

One of the important features of the Center is that it is a so-called "rule-oriented ADR."[46] The Center deals with the nuclear damage claims arising

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[41] *Id.*

[42] *Id.* at 1-2.

[43] *Id.* at 2.

[44] *Id.*

[45] In order to protect the privacy of the claimants, information by which a claimant can be identified is masked or altered.

[46] In terms of mediation methods (or mediation types), the process being conducted at the Center is an evaluative method, where an mediator gives a settlement proposal based on

from one accident. The claimants are many, but the respondent is TEPCO alone. Although the results of the mediation cases—the settlements—can vary, the rules and the standards applied in them should be the same. Otherwise, it may cause disparity among the victims, which will be another cause for dissatisfaction, and it will also be difficult for TEPCO to accept. In order to secure the assimilation of the standards applied in each mediation case, the Center adopts the following mechanisms and practices: the Guidelines, discussed above, General Standards, and the ability of the General Committee to advise mediators who handle settlement proposals.

Because the Center's mediation function is derived from the power entrusted to the Council, the substantive rules governing the mediation conducted at the Center are primarily the Interim Guidelines (*Chuukan-Shishin*) adopted by the Council in August 2011,[47] as supplemented by the Additional Interim Guidelines of December 2011 and March 2012.[48]

Also, the General Committee is empowered to adopt General Standards (*Soukatsu-Kijun*), which paraphrase, break down or supplement the Guidelines.[49] So far, the General Committee has issued fourteen General Standards. Both the Guidelines and the General Standards are based on tort law and these are a crystallization of the interpretation of tort law applicable to damage claims of such massive scale.[50]

In addition, the General Committee has the ability to advise a mediator on making a settlement proposal. Such advice increases the likelihood of consistency among the mediators, who are expected to closely adhere to the General Committee's Guidelines and the General Standards.

Although the mediators are independent, the research clerks in charge of each case exchange information daily so that the mediators can catch up with the discussions and opinions of other mediation panels. Also, the

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legal evaluation of the merit of the case, as opposed to a facilitative method, where a mediator concentrates on facilitating discussion between the disputing parties to accomplish mutual compromise and agreement. As such, the mediation proceedings tend to be like a mini-arbitration aiming at giving the mediator's non-binding ruling, rather than mediation seeking compromise and agreement between the parties.

[47] *Interim Guidelines*, *supra* note 16.

[48] Council for Nuclear Damage Dispute, *Supplement to the Interim Guidelines on Determination of the Scope of Nuclear Damage resulting from the Accident at the Tokyo Electric Power Company Fukushima Daiichi and Daini Nuclear Power Plants (concerning Damages related to Voluntary Evacuation, etc.)*, (Dec. 6, 2012), *reprinted in* Nuclear Energy Agency, OECD, *Japan's Compensation System for Nuclear Damage*, 163-168, OECD Doc. NEA No. 7089 (2012), *available at* http://www.oecd-nea.org/law/fukushima/7089-fukushima-compensation-system-pp.pdf; *Second Supplement to Interim Guidelines*, *supra* note 23.

[49] Idei, *supra* note 31, at 2.

[50] *Id.*

mediators themselves gather and confer with each other by means of inter-panel conferences as well as informal study groups.

IV. ACTIVITIES AND CHALLENGES OF THE CENTER

1. Cases Filed and Concluded

The Center started its operation on September 1, 2011. Since its start and up to the end of 2012, the Center has accepted more than 5,000 filings, among which more than 1800 cases have come to conclusion either by settlement, withdrawal or discontinuation. (See the monthly table up to the end of 2012).

Table 1: Number of Cases Filed and the Results as of December 31, 2012

	Sep. 2011	Oct. 2011	Nov. 2011	Dec. 2011	Jan. 2012	Feb. 2012	Mar. 2012	Apr. 2012
Cases Filed	38	80	143	260	248	355	466	447
Cases Completed	0	1	1	4	8	23	49	91
Cases Settled	0	0	1	1	2	7	23	44
Cases Discontinued	0	0	0	0	1	7	10	11
Cases Withdrawn	0	1	0	3	5	9	16	36
Backlog	38	117	259	515	755	1,087	1,504	1,860

	May 2012	June 2012	July 2012	Aug. 2012	Sept. 2012	Oct. 2012	Nov. 2012	Dec. 2012	Total
Cases Filed	480	409	472	395	281	347	299	343	5,063
Cases Completed	127	160	215	235	184	266	256	241	1,851
Cases Settled	64	93	134	151	122	183	187	192	1,204
Cases Discontinued	34	30	36	34	25	29	33	22	272
Cases Withdrawn	29	37	45	50	37	54	36	27	385
Backlog	2,213	2,462	2,719	2,879	2,976	3,057	3,100	3,202	

Between 70—80% of the claims filed are claims by individuals, seeking compensation for damages of evacuation expenses, loss of earnings, as well as of non-economic damages, such as consolation money.[51] Between 20—30% of the claims are filed by business enterprises, seeking damages of lost revenues from the damaged business.[52] Also, business damages caused by rumors of contamination as well as indirect or secondary damages triggered by the primary victim's evacuation or interruption of the activities are claimed.[53] Less than 30% of the claims filed with the Center are represented by lawyers,[54] although recently the percentage of the claims represented by lawyers is increasing, as mentioned below.

2. Increasing Number of Filings

As shown in the table, the filings have substantially increased to 300 to 500 cases a month. A backlog is accumulating to more than 3000 cases.

It has taken approximately seven to eight months to finish the proceedings for each case. For an ADR expected to bring about swift and effective resolution of nuclear damage claim disputes, this situation is far from satisfactory. The criticism is heard that the procedure of the Center is too slow and the system of the Center is not well attuned to the swift rescue of the victims.

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[51] *Id.* at 3.
[52] *Id.*
[53] *Id.*
[54] *Id.*

In July 2012, TEPCO made its criteria for compensation of property damages and announced that it would accept filings as soon as the government draws the lines for the re-categorization of evacuation areas,[55] as mentioned in Part I above. It is anticipated that some time in 2013 the Center may be flooded with the property damage claim cases filed by the victims who are not satisfied with the amount offered by TEPCO through direct negotiation.[56] The Center needs to be prepared for such filings.

3. Coping with the Difficult Situation

Whether or not the Center really can handle such an increasing level of claims is the challenge the Center faces. In response to the challenge, the Center is coping with the following agenda.

First, the Center has tried and is trying to substantially simplify the mediation proceedings. The oral hearing will be held basically only once or twice, though there are exceptions. Many cases conclude without holding an oral hearing. Also, single person mediation is the norm and only in difficult cases is a panel of two or three mediators formed.[57]

Second, the Center is studying and developing a method of effectively handling mass claims, learning from the examples of mass litigation. In one case filed by approximately 130 individuals seeking damages of evacuation cost, consolation money, etc., the panel of mediators first selected representative cases (champion claims), and after making settlement proposals for the representative cases, have the parties negotiate directly in accordance with the standards adopted in the settlement proposal for the representative cases.[58] Such a method is called a "Champion Method."[59] There are many such mass claims involving a number of claimants.

Third, human resources have been enhanced and must be enhanced further. In April and May 2012, the Center, with the cooperation of the bar associations, increased the number of mediators to 200. The research clerks

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[55] Press Release, Tokyo Electric Power Company, Compensation According to the Redefined Evacuation Zone (Within the Evacuation Zone) (Jul. 24, 2012), http://www.tepco.co.jp/en/press/corp-com/release/2012/1211715_1870.html.

[56] *Cf.* Idei, *supra* note 31, at 3 ("TEPCO has been . . . rejecting direct claims if they are not within the standards TEPCO has adopted internally. Such an attitude is attributed to the increase of filing of claims with the Center.").

[57] In the beginning of the operation of the Center in 2011, a three-mediator panel was the norm. However, in response to the rapid increase of claims filings, the Center changed its policy in 2012. Now a single mediator is the norm. *Id.*

[58] *Id.*

[59] *Id.*

also needed to be increased. As of July 2012 there were approximately forty research clerks. As of the end of 2012, the number of research clerks was increased to ninety. The Center is now in the process of further increasing the research clerks, aiming at up to 200, again with the cooperation of the bar associations. Also, the number of the clerical staff has been increased.

Fourth, the fact that a relatively small number of claims are represented by lawyers has been a drawback, as the self-represented claims tend to exhaust the resources of the Center (especially the research clerks) in ascertaining the basis of the claims. The Center has been asking the bar associations and the Japan Judicial Support Center (*Ho-Terasu*) to cooperate in ameliorating this situation. In response, the National Diet promulgated in March 2012 the special law to ease the requirements for legal aid provided by the Japan Judicial Support Center.[60] Also, in March 2012, the General Committee adopted the General Standard to add lawyers' fees to the damages compensated by TEPCO.[61] These are expected to increase representation by lawyers of the claims filed with the Center. The ratio of cases represented by lawyers has recently increased up to 40%.

Fifth, the Center has been requesting that TEPCO should change its attitude in the direct negotiations. TEPCO has been basically taking a rather formalistic approach, rejecting direct claims if they are not within the standards TEPCO has adopted internally.[62] Such an attitude was attributed to the increase of filing of claims with the Center.

V. LOOKING FORWARD

So far, approximately 1.7 trillion yen has been paid to the victims by TEPCO,[63] mostly through direct negotiation. Nobody can accurately quantify the total scope of damages caused by the Fukushima Nuclear Power Plant accident and nobody can tell how many claims will be further filed with the Center in the near future.

As described above, there are three methods of legally resolving the nuclear damage claim disputes: direct negotiation, adjudication and ADR.

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[60] Special Law on the Business of Japan Legal Support Center for Aid to the Victims of the Great East Japan Earthquate, Act No. 6 of 2012.

[61] The General Standard provided that, as a rule, 3% of the settlement amount can be recovered from TEPCO. *Id.* at 3 n.7.

[62] *Id.*

[63] *See, e.g.*, Tsuyoshi Inajima and Yuji Okada, *Tepco Goes to Government for $12 Billion in Rescue Funds*, BLOOMBERG BUSINESS WEEK (Mar. 29, 2012), http://www.businessweek.com/news/2012-03-29/tepco-requests-12-billion-in-public-funds-to-avert-insolvency.

Eighty to ninety percent of the claims will be settled through direct negotiation. The ADR, i.e., the Center, and the court system do not have the capacity to cope with such a huge number of claims.[64]

Nevertheless, the function of ADR is vital to the whole nuclear damage compensation system. From a broad and long-term perspective, what is expected of the Center is to set the standards of settlement, applying to actual damage claim cases. Then, the victims and TEPCO make efforts to settle through direct negotiations by applying the standards adopted by the Center.

Whether or not such a development will be brought about depends partially on the effective functioning and survival of the Center and partially on the efforts of the parties concerned, i.e., the victims and TEPCO as well as the government. This is the challenge that Japanese society, particularly the judicial system, faces.

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[64] So far, less than 100 cases claiming nuclear damages arising from Fukushima Nuclear Power Plant accident have been filed with Japanese courts. *Cf.* David McNeill, *The Fukushima Nuclear Crisis and the Fight for Compensation*, 10 ASIAN-PAC. J. 8 (2012), http://www.japanfocus.org/-David-McNeill/3707 ("very few compensation claims end up in Japanese courts").

Responsibility and Accountability for Harm Caused by Nuclear Activities

Sherry P. Broder*

I. INTRODUCTION

In 2007, Professor Jon M. Van Dyke criticized the current state of international treaty regimes governing nuclear activities:

> The failure to develop a proper regime that would ensure full restitution and compensation for harm resulting from nuclear facilities constitutes a continuing subsidy to the nuclear industry and distorts decisions regarding energy choices. The effort to update international nuclear law must, therefore, continue until a proper liability and compensation regime is established.[1]

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Since then, there has been no change in the state of the international treaty regimes governing nuclear activities, but the imperative to implement a proper liability and compensation regime has intensified. The nuclear industry should be required to fully and fairly compensate the victims of nuclear accidents for the long-lasting, transboundary, and devastating effects.

To create a system that is responsible, fair, provides adequate compensation for harm, and holds the civilian nuclear industry accountable, the following must happen:

- Strict liability as the governing standard.
- No monetary limits on the total amount of compensation.
- A comprehensive definition of damages:
    - to compensate victims for exposure to radiation; that includes birth defects, medical monitoring of the

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Attorney. This paper is based on the work of Professor Jon M. Van Dyke, Carlsmith Ball Faculty Scholar, William S. Richardson School of Law, University of Hawai'i at Mānoa. My deepest appreciation and gratitude to the University of Hawai'i Law Review and Editors-in-Chief Onaona P. Thoene and Wayne R. Wagner, and Managing Editors Andrea Maglasang-Miller and Jordyn S.H. Toba for their outstanding assistance in organizing the He Hali'a Aloha No Jon Symposium in honor of the scholarship and teaching of Professor Van Dyke and the publication of this volume. The author wishes to express a special thank you to Julie Suenaga, Faculty Specialist, for her invaluable assistance in all matters relating to the symposium. A special mahalo nui loa to Dean Aviam Soifer whose unwavering support and encouragement for the symposium and to the author was invaluable and substantially contributed to the excellence of the symposium and the papers published in this volume. The author is also grateful to Samuel Wilder King II, Lora L. Nordvedt Reeve, and Mele Coleman for their research assistance. The author extends her heartfelt thanks to Professor Harry Scheiber who encouraged her to pursue this topic. All errors should be attributed to the author.

[1] Jon M. Van Dyke, *Liability and Compensation for Harm Caused by Nuclear Activities*, UPDATING INTERNATIONAL NUCLEAR LAW 205, 242 (Heinz Stockinger, et al. eds., BWV Berliner Wissenschaftsverlag 2007); *see also* Jon M. Van Dyke, *Liability and Compensation for Harm Caused by Nuclear Activities*, 35 DENV. J. INT'L L. & POL'Y 13 (2006); Jon M. Van Dyke, *The Inadequate Liability and Compensation Regime for Damage Caused by Nuclear Activities, presented at*, Symposium, *Managing Radioactive Waste, Problems and Challenges in a Globalizing World, Gothenburg University, Gothenburg, Sweden* (2009), *available at* http://www.cefos.gu.se/digitalAssets/1291/1291824_Van_Dyke__paper_.pdf; Jon M. Van Dyke, *The Disappearing Right to Navigational Freedom in the Exclusive Economic Zone*, 29 MARINE POL'Y 107, 121 (2005); Jon M. Van Dyke, *The Legal Regime Governing Sea Transport of Ultrahazardous Radioactive Materials*, 33 OCEAN DEV. & INT'L L. 77, 84-86 (2002); Jon M. Van Dyke, *Applying the Precautionary Principle to Ocean Shipments of Radioactive Materials*, 27 OCEAN DEV. & INT'L LAW 379 (1996); Jon M. Van Dyke, *Sea Shipment of Japanese Plutonium Under International Law*, 24 OCEAN DEV. & INT'L L. 399 (1993); Duncan E.J. Currie & Jon M. Van Dyke, *Recent Developments in the International Law Governing Shipments of Nuclear Materials and Wastes and their Implications for SIDS*, 14 RECIEL 117 (2005).

exposed population for injuries (including latent injuries, ongoing medical treatment, disability and premature deaths, recovery for psychological damage including fears of contracting cancer and other diseases), loss of homes, land, and businesses, and relocation costs;
    - to pay for the full costs of decontamination and restoration of the environment; and
    - to account for situations where restoration is not possible and to include the value of the loss to future generations.
- Access to a neutral tribunal by those bringing claims.
- Ability to bring claims against all responsible parties in the nuclear supply chain—operators, equipment and materials suppliers, engineers, architects, financiers, construction, maintenance, relevant governments, and in the case of transport situations, shippers and owners of the cargo.
- No statute of limitations.
- Adequate financial coverage by operators and other contributing parties. A major nuclear accident would almost certainly bankrupt any private utility.
- No new nuclear plants until a long-term solution to high-level waste is implemented and available.

II. THE NUCLEAR ENERGY RENAISSANCE

Electricity demand continues to grow worldwide.[2] As greenhouse gas emissions increase and the adverse effects of climate change escalate, nuclear power is being looked to as a carbon-free source of energy and an important part of any solution.[3] But could climate change lead to unexpected weather events that could threaten these new reactors? The Fukushima catastrophe was a tragic reminder of the unforeseeable danger of human-made nuclear fission, and the possibility of human error.[4] Nonetheless, Fukushima has not deterred states from pushing ahead with plans for nuclear power.[5]

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[2] *World Energy Needs and Nuclear Power*, WORLD NUCLEAR ASS'N (updated July 2012), http://www.world-nuclear.org/info/Current-and-Future-Generation/World-Energy-Needs-and-Nuclear-Power/.

[3] *Id.*

[4] *See infra* Part V.

[5] *See* Lincoln L. Davies, *Beyond Fukushima: Disasters, Nuclear Energy, and Energy Law*, 2011 B.Y.U. L. REV. 1937, 1952 (2011) ("U.S. leaders were quick to express concern and condolences for Japan and to offer support . . . [b]ut on nuclear power itself, the official policy remained.").

In his State of the Union address in 2011, President Barack Obama said, "Some folks want wind and solar. Others want nuclear, clean coal, and natural gas. To meet this goal, we will need them all[.]"[6] Obama's recent nomination for Secretary of Energy, Ernest Moniz, is a nuclear scientist and has stated his strong support of nuclear energy.[7] He has written that "it would be a mistake . . . to let Fukushima cause governments to abandon nuclear power and its benefits."[8]

In February 2012, the U.S. Nuclear Regulatory Commission ("NRC") voted four-to-one to grant the first new license to build and operate a nuclear reactor in more than thirty years.[9] Two 1,100-megawatt reactors at Southern Company's Alvin W. Vogtle plant near Augusta, Georgia were approved at an estimated cost of $14 billion, and are scheduled to commence operations in 2016.[10] But, because of construction delays and rising costs, the date to start operation has been pushed to 2017.[11] The cost was originally $14 billion.[12] Cost overruns of $737 million have been reported and the Georgia Public Service Commission has delayed a vote on passing the costs on to the ratepayers until 2017 at the earliest.[13] The

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[6] Press Release, Office of the White House Press Secretary, Remarks by the President in the State of the Union Address (Jan. 25, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/01/25/remarks-president-state-union-address. When President George W. Bush signed the Energy Policy Act in August 2005, he remarked that "only nuclear power plants can generate massive amounts of electricity without emitting an ounce of air pollution or greenhouse gases." Press Release, Office of the White House Press Secretary, President Signs Energy Policy Act (Aug. 8, 2005), *available at* http://www.whitehouse.gov/news/releases/2005/08/20050808-6.html.

[7] Steven Mufson, *Ernest Moniz, MIT physicist, nominated as energy secretary*, WASHINGTON POST (Mar. 4, 2013), http://www.washingtonpost.com/business/economy/ernest-moniz-mit-physicist-is-to-be-nominated-as-energy-secretary/2013/03/04/e3fe68aa-808c-11e2-a350-49866afab584_story.html.

[8] Ernest Moniz, *Why We Still Need Nuclear Power, Making Clean Energy Safe and Affordable*, FOREIGN AFFAIRS (Nov./Dec. 2011), http://www.foreignaffairs.com/articles/136544/ernest-moniz/why-we-still-need-nuclear-power.

[9] Matthew L. Wald, *Federal Regulators Approve Two Nuclear Reactors in Georgia*, N.Y. TIMES (Feb. 9, 2012), http://www.nytimes.com/2012/02/10/business/energy-environment/2-new-reactors-approved-in-georgia.html.

[10] Rebecca Smith, *New Nuclear Plant Hits Some Snags*, WALL ST. J. (Dec. 23, 2012, 6:54 PM), http://online.wsj.com/article/SB10001424127887324731304578193880676864240.html.

[11] *Id.*

[12] Vogtle 1 and 2 (the original reactors) were budgeted at a cost of $660 million, but by the time they were completed in 1989 the price had mushroomed to $8.87 billion—a 1,200 percent increase. *Vogtle Nuclear Plant Expansion: Big Risks and Even Bigger Costs for Georgia's Residents*, UNION OF CONCERNED SCIENTISTS (Jan. 2012), http://www.ucsusa.org/assets/documents/nuclear_power/Georgia-nuclear-fact-sheet.pdf.

[13] News Release, *Commission PSC Approves Agreement On Georgia Power Eighth*

Department of Energy has awarded a $8.3 billion loan guarantee, but the details are still being negotiated.[14]

In March 2012, the NRC conditionally approved new licenses for two 1,100-megawatt reactors at South Carolina Electric & Gas Company's Virgil C. Summer Nuclear Generating Station near Columbia, South Carolina.[15] These plants are estimated to cost $11 billion.[16] There have already been cost overruns of $138 million due to delays.[17] Government backing in the form of the loan guarantee provided through the Department of Energy is still in negotiations.[18]

Less than a year after Fukushima, at the ribbon-cutting launch of a new Russian reactor in December 2011, Russian President Vladimir Putin proclaimed that "[n]uclear energy is on the rise. There's a rebirth, a renaissance of the nuclear sphere taking place right now."[19] Putin's nuclear power plant agenda is aggressive and being implemented.[20] By 2030, the Russian Federation claims that it will build thirty-eight reactors at home, triple sales worldwide and build twenty-eight reactors in other countries.[21] Russia has been building floating nuclear power plants to exploit the oil and natural gas resources of the Arctic.[22]

Plant Vogtle Construction Monitoring Report, Georgia Public Service, GEORGIA PUBLIC SERVICE COMMISSION (Sept. 3, 2013), http://www.psc.state.ga.us/GetNewsRecordAttachment.aspx?ID=267.

[14] Daniel Malloy, *Southern Co. CEO Optimistic on Vogtle Loan Guarantee*, ATLANTIC-JOURNAL CONSTITUTION (Mar. 18, 2012), http://www.myajc.com/news/business/southern-co-ceo-optimistic-on-vogtle-loan-guarante/nWwmj/ (reporting a $737 million increase in the estimated cost of Plant Vogtle and progress in negotiations with the Department of Energy over the $8.5 billion loan guarantee).

[15] Ryan Tracy, *U.S. Approves Nuclear Power Plants in South Carolina*, WALL ST. J. (Mar. 30, 2012, 5:54 PM), http://online.wsj.com/article/SB10001424052702303816504577313873449843052.html.

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *See* Gary Peach, *Putin Attends Nuclear Reactor Launch*, YAHOO! FINANCE U.K. & IRELAND (Dec. 12, 2011), http://uk.finance.yahoo.com/news/Putin-attends-nuclear-reactor-apf-1421042839.html.

[20] *Id.*

[21] Eve Conant, *Russia's Nuclear Renaissance*, PEW CENTER ON CRISIS REPORTING (Sept. 3, 2012), http://pulitzercenter.org/projects/russia-nuclear-program-expansion-energy-technology-putin.

[22] Richard Galpin, *The Struggle for Arctic Riches*, BBC NEWS (Sept. 22, 2010 12:43 PM), http://www.bbc.co.uk/news/world-11381773; *see also* Karl Grossman, *Floating Chernobyls*, HUFFINGTON POST (Sept. 3, 2010), http://www.huffingtonpost.com/karl-grossman/floating-chernobyls_b_698550.html (noting the environmental risks); *New Milestone for Floating Nuclear Plant*, WORLD NUCLEAR NEWS (Jan. 29, 2013), http://www.world-nuclear-news.org/NN-New_milestone_for_floating_nuclear_plant-2901

In January 2013, the World Nuclear Association reported that there were 435 nuclear power reactors in operation in the world, operating in thirty-one countries.[23] Despite the accident at Fukushima, there is resurgence in global interest in developing nuclear power.[24] The World Nuclear Association reports that sixty-five nuclear reactors are currently under construction globally, with 164 more on order and 317 planned.[25] A February 2011 survey—a month before Fukushima—showed 62 reactors under construction and 156 on order and 343 planned.[26] The January 2007 report revealed that there were 435 nuclear reactors, 28 under construction, with 64 on order and 158 planned.

After the Fukushima disaster, Germany decided to close all of its nuclear power plants by 2022.[27] In June 2011, Italian voters passed a referendum to cancel plans for new reactors.[28] Over ninety-four percent of the Italian electorate voted in favor of the construction ban, leading to the cancellation of all plants being planned.[29] Italy, like Japan, is susceptible to earthquakes.[30]

Japan reacted to the Fukushima Daiichi radiation exposure by shutting down all of its fifty nuclear reactors.[31] Two were later restarted as emergency measures to avert power shortages in the heavily populated region that includes the cities of Osaka and Kyoto.[32] In September 2012,

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137.html.

[23] *World Nuclear Power Reactors & Uranium Requirements*, INT'L ATOMIC ENERGY AGENCY (Apr. 1, 2013), http://www-pub.iaea.org/MTCD/publications/PDF/RDS2-32_web.pdf; *World Nuclear Power Reactors & Uranium Requirements*, WORLD NUCLEAR ASS'N (Apr. 1, 2013), http://www.world-nuclear.org/info/reactors.html.

[24] Heather Timmons & Vikas Bajaj, *Emerging Economies Move Ahead With Nuclear Plans*, N.Y. TIMES (Mar. 14, 2011), http://www.nytimes.com/2011/03/15/business/energy-environment/15power.html.

[25] *Id.*

[26] *World Nuclear Power Reactors & Uranium Requirements*, WORLD NUCLEAR ASS'N (Dec. 1, 2011), http://www.world-nuclear.org/info/reactors122011.html.

[27] Judy Dempsey & Jack Ewing, *Germany, in Reversal, Will Close Nuclear Plants by 2022*, N.Y. TIMES (May 30, 2011), http://www.nytimes.com/2011/05/31/world/europe/31germany.html.

[28] *Italy Nuclear: Berlusconi Accepts Referendum Blow*, BBC NEWS (June 14, 2011), http://www.bbc.co.uk/news/world-europe-13741105.

[29] *Id.*

[30] *Id.*

[31] David Batty, *Japan Shuts Down Last Working Nuclear Reactor*, GUARDIAN (May 5, 2012, 7:35 AM), http://www.guardian.co.uk/world/2012/may/05/japan-shuts-down-last-nuclear-reactor.

[32] Martin Fackler & Hiroko Tabuchi, *Japan to Begin Restarting Idled Nuclear Plants, Leader Says*, N.Y. TIMES (Feb. 28, 2013), http://www.nytimes.com/2013/03/01/world/asia/japan-to-begin-restarting-idled-nuclear-plants.html.

Prime Minister Yoshihiko announced the phasing out of nuclear power in Japan and an intention to make the country nuclear-free by the 2030s.[33] But in Japan, there is a changing philosophy about nuclear energy. Since its election in December 2012, the Liberal Democratic Party, and its Prime Minister Abe, are promoting nuclear power as a major source of energy generation.[34] On February 28, 2013, Prime Minister Abe pledged to restart nuclear plants that pass more stringent safety guidelines, which are expected to be adopted by the summer of 2013 by the Nuclear Regulation Authority, a new agency designed to be more independent from the nuclear industry.[35]

For the most part, the movement to build nuclear reactors is unabated. China has sixteen nuclear power plants, twenty-nine under construction and plans for ten new plants per year for the next decade.[36] South Korea and India plan several new plants.[37] Turkey has recently entered into an arrangement to have the Russian Federation build and operate its first nuclear power plant.[38] The United Arab Emirates is moving ahead to construct four nuclear power plants supplied by South Korea.[39] Russia has intentions not only to expand its nuclear power plants, but also to have a floating nuclear power plant in the Arctic.[40] The United States has been showing a renewed interest in nuclear power, and two plants were approved in 2012.[41]

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[33] Carol Williams, *In Wake of Fukushima Disaster, Japan to End Nuclear Power by 2030s*, L.A. TIMES (Sept. 14, 2012, 12:25 PM), http://latimesblogs.latimes.com/world_now/2012/09/in-wake-of-fukushima-disaster-japan-to-end-nuclear-power-by-2030s.html.

[34] Michiyo Nakamoto, *Japan Prepares for Nuclear Policy U-Turn*, FINANCIAL TIMES (Jan. 3, 2013, 1:43 PM), http://www.ft.com/intl/cms/s/0/d85d6624-5588-11e2-bbd1-00144feab49a.html.

[35] Martin Fackler & Hiroko Tabuchi, *Japan to Begin Restarting Idled Nuclear Plants, Leader Says*, N.Y. TIMES (Feb. 28, 2013), http://www.nytimes.com/2013/03/01/world/asia/japan-to-begin-restarting-idled-nuclear-plants.html.

[36] *See World Nuclear Power Reactors & Uranium Requirements*, *supra* note 23.

[37] *Id.*

[38] *Nuclear Power in Turkey*, WORLD NUCLEAR ASS'N (Apr. 9, 2013), http://world-nuclear.org/info/country-profiles/countries-T-Z/Turkey/.

[39] *Nuclear Power in United Arab Emirates*, WORLD NUCLEAR ASS'N (Mar. 2003), http://world-nuclear.org/info/country-profiles/countries-T-Z/United-Arab-Emirates/.

[40] Galpin, *supra* note 22.

[41] Tracy, *supra* note 15.

III. THE INADEQUATE INTERNATIONAL NUCLEAR LIABILITY TREATY REGIME

A. The Need for a Global Nuclear Liability Regime

There is no one comprehensive and unified international liability treaty regime for nuclear accidents.[42] Rather, a myriad of treaties exist and some are interrelated, but many of the treaties are not ratified and in effect.[43] Ratification takes many years.[44] It has long been recognized that the liability provisions of international nuclear law are inadequate.[45] In June 2011, the ministers of the International Atomic Energy Agency ("IAEA") met after the Fukushima disaster to consider its ramifications, and adopted an Action Plan on Nuclear Safety recognizing the need for a "global nuclear liability regime."[46] The IAEA Action Plan also set a goal to "improve the effectiveness of the international legal framework" by having more states join the international liability regimes, and asking member states "to work towards establishing a global nuclear liability regime that addresses the concerns of all States that might be affected by a nuclear accident with a view to providing appropriate compensation for nuclear damage," and to consider joining the international liability instruments.[47]

A number of States with significant nuclear energy capacity are not part of any regime. IAEA data lists 437 operating reactors around the world with another sixty-four under construction.[48] About 370 of these units under construction, or in operation, are in eight states: Canada, China, France, India, Japan, the Republic of Korea, the Russia Federation, and the United States.[49] Several of these States—Canada, China, Japan, Korea, and

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[42] Stephen G. Burns, *A Global Nuclear Liability Regime: A Journey Or A Destination?*, INT'L NUCLEAR LAW ASS'N 3 (Oct. 8-11, 2012), *available at* http://www.burges-salmon.com/INLA_2012/10156.pdf.

[43] *Id.* at 3-4.

[44] *See generally id.*

[45] *See generally* Int'l Atomic Energy Agency [IAEA], *Declaration by the IAEA Ministerial Conference on Nuclear Safety in Vienna on 20 June 2011*, IAEA Doc. INFCIRC/821 (June 20, 2011), *available at* http://www.iaea.org/Publications/Documents/Infcircs/2011/infcirc821.pdf.

[46] IAEA, *Draft IAEA Action Plan on Nuclear Safety*, IAEA Doc. GOV/2011/59-GC(55)/14 (Sept. 5, 2011) [hereinafter *IAEA Action Plan*], *available at* http://www.iaea.org/About/Policy/GC/GC55/Documents/gc55-14.pdf; *see also Declaration by the IAEA Ministerial Conference on Nuclear Safety in Vienna on 20 June 2011*, *supra* note 45.

[47] IAEA Action Plan, *supra* note 46, at 4.

[48] *The Database on Nuclear Power Reactors*, IAEA (Apr. 13, 2013), http://www.iaea.org/pris/.

[49] *Number of Power Reactors by Country and Status*, IAEA (Apr. 13, 2013),

India—are not members of any regime, and the United States is a party to a regime not yet in force, the Convention on Supplementary Compensation for Nuclear Damage ("CSC").[50] In 2010, India signed the CSC but has not yet ratified it.[51] "That puts something near 243 operating plants and 44 plants under construction—about 57% of the world total—outside the scope of an international third party liability regime currently in force."[52] Only about half of the world's 435 nuclear reactors are located in states that are parties to one of the nuclear liability regimes.[53] Countries such as the United States and Japan have not become part of either convention.[54] Most nations that operate nuclear power plants also have their own legal frameworks, which are not always fully compatible with the international conventions.

It is clear that there is a pressing need, going forward, to have a truly "global nuclear liability regime" that all states are parties to, and that provides "appropriate compensation for nuclear damage."[55] If nuclear power continues to be a likely choice for many countries, despite the potential for a catastrophic accident and the inability to find a solution to its waste, the imperative to update international nuclear law is greater than ever.

B. The First Generation of Nuclear Liability Treaties

The following major agreements on nuclear liability create a confusing patchwork of laws: 1960 Paris Convention on Third Party Liability in the Field of Nuclear Energy ("Paris Convention"),[56] 1963 Vienna Convention

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http://www.iaea.org/PRIS/CountryStatistics/CountryStatisticsLandingPage.aspx.

[50] Burns, *supra* note 42, at 4; *Convention on Supplementary Compensation for Nuclear Damage*, IAEA (Sept. 12, 1997), *available at* http://www.iaea.org/Publications/Documents/Conventions/supcomp.html [hereinafter CSC].

[51] *India Signs CSC on Nuclear Damages*, TIMES OF INDIA (Oct. 27, 2010, 2:47 PM), http://articles.timesofindia.indiatimes.com/2010-10-27/india/28250665_1_nuclear-liability-nuclear-accident-convention-on-supplementary-compensation.

[52] Burns, *supra* note 42, at 4.

[53] *Id.*

[54] *See* Org. for Econ. Co-operation and Dev. Nuclear Energy Agency [OECD-NEA], Latest Status of Ratifications or Accessions, Paris Convention on Nuclear Third Party Liability, NUCLEAR ENERGY AGENCY, *available at* http://www.oecd-nea.org/law/paris-convention-ratification.html (last updated June 10, 2009); Last Change of Status: 29 March 2011, Vienna Convention on Civil Liability for Nuclear Damage, IAEA (Apr. 15, 2013), *available at* http://www.iaea.org/Publications/Documents/Conventions/liability_status.pdf.

[55] Burns, *supra* note 42, at 5, 6.

[56] Paris Convention on Third Party Liability in the Field of Nuclear Energy, July 29, 1960, as amended by the Additional Protocol of 28th January 1964 and by the Protocol of 16th November 1982, 956 U.N.T.S. 263 [hereinafter Paris Convention], *available at*

on Civil Liability for Nuclear Damage ("Vienna Convention"),[57] Brussels Convention Supplementary to the Paris Convention, adopted in January 1963,[58] 1971 Maritime Carriage of Nuclear Material Convention,[59] 1988 Joint Protocol,[60] 1997 Protocol to Amend the Vienna Convention,[61] 1997 Convention on Supplementary Compensation for Nuclear Damage ("CSC"),[62] and 2004 Protocol.[63] These treaties do not provide adequate liability for a nuclear accident.[64] In addition, there is the 1994 Convention

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http://www.oecd-nea.org/law/nlparis_conv.html.

[57] Vienna Convention on Civil Liability for Nuclear Damage, May 21, 1963, 1063 U.N.T.S. 265, 2 I.L.M. 727 [hereinafter 1963 Vienna Convention], *available at* http://www.iaea.org/Publications/Documents/Conventions/liability.html.

[58] Convention of 31st January 1963 Supplementary to the Paris Convention of 29th July 1960, as amended by the additional Protocol of 28th January 1964 and by the Protocol of 16th November 1982, Jan. 31, 1963, 2 I.L.M. 685 (1963) [hereinafter Brussels Supplementary Convention], *available at* http://www.oecd-nea.org/law/nlbrussels.html. The Paris Convention and the Brussels Supplementary Convention have both been amended three times by additional Protocols adopted in 1964, 1982 and 2004. The 1960 Convention and the 1964 Protocol entered into force on April 1, 1968. The 1982 Protocol entered into force on October 7, 1988. The Paris Convention treaty regime includes most Western European countries. As of January 2013, seventeen countries were parties to the Convention and the 1964 and 1982 Protocols (Germany, Austria, Belgium, Denmark, Spain, Finland, France, Greece, Italy, the Luxembourg, Norway, Netherlands, Portugal, U.K., Sweden, Switzerland, and Turkey).

[59] Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material, Dec. 17, 1971, 974 U.N.T.S. 255, 11 I.L.M. 277 [hereinafter Maritime Carriage of Nuclear Material Convention], *available at* http://www.imo.org/About/Conventions/ListOfConventions/Pages/Convention-relating-to-Civil-Liability-in-the-Field-of-Maritime-Carriage-of-Nuclear-Material-(NUCLEAR).aspx.

[60] IAEA, *Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention*, IAEA Doc. INFCIRC/402 (Sept. 21, 1988) [hereinafter Joint Protocol], *available at* http://www.iaea.org/Publications/Documents/Infcircs/Others/inf402.shtml.

[61] 1997 Vienna Convention on Civil Liability for Nuclear Damage, Sept. 12, 1997 [hereinafter 1997 Vienna Convention], *available at* http://www.iaea.org/Publications/Documents/Conventions/protamend_annex.html.

[62] CSC, *supra* note 50.

[63] 2004 Protocol to Amend the Paris Convention, NUCLEAR ENERGY AGENCY (Feb. 12, 2004), *available at* http://www.oecd-nea.org/law/paris-convention-protocol.html [hereinafter 2004 Protocol].

[64] For discussions on the international treaty regime governing liability for nuclear accidents, see Duncan E.J. Currie, *The Problems and Gaps in the Nuclear Liability Conventions and an Analysis of How an Actual Claim Would Be Brought Under the Current Existing Treaty Regime in the Event of a Nuclear Accident*, 35 DENV. J. INT'L L. & POL'Y 85 (2006); Alexandre Kiss, *State Responsibility and Liability for Nuclear Damage*, 35 DENV. J. INT'L L. & POL'Y 67 (2006); Jon M. Van Dyke, *Liability and Compensation for Harm Caused by Nuclear Activities*, 35 DENV. J. INT'L L. & POL'Y 13 (2006); Ved P. Nanda, *International Environmental Norms Applicable to Nuclear Activities, with Particular Focus on Decisions of International Tribunals and International Settlements*, 35 DENV. J. INT'L L.

on Nuclear Safety[65] and the 1997 Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management.[66] These two treaties were developed under the auspices of the IAEA to supplement the already existing IAEA nuclear safety standards and more importantly to make them binding on the parties, particularly the nuclear nations.[67]

The two primary international treaty regimes that establish terms and conditions of civil liability from nuclear damage are the 1960 Paris Convention and the 1963 Vienna Convention. The 1960 Paris Convention treaty regime was established under the auspices of the Organisation for Economic Co-operation and Development ("OECD") and entered into force in 1968.[68] The Paris Convention treaty regime established the major legal principles that the subsequent international nuclear liability conventions followed.[69] The Paris Convention was the first international treaty to introduce the concept of channeling liability to the nuclear operator.[70] Victims are limited in recovery, and the maximum liability of the operator with respect to damage caused by a nuclear accident is fifteen million Special Drawing Rights ("SDRs").[71] But, a State Party can set a minimum amount of no less than five million SDRs.[72] The Brussels Supplementary

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& POL'Y 47 (2006).

[65] Convention on Nuclear Safety, June 17, 1994, 1963 U.N.T.S. 293, *available at* http://www.iaea.org/Publications/Documents/Infcircs/Others/inf449.shtml.

[66] Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management, Sept. 5, 1997, 36 I.L.M. 1436, *available at* http://www.iaea.org/Publications/Documents/Infcircs/1997/infcirc546.pdf.

[67] IAEA, *IAEA Safety Standards for Protecting People and the Environment: Compliance Assurance for the Safe Transport of Radioactive Material*, IAEA Safety Series No. TS-G-1.5 (2009), *available at* http://www-pub.iaea.org/MTCD/publications/PDF/Pub1361_web.pdf; Johan Rautenbach et al., *Overview of the International Legal Framework Governing the Safe and Peaceful Uses of Nuclear Energy—Some Practical Steps, in* INTERNATIONAL NUCLEAR LAW IN THE POST-CHERNOBYL PERIOD, A Joint Report by the OECD Nuclear Energy Agency and the International Atomic Energy Agency, NEA No. 6146, 7-36 (2006), *available at* http://www.oecd-nea.org/law/chernobyl/nea6146-iaea-chernobyl.pdf.

[68] Paris Convention, *supra* note 56.

[69] *See generally* Nuclear Energy Agency & Organization for Economic Cooperation and Development, LIABILITY AND COMPENSATION FOR NUCLEAR DAMAGE: AN INTERNATIONAL OVERVIEW (1995).

[70] Currie, *supra* note 64, at 87-91 (stating that the Paris Convention is one of the foundational documents for the international nuclear liability regime).

[71] *See* Paris Convention, *supra* note 56, art. 7(b). SDRs are a unit of currency used by the International Monetary Fund ("IMF"), and the IMF also sets the currency value of SDRs. Factsheet: Special Drawing Rights ("SDRs"), INT'L MONETARY FUND, http://www.imf.org/external/np/exr/facts/sdr.htm (last visited Mar. 10, 2013) (USD 1.00=0.66 SDR Valuation).

[72] Paris Convention, *supra* note 56, art. 7(b)(i).

Convention amended the Paris Convention and entered into force in 1974.[73] It supplemented the liability limits in the Paris Convention by requiring contributions by the Installation State of up to 175 million SDRs and other parties to the convention on the basis of their installed nuclear capacity up to a total of 300 million SDRs.[74] In addition, the NEA currently recommends that the Paris Convention States set the maximum liability amount to not less than 150 million SDRs.[75] The statute of limitations is set at ten years.[76] The courts of the state where the nuclear power plant is situated has jurisdiction.[77]

The Vienna Convention was adopted in 1963, generally followed the 1960 Paris Convention, and entered into force in 1977.[78] The Vienna Convention is open to all States; the Paris Convention is open to any OECD country as of right, and to any non-member with the consent of the other contracting parties. This second nuclear liability treaty regime was developed under the auspices of the IAEA.[79] It has been ratified by thirty-eight states worldwide: Argentina, Armenia, Belarus, Bolivia, Bosnia & Herzegovina, Brazil, Bulgaria, Cameroon, Croatia, Cuba, Czech Republic, Egypt, Estonia, Hungary, Kazakhstan, Latvia, Lebanon, Lithuania, Mexico, Montenegro, Morocco, Niger, Nigeria, Peru, Philippines, Poland, Republic of Moldova, Romania, Russian Federation, Saint Vincent & the Grenadines, Saudi Arabia, Senegal, Serbia, Slovakia, Former Yugoslav Republic of Macedonia, Trinidad & Tobago, Ukraine, Uruguay.[80] The United Kingdom is a signatory only.[81] Major nuclear nations such as Japan, Germany, France, and the United States are neither parties nor signatories.[82]

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[73] Brussels Supplementary Convention, *supra* note 58.

[74] *Id.*

[75] Paris Convention, *supra* note 56. The Paris Convention was modified by the 1963 Brussels Supplementary Convention and two protocols adopted in 1964 and 1982. Compensation is provided to a maximum amount of SDR 300 million, in three tiers: a first tier requiring an operator liability amount of at least SDR 5 million, to be provided by insurance or other financial security; a second tier consisting of the difference between SDR 175 million and the amount required under the first tier, which is to be provided from public funds to be made available by the party in whose territory the nuclear installation of the liable operator is situated; and a third tier comprising SDR 125 million to be made available from public funds contributed jointly by all the parties to the Convention according to a pre-determined formula.

[76] *Id.* art. 8(a).

[77] *Id.* art. 13(b).

[78] 1963 Vienna Convention, *supra* note 57.

[79] *Id.*

[80] Last Change of Status: 29 March 2011, Vienna Convention on Civil Liability for Nuclear Damage, *supra* note 54.

[81] *Id.*

[82] *See id.*

The Paris and the Vienna Conventions are supplemented, in relation to maritime transport, by the Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material of 17 December 1971 (the "1971 Brussels Convention"). The Maritime Liability Convention[83] continues the principle of channeling all liability to the operator, and exonerates a transporter for damage caused by a nuclear accident if the operator of the destination installation is liable under the Paris or Vienna Convention.[84]

These first generation nuclear liability treaties were negotiated at the dawn of the civilian nuclear energy age when there was a strong interest encouraging the growth of an industry that was viewed as a beacon of hope and prosperity.

> With the emergence of civilian nuclear power development in the mid-1950s, the question of a need for a special liability regime soon arose in view of the perceived special and uncertain hazards of nuclear operations as well as the potentially far-reaching consequences of a nuclear accident that might cross national borders.[85]

In light of the potentially extremely costly liability in the event of a catastrophic accident, a liability environment was created to contain and limit the potential monetary damages to be paid.[86] Supposedly, in return, there was to be quick and ready compensation to the victims in the event of an accident.[87] "This principle is, so to speak, the *quid pro quo* for the benefits to victims of the imposition of strict and exclusive liability upon a nuclear operator."[88]

C. The Post-Chernobyl Second Generation of Nuclear Liability

There were no major changes to these two nuclear liability treaties until after the Chernobyl catastrophe on April 26, 1986.[89] Chernobyl was an awakening for the international community to the true extent of the health risks, environmental damages, and transboundary effects of nuclear accidents, and led to an effort to revise and update both the Paris and

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[83] Maritime Carriage of Nuclear Material Convention, *supra* note 59.

[84] *Id.* art. I.

[85] Burns, *supra* note 42, at 2.

[86] Julia A. Schwartz, *International Nuclear Third Party Liability Law: The Response to Chernobyl, in* INTERNATIONAL NUCLEAR LAW IN THE POST-CHERNOBYL PERIOD 38-41 (2006), *available at* http://www.oecd-nea.org/law/chernobyl/SCHWARTZ.pdf.

[87] *Id.* at 39-40.

[88] *Id.* at 40.

[89] *Id.* at 44-45.

Vienna treaty regimes.[90] It was abundantly clear that, compared with the health and environmental damages caused by the Chernobyl nuclear power plant disaster, the liability ceilings were inadequate and the definitions of damages were too narrow.[91] Chernobyl led to a second generation of nuclear treaties and adoption of several new international conventions.[92] Subsequent supplementary conventions expanded the items covered by international treaties to include environmental damage and preventive measures and to increase the liability limits, which were an improvement, but nonetheless the basic inadequacies remain and the nuclear industry continues to be unfairly protected against financial responsibility for the full extent of its accidents and failures.[93] In addition, the Chernobyl accident spurred the adoption of the conventions on nuclear safety standards, on notification of the international community and on radioactive waste management.[94]

The 1988 Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention linked the Paris Convention and the Vienna Convention and any of their amendments, extended the provisions of one convention to victims of a nuclear incident in a State party to the other convention, and essentially combined the two treaty regimes into one.[95] Although it entered into force in 1992, many major nuclear nations who have ratified the Paris or Vienna Convention are not parties.[96] The United Kingdom and France are not.[97] The original agreements did not cover environmental damage.[98] The Vienna Convention holds the operator liable for "nuclear damage," defined simply as "loss of life, any personal injury or any loss of, or damage to, property which arises out of or results

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[90] *Id.*

[91] *Id.* at 45.

[92] *Id.* at 44-57.

[93] *Id.* at 60-62.

[94] *See* IAEA, *Convention on Early Notification of a Nuclear Accident*, IAEA Doc. INFCIRC/335 (Nov. 18, 1986), *available at* http://www.iaea.org/Publications/Documents/Infcircs/Others/infcirc335.shtml; *see also* IAEA, *Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency*, IAEA Doc. INFCIRC/336 (Nov. 18, 1986), *available at* http://www.iaea.org/Publications/Documents/Infcircs/Others/infcirc336.shtml.

[95] *See* Joint Protocol, *supra* note 60.

[96] *See* IAEA, Last Change of Status: 29 August 2012, Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention, *available at* http://www.iaea.org/Publications/Documents/Conventions/jointprot_status.pdf.

[97] *Id.*

[98] *See* Paris Convention, *supra* note 56; 1963 Vienna Convention, *supra* note 57, art. III, ¶ 1(k).

from . . . a nuclear installation."[99] The Joint Protocol effectively applies to transboundary pollution.[100]

In 1997 two new treaties were negotiated under the auspices of the IAEA: The Protocol to Amend the Vienna Convention on Civil Liability for Nuclear Damage[101] and the CSC.[102] The 1997 Protocol to Amend the Vienna Convention, although in force since 2003, has only eleven contracting parties.[103] The newest party is the United Arab Emirates, which is constructing its first nuclear power plant.[104] Saudi Arabia has ratified the Protocol and is considering a nuclear power program.[105] The Russian Federation, which ratified the 1963 Vienna Convention in 2005, has not ratified the 1997 Protocol.[106] The Vienna Protocol increased the compensation limits to 300 million SDRs or where public funds are available from 5 million to 150 million SDRs.[107]

The 1997 Vienna Protocol extended geographic coverage to include damage "wherever suffered."[108] However, states that are not parties, do not provide reciprocal benefits, and have a nuclear installation, may be excluded from recovery for damage in their territory or maritime zones through domestic legislation.[109] Claims still must be brought in the courts of the country where the nuclear power plant is located.[110] "Nuclear damage" is defined to include "the costs of measures of reinstatement of

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[99] 1963 Vienna Convention, *supra* note 57, art. III, ¶ 1(k).

[100] Joint Protocol, *supra* note 60.

[101] Protocol to Amend the Vienna Convention on Civil Liability for Nuclear Damage, *opened for signature* Sept. 12, 1997, IAEA Doc. INFCIRC/566 [hereinafter 1997 Vienna Protocol], *available at* http://www.iaea.org/Publications/Documents/Infcircs/1998/infcirc566.pdf.

[102] CSC, *supra* note 50.

[103] Eleven countries are parties to the 1997 Protocol to Amend the 1963 Vienna Convention (Argentina, Belarus, Bosnia and Herzegovia, Kazakhstan, Latvia, Montenegro, Morocco, Poland, Romania, Saudi Arabia, United Arab Emirates) and another nine countries are signatories but have not ratified or acceded (Czech Republic, Hungary, Indonesia, Italy, Lebanon, Lithuania, Peru, Philippines, Ukraine). IAEA, Last Change of Status: Mar. 1, 2013, Protocol to Amend the Vienna Convention on Civil Liability for Nuclear Damage, IAEA Doc. INFCIRC/566 [hereinafter *Protocol to Amend Status*], *available at* http://www.iaea.org/Publications/Documents/Conventions/protamend_status.pdf.

[104] *Id.*

[105] *Nuclear Power in Saudi Arabia*, WORLD NUCLEAR ASS'N (June 2012), http://www.world-nuclear.org/info/Country-Profiles/Countries-O-S/Saudi-Arabia/ ("Saudi Arabia plans to construct 16 nuclear power reactors over the next 20 years at a cost of more than $80 billion.").

[106] *See* Protocol to Amend Status, *supra* note 103.

[107] 1997 Vienna Protocol, *supra* note 101, art. 7.

[108] Currie, *supra* note 64, at 86.

[109] *Id.*

[110] 1997 Vienna Convention, *supra* note 61, art. IA(2), (3).

impaired environment" and "the costs of preventative measures."[111] Thus, damages now can be recovered for any economic loss arising from loss of life, personal injury, or property damage, but other types of economic loss can be recovered as well, such as fishing or tourism, but only if permitted under the civil laws of the installation state.[112] The Protocol also included environmental expenses as a recoverable damage.[113] This was defined as the cost of reinstatement of the impaired environment, but, to be recoverable, the impairment and the reinstatement must be significant.[114]

Importantly, the Vienna Protocol expanded coverage to include claims for nuclear shipment accidents.[115] Damages can be recovered by coastal states and non-installation states when the accident occurs within the exclusive economic zone of a coastal state.[116]

The CSC was negotiated in order to provide a means for supplementary compensation and is open to all States, including existing members of the Paris Convention or Vienna Convention, and even includes the United States, which has not ratified any other conventions but is the largest operator of nuclear facilities.[117] The United States did ratify the CSC, but only four countries are contracting parties to the Convention (Argentina, Morocco, Romania, and the United States), and another eleven countries have signed it (Australia, Czech Republic, India, Indonesia, Italy, Lebanon, Lithuania, Peru, Philippines, Senegal, and Ukraine).[118] India signed the Convention in 2010, and Senegal signed it in 2011.[119] In order for this Convention to enter into force, "at least [five] States with a minimum of 400,000 units of installed nuclear capacity," the requisite installed nuclear generating capacity, have to become parties to the treaty.[120] The fund is collectively provided by contributions from state parties.[121] A state's contribution is calculated based on the state's nuclear installation capacity and a rate assessment conducted by the United Nations.[122] The installation

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[111] *Id.* art. I(1)(k).

[112] Currie, *supra* note 64, at 86.

[113] *See* 1997 Vienna Convention, *supra* note 61, art. I(1)(k).

[114] *Id.*

[115] 1997 Vienna Protocol, *supra* note 101, art. 6.

[116] *Id.* art. 12.

[117] CSC, *supra* note 50.

[118] IAEA, Last Change of Status: 20 Sept. 2011, Convention on Supplementary Compensation for Nuclear Damage [hereinafter CSC Latest Status], *available at* http://www.iaea.org/Publications/Documents/Conventions/supcomp_status.pdf.

[119] *Id.*

[120] CSC, *supra* note 50, art. XX.1.

[121] *Id.* art. IV.

[122] *Id.* art. IV(1)(a)(ii).

state shall ensure the availability of at least 300 million SDRs.[123] Thus far, the United States, which signed in 2007,[124] is the only ratifying party with significant generating capacity.[125] The costs incurred to restore the environment from the injuries suffered are compensable if they are "reasonable," "have been approved by the competent authorities of the State," and are designed to "reinstate or restore damaged or destroyed components of the environment, or to introduce, where reasonable, the equivalent of these components in the environment."[126]

Although the 1997 agreements broaden the range of compensable damages, one commentator has observed that it remains less generous than the compensation provided by the West German government to its own citizens after the 1986 Chernobyl nuclear facility disaster in the Ukraine.[127]

In 2004, the Paris Convention States adopted revisions to the Paris Convention and the Brussels Supplementary Convention.[128] These 2004 protocols have also not yet entered into force, with only Norway, Spain, and Switzerland having ratified to date.[129] The most noteworthy change in the revisions to these treaties is the increase in liability limits:[130]

- Revised Paris Convention increases the operator's minimum liability to €700 million.[131]
- Revised Brussels Supplementary Convention increases the three tiers relating to liability limits as follows:
  - Tier 1: liability amount imposed under the Paris Convention.
  - Tier 2: difference between €1,200 million and Tier 1 to be provided from public funds made available by the state where the subject nuclear installation is located.
  - Tier 3: €300 million to be provided from public funds contributed jointly by all parties.

Thus, the liability limits have been increased to a total of €1.5 billion, to be provided by individual governments.[132] This limit is still woefully

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[123] *Id.* art. IV(1)(a)(i).

[124] *See also* Energy Independence & Security Act of 2007, Pub. L. No. 110-140, § 934, 121 Stat. 1492, 1741–48 (2007).

[125] India announced it would sign the Convention in October 2010. *See* CSC Latest Status, *supra* note 118.

[126] CSC, *supra* note 50, art. I(g).

[127] XUE HANQUIN, TRANSBOUNDARY DAMAGE IN INTERNATIONAL LAW 92 n.68 (2003) (listing compensable categories).

[128] 2004 Protocol, *supra* note 63.

[129] Latest Status of Ratifications or Accessions, Paris Convention on Nuclear Third Party Liability, *supra* note 54.

[130] 2004 Protocol, *supra* note 63, art. 7.

[131] *Id.*

inadequate, when compared to the estimate of €5,000 billion in damage from a potential nuclear reactor meltdown in Germany.[133] Following the Chernobyl accident, Belarus estimated its economic damage at $235 billion U.S. dollars ("USD").[134] The IAEA has not identified a total cost for the extent of the Chernobyl damage but has acknowledged "[a] variety of estimates from the 1990s placed the costs over two decades at hundreds of billions of dollars."[135] In addition the limitations period was extended for loss of life to thirty years.[136]

D. Nuclear Liability Treaties Should Not Continue to Provide Substantial Subsidies to the Nuclear Industry

While there are some differences in detail, and the second generation of treaties has increased the amount of coverage of damages, the Vienna and Paris Conventions and their amending protocols and conventions nonetheless continue to have provisions in common that protect the nuclear industry at the expense of the victims, protect the environment, and guides proper decision-making, including internalizing the risk of the activity. These common provisions serve to:

- Provide a low cap on damages that cannot possibly cover the cost of a significant nuclear accident.
- Channel liability exclusively to the operator of the nuclear installation. Channeling liability to the operator excludes the liability of others who could have contributed to the risk such as the carriers, suppliers, architects, engineers or financiers of nuclear facilities. The operator cannot seek financial recourse through third-party lawsuits, indemnity actions, or other legal means. This provides the third party suppliers and others involved with almost complete immunity.
- Require insurance or other surety to be obtained by the operator.

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[132] *Id.* art. 1(H); 2004 O.J. (L 97).

[133] Hans-Jürgen Ewers & Klaus Rennings, *Economics of Nuclear Risks—A German Study*, *in* SOCIAL COSTS OF ENERGY: PRESENT STATUS AND FUTURE TRENDS 150-66 (Olav Hohmeyer & Richard L. Ottinger eds., 1992).

[134] Press Release, Embassy of the Republic of Belarus in the United States of America, Chernobyl After 19 Years: Problems of Rehabilitation and Sustainable Development (Apr. 22, 2005), *available at* http://usa.mfa.gov.by/eng/chernobyl/pr042505.html.

[135] Press Release, IAEA, Chernobyl: The True Scale of the Accident, PR 2005/12 (Sept. 5, 2005), *available at* http://www.iaea.org/NewsCenter/PressReleases/2005/prn200512.html (last visited Oct. 27, 2006).

[136] 2004 Protocol, *supra* note 63, art. 1(I)(a)(i).

- Impose strict liability on a nuclear operator, regardless of fault; provide limitations on the amount of damages for which nuclear operators are liable; although, the second generation of treaties and instruments has raised the liability limits, they are still woefully inadequate.
- Impose a short statute of limitations; the 1960 Paris Convention and the 1963 Vienna Convention prescribe a ten-year statute of limitations from the accident as the limitation of time to bring claims. The 1997 and 2004 second generation versions of those conventions generally extend the period to thirty years for personal injury, but the 1997 Convention on Supplementary Compensation provides ten years for all types of damage.
- Impose a restrictive definition of nuclear damage.
- Grant exclusive jurisdiction to the courts of the country in whose territory the nuclear plant is located and the law of that state will apply. Jurisdiction over disputes is exclusively in the courts of the country where the accident occurred and a facility operator's insurance is determined by the government where the installation is located. Requiring jurisdiction to be where the installation is located allows the courts to protect the economic interests of that country and places the claimant at a disadvantage.

These provisions protect the nuclear industry from full financial responsibility for nuclear accidents and have constituted a subsidy to the nuclear industry and for the most part, national legislations are similar. "The failure of the international community to develop a comprehensive and adequate liability and compensation regime is the equivalent of providing an enormous subsidy to support the nuclear industry. It should be obvious that any limits on liability are inconsistent with the polluter-pays principle."[137] The costs of a nuclear accident are staggering.

The cost associated with the Fukushima catastrophic accident is ¥ (Japanese yen) 3.24 trillion (approximately $38 billion USD), with the possibility of reaching well over ¥10 trillion (approximately $101 billion USD) when adding the costs of decontamination and compensation.[138] Tokyo Electric Power Company ("Tepco") received a ¥1.0 trillion bailout from the government in April 2012, and in exchange was effectively

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[137] Van Dyke, *Liability and Compensation for Harm Caused by Nuclear Activities*, *supra* note 1, at 230.

[138] Osamu Tsukimori, *UPDATE 2-Tepco Seeks More Govt Support as Fukushima Costs Soar*, REUTERS (Nov. 7, 2012, 4:10 AM), http://www.reuters.com/article/2012/11/07/tepco-fukushima-idUSL3E8M77K720121107.

nationalized.[139] Tepco has already received ¥2.5 trillion (approximately $25.3 billion USD) from the government.[140] By comparison, the claims for damages following the breakup of the oil tanker *Prestige* off the coast of Spain in November 2002 were estimated at €700 million for Spain and €100 million for France.[141] The Japan Center for Economic Research estimates that to clean up and decommission the Fukushima Daiichi reactors will cost between ¥5.7 trillion to ¥20 trillion.[142] This number includes ¥4.3 trillion to purchase land within twenty kilometers of the plant but not beyond it, ¥630 billion for compensation payments to local residents for lost income, and ¥6 trillion to ¥20 trillion for decommissioning the plant's reactors.[143] Not included in the cost estimates are health-related problems and medical monitoring, losses from agriculture, fisheries, industrial production, and tourism, costs of disposing of contaminated water and removing radiation from the soil.

By comparison to the international third party nuclear liability regimes, the United States under the Price-Anderson Act has much higher limits although these limits are clearly inadequate as well.[144] Since 1975, there is no longer government compensation: a first layer of operator's liability of $60 million is supplemented with a regime of retrospective premiums to which all operators contribute. The individual liability of a nuclear operator in the United States is $375 million supplemented with a second layer (consisting of retrospective premiums) of $11.86 billion, leading to a total amount of $12.6 billion, without any government intervention.[145] Price-Anderson has been renewed four times since then: in 1967, 1977, 1987 and 2005.[146] It was renewed for twenty years in 2005.[147] Any claims above the $12.6 billion would be covered by a Congressional mandate to retroactively

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[139] Osamu Tsukimori, *Tepco Gets Bailout but Cedes Power*, WALL ST. J. (Apr. 27, 2012, 9:41 AM), http://online.wsj.com/article/SB10001424052702304811304577369550496643114.html.

[140] *Tepco Gets Government Bailout*, WORLD NUCLEAR NEWS (May 10, 2012), http://www.world-nuclear-news.org/C-Tepco_gets_government_bail_out-1005124.html.

[141] Louise Angelique de La Fayette, *New Approaches for Addressing Damage to the Marine Environment*, 20 INT'L J. MARINE & COASTAL L. 163, 176 (2005).

[142] Tatsuyuki Kobori, *Fukushima Crisis Estimated to Cost From 5.7 Trillion Yen to 20 Trillion Yen*, THE ASAHI SHIMBUN (June 1, 2011), http://ajw.asahi.com/article/0311disaster/quake_tsunami/AJ201106010334.

[143] *Id.*

[144] *See* 42 U.S.C. §§ 2011-23 (1992).

[145] *Liability for Nuclear Damage*, WORLD NUCLEAR ASS'N (Jan. 2013), http://www.world-nuclear.org/info/Safety-and-Security/Safety-of-Plants/Liability-for-Nuclear-Damage/.

[146] *Id.*

[147] *Id.*

increase nuclear utility liability or would be covered by the federal government.[148]

The failure of the international community to develop an adequate, comprehensive and coordinated liability and compensation regime provides an enormous subsidy to support the nuclear industry, as the limits on liability are inconsistent the principles of customary international environmental law. The no-harm rule, the polluter pays principle, the precautionary principle, the principle of sustainable development, and intergenerational equity establish specific duties to provide compensation, reparations and restoration of the environment when nuclear activities cause harm and contamination.

IV. HIGH LEVEL NUCLEAR WASTE—THE ACHILLES' HEEL OF NUCLEAR POWER

A. Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management

In addition to the issues of plant safety and liability for accidents, nuclear waste is a very significant unresolved problem and creates significant health and environmental risks.

> Nuclear waste has sometimes been called the Achilles' heel of the nuclear power industry; much of the controversy over nuclear power centers on the lack of a disposal system for the highly radioactive spent fuel that must be regularly removed from operating reactors. Low-level radioactive waste generated by nuclear power plants, industry, hospitals, and other activities is also a long-standing issue.[149]

The Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management was adopted in 1997 and entered into force in 2001.[150] It has sixty-four parties and forty-two signatories, many of whom are non-nuclear nations.[151] But, despite the adoption of the Joint Convention twenty-five years ago and the use of

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[148] *Id.*

[149] MARK HOLT, CONG. RESEARCH SERV., RL 33461, CIVILIAN NUCLEAR WASTE DISPOSAL (Aug. 30, 2011).

[150] Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management, *supra* note 66.

[151] IAEA, Last Change of Status: Aug. 2, 2012, Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management, Registration No. 1729, *available at* http://www.iaea.org/Publications/Documents/Conventions/jointconv_status.pdf.

civilian nuclear power for over fifty years,[152] there is still no long-term solution to the problem of high-level nuclear waste. This Convention includes most of the major nuclear energy nations—France, Germany, Japan, the Russian Federation, the United Kingdom, and the United States of America.[153] The Convention applies to spent nuclear fuel and radioactive waste worldwide, and its objective is "to ensure that during all stages of spent fuel and radioactive waste management there are effective defenses against potential hazards so that individuals, society and the environment are protected from harmful effects of ionizing radiation."[154] This language clearly requires that nations take steps to safely and effectively dispose of the nuclear waste generated in their nuclear programs. Furthermore, the Joint Convention makes implementation of the principle of intergenerational equity a duty for states. It requires that states "aim to avoid imposing undue burdens on future generations."[155] And it is clear that one of the objectives of the Joint Convention is to:

> [E]nsure that during all stages of spent fuel and radioactive waste management there are effective defenses against potential hazards so that individuals, society and the environment are protected from harmful effects of ionizing radiation, now and in the future, in such a way that the needs and aspirations of the present generation are met without compromising the ability of future generations to meet their needs and aspirations.[156]

The failure to have a reasonable and functioning plan for the disposal of nuclear waste clearly violates the fundamental requirements of this treaty.

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[152] The Obninsk Nuclear Power Station about 110 km southwest of Moscow was the first civilian nuclear power station in the world. *See* IAEA, *From Obninsk Beyond: Nuclear Power Conference Looks to Future*, http://www.iaea.org/newscenter/news/2004/obninsk.html. The first commercial nuclear power plant was Calder Hall, in Sellafield, England, built in 1956, producing 50 MW—later, 200 MW. The first U.S. nuclear power plant was Shippingport Pennsylvania, in 1957, producing 60 MW. *See* IAEA, *50 Years of Nuclear Energy* 3 (2004), http://www.iaea.org/About/Policy/GC/GC48/Documents/gc48inf-4_ftn3.pdf.

[153] Last Change of Status: Aug. 2, 2012, Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management, *supra* note 151.

[154] Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management, *supra* note 66, art. 1(ii); *see also* Peter D. Cameron, *The Revival of Nuclear Power: An Analysis of the Legal Implications*, 19 J. ENVTL. L. 71, 74-75 (2007).

[155] Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management, *supra* note 66, art. 4(vii).

[156] *Id.* art. 1(ii).

B. Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, Feb. 1, 2011 Advisory Opinion, Responsibilities and Obligations of States Sponsoring Persons and Entities With Respect to Activities in the Area, Case No. 17

The International Seabed Authority ("ISA") is the international organization that has control and management over the sea floor and the seabed beyond national jurisdiction, which is part of the common heritage of humanity and is described in the United Nations Convention on the Law of the Sea ("UNCLOS") as the "Area."[157] On February 1, 2011, the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea issued an advisory opinion on the responsibilities and obligations of States sponsoring persons and entities conducting activities in the Area.[158] This recent opinion sets the gold standard for activities with unknown impacts on the environment. The Chamber explained in a unanimous opinion that sponsoring States have two types of obligations.[159] The first obligation requires sponsoring States to ensure compliance by contractors with the terms of their contract and with the obligations set out in the Convention and related instruments.[160] This obligation is an obligation "of conduct," and not "of result."[161] The content of this obligation varies over time in light of technological and scientific developments.[162] The Seabed Disputes Chamber found that riskier activities require a higher standard of due diligence.[163] Certainly nuclear power is one of the most risky activities and when the principle of a higher standard of due diligence is applied, the lack of a permanent long-term repository clearly demonstrates that the duty of due diligence has not been met.

The Seabed Disputes Chamber found that the second set of obligations flow from the Law of the Sea Convention and from Nodules and Sulphides Regulations and include assisting the Authority, applying the precautionary approach and "best environmental practices," ensuring that the contractor

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[157] United Nations Convention on the Law of the Sea, art. 1(1), Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS], *available at* http://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm.

[158] Int'l Tribunal for the Law of the Sea [ITLOS], Seabed Disputes Chamber, *Advisory Opinion, Responsibilities and Obligations of States Sponsoring Persons and Entities With Respect to Activities in the Area*, Case No. 17 (Feb. 1, 2011) [hereinafter ITLOS Advisory Opinion], *available at* http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/Adv_Op_010211_eng.pdf.

[159] *Id.* § IV.

[160] *Id.* ¶ 103.

[161] *Id.* ¶ 110.

[162] *Id.* ¶ 117.

[163] *Id.*

complies with its obligation to conduct an environmental impact assessment ("EIA"), and providing effective methods for compensation in the case that harm results from the mining activity.[164] In the case of nuclear energy, there is no provision for adequate compensation.

Furthermore the Chamber concluded that these Regulations, by embodying the precautionary approach defined in Principle 15 of the 1992 Rio Declaration on Environment and Development,[165] had the effect of transforming a nonbinding concept into a binding obligation.[166] Thus, the Chamber found that the precautionary approach had evolved and is now a norm of customary international law.[167] Continuing to license plants without a solution to high level nuclear waste is unquestionably a violation of the precautionary principle.

C. Reprocessing

Another method to dispose of high-level nuclear waste is reprocessing. The goal of reprocessing is to reuse some of the radioactivity to decrease the amount of waste that must be permanently stored.[168] Reprocessing separates "the plutonium and uranium in irradiated nuclear fuel from fission products and from other isotopes that have built up as a result of neutron absorption."[169] As a result of this process, the dangerous plutonium byproduct can increase the risk of nuclear proliferation and terrorist activity.

Reprocessing also produces its own radioactive waste. In Sellafield, U.K., the reprocessing plants discharge approximately eight million litres of nuclear waste into the Irish Sea each day which causes contamination of the seawater, sediments, and marine life.[170] The Irish Sea is the most

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[164] *Id.* ¶ 122.

[165] United Nations Conference on Environment, Rio de Janiero, Braz., June 3-14, 1992, *Rio Declaration on Environment and Development*, U.N. DOC. A/CONF.151/26/Rev.1 (vol. 7), Annex 1 (Aug. 12, 1992), *available at* http://www.unep.org/Documents.Multilingual/Default.asp?documentid=78&articleid=1163.

[166] ITLOS Advisory Opinion, *supra* note 158, ¶¶ 125-35.

[167] *Id.* ¶ 135.

[168] "Spent fuel held at reprocessing facilities as part of a reprocessing activity is not covered in the scope of this Convention unless the Contracting Party declares reprocessing to be part of spent fuel management." Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management, *supra* note 66, art. 3(1).

[169] Frank N. von Hippel, *Plutonium Reprocessing of Spent Nuclear Fuel*, 293 SCIENCE 2397 (2001).

[170] *Sellafield Nuclear Reprocessing Plant*, GREENPEACE U.K., http://www.greenpeace.org.uk/nuclear/sellafield-nuclear-reprocessing-facility (last visited Dec. 2, 2013).

radioactively contaminated sea in the world.[171] This dumping by the U.K. into the ocean has been of great concern to Ireland for many years. In 2001, Ireland brought a request for emergency provisional measures to stop the U.K. from constructing a new reprocessing plant and the transportation of nuclear materials in seas over which it exercised sovereign rights to the International Court of Justice in *Ireland V. United Kingdom* (the *Mox Plant Case*).[172] The facility was designed to reprocess spent nuclear fuel containing a mixture of plutonium dioxide and uranium dioxide into a new fuel known as mixed oxide ("MOX"). Sellafield is located in the North East of England on the coast of the Irish Sea, approximately 112 miles from the Irish coast at its closest point.[173] The Irish government complained that this new plant would further contribute to the pollution of the Irish Sea and that the transportation of spent nuclear fuel to and reprocessed fuel from the MOX plant would result in further radioactive risks.[174] Ireland pointed out that the many years of radioactive discharge from Sellafield has made the Irish Sea one of the most radioactively polluted seas in the world.[175] Ireland argued that the new plant would engage in additional discharges that would be absorbed into the Irish Sea.[176] Additional discharges, no matter how small, would clearly cause further contamination.[177] Once the plutonium was dumped into the Irish Sea, the environment would be irreversibly further polluted by radioactive materials, and this made Ireland's request one of great urgency.[178] Ireland urged that the International Court of Justice apply the precautionary principle,[179] and require the U.K. to prove that no harm would be caused to the marine environment.[180]

Japan, France, India, the Russian Federation and the United Kingdom engage in reprocessing which is used as a partial solution to the problem of nuclear waste because it reduces the volume of high-level wastes.[181] But

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[171] *Id.*

[172] Ireland v. United Kingdom, Case No. 10, Order of Dec. 3, 2001, http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_10/Order.03.12.01.E.pdf [hereinafter MOX Plant Case].

[173] *Sellafield*, RADIOLOGICAL PROTECTION INSTITUTE OF IRELAND, http://www.rpii.ie/getdoc/321c16e5-e862-4622-abf2-6faf696187ff/Selafield.aspx (last visited Aug. 28, 2013).

[174] Mox Plant Case, Case No. 10, Order of Dec. 3, 2001, ¶¶ 27-43 (request for provisional measures and statement of case of Ireland, Nov. 9, 2001).

[175] *Id.* ¶ 10.

[176] *Id.* ¶ 26.

[177] *Id.* ¶ 107.

[178] *Id.* ¶ 146.

[179] *Id.* ¶¶ 101, 148.

[180] *Id.* ¶ 71.

[181] *Processing of Used Nuclear Fuel*, WORLD NUCLEAR ASS'N (May 2012),

reprocessing also produces plutonium which is a potential serious security threat.[182] France has two reprocessing plants in La Hague, India has two reprocessing plants at Tarapur (one at Kalpakkam and one Trombay), and Russia has a reprocessing plant at Ozersk (Chelyabinsk).[183] There are two nuclear fuel reprocessing plants at Sellafield, Cumbria in the United Kingdom.[184] The Magnox Reprocessing Plant handles Magnox fuel from Britain's early nuclear reactors and is scheduled to cease operations in 2016 and subsequently be decommissioned.[185] The Thermal Oxide Reprocessing Plant reprocesses spent fuel from British Advanced Gas-cooled Reactors and Light Water Reactors worldwide.[186] Sellafield's Thermal Oxide Reprocessing Plant (Thorp) in Cumbria is scheduled to cease operations in 2018 and subsequently be decommissioned.[187] Japan plans to open a major reprocessing plant at Rokkasho and currently has a small plant at Tokai Mura. The Rokkasho plant has had many delays in startup because of operating problems.[188] It is currently scheduled to begin operations in October 2013.[189]

Iran claims the same right as India to reprocess spent nuclear fuel.[190] Korea wants the same rights as Japan and India to reprocess.[191] Korea will reach its limit of capacity to store spent nuclear fuel rods in 2016 and in bilateral negotiations to revise the nuclear energy treaty with the U.S. has been unsuccessfully seeking authority to engage in reprocessing.[192]

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http://www.world-nuclear.org/info/Nuclear-Fuel-Cycle/Fuel-Recycling/Processing-of-Used-Nuclear-Fuel/.

[182] *Id.*

[183] *Id.*

[184] *Spent Fuel Management: Magnox Reprocessing*, SELLAFIELD LTD., http://www.sellafieldsites.com/solution/spent-fuel-management/magnox-reprocessing/ (last visited Aug. 28, 2013).

[185] *Id.*

[186] *Spent Fuel Management: Thorp Reprocessing*, SELLAFIELD LTD., http://www.sellafieldsites.com/solution/spent-fuel-management/thorp-reprocessing/ (last visited Aug. 28, 2013).

[187] *Sellafield Thorp Site to Close in 2018*, BBC NEWS CUMBRIA (June 12, 2012), http://www.bbc.co.uk/news/uk-england-cumbria-18353122.

[188] *Processing of Used Nuclear Fuel*, WORLD NUCLEAR ASS'N (updated May 2012), http://www.world-nuclear.org/info/Nuclear-Fuel-Cycle/Fuel-Recycling/Processing-of-Used-Nuclear-Fuel/.

[189] *Trial Operation of Rokkasho Furnace*, WORLD NUCLEAR NEWS (Jan. 21, 2013), http://www.world-nuclear-news.org/WR-Trial_operation_of_Rokkasho_furnace-2101135.html.

[190] Frank N. Von Hippel & Masafumi Takubo, *Japan's Nuclear Mistake*, N.Y. TIMES (Nov. 28, 2012), http://www.nytimes.com/2012/11/29/opinion/japans-nuclear-mistake.html.

[191] *Id.*

[192] *Japan Could Reprocess Nuclear Fuel From Korea*, CHOSUNILBO (Jan. 7, 2013),

D. Geological Storage of High Level Nuclear Waste

In the United States, nuclear reactors have generated about 75,000 metric tons of spent nuclear fuel and high-level nuclear waste at eighty sites in thirty-five states and are expected to more than double that amount by 2055.[193] No permanent repository for spent fuel exists in the United States.[194] As a result, spent fuel has been stored at the reactor sites.[195] Since 1983, the Department of Energy has spent $14 billion on the proposed Yucca Mountain nuclear waste repository site in Nevada.[196] Under the Obama administration, the site was defunded in 2011.[197] No other site has been identified.

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http://english.chosun.com/site/data/html_dir/2013/01/07/2013010701006.html.

[193] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-731T, NUCLEAR WASTE: DISPOSAL CHALLENGES AND LESSONS LEARNED FROM YUCCA MOUNTAIN, TESTIMONY BEFORE THE SUBCOMMITTEE ON ENVIRONMENT AND THE ECONOMY, COMMITTEE ON ENERGY AND COMMERCE, HOUSE OF REPRESENTATIVES, STATEMENT OF MARK GAFFIGAN, MANAGING DIRECTOR, NATURAL RESOURCES AND ENVIRONMENT 1 (2010), *available at* http://www.gao.gov/assets/130/126333.html. "Existing nuclear waste already exceeds the 70,000 metric ton capacity of the proposed Yucca Mountain repository." *Id.*

[194] *Id.*

[195]

> Most spent nuclear fuel is stored at operating reactor sites, immersed in pools of water designed to cool it and isolate it from the environment. With no offsite storage or disposal option for the spent nuclear fuel, some of the racks in the pools holding spent nuclear fuel have been be rearranged to allow for more dense storage. Despite this reracking, spent nuclear fuel pools in the United States are reaching their capacities. Even before the March 2011 earthquake and tsunami in Japan that resulted in the release of radiation from the damaged reactors at Fukushima Daiichi Nuclear Power Station, concerns had been expressed about the possibility of an accident involving radiation release. The concerns were that an overcrowded spent nuclear fuel pool could release large amounts of radiation if an accident or other event caused the pool to lose water, potentially leading to a fire that could disperse radioactive material. As U.S. reactor operators have run out of space in their spent nuclear fuel pools, they have turned in increasing numbers to dry cask storage systems, which generally consist of stainless steel canisters placed inside larger stainless steel or concrete casks and stored outside the pools on concrete pads. Without a final disposition pathway, this commercial spent nuclear fuel generally remains where it was generated, including nine sites where the reactors have been decommissioned.

Id. at 4-5.

[196] Laurel Adams, *Yucca Mountain Cancellation Creates Expensive Headaches for DOE and Navy,* THE CENTER FOR PUBLIC INTEGRITY (May 6, 2011, 5:20 PM), http://www.publicintegrity.org/node/4503.

[197] *See* Pete Kasperowicz, *House Members Slam Obama on Closing Yucca Mountain Nuclear Waste Site,* THE HILL (May 31, 2012), http://thehill.com/blogs/floor-action/house/230397-house-members-slam-obama-on-yucca-mountain-policy.

The Blue Ribbon Commission on America's Nuclear Future was appointed in 2010 by President Obama.[198] The Commission issued its final report in January 2012 and warned that finding a solution to the waste issue was critical to intergenerational equity: "this generation has a fundamental ethical obligation to avoid burdening future generations with the entire task of finding a safe permanent solution for managing hazardous nuclear materials they had no part in creating."[199] The Commission conducted two years of study and hearings, but did not evaluate the suitability of Yucca or any other site.[200] The Commission recommended that the United States should immediately start seeking a site for the interim storage of nuclear waste as well as one for its long-term burial and that any site should be consent-based, one that the local community supports or at least does not object to.[201]

It seems that an international consensus has emerged that deep geological disposal on land is the most appropriate means for isolating high-level nuclear waste permanently.[202] The main challenges are that the waste must be effectively and permanently isolated for at least 100,000 years, which is about 3,000 future generations, and that a stable political system must be able to protect the site during that time.[203] There are currently no long-term disposal facilities for high-level waste operating in any country.[204]

In 2009, Sweden chose a deep geological site in hard rock at Forsmark, submitted a license application, and plans to have the facility operational by 2023.[205] In France, an underground rock testing laboratory will be built in a clay formation at Bure in Northeast France.[206] This region is identified as

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[198] BLUE RIBBON COMM'N ON AMERICA'S NUCLEAR FUTURE, REPORT TO THE SECRETARY OF ENERGY ii (Jan. 2012), *available at* http://cybercemetery.unt.edu/archive/brc/20120620220235/http://brc.gov/sites/default/files/documents/brc_finalreport_jan2012.pdf.

[199] *Id.* at vi.

[200] *Id.* at ii-iii.

[201] *Id.* at viii-ix.

[202] *Id.* at 137 n.50.

[203] *See* Steve Rose, *Nuclear Waste: Keep Out—for 100,000 Years*, THE GUARDIAN (Apr. 24, 2011, 4:31 PM), http://www.guardian.co.uk/artanddesign/2011/apr/24/nuclear-waste-storage.

[204] Helen Wallace, *Rock Solid? A Scientific Review of Geological Disposal of High-Level Radioactive Waste*, GREENPEACE EU UNIT (Sept. 15, 2010), http://www.greenpeace.org/eu-unit/en/Publications/2010/rock-solid-a-scientific-review/.

[205] *Forsmark for Swedish Nuclear Waste*, WORLD NUCLEAR NEWS (June 3, 2009), http://www.world-nuclear-news.org/WR_Forsmark_for_Swedish_nuclear_waste_0306091.html.

[206] *Next Phase for French Geological Disposal*, WORLD NUCLEAR NEWS (Jan. 5, 2012), http://www.world-nuclear-news.org/WR-Next_phase_for_French_geological_disposal-0501127.html.

the site where a geological disposal facility may be sited.[207] The United States has had an operating facility in a salt formation for long-lived intermediate level waste at the Waste Isolation Pilot Plant in Carlsbad, New Mexico but it is just for nuclear weapons research and production.[208] Belgium has been researching high level waste in clay at an underground rock laboratory in Mol.[209] In May 2002, Finland decided to develop a repository for spent fuel disposal in Oakalo, 100 miles northwest of Helsinki.[210] The Oakalo repository is under construction with plans to open in 2020 to receive radioactive waste.[211] Canada is developing a deep repository for low level waste/intermediate level waste at Kincardine in hard rock, but will not start its spent fuel repository siting until the siting process has been agreed.[212] China is investigating a potential site in the Gobi Desert for the long-lived waste from its rapidly expanding nuclear reactor development.[213] Germany is reopening its investigations in the Goreleben salt dome for heat-generating waste and refurbishing the Konrad facility for (non-heat generating waste) ready for operation in the next few years.[214] Other countries, such as Japan and Switzerland are still in the process of site selection.[215] In the Netherlands there are storage facilities for low-level waste/intermediate level waste and vitrified high-level waste at Vlissingen.[216]

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[207] *Id.*

[208] *See Waste Isolation Pilot Plant*, U.S. DEP'T OF ENERGY, http://www.wipp.energy.gov (last visited Apr. 13, 2013).

[209] *Nuclear Power in Belgium*, WORLD NUCLEAR ASS'N (updated Dec. 2012), http://www.world-nuclear.org/info/country-profiles/countries-A-F/Belgium/.

[210] Dennis Overbye, *Finland's 100,000-Year Plan to Banish its Nuclear Waste*, N.Y. TIMES (May 10, 2010), http://www.nytimes.com/2010/05/11/science/11nuclear.html.

[211] *Id.*

[212] *Ontario Plan for Waste Storage*, WORLD NUCLEAR NEWS (Apr. 27, 2011), http://www.world-nuclear-news.org/WR-Ontario_plan_for_waste_storage-2804114.html.

[213] *China's Nuclear Fuel Cycle*, WORLD NUCLEAR ASS'N (updated Mar. 2013), http://www.world-nuclear.org/info/Country-Profiles/Countries-A-F/China--Nuclear-Fuel-Cycle/; Yuan Ying & Wang Haotong, *China's Nuclear-Waste Rush*, CHINADIALOGUE (Mar. 21, 2011), http://www.chinadialogue.net/article/show/single/en/4172.

[214] *Search for German Repository Site Starts Again*, WORLD NUCLEAR NEWS (Apr. 10, 2013), http://www.world-nuclear-news.org/WR-Search_for_German_repository_site_starts_again-1004134.html.

[215] *See Japan to Rethink Candidate Sites for Nuclear Waste Disposal*, JAPAN TIMES (Feb. 26, 2013), http://www.japantimes.co.jp/news/2013/02/26/national/japan-to-rethink-candidate-sites-for-nuclear-waste-disposal/; *Swiss Radwaste Consultation Opens*, WORLD NUCLEAR NEWS (June 19, 2012), *available at* http://www.world-nuclear-news.org/WR-Swiss_radwaste_consultation_opens-1906127.html.

[216] *Nuclear Fission in the Netherlands*, NODE, http://www.energyresearch.nl/2/energy-options/nuclear-fission/background/nuclear-fission-in-the-netherlands/ (last visited Apr. 25, 2013).

In the U.K., all the nuclear waste produced by the country since the 1940s is kept above ground in Sellafield.[217] There were attempts to move toward finding a site in Cumbria but the local community strongly resisted.[218]

In Russia, no waste repository is yet available.[219] Russia is investigating a possible site in granite on the Kola Peninsula North of the Arctic Circle.[220] Rosatom has stated that the plans for the facility construction would commence with design activities and an underground rock laboratory.[221] The decision on construction would then be ready to be made by 2025, and the facility is scheduled to be completed by 2035.[222]

E. The Current Practices of Temporary Storage of High Level Waste and Spent Nuclear Fuel

After four to six years, nuclear fuel rods are no longer used to produce energy and are then treated as spent nuclear fuel ("SNF").[223] When removed from the reactor, these fuel rods are very hot and emit tremendous amounts of radiation—"enough to deliver a fatal radiation dose in minutes to someone in the immediate vicinity who is not adequately shielded."[224] In order to cool the rods and provide protection from radiation, the rods are transferred to racks in deep, water-filled fuel pools.[225] These on-site fuel pools hold most of the high-level waste that has been generated by reactors.[226] In addition, once the nuclear fuel rods have cooled, they can be transferred to dry storage.[227] However, storage of spent fuel at nuclear power plants was supposed to have been a temporary solution.[228] There is general agreement among the experts that the best solution for SNF storage is a deep geologic repository, comprised of engineered and naturally-occurring barriers for long-term isolation of waste.[229]

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[217] *See* Rose, *supra* note 203.

[218] *Id.*

[219] *Russia's Nuclear Fuel Cycle*, WORLD NUCLEAR ASS'N (updated Apr. 20, 2013), http://world-nuclear.org/info/Country-Profiles/Countries-O-S/Russia--Nuclear-Fuel-Cycle/.

[220] *Id.*

[221] *Id.*

[222] *Id.*

[223] BLUE RIBBON COMM'N ON AMERICA'S NUCLEAR FUTURE, REPORT TO THE SECRETARY OF ENERGY, *supra* note 198, at 10.

[224] *Id.* at 10-11.

[225] *Id.* at 11.

[226] *Id.*

[227] *Id.*

[228] *Id.*

[229] *See id.* at 29 ("While several options for disposing of spent fuel and high-level nuclear

Spent fuel storage pools continue to pose a serious threat at Fukushima.[230] There is concern that the water can boil away or leak out from cracks in the pools or the spent fuel rods will release radiation directly into the air.[231] Britain's National Audit Office has "warned of 'intolerable' risks to the public from Sellafield's fifty-year-old storage ponds."[232]

In the United States, these fuel ponds have been used for approximately fifty years in many locations. Because temporary storage has turned into a half century of storage, nuclear power plants have engaged in replacement of storage racks with higher density racks which allow the storage of more irradiated fuel.[233] But even with re-racking, many plants have reached the maximum capacity of the fuel pools and to achieve additional on-site dry cask storage in concrete, and metal containers have been implemented.[234] Most SNF, however, will remain in spent-fuel pools until a permanent disposal solution is available.[235] It has been estimated that the amount of SNF may grow to 150,000 metric tons by 2050.[236]

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waste have been considered in the United States and elsewhere, international scientific consensus clearly endorses the conclusion that deep geological disposal is the most promising and accepted method currently available for safely isolating spent fuel and high-level radioactive wastes from the environment for very long periods of time."); *id.* ("Mined geologic disposal will use a system comprised of engineered barriers (the waste package and the mined repository) and naturally occurring barriers (the host rock formation and the chemical and physical properties of the repository site itself) to provide long-term isolation of waste from the biosphere.").

[230] Hiroko Tabuchi & Matthew L. Wald, *Spent Fuel Rods Drive Growing Fear Over Plant in Japan*, N.Y. TIMES (May 26, 2012), http://www.nytimes.com/2012/05/27/world/asia/concerns-grow-about-spent-fuel-rods-at-damaged-nuclear-plant-in-japan.html ("The public's fears about the pool have grown in recent months as some scientists have warned that it has the most potential for setting off a new catastrophe, now that the three nuclear reactors that suffered meltdowns are in a more stable state, and as frequent quakes continue to rattle the region.").

[231] Keith Bradsher & Hiroko Tabuchi, *Greater Danger Lies in Spent Fuel Than in Reactors*, N.Y. TIMES (Mar. 17, 2011), http://www.nytimes.com/2011/03/18/world/asia/18spent.html ("The electric utility said that a total of 11,125 spent fuel rod assemblies were stored at the site. That is about four times as much radioactive material as in the reactor cores combined.").

[232] Mark Hennessy, *"Intolerable" Risks in Sellafield Clean-Up*, IRISH TIMES (Nov. 8, 2012), http://www.irishtimes.com/news/intolerable-risks-in-sellafield-clean-up-1.548726.

[233] *See, e.g.*, *Advanced Fuel Storage Design Allows for Double the Amount of Spent Fuel to be Stored*, CCI, http://www.ccivalve.com/case-studies/nuclear/advanced-fuel-storage-design.aspx (last visited Dec. 2, 2013).

[234] BLUE RIBBON COMM'N ON AMERICA'S NUCLEAR FUTURE, REPORT TO THE SECRETARY OF ENERGY, *supra* note 198, at 33-35.

[235] *Id.* at 11.

[236] *Id.* at 14.

SNF remains a dangerous, long-term health and environmental risk "for time spans seemingly beyond human comprehension."[237] In 2010, after twenty years of working on the Yucca Mountain site, the U.S. Department of Energy withdrew its license application for the repository facility.[238] The failure to find a permanent repository is the "central flaw of the U.S. nuclear waste management program to date."[239]

In a 2012 unanimous decision, the Court of Appeals for the District of Columbia Circuit vacated the NRC's recently adopted rules governing the temporary storage and permanent disposal of nuclear waste.[240] The Court of Appeals concluded that the risks and environmental effects of temporary storage for the long-term had not been adequately studied and evaluated and that the waste confidence decision mandated an environmental impact statement or, alternatively, an environmental assessment finding of no significant impact.[241]

> The Commission failed to examine the environmental consequences of failing to establish a repository when one is needed. . . . The Commission apparently has no long-term plan other than hoping for a geologic repository. If the government continues to fail in its quest to establish one, then SNF will seemingly be stored on site at nuclear plants on a permanent basis. The Commission can and must assess the potential environmental effects of such a failure.[242]

Now that funding for the Yucca Mountain option has been eliminated, the Court of Appeals reasoned that failing to establish a repository is a possibility that cannot be ignored and thus the NRC finding of "reasonable assurance" that a permanent nuclear waste site would be developed "when necessary" was certainly not guaranteed.[243]

Based on the state of the evidence, the Court of Appeals did not accept the NRC's extension to sixty years of its earlier finding that spent nuclear fuel could likely be stored safely for as long as thirty years beyond a plant's licensed life, either in pools or giant casks.[244] The Court of Appeals concluded that although pool leaks and the risk of a fire resulting from loss of water in the pools and exposure to air of fuel rods have not created

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[237] Nuclear Energy Inst., Inc. v. Envtl. Prot. Agency, 373 F.3d 1251, 1258 (D.C. Cir. 2004) (per curiam).

[238] BLUE RIBBON COMM'N ON AMERICA'S NUCLEAR FUTURE, REPORT TO THE SECRETARY OF ENERGY, *supra* note 198, at 3.

[239] *Id.* at 27.

[240] N.Y. v. Nuclear Regulatory Comm'n, 681 F.3d 471, 483 (D.C. Cir. 2012).

[241] *Id.* at 478-479.

[242] *Id.* at 479.

[243] *Id.* at 476-77.

[244] *Id.* at 479.

serious environmental risks so far, according to the NRC, the NRC must nonetheless assess the probability and consequence of bigger leaks and other accidents.[245]

California was the first state to ban the construction of new reactors until there is a permanent solution to the high waste problem.[246] Subsequently, eight other states—Connecticut, Illinois, Kentucky, Maine, New Jersey, Oregon, West Virginia, and Wisconsin—adopted statutes that tied approval of new reactors to (at a minimum) progress on the issue of waste disposal.[247] Other states, such as Minnesota, have adopted moratoria on new nuclear reactors, but these moratoria are not necessarily tied to the waste issue.[248]

Worldwide, nuclear waste disposal is still unresolved. As the Court of Appeals for the District of Columbia Circuit aptly stated, "[t]he lack of progress on a permanent repository has caused considerable uncertainty regarding the environmental effects of temporary SNF storage and the reasonableness of continuing to license and relicense nuclear reactors."[249] Until there is a solution to the Achilles' heel problem of the nuclear industry, it is clearly unreasonable and a violation of international environmental norms including the precautionary principle, the no harm rule, the principles of intergenerational equity and the duty to cooperate to continue to license and relicense nuclear reactors.

F. IAEA 2012 Fourth Review Meeting

At the IAEA Fourth Review Meeting in 2012,[250] at which fifty-four contracting parties participated, the members admitted that the siting of geological repositories remains a very difficult problem, stating, "Although good progress was reported by several Contracting Parties, it is recognized that the long term management of spent fuel and high level radioactive waste remains a challenging and difficult topic with considerable areas for improvement."[251] Significantly, the parties concluded that the management

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[245] *Id.* at 481-83.

[246] CAL. PUB. RES. CODE § 25524.2 (2013).

[247] E. Michael Blake, *Where New Reactors Can (and Can't) be Built*, NUCLEAR NEWS, Nov. 2006, at 23-26, *available at* http://www.ans.org/pubs/magazines/nn/docs/2006-11-2.pdf.

[248] *Id.*

[249] *N.Y. v. Nuclear Regulatory Comm'n*, 681 F.3d at 471, 474.

[250] IAEA Review Committees are to be held at least every three years. *See* Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management, *supra* note 66, art. 30.

[251] Fourth Review Meeting of the Contracting Parties, Vienna, Austria, May 14-23, 2012, Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive

of nuclear waste should be taken into account before approval is given for a new nuclear plant.[252] The parties specifically "reaffirmed the importance of taking spent fuel management and radioactive waste management into account from the very beginning of any nuclear activities, such as in expanding nuclear power programmes."[253] After more than fifty years of operation of nuclear power plants with no long-term storage facilities in operation, no further approvals should be given until this problem is solved.

V. FUKUSHIMA DAIICHI NUCLEAR DISASTER FALL-OUT

A. Continuing Radiation Exposure Dangers

The Fukushima Daiichi nuclear accident on March 11, 2011 was the largest nuclear disaster since Chernobyl.[254] Both disasters are the only ones to register Level 7 on the International Nuclear Scale.[255] All three nuclear cores melted within the first few days.[256] The cooling systems did not work and hydrogen explosions damaged the facilities, releasing a large amount of radioactive material into the environment.[257]

Dangerously, the Fukushima nuclear plant is still not stable and contained.[258] At reactor no. 4, more than 1,500 cooling rods were sitting in a cooling pool that could be damaged again in another earthquake.[259] The cooling rods are being removed, but it is expected to take another two years.[260] Reactor no. 3 has not been worked on at all because the level of

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Waste Management, Final Summary Report, ¶ 14, JC/RM4/04/Rev.2 (May 23, 2012), *available at* http://www-ns.iaea.org/downloads/rw/conventions/fourth-review-meeting/summary-report-english.pdf.

[252] *Id.* ¶ 16.

[253] *Id.*

[254] Scott DiSavino, *Analysis: A Month On, Japan Nuclear Crisis Still Scarring*, REUTERS (Apr. 8, 2011, 5:41 PM), http://www.reuters.com/article/2011/04/08/us-nuclear-japan-month-idUSTRE7377I120110408.

[255] Eliza Barclay, *Fukushima vs. Chernobyl: Still Not Equal*, NPR (Apr. 12, 2011, 3:31 PM), http://www.npr.org/2011/04/12/135353240/fukushima-vs-chernobyl-what-does-level-7-mean.

[256] *Fukushima Accident 2011*, WORLD NUCLEAR ASS'N (updated Apr. 2, 2013), http://www.world-nuclear.org/info/Safety-and-Security/Safety-of-Plants/Fukushima-Accident-2011/.

[257] *See* MARK HOLT ET AL., CONG. RESEARCH SERV., R41694, FUKUSHIMA NUCLEAR DISASTER 2 (2012). For detailed information about this nuclear accident, see the IAEA website, which is regularly updated: http://www.iaea.org/newscenter/focus/fukushima/.

[258] Rupert Wingfield-Hayes, *Fukushima Disaster: Long Road to Nuclear Clean-Up*, BBC NEWS (Mar. 11, 2013), http://www.bbc.co.uk/news/world-asia-21737910.

[259] *Id.*

[260] *Id.*

radiation is too high and workers cannot safely go near it.[261] Reactor no. 3 also has spent fuel rods sitting in a cooling pool.[262] Plant manager Takeshi Takahashi explained how difficult the clean-up is: "We need to remove the broken and damaged fuel and safely isolate it. This work will take thirty to forty years. Even during the process we should never release any radioactive material into the surrounding environment."[263]

Tepco has had to resort to dumping contaminated water into the sea.[264] On April 2, 2011, Japanese safety officials discovered a leak in a maintenance pit had been releasing highly radioactive water into the ocean.[265] Two days later, on April 4, 2011, Tepco decided to intentionally discharge 11,000 tons of low-level radioactive water directly into the ocean because space in storage facilities was desperately needed for more highly radioactive water that had been used to cool the reactors.[266] "The government estimated the total amount of radiation contained in the released water at 150 billion becquerels—exceeding the legal limits by about 100 times—depending on the sample taken."[267] China and South Korea expressed strong concerns at the time.[268]

Currently there is not enough onsite storage space for the contaminated water, and thus it has been predicted that Tepco will resort to dumping used radioactive cooling water into the ocean for many years.[269] The local fisheries association in the Fukushima Prefecture strongly objected to any

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[261] *Id.*

[262] *Id.*

[263] *Id.*

[264] Tsuyoshi Inajima, *Tepco Faces Decision to Dump Radioactive Water in Pacific*, BLOOMBERG (Apr. 11, 2013, 4:17 PM), http://www.bloomberg.com/news/2013-04-11/tepco-faces-decision-to-dump-radioactive-water-in-pacific-ocean.html.

[265] *See* Eben Harrel, *Fukushima Dumping: A Violation of International Law?*, TIME (Apr. 6, 2011, 8:00 AM), http://science.time.com/2011/04/06/fukushima-dumping-a-violation-of-international-law/ (noting that international ocean dumping agreements only explicitly cover dumping into the ocean from ships, aircraft, or other man-made structures and do not explicitly cover dumping into the ocean from land, which is what occurred at the Fukushima Daiichi power plant).

[266] Hiroko Tabuchi & Ken Belson, *Japan Releases Low-Level Radioactive Water into Ocean*, N.Y. TIMES (Apr. 4, 2011), http://www.nytimes.com/2011/04/05/world/asia/05japan.html (comparing the level of radiation in the water to be dumped, 100 times the legal limit, with the water which would replace the dumped water in the storage containers, 10,000 times the legal limit).

[267] Mitsuru Obe, *Japan Discloses Data on Radioactive Water Release*, WALL ST. J. (Apr. 16, 2011, 11:09 AM), http://online.wsj.com/article/SB10001424052748704628404576264714007348364.html.

[268] *Id.*

[269] Ken Belson, *Filtering of Tainted Water Begins at Japanese Plant*, N.Y. TIMES (June 17, 2011), http://www.nytimes.com/2011/06/18/world/asia/18tepco.html.

further dumping of radioactive water.[270] Most fish from the Fukushima coast are not permitted to be sold for human consumption.[271] Tepco has reported that 740,000 becquerels per kilogram of radioactive cesium were found in a fish caught close to the plant which is 7,400 times the current government determined limit for safe human consumption.[272]

The rationale behind this intentional dumping is that the ocean is vast and will necessarily dilute nuclear contamination.[273] But it is not at all clear as to how this continuing radioactive contamination will affect marine life, or humans. In addition, atmospheric fallout from the damaged reactors is also causing contamination of the ocean as prevailing winds carry radioactivity out over the Pacific.[274]

Two years later, Tepco is proposing to dump more contaminated water into the ocean.[275] Water is required to keep the melted fuel cool.[276] Water also leaked into the basements of the containment buildings.[277] Pumps are used to drain the contaminated water but then Tepco needs to store it safely.[278] The 9-magnitude earthquake created cracks in the walls of the nuclear power plant and as a result about 400 tons of groundwater has

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[270] Kosaku Narioka, *Fukushima Fishermen to Tepco: Stop the Dumping*, WALL ST. J. JAPAN REALTIME BLOG (Apr. 6, 2011, 7:35 PM), http://blogs.wsj.com/japanrealtime/2011/04/06/fukushima-fishermen-to-tepco-stop-the-dumping/.

[271] Danielle Demetriou, *Record Levels of Radiation Found in Fish Near Japan's Fukushima Plant*, TELEGRAPH (Mar. 23, 2013, 2:48 PM), http://www.telegraph.co.uk/news/worldnews/asia/japan/9937319/Record-levels-of-radiation-found-in-fish-near-Japans-Fukushima-plant.html.

[272] Malcolm Foster, *Fish Near Fukushima Reportedly Contains High Cesium Level*, THE HUFFINGTON POST (Mar. 3, 2013, 3:03 AM), http://www.huffingtonpost.com/2013/03/17/fish-fukushima-cesium_n_2894350.html.

[273] *Cf. Marine Pollution: Centuries of Abuse Have Taken a Heavy Toll*, NATIONAL GEOGRAPHIC, http://ocean.nationalgeographic.com/ocean/critical-issues-marine-pollution/ (last visited June 22, 2013) ("The oceans are so vast and deep that until fairly recently, it was widely assumed that no matter how much trash and chemicals humans dumped into them, the effects would be negligible.")

[274] *See generally* EUGENE BUCK & HAROLD UPTON, CONG. RESEARCH SERV., R41751, EFFECTS OF TOHOKU TSUNAMI AND FUKUSHIMA RADIATION ON THE U.S. MARINE ENVIRONMENT (2012).

[275] *Tepco Plans to Dump 'Cleaned' Fukushima No. 1 Water*, JAPAN TIMES (Jan. 25, 2013), http://www.japantimes.co.jp/news/2013/01/25/national/tepco-plans-to-dump-cleaned-fukushima-no-1-water/.

[276] *Id.*

[277] Mari Yamaguchi, *Fukushima Plant Detects New Radioactive Water Leak, Possibly As Much As 120 Tons Escape*, HUFFINGTON POST (Apr. 9, 2013, 10:13 AM), http://www.huffingtonpost.com/2013/04/09/fukushima-new-radioactive-water-leak_n_3045163.html.

[278] Kazuaki Nagata, *Water is Both the Savior and the Bane at Fukushima No. 1*, JAPAN TIMES (Mar. 9, 2013), http://www.japantimes.co.jp/news/2013/03/09/national/water-is-both-the-savior-and-the-bane-at-fukushima-no-1/.

flowed into the buildings and mixed with the tainted coolant water.[279] Tepco has been storing the estimated 260,000 tons of contaminated water in tanks.[280] Tepco knows that it needs to build more tanks but there is not enough time.[281] There are enough tanks to store about 60,000 more tons which are expected to be filled in the next few months.[282] Once Tepco runs out of capacity, Tepco is considering dumping the contaminated water into the ocean.[283] Tepco plans to treat the water first and filter out radioactive substances.[284] Professor Akio Koyama, Kyoto University, has opined that Tepco seems to have no choice but to dump the water into the ocean because Tepco is not able to remove the radioactive tritium.[285] Professor Koyama suggests that Tepco can dilute the tritium-tainted water to legal levels, thus removing the issue of dumping contaminated water.[286] "The water will be further diluted as soon as it is dumped into the ocean. There are various estimates, but I don't think this will be dangerous," said Professor Koyama.[287]

Tepco has installed a water purification system called "ALPS".[288] This new system is reported to be able to remove sixty-two of the sixty-three radioactive substances detected at Fukushima, but it cannot remove radioactive tritium.[289] The concentration of tritium contained in the contaminated water and other areas at Fukushima is about 1,300 becquerels per one cubic centimeter, far exceeding the government-imposed limit of 60 becquerels per one cubic centimeter.[290]

The Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972 ("London Convention")[291] and the 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972 ("London Protocol")[292]

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[279] *Id.*

[280] *Id.*

[281] *Id.*

[282] *Id.*

[283] *Id.*

[284] *Id.*

[285] *Id.*

[286] *Id.*

[287] *Id.*

[288] *Japan Considers the Dumping of Water From Fukushima Nuclear Plant Into the Ocean*, MARINET (Mar. 7, 2013), http://www.marinet.org.uk/japan-considers-the-dumping-of-water-from-fukushima-nuclear-plant-into-the-ocean.html.

[289] Tritium is a hydrogen isotope. *Id.*

[290] *Id.*

[291] Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, Dec. 29, 1972, 26 U.S.T. 2403, 1046 U.N.T.S. 138 [hereinafter London Convention].

[292] 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping

specifically address ocean dumping.[293] The UNCLOS[294] articles 207 and 213 address land-based ocean dumping.[295] Japan is a party to the London Convention and Protocol and UNCLOS.[296] However, neither the London Convention nor the Protocol were interpreted in this situation to apply to dumping into the ocean of nuclear contaminated water from the land.[297] The London Convention and Protocol specifically define the term dumping as "deliberate disposal at sea of wastes . . . from . . . man-made structures at sea."[298] Moreover, Article V of the London Convention and Article 8 of the London Protocol contain emergency exceptions that will allow otherwise prohibited dumping to occur.[299] In addition, the London Convention and Protocol contain an exception to the prohibition against dumping when infrastructure damage poses a threat to safety.[300] Articles 207 and 213 of UNCLOS require states to regulate, reduce and control land-based ocean

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of Wastes and Other Matter, Nov. 7, 1996, 36 I.L.M. 1 [hereinafter London Protocol].

[293] *See* London Convention, *supra* note 291, art. I ("Contracting Parties shall . . . pledge themselves especially to take all practicable steps to prevent the pollution of the sea by the dumping of waste and other matter . . . ."); London Protocol, *supra* note 292, art. 2 ("Contracting Parties shall . . . prevent, reduce and where practicable eliminate pollution caused by dumping or incineration at sea of wastes or other matter.").

[294] UNCLOS, *supra* note 157, arts. 207, 213.

[295] *Id.* art. 207 ("States shall adopt laws and regulations to prevent, reduce, and control pollution of the marine environment from land-based sources . . . . States shall take other measures as may be necessary to prevent, reduce, and control such pollution."); *id.* art. 213 (requiring states to enforce the laws and regulations promulgated in compliance with article 207, and implement the international standards relating to land-based marine pollution).

[296] Int'l Maritime Org. [IMO] Secretary-General, Status of the London Convention and Protocol, Report of the Secretary-General on the Status of the London Convention, 1972, Annex 1, LC 34/2 (July 19, 2012), *available at* http://www.imo.org/OurWork/Environment/SpecialProgrammesAndInitiatives/Pages/London-Convention-and-Protocol.aspx (indicating that Japan ratified the London Convention on October 15, 1980 and the London Protocol on October 2, 2007); *Chronological Lists of Ratifications of, Accessions and Successions to the Convention and the Related Agreements as of 23 January 2013*, U.N. DIVISION FOR OCEAN AFFAIRS AND THE LAW OF THE SEA, http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm (last visited Apr. 13, 2013) (indicating that Japan ratified UNCLOS on June 20, 1996).

[297] DAUD HASSAN, PROTECTING THE MARINE ENVIRONMENT FROM LAND-BASED SOURCES OF POLLUTION: TOWARDS EFFECTIVE INTERNATIONAL COOPERATION 79-80 (2006) (noting that absent express inclusion in the London Protocol, land-based sources would not likely fall under the definition of dumping in the agreement).

[298] London Convention, *supra* note 291, art. III; London Protocol, *supra* note 292, art. 1.

[299] London Convention, *supra* note 291, art. V (establishing two exceptions from the requirements: one in the case of *force majeure*, and the second when permitted by the contracting Party after consulting with those countries that are likely affected by the dumping); London Protocol, *supra* note 292, art. 8 (providing the same emergency exceptions as article V of the London Convention).

[300] London Convention, *supra* note 291, art. V; London Protocol, *supra* note 292, art. 8.

dumping but do not specifically prohibit ocean dumping of nuclear waste from land.[301] The dumping of radioactive contaminated water from a land-based site should be prohibited under the international treaties governing the oceans, as such dumping would be prohibited from a ship under the London Convention and Protocol.[302] The London Convention and Protocol should be amended to prohibit the deliberate dumping of nuclear contaminated water from a land-based location just as it is prohibited at sea.

B. The Failure to Care For the People Exposed and the Land Contaminated and Lawsuits Filed By the Victims

Tens of thousands of voluntary evacuees, and 160,000 involuntary evacuees, fled from the radioactive fallout.[303] There is still a nineteen-mile exclusion zone and about 160,000 residents from the region have been told that they may never be able to return home due to nuclear contamination.[304] People in Japan have lost their homes, jobs and communities. None of them have received enough compensation to rebuild their lives.[305] On the second anniversary of the disaster, 800 survivors from the Fukushima and neighboring prefectures filed a class action lawsuit in Fukushima District Court seeking ¥55,000 (approximately $520 USD) a month from the government and Tepco until the area contaminated by radioactive fallout is restored.[306] The claimants stated, "Through this case, we seek restitution of the region to the condition before radioactive materials contaminated the area, and demand compensation for psychological pains until the restitution is finished."[307] The lawyers have indicated that they plan to file additional

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[301] *See generally* UNCLOS, *supra* note 157, arts. 207, 213 (requiring states to implement domestic and international rules in accordance with the Convention and other international standards, instead of providing specific requirements and prohibitions with which states must comply).

[302] *See* London Protocol, *supra* note 292, arts. 1(4.1), 2.

[303] Danielle Demetriou, *Japan Earthquake and Tsunami Anniversary: Hundreds of Fukushima Victims File Lawsuit*, TELEGRAPH (Mar. 11, 2013, 11:34 AM), http://www.telegraph.co.uk/news/worldnews/asia/japan/9922036/Japan-earthquake-and-tsunami-anniversary-hundreds-of-Fukushima-victims-file-lawsuit.html.

[304] *Id.*

[305] *Lessons from Fukushima: Time to Stop Protecting the Nuclear Industry*, GREENPEACE CANADA (Mar. 4, 2013) http://www.greenpeace.org/canada/en/campaigns/Energy/end-the-nuclear-threat/Resources/Background-documents/Lessons-from-Fukushima-Time-to-Stop-Protecting-the-Nuclear-Industry--What-impact-has-the-Fukushima-disaster-had-on-the-people-of-Japan-/.

[306] Demetriou, *supra* note 303.

[307] *Id.*

lawsuits in Tokyo and elsewhere and expect to have 10,000 people as plaintiffs.[308]

In December 2012, eight U.S. Navy crewmembers (and the unborn child of one of the sailors) who had served aboard the *U.S.S. Ronald Reagan* filed a claim in U.S. federal court against Tepco.[309] The aircraft carrier *Reagan* had been sent to Japan to render aid in the area stricken by the devastating earthquake and tsunami of March 13, 2011, and the subsequent reactor failure at the Fukushima Daiichi nuclear power plant.[310] At the time of the disaster, Tepco was a wholly owned public benefit subsidiary of the government of Japan.[311]

Japan is not a party to any of the international nuclear liability treaties and the causes of action arise out of U.S. tort law and include claims for negligence, strict liability for failure to warn, strict liability for design defect in the power plant, strict liability for misrepresentations, deceptive business acts and practices, public and private nuisance, and fraud.[312] The suit alleges conspiracy[313] and material misrepresentation[314] on the part of the Tepco and the Japanese government to keep secret the true extent of the danger from radiation and "to create an illusory impression that the extent of the radiation that had leaked from the site of the FNPP [Fukushima nuclear power plant] was at levels that would not pose a threat to the Plaintiffs, in order to promote its interests and those of the government of Japan."[315] The U.S. Navy sailors complain that "Defendant Tepco intentionally and knowingly made misleading environmental claims with knowledge that these claims of environmental safety to the Plaintiffs' detriment"[316] and that:

> [T]he Japanese government kept representing that there was no danger of radiation contamination to the U.S.S. Reagan (CVN-76) and/or its crew, that 'everything is under control,' 'all is OK, you can trust us,' and there is 'no

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[308] *Two Years Later, Japan Seethes at Tsunami Recovery*, CBS NEWS (Mar. 11, 2013, 6:56 AM), http://www.cbsnews.com/8301-202_162-57573526/two-years-later-japan-seethes-at-tsunami-recovery/.

[309] Verified Complaint, Cooper v. Tokyo Electric Power Co., Inc., No. 3:12CV03032 (S.D. Cal. filed Dec. 21, 2012), 2012 WL 6639472 [hereinafter *Verified Complaint*].

[310] Tom Watkins & Lateef Mungin, *U.S. Navy Sailors Sue Japan Over Nuclear Accident*, CNN (Dec. 28, 2012, 9:20 PM), http://www.cnn.com/2012/12/28/world/asia/japan-fukushima-lawsuit/index.html.

[311] *Verified Complaint*, *supra* note 309, ¶ 45.

[312] *See id.* ¶¶ 30-162.

[313] *Id.* ¶ 45.

[314] *Id.* ¶ 56.

[315] *Id.* ¶ 45.

[316] *Id.* ¶ 65.

immediate danger' or threat to human life, all the while lying through their teeth about the reactor meltdowns at FNPP.[317]

An additional eighteen plaintiffs have joined the lawsuit since the filing and the lawyers estimate at least 100 additional navy personnel are interested in joining.[318] If the court agrees with the sailors, this case may be a step toward implementing the polluter pays principle of international environmental law.

VI. CONCLUSION

This survey of inadequate liability regimes and the unresolved issue of long term storage of nuclear waste demonstrate that further work is critical to develop comprehensive, coordinated, and authoritative regimes governing nuclear liability, harm from nuclear activities, and long term waste disposal. Despite the customary environmental international law principles of polluter pays, no harm, and the precautionary principle, the actual treaties are very much inadequate. Moreover, they have not been widely ratified. There is an urgency to update the international nuclear treaties and develop a comprehensive single regime, especially given the current move to develop nuclear power plants despite the specter of the tragedy at Fukushima. The inability to develop a proper regime that ensures full compensation, reparations, and restoration of the environment constitutes a continuing subsidy to the nuclear industry and distorts decisions regarding energy choices. Until there is a solution to the Achilles' heel problem of the nuclear industry, it is clearly unreasonable and a violation of international environmental norms including the precautionary principle, the no harm rule, the principles of intergenerational equity, and the duty to cooperate to continue to license and relicense nuclear reactors.

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[317] *Id.* ¶ 50.

[318] Ida Torres, *More Plaintiffs Join US Military Lawsuit Against Tepco for Lying About Fukushima*, JAPAN DAILY PRESS (Mar. 19, 2013), http://japandailypress.com/more-plaintiffs-join-us-military-lawsuit-against-tepco-for-lying-about-fukushima-1925425.

The ICJ, ITLOS and the Precautionary Approach: Paltry Progressions, Jurisprudential Jousting

David L. VanderZwaag*

I. INTRODUCTION

The precautionary approach, although highly touted as a fundamental principle of international environmental law,[1] has become well-known for the confusion surrounding its interpretation and practical implications.[2] Confusion has emanated from definitional generalities[3] and variations[4] and

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[1] MALGOSIA FITZMAURICE, CONTEMPORARY ISSUES IN INTERNATIONAL ENVIRONMENTAL LAW 1 (2009).

[2] Arie Trouwborst, *The Precautionary Principle in General International Law: Combating the Babylonian Confusion*, 16 Rev. EUR. CMTY. & INT'L ENVTL. L. 185 (2007).

[3] For a review of definitional generalities, including the vagueness emanating from the articulation of the precautionary principle in Principle 15 of the Rio Declaration on Environment and Development, see Dawn A. Russell & David L. VanderZwaag, *Ecosystem and Precautionary Approaches to International Fisheries Governance: Beacons of Hope, Seas of Confusion and Illusion*, *in* RECASTING TRANSBOUNDARY FISHERIES MANAGEMENT ARRANGEMENTS IN LIGHT OF SUSTAINABILITY PRINCIPLES: CANADIAN AND INTERNATIONAL PERSPECTIVES 25, 59-60 (Dawn A. Russell & David L. VanderZwaag eds., 2010).

[4] Over fifty legally binding agreements and more than forty non-binding instruments refer to the precautionary principle. John S. Applegate, *The Taming of the Precautionary Principle*, 27 WM. & MARY ENVTL. L. & POL'Y REV. 13, 17 (2002).

even debates over appropriate terminology.[5] A spectrum of precautionary measures exist and viewpoints on whether strong versions of precaution[6] or weaker versions[7] should prevail have differed.[8]

Progressions in clarifying the practical meaning of the precautionary approach have largely depended on international negotiation efforts. For example, the precautionary approach has become quite "crystal clear" in the ocean dumping context, with the 1996 Protocol[9] to the London Convention, 1972[10] adopting a reverse listing approach whereby only wastes listed on a global "safe list" may be disposed of at sea, but only after following a precautionary waste assessment review that considers reuse and recycling feasibilities.[11] Precautionary steps in the fisheries field, while continuing to be a work in progress,[12] have been further defined as requiring the establishment of precautionary reference points for fish stocks,[13] the

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[5] The term "approach" has often been preferred because of the perception that such wording better reflects the non-legally binding nature. Nicolas de Sadeleer, *Origin, Status and Effects of the Precautionary Principle*, *in* IMPLEMENTING THE PRECAUTIONARY PRINCIPLE: APPROACHES FROM THE NORDIC COUNTRIES, EU AND USA 3 (Nicolas de Sadeleer ed., 2007).

[6] One of the strongest versions is reversing the burden of proof to proponents of development or risky activities to establish some level of safety or acceptability. NICOLAS DE SADELEER, ENVIRONMENTAL PRINCIPLES: FROM POLITICAL SLOGANS TO LEGAL RULES 202-06 (2002).

[7] Weaker versions include a call for cost-effective measures and the need to justify regulatory measures by means of a scientific risk assessment. *See* Andrew Jordan & Timothy O'Riordan, *The Precautionary Principle in Contemporary Environmental Policy and Politics*, *in* PROTECTING PUBLIC HEALTH & THE ENVIRONMENT, IMPLEMENTING THE PRECAUTIONARY PRINCIPLE 15, 30-31 (Carolyn Raffensperger & Joel A. Tickner eds., 1999). For a review of disputes over the precautionary principle in the free trade area and the requirement for a rigorous risk assessment to support precautionary measures under the umbrella of the Sanitary and Phytosanitary Measures Agreement, see TIM STEPHENS, INTERNATIONAL COURTS AND ENVIRONMENTAL PROTECTION, 331-42 (2009).

[8] *See generally* Jaye Ellis, *Overexploitation of a Valuable Resource? New Literature on the Precautionary Principle*, 17 EUR. J. INT'L L. 445 (2006).

[9] Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, Nov. 7, 1996, 36 I.L.M. 1.

[10] Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, Dec. 29, 1972, 1046 U.N.T.S. 120.

[11] David L. VanderZwaag & Anne Daniels, *International Law and Ocean Dumping: Steering a Precautionary Course Aboard the 1996 London Protocol, but Still an Unfinished Voyage*, *in* THE FUTURE OF OCEAN REGIME BUILDING: ESSAYS IN TRIBUTE TO DOUGLAS M. JOHNSTON 515-550 (Aldo Chircop, Ted L. McDorman & Susan J. Rolston eds., 2009).

[12] Russell & VanderZwaag, *supra* note 3, at 60-61.

[13] As called for under the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, July 24-Aug. 4, 1995, Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982, Relating to the Conservation and Management of Straddling Fish Stocks and Highly

encouragement of more environmentally friendly fishing gears and the expansion of marine protected areas.[14]

While the precautionary clarification trend will no doubt continue to proceed primarily through international consultative and negotiation processes, the potential role for international courts and tribunals to develop jurisprudential dimensions should not be ignored.[15] This article reviews how two main international adjudicative bodies, the International Court of Justice (ICJ) and the International Tribunal for the Law of the Sea (ITLOS), have addressed the precautionary approach in a rather paltry manner to date. The cases reviewed display an underlying "jurisprudential jousting" over whether the precautionary approach is to be solely defined by state agreement or whether precaution may be based upon natural law foundations including the fundamental need to protect the environment on which human survival depends.

After surveying the paltry progression and jurisprudential jousting realities, the article concludes by discussing future directions in international precautionary approach litigation. Two cases before the ICJ hold promise to further advance judicial articulations.[16] However, key judicial limitations also continue, including the dominance of positivistic thinking and sensitivities over the appropriate judicial role in international legal development.[17]

II. PALTRY PROGRESSIONS

Three cases from the ICJ and four cases from ITLOS have raised the legal implications of the precautionary approach. However, very limited

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Migratory Fish Stocks, U.N. Doc. A/CONF.164/37, 34 I.L.M. 1542 (1995).

[14] David VanderZwaag, *The Precautionary Principle and Marine Environmental Protection: Slippery Shores, Rough Seas, and Rising Normative Tides*, 33 OCEAN DEV. & INT'L L. 165, 168 (2002).

[15] For comprehensive reviews, see generally STEPHENS, *supra* note 7 and CAROLINE E. FOSTER, SCIENCE AND THE PRECAUTIONARY PRINCIPLE IN INTERNATIONAL COURTS AND TRIBUNALS (2011).

[16] *See* Construction of a Road in Costa Rica along the San Juan River (Nicar. v. Costa Rica) instituted on Dec. 31, 2011 and Aerial Herbicide Spraying (Ecuador v. Colom.) instituted on March 31, 2008. On April 17, 2013, the ICJ decided to join the Construction of a Road in Costa Rica along the San Juan River case to Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua). *See* Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.), Order (April 17, 2013), *available at* http://www.icj-cij.org/docket/ files/150/17350.pdf.

[17] Markus Krajewski & Christopher Singer, *Should Judges be Front-Runners? The ICJ, State Immunity and the Protection of Fundamental Human Rights*, 16 MAX Planck Y.B. U.N. L. 1 (2012), *available at* www.rph1.jura.uni-erlangen.de/material/rexte/ICJstateimmunity.pdf.

analysis and guidance has been provided by judges on its status and meaning.

A. ICJ Cases

The three ICJ cases confronting the application of precaution might be described as a "near miss," a "tangential touching" and a "feeble pat."

1. Near miss

In the 1995 *Nuclear Tests* case,[18] New Zealand, attempting to reopen a previous ICJ case from 1974 addressing French atmospheric nuclear testing in the South Pacific,[19] emphasized the importance of the precautionary principle, but the Court never addressed the merits. New Zealand argued the principle would shift the burden of proof on a state wishing to engage in potentially damaging conduct to show in advance that its activities would not cause contamination.[20] While the majority of the Court dismissed the case for lack of jurisdiction,[21] Judge *ad hoc* Sir Geoffrey Palmer, in dissent, lamented the missed opportunity for the Court to progressively develop the field of international environmental law and noted that the precautionary principle may now be a principle of customary international law relating to the environment.[22]

2. Tangential touching

In the *Gabčíkovo-Nagymaros Project (Hung./Slovk.)* case,[23] Hungary tried to justify its termination of a 1977 treaty with Czechoslovakia (succeeded by Slovakia) to jointly construct and operate a system of locks and barrages on the Danube River based upon various grounds, including the development of new norms of international environmental law such as

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[18] Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (N.Z. v. Fr.) Case, Order, 1995 I.C.J. 288 (Sept. 22) [hereinafter *Nuclear Tests case*].

[19] Paragraph "67" of the previous case left open the possibility for resumed jurisdiction of the Court if the Judgment were to be subsequently "affected," and thus the key issue was whether proposed French underground nuclear testing came within the scope of the reserved jurisdiction. *Id.* ¶ 34.

[20] *Nuclear Tests case*, *supra* note 18, ¶ 34. The need for a full environmental impact assessment before France undertook further nuclear testing was also argued under the rubric of the precautionary principle. *Id.* at 412, ¶ 89 (Palmer, J., dissenting).

[21] By a vote of twelve to three. *Nuclear Tests case*, *supra* note 18, ¶ 68.

[22] *Id.* at 412, ¶ 91 (Palmer, J., dissenting).

[23] Judgment, 1997 I.C.J. 7 (Sept. 25) [hereinafter *Gabčíkovo*].

the precautionary principle and the prevention of environmental damage.[24] The majority of the Court, while noting that "vigilance and prevention are required on account of the often irreversible character of damage to the environment,"[25] avoided any detailed analysis of the precautionary principle and took a procedural way out.[26] The Court found that the parties had an ongoing obligation to negotiate in good faith a joint operational regime that must take into account the norms of international environmental law and the principles of international watercourses.[27]

3. Feeble pat

In the *Pulp Mills on the River Uruguay (Arg. v. Uru.)* case,[28] Argentina, contesting the construction of two pulp mills in Uruguay adjacent to a transboundary river, alleged various procedural violations of the 1975 Statute of the River Uruguay,[29] including shortcomings in notifications and consultations, and breaches of key substantive international obligations such as pollution prevention and precaution.[30] As a central proposition, Argentina argued the precautionary approach should place the burden on Uruguay to prove that the pulp mills would not cause significant damage to the environment.[31] The majority of the ICJ, avoiding any detailed discussion of the precautionary approach, simply concluded that "while a precautionary approach may be relevant in the interpretation and application of the provisions of the Statute, it does not follow that [the precautionary approach] operates as a reversal of the burden of proof."[32] The judgment has left considerable uncertainty over whether the Court was limiting its burden of proof conclusion to the specific treaty in question or was articulating a broader statement on precaution.[33] One author has concluded the ICJ eviscerated the precautionary principle.[34]

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[24] *Id.* ¶ 97.

[25] *Id.* ¶ 140.

[26] FOSTER, *supra* note 15, at 37-41.

[27] *Gabčikovo*, *supra* note 23, ¶ 141.

[28] *Pulp Mills on the River Uruguay*, Judgment, 2010 I.C.J. 14 (Apr. 20).

[29] The Statute of the River Uruguay is a treaty signed by Argentina and Uruguay on Feb. 26, 1975 and entered into force on Sept. 18, 1976. *Id.* ¶ 1.

[30] *Id.* ¶ 55.

[31] *Id.* ¶ 160.

[32] *Id.* ¶ 164.

[33] Ralph Bodle, *Geoengineering and International Law: The Search for Common Legal Ground*, 46 TULSA L. REV. 305, 307 (2010).

[34] Daniel Kazhdan, *Precautionary Pulp: Pulp Mills and the Evolving Dispute Between International Tribunals Over the Reach of the Precautionary Principle*, 38 ECOLOGY L.Q. 527, 528 (2011).

B. ITLOS Cases

ITLOS has confronted the precautionary approach on four occasions, in one consolidated case addressing fisheries and three cases dealing with marine pollution and degradation.

1. Fisheries

In the *Southern Bluefin Tuna* cases,[35] New Zealand and Australia requested provisional measures from ITLOS to stop Japan from unilaterally increasing its catch levels of southern bluefin tuna and one of the central arguments was that Japan was failing to act consistently with the precautionary principle.[36] The Tribunal did not expressly discuss the precautionary principle but gave precaution an "implicit mention": "[I]n the view of the Tribunal the parties should in the circumstances act with *prudence and caution* to ensure that effective conservation measures are taken to prevent serious harm to the stock of southern bluefin tuna[.]"[37]

The provisional measures granted by the Tribunal were partly procedural in nature. Besides ordering each of the parties to refrain from conducting an experimental fishing program,[38] the Tribunal encouraged Australia, Japan and New Zealand to resume negotiations towards reaching an agreement on conservation and management measure and urged the parties to make further efforts to reach a conservation agreement with other states and fishing entities engaged in southern bluefin fishing.[39]

Separate opinions written by two of the judges did specifically address precaution but with minimal clarification. Judges Shearer and Laing both expressed the view that the Tribunal's provisional measures were based on considerations deriving from a precautionary approach.[40] Judge Laing

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[35] Southern Bluefin Tuna cases (N.Z. v. Japan; Austl. v. Japan), Case Nos. 3 & 4, Order of Aug. 27, 1999, 3 ITLOS Rep. 280, *available at* http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_3_4/order.27.08.99.E.pdf [hereinafter *Southern Bluefin Tuna cases*].

[36] *Id.* ¶¶ 28 & 29.

[37] *Id.* ¶ 77 (emphasis added). For a critique of the limited addressing of precaution, see David Freestone, *Caution or Precaution: A Rose by Any Other Name. . .?* 10 Y.B. INT'L ENVTL. L. 15 (1999).

[38] Except with the agreement of the other parties or unless the experimental catch was counted against its annual national allocation. *Southern Bluefin Tuna cases, supra* note 35, ¶ 90(1)(d).

[39] *Id.* ¶ 90(1)(e)(f).

[40] Southern Bluefin Tuna cases (N.Z. v. Japan; Austl. v. Japan), Case No. 3 & 4, Order of Aug. 27, 1999, 3 ITLOS Rep. 280, 305, 309 (Shearer, J., sep. op.), *available at* http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_3_4/Separate.Shearer.27.08.9

noted that the Tribunal did not *per se* engage in an explicit reversal of the burden of proof but took a cautious approach, which he saw as commendable. Further debate would best be reserved for the merits stage of the case, that is, the arbitral tribunal.[41]

2. Marine pollution and degradation

In the *MOX Plant* case,[42] Ireland, seeking provisional measures to stop the commissioning of a mixed oxide (MOX) fuel facility by the UK, also invoked the precautionary principle with a key argument being that the burden of proof should be on the UK to establish the plant's commissioning would not cause serious harm to the marine environment.[43] Once again ITLOS did not explicitly refer to the precautionary principle nor delve into jurisprudential details but did note the need for caution: "[P]rudence and caution require that Ireland and the United Kingdom cooperate in exchanging information concerning risks or effects of the operation of the MOX plant and in devising ways to deal with them, as appropriate[.]"[44]

The Tribunal did grant provisional measures, although not those specifically requested by Ireland, based upon the fundamental duty to cooperate in the prevention of marine environmental pollution. The Tribunal required various forms of cooperation including: exchanging of further information regarding possible consequences for the Irish Sea arising from commissioning of the MOX plant; monitoring risks or effects of operation of the plant for the Irish Sea; and devising appropriate measures to prevent pollution of the marine environment which might result from the operation of the plant.[45]

Judge Wolfrum in his separate opinion did discuss the precautionary approach more substantively. He indicated support for a burden of proof reversal approach:

9.E.pdf. Southern Bluefin Tuna cases (N.Z. v. Japan; Austl. v. Japan), Case No. 3 & 4, Order of Aug. 27, 1999, 3 ITLOS Rep. 280, 305, 309 (Laing, J., sep. op.), *available at* http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_3_4/Separate.Laing.27.08.99.E.pdf.

[41] *Id.* ¶ 21. The arbitral tribunal subsequently in an award of August 4, 2000 declined jurisdiction, see Arbitral Tribunal Constituted Under Annex VII of the United Nations Convention on the Law of the Sean (UNCLOS): Southern Bluefin Tuna cases (N.Z. v. Japan; Austl. v. Japan) (Award on Jurisdiction and Admissibility), 39 I.L.M. 1359 (2000).

[42] The MOX Plant Case (Ir. v. U.K.), Case No. 10, Order of Dec. 3, 2001, 5 ITLOS Rep. 95, 96, *available at* http://www.itlos.org/fileadmin/iitlos/documents/cases/case_no_10/order.03.12.01.E.pdf (request for provisional measures).

[43] *Id.* ¶ 71.

[44] *Id.* ¶ 84.

[45] *Id.* ¶ 89.

> There is no general agreement as to the consequences which flow from the implementation of this principle other than the fact that the burden of proof concerning the possible impact of a given activity is reversed. A State interested in undertaking or continuing a particular activity has to prove that such activities will not result in any harm, rather than the other side having to prove that it will result in harm.[46]

He justified not granting Ireland the provisional measures specifically requested on two main grounds. He emphasized the exceptional nature of provisional measures and the lack of some evidence of marine environmental risk in the short time period before the arbitral tribunal would consider the case on the merits.[47]

In the *Straits of Johor* case,[48] ITLOS also displayed an indirect and limited approach to addressing precaution. Malaysia, seeking provisional measures to require Singapore to suspend land reclamation activities, argued various breaches of the UN Convention on the Law of the Sea, including a failure to undertake an adequate environmental impact assessment, and also alleged that Singapore was acting contrary to the precautionary principle.[49] The Tribunal avoided detailed discussion of the principle and simply noted once again that "prudence and caution" were required.[50] The Tribunal prescribed provisional measures: it called upon Malaysia and Singapore to cooperate and to enter into consultations in order to promptly establish a group of independent experts to study the effects of Singapore's land reclamation and to propose measures to address any adverse effects; and the Tribunal directed Singapore not to conduct its land reclamation in ways that might cause serious harm to the marine environment.[51]

The latest ITLOS case to address the precautionary approach has certainly shown the most progression in doctrinal discussion and development. On February 1, 2011, the Seabed Disputes Chamber of ITLOS issued its *Advisory Opinion on Responsibilities and Obligations of States Sponsoring Persons or Entities with Respect to Activities in the*

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[46] MOX Plant case (Ir. v. U.K.) (Dec. 3, 2001), Case No, 10, Order of Dec. 3, 2001, 5 ITLOS Rep. 131,134 (Wolfrum, J., sep. op.), *available at* http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_10/sep.op.Wolfrum.E.orig.pdf.

[47] *Id.*

[48] Land Reclamation by Singapore in and Around the Straits of Johor (Malay. v. Sing.), Case No. 12, Order of Oct. 8, 2003, 7 ITLOS Rep. 10, *available at* http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_12/order.08.10.03.E.pdf.

[49] *Id.* ¶ 74.

[50] *Id.* ¶ 99.

[51] *Id.* ¶ 106.

Area.[52] The Council of the International Seabed Authority (ISA), at the behest of Nauru, requested an advisory opinion regarding the legal responsibilities and extent of liability of states sponsoring deep seabed mineral activities. The Chamber noted that the two sets of regulations adopted by the ISA on prospecting and exploring for polymetallic nodules (2000) and for polymetallic sulphides (2010) both require sponsoring states to apply a precautionary approach, as reflected on Principle 15 of the Rio Declaration, in order to ensure effective protection of the marine environment from harmful activities which may result from activities in the Area beyond national jurisdiction.[53] The Chamber indicated that the precautionary approach is also an integral part of the general obligation of due diligence of sponsoring states which is even applicable outside the Regulations:

> This obligation applies in situations where scientific evidence covering the scope and potential negative impact of the activity in question is insufficient but where there are plausible indications of potential risks. A sponsoring State would not meet its obligations of due diligence if it disregarded those risks. Such disregard would amount to a failure to comply with the precautionary approach.[54]

While this recognition of "precautionary due diligence" certainly represents a step forward, the opinion may still be viewed as rather meager on other fronts. The Chamber stopped short of recognizing the precautionary approach as a principle of customary international law although the Chamber did observe that with the incorporation of the precautionary approach into a growing number of international treaties and instruments there is "a trend towards making this approach part of customary international law."[55] The Chamber did not provide a detailed jurisprudential analysis of the precautionary approach and merely noted the various questions of interpretation left open by Principle 15 of the Rio Declaration, such as "serious or irreversible damage" and "cost-effective measures."[56] The Chamber did not find that sponsoring states would be strictly liable for the activities of their sponsored entities,[57] although a strict

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[52] Case No. 17, Advisory Opinion of Feb. 1, 2011, 11 ITLOS Rep. 10, *available at* http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/adv_op_010211.pdf.

[53] *Id.* ¶ 125.

[54] *Id.* ¶ 131.

[55] *Id.* ¶ 135.

[56] *Id.* ¶¶ 128-29.

[57] However, as noted by Freestone, the wording of the United Nations Convention on the Law of the Sea itself may weigh heavily against this conclusion. *See* David Freestone, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, 105 AM. J. INT'L L. 755, 759 (2011).

liability approach might best ensure pollution prevention and precaution are followed in practice.[58]

III. JURISPRUDENTIAL JOUSTING

A history of ambiguity and dispute has surrounded the appropriate meaning to be given to the third source of international law set out in Article 38(1)(c) of the ICJ Statute, namely, general principles of international law recognized by civilized nations.[59] A "legal positivism" approach would restrict the derivation of rules and principles from the will of states as manifested in treaties, customary international law and general principles of international law.[60] A positivist view would restrict the latter category to general maxims commonly applied in municipal legal systems and perhaps to general principles found in various international declarations and other soft law instruments.[61]

A "natural law" approach, held by one group of original drafters of the statutory language,[62] thought the category of general principles would enable the Court to apply natural law principles. Such principles of "objective justice" may be drawn from common human values and reason.[63]

Two ICJ judges have stood out for jousting in the environmental context against the dominant positivistic judicial philosophy towards international law. Judge Cançado Trindade, from Brazil and a member of the Court since 2009, has been perhaps the strongest advocate of natural law, while Judge Weeramantry, from Sri Lanka and a member of the Court from 1991-2000,[64] has also jousted against the strictures of legal positivism.

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[58] *See* Bruce Pardy, *Applying the Precautionary Principle to Private Persons: Should It Affect Civil and Criminal Liability?"* 43 LES CAHIERS DE DROIT 63 (2002) (asserting that the precautionary principle should be applied in civil cases but not criminal cases). For a further review of the strict liability arguments, see Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the International Seabed Area, Case No. 17, Written Statement of International Union for Conservation of Nature and Natural Resources, Commission on Environmental Law, Oceans, Coastal and Coral Reefs Specialist Group of Aug. 19, 2010, *available at* http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/statementIUCN.pdf.

[59] *See*, PATRICIA BIRNIE, ALAN BOYLE & CATHERINE REDGWELL, INTERNATIONAL LAW AND THE ENVIRONMENT 26 (3rd ed. 2009).

[60] *Id.*

[61] *Id.* at 26-28.

[62] Drafters of the Statute of the Permanent Court of Justice in the early 1920s. *Id.* at 26.

[63] *Id.*

[64] He was Vice-President of the Court from 1997-2000. *Presidency*, INTERNATIONAL COURT OF JUSTICE, *available at* http://www.icj-cij.org/court/index.php?p1=1&p2=3.

A. Judge Cançado Trindade

In his separate opinion in the *Pulp Mills* case, Judge Cançado Trindade lamented over the missed opportunity for the ICJ to affirm and elaborate on the general principles of international environmental law including the precautionary principle. He stated, "It escapes my comprehension why the ICJ has so far had so much precaution with the precautionary principle."[65] He further reflected, "The Hague Court . . . is not simply the International Court of Law, it is the International Court of *Justice*, and, as such, cannot overlook *principles*."[66]

After reviewing the historical and scholarly debate as to whether the category of general principles of law recognized by civilized nations opens the door to natural law principles, he embraced and encouraged a natural law approach. He noted, "General principles of law . . . emanate . . . from human conscience, from the universal juridical conscience, which I regard as the ultimate material 'source' of all law."[67] He saw it as "imperative to keep on swimming against the current, to keep on upholding firmly the application of general principles of law, in addition to the pertinent positive law."[68] In his view, examples of principles having an axiological dimension and reflecting the values of the international community include prevention, precaution, sustainable development and intergenerational equity.[69]

While stopping short of a reverse burden of proof analysis, he did expand somewhat on the precautionary principle. He noted the principle calls for consideration of alternative sources of acting in the face of probable threats or dangers.[70] He highlighted the need for reasonable assessment, before the issuance of authorizations, in the face of probable risks and uncertainties. Such assessment may include a complete environmental impact assessment, careful environmental risk analysis and further environmental studies.[71]

B. Judge Weeramantry

Also a proponent of "judicial activism" in developing the principles of international environmental law, Judge Weeramantry adopted what might

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[65] *Pulp Mills on the River Uruguay*, Judgment, 2010 I.C.J. 14, 135-61 ¶ 67 (Apr. 20), *available at* http://www.icj-cij.org/docket/files/135/15885.pdf.

[66] *Id.* ¶ 220.

[67] *Id.* ¶ 62.

[68] *Id.* ¶ 206.

[69] *Id.* ¶ 210.

[70] *Id.* ¶ 71.

[71] *Id.* ¶ 96.

be described as primarily a "sociological jurisprudence," that is, looking to historical and present social/cultural practices for general principles of international law.[72] For example, in the *Gabčíkovo-Nagymaros* case, he found the sustainable development principle, in relation to balancing development and environmental dimensions of harnessing streams and rivers, may be derived from numerous legal systems, including those in Asia, the Middle East, Africa, Europe, the Americas and the Pacific.[73] In the *Legality of the Threat or Use of Nuclear Weapons* case,[74] he deciphered from various ancient civilizations a prohibition on hyper-destructive weapons in time of war.[75]

In the *Nuclear Weapons* case, he also recognized the potential "supplementary door" of natural law in general principle evolution. He emphasized that key principles of environmental law, such as the precautionary principle, trusteeship of the earth resources, the burden of proving safety relies upon the author of the act complained of, and polluter pays, do not depend for their validity on treaty provisions. "They are part of customary international law. They are part of the *sine qua non* for human survival."[76]

In his dissent in the *Nuclear Tests* case,[77] Judge Weeramantry would have allowed New Zealand to reopen the 1974 case. He indicated likely support for New Zealand's key principled arguments regarding France bearing the burden of proof to show its underground nuclear testing activities would not cause contamination and the necessity for an environmental impact assessment before proceeding.[78]

IV. CONCLUSION

The precautionary approach continues to be subject to considerable confusion and controversy in international environmental law with the two key international tribunals, the ICJ and the ITLOS, providing rather paltry guidance to date.[79] The adjudicatory processes have not yet engaged in

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[72] For a further noting of his interdisciplinary approach to international law, see Trevor R. Updegraff, *Morals on Stilts: Assessing the Value of Intergenerational Environmental Ethics*, 20 COLO. J. INT'L ENVTL. L. & POL'Y 367 (2009).

[73] *Gabčíkovo*, Separate Opinion, 1997 I.C.J. 7, 97-110 (Sept. 25).

[74] Advisory Opinion, 1996 I.C.J. 226 (July 8).

[75] *Id.* at 478-82 (Weeramantry, J., dissenting).

[76] *Id.* at 502-04.

[77] Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 Dec. 1974 in the Nuclear Tests (N.Z. v. Fr.), 1995 I.C.J. 288, 317 (Sept. 22).

[78] *Id.* at 342-45.

[79] *See* Francesco Francioni, *Realism, Utopia, and the Future of International*

detailed discussions or jurisprudential clarifications. Rather than drawing from the extensive academic literature surrounding the precautionary approach, the ICJ and ITLOS stand out for their overall procedural leanings to place the responsibility on disputing states to sort out the practical implications of precaution through further cooperative consultations and negotiations.

Two environmental cases before the ICJ may offer an opportunity to revisit the precautionary approach.[80] In the *Aerial Herbicide Spraying* case, Ecuador is claiming Colombia's spraying of toxic herbicides near and over the border with Ecuador has violated various rights under international law including the obligations of pollution prevention and precaution.[81] In the *Construction of a Road in Costa Rica along the San Juan River* case, Nicaragua is claiming numerous customary and conventional international law breaches by Costa Rica in allowing a major road construction and other activities to pollute the shared San Juan River.[82] While an explicit breach of the precautionary principle/approach has not been pleaded, Nicaragua may further develop precautionary arguments based on convention obligations, such as the Convention on Biological Diversity expressly listed as being breached, and the reservation of the right to further amplify and specify Costa Rica's obligations under general international law.

Environmental Law, *in* REALIZING UTOPIA: THE FUTURE OF INTERNATIONAL LAW 442, 453-54 (Antonio Cassese ed., 2012).

[80] It remains uncertain whether a third case, brought by Australia against Japan to stop Japan's "scientific whaling" program in the Southern Ocean, will also provide the ICJ with an opportunity to address the precautionary approach. The application to institute proceedings filed on May 31, 2010 alleges various obligations breached, including responsibilities under the International Whaling Convention and the Convention on Biological Diversity but no specific precautionary breach was pleaded. *See* Application Instituting Proceedings, Whaling in the Antarctic (Austl. v. Japan) (May 31, 2010), *available at* http://www.icj-cij.org/docket/files/148/15951.pdf.

[81] *See* Application Instituting Proceedings (Ecuador v. Colom.), 2008 I.C.J. Pleadings 10 (Mar. 31, 2008). For a review of the dispute, see Jessica L. Rutledge, *Wait a Second: Is That Rain or Herbicide? The ICJ's Potential Analysis in Aerial Herbicide Spraying and an Epic Choice between the Environment and Human Rights*, 46 WAKE FOREST L. REV. 1079 (2011). [Editor's note: On September 13, 2013, the *Aerial Herbicide Spraying* case was removed from the Court's list at the request of Ecuador, which reached an agreement with Colombia over Colombia's aerial spraying. *See* Aerial Herbicide Spraying (Ecuador v. Colum.), Press Release (Sept. 17, 2013), *available at* http://www.icj-cij.org/docket/files/138/17526.pdf.]

[82] *See* Application of the Republic of Nicaragua Instituting Proceedings against the Republic of Costa Rica (Nicar. V. Costa Rica) (Dec. 21, 2011), *available at* http://www.icj-cij.org/docket/files/152/16917.pdf (Construction of a Road in Costa Rica along the San Juan River (Nicar. v. Costa Rica) later joined with Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.)).

While the legal door for further clarifying and perhaps empowering the precautionary approach has been opened by two ICJ judges in particular, progressive development through further litigation remains doubtful due to various factors. Positivistic thinking continues to dominate among international lawyers and judges.[83] A conservative role for judges in the further development of international law may be an expected practical reality in light of the political background of many judges,[84] the need to bolster judicial legitimacy with sovereign states, and the thinness of consensus that undergirds international law.[85]

Clearly, the main routes for further developing and implementing the precautionary approach in international law should be through existing multilateral environmental agreements and the negotiation of additional precautionary provisions and measures. The need to get firm precautionary grips on the looming expansion of nanotechnologies[86] and the increasing number of chemicals in the environment[87] especially stand out, but a broad range of precautionary challenges remain to be addressed from climate change to fisheries management.[88]

Academic voices supporting strong versions of the precautionary approach must not be forgotten,[89] including the progressive advocacy of Professor Jon Van Dyke. In a 2006 article, he maintained that the precautionary principle at a minimum serves to reverse the burden of proving a certain activity does not or will not cause damage to the state

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[83] For a description of the ICJ as a stock-taking rather than a ground-breaking body, see Jorge E. Viñuales, *The Contribution of the International Court of Justice to the Development of International Environmental Law: A Contemporary Assessment*, 32 FORDHAM INT'L L.J. 232, 258 (2008).

[84] Regarding the political dimensions of international judicial elections, see Armin von Bogdandy & Ingo Venzke, *On the Democratic Legitimation of International Judicial Lawmaking*, 12 GERMAN L.J. 1341 (2011); see also Sir Geoffrey Palmer, *Perspectives on International Dispute Resolution from a Participant*, 43 VICT. U. WELLINGTON L. REV. 39 (2012).

[85] Jaye Ellis, *General Principles and Comparative Law*, 22 EUR. J. INT'L. L. 949, 965 (2011).

[86] *See, e.g.*, John Quinn, *EU Regulation of Nanobiotechnology*, 9 NANOTECHNOLOGY L. & BUS. 168 (2012); *see also* Oren Perez, *Precautionary Governance and the Limits of Scientific Knowledge: A Democratic Framework for Regulating Nanotechnology*, 28 UCLA J. ENVTL. L. & POL'Y 29 (2010).

[87] *See* David L. VanderZwaag, *The Precautionary Approach and the International Control of Toxic Chemicals: Beacon of Hope, Sea of Confusion and Dilution*, 33 HOUS. J. INT'L L. 605 (2011).

[88] Russell & VanderZwaag, *supra* note 3, at 59-60.

[89] *See* Noah M. Sachs, *Rescuing the Strong Precautionary Principle from Its Critics*, 2011 U. ILL. L. REV. 1285, 1307 (2011).

seeking to initiate an environmentally sensitive activity.[90] He also emphasized the need for vigilant stewardship of natural resources in light of the many mistakes made in recent years.[91]

Whether the precautionary approach will eventually evolve into a strong judicial lance remains to be seen. Judicial jousting has hardly begun and numerous issues have yet to be fully faced. They include the jurisprudential foundations of general principles,[92] their appropriate role[93] and the possible synergies of precaution with other principles, such as intergenerational equity[94] and sustainable development,[95] and doctrinal developments in human and environmental rights.[96] The fragmented world of international adjudication[97] also raises the prospect of differing judicial interpretations of precaution. At the very least, the world community deserves better reasoned decisions with expanded policy considerations in future cases addressing the precautionary approach.[98]

The ICJ and ITLOS do have critical supportive roles to play in the quest for protecting global public goods[99] and reaching for utopia,[100] but more than doctrinal progressions may be necessary. Further democratization of

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[90] Jon M. Van Dyke, *Liability and Compensation from Harm Caused by Nuclear Activities*, 35 DENV. J. INT'L L. & POL'Y 13, 18-20 (2006).

[91] *Id. See also* Jon M. Van Dyke, *Applying the Precautionary Principle to Ocean Shipments of Radioactive Materials*, 27 OCEAN DEV. & INT'L L. 379 (1996).

[92] On the need to rethink the sources of international law and their theoretical underpinnings, see generally Harlan Grant Cohen, *Finding International Law, Part II: Our Fragmenting Legal Community*, 44 N.Y.U.J. INT'L L. & POL. 1049 (2012).

[93] While some have viewed general principles as a subsidiary source of international law, others have viewed the category as embodying the highest principles of international law. *See* BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 4-5 (1987). For a further review of the question of normative hierarchy, see generally Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. INT'L L. 291 (2006).

[94] *See* DONALD K. ANTON & DINAH L. SHELTON, ENVIRONMENTAL PROTECTION AND HUMAN RIGHTS 91-92 (2011).

[95] *See* Virginie Barral, *Sustainable Development in International Law: Nature and Operation of an Evolutive Norm*, 23 EUR. J. INT'L L. 377 (2012).

[96] *See* Alan Boyle, *Human Rights or Environmental Rights? A Reassessment*, 18 FORDHAM ENVTL. L. REV. 471 (2007).

[97] *See* Gary Born, *A New Generation of International Adjudication*, 61 DUKE L.J. 775 (2012).

[98] On the need for sound and persuasive legal argumentation and reasoning, see Ellis, *supra* note 85, at 971.

[99] *See* André Nollkaemper, *International Adjudication of Global Public Goods: The Intersection of Substance and Procedure*, 23 EUR. J. INT'L L. 769 (2012).

[100] *See* Isabel Feichtner, *Realizing Utopia through the Practice of International Law*, 23 EUR. J. INT'L. L. 1143 (2012).

international dispute resolution has been advocated but not yet heeded.[101] The armour of state sovereignty continues to hinder the progressive and precautionary development of international law.[102]

[101] For example, expanding the contentious jurisdiction of the ICJ to intergovernmental organizations and granting the right to request advisory opinions to subjects other than states. Antonio Cassese, *The International Court of Justice: It is High Time to Restyle the Respected Old Lady, in* Cassese, *supra* note 79, at 239.

[102] For a comprehensive review of the progressive possibilities and limits, see RUSSELL A. MILLER & REBECCA M. BRATSPIES (eds. 2008), PROGRESS IN INTERNATIONAL LAW.

A Justice Paradox: On Climate Change, Small Island Developing States, and the Quest for Effective Legal Remedy

Maxine Burkett*

Abstract

Despite their clear and significant vulnerability to climate change, small island developing states have not had the opportunity to pursue in earnest a remedy for the impacts of that change. All small island developing states face significant challenges to their economic well-being and the availability of basic resources—including food and water. Some face the loss of habitability of their entire territory. Identifying and implementing adequate repair will be difficult enough. After at least two decades of knowledge of these impacts, however, small island developing states still face the equally difficult task of just getting their claims heard. This is not for want of trying. Indeed, there has been extensive research and scholarship as well as abbreviated attempts in international fora to hold large emitters accountable. These have not been effective. Further, the latest attempt to clarify the legal responsibility of the largest emitters has been met with threats of reprisal by those large emitters. This kind of intimidation, coupled with a weak international legal regime at base, delays justice for small island developing states.

In this article, Professor Burkett explores the failure of the legal regime to provide adequate process and substantive remedy for small island developing states—either through the absence of viable legal theories, capacity constraints, or uneven power dynamics in the international arena—or all three. She argues, however, that the costs of pursuing these claims—and other novel approaches she outlines in the article—are dwarfed by the costs to small island communities of unabated climate impacts. In surveying the possible claims and introducing new approaches, Professor Burkett attempts to respond to a striking and persistent (if unsurprising) justice paradox: the current international legal regime forecloses any reasonable attempts at a remedy for victims of climate change who are the most vulnerable and the least responsible.

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I. INTRODUCTION

Despite their clear and significant vulnerability to climate change, small island developing states (SIDS) have not had the opportunity to pursue in earnest a remedy for the impacts of that change. This presents a justice paradox, in which the current international legal regime forecloses any reasonable attempts at a just remedy for the victims of climate change who are the most vulnerable and the least responsible. Worse still, attempts to seek justice in such clear instances of need may yield negative political outcomes against the claimants themselves, namely the loss of aid for other critical functions from wealthy large emitters. Nonetheless, it is still necessary for SIDS to pursue vigorously both aggressive emissions abatement as well assistance with managing climate impacts. This is true if only for the likely result that climate change losses and any bold action to mitigate or adapt to them will likely dwarf the costs of retaliation from the wealthy that island states might face. Indeed, a survey of the basket of remedies available to small island claimants in addition to novel approaches this article recommends reveals possible pathways for concerted and effective action.

All SIDS face dangerous impacts to their economic well-being and the availability of basic resources—including food and water. Some face the loss of all habitable territory. After at least two decades of knowledge of these impacts, however, SIDS are unable to get their claims heard in major legal fora—never mind the more formidable tasks of identifying and

implementing adequate abatement and reparative measures. This is not for wont of trying. Indeed, there has been extensive research and scholarship on viable claims as well as abbreviated attempts in international arenas to hold large greenhouse gas emitters accountable.[1] This author's early research attempted to do the same by identifying meaningful avenues of remedy through reconciliation and reparation.[2] These efforts have not been wholly effective to date. Yet, scholar-advocates, like Professor Jon M. Van Dyke, insist that actions against the largest emitters are necessary in response to the injustice of delayed or tepid climate mitigation and adaptation for SIDS.[3] Professor Van Dyke's passionate call to action inspired this author to revisit the possibilities for SIDS to pursue their claims through litigation and the courts.

Today, there are renewed efforts to invite the International Court of Justice ("ICJ") to advise on the legal responsibility of the largest emitters vis-à-vis climate change.[4] This effort by Palau, a particularly vulnerable Pacific island state, however, has been met with threats of reprisal by the largest historical emitter, the United States.[5] This kind of intimidation, coupled with a weak international legal regime at base, delays justice for SIDS. It lays bare the fact that in the face of one of the most poignant instances of grave injustice—the loss of one's land, livelihood, culture, and ancestors as a result of another's unabated emissions—our legal systems at the international, national, and subnational level, are unable to effect a swift, definitive, and just resolution. The absence of a clear legal pathway coupled with fears that some countries might retaliate effectively stifle legal action.

This article discusses the failure of the legal regime to provide adequate process and substantive remedy for SIDS—either through the lack of viable legal theories or through uneven power dynamics in the international arena. Despite skepticism about its efficacy in light of present-day exigencies, the costs of pursuing these claims—and other novel approaches the article

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[1] *See* discussion *infra* Part II.

[2] *See generally* Maxine Burkett, *Climate Reparations*, 10 MELBOURNE J. INT'L L. 509 (2009).

[3] *See* Jon M. Van Dyke, *Regionalism, Fisheries, and Environmental Challenges in the Pacific*, 6 SAN DIEGO INT'L L. J. 143 (2004).

[4] Lawrence Hurley, *Island Nation Girds for Legal Battle Against Industrial Emissions*, THE NEW YORK TIMES (Sept. 28, 2011), www.nytimes.com/gwire/2011/09/28/28greenwire-island-nation-girds-for-legal-battle-against-i-60949.html.

[5] Duncan Clark, *Which Nations are Most Responsible for Climate Change?*, THE GUARDIAN (Apr. 21, 2011), http://www.guardian.co.uk/environment/2011/apr/21/countries-responsible-climate-change. *See also* Rachel Brown, *The Rising Tide of Climate Change Cases*, THE YALE GLOBALIST (Mar. 4, 2013, 11:30 p.m.), tyglobalist.org/in-the-magazine/theme/the-rising-tide-of-climate-change-cases/.

introduces—are dwarfed by the costs to small island communities of unabated climate impacts. In surveying the possible claims and introducing new approaches, the article attempts to respond to a striking and persistent (if unsurprising) justice paradox.

The article proceeds as follows. Part I briefly describes the current science of climate change, including forecasted impacts as well as recommendations for emissions abatement. In addition, it looks at the severe current and forecasted climate impacts to SIDS. Part II describes the geopolitical backdrop of claims against large emitters, which explains in part the uphill battle SIDS face. Part III follows with a survey of the most commonly cited claims that SIDS might pursue against the largest emitters. Part IV introduces the possibility of identifying and pursuing claims using unconventional plaintiffs and defendants, and even borrows from proposals in the international economic law realm to consider the possible efficacy of "class action litigation" to empower individual SIDS. Part IV further notes the political milieu in which SIDS might bring these claims and considers how the value of publicity and notions of interest converge may advance claims beyond their prospects in the courtroom alone. In conclusion, the article situates this paradox in the context of a larger conception of "the justice paradox" in law as articulated by Dean Robert E. Scott.[6] Dean Scott argues that the law vacillates between meeting the needs of present justice, on one hand, and future justice, on the other. This is a perennial sway that we might embrace, according to Scott. I argue that if that vacillation consistently excludes the most vulnerable, the law in its current form is dangerously inadequate.

II. THE IMPACTS OF CLIMATE CHANGE ON SMALL ISLAND DEVELOPING STATES

> "Some scientific conclusions or theories have been so thoroughly examined and tested, and supported by so many independent observations and results, that their likelihood of subsequently being found to be wrong is vanishingly small. Such conclusions and theories are then regarded as settled facts."
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> - U.S. National Academy of Science and Engineering, May 29, 2010[7]

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[6] *See generally* Robert E. Scott, *Chaos Theory and the Justice Paradox*, 35 WM. & MARY L. REV. 329 (1993).

[7] U.S. NATIONAL ACADEMY OF SCIENCES, ADVANCING THE SCIENCE OF CLIMATE CHANGE 21-22 (2010).

A. Climate Impacts Generally

It has been decades since the international community has been aware of the grave risks of climate change and the imperative of brisk and aggressive attempts to mitigate those risks, with no measurable action. During this time venerable institutions, such as the National Academy of Sciences, have have declared repeatedly that human-caused climate change is a settled fact.[8] Noted climate scientist Dr. James Hansen has stated that the current atmospheric concentration of carbon dioxide, approaching 400 parts per million, "is already in the 'dangerous zone."[9] This concentration, Hansen states, is too high to maintain "the climate to which humanity, wildlife, and the rest of the biosphere are adapted."[10] Additionally, there is significant warming in the pipeline.[11] In other words, global temperature might rise by two to three degrees Celsius even without additional greenhouse gas emissions. According to Hansen, "[h]umanity's task of moderating human-caused global climate change is urgent."[12]

The impacts are not solely prospective and, for all intents and purposes, are irreversible.[13] The current, and often jarring, signs of climate disruption are legion.[14] Further, they outpace the modeling of climate phenomenon,[15]

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[8] *See id.* ("The Earth system is warming and that much of this warming is very likely due to human activities.").

[9] James Hansen et al., *Target Atmospheric CO_2: Where Should Humanity Aim?*, 2 OPEN ATMOS. SCI. J. 217, 218 (2008).

[10] *Id.* at 228.

[11] *Id.* at 226.

[12] *Id.* at 228.

[13] *See generally* Susan Solomon et al., *Irreversible Climate Change Due to Carbon Dioxide Emissions*, 106 PROCEEDINGS OF THE NAT'L ACAD. OF SCIENCES, no. 6, 1704 (Feb. 10, 2009), *available at* http://www.pnas.org/content/106/6/1704.full.pdf+html) (stating that climate change that takes place due to increases in carbon dioxide concentrations is largely irreversible for 1,000 years after emissions stop). "Irreversible" is defined as a time scale exceeding the end of the millennium in the year 3000. *Id.* at 1704. The study did not consider the possibility of geo-engineering measures. *Id.*

[14] *Id.* at 1709 ("Irreversible climate changes due to carbon dioxide emissions have already taken place, and future carbon dioxide emissions would imply further irreversible effects on the planet, with attendant long legacies for choices made by contemporary society."). *See* Andrew Freedman, *U.S. Dominated Global Disaster Losses in 2012: Swiss Re*, CLIMATE CENTRAL (Apr. 1, 2013), http://www.climatecentral.org/news/us-dominated-global-disaster-losses-in-2012-insurer-reports-15814; *see also* Andrew Steer, *Listening to Hurricane Sandy: Climate Change is Here*, BLOOMBERG (Nov. 2, 2012, 6:52 a.m.), http://www.bloomberg.com/news/2012-11-02/listening-to-hurricane-sandy-climate-change-is-here.html; and Brad Plumer, *Yes, Hurricane Sandy is a Good Reason to Worry about Climate Change*, THE WASHINGTON POST (Oct. 29, 2012), http://www.washingtonpost.com/blogs/wonkblog/wp/2012/10/29/yes-hurricane-sandy-is-a-good-reason-to-worry-about-climate-change/.

producing more significant impacts than predicted. Impacts include changes in rainfall, with adverse effects on water supplies for humans, agriculture and ecosystems; increased fire frequency; desertification; and, irrevocable sea-level rise.[16] The latter might be so severe that sea walls and other measures to adapt will prove inadequate.[17] In short, as atmospheric scientist and key contributor to the Intergovernmental Panel on Climate Change Susan Solomon explains, carbon dioxide emissions might peak to levels that would lead to eventual sea-level rise in the order of meters, "implying unavoidable inundation of many small islands and low-lying coastal areas."[18]

The need to rapidly draw down emissions of carbon dioxide and other greenhouse gases to below current atmospheric concentrations cannot wait until a future date if humanity is to avoid catastrophic changes.[19] Indeed, the period for carbon emissions to peak and then fall dramatically to avoid these changes is rapidly closing, with less than ten years remaining to halt emissions growth to have a palpable effect on worsening climate change.[20] For Hansen, prompt policy changes are imperative,[21] and the failure to act suggests to him that "decision-makers do not appreciate the gravity of the situation."[22]

The United Nations Framework Convention on Climate Change ("UNFCCC" or "Framework Convention"), to which the global community committed some twenty years ago, specifically speaks to "threats of serious

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[15] Hansen, *supra* note 9, at 226.

[16] *See* Solomon, *supra* note 13, at 1708.

[17] *Id.* (explaining that the conservative lower limit of sea-level rise, defined by thermal expanses alone, can be expected to be associated with substantial irreversible commitments to future changes in the geography of the Earth due to many coastal and island features ultimately becoming submerged).

[18] *Id.* at 1704.

[19] *See, e.g.*, Hansen, *supra* note 9, at 217 ("If the present overshoot of [350 parts per million of carbon dioxide] is not brief, there is a possibility of seeding irreversible catastrophic effects."); Solomon, *supra* note 13, at 1708-09 ("It is sometimes imagined that slow processes such as climate changes pose small risks, on the basis of the assumption that a choice can always be made to quickly reduce emissions and thereby reverse any harm within a few years or decades. We have shown that this assumption is incorrect for carbon dioxide emissions, because of the longevity of the atmospheric CO_2 perturbation and ocean warming.").

[20] Hansen, *supra* note 9, at 229 (explaining that continued growth of greenhouse gas emissions, for just another decade, practically eliminates the possibility of near-term return of atmospheric composition beneath the tipping level for catastrophic effects).

[21] *Id.* at 217. Hansen argues that a limit of one degree Celsius increase in global temperature is necessary to avoid practically irreversible ice sheet and species loss. *Id.*

[22] *Id.* at 229.

or irreversible damage."[23] In addition, it pays particular attention to the plight of small island states, early seen as among the most vulnerable to climate change. If preserving a climate "similar to that on which civilization developed and to which life on Earth is adapted"[24] is desired, the international community must never emit the vast majority of the remaining fossil fuel carbon.[25] This is indeed a herculean task.[26] Hopes for later and rapid reductions are, however, "risky, expensive and disruptive;" and, as such, far less politically feasible.[27] Further, for SIDS, it may herald the "end of their history."[28]

B. Climate Change and Small Island Developing States

Leaders from the Pacific Islands Forum to the Secretary General of the United Nations recognize the dire consequences of climate change for SIDS, describing it as the greatest threat to livelihoods, security, and well-being.[29] This echoes the United Nations General Assembly's repeated and unanimous affirmation of the seriousness of climate change and the particular vulnerability of SIDS.[30] Though geographically disparate,[31]

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[23] Solomon, *supra* note 13, at 1704 (citing United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107, at art. 3, [hereinafter *UNFCCC*], *available at* http:// unfcc.int/resource/docs/convkp/conveng.pdf).

[24] Hansen, *supra* note 9, at 217.

[25] *Id.* at 226.

[26] *Id.* at 229 ("The most difficult task, phase-out over the next twenty to twenty-five years of coal use that does not capture CO_2, is herculean, yet feasible when compared with the efforts that went into World War II. The stakes, for all life on the planet, surpass those of any previous crisis. The greatest danger is continued ignorance and denial, which could make tragic consequences unavoidable.").

[27] Myles Allen et al., *The Exit Strategy*, 3 NATURE REPORTS: CLIMATE CHANGE 56 (2009), http://www.nature.com/climate/2009/0905/pdf/climate.2009.38.pdf.

[28] *Islands Fear 'End of History' Due to Climate Changes*, REUTERS (Nov. 29, 2010, 10:56 p.m.), http://www.reuters.com/article/2010/11/30/us-climate-islands-idUSTRE6AT0KW20101130. Antonio Monteiro Lima, a delegate of Cape Verde who is vice-chair of the forty-three member Alliance of Small Island States, identified Kiribati, Tuvalu, the Cook Islands, the Marshall Islands, and the Maldives as the most at risk. *Id.* Monteiro stated, "All these countries are at this moment struggling to survive . . . they are facing the end of history[.]" *Id.*

[29] *Joint Statement by Leaders of Pacific Islands Forum, UN Secretary-General*, UNITED NATIONS, SG/2191 (Oct. 10, 2012) [hereinafter *Joint Statement*], *available at* www.un.org/News/Press/docs/2012/sg2191.doc.htm.

[30] *See* Aaron Korman & Giselle Barcia, *Rethinking Climate Change: Towards an International Court of Justice Advisory Opinion*, 37 YALE J. INT'L L. ONLINE 35, 36 (2012) *available at* http://www.yjil.org/docs/pub/o-37-korman-barcia-rethinking-climate-change.pdf.

[31] *See* Tuiloma Neroni Slade, *The Making of International Law: The Role of Small*

SIDS share many preexisting vulnerabilities, such as limited resources and high vulnerability to external economic and geo-political shocks.[32] These vulnerabilities, exacerbated by climate change and coupled with low adaptive capacity, inspired special recognition for SIDS within the Framework Convention.[33] They have also inspired "persistent and innovative" arrangements between SIDS to facilitate cooperation and regional collaboration,[34] which may bode well for future actions against large emitters.[35]

Among the most striking climate change impacts is the acute coastal vulnerability of SIDS, and in some cases the almost certain uninhabitability of their ancestral homes.[36] In the Pacific, for example, SIDS risk many of the more globally widespread climate impacts, including coastal inundation, rising air temperatures, decreased rainfall, and rising ocean temperatures.[37] With these climatic changes—increased coral bleaching, increased coastal flooding, and erosion—threats to traditional lifestyles of indigenous communities and human migration will also occur.[38]

Islanders have long been aware of these impacts. The impassioned plea in 1997 of the Prime Minister of Tuvalu, an atoll nation that faces the total loss of territory, still rings true today:

Island States, 17 TEMP. INT'L & COMP. L.J. 531 (2003) ("Small island states are located in all parts of the world, from the Mediterranean to the Pacific, in Africa, Asia, the Indian Ocean, and the Caribbean. They range from the very small (Barbados and Tuvalu) to the quite large (Jamaica and Papua New Guinea).").

[32] *See generally* Burkett, *supra* note 2; Slade, *supra* note 31, at 533; Alexander Gillespie, *Small Island States in the Face of Climate Change: The End of the Line in International Environmental Responsibility*, 22 UCLA J. ENVTL. L. & POL'Y 107 (2004).

[33] *UNFCCC*, *supra* note 23, art. 4.

[34] Slade, *supra* note 31, at 533-4, 540 (citing early collaboration including the Pacific Islands Forum, the Caribbean Community (CARICOM) and the Indian Ocean Commission as well as more recent efforts embodied in the Alliance of Small Island States (AOSIS)).

[35] *See* discussion *infra* Part IV.

[36] *See generally* Maxine Burkett, *In Search of Refuge: Pacific Islands, Climate-Induced Migration, and the Legal Frontier*, ASIA PAC. ISSUES, no. 98, Jan. 2011, at 1. It is important to note that coastal erosion and seawater inundation will likely render atoll islets uninhabitable long before sea level overtops the surfaces. William R. Dickinson, *Pacific Atoll Living: How Long Already and Until When?*, 19 GSA TODAY, Mar. 2009, at 4.

[37] In its Fourth Assessment Report, the Intergovernmental Panel on Climate Change stated the changes anticipated for the small islands with "very high confidence," including stark forecasts projecting reduced water resources in many Caribbean and Pacific islands that would be insufficient to meet demand during low rainfall periods by mid-century. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: SYNTHESIS REPORT 48-49 (R.K. Pachauri & A. Reisinger eds., 2011).

[38] *See generally* NATIONAL CLIMATE ASSESSMENT REGIONAL TECHNICAL INPUT REPORT SERIES, CLIMATE CHANGE AND PACIFIC ISLANDS: INDICATORS AND IMPACTS (Victoria W. Keener, et al. eds., 2012).

> There is an asserted consensus that binding significant targets to reduce greenhouse gases are essential, if the catastrophic impacts of climate change on the livelihood and existence of people are to be limited . . . . For the people of low-lying island states of the world, however, and certainly of my small island country of Tuvalu in the Pacific, this is no longer a debatable argument. The impacts of global warming on our islands are real, and are already threatening our very survival and existence.[39]

Indeed, as His Excellency Tuiloma Neroni Slade, judge of the International Criminal Court,[40] stated ten years ago, sea-level rise "poses the most critical threat, for it touches the very life force of island communities . . . Fundamentally, it is an issue of equity, and of survival."[41] The Joint Statement by Leaders of Pacific Islands Forum and the Secretary General echoes this sentiment in its call to the international community to identify threats—like the violation of territorial integrity and increased natural resource scarcity—and to assist these vulnerable countries.[42] Indeed, the Joint Statement seeks "urgent international action to reduce emissions commensurate with the science and associated social, economic and security impacts, sufficient to enable the survival and viability of all [] small island developing States."[43] The Joint Statement also stresses the need to address these impacts in "all relevant international forums, including but not limited to the United Nations Framework Convention on Climate Change, the General Assembly and the Security Council."[44] It is not clear, however, that these forums will yield much progress. They have not to date.

III. CREATIVITY, FUTILITY, AND REALPOLITIK

There have been many claims and avenues for remedy posited by academics and practitioners. Pioneering individuals and communities from

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[39] Rebecca Elizabeth Jacobs, *Treading Deep Waters: Substantive Law Issues in Tuvalu's Threat to Sue the United States in the International Court of Justice*, 14 PAC. RIM L. & POL'Y J. 103, 104 (2005) (citation omitted).

[40] Slade, *supra* note 31, at 531. Judge Tuiloma Neroni Slade is a Judge on the International Criminal Court ("ICC"). Prior to his election to the ICC, he served as the Permanent Representative of Samoa to the United Nations and as the Samoan Ambassador to the United States. He has also held the office of Attorney-General of Samoa, was a senior legal advisor with the Commonwealth Secretariat in London, and was the Chairman of the Alliance of Small Island States ("AOSIS") in 1997, which was the year that the Kyoto Protocol agreement on controlling greenhouse gases was adopted. *Id.*

[41] Slade, *supra* note 31, at 540.

[42] *Joint Statement*, *supra* note 29.

[43] *Id.*

[44] *Id.*

the most vulnerable regions of the world have pressed or attempted to pursue some of these claims in international fora, though without successful resolution. For example, the Inuit petition at the Inter-American Commission on Human Rights ("IACHR") sought to hold the United States responsible for human rights violations caused by its disproportionate contribution to historical and present greenhouse gas emissions.[45] The claim, however, never reached conclusion and a final decision is likely not forthcoming.[46] In 2002, Tuvalu also threatened to bring suit in the ICJ in response to the United States' intransigence regarding emissions reductions.[47] Of course, the ICJ's lack of jurisdiction over the United States would have been the first major jurisdictional hurdle, followed perhaps by several substantive law issues.[48]

Many of the remaining claims are robust in the academic realm alone. This is the case for proposed claims under the United Nations Convention on the Law of the Sea ("UNCLOS")[49] and the U.S. Alien Torts Statute ("ATS"),[50] for example. The search for a viable means for remedy demonstrates the failure of the Framework Convention, the main international instrument on climate change, to address the absence of enforceable compliance mechanisms to date.[51] There is a renewed effort to pursue avenues under the UNFCCC[52]—and Part III surveys the other most

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[45] *See* Hari M. Osofsky, *The Inuit Petition as a Bridge? Beyond Dialectics of Climate Change and Indigenous Peoples' Rights, in* 272 ADJUDICATING CLIMATE CHANGE: STATE, NATIONAL, AND INTERNATIONAL APPROACHES (William C.G. Burns & Hari M. Osofsky eds.,2009); *see also* discussion, Part IV.A *infra.*

[46] *Id.* at 289-90.

[47] *See* Jacobs, *supra* note 39, at 112.

[48] *See id.* at 105 (asserting that even if Tuvalu gains jurisdiction for a suit in the ICJ against the United States, it will face numerous substantive law issues).

[49] *See id.* at 116.

[50] *See generally* RoseMary Reed, Comment, *Rising Seas and Disappearing Islands: Can Island Inhabitants Seek Redress Under the Alien Tort Claims Act?*, 11 PAC. RIM. L. & POL'Y J. 399 (2002).

[51] *See, e.g.*, Jacobs, *supra* note 39, at 112 (arguing that Tuvalu would have difficulty asserting that the United States is bound by the Framework Convention for two reasons: First, countries may postpone such measures when they are not cost effective. The United States would likely defend its actions by pointing to the economic hazards of substantial emissions reduction. And, second, the Framework Convention is not binding, so the United States could argue that it is not required to abide by its emissions standards).

[52] These include employing an "obscure dispute settlement provision of the U.N. Framework Convention on Climate Change (UNFCCC)," under Article 14 of the treaty. Lisa Friedman, *Island States Mull Risks and Benefits of Suing Big Emitters*, E&E REP. (Nov. 16, 2012), http://www.eenews.net/public/climatewire/2012/11/16/1 (last visited Mar. 12, 2013); *see also* Jacobs, *supra* note 39, at 118.

commonly cited legal avenues. This section, however, poses fundamental geo-political questions that complicate these kinds of cases at the outset.

SIDS appear to have a viable claim at base: the unabated emissions activity of the highest emitters has resulted in altered atmospheric chemistry that in turn has created a climate extremely hostile to small island states in particular.[53] Further, it seems reasonable to allege that the highest emitters were aware of the consequences of their actions since at least 1992, at the drafting of the Framework Convention. A compelling case could proceed on the merits. There are, however, antecedent concerns regarding the geo-political milieu in which these cases are brought. For example, does the complaining island nation have the financial and human resources and capacity to pursue these claims against large emitters? And, on a related note, if a vulnerable nation pursues legal recourse, will the very nation-state(s) from which it seeks remedy retaliate?

There is evidence that both lack of resources and fear of retaliation have stymied efforts to hold large emitters accountable for their actions in the international arena.[54] That may color the proposed legal actions' viability. Backed by wealthy European nations, the Republic of Palau is currently leading a coalition of vulnerable states in a campaign to request an advisory opinion from the ICJ.[55] The request seeks "on an urgent basis . . . an advisory opinion from the ICJ on the responsibilities of States under international law to ensure that activities carried out under their jurisdiction or control that emit greenhouse gases do not damage other States."[56] Reports indicate, however, that diplomats and attorneys are "putting on the brakes" for fear of losing billions in aid from China and the United States for non-climate needs, such as education, roads, and HIV-AIDS clinics.[57] The United States, for example, has "made its objections known," using threats of worsening "[c]ongressional inaction as a clear warning" against pursuing legal action.[58] Conversations regarding more "confrontational

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[53] *See* Friedman, *supra* note 52.

[54] *Id.*

[55] *See generally id.* Palau formed Ambassadors for Responsibility on Climate Change ("ARC") to ask the General Assembly for an advisory opinion. *Id.* Germany, Ireland, and Switzerland have vowed support for Palau. *Id.* For more in depth discussion of ICJ advisory opinions, see discussion Part IV.D *infra*.

[56] Press Conference on Request for International Court of Justice Advisory Opinion on Climate Change, U.N. Press Release (Feb. 3, 2012) [hereinafter *Advisory Opinion on Climate Change*].

[57] Friedman, *supra* note 52 ("'Some of them are afraid, since the big country doesn't like it,' said Bangladesh Ambassador to the United Nations Abdul Momen. Momen and others said the concern has not derailed nations' pursuit of an advisory opinion before the Hague-based International Court of Justice, but it has significantly slowed the momentum.").

[58] *Id.* In addition, the United States has a unique relationship with a number of the most

alternatives" are occurring at the "margins" of the negotiations and the largest impediment for poor nations, generally, is their "near-total dependency on big emitters for development, trade and, increasingly, money to adapt to climate change."[59] Former President of Palau, Johnson Toribiong, insists, however, that the advisory opinion would "complement and not conflict" with international negotiations.[60] This action would perhaps "renew our faith in a system of law that has guided States' actions in the past and gives them legitimacy today," according to President Toribiong.[61]

This kind of stifled voice, as a result of capacity constraints or power differentials is not unique to climate-related circumstances, though the consequences here are perhaps most dire. In fact, similar capacity and retaliation concerns operate in the World Trade Organization's ("WTO") dispute settlement regime. Lack of resources and legal capacity as well as fear of non-WTO or extralegal retaliation by more powerful trading partners, are two of the small handful of reasons that developing nations might not invoke the relevant dispute settlement mechanisms.[62] The

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vulnerable nations, including Palau. The Federated States of Micronesia, the Republic of the Marshall Islands, and Palau are freely associated with the United States, institutionalized by respective Compacts of Free Association. *See generally* Briana Dema, Note, *Sea Level Rise and the Freely Associated States: Addressing Environmental Migration Under the Compacts of Free Association*, 37 COLUM. J. ENVTL. L. 177, 183-85 (2012). "Free association occupies the 'middle ground between integration and independence.' It is characterized by a formal association between two states in which one state cedes to the other 'a fundamental sovereign authority and responsibility for the conduct of its own affairs.'" *Id.* at 183 (citations omitted). Whereas Dema writes about the Compact in the context of climate-induced migration, at least one other commentator suggests that the Compact might be useful for limiting emissions from the "world's leading producer of greenhouse gases." *See* J. Chris Larson, Note, *Racing the Rising Tide: Legal Options for the Marshall Islands*, 21 MICH. J. INT'L L. 495, 496-97 (2000) ("A treaty obligation exists between [the Republic of Marshall Islands] and the United States, which, broadly interpreted, may require the United States to defend RMI from accelerated sea-level rise."); *see also* Clement Yow Mulalap, *Islands in the Stream: Addressing Climate Change from a Small Island Developing State Perspective, in* CLIMATE CHANGE AND INDIGENOUS PEOPLES: THE SEARCH FOR LEGAL REMEDIES (Randall S. Abate & Elizabeth Ann Kronk eds., 2013).

[59] Friedman, *supra* note 52 ("'Were it not for the fact that they are so dependent on foreign aid, I think they would have brought claims ten years ago. I know this for a fact,' said Matt Pawa, an attorney who represented the Alaskan village of Kivalina in a landmark global warming case.").

[60] *Advisory Opinion on Climate Change*, *supra* note 56.

[61] *Id.*

[62] *See* Phoenix X.F. Cai, *Making WTO Remedies Work for Developing Nations: The Need for Class Actions*, 25 EMORY INT'L L. REV. 151, 155-56 (2011). Developing nations may "fear the possibility of unilateral retaliation by the United States, either through a decrease in development or military aid or by revoking access to the Generalized System of

persistent capacity and power differential in the climate context, and other areas in which it influences international law, threatens to compromise confidence in international law's ability to promote and defend legal rights.[63] Indeed, one scholar has questioned if international law is able to provide effective legal mechanisms to protect sovereign interests when other states control the unyielding emissions that accelerate climate change.[64] If international law cannot do this for the most vulnerable, it does not bode well for SIDS for which the international legal regime is an indispensable piece of their efforts to halt dangerous climate change.

IV. SURVEY OF CLIMATE CHANGE LITIGATION CLAIMS

There have been several calls for climate-related litigation, often with a focus on claims brought by or in the interest of most vulnerable.[65] The defendant contemplated is almost always the United States, the single

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Preferences, which grants them preferential trade terms as developing nations." *Id.* at 180. Cai identifies two additional reasons: (i) "lack of market share and ability to affect world markets"; and (ii) "asymmetries or unevenness in the effectiveness of remedies." *Id.* at 156 (citation omitted). *But see* Andrew T. Guzman & Beth A. Simmons, *Power Plays and Capacity Constraints: The Selection of Defendants in World Trade Organization Disputes*, 34 J. LEGAL STUD. 557 (2005) (finding that although capacity constraints may limit the number of cases developing countries are able to pursue, political hurdles, such as fear of retaliation by the would-be defendant are less supported). Although the study is useful overall, Guzman and Simmons' methodology is not directly useful for the parallel I wish to draw here. Among several other reasons, Guzman and Simmons' article has limited relevance (i) because of their choice of defendants on whom they focus their study and (ii) because they do not isolate the particularly resource- and power- constrained SIDS I am concerned with here. Nevertheless, the authors admit, "Although our results fail to support the power hypothesis, we cannot rule out the possibility that power plays an important role in determining the number of cases filed." *Id.* at 571.

[63] On this point, see Professor Badrinarayana's trenchant argument in, Deepa Badrinarayana, *Global Warming: A Second Coming for International Law*, 85 WASH. L. REV. 253 (2010). Badrinarayna's articles examines "why international law does not provide adequate redress to about eighty percent of the world's population whose lives and property are threatened by climate change, and whose governments may thus effectively be denied sovereign control over their domestic affairs." *Id.* at 254. She attributes "the inadequacy of international law in the climate context to the evolution of the international community into an economic union that has historically privileged material interests over legal rights." *Id.* at 253. Ultimately she argues that "state behavior in the context of climate change is currently consistent with historic international legal responses to rights violations generally, and thus, mitigating violations of sovereignty will require new approaches in international law." *Id.* at 255. Although she offers valuable tools to conceive of new approaches, crafting these new approaches is left largely to others.

[64] *See id.* at 254

[65] Brown, *supra* note 5.

largest historical emitter and the second greatest current emitter.[66] They also explicitly or tacitly admit the Framework Convention's failure to address failed mitigation efforts or the possibility of climate-related damage that is too great for adaptation provisions to address.[67] This section briefly describes the four most commonly recommended claims and legal avenues: (1) human rights claims and tribunals; (2) alien tort claims in United States district courts; (3) violation of the United Nations Convention on the Law of the Sea in several fora; and (4) violations of treaties, breaches of customary international law or requests for an advisory opinion in the ICJ.[68] It does not delve into some of the substantive issues, such as establishing a causal link between a nation's emissions and climate impacts, which might impede the merits phase of the action.

A. Appealing to Human Rights

Climate change directly and indirectly implicates well-recognized human rights obligations.[69] Consideration of these obligations is particularly useful for vulnerable populations as it connects the many dangerous climate impacts to the human rights commitments states have already undertaken. In addition, it helps to demonstrate the extent of the harm suffered as a result of the rights violation.[70] Life-threatening extreme weather events, for example, directly impact rights to life, dignity, and personal security—core

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[66] Clark, *supra* note 5.

[67] *See, e.g.*, Roda Verheyen & Peter Roderick, *Beyond Adaptation: The Legal Duty to Pay Compensation for Climate Change Damage*, WWF-UK Climate Change Programme Discussion Paper, Nov. 2008, at 6, 13, *available at* http://assets.wwf.org.uk/downloads/beyond_adaptation_lowres.pdf.

[68] For a more comprehensive discussion of legal rights and remedies with respect to climate change adaptation, see Maxine Burkett, *Legal Rights and Remedies*, *in* THE LAW OF ADAPTATION TO CLIMATE CHANGE: UNITED STATES AND INTERNATIONAL ASPECTS 815 (Michael Gerrard & Katrina Kuh, eds., 2012). There are other possible international fora that scholars have considered that are not discussed here, including the World Trade Organization, the World Heritage Committee, and the Straddling Fish Stocks Agreement. *See generally* ADJUDICATING CLIMATE CHANGE: STATE, NATIONAL, AND INTERNATIONAL APPROACHES (William C. G. Burns & Hari M. Osofsky eds., 2009).

[69] *See generally* U.N. Human Rights Council, *Promotion And Protection Of All Human Rights, Civil, Political, Economic, Social And Cultural Rights, Including The Right To Development*, A/HRC/10/24 (Nov. 17, 2008), *available at* http://www.refworld.org/docid/49a5223b2.html; *see also* U.N. Human Rights Council, *Human Rights and Climate Change*, A/HRC/10/L.30 (Mar. 20, 2009), *available at* http://documents-dds-ny.un.org/doc/UNDOC/LTD/G09/124/08/pdf/G0912408.pdf?OpenElement.

[70] Megan Chapman, *Climate Change and the Regional Human Rights Systems*, 10 SUSTAINABLE DEV. L. & POL'Y 37, 37 (2010) (citing U.N. Human Rights Council Resolution 7/23 (Mar. 28, 2008)).

civil and political rights.[71] Decreased rainfall resulting in increasing drought and desertification threatens the ability to produce food, thus implicating the recognized right to food.[72] Some less direct human rights obligations involve the plight of climate-induced migrants, for whom the right to privacy and family life has been compromised.[73] Other rights implicated include: the rights to the highest attainable standard of health, adequate housing, and self-determination as well as human rights obligations related to access to safe drinking water and sanitation.[74]

Some rights are given greater deference than others. Courts tend to find civil and political rights, like the right to life and security, enforceable more so than their economic, social, and cultural counterparts.[75] In fact, many of the rights that climate change affects fall into the latter category in which the link between the right and the corresponding duty is blurred.[76] Nonetheless, these claims may still have traction, evidenced by their progress in regional human rights tribunals. Where pollution prevented people from living in their homes, for example, the European Court of Human Rights has found that the right to privacy and family life was violated.[77] Further, a more general right to a healthy environment is emerging at the international, regional, and national level.[78]

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[71] *See* Amy Sinden, *An Emerging Human Right to Security from Climate Change: The Case Against Gas Flaring in Nigeria, in* ADJUDICATING CLIMATE CHANGE: STATE, NATIONAL, AND INTERNATIONAL APPROACHES 173, 185 (William C. G. Burns & Hari M. Osofsky eds., 2009).

[72] Graham Frederick Dumas, *A Greener Revolution: Using the Right to Food as a Political Weapon Against Climate Change*, 43 N.Y.U. J. INT'L L. & POL. 107 (2010) (citing Article 11 (1) and (2) of the International Covenant on Economic, Social and Cultural Rights).

[73] Sinden, *supra* note 71, at 185 (arguing that if sea-level rise displaces people from their homes even without physical injury, the right to privacy and family life might well be violated). Sinden also suggests a violation of the right to information that is "increasingly viewed as derivative of long-standing and fundamental civil and political rights to freedom of expression." *Id.* at 187 (citation omitted).

[74] U.N. Human Rights Council, *Promotion And Protection Of All Human Rights, Civil, Political, Economic, Social And Cultural Rights, Including The Right To Development*, *supra* note 69; *see also* U.N. Human Rights Council, *Human Rights and Climate Change*, *supra* note 69.

[75] Sinden, *supra* note 71, at 182. *See also*, Wolfgang Sachs, *Climate Change and Human Rights*, 106 INTERACTIONS BETWEEN GLOBAL CHANGE AND HUM. HEALTH 349 (2006).

[76] Sachs, *supra* note 75, at 349.

[77] Sinden, *supra* note 71, at 187. *See* International Covenant on Civil and Political Rights, art. 17, Dec. 16, 1966, 999 U.N.T.S. 171, entered into force Mar. 23, 1976 [hereinafter *ICCPR*]. ("No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence . . . .").

[78] *See* Chapman, *supra* note 70; Reed, *supra* note 50, at 413-14. The African Charter on

To date, the IACHR is the only regional human rights body that has heard a claim of violation of rights because of climate change.[79] Relying on the rights laid out in the American Declaration of the Rights and Duties of Man, the Inuit peoples of Alaska and Canada brought an action against the United States in 2005.[80] Petitioners alleged adverse impacts resulting from U.S. emissions that threatened the enjoyment of numerous human rights—including the rights to preservation of life, security, means of subsistence, and to residence and inviolability of home.[81] The IACHR dismissed the Petition without prejudice in 2006 finding insufficient information to determine that the alleged facts characterized a violation of rights the American Declaration protects.[82] In 2007, however, the IACHR invited the petitioners, at their request, to a broader hearing to discuss the nexus between climate change and human rights.[83] A decision from the IACHR is, in all likelihood, not forthcoming. The most notable challenge to the claim was that the United States has not accepted the jurisdiction of the IACHR.

Lack of jurisdiction of human rights treaties over the most significant emitters is common. Even if there is jurisdiction, an IACHR decision declaring human rights violations resulting from the impacts of anthropogenic climate change is not enforceable.[84] Its value is in the declaration's ancillary effects. Those seeking compensation in a domestic action due to climate-related injuries, for example, could use a statement on climate change and human rights from a relevant tribunal as persuasive authority in domestic courts.

Human and Peoples' Rights, for example, explicitly recognizes right to environment. Chapman, *supra* note 73, at 37. Further, the African Commission on Human and Peoples Rights has found violations of this right. *Id.*

[79] *See* Burkett, *supra* note 68.

[80] *See* Petition to the Inter American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States (submitted Dec. 7, 2005), *available at* http://earthjustice.org/sites/default/files/library/legal_docs/petition-to-the-inter-american-commission-on-human-rights-on-behalf-of-the-inuit-circumpolar-conference.pdf.

[81] Svitlana Kravchenko, *Right To Carbon Or Right To Life: Human Rights Approaches to Climate Change*, 9 VT. J. ENVTL. L. 513, 523, 528 (2008).

[82] *Id.* at 535.

[83] For a general discussion of the procedural history and substantive claims of the Inuit Petition, see Osofsky, *supra* note 45, and Kravchenko, *supra* note 81, at 534-36.

[84] *See* Statute of the Inter-American Commission on Human Rights arts. 1-2, Oct. 31, 1979, O.A.S. G.A. Res. 447 (IX-o/79), *available at* http://www.iachr.org/Basicos/basic15.htm [hereinafter *ATS*]. Only the IACHR can generate enforceable decisions and it too lacks jurisdiction over the U.S. *Id.*

Although the general theories at base usually concern human rights norms, other international norms might be relevant.[85] The transboundary harm rule, which requires states to prevent or minimize the risk of damage to other states,[86] and state responsibility, which holds an offending state responsible for the cost of preventing damage and addressing "unavoided" damage,[87] are foundational for claims seeking rapid emissions reduction and compensation for loss and damage small islands suffer. SIDS might bring a claim based on the breach of this kind of customary international law in U.S. domestic courts via the Alien Tort Statute ("ATS"), or, perhaps, in the ICJ.

B. Possible Claims Under the Alien Tort Statute

The Alien Tort Statute[88] ("ATS") was enacted in 1789 to allow foreign persons to sue defendants in U.S. courts for violations of international law.[89] The ATS states simply: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[90] A claimant must meet the following requirements to bring a claim under the ATS: (i) an alien must bring suit; (ii) the claim must be in tort; and, (iii) the

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[85] The Rio Declaration contains one of several articulations of the norm: "States shall . . . cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction." United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF. 151/26/Rev.1 (Vol. 1), Annex 1 (Aug. 12, 1992), *reprinted in* 31 I.L.M. 874 (emphasis added).

[86] For a discussion of the possible revival of transboundary harm through an advisory opinion on climate change impacts, see Korman & Barcia, *supra* note 30, at 40. For a comprehensive discussion of the transboundary harm principle and its possible role in litigation under the ATS, see Ajmel Quereshi, *The Search for an Environmental Filartiga: Trans-Boundary Harm and the Future of International Environmental Litigation*, 56 HOW. L.J. 131, 168 (2012).

[87] Verheyen & Roderick, *supra* note 67, at 6, 15-18. State responsibility as well as the polluter pays principle are ostensibly reflected in the Framework Convention, "which notes that the largest share of historical and current global emissions has originated in developed countries." Slade, *supra* note 31, at 541.

[88] 28 U.S.C. § 1350 (2007). For a general discussion of the ATS and its relevance to climate change and other environmental claims, see Ajmel Quereshi, *supra* note 86. *See also* Reed, *supra* note 50.

[89] *See* Burkett, *supra* note 68.

[90] *See ATS*, *supra* note 84.

tort must be a violation of the law of nations.[91] Jurisdiction extends beyond the governments of foreign nationals to include private parties.[92]

In *Sosa v. Alvarez-Machain*,[93] the Supreme Court recognized the propriety of the district courts to "recognize private causes of action for certain torts in violation of the law of nations,"[94] including human rights-based litigation. The scope of claims is limited, however, by those "norms of international character accepted by the civilized world and defined with a specificity comparable to the features" at the time the ATS was originally enacted. In other words, the Court limited claims of international law violations to those recognized in the 18th century. It is not clear if courts would deem human rights claims based on anthropogenic greenhouse gas emissions as tantamount to, say, torture and genocide.[95]

Some have argued that the ATS may indeed serve as a powerful tool to address environmental harms generally and climate change specifically.[96] It is important to note, however, that to date courts have generally dismissed "environmental ATS" cases due to diverse substantive and procedural issues.[97] Nonetheless, there is persuasive literature that suggests that the ATS might be an important part of a bundle of claims that claimants could bring at the international and domestic scales. Possible claims would be based on human rights actions[98] or based on the rule of no transboundary harm, with the latter obligation argued as well-established customary international law.[99] There are significant substantive limitations

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[91] For further discussion, see Reed, *supra* note 50, at 423.

[92] See Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995), and discussion by Richard O. Faulk, *The Expanding Use of the Alien Torts Act in International Human Rights Enforcement, in* CLASS ACTION LITIGATION REPORT, 10 TXLR 294 (2009) *available at* http://works.bepress.com/cgi/viewcontent.cgi?article=1023&context=richard_faulk.

[93] 542 U.S. 692 (2004).

[94] *Id.* at 744.

[95] Perhaps telling, the *Sosa* Court expressed doubt as to the utility of the ICCPR for setting actionable international law norms for the purposes of the ATS. *Id.* at 692; *see also* Faulk, *supra* note 92.

[96] *See generally*, Quereshi, *supra* note 86; Reed, *supra* note 50 (seeking to show that environmental human rights do exist and that a violation of these rights is a violation of international law, and therefore remediable under the ATCA).

[97] Quereshi, *supra* note 86, at 133, 152 (summarizing the three grounds on which courts have consistently criticized environmental norms).

[98] Reed, *supra* note 50, at 407 (arguing that "[b]ecause no case arguing a violation of international environmental law has been successful under the ATCA, the Pacific Island nations may be more successful arguing a violation of environmental human rights. As other human rights claims have been successful, tying an environment protection claim to a human rights claim might have the greatest chance of success.") (citations omitted).

[99] *See* Quereshi, *supra* note 86, at 132-33. Quereshi argues: "The hesitancy of American courts to recognize a viable environmental claim under the ATS results in part

to these claims, namely that individuals are not understood as the rights bearers in the transboundary harm cases and, similarly though conversely, individual entities are not deemed the duty bearers in the human rights context.[100] There may be relevant legal arguments that can soften some of these limitations,[101] however, they are beyond the scope of the current discussion.[102]

A more hopeful possibility is the continued evolution of international law norms, an evolution that might soon empower small island litigants in U.S. domestic courts. Since the enactment of the ATS, jurists were concerned with whether the norm asserted by the claimant was "ripe"—in other words, whether the norm "had achieved sufficient status to be part of the 'law of

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from the failure of international litigators to file and sufficiently support a claim alleging a violation of the most viable international environmental norm—the prohibition on trans-boundary harm." *Id.* at 133. Quereshi admits, however, that a major hurdle to pursuing a claim on the basis of transboundary harm is "unlike a number of norms in the human rights context, the prohibition against trans-boundary harm is generally understood as creating a duty between states, not individuals." *Id.* at 133-34. As discussed *infra* note 102, ATS claims against states suffer a number of significant jurisdictional hurdles.

[100] Quereshi, *supra* note 86, at 165; *see also* Reed, *supra* note 50, at 421-22.

Reed explains:

> Because judicial interpretation of the ATCA has not yet included human rights violations as one of the harms that does not require a state action, the nations will have to make a claim that greenhouse gas emission by corporations in the United States is done under color of state law. Such a claim is daunting, but not insurmountable . . . . [M]ajor corporations in coal, oil, gas, and energy production industries do extensive lobbying of Congress. . . . [A] combination of creation and implementation of state policy could potentially satisfy the state actor test.

Id.

[101] See discussion of the §1983's color of law doctrine in Quereshi, *supra* note 86, at 164.

[102] Whether jurisdiction extends to multinational corporations, who as a group are a significant source of global greenhouse gas emissions, is also up for determination. Recent appellate court decisions have done little to clarify this point. In Kiobel v. Royal Dutch Petroleum Co., 621 F.3 111 (2d Cir. 2010), the Second Circuit held that ATS jurisdiction does not extend to claims against corporate defendants. *Id.* Coming to the polar opposite conclusion, however, the D.C. Circuit held in Doe v. Exxon Mobil Corp, 654 F.3d 11 (D.C. Cir. 2011) that corporations are not immune from liability under the ATS. *Id.* The circuit split leaves this question open, along with several other questions the Supreme Court's *Sosa* decision left unresolved. In late 2011, the Supreme Court agreed to review *Kiobel* and decide whether claimants can sue oil companies and other multinationals for alleged human rights abuses overseas. Burkett, *supra* note 68, at 823. At oral arguments the Court ordered new oral arguments directing the parties to brief and argue a third question: "Whether and under what circumstances the Alien Tort Statute, 28 U.S.C. § 1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States." Lyle Denniston, *Kiobel to be Expanded and Reargued*, SCOTUS BLOG (Mar. 5, 2012, 2:01 PM), http://www.scotusblog.com/?p=140230 (quotation marks omitted).

nations.'"[103] Centuries later, courts can look at the non-static norms of international law to identify the enforceable norm under the ATS.[104] In other words, courts have "embraced [the law of nations] as dynamic and changing as the international community recognizes new rights and duties."[105] Some scholars argue, therefore, that an expanded embrace will include key environmental rights and duties, if it has not already.

If the Court resolves questions regarding possible climate-related claims and defendants in favor of a more expansive view, it is plausible that plaintiffs can pursue claims for damages relief against large emitters in federal district courts. In the near-term, however, the lack of clarity with respect to proper jurisdiction makes ATS a less favorable avenue through which to seek remedy.

C. Claims Under the Convention on the Law of the Sea

The dispute resolution mechanism under the United Nations Convention on the Law of the Sea[106] ("UNCLOS") may provide a viable avenue for a binding decision in favor of the most vulnerable island nations.[107] Commonly referred to as "a constitution for the oceans," UNCLOS entered into force in 1948 and currently has 165 parties.[108] Unsurprisingly, small island states, many with extensive ocean resources, were heavily engaged in the development of the Convention.[109] UNCLOS may be a promising instrument for advancing climate change litigation due to its expansive definition of pollution, the clear obligations on State parties to preserve the health of the environment, and the availability of voluntary and compulsory

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[103] Quereshi, *supra* note 86, at 135.

[104] *See* Reed, *supra* note 50, at 406.

[105] *Id.*

[106] U.N. Convention on the Law of the Sea, Dec. 10, 1982, U.N. Doc.A/Conf.62/121, 21 I.L.M. 1261 [hereinafter *UNCLOS*].

[107] *See generally* William C.G. Burns, *Potential Causes of Action for Climate Change Damages in International Fora: The Law of the Sea Convention*, 2 INT'L J. SUST. DEV. L. &POL'Y, no. 1 (2006), at 27-51 (arguing that UNCLOS may prove to be one of the primary battlegrounds for climate change issues in the future); Jacobs, *supra* note 39, at 115 (2005) (arguing, inter alia, that "[d]ispute resolution under the Law of the Sea Convention may be Tuvalu's most successful avenue for redress, especially if Tuvalu desires a binding decision by the ICJ.").

[108] *Chronological Lists of Ratifications of, Accessions and Successions to the Convention and the Related Agreements as of 23 January 2013*, U.N. DIVISION FOR OCEAN AFFAIRS & THE LAW OF THE SEA, http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm (last visited April 26, 2013).

[109] *See* Slade, *supra* note 31, at 534-35 (describing, inter alia, small island states' active participation in the work of the U.N. Seabed Committee and the Third U.N. Conference on the Law of the Sea, shaping the development of exclusive economic zones).

dispute resolution mechanisms to press claims related to environmental pollution.[110] Notably, however, the United States is not a State party.[111]

UNCLOS expansively imposes obligations on State parties regarding the prevention and reduction of pollution. It defines pollution such that an arbiter could conclude that carbon dioxide is a pollutant that State parties are obliged to limit.[112] In the context of climate change impacts, respondent states could be the small group of states that are both parties to UNCLOS and major emitting developed countries.[113] The remedies an affected state could pursue range from an order to perform impact assessments of greenhouse gas emitting projects[114] to monetary damages for the costs carbon pollution imposes on the coastal state, including the costs of adaptation and building defenses as well as the value of lost land area, coastal resources, and sovereignty. Additional remedies might include cooperation on the initiation of international negotiations on ocean acidification or displaced persons, for example.

UNCLOS recognizes the sovereign right of states to exploit their natural resources, but the use of their resources must be in accordance with "their duty to protect and preserve the marine environment."[115] Specifically, State parties are required to "prevent, reduce and control pollution of the marine environment from any source."[116] That obligation includes avoiding "the release of toxic, harmful or noxious substances, especially those that are persistent . . . from land-based sources, [or] from or through the atmosphere."[117] In addition, State parties must "take 'all measures

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[110] *See generally*, Burns, *supra* note 107; *see also* Chris Wold, David Hunter & Melissa Powers, CLIMATE CHANGE AND THE LAW,412-26 (2009).

[111] This may not be dispositive of related claims against the U.S., see discussion *infra* Part IV.D, and it may change shortly. *See also* Allison Winter, *Sen. Kerry Sees Prospects to Advance Law of the Sea*, ENVT. & ENERGY DAILY (July 20, 2011), http://www.eenews.net/EEDaily/2011/07/20/6. Ironically, the melting Arctic ice has inspired renewed interest in the region with its new shipping lanes and areas of potential oil and gas exploration. *Id.* To participate in the international governance regime, it would behoove the United States to ratify UNCLOS. *Id.*

[112] *See UNCLOS, supra* note 106, art. 1, para. 4 ("'[P]ollution of the marine environment' means the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities.").

[113] For the legal elements of an UNCLOS claim, see Burkett, *supra* note 68.

[114] *See UNCLOS*, *supra* note 106, art. 206.

[115] *Id.* art. 193.

[116] *Id.* art. 194, para.1.

[117] *Id.* art. 194, para. 3(a); *Id.* art. 207 (requiring states to "adopt laws and regulations to prevent, reduce, and control pollution of the marine environment from land-based sources,

necessary' to ensure that activities under their jurisdiction [] are so conducted as not to cause damage by pollution to other States and their environment [.]"[118] Further, parties must take measures to "protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life."[119]

UNCLOS obligations are not absolute. The "protect and preserve" mandate is not a total prohibition against pollution but has been interpreted instead as a due diligence obligation.[120] Nevertheless, UNCLOS might effectively address the adverse effects of climate change.

Particularly relevant to international obligations vis-à-vis climate change under the Framework Convention, Article 212 requires parties to take into account international mechanisms to control pollution and take into account "internationally agreed rules, standards and recommended practices and procedure."[121] In addition, parties must cooperate through "competent international organization" to formulate, rules, standards, and practices to protect and preserve the marine environment, under Article 197. A State's failure to fulfill these obligations under UNCLOS triggers liability, which might include "assessment of and compensation for damage," among other things.[122] Article 235 states that, "States are responsible for the fulfillment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law."[123] A State party to the UNFCCC, for example, may face liability claims pursuant to Article 235.[124] The extent of liability that

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including rivers, estuaries, pipelines and outfall sources"; "take other measures as may be necessary to prevent, reduce and control such pollution"; and "endeavor to establish global and regional rules, standards and recommended practices and procedures to prevent, reduce, and control pollution of marine environment from land-based sources, taking into account characteristic regional features, economic capacity of developing states and their need for economic development"); *Id.* art. 212, para. 1 ("States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment from or through the atmosphere . . . .").

[118] Burns, *supra* note 107, at 37-38 (citation omitted); *see* UNCLOS, *supra* note 106, art. 194, para. 2.

[119] *UNCLOS, supra* note 106, art. 194, para. 5.

[120] Burns, *supra* note 107, at 46.

[121] *UNCLOS, supra* note 106, art. 212, para. 1.

[122] *Id.* art. 235, para. 3. It also provides:

> States shall cooperate in the implementation of existing international law and the further development of international law relating to responsibility and liability for the assessment of and compensation for damage and the settlement of related disputes, as well as, where appropriate, development of criteria and procedures for payment of adequate compensation, such as compulsory insurance or compensation funds.

[123] *Id.* art. 235, para. 1.

[124] For a comprehensive discussion of the relationship between UNCLOS and the

extends from obligations under UNFCCC is subject to interpretation.[125] Nevertheless, a party to UNCLOS could argue that a State party has not met its UNFCCC obligations and is liable for damages under Articles 235 and 197 of UNCLOS.[126]

One of the major barriers to effective use of the UNCLOS dispute settlement regime is that the United States, a major historical emitter, is not a party to the Convention. Whereas the U.S. has accepted the major provisions of UNCLOS as customary international law, to which it must comply, it has not accepted the jurisdiction of the ICJ for resolving disputes over customary law violations.[127] In other words, although the U.S. is not subject to the dispute settlement mechanisms of UNCLOS, a complaining party could arguably press claims under violations of customary law due to the impact of its emissions on marine health. The complaining party could not bring that claim to the ICJ, however, as the U.S. withdrew its acceptance of the ICJ's compulsory jurisdiction.[128]

D. The International Court of Justice and the Promise of an Advisory Opinion

1. The International Court of Justice and Climate Change

To press climate adaptation claims against another State, countries can bring suit in the ICJ.[129] The ICJ has two primary adjudicative functions. One is to resolve international law disputes between sovereign states.[130] The other is to issue advisory opinions on outstanding legal questions at the request of the General Assembly.[131] Again, it is important to note,

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UNFCCC, see Burns, *supra* note 107, at 46-49.

[125] *See id.*

[126] Parties would press their claims in one of several arenas. Part XV of UNCLOS provides states with four possible venues for dispute settlement. UNCLOS, *supra* note 106, art. 287, para.1. An affected state can bring a claim under UNCLOS to (i) the International Tribunal for the Law of the Sea (ITLOS); (ii) the International Court of Justice (ICJ); (iii) an arbitral panel; or, (iv) a special arbitral panel. *Id.* States may declare a choice of forum. *Id.* If they have not, or where parties to the dispute have not accepted the same procedures for dispute settlement, the dispute is submitted to binding arbitration unless the parties agree otherwise. *Id.* art. 280, para. 5.

[127] *See* Burns, *supra* note 107, at 45.

[128] *Id.* 45.

[129] *See* Burkett, *supra* note 68.

[130] Statute of the International Court of Justice art. 36, http://www.icj-cij.org/documents/?p1=4&p2=2&p3=0#CHAPTER_IV [hereinafter *ICJ Statute*]; *see also* Korman & Barcia, *supra* note 30, at 38.

[131] *ICJ Statute*, *supra* note 130.

however, that the United States does not recognize the jurisdiction of the ICJ.[132] Further, the jurisdiction of the ICJ is limited to State complaints against other states, and not private parties.[133] In addition, there is no formal mechanism to enforce judgments of the Court.[134] Nonetheless, Tuvalu threatened to sue the United States in the ICJ.[135] Moreover, Palau's call for an advisory opinion has excited many and inspired this renewed consideration of the efficacy of litigation for SIDS.[136]

Low-emitting, high impact countries, like SIDS, are the most obvious applicant countries to press claims before the ICJ.[137] The ICJ can exercise jurisdiction over the parties (i) by mutual agreement; (ii) through the "coincident existence" of applicant and respondent parties who had accepted compulsory jurisdiction of the ICJ;[138] or, (iii) through an independent treaty's dispute resolution clause specifying settlement before the ICJ.[139] If the Court cannot exercise jurisdiction over one or both of the parties, a country can seek an advisory opinion from the ICJ through the General Assembly.[140]

In reviewing substantive claims presented before it, the ICJ can look to several sources of law. The Court would look to other special treaties, such as the UNFCCC, customary international law, and general principles of

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[132] *See The United States and the ICJ*, COUNCIL ON FOREIGN RELATIONS, (Dec. 27, 2011) http://www.cfr.org/international-criminal-courts-and-tribunals/united-states-icj/p26905.

[133] *See Contentious Jurisdiction*, INTERNATIONAL COURT OF JUSTICE, ijc-cij.org, http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1 (last visited April 26, 2013).

[134] *See Advisory Jurisdiction*, INTERNATIONAL COURT OF JUSTICE, ijc-cij.org, http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1 (last visited April 26, 2013).

[135] *See generally* Jacobs, *supra* note 39.

[136] *See Palau Seeks UN World Court Opinion on Damage Caused by Greenhouse Gases*, UN NEWS CENTER (Sept. 22, 2011), http://www.un.org/apps/news/story.asp?NewsID=39710&Cr=pacific+island&Cr1#.UXsosuDE0yE [hereinafter *Palau Seeks UN World Court Opinion*].

[137] In fact, Tuvalu threatened to bring a claim against the United States before the ICJ. Andrew Strauss, *Climate Change Litigation: Opening the Door to the International Court of Justice, in* ADJUDICATING CLIMATE CHANGE: STATE, NATIONAL, AND INTERNATIONAL APPROACHES 334 (William C. G. Burns & Hari M. Osofsky eds., 2009). For a thorough discussion on the viability of such a claim, as well as the formidable hurdles it would face, see Jacobs, *supra* note 39.

[138] *See generally* Strauss, *supra* note 137, at 338-348.

[139] *See generally id.* at 345. Strauss identifies additional procedural and substantive issues that might bar claims before the ICJ.

[140] *ICJ Statute*, *supra* note 130, art. 65. In September 2011, the Pacific Island nations of Palau and the Republic of the Marshall Islands announced plans to seek an advisory opinion on whether countries have a legal responsibility to ensure that greenhouse gas emitting activities on their territory do not pose harm to other States. *Palau seeks UN World Court Opinion*, *supra* note 136.

international law.[141] The UNFCCC would be a logical starting point,[142] as treaties are the most authoritative source of international law. Although provisions of the Framework Convention are relevant, the ICJ would not be inclined to intervene in an ongoing, international negotiations process. At best the Court would only intervene if the complaining party could demonstrate that at least some parties are not negotiating in good faith.[143] For example, a small island state might press the ICJ directly arguing the absence of good faith based on a failure to meet emissions-reduction and adaptation assistance obligations set out in the Framework Convention and Kyoto Protocol.

An applicant country might also advance claims based on customary international law and general principles of law, such as the law on state responsibility for transboundary harm discussed briefly in Part IV.A. The principle for liability based on extraterritorial harm is drawn from the most basic legal precept that arbiters should hold legal actors responsible for the harm they do to others.[144] There is precedent for finding State liability based on transboundary harm that might assist a complaining State suffering from the impacts of sea-level rise, for example, to seek aggressive mitigation and compensation from high-emitting states.[145]

If the ICJ is able to adjudicate a claim, it could yield significant advantages.[146] For example, a favorable ruling could make for a more rigorous post-Kyoto regime, as affected states could enjoy the normative higher ground in negotiations. An adverse finding against a powerful country, however, could be quite difficult to enforce.

2. The promise of Palau's advisory opinion

Since September 2011, with the request by its President to the UN General Assembly, Palau has sought "on an urgent basis . . . an advisory opinion from the ICJ on the responsibilities of States under international law to ensure that activities carried out under their jurisdiction or control

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[141] *See generally* Strauss, *supra* note 137, at 350.

[142] For discussion of claims that the Republic of Marshall Islands might bring before the ICJ, see J. Chris Larson, *Racing the Rising Tide: Legal Options for the Marshall Islands*, 21 MICH. J. INT'L L. 495 (2000).

[143] Joyeeta Gupta, *Legal Steps Outside the Climate Convention: Litigation as a Tool to Address Climate Change*, 16 REV. OF EUROPEAN COMTY. & INT'L ENVTL. L., 1 76, 78 (2007), *available at* http://dspace.ubvu.vu.nl/bitstream/handle/1871/31866/208178.pdf?sequence=1.

[144] *See* Strauss, *supra* note 137, at 350-52.

[145] *See id.* at 352 (discussing the Trail Smelter arbitration).

[146] *Id.* at 339.

that emit greenhouse gases do not damage other States."[147] Palau's hope, shared by numerous commentators, is that an advisory opinion will close the "rhetorical gap" between state action and international legal responsibilities.[148]

Consistent with the UN Charter, the ICJ can issue advisory opinions presented by the General Assembly,[149] regardless of its political nature or the absence of discrete parties before it.[150] Further, although not binding law, advisory opinions nevertheless have authority as statements of law.[151] So, although the U.S. does not accept the jurisdiction of the ICJ, an advisory opinion may hold important symbolic weight.[152] Citing impactful opinions issued in the Nuclear Weapons Cases and in the Occupied Palestinian Territory, among others, Bavishi and Barakat argue: "Although advisory opinions are not legally binding, the findings contained in them

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[147] Raj Bavishi & Subhi Barakat, *Procedural Issues Related to the ICJ's Advisory Jurisdiction*, Briefing Paper, LEGAL RESPONSE INITIATIVE (June 11, 2012), *available at* http://www.legalresponseinitiative.org/download/BP41E%20-%20Briefing%20Paper%20-%20The%20ICJ%20Advisory%20Opinion%20Procedure%20(11%20June%202012).pdf.

[148] Korman & Barcia, *supra* note 30, at 38.

[149] *See* U.N. Charter, art. 96, para. 1 ("The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question."). *See ICJ Statute*, *supra* note 130, art. 65 ("The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request."); Bavishi & Barakat, *supra* note 147, at 1 ("The General Assembly, the Security Council and UN organs and agencies authorized by the General Assembly can request an advisory opinion on 'legal questions arising within their scope of activities.'"). For a comprehensive discussion of the process and substance of ICJ advisory opinions, *see* Bavishi & Barakat, *supra* note 147. *See also* Korman & Barcia, *supra* note 30, at 38. The ICJ has issued twenty-six advisory opinions, with the 1996 Nuclear Weapons case widely deemed the most relevant to the current climate change cases. *Id.* at 39.

[150] *See* Bavishi & Barakat, *supra* note 147, at 7. Regarding the political nature of a question, Bavishi and Barakat state:

> Contentions about the political nature of a question have been raised to argue against the propriety of the ICJ giving an advisory opinion. Where a question contains a political dimension, the ICJ, to date, has taken a flexible approach and taken care to identify and address only the legal elements of a question which invite it to "discharge an essentially judicial task." A request for an advisory opinion is therefore valid and the ICJ has jurisdiction to provide an advisory opinion even in situations in which political considerations are prominent, provided that the question asked is a legal one.

Id. (citations omitted).

[151] *See* MOHAMED SAMEH M. AMR, THE ROLE OF THE INTERNATIONAL COURT OF JUSTICE AS THE PRINCIPAL JUDICIAL ORGAN OF THE UNITED NATIONS 111 (2003), ("the [ICJ's] opinions, in practice, have the same value as [] judgments because they are 'pronouncements' ruled by the Court regarding the applicable law in specific issues.").

[152] Jacobs, *supra* note 39, at 117 (explaining that the advisory opinion may be one way for the ICJ to gain jurisdiction over the U.S. to the benefit of SIDS).

carry great legal weight and moral authority. They contain the World Court's view on important issues of international law and contribute to the elucidation and development of international law."[153] Korman and Barcia go one step further and argue that an advisory opinion on climate change would not only have historic value but would "have the power to reshape positively the international approach to greenhouse gas emissions."[154]

It could, among other things, clearly establish an international norm against transboundary harm caused by these emissions. A clear definition of states' obligations and responsibilities would come at an "opportune time," which, at the time of Korman and Barcia's publication was at the desired commencement of a new international agreement binding all countries at the most recent UNFCCC conference of the parties.[155] Although that moment may have unceremoniously passed, with the waning faith in and enthusiasm for the UNFCCC process, another moment may have emerged with the Obama Administration's recent statements regarding climate action.[156]

V. WEIGHING AID AND EXTINCTION

The existence of a justice paradox in the climate change context is perhaps unsurprising when set against the backdrop of other international law dynamics. Power disparities in the international community are arguably inherent in the conception and structure of current international organization,[157] with the Security Council serving as a paragon of the imbalance. The paradox is most striking in this instance, however, because the stakes for SIDS are unusually high, completely unprecedented, and likely irreversible in terms of the nature and scope of the impacts.

The prognosis for atoll nations like the Maldives, Tuvalu, and Kiribati is that they will lose all of their territory, a loss that significantly dwarfs the aid numbers that some countries currently fear losing. In fact, a comparison of the annual aid dollars that the U.S. gives to the Maldives versus the cost of certain adaptations or the loss of GDP due to the total loss of territory demonstrates the uneven impacts of climate change.[158] Indeed, a survey of

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[153] Bavishi & Barakat, *supra* note 147, at 2.

[154] Korman & Barcia, *supra* note 30, at 36.

[155] *Id.* at 38.

[156] See discussion *infra* Part V.C.

[157] *See generally* Badrinarayana, *supra* note 63.

[158] The U.S. plans to give between two to three million dollars to the Maldives. Maldives, FOREIGNASSISTANCE.GOV, http://www.foreignassistance.gov/OU.aspx?FY=2013&OUID=307&AgencyID=0&budTab=tab_Bud_Planned; *see also* Hassan H. Shihab, First Sec'y of the Permanent Mission of the Maldives to the U.N., Statement to the Chairperson at

aid numbers across similarly situated SIDS reveals the same imbalance.[159] Some countries appreciate this imbalance and are fearless in the face of it.[160] Palau Ambassador to the United Nations, Stuart Beck, acknowledges the United States' objections and maintains that Palau "'gives far more in strategic value' to the United States than it takes in assistance."[161]

Although the general fear of retaliation may be warranted today, the calamity that some of these nations face requires creativity and courage in pursuing the claims summarized in Part IV, and perhaps a few other legal and political approaches that might yield results.[162] This section explores the possibility of pursuing second-tier defendants, identifying representative parties or class action litigation to bring claims, and the value of litigation generally in moving the legal and political needle.

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the General Debate of the Second Committee, (Oct. 8, 2012), *available at* http://www.un.org/en/ga/second/67/maldives8oct.pdf ("Maldives is doing whatever it can to build its resilience to combat the effects of climate change. The Government of Maldives is currently spending more than 27% of its national budget for this purpose.").

[159] For a comparison of aid numbers, see generally AIDFLOWS, http://www.aidflows.org (last visited Apr. 10, 2013). The United States has a unique relationship to the freely associated island nations. Additional cash flows go to the Republic of Marshall Islands, the Federal States of Micronesia, and Palau from the United States, beyond the aid numbers given through aid agencies. *See* Francis X. Hezel, S.J., *Pacific Island Nations: How Viable Are Their Economies?*, 7 PAC. ISLAND POL'Y 1, 21-23 (2012), *available at http://www.eastwestcenter.org/sites/default/files/private/pip007_0.pdf.* Although this may shift the balance slightly, acting in response to the cost of climate impacts is still preferred. *Id.* at 3-4.

[160] *See* Friedman, *supra* note 52 (citing Seychelles Ambassador to the United Nations, Ronald Jumeau, referring to the United States: "'We just don't trust you anymore. And we've waited long enough. In fact, we've waited until your own country has been hit by the worst drought in [sixty] years, until your people are squealing like us. How much more can we wait?' . . . He added that parties pressing the ICJ case have been careful not to name any specific country and have willingly watered down the resolution to attract European support.").

[161] *Id.*

[162] The author does not wish to understate the difficulty of pursuing these claims for SIDS. The benefits, however, would be great if realized. Carroll Muffett, President of the Center for International Environmental Law, is confident that eventually the law will force changes where treaty negotiations have not. *See id.* He explains:

> It's not easy, but once you open that door, if some clever attorney and some brave plaintiff somewhere can open that door, it changes the entire calculus . . . There are a lot of levers out there that haven't been pulled yet. When they're pulled, it's going to move the world in exciting ways. But finding a country that has the capacity and the will and the immune system for this stuff is tough.

Id.

A. Second-Tier Defendants

One way to sidestep concerns of reprisal from major economic powers[163] is to look to the actions of other significant sources of emissions from countries on which SIDS are less dependent. In this "thousand cuts" approach, SIDS can seek to limit the current unabated emissions from other high emitters that provide little if any aid, and at the same time deter other similarly situated countries from continuing or expanding its use of fossil fuel resources, for example.[164] The Federated States of Micronesia modeled this approach in its novel challenge to the Czech upgrade of the Prunerov power plant.[165]

Though ultimately unsuccessful, the claim brought against the Czech Republic arguing transboundary impacts under the 1991 Espoo Convention[166] put governments and corporations "on notice."[167] With the upgrade, the power plant is among the highest greenhouse gas emitting plants in Europe.[168] Micronesia requested inclusion in the transboundary environmental impact assessment prior to project commencement, a request that delayed but did not halt the upgrade.[169] Nonetheless, Micronesia's approach was considered "precedent-setting." Indeed, it provides a skeletal

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[163] For example, according to Seychelles Ambassador to the United Nations Ronald Jumeau, China and the United States appear to be "terrified" that the request for an advisory opinion will move forward. *Id.*

[164] *See id.*

[165] *See generally* Robert Maketo et al., *Transboundary Climate Challenge to Coal: One Small Step against Dirty Energy, One Giant Leap for Climate Justice*, *in* THREATENED ISLAND NATIONS: LEGAL IMPLICATIONS OF RISING SEAS AND A CHANGING CLIMATE 589 (Michael Gerrard & Gregory Wannier, eds., 2013); Eva Munk, *Czech Ministry Accepts Micronesian Input In Assessing Impact of Power Plant Upgrade*, DAILY ENVT. RPT. (Jan. 25, 2010).

[166] Convention on Environmental Impact Assessment in a Transboundary Context, Sept. 10, 1997, 1989 U.N.T.S. 309, *available at* http://www.unece.org/fileadmin/DAM/env/eia/documents/legaltexts/conventiontextenglish.pdf. The convention gives States that signed the right to enter impacts assessments in other member states. *Id.* arts. 3-5. Micronesia is not a signatory, whereas the Czech Republic is a party. *See Status of Ratification*, U.N. TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-4&chapter=27&lang=en (last visited Apr. 27, 2013).

[167] *Czech Ministry Accepts Micronesian Input In Assessing Impact of Power Plant Upgrade, supra* note 165 (Jan Rovensky of Czech branch of Greenpeace stated: "In a broader context, the current case should put governments and corporations in developed countries on notice that states vulnerable to climate change are keen to explore new avenues to challenge decision on projects that contribute to climate change.").

[168] *Id.*

[169] *See* Gabriella Hold, *PRUNÉŘOV EXPANSION APPROVED*, THE PRAGUE POST (May 5, 2010), http://www.praguepost.com/news/4331-prunerov-expansion-approved.html.

roadmap of how to explore and employ similar provisions to pursue actions against significant yet "second-tier" emitters.

B. Representative Parties and Class Action Litigation

Another approach that utilizes existing laws in novel ways would be to rethink the plaintiffs that bring these claims. Representative parties who will suffer significant impacts and are large in number across disparate communities could make the greatest strides. Similarly, countries might act in concert to deflect some of the specific scrutiny a single country might face if it brings claims on its own. These actions might advance efforts that could aid the most vulnerable small island states.

Representative parties that suffer similar impacts from across a particular region might serve as compelling claimants in an action against large emitters or "second-tier" defendants. Representative parties might bring these claims in relevant international fora or in U.S. district courts,[170] depending on where plaintiffs can sustain jurisdiction over defendants. For example, the plight of Palauan women demonstrates great possibility in the legal arena.[171] During his impassioned analysis of "diplomats dither[ing]" at the climate summits in Copenhagen and Cancun, Palau Ambassador to the United Nations Stuart Beck decried the impotence of the UNFCCC meetings while his island lost land and the capacity to grow taro.[172] This acutely impacts the women of the most vulnerable pacific islands. Beck explained, "[i]f the ladies can't grow taro, and it's generally a matriarchal task, they're going to move from that island. And that's a slow-moving kind of depopulation, but it's a real one nonetheless. . . . It's death by a thousand cuts, and every time somebody leaves the island, that's another cut."[173] A claim brought by women taro growers against a variety of large emitting entities might be an effective means of pursuing litigation and galvanizing myriad smaller lawsuits to arrest growing greenhouse gas emissions.

In addition to administrative efficiency, class action suits have been an effective mechanism for pooling resources and leveling the playing field between many similarly situated plaintiffs and powerful defendants in the U.S. It is a potentially powerful mechanism in the international arena as

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[170] Kali Borkoski, *Kiobel v. Royal Dutch Petroleum: What's at Stake, and For Whom?*, SCOTUS BLOG (Sept. 30, 2012, 9:36 PM), http://www.scotusblog.com/2012/09/kiobel-v-royal-dutch-petroleum-whats-at-stake-and-for-whom/ (discussing whether the ATS can apply even if all the violations occurred outside the United States).

[171] *See* Friedman, *supra* note 52.

[172] Friedman, *supra* note 52.

[173] *Id.*

well; and has been contemplated by other scholars and practitioners. Indeed, in her analysis of the feasibility of islanders seeking redress under the ATS, RoseMary Reed suggests that "[w]hile it is possible for a single individual or nation to bring this action, it may be even more powerful if several nations band together to form a class action and litigate this issue once."[174] Professor Phoenix Cai makes a similar suggestion in the context of the World Trade Organization and expands on the promise of class actions in the dispute settlement mechanism to pool benefits and risks—including very damaging retaliation or extralegal contraction of aid.[175]

The class action regime proffered for the WTO might be instructive in the international climate litigation context. When a member of the WTO violates a rule or trade term, the affected party may bring a complaint under the WTO's dispute settlement regime.[176] The process and remedy for developing nations, however, suffers from similar concerns of retaliation and parties' uneven resources.[177] In response, Professor Cai proposes a class action type mechanism that would allow developing nations to pool their complaints in cases against larger or more developed nations.[178] Importantly, the group of nations could also use the class action strategy against emerging developing nations, such as China and India;[179] and would afford least-developed countries the right to join as a third party in the dispute settlement process.[180] Although there would be burdens and risks to such an arrangement, particularly to the "lead" developing nation plaintiff,[181] there would be many systemic benefits to class action litigation. Some of those benefits include: the ability to engage in litigation without risking extrajudicial threats of retaliation and without the fear of lengthy and costly litigation; the ability to bring suits that advance developing

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[174] Reed, *supra* note 50, at 423. The author made similar calls in the context of a reparations claim. *See generally* Burkett, *Climate Reparations*, *supra* note 2.

[175] *See generally* Cai, *supra* note 62. More than two-thirds of the 153 WTO member nations are developing nations. *Id.* at 154. Cai explains, "despite their strength in numbers, developing nations as a group rarely participate in dispute settlement, a core aspect of the WTO. This is problematic because the WTO is essentially a self-enforcing system of reciprocal trade rights that relies on proactive monitoring by all members." *Id.*

[176] In fact, it is incumbent on each WTO member to "police its interests." *Id.* at 155. According to Cai, "[w]hen developing nations fail to initiate cases, the result is both under-enforcement of key WTO norms and skewed enforcement in favor of developed nations." *Id.*

[177] Other concerns operate. *See id.* at 153 (discussing the inadequacy of the "prospective" WTO remedies, namely withdrawal of the offending measure or rule).

[178] *Id.* at 157 (describing the proposal in a nutshell).

[179] *Id.*

[180] *Id.*

[181] *Id.* at 184-85.

nation agendas and interests; the valuable opportunity for coalition-building; and, perhaps most important, the benefits of greater developing nation participation "in the WTO system as a whole, especially in terms of perceived legitimacy."[182]

In the climate context, class action litigation can serve similar functions as proposed in the WTO context and remain consistent with what it seeks to achieve in the larger societal context. As Cai explains:

> Class actions serve important societal functions. They are often used as a tool to compensate for small losses and enforce regulations. They enable less powerful groups to act as private attorneys general. They have also been effectively employed as a means for lasting social change, as during the civil rights era. As a result of all these dynamics, class actions more deeply embed social values embodied in laws in the greater society by giving voice to the otherwise voiceless.[183]

Based on the climate forecast for small islands, it is critical for them to acquire that voice rapidly.

C. Interest Convergence and the Power of Publicity

> The rule of law must reflect the interests of the entire international community.
>
> -President Johnson Toribiong, Republic of Palau[184]

The value of all of the proposed claims is perhaps greatest in their ability to spark and sustain a conversation about the disproportionate harms suffered by small island states. Publicity, the airing of injuries, and the shaming of large emitters might spur measurable reparative developments depending on the political moment in which it occurs. Perhaps the most common refrain from practitioners, scholars, and vulnerable communities alike is that engaging in the uphill battle of climate litigation, with the accompanying losses and false starts, remains important for its story-telling capacity.[185] This is particularly true in the human rights context.[186] It

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[182] *Id.* at 182-83, 189.

[183] *Id.* at 196.

[184] Press Conference on Request for International Court of Justice Advisory Opinion on Climate Change, United Nations, (Feb. 3, 2012) *available at* http://www.un.org/news/briefings/docs/2012/120203_ICJ.doc.htm [hereinafter *UN Press Conference on Request for International Court of Justice Advisory Opinion on Climate Change*].

[185] See discussion in Burkett, *supra* note 68. *See also UN Press Conference on Request for International Court of Justice Advisory Opinion on Climate Change*, *supra* note 184 ("[S]ince [twenty] years of climate-change negotiations had shown that every State saw the phenomenon differently—as an economic problem, or an issue of geopolitics. 'For us, it's

served that purpose for the claimants in the Inuit action brought before the IACHR.[187] As more stories are told perhaps they collectively will have the power to incite rapid emissions reduction and aggressive and concerted adaptation action from the largest emitters. This section explores the power of shaming and the relevance of interest convergence in pursuing claims today despite their real or perceived shortcomings.

The story-telling value of these claims becomes clear when viewed alongside stories that are not told. Publicizing injustices has the power to catalyze efforts to redress those injustices. One example is in the redress claims of the innocent victims of the No Gun Ri massacre, in which U.S. soldiers killed hundreds[188] of Koreans fleeing their war torn villages.[189] Although the massacre occurred in 1950,[190] it was difficult to break the "curtain of secrecy shrouding the case" until the story was finally told by the Associated Press on September 30, 1999, some four decades later.[191] Prior to that, the Korean government did not help the surviving victims

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about survival.' The International Court of Justice process would raise awareness of that reality, in addition to providing guidance to the negotiation track."); Sinden, *supra* note 71, at 185 (arguing that even if a lawsuit "does not ultimately result in an enforceable order ending gas flaring," framing it as a "human rights issue still serves an important rhetorical purpose by bringing into stark relief the power imbalance at root."); Reed, *supra* note 50, at 427 ("While such a claim would cover new ground legally, the foundation in international human rights law is sufficient to make the claim. A claim such as this would certainly gather significant media attention. Thus, even if the claim were not legally successful, it could still be a success by bringing the world's attention to the problem."); Jacobs, *supra* note 39, at 108 ("Tuvalu's proposed suit against the United States in the International Court of Justice is as much about obtaining relief as it is about obtaining a more public and hopefully sympathetic arena.").

[186] Eric K. Yamamoto & Ashley Kaiao Obrey, *Reframing Redress: A "Social Healing Through Justice" Approach to United States-Native Hawaiian and Japan-Ainu Reconciliation Initiatives*, 16 ASIAN AM. L.J. 5, 39 (2009) ("Human rights norms remain largely aspirational.").

[187] *See id.*; *see also* Osofsky, *supra* note 45 (stating that Inuit representatives intended the petition to educate and encourage the U.S. to join the community of nations and even if the petition could not force behavioral change in the U.S. the petition puts pressure on the U.S. to engage in dialogue about alternatives).

[188] *See* Tae-Ung Baik, *A War Crime Against an Ally's Civilians: The No Gun Ri Massacre*, 15 NOTRE DAME J.L., ETHICS & PUB. POL'Y 455, 463 (2001).

[189] *See generally* Tae-Ung Baik, *The Remedies for the Victims of the Jeju April Third Incidents, in* RETHINKING HISTORICAL INJUSTICE AND RECONCILIATION IN NORTHEAST ASIA, THE KOREAN EXPERIENCE 94 (Gi-Wook Shin et al. eds., 2006) [hereinafter *Remedies for the Victims*]. For a description of the massacre of innocent Koreans by U.S. soldiers, see Baik, *supra* note 188 at 463-65.

[190] The massacre continued from July 26 to July 29, 1950. Baik, *supra* note 188, at 463-65.

[191] *Id.* at 502.

gather information regarding the massacre, arguing that claims against the U.S. might help the North Korean government.[192] With the news reports, however, the Korean government finally made remedies available to the victims, including compensation, memorials, and a museum.[193] Other examples of the power of publicity tell similar stories of eventual repair and reconciliation.[194]

An important complement to the powerful public narrative is a receptive audience, particularly if that audience is the world leader small island nations seek to influence. Further, the offending party is more likely to remedy the injustice complained of if it is in its interest. In the international context this is the geo-political parallel to Derrick Bell's interest convergence theory, which Bell employed in the context of American racial politics.[195] Eric Yamamoto and Ashley Obrey argue that a country's desire to achieve democratic legitimacy might occur at the same moment a community or country is seeking redress for harms suffered because of that democracy's unjust actions.[196] The perception of a government's validity in terms of democratic governance and its commitment to civil and human rights determines its "democratic legitimacy."[197] Through the lens of the interest convergence theory, therefore, a dominant power will "countenance civil and human rights advances only when those gains simultaneously serve its larger political interests."[198] Yamamoto and Obrey argue that this may have allowed for rights advances in the United States for groups such as Native Hawaiians when the Obama Administration's first term commenced.[199] Although the latter may have been an overly sanguine

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[192] *Id.* at 502-03.

[193] Baik, *Remedies for the Victims*, *supra* note 188, at 94.

[194] *See, e.g.*, Yamamoto & Obrey, *supra* note 186 at 41 (citing international criticism of America's racist Jim Crow democracy during the Cold War and President Reagan's reversal in his prior opposition to Japanese American redress in 1988). Interest convergence was also at play in instances Yamamoto & Obrey cite. *See also* Burkett, *Climate Reparations*, *supra* note 2.

[195] *See generally* Derrick A. Bell, Jr. *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

[196] *See* Yamamoto & Obrey, *supra* note 186, at 41. ("For modern redress advocates, this kind of American self-interest in redress lies at the heart of Derrick Bell's theory of interest-convergence—that a dominant power will countenance civil and human rights advances only when those gains simultaneously serve its larger political interests."). *Id.*

[197] *Id.* at 40.

[198] *Id.* ("Whether a country heals persisting wounds is increasingly viewed as integral. . . globally, to claim legitimacy in the eyes of the world as a democracy truly committed to civil and human rights (which affects a country's standing to participate in matters of international security and responsible economic development).)." *Id.* at 7.

[199] *Id.* at 41, 50. ("Although reparations claims rarely succeed in court, most politically successful reparations or reconciliation movements have been inspired and shaped at crucial

assessment of President Obama's approach to reparatory action, elements of Yamamoto and Obrey's analysis may be instructive nonetheless.

In the climate context President Obama has repeatedly articulated concern about dangerous climate impacts.[200] The most recent statement in his 2013 inaugural address suggested a recommitment to the hard work of reigning in U.S. emissions.[201] And, some are more optimistic as a result.[202]

Evidence of the applicability of this theory is legion and militates in favor of a continuous drumbeat of litigation and story-telling. Litigation, according to Yamamoto and Obrey, "serves as a lightning rod for recognition and responsibility and as a bully pulpit for community organizing about the injustice and need for system-wide reconstruction and reparation."[203] They further state:

> Sociolegal research suggests that international human rights claims are widely publicized through court challenges, in certain political settings, and alter over time what both government policymakers and the public come to view as 'right,' 'natural,' 'just,' or 'in their interest.' This in turn can help build public pressure.[204]

That need for pressure is widely recognized. Unsympathetic to the U.S.'s protestations to Palau's request for an advisory opinion and similar actions, Bangladesh Ambassador to the United Nations Abdul Momen complained: "The U.S. is saying, 'We are trying, but this is making it harder.' But unless you pressure, things never happen."[205] Even conservative commentators in the U.S. acknowledge the important catalyst litigation can be, remarking, "[i]f you have sensitive climate change treaty negotiations

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points by litigation."). *Id.* at 40. This is an effort that might correct for the legitimacy lost under the Bush Administration, Yamamoto and Obrey argue. *Id.* at 41 (citing Abu Ghraib, Guantanamo Bay, secret detention centers, and post-9/11 domestic civil liberties violations).

[200] *See, e.g.*, Jeff Mason, *At Fundraisers Obama Talks Climate, Regaining U.S. House*, REUTERS, (Apr. 4, 2013, 1:48 AM), http://www.reuters.com/article/2013/04/04/us-usa-campaign-obama-fundraising-idUSBRE93305920130404. Although, President Obama's prior statements have yielded little tangible progress.

[201] Richard W. Stevenson & John M. Broder, *Speech Gives Climate Goals Center State*, N.Y. TIMES, Jan. 21, 2013 at A1, *available at* http://www.nytimes.com/2013/01/22/us/politics/climate-change-prominent-in-obamas-inaugural-address.html?_r=0 ("'We will respond to the threat of climate change, knowing that failure to do so would betray our children and future generations,' Mr. Obama said on Monday at the start of eight sentences on the subject, more than he devoted to any other specific area.").

[202] For example, Bangladesh Ambassador to the United Nations Abdul Momen, said he is confident the United States is going to be more receptive under a second Obama term. Friedman, *supra* note 52.

[203] Yamamoto & Obrey, *supra* note 186, at 40.

[204] *Id.*

[205] Friedman, *supra* note 52.

going on, you have a compliant president and there is some looming international lawsuit pending, it can't help but move the negotiations forward."[206] Further, it appears convincing that a country's "quest for enhanced international stature can shape that country's evolving responses to redress claims."[207] This kind of interest convergence at the international level is also understood as correcting for the "reputational costs" of an action, or failure to act.[208] There is some skepticism regarding the efficacy of reputational costs in the climate context.[209] Indeed, the past twenty years suggest that these costs, if sizeable, do not operate in the current circumstances.[210] It might mean, however, that the hard work of SIDS litigation is not yet done and, therefore, the costs experienced by powerful large emitters have not yet been fully meted out.

IV. CONCLUSION

The concept of a "justice paradox" has been employed before. In his article *Chaos Theory and the Justice Paradox*, Dean Robert Scott describes the recurring conflict between effecting "present justice"—"[d]oes the law accomplish justice between the parties to any particular dispute?"—and "future justice"—"[d]oes the law appropriately regulate the conduct of other parties likely to have similar disputes" and make it less likely that similar misfortune will befall others.[211] As Scott demonstrates, arbiters must meet both present and future justice to achieve a just outcome.[212] They are, however, almost always intractably opposed.[213] Scott suggests

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[206] *Id.* (quoting Steven Groves, a fellow at the Heritage Foundation, a conservative think tank).

[207] Yamamoto & Obrey, *supra* note 186, at 52.

[208] *See* Badrinarayana, *supra* note 63, at 282; Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823, 1827 (2002); Beth A. Simmons, *The Legalization of International Monetary Affairs*, 54 INT'L ORG. 573, 574 (2000), *available at* http://scholar.harvard.edu/files/bsimmons/files/LegalizationIntlMonetaryAffairs.pdf; *see also* Cai, *supra* note 62, at 181 (arguing that an additional value of class action litigation at the WTO is that the reputation harms of non-compliance or foot-dragging in compliance increases with the number of complainants).

[209] Badrinarayana, *supra* note 63, at 283-84. "For example, core nations like the United States appear unaffected by the reputation cost of not signing the Kyoto Protocol, even though without its participation, international efforts to reduce emissions—and consequently—alleviate the threat to sovereign rights of Tuvalu and Maldives will prove ineffective." *Id.* at 284.

[210] *Id.*

[211] Scott, *supra* note 6.

[212] *Id.*

[213] *Id.* at 329-30 ("The legal profession is searching, even struggling, to define its role in a changing society. Much of this angst comes from a feeling that the legal community

that the legal profession abandon the handwringing that this paradox produces and embrace the lessons of Chaos Theory. In essence, instead of attempting to resolve the paradox, the profession should accept its chaotic nature—contradictions, disorder, and all.[214]

It is not clear that this is an acceptable posture in the face of a changing climate and the injustices at base. Indeed, one can understand the paradox as articulated in this article as an antecedent one. In others words, while the law vacillates between the demands of present and future justice, it completely—and consistently—ignores the needs of the most vulnerable at the international scale. It has in its geopolitical context failed to provide clearly viable recourse for small island litigants. The law, therefore, moves along a spectrum that continually favors the most powerful and, accordingly, excludes the most vulnerable. The most vulnerable, then, are left with the formidable task of situating their claims within the constricted band of law's current patterns. The extent to which the legal infrastructure is able to effect just outcomes is circumscribed and may continue to be so if small island states are unable to pursue the patchwork of legal avenues, a few of which this article highlights.

A promising element of Scott's elucidation of the Justice Paradox, however, is that it leaves open the possibility for improvement through evolution. Scott writes: "Do not despair because law has fundamental contradictions. It is the very tension whose resolution we seek that keeps our legal system in a dynamic state of continuous renewal and repair. It is the dynamic of the Justice Paradox that keeps our legal system alive."[215] If the current patterns that consistently exclude at present are susceptible to the dynamism Scott describes, then it is feasible that in its next iteration the law will yield swift and comprehensive solutions to one of the greatest challenges in human history.

This article has attempted to take stock of viable legal avenues posited to date and push the conversation regarding effective legal and political avenues available to small island states. It does so fully cognizant of the formidable challenges of climate litigation in the current geo-political environment. It also does so fully aware of the bleak climate forecast for islands, and the rest of the globe. On balance, therefore, it hopes to make

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hasn't made much progress in resolving what I will term the 'Justice Paradox.'").

[214] *Id.* at 349 ("So what is the lesson? We can either continue to challenge the theories of previous legal movements, or we can come to accept that any new movement must recycle old doctrine, but in doing so, will ultimately fail to construct an encompassing theory of law. There is no algorithm for a just society. Chaos in law describes human life. Thus, we in law must continuously be self-conscious, self-criticizing, self-analyzing, but above all, patient and accepting of the limits of our discipline.").

[215] *Id.* at 350.

clear that pressing this litigation is the only real option available. If there was one message Jon Van Dyke sought to make clear during his own work on the matter, it was that the other option is simply unviable.

Can the UN Climate Regime Respond to the Challenges of Sea Level Rise?

David Freestone*

I. INTRODUCTION: THE ISSUE OF SEA LEVEL RISE

Fifty-six million years ago, for reasons we still do not fully understand, massive amounts of carbon dioxide were pumped into the earth's atmosphere. Many scientists think the results were apocalyptic. Temperatures rose by some 5-9°C (41-48°F); the seas turned acid, eliminating calciferous creatures; sea levels rose to a level more than 200 feet higher than today, inundating vast tracts of landmass; massive extinctions of species took place as well as the rapid change and evolution of existing species.[1] This period, which brought the Paleocene era to an end, scientists now call the Paleocene-Eocene Thermal Maximum (PETM).[2] It took more than 100,000 years for the earth to absorb the CO_2 in the atmosphere, for sea levels to fall again and the sea to regain its diversity and abundance.[3]

The amount of carbon dioxide in the atmosphere in the PETM which precipitated these cataclysmic changes is thought to be approximately the amount of carbon currently locked up in the earth's oil and gas reserves.[4]

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[1] Of course, those events are not uncontroversial, compare Paleocene-Eocene Thermal Maximum, BRITANNICA.COM, http://www.britannica.com/EBchecked/topic/1419455/Paleocene-Eocene-Thermal-Maximum-PETM (last visited Mar. 9, 2013), with Richard E. Zeebe, James C. Zachos & Gerald R. Dickens, *Carbon dioxide forcing alone insufficient to explain Palaeocene–Eocene Thermal Maximum warming*, *NATURE GEOSCIENCE* 2, Jul. 13, 2009, at 576, *available at* http://www.nature.com/ngeo/journal/v2/n8/abs/ngeo578.html.

[2] *Id.*

[3] *Id.*

[4] Robert Kunzig, *World Without Ice*, NATIONAL GEOGRAPHIC, Oct. 2011, available at http://www.nature.com/ngeo/journal/v2/n8/abs/ngeo578.html.

This then may be the sort of world that awaits us if we chose to ignore the warnings of scientists and continue to burn up all these fossil fuel resources. The Intergovernmental Panel on Climate Change (IPCC) in its 2007 Fourth Assessment Report has already warned us that global emissions of greenhouse gases (GHGs) are approaching tipping points where it may be too late to arrest some of the most "dangerous anthropogenic interference" with the climate system.[5] The phrase "dangerous anthropogenic interference" comes, of course, from Article 2 of the 1992 United Nations Framework Convention on Climate Change (UNFCCC).[6] The good news is that we do have an international treaty framework addressing Climate Change; the bad news is that it seems to have hit a major roadblock in its onward negotiations. This essay looks at the issue of whether that regime has a role to play in addressing the problems of climate change induced sea level rise.

Although sea level rise is only one of the radical impacts of climate change it has for a long time been a particular concern of mine[7]—as I know it was also of Jon Van Dyke.[8] In the late 1980s/early 1990s we were part of a very small group of lawyers and geographers warning of the possible catastrophic impacts of sea level rise on small states, both their maritime zones and indeed on their very existence.[9] Indeed, in 1991, excited by the

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[5] For summary conclusions see LENNY BERNSTEIN, ET AL., CLIMATE CHANGE 2007: SYNTHESIS REPORT, *in* IPCC FOURTH ASSESSMENT REPORT (Abdelukar Allali: et al., eds. 2007), http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr.pdf [hereinafter *AR4 Synthesis Report*].

[6] United Nations Framework Convention on Climate Change, May 9, 1991, 1771 U.N.T.S. 107 [hereinafter *UNFCCC]*.

[7] *See* David Freestone, *International Law and Sea Level Rise,* in INTERNATIONAL LAW AND GLOBAL CLIMATE CHANGE 109-25 (Robin R. Churchill and David Freestone eds. 1991) [hereinafter *Freestone, International Law and Sea Level Rise*]; *see also* David Freestone and John Pethick, *Sea Level Rise and Maritime Boundaries: International Implications of Impacts and Responses, in* 5 MARITIME BOUNDARIES, WORLD BOUNDARIES 73 (Gerald Blake ed. 1994) [hereinafter *Freestone & Pethick, Sea Level Rise and Maritime Boundaries*].

[8] The seminal volume which he co-edited in 1993 covers a wide range of human impacts on the oceans and small islands: FREEDOM FOR THE SEAS IN THE 21ST CENTURY: A NEW LOOK AT OCEAN GOVERNANCE AND ENVIRONMENTAL HARMONY (Jon Van Dyke, Durwood Zaelke, & Grant Hewison eds., 1993). See particularly Jon's paper in that volume, *Protected Marine Areas and Low-Lying Atolls*, at 214-228. The very last issue that he worked on was a power point presentation for the Wollongong Conference in November 2011 entitled, *The Crisis of Climate Change and Its Impact on Pacific Islands Facing Sea-Level Rise.*

[9] *See supra* note 7; E. Bird & J.R.V. Prescott, *Rising Global Sea Levels and National Maritime Claims, in* MARINE POLICY REPORTS 177-96 (1989); A.H.A Soons. *The Effects of Sea Level Rise on Maritime Limits and Boundaries*, 37 NETH. INT'L L. REV. 207 (1990); David D. Caron, *When Law makes Climate Change Worse: Rethinking the Law of Baselines in Light of a Rising Sea Level*, 17 ECOLOGY L. Q. 621 (1990).

progress being made in the negotiation of the UNFCCC and the imminent Rio Earth Summit, I proposed that sea level rise would make an appropriate subject for a protocol to the UNFCCC.[10]

In retrospect I am afraid this does look astonishingly naive. But how were we to know that twenty years on the UNFCCC regime would become so mired down as to seem incapable of effective action? I have not entirely given up on the UNFCCC system, but have a slightly less optimistic, but I hope realistic, view of what it can achieve and what it cannot. So this piece will first look at the threat and some of the possible consequences of sea level rise, and then, with nearly 20 years of experience of the UNFCCC regime, make an assessment of what it can and what it cannot deliver on this issue.

First, the scientific base. The Intergovernmental Panel on Climate Change (IPCC) was set up in 1988 by the United Nations Environment Programme (UNEP) and the World Meteorological Organization (WMO).[11] In that same year the United Nations General Assembly provided the mandate for the preparation of the First Assessment Report, which was completed in 1990, the Second Assessment Report followed in 1995, the third in 2001 and the fourth, which is the current one, in 2007.[12] The fifth assessment report is due in 2013 or 2014.[13] As these reports have progressed, they have each taken longer to prepare but include more participants and more issues; also, the science has begun to be more confident. The 2007 4th Assessment Report—the authors of which (along with Al Gore) were awarded the Nobel Peace Prize in 2007—said for the first time that the evidence of climate change was now unequivocal. However, the time lag in providing advice to the UNFCCC Conference of the Parties (COPs) is long—so much so that in 2009 for the Copenhagen COP a special Scientific Summit was held in Copenhagen to update the findings of the 2007 report. There has never been an international collaborative scientific exercise of this scale before and, understandably, there have been errors both of omission and commission.[14] It seems that the early forecasts radically underestimated sea level rise. The 2007 Fourth

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[10] *See* Freestone, *International Law and Sea Level Rise*, *supra* note 7, at 125.

[11] *History*, IPCC (Mar. 9, 2013, 2:00PM), http://www.ipcc.ch/organization/organization_history.shtml#.UTxBNo6xEdI.

[12] *Id.*

[13] *Id.*

[14] *See, e.g.*, Thomas F. Stocker, *Adapting the Assessments*, NATURE.COM (Dec. 21, 2012), http://www.nature.com/ngeo/journal/v6/n1/full/ngeo1678.html?WT.ec_id=NGEO-201301

AR estimates sea level rise of between 0.26–0.59 metres by 2100.[15] However, more recently Vermeer and Ramstorf have suggested that the figures could be much higher.[16] They flag several important points:

- Thermal expansion of the ocean is a big driver of sea level rise—between 55-70%.
- Even the low-emission scenario indicates sea level rising one meter by 2100.
- Higher emission scenarios suggest it may be as much as two meters.
- Both of these are about three times higher than the 2007 IPCC report suggests.
- Like the IPCC report, this model does not include the possibility of more catastrophic thaw of major ice sheets like Greenland and Antarctica (which is really hard to predict). So the potential for even greater—perhaps significantly greater—sea level rise exists.
- To the extent that we are already committed to some warming, we are likely already committed to sea level rise. This study suggests at least 75 cm.[17]

Moreover, as Clive Schofield and I wrote recently, sea level rise has:

> potentially disastrous implications for many coastal States, especially those with large and heavily populated low-lying coastal areas, as well as small low-lying island States. In addition to the essentially terrestrial, inward-looking, threat posed to low-lying coastal areas and their associated populations from inundation by rising seas, threats also exist looking outwards from the land to the ocean spaces adjacent to such threatened territories. In particular, sea level rise has the potential to significantly affect national claims to maritime jurisdiction all the way to the outward extent of maritime zones.[18]

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[15] *AR4 Synthesis Report*, *supra* note 5, at 45 tbl. 3.1. Although the IPCC *AR4 Synthesis Report* acknowledges the key uncertainties, "[f]uture changes in the Greenland and Antarctic ice sheet mass, particularly due to changes in ice flow, are a major source of uncertainty that could increase sea level rise projections. The uncertainty in the penetration of the heat into the oceans also contributes to the future sea level rise uncertainty." *Id.* at 73.

[16] Martin Vermeer & Stefan Rahmstorf, *Global Sea Level Linked to Global Temperature*, 106 PNAS 21527 (Oct. 26, 2009), *available at* http://www.pnas.org/content/106/51/21527.full.

[17] *Id.* Others have suggested that the polar ice sheets contain 68 meters of potential sea level rise. *See, e.g.*, Steve Connor, *Fear of "Catastrophic" Sea-level Rise as Ice Sheets Melt Faster than Predicted*, THE INDEPENDENT (Jan. 7, 2013), http://www.independent.co.uk/environment/climate-change/fear-of-catastrophic-sealevel-rise-as-ice-sheets-melt-faster-than-predicted-8440277.html

[18] Clive Schofield & David Freestone, *Options to Protect Coastlines and Secure Maritime Jurisdictional Claims in the Face of Global Sea Level Rise*, *in* THREATENED

In that essay we also point out, as others have before, the problems that sea level rise poses to the complicated maritime zone regime developed by the 1982 Law of the Sea Convention.[19] Because the maritime zones are measured from coastal baselines and base points declared or recognized by the coastal State, changes in coast line configuration and land inundation could have serious effects on these zones and upon the viability of the islands of small island states to maintain human habitation. This then raises the issue of the continued existence of states that have effectively lost their land territory. Soons pointed out in 1990, that international customary law inevitably evolves,[20] and so a solution or a series of solutions to these issues does seem possible. However, what seems to me to be highly unlikely is that the parties to the UNFCCC will be able to use that forum to address these issues. My initial optimism that the UNFCC might act as a forum for the discussion of substantive new issues such as sea level rise was entirely misplaced; nor does it seem feasible or likely that it can deal with currently pressing issues such as ocean acidification and geo-engineering.

That does not mean that the UNFCCC has no role to play in these issues, but I do not see it as a forum for overt policy formation or for the crystallization of customary international law rules on the regime of islands, on the evolution of coastal baselines, or on the very existence of states inundated by climate change induced sea level rise. It might happen at some point but not in the short- to medium-term.

So what role does the UNFCCC have? I think it has a key role that it could, and hopefully will, play in the mobilization of resources to address these issues. First though, a few words of background of the UNFCCC regime and the financing regimes that it envisages through the Global Environment Facility. Then a few words about developments since 1992, through the establishment of the Adaptation Fund by Article 12 of the Kyoto Protocol, the Climate Funds established by the World Bank, and finally the adaptation regime agreed in Durban, together with the Green Carbon Fund first envisaged by the Copenhagen Accord.

ISLAND NATIONS: LEGAL IMPLICATIONS OF RISING SEAS AND A CHANGING CLIMATE 141 (Michael B. Gerrard and Greg E. Warnier eds., 2013).

[19] *Id.* at 164.

[20] Soons, *supra* note 9, at 207-32.

II. THE UNFCCC REGIME

The text of the UN Framework Convention on Climate Change was finalised in New York on May 9, 1992.[21] It was then opened for signature in June 1992 as a part of the UN Conference on Environment and Development (UNCED) in Rio de Janeiro, Brazil.[22] There are currently 195 Parties to the UNFCCC.[23] The basic objective of the Convention, set out in Article 2, is not to reverse greenhouse gas emissions but to stabilise them "at a level that would prevent dangerous anthropogenic interference with the climate system."[24] That stabilization should be achieved "within a time frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner."[25]

Article 3 then goes on to enumerate the principles by which the Parties should be guided in their actions to achieve this objective.[26] These include a number of the innovative principles set out in the 1992 Rio Declaration.[27] The generally hortatory obligations of all Parties are set out in Article 4(1), but of particular interest to us here are the obligations relating to provision of financial and technical resources for developing countries, including adaptation, notably 4(3).[28] Under Article 4(3) the developed countries

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[21] Report of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change, Apr. 30-May 9, 1992, U.N. Doc. A/AC.237/18 (Part II)/Add. 1, 5th Sess. (May 15, 1992). UN Doc Distr. General A/AC.237/18 (Part II)/Add.1.15 May 1992. *See also* Jill Barrett, The Negotiation and Drafting of the Climate Change Convention, in INTERNATIONAL LAW AND GLOBAL CLIMATE CHANGE 183-201 (Robin Churchill & David Freestone eds., 1991).

[22] For a full introduction to the regime see David Freestone, *The International Climate Change Legal and Institutional Framework: An Overview*, in LEGAL ASPECTS OF CARBON TRADING: KYOTO, COPENHAGEN AND BEYOND 3, 3-32 (David Freestone & Charlotte Streck eds., 2009).

[23] 194 States and 1 regional economic integration organization (the EU). *See* Status of Ratification of the Convention, UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, http://unfccc.int/essential_background/convention/status_of_ratification/items/ 2631.php.

[24] *UNFCCC*, *supra* note 6, art. 2.

[25] *Id.*

[26] *Id.*

[27] *Id.* These include the precautionary principle, inter-generational equity and common but differentiated responsibility. Also, the special needs of developing country Parties and of those "that would have to bear a disproportionate or abnormal burden under the Convention," as well as the right of all Parties to promote sustainable development and the need to promote "a supportive and open international economic system." *See* David Freestone, *The International Climate Change Legal and Institutional Framework: An Overview*, *supra* note 22, at 6.

[28] *Id.* art. 4(3).

listed in Annex II[29] shall provide "new and additional financial resources" to meet the "agreed full costs" incurred by developing countries in meeting their communication obligations under Article 12 and to meet the "agreed full incremental costs" in implementing mitigation measures agreed between the developing country Party and the "entity or entities referred to in Article 11" (i.e. the Financial Mechanism).[30] Also, highly significant for us here is that the Annex II countries undertake to "assist the developing countries that are particularly vulnerable to the adverse effects of climate change in meeting costs of adaptation to those adverse effects"[31] and to "take all practicable steps to promote, facilitate and finance, as appropriate, the transfer of, or access to, environmentally sound technologies and know-how to other Parties, particularly developing [countries], to enable them to implement the provisions of the Convention."[32]As I have written elsewhere, adaptation is widely regarded as the poor relation of the international climate change treaty regime.[33] Only Article 4 of the UNFCCC text discusses adaptation in any detail. Nevertheless, as Philippe Sands has pointed out, the Convention does include numerous references to "effects" and "adverse effects" of climate change which suggests that there is an implicit agenda to address such effects—and adaptation is the modality by which this can be done.[34]

The institution responsible for the mobilization of the new financial resources required by the Convention is the Financial Mechanism defined by Article 11 that will provide financing on a grant or concessional basis.[35] Although not free from controversy, this Mechanism has for the last twenty years been the Global Environment Facility (GEF).[36] Over this time the

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[29] Annex II differs from Annex I in that it does not contain the countries with economies in transition.

[30] *Id.* Under *UNFCCC* art. 21(3), the Global Environment Facility "shall be the international entity entrusted with the operation of the financial mechanism referred to in Article 11 on an interim basis." UFCCC, *supra* note 6, art. 21(3). Note that Article 4(3) does qualify the obligation to provide "agreed full incremental costs" by requiring that account be taken of the need for adequacy and predictability in the flow of funds and the importance of appropriate burden sharing among the developed country Parties. *Id.* art. 4(3).

[31] *Id.* art. 4(4) (emphasis added).

[32] *Id.* art. 4(5).

[33] David Freestone, *The International Legal Framework for Adaptation*, *in* LAW OF ADAPTATION TO CLIMATE CHANGE: US AND INTERNATIONAL ASPECTS 601, 601 (Michael Gerard & Katrina F. Kuh, eds., 2012).

[34] PHILIPPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 362 (2nd ed. 2003).

[35] *UNFCCC*, *supra* note 6, art. 11(1).

[36] For a detailed assessment of the GEF see David Freestone, *The Establishment, Role and Evolution of the Global Environment Facility: Operationalising Common but Differentiated Responsibility?*, *in* LAW OF THE SEA, PROTECTION OF THE MARINE

focal areas for which the GEF has responsibility have grown from four to six.[37] "The conventions for which the GEF provides a financial mechanism have also increased from two to four, yet over the last decade or so since the second replenishment in 1998, the amount of money made available by the donors has barely kept pace with inflation."[38]

III. THE MARRAKECH CLIMATE CHANGE FUNDS

UNFCCC COP 7 in Marrakech established three new funds.[39] The Adaptation Fund, mandated by Article 12 of the Kyoto Protocol would be financed by a "share of the proceeds" of the Clean Development Mechanism project activities, and by additional funding invited from those Annex 1 Parties intending to ratify the Protocol.[40] The other two funds were intended to direct donor money to more specific UNFCCC concerns: the Special Climate Change Fund (SCCF)[41] and the Least Developed

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ENVIRONMENT AND SETTLEMENT OF DISPUTES: LIBER AMICORUM JUDGE THOMAS A. MENSAH 1077, 1077-1107 (Tafsir Malick Ndiaye & Rüdiger Wolfrum eds. 2007), *reprinted in* DAVID FREESTONE, THE WORLD BANK AND SUSTAINABLE DEVELOPMENT—LEGAL ESSAYS 113, 113-42 (Martinus Nijhoff 2012).

[37] DAVID FREESTONE, THE WORLD BANK AND SUSTAINABLE DEVELOPMENT—LEGAL ESSAYS 170 (Martinus Nijhoff 2012). "Initially designated as Biological Diversity, Climate Change, Ozone Depletion and International Waters, Land Degradation and Persistent Organic Pollutants were added in 2002 by amendment of the Instrument at the GEF Assembly in Beijing . . .." *See* Freestone, *supra* note 36, at 1092.

[38] DAVID FREESTONE, THE WORLD BANK AND SUSTAINABLE DEVELOPMENT—LEGAL ESSAYS 170 (Martinus Nijhoff 2012). "The GEF now acts as designated financial mechanism for the 1992 Convention on Biological Diversity (CBD), 1992 United Nations Framework Convention on Climate Change (UNFCCC), 2001 Stockholm Convention on Persistent Organic Pollutants (POPs) and, since 2006, 1994 UN Convention to Combat Desertification (UNCCD)." *Id.* at 170 n.39.

[39] *Id.*

[40] Report of the Conference of the Parties on its Seventh Session, Marrakesh, Morroco, Oct. 29-Nov. 10, 2001, 10/CP.7, ¶ 2, U.N. Doc. FCCC/CP/2001/13/Add.1 (Jan. 21, 2002) [hereinafter *Conference of the Parties 7th Session Report*].

[41] *Id.* 7/CP.7, ¶ 2. The decision sets out the range of activities which might be financed by these funds. According to Decision 5/CP.7, this Fund will be available to finance activities, programmes and measures relating to climate change, in accordance with paragraph 2 of decision 7/CP.7, that are complementary to those funded by the resources allocated to the climate change focal area of the GEF and by bilateral and multilateral funding, in the following areas: (a) adaptation, in accordance with paragraph 8 of decision 5/CP.7; (b) transfer of technologies, in accordance with decision 4/CP.7; (c) energy, transport, industry, agriculture, forestry and waste management; (d) activities to assist developing country Parties referred to under Article 4, paragraph 8(h) (i.e., countries whose economies are highly dependent on income generated from the production, processing and export, and/or on consumption of fossil fuels and associated energy-intensive products) in diversifying their economies. *Id.*; *Id.* 5/CP.7.

Countries Fund (LDCF).[42] It is clear that there are a number of overlaps in the mandates of these various funds. According to the COP Decision 5/CP.7, the SCCF will be available to finance activities, programmes including adaptation.[43] The LDCF also has a specific adaptation mandate to provide funding from the LDC Fund to meet the agreed full cost of preparing the National Adaptation Programmes of Action (NAPAs).[44]

IV. THE WORLD BANK CLIMATE INVESTMENT FUNDS

In 2008, the World Bank established two Climate Investment Funds with pledges amounting to some $6.2 billion from ten donors.[45] These funds dwarfed the GEF finance available for climate change which in 2010 was replenished with $4.3 billion for four years for all its programs.[46] There are two funds. The Clean Technology Fund (CTF) invests in projects and programs in developing countries that contribute to the demonstration, deployment, and transfer of low-carbon technologies.[47] The second fund, the Strategic Climate Fund, is of more interest in this context as it is broader and more flexible in scope. It will serve as an overarching fund for various programs to test innovative approaches to climate change, including "climate resilience." The use of the term "resilience" should be understood

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[42] *Id.* at 5/CP.7, ¶ 12, 7/CP.7, ¶ 1(c)(iii). Initial guidance on the Least Developed Countries Fund was provided by decision 7/CP.7: (a) as a first step, to provide funding from the LDC Fund to meet the agreed full cost of preparing the National Adaptation Plans of Action (NAPAs), given that the preparation of NAPAs will help to build capacity for the preparation of national communications under Article 12, paragraph 1, of the Convention; (b) to ensure complementarity of funding between the LDC Fund and other funds with which the operating entity is entrusted; (c) to ensure separation of the LDC Fund from other funds with which the operating entity is entrusted; (d) to adopt simplified procedures and arrange for expedited access to the Fund by the least developed countries, while ensuring sound financial management; (e) to ensure transparency in all steps relating to the operation of the Fund; (f) to encourage the use of national and, where appropriate, regional experts; (g) to adopt streamlined procedures for the operation of the Fund. *Id.* 7/CP.7.

[43] *Id.* 5/CP.7, ¶ 2.

[44] *Id.* 7/CP.7, ¶ 6.

[45] Australia, France, Germany, Japan, The Netherlands, Norway, Sweden, Switzerland, the United Kingdom, and the United States. For details, see The World Bank, *Donor Nations Pledge Over $6.1 Billion to Climate Investment Funds* (Sept. 26 2008), http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:21916602~pagePK:34370~piPK:34424~theSitePK:4607,00.html.

[46] *See* The World Bank, *Global Environment Facility 4th Assembly: Taking Stock, Moving Forward* (May 27, 2010), http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTSDNET/0,,contentMDK:22594466~menuPK:64885113~pagePK:64885161~piPK:64884432~theSitePK:5929282,00.html.

[47] *See Clean Technology Fund*, CLIMATE INVESTMENT FUNDS, https://www.climateinvestmentfunds.org/cif/node/2 (last visited Mar. 9, 2013).

to be sending message that it does not intend to compete with the role of the Adaptation Fund, but the concepts are similar.[48] The first program under this fund was a pilot aimed at increasing climate resilience in developing countries.[49]

V. THE GREEN CLIMATE FUND

At the now notorious Copenhagen COP 15, the heads of state, including U.S. President Obama agreed the Copenhagen Accord.[50] This political declaration is not a UNFCCC document—it was simply "noted" by the plenary session.[51] The nonbinding Accord did however make reference to "[s]caled up, new and additional, predictable and adequate funding . . . to developing countries, in accordance with the relevant provisions of the Convention[.]"[52] As part of this provision it envisaged "approaching USD 30 billion by 2010-12" to enable and support enhanced action on a range of issues, including adaptation.[53] It went on to talk of "mobilizing jointly USD 100 billion dollars a year by 2020 to address the needs of developing countries . . . ."[54] It also envisaged that significant portion of such funding should flow through what it termed the "Copenhagen Green Climate Fund" and proposed a High Level Panel to study the potential sources of revenue, including alternative sources of finance that might be available to meet this goal.

The UN Secretary-General's High-Level Advisory Group on Climate Change reported in November 2010 that such a target was "challenging but

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[48] *See Strategic Climate Fund*, CLIMATE INVESTMENT FUNDS, https://www.climateinvestmentfunds.org/cif/node/3 (last visited Mar. 9, 2013).

[49] *See Pilot Program for Climate Resilience*, CLIMATE INVESTMENT FUNDS, https://www.climateinvestmentfunds.org/cif/ppcr (last visited Mar. 9, 2013).

[50] *See* David Freestone, *From Copenhagen to Cancun: Train Wreck or Paradigm Shift?* 12 ENVTL. L. REV. 87 (2010).

[51] Report of the Conference of the Parties on its Fifteenth Session, Copenhagen, Den., Dec. 7-19, 2009, 2/CP.15, U.N. Doc. FCCC/CP/200911/Add. 1 (Mar. 30, 2010) [hereinafter *Conference of the Parties 15th Session Report*].

[52] *Id.* ¶ 8.

[53] *Id.*

[54] *Id.* A significant portion of such funding should flow through the Copenhagen Green Climate Fund. *Id.* ¶ 10. To this end, a High Level Panel will be established under the guidance of, and accountable to, the Conference of the Parties to study the contribution of the potential sources of revenue, including alternative sources of finance, towards meeting this goal. In fact the UN Secretary-General himself convened a High Level Advisory Group on Climate Change Financing which reported in November 2010. Report of the Secretary-General's High-level Advisory Group on Climate Change Financing (Nov. 5, 2010), http://www.un.org/wcm/webdav/site/climatechange/shared/Documents/AGF_reports/AGF%20Report.pdf.

feasible" with a blend of public and private sector financing, with a carbon price of between $20-25 a ton of CO_2, with auctions of allowances with 10% allocated to international climate action and with 1:4 leveraging of Fund to other donor resources by the Multilateral Development Banks.[55]

Later that month in Cancun at COP 16 major progress was made in developing a framework for adaptation funding.[56] The COP 16 decision envisages that the Cancun Adaptation Framework:

> will strengthen action on adaptation in developing countries through international cooperation. It will support better planning and implementation of adaptation measures through increased financial and technical support, and through strengthening and/or establishing regional centres and networks. The framework will also boost research, assessments and technology cooperation on adaptation, as well as strengthen education and public awareness.[57]

Highly significantly, in the introduction to the decisions containing the Cancun Adaptation Framework, the parties determined that "adaptation *must* be addressed with the *same priority as mitigation.*"[58] The parties also emphasized that further work on the transfer of technology between developed and developing countries, as well as enhanced, reliable funding for adaptation projects is needed in order to achieve this goal.[59] In keeping with the overall principles of the UNFCCC framework, the parties further underscored the importance of reducing vulnerability and increasing resilience in the developing world, especially among those countries that are particularly vulnerable to the effects of climate change.[60]

The Framework document invites all parties to undertake:

- Adaptation projects, programmes and national adaptation plans (covering water resources; health; agriculture and food security; infrastructure; socio-economic activities; terrestrial, fresh water and marine ecosystems; and coastal zones)[61]
- Adaptation assessments focusing on vulnerability and the economic, social and environmental impacts of climate change[62]
- Increasing institutional capacity to address adaptation needs[63]

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[55] *Id.*

[56] *See* Report of the Conference of the Parties on its Sixteenth Session, Cancun, Mex., Nov. 29-Dec. 10, 2010, U.N. Doc. FCCC/CP/2010/7/Add. 1 (Mar. 15, 2011) (emphasis added) [hereinafter *Conference of the Parties 16th Session Report*].

[57] *Adaptation: Adapting to the Impacts of Climate Change*, UNFCCC THE CANCUN AGREEMENTS, http://cancun.UNFCCCc.int/adaptation/ (last visited Mar. 9, 2013).

[58] *Conference of the Parties 16th Session Report, supra* note 56, 1/CP.16, ¶ 2(b).

[59] *Id.* ¶ 2(a).

[60] *Id.* ¶ 14 (a)-(i).

[61] *Id.* ¶ 14(a).

[62] *Id.* ¶ 14(b).

- Building socio-economic and environmental resilience through economic diversification and sustainable management of natural resources[64]
- Enhancing climate change related disaster risk reduction, in part through the Hyogo Framework for Action[65]
- Improve understanding, coordination and cooperation regarding climate change induced internal displacement, migration and planned relocation[66]
- Adaptation related technology transfer, particularly to developing countries[67]
- Strengthening data, knowledge, public awareness and education regarding adaptation[68]
- Improving climate-related research and observation[69]

The Cancun decisions also create a systematic process for the least developed countries to develop and implement NAPAs.[70] These plans will identify needs and vulnerabilities and create a process to meet and address these issues.[71]

Similarly, the Framework also established a work programme, within the Subsidiary Body on Implementation (SBI), to monitor, discuss and address the loss and damage associated with climate change in developing countries, especially those that are particularly vulnerable.[72] The types of events to be addressed include both extreme weather events and slow onset events like ocean acidification, sea level rise, glacial retreat and desertification.[73] The Framework invites the parties to provide input on several possible topics that could be included in the work programme such as the creation of a climate risk insurance facility; risk management and reduction through micro-insurance; increased resiliency and economic diversification; rehabilitation measures; and ways to increase knowledgeable stakeholder input.[74]

Finally, Cancun established the Adaptation Committee to manage the Fund envisaged by Art 12 of the Kyoto Protocol. Its functions include: providing technical support and guidance to parties addressing adaptation; facilitating the sharing of information and best practices for adaptation;

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[63] *Id.* ¶ 14(c).
[64] *Id.* ¶ 14(d).
[65] *Id.* ¶ 14(e).
[66] *Id.* ¶ 14(f).
[67] *Id.* ¶ 14(g).
[68] *Id.* ¶ 14(h).
[69] *Id.* ¶ 14(i).
[70] *Id.* ¶ 15.
[71] *Id.* ¶ 18.
[72] *Id.* ¶ 20.
[73] *Id.* ¶ 25.
[74] *Id.* ¶ 28.

enhancing synergy among national, regional and international organizations seeking to address adaptation; providing information and recommendations on strategies to undertake adaptation; considering information submitted by parties on their progress towards adaptation goals.[75]

This Framework was taken further by the UN Climate Change Conference in Durban, South Africa in December 2011 (COP 17), when the role of the Adaptation Committee established in Cancun was reaffirmed as "the overall advisory body to the [COP] on adaptation to the adverse effects of climate change."[76] Operating under the authority of the COP, the Committee will report annually, through the subsidiary bodies, and is mandated in its first year with developing a three-year work plan with milestones, activities, deliverables, and resource requirements for approval by COP 18 in Doha.[77]

The Durban COP 17 also decided on the composition and organization of the Committee which will meet at least twice a year and have power to form subcommittees, panels, etc. It will have sixteen members, each serving two-year terms with half of the members retiring each year, who serve in their personal capacity.[78] The Durban decision conveys the clear message that the Committee should start work quickly and work efficiently; implementation of this agenda as discussed above is regarded by the Group of 77 as already well behind schedule. The Green Climate Fund was also established formally at the Durban COP 17,[79] with a projected target turnover of $100 billion a year.[80]

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[75] *Id.* ¶ 20.

[76] Report of the Conference of the Parties on Its Seventeenth Session, Durban, S. Afr., Nov. 28-December 11, 2011, Draft Decision-/CP.17, ¶¶ 92-119, FCCC/CP/2011/9/Add.1 (Mar. 15, 2012).

[77] *Id.* ¶¶ 96-97. The Adaptation Committee will hold its first meeting "soon after the seventeenth session of the [COP]." *Id.* ¶ 115. It is requested to commence some of its planned activities during its first year. *Id.* ¶ 98.

[78] "A fair equitable and balanced representation" shall be achieved by electing (a) Two members from each of the five United Nations regional groups; (b) One member from a small island developing State; (c) One member from a least developed country Party; (d) Two members from Parties included in Annex I to the Convention (Annex I Parties); (e) Two members from Parties not included in Annex I to the Convention (non-Annex I Parties). *Id.* ¶ 101(a)-(e).

[79] Note that the name link with Copenhagen has been quietly dropped!

[80] Interestingly, the World Bank was invited to become the Trustee for this new Fund, albeit on an interim basis for three years. After three years there is to be a competitive process for the selection of a permanent trustee. The GEF was asked only to assist in the establishment of the Secretariat in an institution yet to be determined, after which its role would end. *See Trustee*, GREEN CLIMATE FUND, http://gcfund.net/about-the-fund/trustee.html.

VI. CONCLUSIONS

Scientists seem to agree that the world is already committed to substantial levels of sea level rise over the coming centuries and that by 2100 this rise is likely to be closer to a meter than the half a meter that the IPCC had cautiously suggested in 2007. We do know that this process will be uneven as sea level rise is a phenomenon that exhibits marked spatial and temporal variability.[81] Sea levels vary diurnally, under the influence of the tides, but also seasonally, regionally and inter-annually.[82] Moreover, the impacts on particular coastlines are substantially dependent on its particular characteristics, such as the morphology of the seabed immediately offshore. We also know that this steady increase in sea levels is likely to continue even if global mitigation measures are agreed to reduce the concentrations of greenhouse gases in the atmosphere; there is a long time lag in the process by which equilibrium is reached between global ambient temperature and ice melt.

Unfortunately, the UNFCCC process has yet to agree a global regime for the mitigation of greenhouse gases. After the unsuccessful Copenhagen meeting in 2009, the time line for the process of developing such a regime has now been extended to 2015. The only existing regime mandating reductions in GHGs is the Kyoto Protocol, and although the commitment period of the Kyoto Protocol has now been extended to 2020, it has suffered major reductions in its participation.[83] It is also clear, as we said above, that although the UNFCCC has near universal participation, it has not emerged as a forum at which wider policy issues can be usefully discussed.

The sort of policy issues, therefore, which were briefly alluded to at the beginning of this paper—the legal implications of loss of baselines and base points for coastal states, the possible loss of entitlement to maritime zones of low-lying states inundated by sea level rise, the rights of climate displaced persons, the continued existence of states that might lose all their land territory—will need to be discussed elsewhere. The most obvious forum for this at present seems the UN General Assembly.

The only role which may therefore remain for the UNFCCC is the mobilisation of resources—both financial and technical—for adaptation by

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[81] Schofield and Freestone, *supra* note 17, at 145.

[82] *See Climate Change 2007: Working Group I: The Physical Science Basis, Executive Summary*, INTER-GOVERNMENTAL PANEL ON CLIMATE CHANGE (IPCC), *available at* http://www.ipcc.ch/publications_and_data/ar4/wg1/en/ch5s5-es.html.

[83] Canada, Japan and Russia have refused to agree to the later commitment period. *See, e.g., Russian Supports Canada's Withdrawal from Kyoto Protocol*, THE GUARDIAN, Dec. 16, 2011, *available at* http://www.guardian.co.uk/environment/2011/dec/16/russia-canada-kyoto-protocol.

those countries that face the most severe threats. Very late in the day—at Cancun in 2010—the UNFCCC parties agreed to the Adaptation Framework and agreed that adaptation should now be addressed with the same urgency as mitigation—which has preoccupied them for the first sixteen years of their existence. There is now an established process for the development and financing of National Adaptation Plans of Action (NAPAs). Sea level rise, impacts on coastal zones, vulnerability of states to ocean acidification and sea level changes, climate risk insurance systems are all included within this comprehensive package. At Durban in 2011, the Adaptation Committee was told to start work, quickly and efficiently.

Important issues still remain. Which body will take on the role of Secretariat and of Trustee of the Green Climate Fund? Will it command the confidence of the both recipients and donors, so as to allow the mobilisation of the level of resources necessary for this task and for their efficient disbursement?[84] But at least the long overdue framework for this is now in place.

[84] The mobilisation of resources has begun under the Fast Start Initiative. *See Contributing Countries*, FAST START FINANCE, http://www.faststartfinance.org/content/contributing-countries (last visited Mar. 15, 2013). This has now been absorbed within the UNFCCC Finance Portal. *See Finance Portal for Climate Change*, UNFCC, http://www3.unfccc.int/pls/apex/f?p=116:1:4316703262024627 (last visited Mar. 15, 2013).

What Can the Abolition of Slavery Teach Us About Climate Change? Local Action in the Liquefied Natural Gas Controversy

Richard Wallsgrove*

> *Are you an idiot deceiver or just plane [sic] stupid? I have news for you. There is no such thing as man-made global warming!!!! It's quite possibly the largest fraud in human history!!!! CO_2 is plant*

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> *food! I'm leaving now to increase my carbon footprint which I know will HELP society. If you're still worried, then please by all means, just kill yourself!*
>
> – Email sent to Professor Andrew J. Hoffman, after he compared climate change mitigation to the abolition of slavery[1]

I. INTRODUCTION: WHAT WOULD JON VAN DYKE DO?

If I learned one thing from Professor Jon Van Dyke, it was the value of using polite, persistent, and persuasive[2] dialogue as a tool to untangle difficult problems. He taught me that even the most zealously opposed advocates can use constructive analysis to understand their respective positions, and move closer to practical solutions.

Disappointingly, today's climate crisis too often invokes dialogue that deviates from Van Dyke's proven recipe; the email quoted at the beginning of this article is but one example. That email arose after the management journal *Organizational Dynamics* published a paper by Professor Andrew Hoffman.[3] Hoffman argued that climate change is an issue with cultural roots, and that despite this, we tend to overlook social and behavioral dimensions in favor of technological and economic ones.[4] Hoffman analogized his thesis to the example of cigarette smoking: "For years, the scientific community recognized that the preponderance of epidemiological and mechanistic data pointed to a link between cigarette smoking and cancer. And for years, the general public consciousness ignored that fact."[5]

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[1] Professor Hoffman is the Holcim Professor of Sustainable Enterprise at the University of Michigan, a joint appointment at the Stephen M. Ross School of Business and the School of Natural Resources & Environment. This and other email responses to Professor Hoffman are available at http://beccconference.org/wp-content/uploads/2012/11/BECC-November-2012b-Hoffman.pdf.

[2] "Polite, persistent, persuasive." Those are the words Professor Denise Antolini used to memorialize Professor Van Dyke. *Obituary: Jon Markham Van Dyke*, WILLIAM S. RICHARDSON SCHOOL OF Law (Dec. 9, 2011), https://www.law.hawaii.edu/news/2011/12/09-0.

[3] Andrew J. Hoffman, *Climate Change as a Cultural and Behavioral Issue: Addressing Barriers and Implementing Solutions*, 39 ORGANIZATIONAL DYNAMICS 295 (2010).

[4] *Id.*

[5] *Id.* at 296.

In this, Hoffman found an illustration of the importance of turning anthropogenic climate change into a "social fact," rather than a "scientific fact," if we hope to alter the behavioral patterns that created and prolong the climate crisis.[6]

For a second illustration, Hoffman asserted that "the magnitude of the cultural and moral shift around climate change is as large as that which accompanied the abolition of slavery."[7] Perhaps not surprisingly, Hoffman's comparison to slavery sparked attention in circles outside the traditional readership of management journals. On October 27, 2010, the New York Times Green Blog[8] picked up Hoffman's slavery analogy, followed by various other internet sites. In telling the story of what happened next, Hoffman uses a collection of inane and offensive emails that found their way to his inbox.[9] He was accused of being a "racist," a "sonabitch green terrorist," and a "falsifying sh-thead[]."[10] Interestingly, the author of the email reprinted at the beginning of this paper chose to describe climate change as "possibly the largest fraud in human history"—even in the context of discussing the indescribably immense fraud of relegating human beings to property status based on nothing more than skin pigmentation.

Upon learning about Hoffman's experience, I began to wonder, what would Jon Van Dyke do—or in shorthand, WWJVDD? I am certain that he would have demanded more. Expletive-laden diatribe does not move us closer to a workable consensus on climate change and its solutions.

Following Van Dyke's example, I examine the abolition/climate change analogy more closely, and conclude that the history of abolition teaches us to recognize both sides of the dichotomy that separates global climate mitigation strategies from local ones. In short, the world needs local climate solutions just as urgently as it needs global ones. Neither strategy is likely to work without the other.

I then apply this "local action" paradigm to Hawai'i, a place that Van Dyke cared for deeply. Despite Hawaii's geographic isolation, we must ensure that local climate responses are incorporating an appropriately broad

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[6] *Id.* at 295-96.

[7] *Id.* at 296.

[8] *See* John M. Broder, *A Cultural Barrier to Action on Climate Change*, N.Y. TIMES GREEN BLOG (October 27, 2010, 12:33 pm), http://green.blogs.nytimes.com/2010/10/27/a-cultural-barrier-to-action-on-climate-change.

[9] *See* Andrew Hoffman, *Culture, Ideology and a Social Consensus on Climate Change, Address at the 2012 Conference on Behavior, Energy and Climate Change* 45 (November 12, 2102), *available at* http://beccconference.org/wp-content/uploads/2012/11/ BECC-November-2012b-Hoffman.pdf (last visited Apr. 5, 2013).

[10] *Id.*

view of how those decisions have global impacts. In Hawai'i, that reality is easy to see in the current debate surrounding the importation of liquefied natural gas ("LNG" or more appropriately, "industrialized methane")—a greenhouse gas 21 times stronger than carbon dioxide. In the midst of that debate, a marketing blitz by the gas utility is sadly blurring the lines between scientific and social facts. But analysis of those facts reveals several opportunities reminiscent of the abolitionists' local action toolbox. With appropriate regulation, taxation, and litigation, we can ensure that if Hawai'i chooses to expand its fossil fuel portfolio and import industrialized methane, the decision is made with a full accounting of the costs and benefits.

II. THE SLAVERY/CLIMATE ANALOGY

A. Testing the Analogy's Boundaries

Hoffman's slavery analogy[11] is constructed from several valid observations:

> [I]n the 18th century more than 75% of the world's population was in slavery or serfdom. Humans were a primary source of energy and wealth, particularly for the dominant world power, Great Britain. . . . '[I]f you stood on a London street corner and insisted that slavery was morally wrong and should be stopped, nine out of 10 listeners would have laughed you off as a crackpot.' . . . Now, flash forward to today. We live in a fossil fuel-based economy. Fossil fuels are our primary source of energy and support our entire way of life. . . . Just as few people saw a moral problem with slavery in the 18th century, few people in the 21st century see a moral problem with the burning of fossil fuels.[12]

Thus, the analogy certainly appears to capture some of the economic and ethical[13] dimensions that frame the current climate crisis.

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[11] Hoffman is not the only scholar to utilize this analogy. *See, e.g.*, Albert C. Lin, *Evangelizing Climate Change*, 17 N.Y.U. ENVTL. L.J. 1135, 1169 (2009); Craig Segall, *Darkness, Visible: Global Warming and British Anti-Slavery*, 36 ENVTL. L. REP. 10845 (2006); Marc D. Davidson, *Parallels in Reactionary Argumentation in the US Congressional Debates on the Abolition of Slavery and the Kyoto Protocol*, 86 CLIMATIC CHANGE 67 (2008).

[12] Hoffman, *supra* note 3, at 296 (quoting ADAM HOCHSCHILD, BURY THE CHAINS: PROPHETS AND REBELS IN THE FIGHT TO FREE AN EMPIRE'S SLAVES 7 (2005)).

[13] *See, e.g.*, Maxine Burkett, *Rethinking the North-South Divide: Climate Reparations*, 10 MELB. J. INT'L L. 509, 510 (2009).

> The impacts of climate change are experienced unevenly, with the most vulnerable—the 'climate vulnerable'—set to suffer first and worst. The current and anticipated impacts demonstrate a grand irony: those who will suffer most acutely are also those

But what are the boundaries of Hoffman's argument? To start, no analogy can perfectly capture the depth and breadth of human suffering and inequality borne directly from slavery. Similarly, it is difficult to draw climate analogies that properly illustrate the scope of human activities that impact every corner of the globe. For Hoffman and others this highlights a "new cultural reality": "humankind has grown to such numbers and our technologies have grown to such a capacity that we can, and do, alter the Earth's ecological systems on a planetary scale. It is a fundamental shift in the physical order—one never before seen."[14] From a physical perspective, climate change is being driven by atmospheric greenhouse gas concentrations that are higher today than at any other time in the human experience.[15] Some experts have thus dubbed this a no-analogue situation.[16]

B. Local Response as a Precursor to Wider Cooperation on Abolition

The second piece of Hoffman's new "reality is that we share a collective responsibility and require global cooperation to solve [the climate crisis]." He argues that "[t]he coal burned in Ann Arbor, Shanghai or Moscow has an equal impact on the environment we all share. The kind of cooperation

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who are least responsible for the crisis to date. That irony introduces a great ethical dilemma, one that our systems of law and governance are ill-equipped to accommodate.

Id.; *see also* Ved P. Nanda, *Climate Change and the Developing Country: The International Law Perspective*, 16 ILSA J. INT'L & COMP. L. 539, 543 (2010) ("All indications are that the brunt of the adverse impacts of global climate change will be felt hardest by some of the poorest and most vulnerable communities, which have already begun to suffer from its effects.").

[14] Hoffman, *supra* note 3, at 296; *see also* Burkett, *supra* note 13, at 509 ("The climate crisis introduces an existential and moral dilemma of unparalleled proportions.").

[15] *See, e.g.*, Intergovernmental Panel on Climate Change, CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS: CONTRIBUTION OF WORKING GROUP I TO THE FOURTH ASSESSMENT REPORT OF THE IPCC § 6.4.1.1 Fig. 6.3 (2007) (reporting atmospheric carbon dioxide concentration through the last 600,000 years, ranging from approximately 180 to 300 parts per million); *Trends in Atmospheric Carbon Dioxide Concentration*, U.S. DEP'T OF COMMERCE NAT'L OCEANIC & ATMOSPHERIC ADMIN., http://www.esrl.noaa.gov/gmd/ccgg/trends (last visited Apr. 6, 2013) (reporting Feb. 2013 atmospheric carbon dioxide concentration of more than 396 parts per million).

[16] *See, e.g.*, J.B. Ruhl, *Climate Change and the Endangered Species Act: Building Bridges to the No-Analog Future*, 88 B.U. L. REV. 1, 11 (2008) (citing Douglas Fox, *Back to the No-Analog Future?*, 316 SCIENCE 823, 823 (2007)) (describing the "no-analog" problem in the context of climate change and ecosystem management).

necessary to solve this problem is far beyond anything we, as a species, have ever accomplished before."[17]

Similar assertions about the need for global cooperation have been made in the legal context, with astute analyses of the tools, opportunities, and challenges associated with addressing climate change in the international realm.[18] Here again, we see the abolition analogy fitting the facts; one early success of the abolitionist movement was the 1815 Declaration Relative to the Universal Abolition of the Slave Trade, the "first international instrument to condemn [the slave trade]."[19]

However, analogizing to the abolition of slavery also allows room for another perspective. International cooperation did not act alone to abolish slavery.[20] For example, the United States acted unilaterally to outlaw slavery in 1865 with the 13th amendment.[21] In the British colonies, slavery was outlawed by the Slavery Abolition Act of 1833.[22] Furthermore, by 1808 the United States and Great Britain[23] had each independently attacked the slave trade by outlawing the importation of slaves (although the institution of slavery remained in place).[24] In perhaps the clearest example

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[17] Hoffman, *supra* note 3, at 296.

[18] *See, e.g.*, Nanda, *supra* note 13.

[19] Kevin Bales & Peter T. Robbins, *No One Shall Be Held in Slavery or Servitude: A critical analysis of international slavery conventions*, HUMAN RIGHTS REV., Jan.—Mar. 2001, at 18-19, *available at* http://oro.open.ac.uk/5033/1/Bales_and_Robbins.pdf ("The 1815 Declaration Relative to the Universal Abolition of the Slave Trade . . . was the first international instrument to condemn [the slave trade], and one of the abolitionist movement's first clear achievements." (internal citations omitted)).

[20] Undoubtedly, some readers will find additional parallels between slavery and climate change, and some will find discordances. Also, huge portions of the world population still live in an economic state akin to serfdom, and the impacts of pre-19th century slavery are still being suffered today. An active modern slave trade is evidenced by intolerably numerous human rights violations, such as human trafficking. Thus, it is incorrect to suggest that the problem of slavery has been solved. *Cf. id.* at 18:

> Slavery as a social and economic relationship has never ceased to exist during recorded history, but the form that it takes and its definition have evolved and changed. . . . [N]one of the more than 300 laws and agreements written since 1815 to combat it has been totally effective.

[21] *See* U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").

[22] The Slavery Abolition Act 1833, 3 & 4 Will. 4, c. 73 (Eng.) (repealed 1998), *available at* http://www.pdavis.nl/Legis_07.htm (with troubling exceptions for "Territories in the Possession of the east India Company," the "Island of Ceylon [Sri Lanka]," and the Island of Saint Helena," eliminated in 1843).

[23] This brief historical review is limited to the United States and Great Britain, but the abolitionist movement grew in many different places.

[24] *See* Slave Trade Act, 1807, 47 Geo. 3, c. 36 (Eng.), *available at* http://www.pdavis.nl/

of unilateral action, Great Britain's Royal Navy tasked its West Africa Squadron with enforcing the 1807 Act by patrolling the coast of West Africa for ships carrying slaves—essentially using military force to interfere with international shipping.[25] Even earlier, Great Britain's 1788 Dolben's Act imposed regulations on shipping conditions for slaves to chip away at the slave trade.[26] In the United States, some members of Congress apparently attempted to levy a tax on the importation of slaves as punishment for South Carolina lifting its ban on importation in 1804.[27]

Other early legal responses were focused even more locally. For example, in the *Quock Walker* cases, Chief Justice William Cushing of the Massachusetts Supreme Court[28] declared in 1788 that slavery was incompatible with the rights guaranteed in the 1780 Massachusetts constitution.[29] By 1804, New Hampshire, Vermont, Pennsylvania,

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Legis_06.htm; Slave Trade Prohibition Act, ch. 22, 2 Stat. 426 (1807).

[25] *See generally Tara Helfman, Note: The Court of Vice Admiralty at Sierra Leone and the Abolition of the West African Slave Trade, 115 Yale L.J. 1122, 1132 (2006); Jo Loosemore, Sailing Against Slavery, BBC DEVON, http://www.bbc.co.uk/devon/content /articles/2007/03/20/abolition_navy_feature.shtml (last visited Apr. 6, 2013).*

[26] *See, e.g.*, Benjamin N. Lawrance & Ruby P. Andrew, *A "Neo-Abolitionist Trend" in Sub-Saharan Africa? Regional Anti-Trafficking Patterns and a Preliminary Legislative Taxonomy*, 9 SEATTLE J. SOC. JUST. 599, 617 (2011) (explaining that the Dolben Act "limited the number of slaves carried by British vessels, thus raising transportation costs and diminishing the incentive for slavers to ship low-value slaves such as children"); *see also The Dolben's Act of 1788*, CHILDREN & YOUTH IN HISTORY, http://chnm.gmu.edu /cyh/primary-sources/146 (last visited Apr. 6, 2013) (reprinting portions of the Act's text).

[27] *See* Joel S. Newman, *Slave Tax as Sin Tax: 18th and 19th Century Perspectives*, 101 TAX NOTES 1019, 1021-25 (2003). Newman argues that in the absence of constitutional authority to ban the importation of slaves, some congressional abolitionists attempted to levy a "sin tax" instead:

> In 1804, South Carolina, which had previously banned the importation of slaves, lifted its ban. Apparently, they could not enforce it, nor could they afford to try any longer. Nonetheless, the federal Congress was outraged, and debated a 10 dollar tax on the importation of slaves, largely with a view to punishing South Carolina.

Id. But see Paul Finkelman, *The Founders and Slavery: Little Ventured, Little Gained*, 13 YALE J.L. & HUMAN. 413, 419 (2001) (arguing that taxation on slaves was a function of economic value rather than a sin tax: "We must assume that tax collectors and investors in slaves were fundamentally rational economic actors, who understood that slavery was profitable.").

[28] Chief Justice William Cushing, a short time later, became a Justice of the United States Supreme Court.

[29] The *Quock Walker* cases were not published, but Chief Justice Cushing's jury charge is reprinted in John D. Cushing, *The Cushing Court and the Abolition of Slavery in Massachusetts: More Notes on the "Quock Walker Case,"* 5 AM. J. LEGAL HIST. 118, 133 (1961):

> In short, without resorting to implication in constructing the constitution, slavery is in my judgment as effectively abolished as it can be by the granting of rights and

Connecticut, Rhode Island, New York, and New Jersey had each individually enacted gradual emancipation statutes or constitutional provisions similar to Massachusetts'.[30]

These responses to slavery—whether by military force, legislation, or litigation—exemplify a unilateral approach that is the antithesis of international cooperation. Thus if the abolition analogy is to apply to the climate crisis, it can counsel for intensely local action, just as much as it can counsel for international cooperation.

This is essentially the same lesson that Henry David Thoreau described in *Civil Disobedience* in 1849:

> Practically speaking, the opponents to a reform in Massachusetts are not a hundred thousand politicians at the South, but a hundred thousand merchants and farmers here, who are more interested in commerce and agriculture than they are in humanity, and are not prepared to do justice to the slave and to Mexico, cost what it may. *I quarrel not with far-off foes, but with those who, near at home, co-operate with, and do the bidding of, those far away, and without whom the latter would be harmless.* We are accustomed to say, that the mass of men are unprepared; but improvement is slow, because the few are not as materially wiser or better than the many. It is not so important that many should be good as you, as that there be some absolute goodness somewhere; for that will leaven the whole lump. There are thousands who are in opinion opposed to slavery and to the war, who yet in effect do nothing to put an end to them; who, esteeming themselves children of Washington and Franklin, sit down with their hands in their pockets, and say that they know not what to do, and do nothing; who even postpone the question of freedom to the question of free trade . . . . They hesitate, and they regret, and sometimes they petition; but they do nothing in earnest and with effect. *They will wait, well disposed, for others to remedy the evil, that they may no longer have it to regret.* At most, they give up only a cheap vote, and a feeble countenance and Godspeed, to the right, as it goes by them. . . . I know this well, that if one thousand, if one hundred, if ten men whom I could name,—if the, honest men only,—ay, if any one man, in this State of Massachusetts, ceasing to hold

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> privileges wholly incompatible and repugnant to its existence. The court are therefore fully of the opinion that perpetual servitude can no longer be tolerated in our government, and that liberty can only be forfeited by some criminal conduct or relinquished by personal consent or contract.

(emphasis in reprinted version omitted) (internal quotation omitted).

[30] *See, e.g.*, Paul Finkelman, *Introduction: "Let Justice Be Done, Though the Heavens May Fall": The Law of Freedom*, 70 CHI.-KENT L. REV. 325, 334-35 (1994). The 1772 Somerset case had a similar impact in Great Britain. *Somerset v. Stewart*, (1772) 98 Eng. Rep. 499, 510 (K.B.).

> slaves, were actually to withdraw from this co-partnership, and be locked up in the county jail therefor, it would be the abolition of slavery in America.[31]

Thoreau's next line perfectly summarizes the thrust of the local action paradigm: "*For it matters not how small the beginning may seem to be: what was once well done is done forever.*"[32]

III. HAWAII'S OPPORTUNITIES FOR LOCAL ACTION ON CLIMATE CHANGE, ILLUSTRATED BY THE DEBATE OVER INDUSTRIALIZED METHANE (LNG)

Armed with the conclusions drawn from the abolitionist "local response" paradigm, WWJVDD? Professor Van Dyke cared deeply for Hawai'i and its people. After testing the boundaries of the abolition analogy, he very likely would have searched for lessons applicable to his home. Hawai'i finds itself embroiled in a broad policy debate about how to remake its local energy infrastructure, for interrelated reasons stretching from economic security to climate change mitigation. Van Dyke would not have needed to search far to find opportunities to apply the local action lesson.

In particular, a proposal to import industrialized methane (LNG) has recently ignited debate on whether Hawai'i should expand its fossil fuel portfolio. This hotly contested issue provides a blank canvas for Hawai'i to take immediate local action on climate mitigation. And this is especially important in light of recent scientific findings that despite its "clean" reputation, greenhouse gas emissions from the LNG supply chain can render it *worse* for the climate than other fossil fuels.[33] Much like the early, localized abolitionist actions, opportunities for local action on this issue can include trade regulation (like the 1788 Dolben's Act), taxation (like attempts to tax the importation of slaves), or litigation (like the *Quock Walker* cases).

A. The Proposal to Import Industrialized Methane (LNG) to Hawai'i

Natural gas is a fossil fuel composed primarily of methane (CH_4).[34] Liquefaction is the industrial process of cooling the gas to approximately -256 °F, "at which point it liquefies and occupies 1/600th of the volume

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[31] HENRY DAVID THOREAU, *Civil Disobedience*, *in* WALDEN AND CIVIL DISOBEDIENCE 390-97 (Jonathan Levin ed., Barnes and Noble Classics 2003) (1849) (emphasis added and emphasis removed).

[32] *Id.* (emphasis added).

[33] *See, e.g.*, *infra* note 52.

[34] *See, e.g.*, *Background*, NATURAL GAS ORG., http://www.naturalgas.org/overview/background.asp (last visited Apr. 6, 2013).

that it does in its gaseous state."[35] The basic LNG supply chain is: (1) well drilling/extraction;(2) processing/liquefaction; (3) shipping; (4) regasification; and (5) distribution.

Although much of Hawaii's energy arrives in the form of imported fossil fuels, the State has not historically imported LNG. In August 2012, The Gas Company (Hawaii's gas utility) sparked an explosive debate by submitting an application to the Federal Energy Regulatory Commission ("FERC") and describing a "comprehensive, multi-phased LNG strategic plan" to import large quantities of LNG to Hawai'i.[36] The Company reported that it would "implement its strategic LNG plan in three, mostly parallel, phases."[37] Phase three would include the construction of "larger, permanent storage and receiving facilities in Hawaii" with "a storage capacity of up to 10 million gallons," along with the regasification facilities required to convert LNG back to its gaseous form.[38] This new supply would supplant much of the company's existing feedstock, and additionally "provide fuel for up to 400 MW of both existing and new conventional and/or combined cycle power generation facilities, as well as for industrial and other commercial applications" in the state.[39]

Historically, gas sold by The Gas Company has been produced from oil refinery byproducts, along with a small renewable component.[40] The Gas Company has proclaimed that the gas it sells "doesn't require us to import one drop of additional oil."[41] Thus, its request to import large quantities of LNG has the potential to dramatically expand Hawaii's fossil fuel portfolio. The Company's application sought FERC approval "in order to expeditiously commence with" this plan.[42] Ultimately, FERC declined to exercise jurisdiction over The Gas Company's phase 1 application, ensuring

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[35] *See, e.g., FGE FACTS Global Energy, Evaluating Natural Gas Import Options for the State of Hawaii E-1* (April 2007), *available at* http://www.hawaiienergypolicy.hawaii.edu/PDF/FGErevised.pdf.

[36] Application of the Gas Co., LLC for Authorization Under Section 3 of the Natural Gas Act at 2 (F.E.R.C. No. CP12-498), http://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=13043701 [hereinafter *FERC Application*].

[37] *Id.*

[38] *Id.* at 22-23.

[39] *Id.* at 23.

[40] *Relating to Renewable Energy: Hearing on H.B. 1464 H.D. 2 Before H. Comm. On Finance*, 23d Leg., Reg. Sess. 2 (Haw. 2009) (testimony by The Gas Co., LLC), *available at* http://www.capitol.hawaii.gov/session2009/testimony/HB1464_HD2_TESTIMONY_FIN_02-27-09_4_.pdf [hereinafter *Hearing on H.B. 1464*].

[41] *Id.*

[42] *FERC Application, supra* note 37, at 3 (describing The Gas Company's desire "for the regulatory certainty afforded by the issuance of a Commission order authorizing the operation of the Phase 1 Facilities pursuant to NGA Section 3 in order to expeditiously commence with the implementation of its overall LNG strategy").

that the issue will be addressed via local decision-making.[43] Cutting-edge science demands that these local decisions must examine the global impacts of LNG greenhouse gas emissions.

B. LNG—A Greenhouse Gas Wolf in Sheep's Clothing?

In late 2012, the Hawai'i Natural Energy Institute ("HNEI") commissioned a report on Hawai'i LNG imports.[44] Curiously, HNEI selected The Gas Company's own consultant to prepare the report, raising obvious questions about potential conflicts of interest.[45]

In that report, LNG is touted as "the cleanest of the fossil fuels."[46] Typically, this claim is based on an assumption that LNG can emit less carbon dioxide when burned to generate power, in comparison to other fossil fuels.[47] While this may be true, carbon dioxide emissions from burning are only one part of the greenhouse gas emissions story.[48]

Methane, the primary component of LNG, is itself a potent greenhouse gas. According to the U.S. Environmental Protection Agency ("EPA"), "[d]irect methane emissions released to the atmosphere (without burning) are about *21 times more powerful than CO_2 in terms of their warming effect* on the atmosphere."[49] Before gas ever reaches a power plant for burning,

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[43] *See* Order Dismissing Request for Section 3 Authorization, No. CP12-498 (F.E.R.C. Jan. 17, 2013), *available at* http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=13155176.

> The Gas Company's described facilities and operations would be exempt from our section 7 jurisdiction by either NGA section 1(b), which exempts a company that provides only local distribution services, or section 1(c) (known as the 'Hinshaw' exemption), which exempts a company if it receives all of its interstate gas supplies within its own state, all of the gas it receives is consumed in that state, and the company is subject to regulation by a state commission.

Id.

[44] *See* FGE–FACTS Global Energy, *Liquefied Natural Gas for Hawaii: Policy, Economic, and Technical Questions Evaluating Liquefied Natural gas for Hawai'i and the Corresponding Policy, Economical, and Technical Questions Associated with Potential Imports* 9 (Dec. 20, 2012), FACTS GLOBAL ENERGY, http://www.hnei.hawaii.edu/sites/web41.its.hawaii.edu.www.hnei.hawaii.edu/files/story/2013/01/Liquefied%20Natural%20Gas%20for%20Hawaii%20Policy%20Economic%20and%20Technical%20Questions-FINAL.pdf.

[45] *Id.* at 1.

[46] *Id.* at 164 (asserting that "LNG is not a zero- CO_2 fuel. It is simply the lowest CO_2 fossil fuel.")

[47] In addition, non-methane hydrocarbons, sulfur, and other contaminants can be removed during the processing/liquefaction stage of the LNG supply chain. Burning natural gas also yields little particulate matter.

[48] *See infra* note 50.

[49] EPA CALCULATIONS AND REFERENCES, http://www.epa.gov/cleanenergy/energy-resources/refs.html (emphasis added) (last visited Apr. 6, 2013).

methane leakage at various points in the supply chain can therefore have a powerful impact on climate forcing.

To quantify the relative impact of these fugitive methane emissions, in comparison to carbon dioxide emissions, scientists balance methane's higher warming potential against its atmospheric half-life (which is shorter than the atmospheric half-life of carbon dioxide).[50] Combined, these effects are estimated to create a "3.2% threshold beyond which gas becomes worse for the climate than coal" in the near term.[51] In other words, if total methane leakage along the supply chain exceeds this 3.2% tipping point, LNG must be stripped of its "clean" reputation, from a climate change perspective.

Attempts to assess fugitive emissions typically utilize various assumptions about leakage at each stage of the supply chain. Such methods have yielded a wide range of estimated leakage rates (e.g. 1.7% to 7.9% of total well production),[52] spanning both sides of the 3.2% threshold. There is little surprise in the fact that it has been difficult to quantify fugitive methane emissions on an industry-wide scale—the U.S. natural gas system comprises "hundreds of thousands of wells, hundreds of processing

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[50] *See, e.g.*, Ramon A. Alvarez et al., *Greater focus needed on methane leakage from natural gas infrastructure*, 109 PROC. NAT'L ACAD. SCI. 6435 (2012).

> Comparing the climate implications of CH_4 and CO_2 emissions is complicated because of the much shorter atmospheric lifetime of CH_4 relative to CO_2. On a molar basis, CH_4 produces 37 times more radiative forcing than CO_2. However, because CH_4 is oxidized to CO_2 with an effective lifetime of 12 yr, the integrated, or cumulative, radiative forcings from equi-molar releases of CO_2 and CH_4 eventually converge toward the same value. Determining whether a unit emission of CH_4 is worse for the climate than a unit of CO_2 depends on the time frame considered. Because accelerated rates of warming mean ecosystems and humans have less time to adapt, increased CH_4 emissions due to substitution of natural gas for coal and oil may produce undesirable climate outcomes in the near-term.

Id.

[51] *Id.* at 6437.

> Much work needs to be done to determine actual emissions with certainty and to accurately characterize the site-to-site variability in emissions. However, given limited current evidence, it is likely that leakage at individual natural gas well sites is high enough, when combined with leakage from downstream operations, to make the total leakage exceed the 3.2% threshold beyond which gas becomes worse for the climate than coal for at least some period of time.

Id.

[52] *See* Robert W. Howarth et al., *Methane and the greenhouse-gas footprint of natural gas from shale formations*, 106 CLIMATIC CHANGE 679, 684 tbl. 2 (2011), *available at* http://link.springer.com/article/10.1007/s10584-011-0061-5. A recent EPA estimate pegged emissions at 2.4%. *See* Jeff Tollefson, *Methane leaks erode green credentials of natural gas*, 493 NATURE 12 (2013).

facilities, and over a million miles of transmission and distribution pipelines."[53]

To untangle this issue, scientists from the National Oceanic and Atmospheric Administration and elsewhere have taken a more direct approach. Using sensors mounted on a tower, automobiles, and airplanes to sample the atmosphere, they are directly measuring methane vented from well fields.[54] Applied in and around a well field in Colorado, this methodology found that 4% of well production was being vented into the atmosphere, exceeding the 3.2% threshold.[55]

More recently, the same authors reported that emissions from a well field in Utah are "an eye-popping 9% of the total production." Their findings sparked this headline in the respected journal *Nature*: "*Methane leaks erode green credentials of natural gas.*"[56] Admittedly, it remains unclear whether these results from Colorado and Utah are typical of other well fields in the United States. However, similar atmospheric sampling studies over oil and gas regions in Texas, Oklahoma, and Kansas have "revealed substantial regional atmospheric [methane] and non-methane hydrocarbon . . . pollution."[57] Furthermore, there is mounting evidence of worrisome methane leakage elsewhere in the gas supply chain; researchers recently surveyed 735 miles of Boston roadways, and identified an alarming 3356 leaks associated with natural gas pipelines.[58]

Proponents of importing LNG to Hawai'i tout it as a "clean" fuel that can help Hawai'i reduce its greenhouse gas emissions, while simultaneously lowering the cost of energy. But this recent science on methane emissions

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[53] EPA, DRAFT INVENTORY OF U.S. GREENHOUSE GAS EMISSIONS AND SINKS: 1990–2011 3-56 (Feb. 11, 2013), *available at* http://www.epa.gov/climatechange/Downloads/ghgemissions/US-GHG-Inventory-2011-Chapter-3-Energy.pdf

[54] Gabrielle Pétron et al., *Hydrocarbon emissions characterization in the Colorado Front Range: A pilot study*, 117 J. GEOPHYS. RES. D04304-15 tbl. 4 (2012) (reporting that 4.0% of well production was being vented, with a minimum value of 2.3% and a maximum value of 7.9%).

[55] *Id.*

[56] Tollefson, *supra* note 52. As proof of the vigorous scientific inquiry being made into the issue of methane emissions, even these direct measurements are the subject to ongoing scientific analysis and discussion. *See* Michael A. Levi, Comment on "Hydrocarbon emissions characterization in the Colorado Front Range: A pilot study" by Gabrielle Pétron et al., 117 J. GEOPHYSICAL RESEARCH: ATMOSPHERES D21203 (2012); *see also* Gabrielle Pétron et al., *Reply to comment on "Hydrocarbon emissions characterization in the Colorado Front Range—A pilot study" by Michael A. Levi*, 118 J. GEOPHYSICAL RESEARCH: ATMOSPHERES 236 (2013).

[57] Pétron, *supra* note 54, at D04304-2.

[58] *See* Nathan G. Phillips et al., *Mapping urban pipeline leaks: Methane leaks across Boston*, 173 ENVTL. POLLUTION 1, 2 (2013), *available at* http://www.bz.duke.edu/jackson/ep2013.pdf.

reduces the credibility of such claims—unless or until a specific source of Hawai'i-bound LNG is identified, and leakage from the supply chain specific to that source is accurately quantified.

Notably, the HNEI/Gas Company consultant concluded that gambling on LNG imports for Hawai'i would make sense only if the LNG is sourced from the United States mainland via the West Coast or Gulf Coast; the "large investments and long-term commitments" required for bulk LNG imports would be too risky under price forecasts for LNG sourced from Alaska, Canada, or Australia.[59] This heightens the need to understand the true emissions profile of Hawai'i-bound LNG, because LNG sourced from the mainland is increasingly likely to come from wells drilled using hydraulic fracturing, or "fracking" techniques.[60] On top of the serious water quality[61] and other environmental concerns about fracking being raised in communities across the mainland, fracked wells are also

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[59] FGE–FACTS Global Energy *supra* note 44, at 12 (stating that "[e]xpected savings of, say, 10-15% [relative to the cost of fuel oil], are probably not enough to warrant the large investments and long-term commitments required for bulk LNG imports; such savings could easily be wiped away by market fluctuations," and forecasting that of the sources analyzed, only LNG sourced from the U.S. West Coast or Gulf Coast can meet this threshold).

[60] *See, e.g.*, Howarth, *supra* note 52 at 680 ("Domestic production in the U.S. was predominantly from conventional [non-fracked] reservoirs through the 1990s, but by 2009 U.S. unconventional [fracked] production exceeded that of conventional gas. The Department of Energy predicts that by 2035 total domestic production will grow by 20%, with unconventional gas providing 75% of the total.") (citation omitted)).

[61] See, e.g., Shale gas: Hydraulic fracturing and environmental issues, U.S. ENERGY INFO. ADMIN., http://www.eia.gov/forecasts/ieo/hei.cfm (last visited Apr. 7, 2013).

> Concerns about the extensive use of hydraulic fracturing have been raised by the public in the United States and elsewhere in the world because of the large volumes of water required, the chemicals added to fracturing fluids, and the need to dispose of the fluids after wells have been completed. A principal concern is the potential for contamination of aquifers and ground water, either from wells passing through aquifers or from surface spills.

Id.;

> EPA's analysis of samples taken from the Agency's deep monitoring wells in the aquifer indicates detection of synthetic chemicals, like glycols and alcohols consistent with gas production and hydraulic fracturing fluids, benzene concentrations well above Safe Drinking Water Act standards and high methane levels. Given the area's complex geology and the proximity of drinking water wells to ground water contamination, *EPA is concerned about the movement of contaminants within the aquifer and the safety of drinking water wells over time.*

Press Release, EPA, EPA Releases Draft Findings of Pavillion, Wyoming Ground Water Investigation for Public Comment and Independent Scientific Review (Jan. 8, 2011), available at http://yosemite.epa.gov/opa/admpress.nsf/0/EF35BD26A80D6CE3852579600065C94E (emphasis added).

associated with higher rates of methane leakage.[62] Plainly, Hawai'i must ready itself to deal with local policy questions related to the proposed LNG imports.

C. Four Local Strategies For Managing the Climate Risks of LNG

1. Lifecycle emissions analysis under Hawaii's Act 234–following in the regulatory footsteps of the 1788 Dolben's Act?

In 2007, Hawaii's Act 234 directed the Hawai'i Department of Health to adopt rules "[e]stablishing greenhouse gas emission limits . . . and establishing emission reduction measures to achieve the maximum practically and technically feasible and cost-effective reductions in greenhouse gas emissions."[63] The Act also required that the "emission reductions [must be] real, permanent, quantifiable, verifiable, and enforceable."[64]

Although Act 234 mandated that these greenhouse gas ("GHG") rules would be adopted before December 31, 2011, as of March 2013 the rules are not yet finalized. Proposed rules were published in October 2012, with public comments due in January 2013.[65] The proposed rules adopted an initial strategy of identifying the twenty-five largest stationary GHG emitters in the state, and generally requiring each of those facilities to submit a plan to reduce emissions by 25%.[66] As part of each plan, the facilities are required to "[i]dentify all available control measures," including a list of minimally acceptable measures that includes strategies such as "direct GHG capture and control," "[e]nergy efficiency upgrades," "operational improvements," and [f]uel switching," among others.[67]

At a public hearing held on O'ahu,[68] much of the testimony highlighted the need to assess total "lifecycle" emissions associated with each plan—including direct GHG emissions from each facility, and also the upstream emissions associated with the fuels or other inputs for the facility's

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[62] Howarth, *supra* note 52, at 683 tbl. 2.

[63] *See* HAW. REV. STAT. § 342B-72(a)(1) (LEXIS through 2012 Regular Session).

[64] *Id.* § 342B-72(c)(1).

[65] *Extension of Public Comment Period on Proposed Revisions to the Hawaii Administrative Rules (HAR) Chapter 11-60.1, Air Pollution Control,* STATE OF HAW. DEP'T OF HEALTH, *available at* http://hawaii.gov/health/about/proposed/cab/proposed_PDF/2012_extension.pdf.

[66] Air Pollution Control (proposed October 7, 2012) (to be codified at Haw. Admin. R. Ch. 11-60.1).

[67] *Id.* § 11-60.1-204(d)(3).

[68] Public hearing on proposed rule attended by the author on Nov. 28, 2012.

operation. Promisingly, this testimony illustrated public support for a regulatory approach that will recognize the global impact of Hawaii's local use of imported fossil fuels.

The climate impacts of LNG leakage are a perfect illustration of why a lifecycle approach is necessary. Many of the twenty-five facilities (especially power generating facilities) are likely to look closely at fuel-switching strategies to reduce emissions. If a facility switches its fuel source to LNG from another fossil fuel, it is likely that direct GHG emissions in Hawai'i would be reduced. Yet the science on upstream fugitive methane emissions suggests that a significant portion of such reductions would be illusory, or that emissions would actually *increase*. Recall that Act 234 mandates that the GHG emissions reductions must be "real." To satisfy this statutory mandate, the final emissions rules *must* account for lifecycle emissions of methane and other GHGs.

Act 234 is a classic example of the abolitionist's local action paradigm at work in Hawai'i. As only the third state in the United States to enact a GHG emissions limit, Hawai'i acted in the absence of major federal legislation to address climate change (and also in the absence of congressional ratification of the GHG emissions reductions outlined in the Kyoto Protocol).[69] A short-sighted analysis of climate change would have waited for comprehensive cooperation.[70] Yet like the 1788 Dolben's Act (which addressed the immense moral problems associated with the slave trade by first addressing the narrower problems associated with shipping conditions), Act 234 adopted a visionary approach that recognized the incremental power of locally regulating a global trade. To satisfy that vision, the rules implementing Act 234 must address the global lifecycle emissions associated with Hawaii's local energy choices.

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[69] *See* Douglas A. Codiga, *Act 234: Hawaii's Climate Change Law*, HAW. BAR J., May 2008, at 4.

[70] *See, e.g.*, Lee H. Endress, *The Hawai'i Clean Energy Initiative (HCEI): Watt, Me Worry?*, ECON. CURRENTS BLOG (March 7, 2013) (arguing that because "Hawaii's contribution to global carbon dioxide emissions is on the order of 0.01% . . . [adopting a clean energy future] will not meaningfully prevent climate change nor save the planet."). This argument is nonsensical. Irrespective of the substantive topic, if everyone adopted this position, no problem would ever get solved. Furthermore, the abolitionist analogy shows that incremental local action can be a precursor to large-scale solutions, even for the most intractable problems.

2. Fracking regulations under Senate Bill 375 and House Bill 93—akin to the 1807 acts banning the importation of slaves?

Like Act 234, a recent legislative proposal has the potential for local, unilateral action on LNG impacts. In 2013, a group of state senators and representatives introduced a pair of companion bills (Senate Bill 375 and House Bill 93) to regulate fracking in Hawai'i: "It shall be unlawful for any person, corporation, or other business entity to engage in hydraulic fracturing [for the purpose of producing or recovering oil or gas] within the state without first obtaining a permit to do so."[71] At the first Senate committee hearing, it became clear that the bills missed their mark because Hawai'i has no known oil or gas reserves. Subsequent explanation revealed that the reference to "oil and gas" was a mistake and that the bills were intended to address potential "enhanced" geothermal development. This is a technique for accessing hard-to-reach geothermal energy resources via fracking techniques like those used for many mainland gas wells.

The bills died shortly after introduction, but they nonetheless highlight an issue that is likely to arise again in the future. Hawai'i residents are well aware of the sharp controversy over fracking on the mainland and elsewhere. At the same time, enhanced geothermal energy is a potential source of renewable firm power that could help in meeting the state's clean energy goals. In the future, this fracking debate could end up pitting Hawai'i environmentalists against one another. But more immediately, the same issue is relevant to fossil fuel imports.

By importing fossil fuels, and then exporting the associated GHG emissions to the atmosphere, the state has an embarrassing history of outsourcing many of the environmental impacts of its energy choices. If fracking will be regulated within the state, yet fracked oil and gas will be imported from places that do not adhere to equally stringent standards, it will further cement that embarrassing history. For LNG, this is especially true in light of the higher fugitive emissions associated with fracked wells in comparison to conventional wells.

This is not an intractable problem. Much like the United States and Great Britain banning the importation of slaves in 1807,[72] Hawai'i could choose to ban the importation of fracked fuels. Or at a minimum, Hawai'i

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[71] *See* S.B. 375, 27th Leg. § 1 (Haw. 2013); H.B. 93, 27th Leg. § 1 (Haw. 2013) (defining "hydraulic fracturing to mean "the process of pumping a fluid into or under the surface of the ground in order to create fractures in rock for the purpose of producing or recovering oil or gas").

[72] *See, e.g.*, Andrew Glass, *Congress Votes to Ban Slave Trade: March 2, 1807*, POLITICO, *available at* http://www.politico.com/news/stories/0309/19465.html.

could choose to import such fuels only if they are sourced from jurisdictions with an acceptably protective regulatory scheme.

3. Taxing fossil fuel imports—paralleling the congressional abolitionist debate in the antebellum south?

Many people are surprised to learn that Hawai'i has enacted a form of carbon taxation, albeit a small one: "$1.05 on each barrel or fractional part of a barrel of petroleum product that is not aviation fuel," payable by the petroleum distributor.[73] In various proportions, these "barrel tax" revenues fund dedicated programs focused on energy security (15 cents) and development (10 cents), environmental response (5 cents), and food security (15 cents).[74] Once again, we see an example of Hawai'i acting locally in the absence of federal legislation on this issue.[75]

However, the tax has several important but solvable flaws. Most fundamentally, it is applied only to barrels of petroleum product. Hawai'i imports more than 700,000 tons of coal each year,[76] and as described above, may begin to import huge quantities of LNG. In the interest of fairness, and to more uniformly account for the externalities imposed by these fossil fuels, the tax should be expanded to apply to coal and gas, along with the liquid petroleum products. This will also have a practical impact. If LNG is used to displace fuel oil burned for electricity power production, taxing LNG will ensure that the programs supported by dedicated barrel tax revenues are not adversely impacted. Finally, a careful reader may have noted that the four dedicated funds sum up to forty-five cents, less than fifty percent of the total tax rate ($1.05 per barrel). To date, the remaining portion has been funneled into the state's general fund, rather than into the programs with a closer nexus to the tax. That nexus can be important. By funding energy security and development programs, the tax can be self-limiting and help contribute to Hawaii's climate change mitigation efforts.

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[73] HAW. REV. STAT. § 243-3.5(a) (LEXIS through 2012 Regular Session).

[74] *See id.* § 243-3.5(a)(1)-(5).

[75] To date, none of the various federal carbon tax proposals have succeeded; however, on March 12, 2013 Hawai'i Senator Brian Schatz, with Representative Henry A. Waxman, Senator Sheldon Whitehouse, and Representative Earl Blumenauer, released a draft of carbon-pricing legislation. *See* Press Release, U.S. House Committee on Energy and Commerce, Waxman, Whitehouse, Blumenauer, and Schatz Release Carbon Price Discussion Draft (March 12, 2013), *available at* http://democrats.energycommerce.house.gov/index.php?q=news/waxman-whitehouse-blumenauer-and-schatz-release-carbon-price-discussion-draft.

[76] *See* U.S. ENERGY INFO. ADMIN., ANN. COAL REP. 2011 tbl. 26, http://www.eia.gov/coal/annual/pdf/table26.pdf (last visited Apr. 6, 2013).

Successfully developing secure indigenous energy resources will necessarily reduce the importation of fossil fuels.

Two bills introduced during the 2013 legislative session can address these shortcomings. Senate Bill 17 and House Bill 451 were introduced to fold gaseous fossil fuels (LNG) into the tax.[77] Subsequent drafts have added solid fossil fuels (coal), and changed the proportional dedicated funding to equal one hundred percent of the total tax rate.[78] In addition, the revisions have specified differing tax rates for each category of fuels (solid, liquid, gaseous), with the intent of reflecting their relative carbon emissions.[79] Unfortunately, this amendment presently accounts only for estimated direct carbon emissions, rather than the lifecycle emissions that would more accurately reflect the climate impacts of each fuel.[80]

With further amendment to incorporate this lifecycle emissions approach, all three shortcomings identified above would be addressed. Much as congressional abolitionists sought to impose a tax on the importation of slavery, as one method of incentivizing South Carolina to reinstate and enforce its ban in the slave trade, an effective carbon tax could reduce Hawaii's climate impacts by shifting incentives away from fossil fuels and toward indigenous and sustainable energy sources.

4. Litigation arising from unfair and deceptive trade practices and unfair methods of competition—Hawaii's "West Africa Squadron"?

After 1808, Great Britain charged its West Africa Squadron with aggressively attacking the slave trade with military might.[81] This paper's fourth and final example of a local opportunity for climate action suggests

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[77] *See* S.B. 17, 27th Leg. (Haw. 2013); H.B. 451, 27th Leg.(Haw. 2013) (proposing to amend HAW. REV. STAT. § 243-3.5: "$1.05 on each barrel equivalent of liquid or gaseous fossil fuels having an energy content of 5,800,000 British Thermal Units or fractional part of a barrel equivalent of [~~petroleum product~~] liquid or gaseous fossil fuels that is not aviation fuel").

[78] *See* S.B. 17 S.D. 2, 27th Leg. (Haw. 2013); H.B. 451 H.D. 1, 27th Leg. (Haw. 2013).

[79] *See* S.B. 17 S.D 2, 27th Leg. (Haw. 2013); H.B. 451 H.D. 1, 27th Leg. (Haw. 2013). The revised drafts amend HAW. REV. STAT. § 243-3.5 to incorporate a tax rate of $1.05 per barrel of liquid petroleum, $0.12 per thousand cubic feet of gas, and $4.00 per short ton of coal. *See id.* Effectively, these rates provides a tax break for LNG, skewing the market for fossil fuels in favor of LNG.

[80] By the author's calculations, taxing these fuels on the basis of their equivalent energy content would result in gas being taxed at a rate of $0.19 per thousand cubic foot. Taxing on the basis of relative lifecycle emissions of $CO_{2(eq)}$ could make the gas rate higher, depending on upstream emissions of methane and other greenhouse gases.

[81] *See, e.g.*, *How did the Abolition Acts of 1807 and 1833 Affect the Slave Trade?*, THE NAT'L ARCHIVES, http://www.nationalarchives.gov.uk/education/lesson27.htm (last visited Apr. 7, 2013).

that Hawai'i law could allow similarly aggressive litigation that would protect Hawai'i consumers from environmental and economic risks associated with LNG imports.

Although litigation is probably not the answer, the *possibility* of litigation can help to ensure that (i) the LNG policy debate is open, honest, and accurate, (ii) economic risks are borne by the same parties who are motivated by potential pecuniary benefits, and (iii) if LNG is imported, it is done with appropriate mechanisms for minimizing climate impacts and ensuring that imports will be steadily scaled back in proportion to growing reliance on indigenous energy resources.

a. Claims for unfair and deceptive acts or practices as a favored tool for Hawai'i consumer protection

Hawaii's unfair and deceptive trade practices statute, Haw. Rev. Stat. § 480-2, declares that "unfair or deceptive acts or practices [UDAP] in the conduct of any trade or commerce are unlawful." Several aspects of UDAP claims under section 480-2 make them a powerful tool for consumer protection. First, chapter 480 arms the plaintiff with the specter of treble damages.[82] Second, the statute grants reasonable attorneys' fees and costs to a successful plaintiff.[83] And third, the terms "unfair" and "deceptive" are broadly defined, often rendering UDAP claims unsuitable for disposition upon a motion for summary judgment—and enhancing the likelihood that a plaintiff's claims will be examined on the merits. To wit:

> "Deceptive" acts or practices violate HRS § 480-2, but HRS ch. 480 contains no statutory definition of "deceptive." This court has described a deceptive practice as having "the capacity or tendency to mislead or deceive . . . . [Under a more refined test] a deceptive act or practice is (1) a representation, omission, or practice that (2) is likely to mislead consumers acting reasonably under the circumstances where (3) the representation, omission, or practice is material." A representation, omission, or practice is considered "material" if it involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product. Moreover, the . . . test is an objective one, turning on whether the act or omission is likely to mislead consumers, as to information important to consumers in making a decision regarding the product or service . . . . The application of an objective "reasonable person" standard, of which [this] test is an example, is ordinarily for the trier of fact, rendering summary judgment often inappropriate.[84]

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[82] *See* HAW. REV. STAT. § 480-13 (LEXIS through 2012 Regular Session).

[83] *See id.*

[84] Courbat v. Dahana Ranch, Inc., 111 Haw. 254, 261-63, 141 P.3d 427, 434-37 (2006) (internal quotations, alterations, and citations omitted).

"Unfair" acts or practices are distinct from "deceptive" acts or practices, but are defined in similarly broad terms.[85] "Unfairness cases usually involve actual and completed harms, whereas deception cases tend to focus on the likelihood of an injury."[86] "A practice is unfair when it offends established public policy and when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers."[87] But "[i]t is impossible to frame definitions which embrace all unfair practices."[88] In this broad framework, unfair practices often fall into four primary categories: "(1) withholding material information; (2) making unsubstantiated advertising claims; (3) using high-pressure sales techniques; and (4) depriving consumers of various post-purchase remedies."[89] In addition to these broadly defined forms of unfair or deceptive practices under section 480-2, section 481A-3 describes that:

A person [or entity] engages in a deceptive trade practice when, in the course of the person's business, vocation, or occupation, the person [or entity] . . . [r]epresents that goods or services have . . . characteristics [or] benefits . . . that they do not have [or] [r]epresents that goods or services are of a particular standard, quality, or grade . . . if they are of another

b. The risk of material omissions and representations in the LNG debate

Several aspects of the public dialogue on LNG risks invoke these hallmarks of unfair and deceptive acts. For example, in conjunction with its FERC application to import LNG, The Gas Company has embarked on a public relations campaign designed to remake its image. It now does business under the name "Hawai'i Gas The Clean Energy Company."[90] The Company's website touts LNG as the "cleanest of all fossil fuels

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[85] Rick J. Eichor, *Updating Unfair or Deceptive Acts and Practices Under Chapter 480-2*, HAW. BAR J., July 2007, at 109 (citing Bronster v. U.S. Steel Corp., 82 Haw. 32, 51, 919 P.2d. 294, 313 (1996)).

[86] *Id.* (citing In re Int'l Harvester Co., 104 F.T.C. 949(1984)).

[87] Haw. Cmty. Fed. Credit Union v. Keka, 94 Haw. 213, 228, 11 P.3d 1, 16 (2000) (quoting Rosa v. Johnston, 3 Haw. App. 420, 427, 65 P.2d 1228, 1234 (1982)).

[88] Davis v. Four Seasons Hotel Ltd., 122 Haw. 423, 439, 228 P.3d 303, 318 (2010) (quoting Cieri v. Leticia Query Realty, 80 Haw. 54, 61, 905 P.2d 29, 36 (1995)).

[89] Eichor, *supra* note 85 (citing Am. Fin. Services v. F.T.C., 767 F.2d 957, 979 (D.C. Cir. 1985)). Note that HAW. REV. STAT. § 480-2(b) mandates that when interpreting the statute, courts must give "due consideration to the rules, regulations, and decisions of the Federal Trade Commission and the federal courts interpreting section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1))."

[90] *See, e.g.*, HAWAI'I GAS, http://www.hawaiigas.com (last visited Apr. 7, 2013) ("The Gas Company is now HAWAI'I GAS").

producing 50% less CO2 [sic] emissions than coal and 30% less emissions than oil."[91] As described above, this claim is challenged by scientific findings about the serious impact of fugitive methane emissions from the LNG supply chain, and $CO_{2(eq)}$ emissions that can be "worse for the climate than coal."[92]

At best, the Company risks a claim that its "cleanest of all fossil fuels" assertion amounts to an omission of information about the actual emissions impact of its product, or an unsubstantiated advertising claim. At worst, the Company risks being accused of engaging in a greenwashing campaign that is actively making misleading representations about the emissions associated with LNG.

In either case, the omission or representation is material. The Company has chosen to coordinate its rebranding effort with its push to import LNG. This appears to demonstrate that the Company believes that a "clean" emissions image "is important to consumers and, hence, likely to affect their choice of, or conduct regarding, [the Company's] product."[93] Indeed, the website of its parent company states that the Company's products "are relatively clean-burning fuels that produce lower levels of carbon emissions than other hydrocarbon fuels such as coal or oil. *This is particularly important in Hawai'i where heightened public awareness of environmental impact makes lower emission products attractive to customers.*"[94] In other words, the Company believes that information about emissions is material to consumers. Omission of such information, or presentation of misleading information, can therefore satisfy the definition of an unfair and/or deceptive practice.

Similarly, the Company has focused its rebranding on burnishing its image as a "Hawai'i" company. This is evident in the new "Hawai'i Gas" name and fishhook logo. The Company actively proclaims that: "Our new name better reflects who we are: a Hawai'i company that's building Hawaii's energy future . . . . We are proud to be local."[95] These assertions may also expose the company to potential UDAP claims. "The Gap Company, LLC dba HAWAI'I Gas" is a subsidiary of Macquarie Infrastructure Company, LLC, listed on the New York Stock Exchange

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[91] *Hawai'i Gas LNG*, HAWAI'I GAS, http://www.hawaiigas.com/hawaii-gas-lng.aspx (last visited Apr. 7, 2013).

[92] Alvarez, *supra* note 50, at 6435.

[93] Courbat v. Dahana Ranch, Inc., 111 Haw. 254, 262, 141 P.3d 427, 435 (2006).

[94] *Gas Processing and Distribution*, MACQUARIE INFRASTRUCTURE CO., http://www.macquarie.com/mgl/com/mic/portfolio/gas-production (last visited Apr. 7, 2013) (emphasis added).

[95] *About Us*, HAWAI'I GAS, http://www.hawaiigas.com/about-us.aspx (last visited Apr. 7, 2013).

under the symbol MIC.[96] The Gas Company is just one of the businesses that MIC owns, in addition to interests in (i) a large network of airport fueling, terminal, and hangar operations stretching across the United States, (ii) "one of the largest independent bulk liquid storage terminal businesses in the U.S. with storage capacity of more than 43 million barrels" of petroleum and other oil products, and (iii) district energy businesses in Chicago and Law Vegas.[97] In turn, MIC is a subsidiary of the Macquarie Group, a huge multinational that manages over $350 Billion, with 13,400 employees operating in 28 countries.[98] To many consumers, it may be difficult to reconcile the "we are local" claim with this multinational corporate ownership structure. And like the "cleanest of all fossil fuels" claim, the Company's rebranding efforts illustrate that a local reputation is important to consumers, confirming that such information is material.

Perhaps the most problematic part of the Company's aggressive marketing campaign is this claim: "Gas is the most efficient source of heat energy. And it's getting even greener—we are committed to making 50% of our gas from renewable and sustainable sources by 2015."[99] This apparent commitment to sustainability has long been a part of the Company's public image campaign. In 2009, the Company testified to the Hawai'i legislature that:

> We are actively taking the necessary steps to increase the renewable content of our gas to 50 percent for the entire state within five years. Our strategy includes diversifying our feed stock to include gas from renewable resources such as landfill gas and bio-methane, and other renewable sources, including animal fat and plant oils that are locally produced. It is important to point out that all of these activities are being solely financed by our Company, without government subsidy or an added burden on our rate payers. This confirms our Company's commitment toward investing in Hawaii's energy future. In fact, we believe that we can successfully replace at least half of our feedstock supply with renewable sources and actually lower our cost of production from present levels.[100]

Locally produced gas from renewable and sustainable resources would no doubt be welcomed by many Hawai'i consumers, especially at reduced cost. But when compared with the "comprehensive, multi-phased LNG

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[96] *Investor Fact Sheet*, MAQUIRIE INFRASTRUCTURE CO., *available at* http://www.macquarie.com/dafiles/Internet/mgl/com/mic/investor-center/faqs/investor_factsheet.pdf.

[97] *Id.*

[98] MACQUARIE INFRASTRUCTURE CO., http://www.macquarie.com/mgl/com (last visited Apr. 7, 2013).

[99] *About Us*, HAWAI'I GAS, http://www.hawaiigas.com/about-us.aspx (last visited Apr. 7, 2013).

[100] *Hearing on H.B. 1464*, *supra* note 40.

strategic plan" detailed in the Company's FERC application, the numbers do not add up. The Company cannot replace fifty percent of its feedstock with renewable sources, while simultaneously implementing its plan to use LNG to "meet up to 75% of the Company's customers' requirements," and also "provide fuel for up to 400 MW" of power generation.[101] Yet more than six months after the FERC LNG application was filed, the Company continues to broadcast its renewables plan to consumers.[102] This claim veers even nearer to misleading consumers with material misinformation—especially in light of the fact that the same web page touting the renewables plan includes a large link to "Request New Gas Service."

c. The filed-rate doctrine as a potential bar to UDAP claims

Despite these somewhat alarming examples, a UDAP claim against a public gas utility would face some interesting legal hurdles. Foremost, the imprimatur of the Hawai'i Public Utilities Commission ("PUC") can bar some UDAP claims. In 2005, the Hawai'i Supreme Court ruled in *Balthazar v. Verizon Haw. Inc.*[103] that a UDAP claim against a PUC-regulated telephone company was barred by the filed-rate doctrine. Generally, the filed-rate doctrine prevents courts from making rulings that would impose service or rate discrimination among utility consumers, or "intrud[e] upon the rate-making authority" of utility regulators.[104]

In *Balthazar*, the plaintiffs filed class action UDAP claims under sections 480-2 and 481A-3, alleging that Verizon engaged in unfair and deceptive trade practices by providing identical telephone services to customers, even though some of those customers paid an extra fee for touch tone dialing services.[105] Essentially, the plaintiffs argued that customers who paid the fee could have received the same service without paying the fee but for Verizon's failure to disclose that option. The court applied the filed-rate doctrine in several ways. First:

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[101] *FERC Application*, *supra* note 36, at 2. Moreover, even without the LNG plan, serious questions abound related to the Company's use of renewable feedstock. As of 2012, only 2.4% of the Company's feedstock was non-petroleum based. *See* THE GAS COMPANY, LLC, REPORT TO THE PUBLIC UTILITIES COMMISSION 3 (2013). In the third quarter of 2013, the Company anticipates that its renewable gas facility will begin inserting renewable-based gas into its pipelines, but comprising only four to six percent of the total gas volume. *See id.* at 5. This will still be far short of the fifty percent promised in 2009.

[102] *About Us*, HAWAI'I GAS, http://www.hawaiigas.com/about-us.aspx (last visited Apr. 7, 2013).

[103] 109 Haw. 69; 123 P.3d 194 (2005).

[104] *Id.* at 73, 123 P.3d at 198.

[105] *Id.* at 71, 123 P.3d at 196.

> Whether Verizon claimed that Touch Calling service would be inaccessible to customers who did not pay the fee is not determinative. Verizon's tariffs make plain that the Touch Calling fees should be paid in exchange for Touch Calling service and knowledge of these tariff provisions is imputed to Plaintiffs under the filed-rate doctrine.[106]

"Plaintiffs can prove neither the injury that is required for recovery under HRS § 480-2 nor the likelihood of damage that is required for recovery under chapter 481A."[107] Second, under the filed-rate doctrine:

> Plaintiffs were bound to pay the Touch Calling fees in exchange for the service, irrespective of any statements Verizon may have made. Thus, Plaintiffs were not induced into paying the fees by Verizon's representations. Rather, Plaintiffs were obligated under the tariff to pay the fees inasmuch as they elected to receive the Touch Calling service.[108]

Third, "Plaintiffs' claim for money damages is barred for an additional reason—an award of money damages would compromise the rate structure that was set forth in the tariff filed with the [PUC]."[109]

d. UDAP claims that may not be subject to the filed-rate doctrine

At first glance, one might assume that the same rationale would bar litigation based on the gas-related assertions described above. Such a conclusion is premature, and one can envision several ways that a defense based on the filed-rate doctrine is not applicable to the LNG debate.

First, the filed-rate doctrine is applicable in cases involving a public utility "subject to the authority of a state regulatory agency."[110] To the extent that the parent companies of The Gas Company participate in unfair or deceptive trade practices, the PUC arguably plays no regulatory role. This may be particularly important for UDAP claims based on the "we are local" assertion. It is clear that the MIC parent company has directly engaged with Hawai'i consumers. For example, in a January 2013 MIC press release, MIC's Chief Executive Officer asserted that "FERC's decision not to assert jurisdiction over the proposed transportation of LNG to Hawaii is a positive step for both the company and the Hawaiian economy . . . . The decision should hasten implementation of the LNG program at HAWAI'I GAS . . . ."[111]

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[106] *Id.* at 79, 123 P.3d at 204.

[107] *Id.* at 78, 123 P.3d at 203.

[108] *Id.* at 80, 123 P.3d at 205.

[109] *Id.*

[110] *Id.* at 77, 123 P.3d at 202.

[111] Press Release, Macquarie Infrastructure Co., Macquarie Infrastructure Company's

Second, the trade practices raised by The Gas Company's assertions are very different than those raised in the *Balthazar* case, insofar as they do not relate to the application of fees disclosed in a tariff.[112] The filed-rate doctrine is not a blanket shield against liability in PUC-regulated industries; it is fundamentally a mechanism for protecting regulated rate structures and preventing discriminatory pricing among customers of regulated utilities.

Third, a filed tariff probably would not include disclosures on LNG lifecycle emissions,[113] again rendering the filed-rate doctrine inapplicable. Similarly, the *Balthazar* decision distinguished a California case on the basis that "there was no discussion in that case of whether the billing practice in question was disclosed in a tariff."[114]

A more definitive fact pattern, and effective lawyering, would undoubtedly reveal other reasons to find that the filed-rate doctrine is inapplicable in the context of Hawaii's LNG debate. One can imagine, for example, UDAP claims against an LNG purveyor made on behalf of electric utility customers, or customers of other industries that use gas, as indirect purchasers of the fuel, rather than customers subject to a tariff.[115] Another permutation might see the UDAP claim transformed into a claim for unfair methods of competition ("UMOC"), expanding the potential pool of plaintiffs beyond consumers to "[a]ny person who is injured in the person's business or property."[116] UMOC claims require the plaintiff to allege the nature of the competition that is harmed.[117] Energy touches every corner of Hawaii's economy, such that it would not be difficult to allege the requisite harm on economic competition.

HAWAI'I GAS business clears federal hurdle to transporting containerized LNG (January 18, 2013), *available at* http://www.hawaiigas.com/news/press-releases/2013/macquarie-infrastructure-companys-hawaii-gas-business-clears-federal-hurdle-to-transporting-containerized-lng.aspx.

[112] The filed-rate doctrine is not limited to disputes about rates, nor does it likely extend to the issue of emissions or other environmental impacts. *Cf.* In re Waikoloa Sanitary Sewer Co., 109 Haw. 263, 273, 125 P.3d 484, 494 (2005) (stating that "the filed-rate doctrine applies to more than just rates; it extends to the services, classifications, charges, and practices included in the rate filing").

[113] Generally, tariffs are "public documents setting forth services being offered; rates and charges with respect to services; and governing rules, regulations, and practices relating to those services." *Id.* at 271, 125 P.3d at 492 (internal citations omitted).

[114] Balthazar v. Verizon Haw. Inc., 109 Haw. 69, 81, 123 P.3d 194, 206 (2005) (distinguishing Cundiff v. GTE Cal., 101 Cal. App. 4th 1395 (2002)).

[115] However, under HAW. REV. STAT. § 480-13(a)(1), indirect purchasers are entitled only to compensatory damages, not treble damages.

[116] *Contra* HAW. REV. STAT. § 480-2(e) (LEXIS through 2012 Regular Session).

[117] *See, e.g.*, Davis v. Four Seasons Hotel Ltd., 122 Haw. 423, 437, 228 P.3d 303, 317 (2010).

e. Potential litigation as a method for more effectively apportioning energy risks

Like the military force exercised by the West Africa Squadron, litigation often imposes collateral harm and inefficiencies,[118] rendering it a less-than-optimal solution. But the potential for UDAP or UMOC claims related to Hawaii's LNG debate comes with three benefits that help mitigate against the potential harms. First, a public policy decision as important as making large, long-term capital commitments to LNG demands open, honest, and collaborative public discourse. The specter of treble damages—especially at the scale of hundreds of millions of dollars per year that could be applicable to large-scale fuel imports—can help to ensure that Hawaii's debate achieves this benchmark.

Second, the traditional paradigm for utility-scale fuel sales has left Hawai'i ratepayers bearing essentially all the economic risk for fossil fuel imports. When the price of fossil fuels rise, purveyors pass that increase on to the consumer, but continue to earn a profit. In many ways, purveyors are "playing with house money"—especially if the filed-rate doctrine is applied to shield regulated entities from consumer claims. If this paradigm continues indefinitely, it will act as a subsidy for the fossil fuel industry, distorting decisions about Hawaii's energy choices.[119] UDAP or UMOC claims may be able to more appropriately apportion such risk in situations where purveyors engage in acts or practices that misinform consumers.

Third, if LNG is imported, the threat of litigation will help to incentivize acceptance of appropriate regulatory conditions, such as stringent limits on lifecycle methane emissions.

IV. CONCLUSION

WWJVDD? In 2005, Professor Van Dyke eloquently and persuasively used principles of international law to show that the Canadian government

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[118] The West Africa Squadron presents a particularly tragic example. Several authors suggest that slave trade ships, when faced with potential capture by the Royal Navy, simply threw the human cargo overboard rather than face confiscation of the ship. *See, e.g.*, Keith Hamilton & Farida Shaikh, *Introduction* to SLAVERY, DIPLOMACY AND EMPIRE: BRITAIN AND THE SUPPRESSION OF THE SLAVE TRADE, 1807-1975 9 (Keith Hamilton & Patrick Salmon eds., 2009).

[119] *Cf.* Jon M. Van Dyke, *Liability and Compensation for Harm Caused by Nuclear Activities*, 35 DENV. J. INT'L L. & POL'Y 13, 46 (2006) ("The failure to develop a proper regime that would ensure full restitution and compensation for harm resulting from nuclear facilities constitutes a continuing subsidy to the nuclear industry and distorts decisions regarding energy choices.").

was justified in preventing U.S. LNG ships from passing through environmentally sensitive coastal waters in the Bay of Fundy.[120] In essence, Van Dyke explained that Canada was empowered to take unilateral action "to protect its coastal population and resources."[121] Given the subsequent boom in U.S. LNG production, and the coming shockwave of export activity, Van Dyke was on the forward-cusp of an emerging and important topic. Perhaps he knew that Hawai'i would one day face similar questions.

No doubt, he would have preferred cooperative solutions based on broad consensus. But I like to think that he would have also seen the opportunity to learn from key human victories, such as the abolition of slavery, when working to shape that consensus.

Hawai'i cannot wait for other people and other places to solve the climate crisis for us. Like Professor Hoffman's hypothetical person on a London street corner, we must start showing the world that fossil fuels are not the answer.

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[120] Jon M. Van Dyke, *Canada's Authority to Prohibit LNG Vessels from Passing Through Head Harbor Passage to U.S. Ports*, 14 OCEAN & COASTAL L.J. 45 (2008).

[121] *Id.* at 72.

New Marine Resource Opportunities, Fresh Challenges

Clive Schofield*

I. INTRODUCTION

Recent decades have witnessed a tremendous extension of coastal state claims to maritime jurisdiction offshore. Where once coastal state claims were restricted to a relatively narrow band of waters, generally out to three nautical miles (nm) from the coast, now claims of 200nm breadth are commonplace and in many cases may extend substantially further offshore.[1] These extensive maritime spaces offer considerable potential resource opportunities. This is particularly the case with respect to seabed energy resources of various types. Seabed resource opportunities relating to minerals (seabed mining) and marine genetic resources are also likely to arise in these areas.[2]

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[1] It is recognised that, technically, the correct abbreviation for a nautical mile is "M," with the "nm" referring to nanometres. However, "nm" is widely used by many authorities (for example the UN Office of Ocean Affairs and the Law of the Sea) and appears to cause less confusion than "M," which is often taken to be an abbreviation for metres.

[2] *See, e.g.*, Clive H. Schofield & Robert Van de Poll, *Exploring the Outer Continental Shelf* (2012) (forthcoming in International Seabed Authority Technical Study No.11), (Working Paper prepared for the International Workshop on *Implementation of Article 82 of the United Nations Convention on the Law of the Sea*, ISA Technical Study: No. 12, (Beijing, 26-30 Nov. 2012), http://www.isa.org.jm/files /documents/EN/Pubs/TS12-web.pdf). *See also*, Kate Galbraith, *Deep-Sea Drilling Muddies Political Waters*, N. Y. TIMES, Feb. 6, 2013, http://www.nytimes.com/2013/02/07/business/energy-environment/07iht-green 07.html?partner =yahoofinance&_r=1&.

Accompanying the significant, and ongoing, extension of coastal state jurisdiction over broad expanses of the oceans, significant advances in drilling and exploration technology are taking place that are likely to facilitate resource exploration activities to advance into ever deeper waters and further offshore.[3] For example, continental shelf areas seawards of the 200nm limits of the exclusive economic zone ("EEZ") are likely to provide the deep and ultra-deepwater plays set to form the "next frontier" for the oil and gas industry over the next twenty-five years.[4] Accordingly, it is anticipated that billions of dollars will be devoted to deep sea exploration efforts in the foreseeable future, with trillions of dollars of resources at stake.[5] Analogous developments are also taking place, in respect of seabed mining opportunities and marine genetic resources, albeit not so far advanced as for the oil and gas industry.

All of these developments have significant implications for the marine environment and preservation of valuable biodiversity of the deep. The paper outlines progress in terms of definition of maritime jurisdictional claims, highlights "new" marine resources and associated technologies, notably with respect to hydrocarbons, seabed mining and marine genetic resources, and suggests some emerging challenges for the future.[6]

II. CREEPING COASTAL STATE JURISDICTION

The United Nations Convention on the Law of the Sea ("LOSC")[7] provides the generally accepted legal framework governing maritime jurisdictional claims and the delimitation of maritime boundaries between national maritime zones. LOSC has gained widespread international recognition and at the time of writing there were 166 parties to it.[8] A

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[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] The paper builds on previous works by the author, especially in collaboration with Robert Van de Poll. *See, e.g.*, Robert Van de Poll & Clive H. Schofield, *Exploring to the Outer Limits: Securing the Resources of the Extended Continental Shelf in the Asia-Pacific* (2012) (unpublished manuscript) (on file with the authors) (prepared for the 7th Biennial conference organised by the Advisory Board on the Law of the Sea (ABLOS), *UNCLOS In A Changing World*, Monaco, 3-5 October 2012); and Schofield & Van de Poll, *Exploring the Outer Continental Shelf*, *supra* note 2.

[7] United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter *LOSC*].

[8] Comprising 164 states plus the European Union. *Chronological List of Ratifications of, Accessions and Successions to the Convention and the Related Agreements as at 2013*, OCEANS & LAW OF THE SEA UNITED NATIONS (2013), http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm#The United Nations

notable absentee from the list of state parties to LOSC is the United States.[9] Nonetheless, the United States accepts that much of LOSC, including the maritime jurisdictional and boundary delimitation provisions, is declaratory of customary international law and conducts its policy accordingly.[10]

A key achievement of LOSC was agreement on spatial limits to national claims to maritime jurisdiction.[11] Consequently, maritime claims are predominantly defined as extending to a set distance from baselines along the coast.[12] In accordance with the terms of LOSC, the breadth of a coastal state's territorial sea is not to exceed 12nm from baselines along the coast.[13] Previously, the issue of the appropriate breadth of the territorial sea had been a particularly contentious one so the LOSC definition of a 12nm territorial sea limit represented significant progress. In accordance with the provisions of LOSC, a coastal state's contiguous zone may not extend beyond 24nm from the baselines from which the breadth of the territorial sea is measured.[14] As most states claim a 12nm breadth territorial sea, the contiguous zone, if claimed, generally extends from the 12nm to 24nm limits as measured from baselines along the coast.[15] LOSC also introduced the concept of the exclusive economic zone (EEZ), which "shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured."[16] As noted above, most coastal states claim a 12nm territorial sea, meaning that the actual breadth of the EEZ is usually 188nm seaward of territorial sea limits. Claims to contiguous zone and EEZ rights therefore overlap—wholly so for the contiguous zone, partially for the EEZ. Accordingly, the key factors required for the definition of the outer limits of each of the international zones of maritime jurisdiction is an understanding of the location of the baseline, coupled with a geodetically robust (that is, accurate and precise) means of calculating the relevant distance measurements of 12nm, 24nm and 200nm.

The definition of the outer limits of the continental shelf is a more complex task, specifically where areas of "extended" or "outer" continental

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Convention on the Law of the Sea.

[9] *Id.*

[10] J. ASHLEY ROACH & ROBERT W. SMITH, UNITED STATES RESPONSES TO EXCESSIVE MARITIME CLAIMS 4-5 (3d ed. 2012).

[11] *LOSC*, *supra* note 7.

[12] *Id.*

[13] *Id.* arts. 3 & 4.

[14] *Id.* art. 33(2).

[15] *The World Factbook, Field Listing: Maritime Claims*, CENTRAL INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/fields/2106.html (last visited Feb. 22, 2013).

[16] *LOSC*, *supra* note 7, art. 57.

shelf seawards of the 200 nautical mile limit are under consideration.[17] In this context it is worth noting that neither of the terms "outer" or "extended" continental shelf are ideal or have gained universal acceptance. The term "outer continental shelf" suggests that there are distinct parts of the continental shelf when legally this is not the case. For its part the term "extended continental shelf" gives a somewhat misleading impression that coastal states are somehow extending or advancing claims to additional areas of continental shelf. This is not the case as the sovereign rights enjoyed by the coastal state over the continental shelf are inherent.[18]

Defining the outer limits of the continental shelf is more challenging than those for other maritime jurisdictional zones primarily because such entitlements are not determined solely by reference to a distance formula. Where the continental margin extends beyond 200nm from a state's baselines, the coastal state may be able to assert rights over that part of the continental shelf beyond the 200nm limit that forms part of its natural prolongation. However, in order to fulfil the complex series of criteria laid down in Article 76 and prepare a submission on extended continental shelf rights to the relevant United Nations technical body, the Commission on the Limits of the Continental Shelf ("CLCS"),[19] a coastal state is required to gather information related to the morphology of its continental margin and its geological characteristics as well as bathymetric information relating to water depth. Additionally, distance measurements are necessary in order to determine, for example, the location of 200nm and 350nm limit lines.[20]

The vast majority of maritime claims are consistent with LOSC, at least in terms of their breadth, although disputes exist with respect to baselines and thus the starting points for measuring such claims.[21] Indeed many past claims to overly broad maritime limits have been "rolled back," though a few states still retain excessive claims for instance to 200nm-breadth territorial seas.[22] The introduction of 200nm breadth EEZs, in particular,

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[17] *Id.* art. 76.

[18] *See Id.* art. 77(3); North Sea Continental Shelf (Federal Republic of Germany/Netherlands), 1969 I.C.J. 3, ¶ 19 (Feb. 20).

[19] *See Commission on the Limits of the Continental Shelf (CLCS)*, OCEANS & LAW OF THE SEA UNITED NATIONS (2012), http://www.un.org/Depts/los/clcs_new/clcs_home.htm [hereinafter *CLCS*].

[20] *See, e.g.*, Clive H. Schofield & I Made Andi Arsana, (2009), *Beyond the Limits?: Outer Continental Shelf Opportunities and Obligations in East and Southeast Asia*, 31 CONTEMP. SOUTHEAST ASIA: A J. INT'L & STRATEGIC AFF. 28 (2009).

[21] *See, e.g.*, Clive H. Schofield, *Departures from the Coast: Trends in the Application of Territorial Sea Baselines under the Law of the Sea Convention*, 27 INT'L J. MARINE & COASTAL L. 723 (2013).

[22] Notably Benin, Ecuador, El Salvador, and Peru. *See* ROACH & SMITH, *supra* note 10, at 148. Somalia is often included in the list of States claiming a 200 nm territorial sea.

has had a dramatic impact on the scope of ocean spaces becoming subject to the maritime claims of coastal states.

It has been estimated that, should every coastal State make national maritime jurisdictional claims out to 200nm (as is predominantly the case), these claims would encompass 43 million square nautical miles (147 million square kilometres) of maritime space. This amounts to approximately [forty-one percent] of the area of the oceans or [twenty-nine percent] of the Earth's surface.[23] The extension of coastal state rights offshore is, however, far from complete.[24] In particular, as noted, defining the outer limits of the extended continental shelf is a complex task. Consequently, the outer limits of continental shelf areas extending seawards of the 200nm limit of the EEZ have yet to be finalised. Of the 193 United Nations member states, 155 are coastal states.[25] Among these coastal states, seventy-eight had, at the time of writing, made either full submissions or submissions of preliminary information as a prelude to making full submissions to the CLCS regarding outer continental shelf rights.[26] In total, 100 outer continental shelf submissions had been deposited with the UN, comprising sixty-one full submissions and thirty-nine preliminary submissions.[27]

These submissions collectively encompass an enormous area, of approximately 29,417,052 km^2.[28] It is important to note this figure does not include outer continental shelf areas for Chile, China, the Comoros and Vanuatu as these states have yet to supply any indication of the extent of

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However, the 1988 Law of the Somali Sea provides for a 12 nm territorial sea and 200 nm EEZ although it is unclear whether this legislation is in force. *See* International Maritime Organization, *Table of Somali Laws Relevant to Maritime Law Enforcement*, IMO.ORG (Mar. 18, 2013), http://www.imo.org/OurWork/Security/PIU/Documents/2013-03-18%20Somali%20Laws%20Relevant%20to%20Maritime%20Law%20enforcement.doc.

[23] Clive H. Schofield, *Parting the Waves: Claims to Maritime Jurisdiction and the Division of Ocean Space*, 1 PENN ST. J.L. & INT'L AFF. 40, 46 (2012).

[24] *Id.*

[25] The figure of 155 coastal states includes three states, Azerbaijan, Kazakhstan and Turkmenistan, whose only coastlines are those on the Caspian Sea. Arguably, therefore, as the Caspian is not connected to the world ocean save via rivers and canals, this figure could be put at 152 coastal states. For the purposes of this analysis, the more inclusive figure of 155 coastal states is used. *Member States of the United Nations*, UN.ORG (2006), http://www.un.org/en/members/.

[26] *See CLCS*, *supra* note 19.

[27] Noting that a number of these submissions are joint or partial and these figures are inclusive of multiple partial submissions for different areas by some states. Additionally, preliminary submissions are gradually being replaced by full submissions. Thus, while the CLCS lists forty-five submissions of preliminary information, only thirty-nine states are involved. *See id.*

[28] *Id.*

their areas of continental shelf located seawards of the 200nm limit from their baselines.[29]

As coastal states have made their submission it has become clear that numerous overlapping claims to the same areas of outer continental shelf exist. These overlaps encompass approximately 3,227,110 km^2 of potential outer continental shelf areas.[30] Further, the process is not yet at an end as a further seven more states are likely to (or may yet decide to) make submissions in due course, but they have yet to do so because the deadline for their submissions has yet to pass. The states that have yet to make submissions are: Canada, Ecuador, Liberia, Morocco, Peru, USA and Venezuela.[31]

III. NEW RESOURCE FRONTIERS

Claims to maritime jurisdiction offer rights over potentially highly valuable marine resources. This holds true with respect to necessarily far from shore areas of outer continental shelf seawards of 200nm from relevant baselines along the coast.[32] Indeed, the prospect of gaining access to an as yet little known cornucopia of resources represented a significant driver for coastal States to devote the substantial human, financial and political capital necessary to formulate extended continental shelf submissions

In light of rising global energy security concerns for many coastal States, the possibility that extended continental shelf areas may hold considerable seabed hydrocarbon resources acts as a potent lure. For example, many economies in East and Southeast Asia are generally natural resource poor, trade-dependent as well as energy intensive, meaning that they are facing increasingly significant gaps between domestic oil and gas production versus demand.[33] Additionally, outer continental shelf areas as well as the

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[29] *Id.*

[30] *See, e.g.*, Van de Poll & Schofield, *Exploring to the Outer Limits*, *supra* note 6.

[31] It is worth noting that some of these states are more likely to make submissions than others. For example, Canada's preparations towards formulating a submission are known to be well advanced. Other states that appear to be hemmed in by the maritime entitlements of neighbouring states such as Peru may, nonetheless, opt to make submissions in due course. A submission from the USA presupposes that the USA will eventually become a party to LOSC.

[32] *LOSC*, *supra* note 7, art. 77(1) provides that in areas of continental shelf, including outer continental shelf areas, coastal states exercise sovereign rights over these areas "for the purpose of exploring it and exploiting its natural resources."

[33] Clive H. Schofield, *Maritime Energy Resources in Asia: Rising Tensions over Critical Marine Resources, in* MARITIME ENERGY RESOURCES IN ASIA: ENERGY AND GEOPOLITICS 1, 3(Clive Schofield ed., 2011).

deep seabed also hold the potential to offer a range of other mineral and biological resources which are increasingly being exploited, aided by considerable advances in technologies applicable to exploring deep sea areas. The following section highlights some of the potential extended continental shelf resource opportunities with particular reference to oil and gas, gas hydrates and marine genetic resources. In this context it can be observed that the technological developments mentioned above have already prompted significant investments, measured in hundreds of billions of dollars, in deepwater exploration to access seabed resources of various types. At stake are seabed resources speculatively estimated in the trillions of dollars.[34] In light of the rapid pace of developments, only a select few of which are highlighted below, it can be anticipated that there is much more to come in the future.

A. Deep and Ultra-deepwater Oil and Gas Exploration

Offshore areas represent a well established and increasingly important source of non-living resources such as hydrocarbons, especially in the context of dwindling near and on-shore reserves, growing populations and generally, therefore, resource and energy demands. Indeed, it has been estimated that approximately one third of global crude oil is located offshore.[35] Further, it can be anticipated that deep offshore sources of oil and gas will become increasingly important in the future as oil production from terrestrial and near-shore reserves plateaus and declines and as demand continues to escalate.

This combination of factors will tend to elevate oil prices which, in turn, will make the business case for further offshore exploration in deeper

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[34] Indeed, as far back as 2000, one study on behalf of the International Seabed Authority ("ISA") estimated the potential of eight non-living resources (including oil and gas as well as gas hydrates) within the outer continental shelf worldwide at a staggering $11,934 trillion (USD). *See* Bramley J. Murton, Lindsay M. Parsons, Peter Hunter & Peter Miles, *Global Non-Living Resources on the Extended Continental Shelf: Prospects at the Year 2000*, ISA TECHNICAL STUDY, No.1 (2000), http://www.isa.org.jm/files/documents/EN/Pubs/TechStudy1.pdf; *see also* Helene Lavoix, *The Deep-Sea Resources Sigils Brief*, RED (TEAM) ANALYSIS (June 1, 2012), http://www.redanalysis.org/2012/06/01/the-deep-sea-resources-sigils-brief/.

[35] *See, e.g.*, *Rio Ocean Declaration*, UNESCO 6 (2012), *available at* http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/SC/pdf/pdf_Rio_Ocean_Declaration_2012.pdf. It has been suggested that offshore fields accounted for 32% of worldwide crude oil production in 2009 with this figure projected to rise to 34% by 2025. *See* IOC/UNESCO, IMO, FAO, UNDP, *A Blueprint for Ocean and Coastal Sustainability*, Paris: IOC/UNESCO, 10 (2011), http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/SC/pdf/interagency_blue_paper_ocean_rioPlus20.pdf ; and, Int'l ENERGY AGENCY (IEA), WORLD ENERGY OUTLOOK 2010, 3 (2010), *available at* http://www.worldenergyoutlook.org/media/weo2010.pdf.

and/or more hostile and challenging waters more palatable. It is also the case that deep and ultra-deepwater offshore areas offer the potential for "world class," multibillion barrel discoveries,[36] something that is increasingly unlikely in better prospected on shore and shallow water provinces.[37] Indeed, it was estimated that global expenditure on deepwater infrastructure reached $145 billion in 2011.[38] Moreover, the already "spectacular" growth of this sector has been predicted to continue with global capital expenditure on deepwater developments forecast at $232 billion (USD) over the 2012-2016 period—figure that is ninety percent more than the amount spent in the preceding five years.[39]

Significant advances in offshore exploration technologies, in combination with higher oil prices, is increasingly allowing economically viable exploration and exploitation of offshore oil and gas resources in more hostile conditions, including deeper waters (up to and beyond 3,000m depth) further offshore.[40] There have been dramatic technological advances in the oil and gas industry in recent years, particularly in respect to exploration in deep and ultra-deepwater offshore areas.[41] This has involved the drilling of deeper and deeper wells, for example in the Gulf of Mexico where there are in excess of 600 deep water rigs,[42] as well as significant innovations in the design of production platforms and in terms of geophysical exploration technologies that have significantly enhanced the

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[36] Such as the 8 billion barrel plus Lula (Tupi) field off Brazil.

[37] Jennifer Harbour, *World Deepwater Market Report* 2012-2016, 239 PIPELINE & GAS J., no. 6, 2012 at 89, 90.

[38] *The Deepwater & Ultra Deepwater Market 2011-2021*, VISIONGAIN (May 31, 2011), *available at* http://www.visiongain.com/Report/622/The-Deepwater-Ultra-Deepwater-Market-2011-2021.

[39] Harbour, *supra* note 37.

[40] In April 2011 it was reported that the record for the deepest water depth where drilling had been successful had been set at 10,194 feet (3,107m) by ultradeep offshore drillship *Dhirubhai Deepwater KG2* off India. *See Transocean Ltd Announces World Water Depth Drilling Record in 10,194 Feet of Water*, TRANSOCEAN (April 11, 2011), http://phx.corporate-ir.net/phoenix.zhtml?c=113031&p=irol-newsArticle&ID=1549073&highlight=.

[41] The United States government classifies exploration in waters of 1,000ft (305m) or more as deep water, with activities in waters in excess of 5,000ft (1,524m) being deemed to be in ultradeep water. *See, e.g.*, Richard McLaughlin, *Hydrocarbon Development in the Ultra-Deepwater Boundary Region of the Gulf of Mexico: Time to Reexamine a Comprehensive U.S.-Mexico Cooperation Agreement*, 39 OCEAN DEV. & INT'L L. 1, 1 (2008). Other definitions suggest sub-300m water depths as shallow water, 300-1,500m as deep water and 1,500m plus as ultra-deepwater.

[42] Jim Tankersley, *A closer look at deep-water drilling*, LOS ANGELES TIMES, June 10, 2010, http://articles.latimes.com/2010/jun/10/nation/la-na-oil-spill-qa-20100610.

chances of success in deep seabed exploration and exploitation.[43] Prior to the onset of the global financial crisis ("GFC"), these developments led to substantial growth in deep and ultra-deepwater drilling such that global deepwater production tripled from approximately 1.5 million barrels per day ("b/d") to around five million b/d in the period 2000 to 2009.[44] Indeed, notwithstanding the *Deepwater Horizon* disaster in the Gulf of Mexico of 2010 and its aftermath,[45] deep and ultra-deepwater drilling for seabed hydrocarbons, is likely to increase significantly in the future, as evidenced by projected capital investments in deepwater oil and gas exploration efforts.[46] This is particularly the case given that there is little sign of a sustained shift away from oil as the primary energy carrier driving the global economy.[47] As oil supplies become increasingly constrained yet demand continues to spiral upwards, it can be anticipated that exploration efforts with respect to unconventional oil reserves in deep waters and far from shore on areas of extended continental shelf will redouble.[48]

Thus, although outer continental shelf areas have been generally considered to be of only limited interest to oil companies in the past, there have been indications that such areas may provide seabed oil and gas potential. For example, research undertaken by Geoscience Australia using advanced aeromagnetic surveys indicates the existence of significant petroleum potential in basins in at least three of Australia's ten areas of outer continental shelf: in the Great Australian Bight to the south, on the Lord Howe Rise to the east and on the Wallaby Plateau off Western Australia.[49] Exploration efforts of outer continental shelf areas on the part of the oil industry are also on the horizon with, at present time, at least sixteen countries around the world have "issued and/or are offering" offshore oil and gas exploration concession licenses beyond their respective

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[43] Paul L. Kelly, *Deepwater Oil Resources: The Expanding Frontier*, *in* 8 LEGAL AND SCIENTIFIC ASPECTS OF CONTINENTAL SHELF LIMITS 414-16 (Myron H. Nordquist, John N. Moore & Tomas Heidar eds., 2004).

[44] *Deepwater production and global oil supply,* BLOG.CHRON.COM (July 1, 2010), http://blog.chron.com/newswatchenergy/2010/07/deepwater-production-and-global-oil-supply/.

[45] Nick Owen & Clive H. Schofield, *Further and Deeper: The Future of Deepwater Drilling in the Aftermath of the Deepwater Horizon Disaster*, 6 INT'L ZEITSCHRIFT, no. 3, (2010), http://www.zeitschrift.co.uk/v6n3schofieldandowen.

[46] Harbour, *supra* note 37, at 90.

[47] *See* Owen & Schofield, *supra* note 45.

[48] *Id.*

[49] Paul Cleary, *Finds fuel deep-sea oil rush*, THE AUSTRALIAN, April 3, 2010, http://www.theaustralian.com.au/news/nation/finds-fuelbrdeep-seabroil-rush/story-e6frg6nf-1225849081371.

countries 200nm EEZ limits.[50] These developments may well indicate not only a desire by coastal states to "stake their claims" to outer continental shelf areas but also an increasing desire on the part of oil companies to access fresh potentially prospective acerage.

B. Hydrates

Gas hydrates are a non-traditional form of seabed hydrocarbons. They comprise methane trapped in a lattice of water molecules and appear as ice-like crystalline solids, which are stable inside a particular pressure and temperature envelope.[51] Gas hydrates generally occur wither in and below areas of thick permafrost onshore or, alternatively, offshore, in the marine sediments of the outer continental margins, typically in waters deeper than 500m.[52] On a global scale gas hydrates locked in the seabed have been estimated to contain twice the carbon in all known coal, oil and natural gas reserves.[53] This means that gas hydrates represent the most abundant grade of unconventional natural gas in the world, larger than all other grades of gas combined.[54] For example, it has been estimated that Japan alone has gas in place in hydrate deposits in the range of 71-471 trillion cubic feet ("tcf") (median estimate of 212 tcf), while the Asia-Pacific as a whole has median estimated gas resources from hydrates of 4,715 tcf of a global estimate of 43,311 tcf.[55]

They are particularly attractive as a potential energy resource not only because of their abundance but also because they can deliver substantial energy with more limited release of greenhouse gas emissions than

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[50] Based on analysis of exploration licenses coupled with 200nm limits. *See also* Van de Poll & Schofield, *Exploring to the Outer Limits*, *supra* note 6.

[51] William Dillon, *Gas (Methane) Hydrates—A New Frontier*, U.S. GEOLOGICAL SURVEY (Jan. 9, 2013), http://marine.usgs.gov/fact-sheets/gas-hydrates/title.html. *See also* Van de Poll & Schofield, *Exploring to the Outer Limits*, *supra* note 6.

[52] Jill Marcelle-De Silva & Richard Dawe, *Towards Commercial Gas Production from Hydrate Deposits*, 4 ENERGIES 215, 217 (2011), http://www.mdpi.com/1996-1073/4/2/215/pdf. While gas hydrates may occur in water depths in excess of 300m, they predominantly occur in the depth range of 500-4,500m. *What is Gas Hydrate?*, U.S. GEOLOGICAL SURVEY (Apr. 26, 2013, 13:24 PM), http://woodshole.er.usgs.gov/Project-pages/hydrates/primer.html.

[53] Dillon, *supra* note 51.

[54] *See* Nick A. Owen & Clive H. Schofield, *Disputed South China Sea hydrocarbons in perspective*, 36 MARINE POL'Y 809, 813 (2012).

[55] Arthur H. Johnson, *Global Resource Potential of Gas Hydrate*, SEARCH AND DISCOVERY (2011), http://www.searchanddiscovery.com/documents/2011/80183johnson/ndx_johnson.pdf; *see also Japan's Methane Hydrate R&D Program*, RESEARCH CONSORTIUM FOR METHANE HYDRATE RESOURCES IN JAPAN (2008), http://www.mh21japan.gr.jp/english/wp/wp-content/uploads/ca434ff85adf34a4022f54b2503d86e92.pdf.

comparable "traditional" energy carriers.[56] For example, methane liberates around forty-five percent more energy when burnt than heavy fuel oil. Further, burning one tonne of heavy oil generates 3.3 tonnes of CO_2 as compared with the 1.24 tonnes of CO_2 generated when one tonne of methane is burnt. Put another way, heavy fuel oil generates 2.66 times more CO_2 as compared to methane.[57] Consequently there are significant potential advantages to substituting gas hydrates for heavy fuel oil. That said, the exploitation of and/or uncontrolled release of methane from gas hydrate structures (for instance from Arctic regions as a consequence of global warming) poses risks.[58] Land subsidence and landslips on the continental shelf may occur.[59] Additionally, it has been suggested that methane is between ten and twenty-two times more effective than carbon dioxide in causing climate warming.[60]

While the exploitation of gas hydrates therefore appears to hold considerable attractions, their commercial production and exploitation is technically challenging. Consequently, gas hydrates have generally been considered the most difficult and expensive of all unconventional gas resources to recover, meaning that other their development has tended to be viewed as being beyond the horizon.[61] Recent reports suggest, however, that this scenario is changing.

The notable advantages of gas hydrates, as outlined above, have led to major oil and gas companies actively researching potential solutions to the technical obstacles involved in the commercial recovery of these unconventional gas resources. Should these efforts prove to be successful, the hydrates located within national jurisdiction, both within and beyond the 200nm limit, are likely to be a focus for future exploration efforts. In this context it is worth noting that in May 2012 the completion of a "successful, unprecedented test of technology" resulting in the safe extraction of "a steady flow of natural gas from methane hydrates" was reported.[62] The project involved collaboration between the US Department

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[56] Dillon, *supra* note 51.

[57] Calculations of heat liberated and carbon dioxide released based on the atomic and therefore molecular weights of burning methane as compared with heavy fuel oil. The author is indebted to Andrew Carruthers, consultant engineer, for his assistance in making these calculations (personal correspondence, May 2013).

[58] Dillon, *supra* note 51.

[59] *Id.*

[60] *Id.*; *see also* Dianna Shelander, Jianchun Dai, George Bunge, Dan McConnell & Niranjan Banik, *Predicting Gas Hydrates Using Prestack Seismic Data in Deepwater Gulf of Mexico*, AAPG E-SYMPOSIUM (2010), http://www.pttc.org/aapg/predictinghydrates.pdf.

[61] Owen & Schofield, *supra* note 45, at 813.

[62] *U.S. and Japan Complete Successful Field Trial of Methane Hydrate Production Technologies*, ENERGY.GOV (2012), http://energy.gov/articles/us-and-japan-complete-success

of Energy, the Japan Oil, Gas and Metals National Corporation (JOGMEC) and oil major ConocoPhillips and involved the injection of a mixture of carbon dioxide and nitrogen into a methane hydrate formation in the North Slope of Alaska, which stimulated the production of natural gas.[63] This *in situ* exchange of CO_2 and nitrogen with methane within a methane hydrate structure offers the potential for carbon sequestration as well as natural gas production.[64] Further, in what was similarly termed a "world first" development Japanese scientists working with JOGMEC successfully extracted natural gas from methane hydrates located approximately 50km offshore Japan's main island of Honshu in the Nankai Trough in March 2013.[65] Such developments suggest that the exploitation of hydrate resources, including those located within the outer continental shelf, may not be as far over the horizon as we had believed until recently.

C. Seabed Mining

Oil and gas reserves do not constitute the only minerals that can be extracted from the seabed.[66] Indeed, the seafloor has long been the source of valuable resources such as aggregates for building construction and land reclamation, though these have traditionally tended to be accessed from near-shore locations. A notable example in this context is provided by Singapore which is now substantially larger than in previous times thanks to extensive reclamation activities around its shores. This has only been achieved, however, through large-scale sand extraction from the islands and waters of neighbouring Indonesia which, in turn has caused friction between the two States and led to the imposition of a ban on such exports (from 2007) though smuggling of illegally mined sand allegedly continued.[67] Efforts to exploit other seabed resources such as from placer deposits in marine sediments, including resources such as diamonds and both base metals (such as tin)[68] and precious metals (such as gold and platinum), are also of relatively long standing. While such efforts have predominantly been undertaken in relatively shallow and thus more readily accessible locations proximate to the coast, and therefore within claimed

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ful-field-trial-methane-hydrate-production-technologies.

[63] *Id.*

[64] *Id.*

[65] *Japan extracts gas from methane hydrate in world first*, BBC NEWS (Mar. 12, 2013), http://www.bbc.co.uk/news/business-21752441.

[66] *See* Van de Poll & Schofield, *Exploring to the Outer Limits*, *supra* note 6.

[67] *See* Chris Milton, *The Sand Smugglers*, FOREIGN POLICY (Aug. 4, 2010), http://www.foreignpolicy.com/articles/2010/08/04/the_sand_smugglers?page=0,1.

[68] Mined offshore Indonesia, Myanmar and Thailand, for example.

territorial seas and EEZs, exploration efforts for diamonds, for example, are taking place in progressively deeper waters.[69] In a similar vein, there are novel proposals presently under consideration to mine other minerals from relatively shallow waters. An example of note here is a proposal by a New Zealand company to mine rock phosphate in order to make agricultural fertiliser from waters around 450m depth on the Chatham Rise, located between South Island and the Chatham Islands, where an estimated deposit of 25 million tons of phosphate is located.[70]

With respect to deeper waters, however, the main seabed mining opportunities generally relate to polymetallic or manganese nodules, ferromanganese nodules and crusts, seafloor massive sulphide ("SMS") deposits, cobalt-rich crusts and marine phosphorites. Such deposits also have the potential to contain rare earth elements, something that is likely to enhance their attractiveness as targets for seabed resource development.[71]

While there was growing interest in deep sea mineral resources such as those that might be derived from manganese and polymetallic nodules since at least the 1960s, especially in the context of the Cold War and elevated concerns over access to so-called strategic minerals, the commercial development of such resources has until recently not proved to be viable. However, significant and ongoing advances in deep sea exploration and exploitation technologies, coupled with rising mineral commodity prices, are leading to a reappraisal and raising the possibility of the viable recovery of a range of resources from the seabed. As a result, seabed mining, both within and beyond national jurisdiction, is becoming an increasingly near-at-hand proposition and the potential for such previously seemingly unlikely marine resource opportunities becoming a reality has stimulated considerable excitement.

The best known and most advanced project to date is that related to the exploitation of sea floor massive sulphide deposits in the Bismarck Sea off Papua New Guinea. Indeed, Papua New Guinea granted the world's first deep sea mining lease to Nautilus Minerals Inc. for the development of the

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[69] For example, diamond mining company De Beers undertakes sea floor mining operations off the Namibian coast in waters of 90-140m depth. *See Marine Mining*, DE BEERS, http://www.debeersgroup.com/Operations/Mining/mining-methods/Marine-Mining/ (last visited Feb. 22, 2013).

[70] Chatham Rock Phosphate holds an exploration licence over an area of 4,726km2 located approximately 450km east of Christchurch. In July 2013 the company submitted New Zealand's first ever Marine Consent Application to the New Zealand Government's Environmental Protection Authority to enable it to proceed exploration. *See* CHATHAM: ROCK PHOSPHATE, http://www.rockphosphate.co.nz/ (last visited Aug. 25, 2013).

[71] *See, e.g.*, Jim Hein, *Prospects for Rare Earth Elements From Marine Minerals*, INTERNATIONAL SEABED AUTHORITY (2012), http://www.isa.org.jm/files/documents/EN/Pubs/BP2.pdf.

Solwara 1 project in January 2011.[72] This project, billed as the world's "first seafloor gold mine," involves the exploitation of high grade seafloor massive sulfide deposits ("SMS") and hydrothermal sulfide systems in 1,600m of water in the Bismarck Sea. Indicated resources for *Solwara 1* have been put at 870,000 tonnes of ore containing 6.8 percent copper and 4.8 grams per tonne of gold, while inferred resources have been put at 1,300,000 tonnes of ore containing 7.5 percent copper and 7.2 grams per tonne of gold together with zinc and silver components.[73] The project has, however, apparently run into significant trouble not only in terms of disagreements over funding but over potential environmental and social impacts.[74]

Such developments illustrate the potential for such novel developments among the Pacific island States more generally.[75] Analogous interest in seabed mining, including on areas of outer continental shelf, has been expressed by states such as the Cook Islands, the Federated States of Micronesia, Fiji, Kiribati and Palau. Some of the figures relating to potential reserves and associated potential financial benefits to these generally small developing Pacific Island nations are staggering. For example, in August 2013 it was reported that seabed mining of manganese nodules could yield "tens of billions" of dollars in earnings for the Cook Islands alone, potentially increasing gros domestic product "a hundredfold" and transforming the Cook Islands into "one of the richest in the world in terms of per capita income."[76] While such statements appear, at first glance, more than a little far-fetched, it is nonetheless clear that interest in seabed mining opportunities is sharply on the rise.

Advances in deep sea resource exploration and exploitation technologies have also given rise to the prospect of accessing seabed resources not only

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[72] Mohammad Bashir, *Deep sea mining lease granted*, THE POST-COURIER, Jan. 19, 2011, http://www.postcourier.com.pg/20110119/news03.htm; *see also Seafloor Gold & Copper Exploration*, NAUTILUS MINERALS, http://www.nautilusminerals.com/s/Home.asp (last visited Feb. 22, 2013).

[73] *See Responsible Environmentally*, NAUTILUS CARES (2008), http://www.cares.nautilusminerals.com/SubSeaEnvironment.aspx?npath=1,6.

[74] Catherine Wilson, *Environmental Uncertainties Halt PNG Deep Sea Mining*, THE JAKARTA GLOBE, Dec. 21, 2012, http://www.thejakartaglobe.com/international/environmental-uncertainties-halt-png-deep-sea-mining/562974.

[75] Regarding developments in seafloor polymetallic massive sulphide mining, *see* Peter M.Herzig, *Seafloor Massive Sulfide Deposits and Hydrothermal Systems*, *in* 8 LEGAL AND SCIENTIFIC ASPECTS OF CONTINENTAL SHELF LIMITS 431-56 (Myron H. Nordquist, John N. Moore & Tomas Heidar eds., 2004).

[76] Rupert Neate, *Seabed mining could earn Cook Islands 'tens of billions of dollars'*, THE GUARDIAN, Aug. 5, 2013, http://www.theguardian.com/business/2013/aug/05/seabed-mining-cook-islands-billions.

within areas of outer continental shelf but in deeper waters and areas beyond national jurisdiction. While developments in the area are proceeding apace, notably in respect of the Clarion-Clipperton Zone in the Equatorial North Pacific Ocean and in the Central Indian Basin of the Indian Ocean,[77] areas of outer continental shelf subject to national jurisdiction are likely to be particularly attractive areas for development from the perspective of the coastal states, which hold sovereign rights over these areas. Indeed, it has been estimated that the Clarion-Clipperton Zone alone holds more than 27 billion tonnes of nodules containing of the order of 7 billion tonnes of manganese, 340 million tonnes of nickel, 290 million tonnes of copper and 78 million tonnes of cobalt as well as rare earths needed for the production of many hi-tech products such as smart phones.[78] This led the International Seabed Authority's (ISA) Legal Counsel, Michael Lodge, to comment in May 2013 that "We are on the threshold of a new era of deep seabed mining."[79] While the figures suggested may appear extraordinary, there seems little doubt that interest in the exploitation of these resources will be sustained so long as commodity prices remain high. The ISA's approval of exploration plans for the development of cobalt-rich manganese crusts by Chinese and Japanese concerns during its nineteenth session in July 2013 also appears to bear out the seriousness of this interest.[80]

D. Marine Genetic Resources From The Deep

In addition to mineral and other non-living resources contained in the seabed and subsoil of the outer continental shelf, coastal states also have sovereign rights over "living organisms belonging to sedentary species," defined as "organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical

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[77] For maps detailing areas of exploration as well as information on contractors and reserved areas, see *Exploration Areas*, INTERNATIONAL SEABED AUTHORITY, http://www.isa.org.jm/en/scientific/exploration (last visited Feb. 22, 2013).

[78] David Shukman, *Deep sea mining 'gold rush' moves closer*, BBC NEWS, (May 17, 2013), http://www.bbc.co.uk/news/science-environment-22546875.

[79] Vicky Validakis, *Deep sea bed mining rush a step closer to reality*, AUSTRALIAN MINING (May 21, 2013), http://www.miningaustralia.com.au/news/deep-sea-mining-rush-a-step-closer-to-reality; *see also* Christopher Werth, *Deep Sea Mining: Economic Bonanza or Environmental Boondoggle?*, PRI'S THE WORLD (May 20, 2013), http://www.theworld.org/2013/05/deep-sea-mining-economic-bonanza-or-environmental-boondoggle/.

[80] Press Release, International Seabed Authority, International Seabed Authority Concludes Nineteenth Session: Assembly adopts decision on fees; approves amendments to nodules regulations; hears from host country's official; sets date for next session (July 25, 2013), http://www.isa.org.jm/files/documents/EN/Press/Press13/SB-19-17.pdf.

contact with the seabed or the subsoil."[81] These sedentary living resources of the outer continental shelf, including marine genetic resources, may also prove to have considerable value.

Marine biota (plants and animals) represent a relatively untapped resource offering developmental potential for a range of valuable applications. Perhaps the best known of these applications are in the medical and pharmaceuticals industries where so called "wonder drugs" from the sea have been heralded. To date, the actual commercial application of marine biotechnology has been limited, however, with only two marine derived drugs having been approved for use, namely: Prialt®, a painkiller based on cone snail venom peptide omega-conotoxin derived from *Conus magnus*, and Yondelis®, an anticancer agent derived from sea squirt (trunciate) metabolite ecteinascidilin-743 from *Ecteinascidia turbinata*.[82] Additionally, a host of marine-derived drugs are in development with over twenty candidates undergoing clinical and preclinical trials at the time of writing.[83] Marine-derived products may also have commercial applications in other sectors such as agriculture (providing specialist health foods and dietary supplements as well as agricultural chemicals such as herbicides and pesticides), in the cosmetics industry (for instance, the anti-inflammatory properties of the soft coral *Pseudopterogorgia elisabethae* are used in the Estée Lauder Resilience skin-care range to combat irritation), and in industry where marine products can provide valuable enzymes and catalysts in industrial processes.[84]

In this context, marine species and microorganisms that have evolved to exist in extreme environments, so-called "extremophiles," are of particular interest. Such environments and habitats include the deep sea, as well as in the vicinity of seamounts, hydrothermal vents, methane seeps. Such features have been discovered on the extended continental shelf. Organisms living here have adapted to survive in the complete absence of light, in conditions of extremely high pressure, in either low or very high (for example in the vicinity of a hot water vent) temperatures, or in environments characterised by extreme salinity or acidity.

This has led to the emergence of "bioprospecting" and the deep seabed, including outer continental shelf areas, are likely to be a focus for these activities.[85] This represents a potentially rich resource and opportunity for

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[81] *LOSC*, *supra* note 7, art. 77 (4).

[82] Danielle Skropeta, *Exploring Marine Resources for New Pharmaceutical Applications*, *in* MARINE RESOURCES MANAGEMENT 211, 211, 214-15 (Warwick Gullett, Clive H.Schofield & Joanna Vince eds., 2011).

[83] *Id.* at 216-17.

[84] *Id.* at 211, 217.

[85] Bioprospecting has been defined as including "the entire research and development

coastal states. Indeed, marine biotechnology-related products were estimated to be worth $100 billion (USD) in the year 2000 alone.[86] The potential for further growth in marine bioprospecting is emphasised by the fact that around 1,000 new marine natural products are reported annually.[87] This points to how biodiversity-rich yet under-explored and thus little known the oceans are. Indeed, it has been suggested that the oceans are ninety-five percent unexplored.[88] Moreover, the number of ocean-dwelling species has been estimated at around ten million—a figure fifty times greater than the number of marine species reported thus far. In this context, deepwater areas hold particular promise as they are likely to host unique extremophiles and also because these areas are least explored, notwithstanding considerable advances in technologies applicable to exploring deep sea areas made in recent decades. This is illustrated by the fact that of over 30,000 marine natural products reported since the 1960s, less than two percent derive from the deep sea organisms.[89]

While marine genetic resources appear to offer great potential for the future, significant challenges stand in the way of realising this potential and, despite the substantial figures mentioned above, in practice there appears to have been only relatively limited commercialization of marine genetic resources. In particular, securing an adequate supply of extremely rare marine organisms represents a major impediment to scaling up commercial production of marine-derived products. While such obstacles can be overcome through, for example, cultivating the organisms concerned or, alternatively, synthesising the chemical composition of the originally marine-derived product, both of these options necessarily entail

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process from sample extraction by publicly funded scientific and academic research institutions, through to full scale commercialization and marketing by commercial interests such as biotechnology companies." *See An Update on Marine Genetic Resources: Scientific Research, Commercial Uses and a Database on Marine Bioprospecting*, UNITED NATIONS INFORMAL CONSULTATIVE PROCESS ON OCEANS AND THE LAW OF THE SEA 7 (2007), http://www.ias.unu.edu/resource_centre/Marine%20Genetic%20Resources%20UNU-IAS%20Report.pdf; *see also* Salvatore Arico & Charlotte Salpin, *Bioprospecting of Genetic Resources in the Deep Seabed: Scientific, Legal and Policy Aspects*, UNU-IAS REPORT 25 (2005), http://www.ias.unu.edu/binaries2/DeepSeabed.pdf.

[86] Arico & Salpin, *supra* note 85, at 17; *see also* Joanna Mossop, *Protecting Marine Biodiversity on the Continental Shelf Beyond 200 Nautical Miles*, 38 OCEAN DEV. & INT'L L. 283, 283-85 (2007).

[87] Skropeta, *supra* note 82, at 217.

[88] *See, e.g., Rio Ocean Declaration*, *surpa* note 35. Similarly, the 2011 inter agency Blueprint for Ocean and Coastal Sustainability noted that "for all the promise they contain, there are vast ocean regions that remain almost entirely unexplored." *See* IOC/UNESCO, IMO, FAO, UNDP, *supra* note 35, at 21.

[89] Skropeta, *supra* note 82, at 221-22.

considerable costs as well as delays.[90] Moreover, it has been suggested that recent "game changing" advances in biotechnology, especially the way in which biotech research is carried out, may mean that marine genetic resources are likely to become substantially less important and thus valuable than previously thought, potentially undermining the rationale for undertaking bioprospecting in the first place.[91]

IV. EMERGING CHALLENGES

While it seems clear that significant "new" resource opportunities exist—and it will be increasingly feasible to take these opportunities up as exploration and exploitation technologies advance and energy and mineral commodity prices in particular escalate—there is reason for caution. Key issues that occur in this context include uncertainties over the extent of maritime jurisdictional rights and attendant disputes between neighbouring states and the unknown impacts of new resource activities on the marine environment, especially of unknown or unexplored remote and deepwater areas.

With respect to maritime zones, it is worth noting that, even within 200nm of the coast, fewer than half of the potential maritime boundaries around the world have been delimited. In this context it can also be observed that that many of the maritime boundary agreements that have been reached among coastal states are only partial in character - relating to either only part of the length of the potential maritime or dealing with only one zone, such as continental shelf. Additionally, beyond the 200nm limit it appears that it will be a considerable time before the outer limits of the continental shelf are delineated. Indeed, at present rates of progress the CLCS has decades of work ahead of it in order to provide recommendations allowing for the finalisation of the outer limits of the continental shelf. Broad areas of overlapping maritime claims and disputes are therefore likely to remain a notable feature of the maritime political map of the world for the foreseeable future. This is highly likely to have negative implications in terms of the development of marine resources within disputes maritime spaces.

A further key uncertainty and significant challenge for the future relates to the environmental implications of the marine resource developments outlined above. As the *Deepwater Horizon* disaster demonstrated, the

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[90] *Id.* at 217-19.

[91] *See* David Leary and S. Kim Juniper, *Addressing the Marine Genetic Resource Issue: Is the Debate Heading in the Wrong Direction?*, *in* THE LIMITS OF MARITIME JURISDICTION 769-785 (Clive H. Schofield, Seokwoo Lee & Moon-Sang Kwon eds., forthcoming 2014) (manuscript at 777).

offshore oil and gas industry is far from immune to accidents and environmental catastrophe. While recent events in Papua New Guinea and elsewhere provide guarded cause for optimism that deep sea resource opportunities will not be pursued at all costs in that a seabed mining project has stalled at least partly as a consequence of serious concerns over potential impacts on the marine environment, it remains to be seen whether such concerns will prove compelling in the face of economic drivers, especially in developing state contexts. Here it can be observed that few coastal states have developed appropriate regulatory mechanisms to handle such developments or undertaken the in-depth scientific research and analysis necessary in order to be able to take informed decisions on possible or likely environmental impacts. That said, the energy security and economic imperatives to proceed with new marine resource developments remain ominously powerful.

Restoration and Large Marine Ecosystems: Strengthening Governance for an Emerging International Regime Based on "Ecoscape" Management

Anastasia Telesetsky*

Abstract

Ecologists have long recognized that arbitrary political boundaries do not reflect ecological boundaries. In response, they have proposed the adoption of ecoregional thinking. Over time, this ecoregional thinking has influenced policymakers to designate large marine ecosystems ("LMEs") to be managed as one ecological unit across political boundaries. These ecological units include both land and sea systems. The Global Environmental Facility has invested in a number of LMEs to promote restoration activities to reverse environmental degradation. This paper reviews a sample of existing LME projects and explores what restoration efforts are taking place at an LME level and what shared governance institutions exist to support these restoration efforts. This paper concludes that while there are shared visions for restoration projects within the LMEs, there has been insufficient institutional effort to effectively integrate both human and ecological considerations in marine restoration efforts. The concept of "ecoscape" thinking, place-based public and private management of large landscapes and seascapes, provides a useful tool for strengthening LME-specific institutions as leaders in long-term coastal and marine governance. This paper proposes three "ecoscape" interventions to improve LME governance for the future: 1) re-inventing LMEs as socio-ecological decision makers, 2) ensuring that government investments within an LME for marine and coastal restoration will survive long-term climate change impacts, and 3) creating LME-wide enforcement teams.

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I. INTRODUCTION

In the past few decades, biologists have become increasingly insistent that conservation at the large landscape/seascape level is critical to protect vulnerable ecosystems.[1] Responding to the scientific findings that large-scale conservation is necessary to preserve habitat connectivity and diversity,[2] policymakers have invested public resources in designing and implementing large marine protected areas.[3] Ecological restoration at the large landscape/seascape level is also becoming increasingly important in

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[1] *See, e.g.*, LANDSCAPE-SCALE CONSERVATION PLANNING (Stephen C. Trombulak & Robert F. Baldwin eds., 2010); LANDSCAPE LINKAGES AND BIODIVERSITY (Wendy E. Hudson ed., 1991).

[2] Myles H.M. Menz, Kingsley W. Dixon & Richard J. Hobbs, *Hurdles and Opportunities for Landscape-Scale Restoration*, 339 SCIENCE 526 (2013).

[3] The Chagos Marine Reserve is a 397,678 square mile reserve in the Pacific Ocean designated by the Government of the United Kingdom. *Chagos Marine Reserve*, CHAGOS-TRUST.ORG, http://www.chagos-trust.org/about/chagos-marine-reserve (last visited Apr. 12, 2013). The Papahānaumokuākea Marine National Monument is a 139,797 square mile reserve in the Pacific Ocean designated by the United States Government. *Papahānaumokuākea Marine National Monument & World Heritage Site*, PAPAHANAUMOKU AKEA.GOV, http://www.papahanaumokuakea.gov/about/ (last visited Apr. 4, 2013). The proposal by PEW Foundation under its Global Ocean Legacy Program to create 15 large marine reserves by 2022 including a proposed reserve supported by the Government of Chile and the Easter Island residents of approximately 386,102 square miles (1 million square kilometers). A. Krebs & F. Rodruquez, *Creating The Largest Marine Reserve in The World in Easter Island*, PEWENVIRONMENT.ORG (Dec. 5, 2012), http://www.pewenvironment.org/news-room/media-coverage/creating-the-largest-marine-reserve-in-the-world-in-easter-island-85899437842.

order to return ecological functions to damaged ecological systems. Creating governance mechanisms that operate at the large landscape/seascape level, however, presents a daunting challenge because most human communities are unable to strongly identify with areas beyond their physical experience. In our governance practices, social systems remain isolated from ecological systems, in spite of the mutual dependence between these systems. This paper is about governance in Large Marine Ecosystems ("LMEs") and proposals to enhance socio-ecological governance through "ecoscape" thinking.

As context for the topic of large-scale landscape/seascape work and governance, this paper starts with an examination of several LMEs that have received funding from the Global Environment Facility ("GEF") to support restoration activities. As part of the discussion of a few select LMEs, this paper focuses on two questions: 1) what specific LME-based efforts are underway to restore large-scale marine ecosystems? and 2) what regionally shared governance institutions exist within a given LME project to support region wide social changes that may be necessary for effective LME restoration?

A review of these select LMEs suggests that existing LME governance systems, in spite of engaging in restoration work as part of the LME's agenda, have failed to create opportunities for long-term systemic social change. Most of the LMEs function as scientific guidance bodies rather than as socio-ecological decision makers. While credible scientific research is essential to the management of LMEs, the absence of regional governance structures based on LMEs and the lack of a regional enforcement authority represent lost opportunities for implementing an LME-based approach that furthers the goals of large-scale restoration.

This paper proposes the need for developing "ecoscape" thinking to support credible participatory governance across various governance levels in order to restore broken or degraded connections in large-scale marine and coastal ecosystems. Three policy interventions that reflect "ecoscape thinking" are proposed to improve LME-based restoration efforts for the coming century: 1) re-inventing LMEs as socio-ecological decision makers, 2) ensuring that government investments within an LME for marine and coastal restoration will survive long-term climate change impacts, and 3) creating LME wide enforcement teams.

II. LARGE MARINE ECOSYSTEMS AND GOVERNANCE

LMEs provide an opportunity to focus on a large landscape/seascape level. The concept was pioneered in the 1960s[4] as a tool for creating a mechanism to implement ecosystem-based management.[5] This management has largely focused on scientific concerns. As conceived by ecologists, these regions span large areas of over 200,000 square kilometers and are defined by scientific characteristics rather than legal characteristics. As Charlotte de Fountaubert and Tundi Agardy observed, LMEs can be delineated based on their "distinct biological communities with characteristic reproductive, growth and feeding activities and interrelationships."[6] The idea emerged out of integrated marine and coastal area management that is designed to work with all stakeholders "including decision makers in the public and private sectors; resource owners, managers and users; nongovernmental organizations; and the general public"[7] as part of "a participatory process for decision making to prevent, control, or mitigate adverse consequences from human activities in the marine and coastal environment, and to contribute to the restoration of degraded coastal areas."[8]

At the time it was introduced, the idea of an LME served an important policy bridge between the land and the ocean.[9] Instead of delineating land-based management from marine-based management, the LME integrated these concepts in a single biologically meaningful region.[10] LMEs made explicit that what happened on the land impacted the sea in the form of chronic marine pollution and vice versa as fish stocks have continued to fall and fishermen are unable to maintain viable livelihoods.[11]

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[4] U.S. COMMISSION ON OCEAN POLICY, AN OCEAN BLUEPRINT FOR THE 21ST CENTURY 63 (2004), *available at* http://www.oceancommission.gov/documents/full_color_rpt/000_ocean_full_report.pdf.

[5] Kenneth Sherman, *The Large Marine Ecosystem Concept: Research and Management Strategy for Living Marine Resources*, 1 ECOLOGICAL APPLICATIONS 349 (1991).

[6] A. Charlotte de Fontaubert, David Downes & Tundi Agardy, *Biodiversity in the Seas: Implementing the Convention on Biological Diversity in Marine and Coastal Habitats*, 10 GEO. INT'L ENVTL. L. REV. 753, 769 (1998).

[7] *Integrated Marine and Coastal Area Management*, CONVENTION ON BIOLOGICAL DIVERSITY, http://www.cbd.int/marine/imcam.shtml (last visited Dec. 3, 2013).

[8] *Id.*

[9] Lawrence Juda, *Considerations in Developing a Functional Approach to the Governance of Large Marine Ecosystems*, 30 OCEAN DEV. & INT'L L. 89, 89-90 (1999).

[10] *Id.*

[11] *Id.*

There are currently sixty-four designated LMEs.[12] Each LME is measured from a land-based feature such as a river basin or estuary out to a seaward marker such as a continental shelf break or a defined oceanic current system.[13] In the case of the semi-enclosed Black Sea LME, this area is defined by a combination of bottom depth contours, currents, marine productivity, and food webs.[14] There is no singular formula for defining what constitutes a LME.[15] The brief evaluation of LMEs and restoration that follows will be based on several LMEs that are participating in the GEF program that has been organized to help State members to meet ecosystem-related targets. Specifically, GEF is providing funding to LMEs for planning and implementing projects to support "(1) recovery of depleted fish stocks; (2) restoration of degraded habitats; and (3) reduction of coastal pollution and eutrophication."[16]

There are fourteen designated GEF-LME projects that are engaged in a state-based process of "transboundary diagnostic analysis" and in preparing strategic action programs to respond to priority ecosystem concerns in the LMEs.[17] One of the explicit goals of the GEF-LME projects based on the World Summit on Sustainable Development is restoration of fish stocks.[18] The GEF, when it agreed to finance the LME projects, also expected the projects to link social and ecological interests.[19] Specifically, the projects are expected to provide a framework of "basic linkages between scientific assessments, protection of the marine environment, sustainable

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[12] THE UNEP LARGE MARINE ECOSYSTEM REPORT: A PERSPECTIVE ON CHANGING CONDITIONS IN LMES OF THE WORLD'S REGIONAL SEAS iii (Kenneth Sherman & Gotthilf Hempel eds., 2008), *available at* http://iwlearn.net/publications/regional-seas-reports/unep-regional-seas-reports-and-studies-no-182/background-report-perspectives-on-regional-seas-and-the-large-marine-ecosystem-approach/at_download/file [hereinafter UNEP LARGE MARINE ECOSYSTEM REPORT].

[13] SUSTAINING THE WORLD'S LARGE MARINE ECOSYSTEMS 2 (K. Sherman, M.C. Aquarone & S. Adams eds., 2009), *available at* http://www.lme.noaa.gov/lmeweb/downloads/book_sustain.pdf.

[14] UNITED NATIONS ENVIRONMENTAL PROGRAMME AND NATIONAL OCEANOGRAPHIC AND ATMOSPHERIC ADMINISTRATION, UNEP REGIONAL SEAS PROGRAMME LINKED WITH LARGE MARINE ECOSYSEMS ASSESSMENT AND MANAGEMENT 2, *available at* http://www.lme.noaa.gov/LMEWeb/Publications/brochure_unep_rs.pdf [hereinafter UNEP REGIONAL SEAS PROGRAMME LINKED WITH LARGE MARINE ECOSYSTEMS ASSESSMENT AND MANAGEMENT].

[15] SUSTAINING THE WORLD'S LARGE MARINE ECOSYSTEMS, *supra* note 13, at 2 ("[LMEs] are relatively large regions of 200,000 km^2 or greater, the natural boundaries of which are based on four ecological criteria: bathymetry, hydrography, productivity, and trophically related populations.").

[16] THE UNEP LARGE MARINE ECOSYSTEM REPORT, *supra* note 12, at 6.

[17] *Id.* at 7.

[18] *Id.* at 6.

[19] *Id.*

development of coastal and marine resources, and poverty alleviation."[20] Based on the experience of six geographically distinct LMEs, the following section explores 1) what LME-based efforts are underway to restore large-scale marine ecosystems and 2) what regional governance institutions exist within the LME project that can provide leadership for effective LME restoration. The following review is limited to a sample of one GEF-LME project from each major region (Africa, Middle East, Europe, North Asia, North America).[21]

A. Benguela Current LME

The Benguela Current LME includes all of the Exclusive Economic Zones ("EEZs") of Angola and Namibia and part of the South African EEZ for a total area of 1.5 million square kilometers.[22] Marine researchers consider it one of the most productive marine resource areas in the world with large numbers of small fish stocks including sardines, anchovies, and herring.[23] There have been declines in the fish landings since the late 1970s due to excessive fishing effort, overcapacity of fishing fleets, and "fishing down marine food webs" from Namibian, South African, and foreign fleets.[24] In addition, environmental conditions have resulted in changes in stock composition[25] and global climate change is expected to result in additional fluctuations. Some of the environmental challenges impacting the region include harmful algal blooms as a result of inappropriate waste management, agricultural pollution, and industrial pollution.[26] Poor development practices include poor coastal development, large-scale diamond mining and oil production without safeguards for marine protection.[27]

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[20] UNEP REGIONAL SEAS PROGRAMME LINKED WITH LARGE MARINE ECOSYSTEMS ASSESSMENT AND MANAGEMENT, *supra* note 14, at 6.

[21] LMEs participating in the GEF program that were not evaluated for this study were the Mediterranean (19 countries), Gulf of Guinea (6 countries), Yellow Sea (2 countries), Baltic Sea (9 countries), Canary Current (7 countries), Guinea Current (16 countries), Caribbean Sea (23 countries). *Id.* at 5.

[22] S. Heileman & M.J. O'Toole, *I-1 Benguela Current LME*, *in* THE UNEP LARGE MARINE ECOSYSTEM REPORT: A PERSPECTIVE ON CHANGING CONDITIONS IN LMES OF THE WORLD'S REGIONAL SEAS 103 (Kenneth Sherman & Gotthilf Hempel eds., 2008), *available at* http://iwlearn.net/publications/regional-seas-reports/unep-regional-seas-reports-and-studies-no-182/lmes-and-regional-seas-i-west-and-central-africa/at_download/file.

[23] *Id.*

[24] *Id.* at 108-09.

[25] *Id.* at 109.

[26] *Id.* at 110.

[27] *Id.* at 110-11.

Based on its Strategic Action Program, the Benguela Current LME project's priorities are restoring depleted fisheries and reducing coastal resources degradation.[28] However, no mention is made of tapping into the capacity of private governance actors to address either of these priorities. It is unclear from the Benguela Current Commission's ("BCC") documents whether reducing the degradation of coastal resources will also include restoration work.

Organized in 2007, the primary governing institution for the LME is the BCC, which is charged with implementing an ecosystem-based approach in the region.[29] The BCC's functions are to provide best available scientific advice, support sustainable exploitation and management of living marine resources, support responsible exploitation and management of non-living marine resources, conserve environmental resources including "ecosystem functions and processes," prevent and mitigate against pollution, and provide human, institutional, and financial resources to achieve the objectives of the yet to be ratified Benguela Current Convention.[30] The governing treaty for the LME's primary institution, the Benguela Current Convention[31] makes no mention of restoration. It refers instead to the "long-term . . . rehabilitation, enhancement and sustainable use" of the LME.[32] This is understood by the BCC as giving it the authority to create policies and programs for "revers[ing] and prevent[ing] habitat alteration and destruction."[33] The choice of the word "rehabilitation" is a curious one because it is typically associated with a lack of expectation that the rehabilitation will be "in as original or as healthy a state as if it had been restored."[34] The interim BCC, under the strategic action program, was expected to have developed a voluntary Code of Conduct for responsible mining "including rehabilitation of affected areas"[35] by 2004.

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[28] *Id.* at 113.

[29] THE BENGUELA CURRENT COMMISSION, http://www.benguelacc.org/ (last modified Mar. 13, 2013).

[30] *BCC Vision and Mission,* THE BENGUELA CURRENT COMMISSION, http://www.benguelacc.org/index.php/about-us/bcc-vision-and-mission (last modified Feb. 28, 2013).

[31] The treaty was signed on March 18, 2013 in Bengeula, Angola by Angola, Namibia, and South Africa.

[32] *The Benguela Current Convention* 5, THE BENGUELA CURRENT COMMISSION, http://www.benguelacc.org/images/Claire_PDFs/Benguela%20Current%20Convention/Benguela%20Convention%20ENGLISH.pdf (last visited Mar. 21, 2013) [hereinafter The Benguela Current Convention].

[33] *Id.*

[34] Anthony Bradshaw, *Introduction and Philosophy, in* HANDBOOK OF ECOLOGICAL RESTORATION, VOL 1: PRINCIPLES OF RESTORATION 6 (Martin R. Perrow & Anthony J. Davy eds., 2002).

[35] *Strategic Action Programme* 11, BENGUELA CURRENT LARGE MARINE ECOSYSTEM

The BCC is also exploring institutional partnerships with the Abidjan Convention,[36] a treaty negotiated under the United Nations Environmental Programme's Regional Seas Program. The Abidjan Convention focuses on marine waters, coastal zones, and connected inland waters within the jurisdiction of the States of sixteen Western and Central African States.[37] The treaty and its two protocols create a framework for land-based pollution control, managing of special areas, environmental impact assessment, scientific cooperation, and liability.[38] There is no mention in either the treaty or the later protocols of any joint efforts for restoration.

In answering the two review questions posed above, there appears currently to be no systematic efforts underway to restore the large-scale marine ecosystem in the Benguela Current LME even though the BCC understands itself as having the ability to create interventions to reverse, where possible, habitat alteration and destruction. The current Strategic Action Plan calls for countries to cooperatively restore shared fisheries. At this time, most of these fishery restoration efforts appear to be largely administrative and focused on the institution building of the BCC. Specific efforts to restore the fisheries remain undefined in terms of whether the BCC will recommend a passive restoration model or manage an active restoration model with projects such as artificial reefs or wetland creation. It is important to make these types of decisions early because the technical aspects of restoration have a number of uncertainties. Regions may find themselves with fewer options for restoration the longer they delay in making decisions about restoration strategies. For example, where passive restoration through closing a fishery and monitoring for non-compliance

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PROGRAMME (2002), http://www.benguelacc.org/images/Claire_PDFs/BCLME%20SAP%20English.pdf.

[36] Executive Director Report for the Conference of Parties-10 Abidjan Convention, para. 77 (Nov. 12, 2012), UNEP(DEPI)/WACAF/COP.10/3.

[37] The Abidjan Convention countries are Angola, Benin, Cameroon, Cape Verde, Congo, Cote d'Ivoire, Democratic Republic of Congo, Equatorial Guinea, Gabon, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mauritania, Namibia, Nigeria, Sao Tome and Principe, Senegal, Sierra Leone and Togo." UNEP, *The Convention*, ABIDJAN CONVENTION SECRETARIAT, http://abidjanconvention.org/index.php?option=com_content&view=article&id=46&Itemid=103 (last visited Feb. 17, 2013).

[38] *West and Central African States: Conference on Co-operation in the Protection and Development of the Marine and Coastal Environment of West and Central African Region*, 20 INT'L LEGAL MATERIALS 729 (1981); *The Protocol Concerning Co-Operation In Combating Pollution In Cases Of Emergency, id.* at 756; *Additional Protocol To The Abidjan Convention Concerning the Cooperation in the Protection and Development of the Marine and Coastal Environment from Land-Based Sources and the Activities in The Western Central and Southern African Region*, UNEP (2012), *available at* http://abidjanconvention.org/index.php?option=com_docman&task=doc_download&gid=122&Itemid=181.

might be sufficient to restore a given stock or a given habitat, such option may disappear when resources are so depleted that there are few breeding pairs or where the breeding pairs are unhealthy due to pollution. Restoration relies upon processes that take time, both to understand and to implement.[39]

The BCC appears to be well positioned to call for social changes from stakeholders with the catch-all provision in the Convention permitting the Commission to "carry out such other activities as may be necessary for the Commission to achieve the objective of this Convention."[40] The BCC's ability to be able to carry out more comprehensive activities to support restoration at the large landscape/seascape level will depend, of course, on the extent of funding available from both national and international sources. It is encouraging that the Benguela Current LME has a regional governance network specifically designed to respond to managing the LME. Unfortunately, it does not appear to have an LME-wide restoration strategy in place yet, which may result in unnecessary delays in habitat recovery. Nor is there a plan for linking any future restoration work directly to climate change impacts to ensure that habitat restoration work within the LME is adapted to climate change.[41]

B. Red Sea LME

With a surface area of 458,620 square kilometers, the Red Sea LME[42] hosts 3.8% of the world's coral reefs.[43] Though it is one of the most saline water masses, it has a high level of productivity.[44] Most fishing is artisanal, though there is commercial trawling by Egypt, Yemen, and Saudi Arabia.[45] There is widespread illegal fishing and habitat destruction in the area by

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[39] Bradshaw, *supra* note 34, at 6.

[40] The Benguela Current Convention, *supra* note 32, at 6.

[41] Climate Change impacts on the Benguela Current LME particularly in terms of fishery yields have been contemplated frequently, but there is no linkage being made between regional ecosystem restoration and climate change adaptation within the LMEs operational documents.

[42] S. Heileman & N. Mistafa, *III-6 Red Sea LME*, *in* THE UNEP LARGE MARINE ECOSYSTEM REPORT: A PERSPECTIVE ON CHANGING CONDITIONS IN LME OF THE WORLD'S REGIONAL SEAS 175 (Kenneth Sherman & Gotthilf Hempel eds., 2008), *available at* http://iwlearn.net/publications/regional-seas-reports/unep-regional-seas-reports-and-studies-no-182/lmes-and-regional-seas-iii-red-sea-and-gulf-of-aden/at_download/file (states involved in the LME include Djibouti, Egypt, Eritrea, Israel, Jordan, Saudi Arabia, Sudan, and Yemen).

[43] *Id.*

[44] *Id.*

[45] *Id.* at 178.

both local States and distant water States exacerbating the problems with most fish species being either fully exploited or overexploited.[46] A number of endemic shark species located off the coasts of Sudan, Djibouti, and Yemen are over-exploited due to the shark fin trade.[47] Coral habitats are heavily impacted by both "uncontrolled landfilling and land-based pollution" as well as ship sewage and industrial effluent and leaks from chemical plants and oil platforms.[48] Crown of thorn infestations have led to a twenty to thirty percent reduction in coral cover.[49] In addition to coral reef degradation, mangrove forests are dying from building construction, shrimp farming, firewood harvesting, and grazing activities. In addition, seagrass is disappearing because of trawling, dredging, and releasing of untreated wastewater.[50] In short, there is a need even more urgent than what the BCC is calling for in the Benguela Current LME, a thinking that goes beyond mere conservation to the organization of restoration activities.

The Red Sea Strategic Action Program ("SAP") provides both preventive and curative actions.[51] As part of its recommendations for curative actions, the SAP called for "restoration of coastal and marine habitats" as a "highest priority for biodiversity conservation."[52] Where necessary, as part of the protection of the arid coastal zone, the SAP called for "[r]e-stabilization of the mobile dunes by restoration of the plant cover."[53] The SAP identified a number of "curative" actions including better water resources management, water supply and wastewater treatment, solid waste management, industrial pollution control, port reception facilities, control of pollution from oil exploration and production and control of dredging and filling.[54]

In a key part of the SAP, the Red Sea LME States recognize the value of working with non-State actors to promote behavioral changes for restoration of the LME. The States participating in the SAP recognized that "[t]he private sector has a significant role to play in both preventive and curative actions in all sectors in which it is involved and the formation of an

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[46] *Id.* at 180.

[47] *Id.*

[48] *Id.* at 181.

[49] *Id.* at 182.

[50] *Id.*

[51] *Strategic Action Programme for the Red Sea and Gulf of Aden*, REGIONAL ORGANIZATION FOR THE CONSERVATION OF THE ENVIRONMENT OF THE RED SEA AND GULF OF ADEN 3 (1998), *available at* http://iwlearn.net/iw-projects/340/reports/persga_sap_1998.pdf/view.

[52] *Id.* at 33.

[53] *Id.*

[54] *Id.* at 39.

effective 'public-private partnership' at the regional and national level is important to the success of the Programme."[55]

The Red Sea LME's institutional support is through the Programme for the Environment of the Red Sea and Gulf of Aden ("PERSGA"). The institution is responsible for implementing a number of regional treaties including the Regional Convention for the Conservation of the Environment of the Red Sea and Gulf of Aden[56] and the Action Plan for the Conservation of the Environment of the Red Sea and Gulf of Aden.[57] PERSGA has developed a Regional Action Plan for the Conservation of Coral Reefs in the Red Sea and Gulf of Aden. Furthermore, PERSGA has been actively involved in promoting restoration work. In 2010, they produced a Mangrove Restoration Guide that observed that effective large-scale restoration will require both compatibility with "local patterns of resource use and land tenure" and recognition from the local community that the restoration provides them "economic or other tangible benefits."[58]

PERSGA has also developed a set of guidelines regarding compensation for damage to coral reefs by ship grounding.[59] PERSGA called for compensation to be paid by the ship for use in part to restore the coral resources and to improve navigation. This presented a new issue for the Red Sea LME because no restoration practices associated with vessel grounding existed.[60] PERSGA recognized that natural reef recovery may take centuries and so artificial propagation may be necessary.[61] PERGSA proposed a need for an organized regional response to ship grounding. The proposal called for enacting laws that would require vessel owners to pay restoration costs to local authorities immediately. Thus, reducing the likelihood that restoration work would be unnecessarily delayed by court proceedings.[62] The process of restoration is distinguished from rehabilitation and is recognized as a secondary strategy after conservation

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[55] *Id.* at 43.

[56] *Regional Convention for the Conservation of the Red Sea and Gulf of Aden (1982)*, UNEP, http://www.unep.ch/regionalseas/main/persga/convtext.html.

[57] *See Strategic Action Programme for the Red Sea and Gulf of Aden*, *supra* note 51.

[58] PETER SAENGER & AHMED S.M. KHALIL, REGIONAL GUIDELINES FOR MANGROVE RESTORATION IN THE RED SEA AND GULF OF ADEN 14 (2011), *available at* http://www.persga.org/Documents/Publications/Flipping_Books/Mangrove_Restoration/index.html.

[59] Mohammed M.A. Kotb & Mohamed A. Zaid, *Guidelines for Compensation Following Damage to Coral Reefs by Ship Or Boat Grounding* 15, PROGRAMME FOR THE ENVIRONMENT OF THE RED SEA AND GULF OF ADEN TECHNICAL SERIES (2009), http://www.persga.org/Files///Common/Flipping_Books_Downloads/Guidelines_for_Compensation_Following_Damage_to_Coral_Reefs_by_Ship_Grounding.pdf.

[60] *Id.* at 44.

[61] *Id.* at 5-6.

[62] *Id.* at 44.

efforts have failed.[63] In a key observation, PERSGA articulates the complexity of restoration and the need for physical habitat restoration frequently as a precursor to biological restoration with the conclusion that "restoration is not a one-off event but an ongoing process over a time-scale of several years and is likely to need adaptive management."[64] For a political organization, this set of guidelines is refreshing in terms of its understandings of the complex social decisions involved in restoration work as well as the costs of doing physical substrate restoration.[65] In these guidelines, PERSGA has also made the additional governance proposals of forming a regional compensation committee, implementing regional environmental law, and forming a regional coral reef rescue team.[66]

Finally, PERSGA has drafted a biodiversity protocol as a harmonization effort for Red Sea LME States to promote biodiversity policies[67] in conjunction with the Regional Organization for the Protection of the Marine Environment ("ROPME").[68] The Protocol requires parties to examine international restoration standards, to analyze the costs and benefits of environmental restoration including the introduction of artificial habitats, and to monitor "the effectiveness of restoration programmes according to national priorities and capability".[69] For regulated commercial or cultural species, Parties are expected to keep lists including "measures for restoration of [sic] population decline."[70] Parties are expected to develop and adopt "common criteria . . . to determine when an ecosystem or population of a species is sufficiently degraded to merit restoration."[71]

In answering the two evaluation questions posed above, the Red Sea LME has a vision for LME restoration that importantly includes ongoing collaboration with the private sector for "curative actions". PERSGA has been closely involved with restoration through its programs including

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[63] *Id.* at 45.

[64] *Id.*

[65] *Id.* at 46 (observing that physical restoration can cost between $100,000 to $1 million a hectare and is unlikely to be able to done by community organizations).

[66] *Id.* at 48.

[67] *Protocol Concerning The Conservation Of Biological Diversity And The Establishment Of Protected Areas*, PERSGA, http://www.persga.org/Files//Publications/protocols/PERSGA_Biodiversity_Protocol.pdf (This protocol is not yet in force) [hereinafter Protocol Concerning The Conservation of Biological Diversity].

[68] *See generally* REGIONAL ORGANIZATION FOR THE PROTECTION OF THE MARINE ENVIRONMENT, http://ropme.org/ (last visited Mar. 21, 2013) (ROPME's members include Bahrain, Iran, Iraq, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates).

[69] *Protocol Concerning The Conservation Of Biological Diversity*, *supra* note 67, art. 16.

[70] *Id.* art. 6.

[71] *Id.* art. 17.

research and developing restoration guidelines. It is unclear whether PERSGA has the authority to play a regional decision making role in the area or whether it is largely a provider of technical support and a facilitator. The difference between being a supporting institution and a decision making institution becomes critical in terms of the ability to implement complex restoration strategies. For example, the recommendations regarding guidelines on coral restoration developed in 2009 do not appear to have been systematically adopted. Where a regional institution has some decision making authority that is not under continual challenge from its member States, it will be less likely to have to compromise on important technical decisions. Like the Benguela Current Commission, PERSGA does not seem as of yet to be explicitly connecting its contributions to region wide restoration efforts to region wide climate adaptation efforts.

C. Black Sea LME

Covering 460,150 square kilometers, the Black Sea LME[72] provides the catchment area for the Danube, Dnieper, and Don Rivers flowing through 18 countries.[73] Because there is very little vertical mixing in the water column and the Black Sea is subject to eutrophication,[74] the Black Sea LME contains the largest dead zones of any ocean basin.[75] While the species counts are lower in the Black Sea LME as compared to the Mediterranean LME, the Black Sea LME has higher "abundance, total biomass, and productivity."[76] The area suffers from over 200 invasive species, some of which have severely impacted fish production.[77] Habitats have been severely impacted by human activities especially in the coastal "water

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[72] Participating countries in the Black Sea Large Marine Ecosystem include the Black Sea Commission countries of Bulgaria, Georgia, Romania, the Russian Federation, Turkey and Ukraine. *The Commission on the Protection of the Black Sea Against Pollution*, BLACKSEA-COMMISSION.ORG, http://www.blacksea-commission.org/_mission.asp (last visited Apr. 12, 2013).

[73] S. Heileman, W. Parr & G. Volovik, *V-8 Black Sea LME, in* THE UNEP LARGE MARINE ECOSYSTEM REPORT: A PERSPECTIVE ON CHANGING CONDITIONS IN LMES OF THE WORLD'S REGIONAL SEAS 203 (Kenneth Sherman & Gotthilf Hempel eds., 2008), *available at* http://iwlearn.net/publications/regional-seas-reports/unep-regional-seas-reports-and-studies-no-182/lmes-and-regional-seas-v-black-sea/at_download/file.

[74] Eutrophication refers to the usual human introduction of nutrients such as nitrogen and phosphorous into a waterway that may result in harmful algal blooms and reduced survival rates for fish and invertebrates. DICTIONARY OF NATURAL RESOURCE MANAGEMENT 115 (Julian Dunster & Katherine Dunster eds., 2011).

[75] Heileman, Parr & Volovik, *supra* note 73.

[76] *Id.* at 205.

[77] *Id.*

column, coastal lagoons, estuaries/deltas and wetlands/saltmarshes."[78] Fish stocks within the LME are severely overexploited with certain species such as bream, roach perch, pike, bonito, and mackerel coming close to elimination.[79] Thus, there has been an increase in species such as jellyfish that are changing the composition of the ecosystem.[80] Given the extent of the environmental degradation, the Black Sea's ecosystem is more of "a pattern of adaptation rather than one of true recovery."[81] Because of human interventions such as dams, certain anadromous[82] species such as sturgeons depend on artificial breeding for survival in the Black Sea LME.[83]

Given the heavily deteriorated condition of the Black Sea, it is not surprising that restoration activities have been a priority for the Strategic Action Program. Unlike the Benguela Current LME, where the choice of the term "rehabilitate" may be inadvertent, the term is deliberate here because the revival of pre-existing ecosystem functions may no longer be possible because of the loss of critical levels of biomass. Due to the high level of eutrophication that cannot be reversed because of fundamental changes in the ecosystem, the Black Sea LME project seems to be focusing on creating newly functioning ecosystems that may have little correlation with historic conditions, but nevertheless are self-sustaining ecosystems.[84] The goals of the LME are to "achieve environmental conditions in the Black Sea similar to those observed in the 1960s[,]" although it is understood by the participating States that the process will be lengthy and some restoration efforts may never succeed.[85]

The Black Sea LME has received a substantial amount of international attention and has experimented at the large landscape/seascape level with State and non-State partnerships for "rehabilitation of the Black Sea."[86]

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[78] *Id.*

[79] *Id.* at 210.

[80] *Id.* at 213.

[81] *Id.*

[82] Anadromous fish are fish that are born in freshwater, migrate to ocean water, and then return to freshwater to reproduce. DICTIONARY OF NATURAL RESOURCE MANAGEMENT, *supra* note 74, at 16.

[83] Heileman, Parr, & Volovik, *supra* note 73, at 214.

[84] *Id.* at 213.

[85] *The Black Sea Environment*, THE COMMISSION ON THE PROTECTION OF THE BLACK SEA AGAINST POLLUTION, http://www.blacksea-commission.org/_environment.asp (referring to the restoration of "Zernov's field" (dense stands of red algae unique to the Black Sea) as requiring time "if it is possible at all.").

[86] *Strategic Action Plan for the Environmental Protection and Rehabilitation of the Black Sea (2009)*, THE COMMISSION ON THE PROTECTION OF THE BLACK SEA AGAINST POLLUTION, www.blacksea-commission.org/_bssap2009.asp [hereinafter *2009 Strategic Action Plan*].

Adopted in 2009, the revised Strategic Plan provides some important developments over previous versions of the Plan adopted in 1996. For example, on the topic of public participation, the 2009 version provides that "all stakeholders, including communities, individuals and concerned organizations shall be given the opportunity to participate, at the appropriate level, in decision making and management processes that affect the Black Sea."[87] In contrast, the 1996 version of the Plan did not encourage full engagement from the public at large in developing the management processes of the Black Sea but focused instead on NGOs and municipalities participating "in the decision making and implementation of this Strategic Action Plan."[88] One of the primary differences between the 2009 and 1996 language is the recognition that communities, individuals, and concerned organizations (not just NGOs and municipalities) can now assume a leading role in developing Black Sea management processes and not just be agents for the implementation of a top-down strategy decided largely by State actors. This emphasis on the role of non-state governance in the wider Black Sea enhances the possibility of adaptive governance to respond to unexpected changing conditions within ecosystems.

The primary institution affiliated with the LME project is the Black Sea Commission consisting of representatives from the six LME States plus a Permanent Secretariat that is responsible for implementing the rehabilitation efforts of the Black Sea. The Commission has the potential to be a uniquely influential body. In the revised Strategic Action Plan, the Commission is recognized as both "the political body [for] developing regional environmental standards, approaches and methodologies, guidance of its own and regulations/guidelines supplementary to measures imposed by other international organizations" as well as "the supervisory body dedicated to ensuring that SAP [strategic action plan] provisions are fully implemented by all parties throughout the Black Sea region."[89]

In response to the two questions posed above, it is clear that Parties are pursuing "rehabilitation" at the LME level. In addition to having clear restoration goals, the Black Sea LME has the power to undertake specific programs designed to improve the environment. Compared to other commissions, such as PERSGA, which seems to be serving a largely technical role, or the Benguela Current Commission, whose full body of authority is not yet clearly defined, the Black Sea Commission has both

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[87] *Id.* art. 1.15.11.

[88] *Strategic Action Plan for the Rehabilitation and Protection of the Black Sea (1996)*, THE COMMISSION ON THE PROTECTION OF THE BLACK SEA AGAINST POLLUTION, http://www.blacksea-commission.org/_bssap1996.asp [hereinafter *1996 Strategic Action Plan*].

[89] *Id.*

specifically named political and supervisory powers. If it is given a sufficient budget to operate with, the Commission has the potential to become a highly effective body, capable of pursuing its relatively detailed action plan. Unlike some of the other LME programs that are highly aspirational in their objectives, the Black Sea LME has specific and easily definable tasks with scheduled target dates. Four goals of the 2009 action plan include:

> 1) in the next nine to twenty years, upgrading wastewater treatment plants servicing communities with populations greater than 200,000 with the capacity to eliminate nitrogen and phosphorous;
>
> 2) promoting the use of low phosphorous detergents over the next six to seven years;
>
> 3) harmonizing regional water quality standards over the next two to three years; and
>
> 4) establishing remote sensing for fishing vessels over the next ten years.[90]

These types of goals are particularly useful in informing policy-making. One possible concern for the program as currently proposed is that the deadlines may be too generous. For example, given that there has been sufficient technical knowledge since 2009 of how to produce non-phosphorous detergents, the proposed six to seven years for implementation of a promotion program for non-phosphorous detergents seems excessive.

Of all of the LME institutions examined, the Black Sea Commission appears the most robust in terms of having an explicit restoration agenda. However, in terms of habitat restoration, there is no specific linkage made between climate change impacts and ongoing restoration work. Despite this, what is encouraging about the ongoing successes of the Black Sea Commission in restoration work is the number of coordinating members plus the political recognition of the commission as a legitimate regional decision maker.

D. South China Sea LME

The South China Sea LME contains 3.2 million square kilometers of ocean bordering China, Indonesia, Malaysia, Philippines, Taiwan, and Vietnam and almost seven percent of the world's coral reefs and twelve percent of the world's mangrove forests.[91] Fishing is an important industry

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[90] *2009 Strategic Action Plan*, *supra* note 86.

[91] S. Heileman, *VIII-15 South China Sea LME*, *in* THE UNEP LARGE MARINE ECOSYSTEM REPORT: A PERSPECTIVE ON CHANGING CONDITIONS IN LMES OF THE WORLD'S REGIONAL SEAS 297 (Kenneth Sherman & Gotthilf Hempel eds., 2008), *available at*

within the LME, but there is great uncertainty about the health of the stocks because of the large amount of potential illegal, unreported, and unregulated fishing in the area.[92] The loss of viable coral reef fisheries is particularly alarming with seventy percent of the reefs classified as heavily depleted.[93] Certain keystone species within the LME including tuna, billfish, and sharks are under chronic overfishing pressures and there is excessive intentional and accidental capture of endangered and threatened species.[94] In some areas the fisheries have collapsed, leading to malnutrition among fishing families.[95] Seventy percent of the mangroves in the region have disappeared as a result of development; if current trends were to continue, mangrove forests would disappear by 2030.[96] Pollution remains untreated in many locations in the LME leading to algal blooms and eutrophic conditions.[97] Heavy sedimentation in these coastal waters result from unregulated land use related to logging, mining, dredging, and urban development.[98] In addition, oil spills from cargo ship activities are not uncommon and also lead to sedimentation problems.[99] Between twenty to fifty percent of the seagrass beds have suffered damage from poor fishing practices, sedimentation, and pollution.[100]

The Memorandum of Understanding signed by the environmental ministers of the various South China Sea nations has a strategic action program, sub-regional/bilateral agreements, and national action plans. The 2008 strategic action plan provides for coordinated regional responses to rehabilitate mangroves, coral reefs, sea grass, coastal wetlands, and fish habitat.[101] Countries agreed to a number of set goals including updating management plans for a number of specifically named lagoons, estuaries,

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http://www.lme.noaa.gov/lmeweb/LME_Report/lme_36.pdf.

[92] *Id.* at 300.

[93] *Id.* at 303.

[94] *Id.*

[95] *Id.* at 305.

[96] *Id.* at 304.

[97] *Id.* at 303.

[98] *Id.* at 304.

[99] *Id.*

[100] *Id.* at 305.

[101] United Nations Environmental Programme, *Strategic Action Programme for the South China Sea* 16 UNEP/GEF/SCS TECHNICAL PUBLICATION (2008), *in* A PERSPECTIVE ON CHANGING CONDITIONS IN LMES OF THE WORLD'S REGIONAL SEAS 103 (Kenneth Sherman & Gotthilf Hempel eds., 2008), *available at* http://iwlearn .net/publications/regional-seas-reports/unep-regional-seas-reports-and-studies-no-182/lmes-and-regional-seas-i-west-and-central-africa/at_download/file.

tidal mudflats, peat, and non-peat swamps.[102] By 2017, the participating countries intend to create a regional estuary monitoring scheme.[103]

While the South China Sea Project has a number of restoration related projects, some of which have been piloted, a couple observations arise based on the two questions posed above regarding the LME's efforts for restoration of large marine ecosystems and its governance efforts. The restoration efforts in the South China Sea seem to be relatively piecemeal and not coordinated across boundaries, with most of the habitat demonstration projects operating independently. The regional working groups provide oversight and expert guidance for these projects, but do not necessarily have any authority to dictate policymaking priorities. The regional working groups on mangroves, sea grasses, wetlands, and coral reefs are expected to select criteria for the selection of priority transboundary habitat areas and apply those criteria in order to identify areas for future restoration.[104] It is unclear if these working groups have identified any transboundary habitat areas. Most of the demonstration projects that have been described appear to be national projects and only a few seem to include restoration and rehabilitation goals.[105]

Regarding governance, a regional task force on legal matters has held a number of meetings,[106] but it is unclear whether a regional institution to manage the LME, such as the Benguela Current Commission or the Black Sea Commission, will emerge in the South China Sea region. The task force observed that operational cooperation in the area is weak and intra-regional learning is also limited,[107] in part because of recurring political

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[102] *Id.* at 27-29.

[103] *Id.* at 29.

[104] *See, e.g.*, Chris Paterson, *Regional Working Group on Wetlands UNEP/GEF South China Sea Project*, UNEPSCS.ORG (Oct. 24, 2005), http://www.unepscs.org/Regional_Working_Group_on_Wetlands.html (The same mission statement is provided for the other regional working groups.).

[105] For example, out of thirteen proposed sea grass projects, only one project in Malaysia has an objective of rehabilitating degraded sea grass. Chittima Aryuthaka et al., *Seagrass in the South China Sea*, 3 UNEP/GEF/SCS TECHNICAL PUBLICATION 10 (2004), *available at* http://www.unepscs.org/remository/Download/19_-Technical_Publications_and_Guidelines/Technical_Publication_03_-_Seagrasses_of_the_South_China_Sea_(2004).html.

[106] Chris Paterson, *The UNEP/GEF South China Sea Project Regional Task Force on Legal Matters*, UNEPSCS.ORG (Oct. 24, 2005), http://www.unepscs.org/Regional_Task_Force_on_Legal_Matters.html.

[107] United Nations Environmental Programme, *Review of the Legal Aspects of Environmental Management in the South China Sea and Gulf of Thailand*, 9 UNEP/GEF/SCS TECHNICAL PUBLICATION 22 (2007), http://www.unepscs.org/remository/startdown/1959.html ("There is no systematic coordination amongst the projects or programmes" . . . which may be "a regional reflection of the fragmented system of global environmental governance.").

tensions among the States that overshadow environmental restoration. This problem is further compounded by a lack of institutional support. For example, in the case of coastal wetland management including restoration efforts, regional legal experts observed that there is a lack of resources, management plans, conflicting authority, and, in the case of Malaysia, no agency leader for "non-forest wetlands."[108] The lack of transboundary management of the LME at the large landscape/seascape level is concerning because of the "ecological interdependence of sub-basins" within the South China LME.[109]

Leaving aside the lack of current transboundary coordination, there appears to be insufficient coordination among operational agencies even within one nation to manage restoration efforts. For example, in China, the mangrove rehabilitation programs rely on coordinating forestry, oceans, environmental protection, fishery, irrigation, and planning agencies, which lead to inefficiencies and in some cases ineffective projects.[110] One of the observations of the legal team was that "[c]onflicts regarding resource uses are common in this region" because "[e]xisting legal frameworks are not sufficient to accommodate different interests and regulate functions and responsibilities among stakeholders related to habitat management."[111] While this comment appears to be directed at national legal frameworks, it also resonates with the regional situation where region-wide activities appear to be dispersed with little analysis of what restoration and reversing environmental degradation means at a large-scale. Each of the countries in the South China Sea LME have marine protected areas, but there is no apparent coordination between the countries on the management of these areas to ensure that certain LME values are protected such as breeding stocks or feeding grounds of migratory fish.[112]

While there is no sign that the South China Sea states will form a cooperative LME commission, because the States are choosing instead to pursue strategies based on local enforcement, legal experts have specifically urged States within the LME to invest in raising public and community awareness and participation in environmental law enforcement. As this paper will suggest below in the section on proposed policy interventions, a public understanding of the LME as a socio-ecological system is critical to the success of certain restoration efforts, particularly those involving land-based pollution and coastal resource use.[113]

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[108] *Id.* at 49.
[109] *Id.* at iii.
[110] *Id.* at 51.
[111] *Id.* at 52.
[112] *Id.* at 36-37.
[113] *Id.* at 51.

Perhaps because it is the largest of the LMEs reviewed or perhaps because of ongoing political rivalries over islands within the South China Sea, the South China Sea has the least cohesive governance program of any of the LMEs reviewed here. The restoration work within the LME is mostly demonstration projects without thought to how these various demonstration projects will enhance ecosystem function at the large landscape/seascape level. None of the coastal wetland, mangrove, seagrass, or coral reef demonstration projects appear to be factoring in the need for the restoration project to adapt to potential climate change impacts.

E. Humboldt Current LME

The Humboldt Current LME consists of 2.5 million square kilometers along the coasts of Chile and Peru in biologically significant upwelling areas.[114] It is a high production area supporting the world's largest fisheries with large schools of anchovies, sardines, jack mackerel, and chub mackerel accounting for sixteen to twenty percent of the global fish catch.[115] The reduction in fish has been connected to the decline in coastal habitats, especially mangrove forests, which in turn has heavily impacted artisanal fishing.[116] Intensive fishing may be impacting the "ecosystem structure in the LME, leading to further system destabilization."[117] Both Chile and Peru are subject to harmful algal blooms that may be caused by waste from fish canneries and fishmeal factories.[118]

A strategic action plan was prepared in 2003 but was not approved. In fall 2012, the Humboldt Current LME was seeking consultants to provide national policy reports focused on Chilean and Peruvian interests in order to inform a "Transzonal Diagnostic Analysis"[119] and provide suggestions for

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[114] S. Heileman, R. Guevara, F. Chavez, A. Bertrand & H. Soldi, *XVII-56 Humboldt Current LME*, *in* THE UNEP LARGE MARINE ECOSYSTEM REPORT: A PERSPECTIVE ON CHANGING CONDITIONS IN LMES OF THE WORLD'S REGIONAL SEAS 749 (Kenneth Sherman & Gotthilf Hempel eds., 2008), *available at* http://iwlearn.net/publications/regional-seas-reports/unep-regional-seas-reports-and-studies-no-182/lmes-and-regional-seas-xvii-south-east-pacific/at_download/file.

[115] *Id.* at 752.

[116] *Id.* at 758.

[117] *Id.* at 756.

[118] *Id.*

[119] *See, e.g.*, *Consultancy to Deliver a Report on a National Policy and Governance Assessment for the Humboldt Current Large Marine Ecosystem (HCLME) Region Focusing on Peru*, HUMBOLDT.IWLEARN.ORG 1-2 (2012), http://humboldt.iwlearn.org/en/quicklinks/announcements/Module_5_Gov_HCLME_Final_Peru.pdf [hereinafter *Consultancy on Peru*]; *Consultancy to Deliver a Report on a National Policy and Governance Assessment for the Humboldt Current Large Marine Ecosystem (HCLME) Region Focusing on Chile,*

national governance mechanisms as well as input into fisheries, productivity, pollution, ecosystems, and socioeconomics that could be used to formulate a Strategic Action Program. While there is no mention of restoration in these contractor-scoping documents, the contractors are expected to provide information on best practices in "engaging coastal communities in the governance process and particularly into ecosystem management."[120]

Because the Humboldt Current LME is really a bilateral entity rather than a multilateral entity, the two parties have not chosen to create a new regional body, but instead have opted to create an interim executive committee to implement the joint management of the Humboldt Current Large Marine Ecosystem.[121] The Sub-secretary of Fisheries in Chile and the Vice Ministry of Fisheries in Peru are the State agencies responsible for LME decision making.[122] Both States also have national environmental authorities capable of implementation of agreed upon LME policies.[123]

In answering the two evaluation questions posed above, there are many unknowns regarding the priorities and the institutions for the Humboldt Current LME. Without a permanent shared institution and only an interim executive committee, it remains to be seen whether the parties will choose to act largely independent of each other in the management of the LME as the South China Sea LME nations appear to be doing, or whether there will be a larger degree of cooperation. While some LMEs such as the Red Sea LME have explicitly prioritized regional restoration efforts through its proposed Protocols and Guidelines, it is less clear how Chile and Peru intend to proceed in terms of any joint restoration efforts that they might undertake. It is significant that consultants who will be involved in the preparation of the Strategic Action Plan for the two States are seeking means of engaging the individual coastal communities as stakeholders in both the governance process and ecosystem management. As with all of the other LMEs reviewed for this section, there is no explicit linkage between restoration efforts and climate change such that restoration projects are designed to adapt to predicted climate change impacts.

HUMBOLDT.IWLEARN.ORG (2012), http://humboldt.iwlearn.org/en/quicklinks/announcements/Module_5_Gov_HCLME_FinalChile.pdf.

[120] *Consultancy on Peru*, *supra* note 119, at 4.

[121] Heileman, Guevara, Chavez, Bertrand & Soldi, *supra* note 114, at 759.

[122] *Id.* at 758.

[123] *Id.*

F. Gulf of Mexico LME

The 1.5 million square kilometer Gulf of Mexico LME is the largest semi-enclosed sea in the Western Atlantic, which is surrounded by Cuba, the United States and Mexico.[124] Forty-seven estuaries exist within the LME.[125] The region has moderately high productivity but also suffers from "dead zones," which impact the productivity of the region, especially shellfish.[126] The region's fisheries include high levels of bycatch, particularly from shrimp trawlers given the ten to one ratio of biomass to shrimp.[127] Many of the fisheries are overexploited or at their take limit.[128] In some of the regions of the LME, the shrimp fishery and grouper fishery have collapsed due to excess fishing pressure.[129] With management, a few fisheries including the Spanish mackerel, Gulf menhaden, and some shrimp populations, are recovering.[130] Pollution from agricultural and industrial discharge and inadequately treated domestic wastewater are exacerbating problems with "dead zones" in lagoons, wetlands, and bays.[131] Of particular concern for this LME is the loss of coastal wetlands which "have produced a system on the verge of collapse."[132] Coral reefs are also under threat from an array of both natural and anthropogenic factors leading to rampant coral bleaching and disease.[133] Seagrass losses range from twenty to one hundred percent in some estuaries.[134]

Mexico, the United States, and Cuba, like Chile and Peru in the Humboldt Current LME, are currently in the process of negotiating a Strategic Action Program ("SAP"). Among the priorities for the SAP is the "rehabilitation of marine and coastal ecosystems."[135] Referring back to the discussion under the Benguela Current LME, it is interesting that the

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[124] S. Heileman & N. Rabalais, *XV-50 Gulf of Mexico LME*, *in* THE UNEP LARGE MARINE ECOSYSTEM REPORT: A PERSPECTIVE ON CHANGING CONDITIONS IN LMES OF THE WORLD'S REGIONAL SEAS 673 (Kenneth Sherman & Gotthilf Hempel eds., 2008), *available at* http://iwlearn.net/publications/regional-seas-reports/unep-regional-seas-reports-and-studies-no-182/lmes-and-regional-seas-xv-wider-caribbean/at_download/file.

[125] *Id.*

[126] *Id.* at 673, 679-81.

[127] *Id.* at 679.

[128] *Id.* at 678.

[129] *Id.* at 679.

[130] *Id.*

[131] *Id.* at 680.

[132] *Id.* at 681.

[133] *Id.* at 682.

[134] *Id.* at 688.

[135] GEF COUNCIL, *Project Executive Summary* 7 (2007), http://iwlearn.net/iw-projects/1346/project_doc/GoM%20ExSumm%201Aug07_final.pdf/view.

proponents of ecosystem management in the Gulf of Mexico chose to use the term "rehabilitation" rather than "restoration," again raising the issue about whether project planners consider some ecosystem functions and structures dispensable. For the project proponents, rehabilitation is expected to encompass "representative marine protected areas" based on several goals, two of which bear mentioning. Goal one is to create recovery plans for "depleted priority non-commercial species and associated marine flora and fauna."[136] Goal two is to define "management and capacity building . . . to restore degraded marine coastal wetlands."[137] Goal one presupposes that there are recovery plans for commercial species and their associated marine flora and fauna, which may or may not reflect reality within the LME. Goal two is interesting because it focuses on defining "management and capacity building" in order to restore wetlands rather than on actually committing to specific restoration efforts within the LME region.

The Gulf of Mexico's GEF project works with technical contacts at the U.S. National Oceanic and Atmospheric Administration and at the Mexican Secretaría de Medio Ambiente y Recursos Naturales.[138] An array of other institutions currently operate within the LME including the United States Environmental Protection Agency, the United States National Marine Fisheries Service, the Mexican Programme of Ecology, Fisheries and Oceanography of the Gulf of Mexico ("EPOMEX") created at the Autonomous University of Campeche, the U.S. Gulf Restoration Network, and the Gulf of Mexico Foundation. The latter three organizations are non-state actors, who are committing financing and technical skills to restoration challenges.[139] There is no centralized institution as the parties continue to work through drafting a Strategic Action Program for consideration by the State representatives and it is not likely that any institution such as the Benguela Current Commission or the Black Sea Commission will emerge.

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[136] *Id.* at 8.

[137] *Id.* at 41.

[138] *Id.* at 15

[139] HARTE RESEARCH INSTITUTE FOR GULF OF MEXICO STUDIES, *Centro de Ecología, Pesquerías y Oceanografía del Golfo de México (EPOMEX)*, GULFBASE.ORG, http://www.gulfbase.org/ organization/view.php?oid=epomex (last visited Mar. 21, 2013) (providing research on ecology, conservation, and restoration of coastal wetlands); GULF RESTORATION NETWORK, *About Us*, HEALTHYGULF.ORG (2012), healthygulf.org/who-we-are/about-us/about-us (focusing on "uniting and empowering people to protect and restore the natural resources of the Gulf Region."); GULF OF MEXICO FOUNDATION, *Community-based Restoration Partnership*, GULFMEX.ORG (2013), http://www.gulfmex.org/ conservation-restoration/gulf-conservation-restoration-and-preservation/ (managing 79 restoration projects over 15,000 acres throughout the Gulf and Caribbean).

In response to the questions posed above, there is a clear commitment within the LME strategic action plan to focus resources on the restoration of coastal wetlands. As of yet, there is no clear indication whether this restoration activity will be pursued on the scale of the LME or what specific commitments the States are willing to make in relation to restoration efforts to ensure an LME level response. The only commitments are that Terminos Lagoon in Mexico will be restored to ecological functionality as a pilot project,[140] the U.S. will share its expertise in restoration with the other parties, and parties will be "bringing stakeholders at all levels to consensus in designing and implementing habitat [restoration] projects."[141] Like the Humboldt Current LME, this emphasis on broad stakeholder involvement significantly recognizes the value of linking the top-down approach of the strategic action plan with the bottom-up interests of the communities who are most likely to be engaged in implementation of restoration goals. At this juncture, there is no indication of a joint Cuban/Mexican/American institution to mirror the Benguela Current Commission. Once the Strategic Action Program is concluded, the focus will be to develop national action programs rather than regional action programs as in the Red Sea LME.[142] Like the Humboldt Action Plan, much remains to be decided about the governance of large landscape/seascape restoration in the LME. There is no explicit recognition in the Gulf of Mexico documents that any planned habitat restoration work must be designed to adapt to climate change.

G. Summary Thoughts About Restoration, Governance, and LMEs

As demonstrated by the sample of LMEs described above, there is a wide scope of LME approaches to governing restoration ranging from LME specific regional governance institutes to more ad hoc nationally based approaches to restoration efforts. There are two exciting developments demonstrated by each of the LMEs. First, there is a recognition that restoration work will depend on a multi-stakeholder collective and not simply official government action. In the Black Sea, Red Sea, Humboldt, and Gulf of Mexico LMEs, there is a concerted effort for the LME organizers to work with all stakeholders who may be able to contribute to habitat restoration efforts. This approach, which may seem obvious in a world where public-private partnerships are common in many arenas such as building and maintaining infrastructure, has not always been prioritized

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[140] GEF COUNCIL, *Project Executive Summary* 9 (2007), http://iwlearn.net/iw-projects/1346/project_doc/GoM%20ExSumm%201Aug07_final.pdf/view.

[141] *Id.*

[142] *Id.* at 7-8.

in the field of ecological restoration. Until relatively recently, engaging public participation has been considered simply another step in the process and not essential to the success of the project. With increasingly limited government budgets, there is a greater need for true restoration partnerships.

Second, some of the existing LMEs are creating standards that will apply across a broad ecological area. For example, the Red Sea LME and the Black Sea LME are both engaged in creating best socio-ecological practices that will encourage the restoration of mangroves and coastal ecosystems across political boundaries. The drafting of socio-ecological guidelines is an important function for the LME because implementation of restoration is more than just a technical enterprise. Restoration involves not just managing natural resources but also managing people.

The recurring challenge with existing LMEs is that there is little legitimate regional governance authority behind the existing projects. To date, the focus has largely been on researching the ecological systems and less on framing socio-ecological approaches to regional governance. Researchers recognize the importance of devising complex social mechanisms to tackle large-scale ecological issues. Andrew Rosenburg has argued that ecosystem based-management must be "cross-sectoral, meaning that management plans are comprehensive, with the goal of conserving ecosystem services, and inclusive of all types of human activity that may impact coastal and ocean resources."[143] The current LME governance schemes have failed to be fully cross-sectoral. Despite this, a number of the more established LMEs such as the Black Sea and Red Sea LMEs, are endeavoring to create broader programs that can influence land-based decision making. Finally, the various entities in charge of LME management should enhance their focus on the human element of the LME.

Most of the current LMEs reviewed above are physically bounded regions without the political power to directly influence either domestic or international policymaking. This result is not surprising since States and sub-State units are loathe to cede political control to competing institutional mechanisms,[144] even when a crossboundary mechanism may be better

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[143] Andrew A. Rosenburg, *Regional Governance and Ecosystem-Based Management of Ocean and Coastal Resources: Can We Get There From Here?*, 16 DUKE ENVTL. L. & POL'Y F. 179, 181 (2006).

[144] Donna R. Christie, *Oceanic Ecosystem Management: Challenges and Opportunities for Regional Ocean Governance*, 16 DUKE ENVTL. L. & POL'Y F.117, 118 n.12 (2006) (observing that the United States Commission on Ocean Policy identification of large marine ecosystems sparked controversy among States with Alabama, Alaska, and Florida opposed to new regional ocean authorities; Texas, New York and Georgia requested voluntary regional arrangements; and Louisiana, Maryland, and Virginia were concerned about

positioned to govern and handle the complexities that arise from competing jurisdictional rules and regulations. Governing at the appropriate scale becomes a key concern particularly when there are efforts to restore ecological functions in systems split by biologically arbitrary political borders. To improve the effectiveness of LME governance for restoration projects at the LME level, a new way of thinking, described below as ecoscape thinking, may be needed to mainstream large-scale ecological restoration efforts.

III. ECOSCAPE THINKING FOR LARGE-SCALE COASTAL AND MARINE RESTORATION WITHIN LMES

To better promote large-scale restoration within an LME, there is a need for an LME wide recognition of what Bradley Karkkainen refers to as "'post-sovereign' governance,"[145] where solutions do not reside solely within the institution of the State but may be pioneered by non-State actors ranging from dedicated individuals to corporately responsible businesses to civil society groups. Under this model, "states remain leading actors in these collaborative problem-solving arrangements[,]" but the "authority to address problems traditionally considered to fall within the province of state sovereignty is reassigned to hybrid constellations of state and non-state actors."[146]

The question becomes how to return to a concept of integrated coastal area management that involves engagement by decision makers in both public and private sectors in an ongoing effort to achieve long-term restoration of degraded coastal areas that will not be inundated by sea level rise. To build a more effective governance network, this paper proposes a shift towards "ecoscape thinking" which can be more fully implemented within existing LMEs through three policy interventions.

A. An Ecoscape Approach To Restoration

What is an ecoscape? In some ways, it is easier, at first, to define an ecoscape by what it is not. It is not a synonym for the physical environment, a landscape/seascape, or an ecosystem. It is instead a socio-ecological concept that evaluates the interaction between equitable social governance and ecological conservation concerns. It highlights the role of

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creating new bureaucracies).

[145] Bradley Karkkainen, *Marine Ecosystem Management & A "Post-Sovereign" Transboundary Governance*, 6 SAN DIEGO INT'L L.J. 113, 124 (2004).

[146] *Id.*

human decision making in ecosystem restoration without prioritizing human-based needs over other environmental functions.[147] The term "eco" comes from the Greek word for "household" and is incorporated in part because it is also a prefix in both the words economy and ecology. In addition, like the term "household," "eco" can refer to both a place and a body of residents. The suffix "scape" derives from the Latin word for stem. Just as the stem connects the leaves with the roots, the suffix -scape denotes unity. So an ecoscape is a place intimately connected to a body of residents that, through governance at appropriate scales, is capable of ecological self-sustenance. Governance need not be at the sovereign level, but can, as Karkkainen argues, include "constellations of state and non-state actors."[148]

This concept of an ecoscape in the context of large landscape/seascape restoration is offered as a way of structuring thinking about how to translate findings from ecological science about the need to protect at a large landscape/seascape level into policies that have the potential to influence human behaviors. Ecoscape thinking is place-based thinking, but not place defined by governmental bureaucracies. It refers instead to deliberate governance efforts by any number of stakeholders to connect specific physical places with discrete groups of people who are capable of making decisions that can influence a specific place. These decision makers are not restricted to government officials, but also include individual landowners, corporations, and civil society groups. The types of decisions being made will be as varied as the types of decision makers. Sometimes the decision making will be a matter of creating new laws. Sometimes, it will be a matter of creating new social norms about production or consumption or what constitutes good community behavior. Sometimes, it will be a matter of providing financing within a given pre-existing legal or normative structure to make restoration projects viable.

The ecoscape concept for restoration activities makes sense at a human level. It refers collectively to the aggregate of governance decisions made by regional leaders, national legislators, regulatory agencies, mayors, city and county councils, industries, farmers, fishermen, homeowners, and an array of other actors in relation to specific places inhabited by these actors. The concept of place matters greatly for humans. David Kidner observes that place-specific attachment matters to people because there is a reciprocal relationship between people and places because people are

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[147] The concept of "ecosystem services" which has been popularized by policy makers focuses almost exclusively on how nature serves human needs without taking into consideration the need to also protect functions and structures of ecosystems which may not directly benefit human interests.

[148] Karkkainen, *supra* note 145, at 124.

changed by their places at the very same time that they change places.[149] If place-based thinking can be such a powerful social motivator, why has it been largely overlooked as a driver for large-scale ecosystem restoration work? The answer lies in our socially constructed political allegiances where bureaucracies remind us that we are Americans, Russians, South Africans, or Koreans, and that we reside in particular counties, provinces, or States. We are not reminded by our political systems that we belong to the Asian temperate forests, the Nile River Basin, or the South American montane grasslands. These essential ecological boundaries are irrelevant for political governance purposes. Current politics create conflicting social or economic policies within an airshed or across an ecological landscape.

Ecoscape thinking offers a form of place-based thinking at social and ecological scales to which humans individually and collectively can react. Unlike Thomas Lovejoy's call for "planetary-scale restoration[,]"[150] which has the potential to inadvertently induce paralysis on the part of government decision makers, business decision makers, and individual citizens, the ecoscape is intended to be part of the ordinary cerebral map not part of a cosmic map. It recognizes that there are some complex restoration opportunities that will require actions in multiple places that can be led by an array of groups. In some places, marine conservation groups will be well positioned to lead restoration efforts. In other areas, fishing industry groups may be prepared to invest in both the resources and labor necessary for restoration. Some restoration efforts requiring action in single places might be the product of voluntary corporate social responsibility while others might result from the contribution of concerned citizens. Governments should facilitate these efforts, but also be prepared to fill in gaps where there are no private governance activities prepared to contribute to large-scale restoration efforts.

B. Policy Intervention One: Re-Inventing LMEs As Socio-Ecological Managers

The first recommended policy intervention for existing LMEs is for governing institutions within the LME to seek a sociological mapping of the LME area. While a review of LME materials will generate numerous physical maps showing where coral reefs and seamounts and other marine geography are located, similar maps do not exist to show ordinary human

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[149] David Kidner, *Rewilding the Restorer*, *in* RESTORATION AND HISTORY 253, 266 (Marcus Hall ed., 2010).

[150] Interview by Roger Cohn with Thomas Lovejoy, Professor at George Mason University (June 19, 2012), http://e360.yale.edu/feature/thomas_lovejoy_looking_for_solutions_in_fight_to_preserve_biodiversity/2539/.

interactions with the LME itself. In order to act effectively, the LME leadership need to understand both how people are actually interacting with the marine and coastal environment as well as how people understand their ordinary interactions with the marine environment. If we understand how people actually interact with the marine environment, then there may be opportunities to engage private governance efforts in restoration. One of the early successes in U.S. land-based conservation efforts was hunting and fishing groups conserving and rebuilding habitat in order to attract game species.[151] Similar successes may also be possible within the LMEs with private actors working with restoration experts to change industry activity or community activity to further restoration goals. Where private actors are reluctant to act without an incentive, governments may encourage cooperation and investment in coastal and marine restoration projects, perhaps in exchange for government guarantees of preferential future access to these restored resources.[152]

As equally important as knowing how people are interacting with the LME and with each other in the LME is identifying individuals' understanding of their connection with the LME. Many individuals may not identify with the LME that they either live within or live adjacent to because they cannot see the water or the coastal zone in their daily interactions. They may not understand that their ordinary actions have implications. Some municipalities in the world have recognized this disconnect. For example, a number of U.S. cities provide physical fish-shaped markers at curbside gutters to remind individuals that what is dumped into the gutter will end up at the coast. Part of the success of an LME may be in building a sense of identity for individuals by emphasizing individuals' or corporations' connections to an LME through communication and education programs.

This proposed intervention, particularly if supported by the GEF, who has been funding many of the strategic action programs up to now, may address in part the recent critique of the management of Large Marine Ecosystems. While there have been connections drawn by LME leaders between social and ecological systems, particularly in the Yellow Sea LME, Black Sea LME, Benguela Current LME and Caribbean Sea LME, some LME projects, including a number reviewed in this article, have "failed to establish a framework or mechanisms to translate the project's natural

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[151] There are numerous private hunting groups such as Ducks Unlimited, Trout Unlimited, and Pheasants Forever who are engaged in purchasing tracts of land to improve habitat for certain game species.

[152] *See* Susan George, *Conservation in America: State Government Incentives for Habitat Conservation. A Status Report*, DEFENDERS OF WILDLIFE (2002), http://www.defenders.org/sites/default/files/publications/conservation_in_america_state_profiles.pdf.

science results into social impacts" or have been restricted by countries in their ability to analyze socio-ecological systems.[153]

The first policy intervention can be summarized as better positioning LMEs and their governance network as socio-ecological actors by encouraging LMEs to regard themselves as socio-ecological system researchers and potential socio-ecological decision makers. The approach proposed here starts with identifying the potential successes of non-State actors in doing restoration work and then seeks to identify those gaps where government intervention may be more critical for long-term restoration efforts. To take this approach would be a departure from the current LME approaches that focus largely on formal decision making by national government agencies. Launching a LME based socio-ecological mapping project might optimize government efforts for restoration by identifying physical areas where non-State actors are either unable or unwilling to participate in effective restoration projects as well as provide social pressure on non-State actors to restore ecological systems that have been damaged by their actions. The LME wide mapping effort might also lead to two additional policy interventions at the LME level that would be largely government-led efforts to enhance the effectiveness of existing restoration work.

C. Policy Intervention Two: Government Investment In Marine And Coastal Ecological Restoration Efforts That Will Survive Long-Term Climate Change Impacts

The second intervention requires States to understand, with particularity, coastal resource restoration in the context of long-term phenomenon such as sea level rise.[154] LMEs must address the relationship between restoration and sea level rise, as well as restoration and ocean acidification. Just as with the socio-ecological mapping proposed above, it is essential that the LME projects that are focused on large-scale restoration understand the implications of worst-case climate impacts. Otherwise, much of the money that will have been spent in the large-scale restoration efforts will have been spent in vain if restored freshwater estuaries are inundated with saltwater or species are replaced with ones that are unable to cope with acidification or large storm surges. While leaderships within the various LMEs surveyed above understand sea-level rise and ocean acidification as threats to the

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[153] ANNADEL CABANBAN & LAURENCE MEE, ANALYSIS REPORT OF THE LARGE MARINE ECOSYSTEMS AND THE OPEN OCEAN WORKING GROUP 15 (2012), *available at* http://www.thegef.org/gef/sites/thegef.org/files/publication/LMEOO%20ANA%20Final.pdf.

[154] Oliver Houck, *Can We Save New Orleans?*, 19 TUL. ENVTL. L.J. 1, 29 (2006).

LMEs, there is no connection made between the need for restoration work and the need to adapt this work to changing climate conditions.

For restoration work to be effective, it must either reflect government interventions to prevent sea level rise through engineering efforts such as seawalls, or must incorporate alternative efforts to adapt to future sea level rise. Preventing sea level rise through infrastructure is expensive and will require sizable investments that civil society groups may be unable to fund. Additionally, private interest groups may be unwilling to fund the development of this infrastructure because their restoration activities are motivated by short-term corporate responsibility and publicity agendas rather than long-term ecological concerns. What this means is that most governmental effort should be put into adapting new and existing restoration projects to survive climate change impacts. This will require LME participants to invest in regional research efforts that systematically address how large-scale restoration projects can survive a rapidly changing physical climate.

This emphasis on making restoration adaptable is not without costs. While the concept of ecological restoration is not particularly politically controversial and has been embraced by a number of governments, there may be less enthusiasm for restoration as a spending priority if it requires ongoing adaptive management to perpetuate the restoration projects. Given the non-linear threat of climate change, restoration projects are likely to require ongoing financial inputs, which may prove politically unpopular. Governing bodies within LMEs are the appropriate entities to lobby governments to invest in adapting both LME based and nationally based restoration projects. Furthermore, these governing bodies should act now rather than wait for the current restoration projects to fail because of sea level rise or increases in salinity.

D. Policy Intervention Three: Investing In Regional Enforcement Teams

Assuming an implementation of the first two policy interventions, (1) LMEs identify physical opportunities for both non-State restoration investments and long-term government investments and (2) LMEs actively adapt existing or future restoration efforts to ensure that regional efforts are not subsumed by rapid climate change, it is reasonable to suggest a final intervention calling for better regional enforcement through trained crossborder teams. If both State and non-State actors invest in ecological restoration work in places such as marine protected areas, it is critical that these efforts are not undercut by individual actors pursuing short-term goals at the expense of the long-term restoration efforts. Designating physical

boundaries to protect resources will not protect the resources without some credible threat of enforcement.

In the context of LMEs, States have an unparalleled opportunity to create effective regional teams to ensure that marine protection laws that support restoration efforts are actively enforced in the region. Under the Law of the Sea, coastal States have the right to take measures "including boarding, inspection, arrest and judicial proceedings" as long as there is prompt release of vehicles on the posting of a bond.[155] In practice, this leads to a broad array of regulations across an LME and, an even greater array of enforcement efforts. Instead of each State attempting to train and deploy its own Coast Guard to protect environmental resources from damage and organizing its own tracking center for vessel monitoring system, it would be more effective to train a regional force that is empowered by each of the LME states to respond to ecological emergencies and threats within the exclusive economic zone of all of the LME states. This multilateral enforcement force would also avoid some of the issues facing some parts of the world where petty local corruption prevents local government authorities from effectively combating illegal fishing or other marine legal violations. Such a multilateral enforcement force should improve the marine rule of law and limit the culture of impunity that exists in so many regional waters.

In LME regions with limited financial resources, it may be possible to apply for additional GEF funding for mobilizing an adequately equipped and trained regional Coast Guard unit. There is some existing precedent in the World Bank financing costs for shared environmental enforcement vessels. In May 2012, for example, the World Bank agreed to fund the retrofitting of a vessel that will share enforcement duties between Liberia and Sierra Leone.[156] This vessel, donated in September 2012, has already made its first arrest in Sierra Leone.[157]

IV. CONCLUDING THOUGHTS

In contrast to division of labor across political boundaries, LMEs represent an opportunity to consolidate efforts to do restoration at large

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[155] United Nations Convention on the Law of the Sea art. 73, Dec. 10, 1982, 1834 U.N.T.S. 397 (entry into force 16 November 1994), http://www.un.org/Depts/los/ convention_agreements/texts/unclos/closindx.htm.

[156] *Patrol Boat Setting Sail for Africa*, ISLE OF MAN EXAMINER (May 13, 2012), http://www.iomtoday.co.im/news/isle-of-man-news/patrol-boat-setting-sail-for-africa-1-4544375.

[157] *Success for Patrol Boat Gifted to Sierra Leone*, ENERGYFM.NET (Dec. 28, 2012), http://www.energyfm.net/cms/news_story_246479.html.

enough physical levels to make a difference in terms of the ecological health of large connected landscapes and seascapes. LMEs, however, have been so far limited in their capacity to begin large-scale cross border restoration projects. In some instances, there is a lack of institutionalization and in others there is no apparent authority for the LMEs to be decision makers.

States concerned with restoring coastal and marine ecosystems should empower those institutions and agencies entrusted with restoring the LMEs with the legal ability to promulgate uniform region wide restoration laws, to track the interactions between people and the LMEs within which they live, to communicate about the importance of connectivity within LMEs, to advise on how best to spend region wide restoration funds, and to enforce regionally shared conservation and restoration standards. In a world of rapidly depleting coastal and marine resources, where we do not know how close we may be to crossing irreversible ecological thresholds, large-scale restoration must become a priority. Patchwork restoration in political isolation may not succeed in bringing back the dynamic ecological connectivity that has historically characterized marine and coastal ecosystems. Large-scale regional restoration led by regional governance institutions with the legal authority within the LME to speak for the oceans may just succeed if there is the long-term political will to invest in restoring the oceans and coasts that have freely sustained us for centuries.

Transboundary Pollution in Northeast Asia: An International Environmental Law Perspective

Jae-Hyup Lee*

I. INTRODUCTION

Transboundary environmental problems pose significant challenges in achieving lasting peace, order, stability, and prosperity in the Northeast Asian region. Although these problems have not yet developed as full-fledged disputes in this region, they will potentially threaten peace and stability unless they are adequately addressed and resolved. Transboundary air pollution, which is frequently and significantly felt in this region, is closely related to global problems such as climate change because it is worsened by the massive energy use in the course of rapid economic growth. Measures to tackle climate change in this region are therefore critical in solving the transboundary air pollution problem.

The Northeast Asian region is composed of countries such as China, Korea, Japan, Taiwan, and Mongolia. Russia is sometimes included as an important stakeholder country. In terms of the environment of this region, several aspects are worth mentioning. This region accounts for approximately one-quarter of the world's total population.[1] As one of the biggest engines of the world economy, China in particular is undergoing rapid economic development at an unprecedented scale. A mixture of developed and developing nations exists in this region. For instance, Japan and Russia are categorized as Annex-I countries under the United National Framework Convention on Climate Change, whereas China, Korea, Taiwan, Mongolia and North Korea are not Annex-I countries.[2] In terms of

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[1] United Nations Environment Programme Regional Resource Center for Asia and the Pacific, *Environmental Indicators: Northeast Asia*, 11 (2004), *available at* http://www.rrcap.ait.asia/pub/indicator/Vertical%20North%20East%20Asia.pdf.

[2] Jos G.J. Olivier et. al, *Trends in Global CO2 Emissions: 2012 Report*, 29 (2012), PBL

the climate change, some of the largest greenhouse gas emitter countries are located in this region, including China (1st), Russia (4th), Japan (5th), and South Korea (7th).[3] Not only is the absolute amount of carbon emissions significant, but the rate of growth of emissions is also phenomenal in this region, as illustrated in China (1st) and South Korea (6th).[4]

In this context, the transboundary air pollution problem arising from this region deserves attention. Through rapid economic growth and energy-intensive industrialization, countries in this region are faced with serious environmental challenges. Acid rain, marine pollution, and dust and sandstorms ("DSS") have been identified as the three most significant environmental problems in this region,[5] and these have been the main focus of environmental cooperation. Among them, people have most frequently and intensely felt DSS.

In this paper, I will first describe the present state of DSS and the major legal and policy responses to deal with this problem in the Northeast Asian region. I will focus on how international environmental principles and theories can illustrate the emergence of the regional cooperative and regional institutionalization and try to assess the developments so far. I will then lay out why and how more expansive policy coordination among the countries in this region can lead to more promising results.

II. DUST AND SANDSTORMS: FACTS AND PROGRESS UPDATE

Desertification[6] and DSS are not new phenomena in the Northeast Asian region. Indeed, Chinese scholars reported the first major dust storm in 1150

NETHERLANDS ENVTL. ASSESSMENT AGENCY AND JOINT RESEARCH CTR. OF EUROPEAN COMM'N, *available at* http://www.pbl.nl/sites/default/files/cms/publicaties/PBL_2012_Trends_in_global_CO2_emissions_500114022.pdf.

[3] As of 2010, this was an estimate by the U.S. Energy Information Administration. *World Carbon Emissions: The League Table of Every Country*, THE GUARDIAN, http://www.guardian.co.uk/environment/datablog/2012/jun/21/world-carbon-emissions-league-table-country (last visited Apr. 29, 2013) [hereinafter *World Carbon Emissions*]. For current international energy statistics including CO2 emissions, *see International Energy Statistics*, U.S. ENERGY INFORMATION ADMINISTRATION, http://www.eia.gov/cfapps/ipdbproject/iedindex3.cfm?tid=90&pid=45&aid=8&cid=regions&syid=1980&eyid=2010&unit=MMTCD (last visited Apr. 29, 2013).

[4] World Carbon Emissions, *supra* note 3.

[5] Chan-woo Kim, *Northeast Asian Environmental Cooperation: From a TEMM's Perspective*, 12 KOREA REV. INT'L. STUDIES 19, 20 (2009), *available at* http://gsis.korea.ac.kr/gri/contents/2009_1/12-1-02%20Chan-woo%20Kim.pdf.

[6] Desertification is "the persistent degradation of dryland ecosystems by human activities—including unsustainable farming, mining, overgrazing and clear-cutting of land—and by climate change." *World Day to Combat Desertification, 17 June*, UNITED NATIONS, http://www.un.org/en/events/desertificationday/background.shtml (last visited April 29,

B.C. during the Shang dynasty,[7] while Korean scholars recorded "dust falling like rain" in 174 A.D.[8] The number of reported DSS phenomena in China, Korea, and Japan increased from the 15th century onwards as the growing population and their movement along the Silk Road increased desertification.[9] China, Korea, and Japan all have seen a dramatic increase in the number of DSS per year over the past several decades and have begun to realize this as a very serious threat to their health and environment.[10]

The dust and sandstorms, with a long history of occurrence, can be considered as purely a natural phenomenon. DSS originate in the arid and semi-arid regions of China and Mongolia as a result of wind and water erosion.[11] Some artificial factors, such as development-driven land clearing and overgrazing and over-cultivation, are believed to accelerate the phenomena.[12] A typical occurrence of DSS involves an increase in density of atmospheric dust. As DSS move towards China's heavily populated and industrial areas in the east coast, soil and mineral particles are picked up by the wind over the Korean Peninsula and Japan, mostly in spring time.[13] Koreans and Japanese commonly refer to these phenomena as "yellow sand" (*hwangsa* and *kosa*, respectively) and view the increased frequency and severity of DSS as caused by human activities.[14]

DSS bring about a number of harmful consequences, including respiratory diseases and inconveniences due to visibility impairment. The picked-up pollutants in the fine sand generate eye and throat irritation, and pose more serious health risks such as asthma, increased risk of stroke,

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[7] W. Chad Futrell, *Choking on Sand: Regional Cooperation to Mitigate Desertification in China*, 9 CHINA ENVIRONMENT SERIES 57, 57 (2007), *available at* http://www.wilsoncenter.org/sites/default/files/CES%209%20Commentaries,%20pp.%2057-76.pdf (citing H. Chon, *Historical Records of Yellow San Observations in China*, 7 RESEARCH ENVT'L SCI. 1 (1994).

[8] *Id.* (citing Yongsin Chun et al., *Historical Records of Asian Dust Events (Hwangsa) in Korea*, 89 Bulletin of the American Meteorological Soc'y, no.6, 823, 824 (2008), *available at* http://journals.ametsoc.org/doi/pdf/10.1175/2008BAMS2159.1.

[9] Futrell, *supra* note 7, at 57.

[10] *See id.* at 58-59.

[11] *Id.* at 57.

[12] *Id.* at 57-58.

[13] Jennifer L. Turner, *Driving Into the Desert of Sand—Circle of Blue*, 9 CHINA ENVIRONMENT SERIES 57, 62 (2007), *available at* http://www.wilsoncenter.org/sites/default/files/CES%209%20Commentaries,%20pp.%2057-76.pdf; *see also* Ashley Rowland and Hwang Hae-rym, *Yellow Dust Storms Spark Concern in S. Korea*, STARS AND STRIPES, (Dec. 8, 2008), http://www.stripes.com/news/yellow-dust-storms-spark-concern-in-s-korea-1.85961.

[14] Futrell, *supra* note 7, at 57.

heart attack, and cancer.[15] Industries are also impacted by DSS, for example, flight cancellations, disruption of outdoor services, and damage of dust-sensitive industries such as semiconductors.[16] The economic and health costs of DSS vary greatly depending on wind speed and particulate density.[17] China's annual economic loss from DSS is estimated to be 576 million to 1,980 million Yuan.[18] South Korea is regarded as the most vulnerable to DSS: their scientists estimated their country suffered $4.6 billion in sandstorm-related losses in 2002, equivalent to 0.8% of the country's GDP.[19]

Efforts to address DSS can be categorized into two fields: (1) the monitoring and forecasting of DSS outbreaks; and (2) efforts to prevent DSS. The former requires reliable data collection and a proper scientific assessment of the problem.[20] At the domestic level, different stages of the warning mechanisms and the appropriate action manuals are developed as a result of these efforts.[21] Similarly, a bilateral initiative, such as the Korea-China Joint Monitoring Network of DSS, has been developed in 2003 to establish a regional network of observation stations to share data on the origins and paths of DSS.[22]

The efforts to prevent DSS seek to deal with root causes of the problem and to adopt policy measures to solve them. As DSS travels across geographic boundaries, numerous domestic, regional, and international initiatives have emerged.[23] Multiple layers of law and policy have been

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[15] *Id.* at 59.

[16] *Id.* at 58.

[17] *Id.*

[18] Kwang Kyu Kang et al., *A Study on the Analysis of Damages of Northeast Asian Dust and Sand Storms and the Regional Cooperation Strategies*, KOREA ENVIRONMENT INST., 11-12 (2004), *available at* http://203.250.99.31/pub/docu/en/AN/ZA/ANZA2004ACB/ANZA-2004-ACB.PDF.

[19] *See id.* at 33.

[20] *See generally* Yoshika Yamamoto, *Recent Moves to Address the KOSA (Yellow Sand) Phenomenon*, 22 SCI. & TECH. TRENDS QUARTERLY REV. 45 (2007), *available at* http://www.nistep.go.jp/achiev/ftx/eng/stfc/stt022e/qr22pdf/STTqr2203.pdf.

[21] For instance, Korea has developed various measures such as "Yellow Sand Observation and Observatory Operation," "Forecasting Yellow Sand," and "Comprehensive Countermeasures for the Prevention of Damage by Yellow Sand." Whasun Jho & Hyunju Lee, *The Structure and Political Dynamics of Regulating "Yellow Sand" in Northeast Asia*, 33 ASIAN PERSPECTIVE 41, 54 (2009).

[22] Jang Min Choo et. al., *A Study on the Establishment of Regional Cooperation Mechanism to Respond Yellow Dust*, KOREA ENVIRONMENT INST 6 (2007), *available at* http://www.prism.go.kr/homepage/researchCommon/retrieveResearchDetailPopup.do?research_id=1480000-200700257 (in Korean).

[23] For example, the United Nations Convention to Combat Desertification [hereinafter *UNCCD*] is the sole legally binding international agreement linking environment and

developed. China, for instance, unilaterally passed a number of laws, including the Law on Combating Desertification Prevention and Control in 2001, in order to control desertification, the main cause of DSS.[24] In December 2002, regulations on the conversion of farmland to forest were enacted, which allowed individuals or businesses to be reimbursed and remunerated for their forestation efforts by central and local government.[25] In addition, bilateral relations such as those between Korea and China, Korea and Japan, and China and Japan, are being used to deal with the DSS within the region.[26] For instance, the Japan Bank for International Cooperation ("JBIC") supported a plantation project to control erosion in Tianshui, China in 2004.[27] Recently, the governments of Korea and Mongolia have launched the "Korea-Mongolian Greenbelt Plantation Project," which aims to plant trees from 2007 to 2016 for preventing further desertification in the Gobi Desert area.[28]

The United Nations Convention to Combat Desertification ("UNCCD") is heavily involved with combating desertification in this region.[29] International organizations such as the World Bank, the Global Environmental Facility ("GEF") and United Nations Economic and Social Commission of the Asia Pacific ("UNESCAP") have been cooperating and working in a multilateral regional network. For instance, an international conference was held in 2006 with a joint sponsorship of the UNCCD and the UNESCAP to create a Northeast Asia Forest Network to reduce desertification and DSS.[30]

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development to sustainable land management. *About the Convention*, UNITED NATIONS, http://www.unccd.int/en/about-the-convention/Pages/About-the-Convention.aspx. The 195 parties to the Convention work together to improve living conditions for people in drylands, to maintain and restore land and soil productivity, and to mitigate the effects of drought. *Id.* The UNCCD collaborates closely with the Convention on Biological Diversity [hereinafter *CBD*] and the United Nations Framework Convention on Climate Change [hereinafter *UNFCCC*] to meet these complex challenges with an integrated approach and the best possible use of natural resources. *Id.*

[24] Futrell, *supra* note 7 at 59.

[25] *See generally* Kang et al., *supra* note 18 at 12, 15.

[26] *See Bilateral Cooperation*, THE TRIPARTITE ENVIRONMENT MINISTERS MEETING, http://www.temm.org/sub04/02.jsp (last visited April 30, 2013) [hereinafter *TEMM*].

[27] Jho & Lee, *supra* note 21, at 53.

[28] *Summary of Conference*, UNCC COP 10, http://english.unccdcop10.go.kr/sub/01_02.jsp; *see* Lee Won Hee, Int'l Cooperation Division, Korea Forest Service, *Bilateral and Multilateral Cooperation of the Republic of Korea*, presentation at UNCCD Conference of the Parties 10 at Changwon Exhibition Convention Center in Changwon-City, Gyeongnam Province, Republic of Korea, (Oct. 11, 2011), slides *available at* http://www.neaspec.org/documents/UNCCD_side_event/Korea_ Forest_Service.pdf.

[29] *See supra* note 22.

[30] *Desertification Prevention Afforestation Results*, UNCCD COP 10, http://english.un

Governments in this region have also been working closely together to tackle transboundary environmental problems. Most of these mechanisms are led by governments, with various cooperation levels, from working-level to ministerial- and high-level. One of the oldest regional cooperation mechanisms is the Northeast Asian Conference on Environment Cooperation ("NEAC"), which was created in 1992 at the initiative of the Japanese Environment Agency.[31] The special feature of NEAC is the participation of civil societies.[32] In addition, Environmental Congress for Asia and the Pacific (Eco-ASIA) is a multilateral government network for environmental cooperation in Northeast Asia. It was established by Japan's Ministry of Environment in 1991 with the goal of sharing information and opinions among ministries overseeing the environment.

Another prominent inter-governmental body coping with transboundary air pollution is the North-East Asian Subregional Program for Environmental Cooperation ("NEASPEC"), which was established in 1993.[33] The goal of NEASPEC is to build the basis for a legally binding regional cooperation entity in the Northeast Asian region.[34] It is governed by the Senior Officials Meetings of the six countries involved, which convene annually.[35] The Ministry of Foreign Affairs and Trade of Korea has been playing a leading role.[36] NEASPEC is run with financial support

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ccdcop10.go.kr/sub/02_02_04.jsp. To view the proposal of the Northeast Asia Forest Network, see KFS, NORTHEAST ASIA FOREST NETWORK (June 1, 2006), *available at* http://www.google.co.kr/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&ved=0CCsQFjAA&url=http%3A%2F%2Fwww.forest.go.kr%2Fnewkfsweb%2Fcmm%2Ffms%2FBoardFileDown.do%3Bjsessionid%3DZcJHPydRydxMh1RYcKJqTN1vvn1l2Jp04P2XBwv14lsw0WJ22Zd0!568736123%3FatchFileId%3DFILE_000000000071264%26fileSn%3D1%26dwldHistYn%3DN%26bbsId%3DBBSMSTR_1065&ei=N2laUZrtOOLkiAfvgIH4Cw&usg=AFQjCNEmmXIvmbX4OBpmur7WD9U1lh_Q1w&sig2=HuRnLyTjRjHth6SAw5XqCg&bvm=bv.44442042,d.aGc&cad=rjt.

[31] Kazu Kato & Wakana Takahashi, *Whither NEAC: An Overview of the Past, Present and Future of Environmental Cooperation in Northeast Asia*, presented at the 9th Northeast Asian Conference on Environmental Cooperation, Ulaanbaatar, Mongolia, (Jul. 26-28, 2000), *available at* http://enviroscope.iges.or.jp/modules/envirolib/upload/1706/attach/ whither_neac.pdf.

[32] Kim, *supra* note 5, 26-27. However, no NEAC meetings have taken place since 2007. *Id.* at 28. The NEAC appears to be defunct as of now. *See Northeast Asian Conference on Environmental Cooperation (NEAC)*, INT'L ENVT'L COOPERATION TOWARD SUSTAINABLE DEV., http://www.env.go.jp/earth/coop/coop/neac_e.html.

[33] NORTH-EAST ASIAN SUBREGIONAL PROGRAMME FOR ENVIRONMENTAL COOPERATION, http://www.neaspec.org/ (last visited April 30, 2013) [hereinafter *NEASPEC*].

[34] *See generally id.*

[35] The six countries are South Korea, North Korea, Russia, Mongolia, China, and Japan. *See id.*

[36] *See generally* U.N. Economic & Social Comm'n for Asia and the Pacific, Subregional Office for East and Northeast Asia, Rep. of the Sixteenth Senior Officials Meeting of

from the Asia Development Bank ("ADB"), Japan, and Korea, with UNESCAP serving as interim secretariat.[37] Although NEASPEC is equipped with a Secretariat, a financial scheme, and programs to implement, it failed to show any great leadership in forging cooperation and significant environmental solutions in the sub-region.[38]

The most active regional cooperation network is the Tripartite Environmental Ministers Meeting ("TEMM"), the highest level of official government activity which is composed of China, Japan, and Korea.[39] It started in 1999 on the proposal of South Korea's Ministry of Environment and the DSS have been one of the central topics of its annual TEMM meetings.[40] As the country most impacted by yellow dust storms, South Korea has consistently exercised leadership over the DSS-related issues in this forum.[41] TEMM, the only ministerial-level mechanism among the existing environmental cooperation channels, has built up many expectations since its inception. It has focused on activities, such as policy dialogue, information exchange, environmental education and training, environmental industry roundtables and creation of a system to tackle DSS.[42] Overall, TEMM has contributed to building the foundation for future cooperation. As the only ministerial and comprehensive mechanism, TEMM is in a better position to claim the role of the leading mechanism.

Also, environmental nongovernmental organizations ("NGOs") are attempting to deal with regional environmental pollution problems through a transnational network, jointly with international organizations and regional cooperation bodies. NGOs from Korea, China, and Japan have developed a diverse network of groups to address and solve the DSS.[43]

NEASPEC, Sep. 1-2, 2011, U.N. Doc. NEASPEC/SOM(16)/9 (Oct. 4, 2011), *available at* http://www.neaspec.org/documents/som16/SOM16_Report%20of%20the%20Meeting_FINAL.pdf.

[37] *Framework of Institutional and Financial Mechanisms*, NEASPEC, http://www.neaspec.org/framework.asp#3 (last visited April 30, 2013).

[38] Suh-Yong Chung, *Reviving NEASPEC to Address Regional Environmental Problems in Asia*, 28 SAIS REV. 157, 157 (2008).

[39] *Introduction*, TEMM, http://www.temm.org/sub01/01.jsp (last visited April 30, 2013).

[40] *See id.*; *see also Dust and Sand Storm (DDS)*, TEMM, http://www.temm.org/sub08/01.jsp (last visited April 30, 2013).

[41] *See id.*; Laura Henry et al., *From Smelter Fumes to Silk Road Winds: Exploring Legal Responses to Transboundary Air Pollution Over South Korea*, 11 WASH. U. GLOB. STUD. L. R. 565, 568 (2012), *available at* http://law.wustl.edu/WUGSLR/Issues/volume11_3/henrykimlee.pdf ("South Korea is the most vulnerable to transboundary pollution from China.").

[42] *See generally Joint Projects Overview*, TEMM, http://www.temm.org/sub02/07.jsp (last visited April 13, 2013).

[43] *See* Kook Hyun Moon & Dong Kyun Park, *The Role and Activities of NGOs in Reforestation in the Northeast Asian Region*, 201 FOREST ECOLOGY & MGMT 75 (2004),

South Korea's Northeast Asian Forest Forum ("NEAFF") is a good example. It was established in 1998 by former forestry officials and scientists, and held its first international seminar on desertification in 1999.[44] NEAFF has worked with forestry bureau officials and forest scientists to carry out reforestation projects in China and Mongolia.[45] Its main programs include research on the actual conditions for forest preservation in the Northeast Asian region, preventing of desertification, and restoration of the forest ecosystem.[46]

The Yuhan-Kimberly Corporation of Korea has long funded a number of NGOs and forestation projects, including those of NEAFF and the Future Forests, Forests for Peace, and School Yard Forest movements.[47] One of the most prominent projects that NEAFF and Yuhan-Kimberly were engaged in together was the forest-based carbon reduction project in Mongolia in accordance with the Kyoto Protocol's Afforestation/Reforestation (A/R) Clean Development Mechanism ("CDM") rule.[48] Although this project did not materialize in the end, it can be regarded as a noble attempt to show how economic incentive structure can motivate private participants to alleviate DSS in a more proactive manner. However, the NGO and regional scientific community have yet to play an assertive role in demanding transnational legal standards in the Northeast Asian region.

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available at http://www.globalrestorationnetwork.org/uploads/files/LiteratureAttachments/333_the-role-and-activities-of-ngos-in-reforestation-in-the-northeast-asian-region.pdf.

[44] *Keep Northeast Asia Green: The Northeast Asian Forest Forum*, FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, CORPORATE DOCUMENT REPOSITORY, http://www.fao.org/docrep/007/y5841e/y5841e11.htm (last visited April 30, 2013); *see also* www.neaff.org (Kor.).

[45] *See* Moon & Park, *supra* note 43, at 77. NEAFF's partners include the Beijing Forestry University in China and the Mongolian Forest Forum in Mongolia.

[46] *See id.*

[47] Futrell, *supra* note 7, at 60; *see generally People are the Source of Hope*, Yuhan-Kimberly Sustainability Summary Report 39-41(2009), *available at* http://www.yuhan-kimberly.co.kr/resource/pdf/sustain_report/sustain_2009_en.pdf; Rachel Lee, *Yuhan-Kimberly Leads in Green Growth*, THE KOREA TIMES, (Mar. 27, 2013, 5:11 PM), http://www.koreatimes.co.kr/www/news/biz/2013/04/123_132863.html.

[48] *See generally* Pak Sum Low, *North-East Asian Subregional Programme for Environmental Cooperation: Challenges and Opportunities*, commissioned by the NEASPEC Secretariat for the 17th Senior Officials Meeting, Chengdu, China 44-45 (Dec. 20-21, 2012), *available at* http://www.neaspec.org/documents/som17/SOM17_Institutional%20arrangement_Annex.pdf.

III. REGIME FORMATION OR LEGALIZATION?

Some scholars criticize the lack of legalization as the main problem of environmental cooperation in the Northeast Asian region.[49] Countries in this region have approached the DSS problem through inter-ministerial and scientific cooperation, rather than working towards developing a legal instrument with binding obligations.[50] Indeed, no bilateral or regional treaties exist to deal directly with the subject of transboundary air pollution.[51] Does this lack of legalization manifest a sign of diplomatic failure in addressing international environmental problems in this region?

The rules of international law relating to reparation for environmental damage remain unclear. The *Trail Smelter* arbitral award delivered in 1938 and 1941 is considered the seminal judicial contribution to the international law on the subject.[52] The principle derived from the *Trail Smelter* case, was that principles of state responsibility are applicable in the field of transfrontier pollution, and consequently states may be held liable to private parties or other states for pollution that causes significant damage to persons or property.[53] This principle has evolved into a well-accepted rule of customary international law and has become the basis for the prohibition of transboundary environmental harm.[54] Principle 21 of the Stockholm Declaration, for instance, embraced the *Trail Smelter* ruling.[55] It is understood that Principle 21 does not prohibit all transboundary air pollution but provides a state due diligence obligation to prevent

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[49] *See* Henry et al., *supra* note 41, at 569, 570 ("South Korea's reluctance to use legal solutions for transboundary air pollution in this respect is entirely in concert diplomatically with its Northeast Asian neighbors, who have consistently eschewed binding agreements on matters of transborder environmental harm . . . [A]n effective legal solution will ultimately entail the creation of an environmental governance institution for transboundary air pollution . . . with delegated authority to implement . . . precisely defined rules on permissible levels of pollution. . . .").

[50] *Id.* at 568.

[51] *Id.* at 569.

[52] Trail Smelter Case (U.S. v. Can.), 3 R.I.A.A. 1905 (1941), *available at* http://untreaty.un.org/cod/riaa/cases/vol_iii/1905-1982.pdf.

[53] ALEXANDER KISS & DINAH SHELTON, INTERNATIONAL ENVIRONMENTAL LAW 19 (1991).

[54] *See id. at* 20-30 .

[55] Declaration of the United Nations Conference on the Human Environment, 11 I.L.M. 1416 (1972), *available at* http://www1.umn.edu/humanrts/instree/humanenvironment.html [hereinafter *Stockholm Declaration*] ("States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.").

transnational environmental damages.[56] When exercising due diligence, states are required to use the best available techniques, best environmental practices, and best practical means to protect neighbor territories.[57] This was again affirmed in Principle 2 of the Rio Declaration,[58] and the International Court of Justice recognized that Principle 2 has become part of the corpus in international law[59] and reaffirmed the duty of due diligence in the *Pulp Mills* case.[60]

However, state responsibility has not proved an adequate remedy for the global problem because of the difficulty of measuring damages and of proving causation between wrongful acts and damages, in addition to the possibility of infringement on sovereign right and the adverse effects on international foreign relations between the countries concerned.[61] In this regard, cooperative efforts of states involved may be regarded as more effective and appropriate ways to tackle the problem.

As illustrated above, instead of strong binding institutionalization, a softer approach, such as policy dialogue that can have an influence on a counterpart's policies, has been taken in the Northeast Asian region. The development of such policy dialogue illustrates an example of a regional environmental regime development.[62] Scholars view the process of developing international environmental law as a reflexive exercise by state

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[56] SUE ELWORTHY & JANE HOLDER, ENVIRONMENTAL PROTECTION: TEXTS AND MATERIALS 134 (1997) ("[Principle 21] requires states to do more than merely make reparation for damage, placing an obligation on them to take preventive measures to protect the environment—a precautionary approach. What has emerged is an obligation on states to act with due diligence.").

[57] PATRICIA BIRNIE ET AL., INTERNATIONAL LAW AND THE ENVIRONMENT 148 (3d. ed. 2009).

[58] United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Rio Declaration on Environment and Development*, princ. 2, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), Annex I (Aug. 12, 1992) ("States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.").

[59] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 241 (July 8).

[60] Pulp Mills on the River Uruguay (Arg. V. Uru.), Judgment, 2010 I.C.J. 1, ¶ 101 (Apr. 20).

[61] *See generally* Alan Boyle, *Reparation for Environmental Damage in International Law: Some Preliminary Problems*, *in* ENVIRONMENTAL DAMAGE IN INTERNATIONAL AND COMPARATIVE LAW: PROBLEMS OF DEFINITION AND VALUATION 17-26 (Michael Bowman & Alan Boyle eds., 2002).

[62] On regime theory, see ANDREAS HASENCLEVER, PETER MAYER & VOLKER RITTBERGER, THEORIES OF INTERNATIONAL REGIMES (5th ed. 2002).

officials in developing their own understandings of what is the environment, and how they are affected by environmental change; they emphasize the importance of "the epistemic community."[63] International agreements can change "a state's perceptions of its own interests through a process of social learning."[64] The characteristics of an environmental regime usually vary greatly depending on the nature of the issue at hand, the level of knowledge about the subject, and the cost of an alternative policy. The epistemic community, which shares knowledge and similar preferences on social norms, can affect the nature and formation of a transnational environmental regime.[65]

Peter H. Sand explains how the activities of an epistemic community lead to cooperation[66]: first, scientific knowledge helps to substantiate the seriousness of the destruction of the environment while providing alternatives that can produce real results in multilateral negotiations; second, such scientific knowledge greatly affects the values of important policy makers; and third, this knowledge also affects public opinion. Looking at the development of the Mediterranean Action Plan ("MAP"),[67] it is clear that a science-based approach played a significant role.

In the context of the transboundary air pollution, the Convention on Long-Range Transboundary Air Pollution ("LRTAP Convention") is instructive.[68] The United Nations Economic Commission for Europe created a model for controlling transboundary air pollution: a multilateral preventive regulation and integrated policy-making based on sophisticated scientific assessments and economic modeling. LRTAP mainly utilizes non-adversarial, non-binding, non-compliance procedures for dispute resolution which administer regulations that are devised internally by treaty institutions. To provide scientific support to the Convention, the Programme for Monitoring and Evaluation of the Long-Range Transmission of Air Pollutants in Europe ("EMEP") has been established.[69] EMEP's main functions include the collection of emission data,

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[63] DANIEL BODANSKY, THE ART AND CRAFT OF INTERNATIONAL ENVIRONMENTAL LAW 147 (2010).

[64] *Id.* at 152.

[65] Peter M. Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 INT'L ORG. 1, 17 (1992).

[66] Peter H. Sand, *International Cooperation: The Environmental Experience*, *in* PRESERVING THE GLOBAL ENVIRONMENT: THE CHALLENGE OF SHARED LEADERSHIP 236-79 (Jessica Tuchman Mattews ed., 1991).

[67] *See* United Nations Environment Programme, *Mediterranean Action Plan for the Barcelona Convention*, http://unepmap.org/ (last visited Apr. 12, 2013).

[68] Convention on Long-Range Transboundary Air Pollution, Nov. 13, 1979, 1302 U.N.T.S. 217.

[69] EMEP, http://www.emep.int (last visited Apr. 30, 2013).

measurement of air quality, modeling of atmospheric transport and deposition of air pollution, and integrated assessment modeling.[70] Decades of experience with multilateral environmental treaties has shown that investigation and monitoring can be important tools underlying a dynamic regulatory framework that can adapt to changes in levels of risk identified by science.

Another form of regime development to respond to transboundary air pollution was developed in the Southeast Asian region. The Association of Southeast Asian Nations ("ASEAN")[71] governments agreed to a Regional Haze Action Plan ("RHAP") in December 1997.[72] This plan establishes mechanisms to monitor fires and to strengthen regional fire-fighting capabilities, including timely and more accurate weather forecasts, early warning mechanisms and the development of preventive tools, such as monitoring databases and fire danger rating systems.[73] At the 2002 World Conference and Exhibition on Land and Forest Fire Hazards held in Kuala Lumpur, the ASEAN ministers signed the ASEAN Agreement on Transboundary Haze Pollution (the "2002 ASEAN Agreement").[74]

Likewise, in Northeast Asia, Korea, China, and Japan began formulating proper instruments and institutions to deal with the problem.[75] The process was not smooth, as each country had different positions and interests. Each country was hesitant to take the economic initiative or let other countries assume political leadership in order to maintain the balance of power in this region in the beginning.[76] On the other hand, knowledge-based cooperation was possible. The most effective avenue of collaboration was in determining the scientific basis of the problem. Scholars of each country collected data, established focal points for communication, and met

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[70] *See id.*

[71] ASSOCIATION OF SOUTHEAST ASIAN NATIONS, http://www.asean.org/ (last visited Apr. 30, 2013).

[72] ASEAN Regional Haze Action Plan (Dec. 23, 1977). *See* FIRE, SMOKE, AND HAZE, THE ASEAN RESPONSE STRATEGY, 207 (S. Tahir Qadri ed., 1995), *available at* http://www.asean.org/archive/pdf/fsh.pdf.

[73] *See id.*

[74] ASEAN Agreement on Transboundary Haze Pollution (June 10, 2002), *available at* http://www.aseansec.org/pdf/agr_haze.pdf; *see* Press Release, International Forest Fire News, the ASEAN Agreement on Transboundary Haze Pollution (Jun. 11, 2002), *available at* http://www.fire.uni-freiburg.de/iffn/iffn_31/14-IFFN-31-ASEAN-Agreement-2.Pdf (containing full text of the agreement); *see also* Alan Khee-Jin Tan, *The ASEAN Agreement on Transboundary Haze Pollution: Prospects for Compliance and Effectiveness in Post-Suharto Indonesia*, 13 N.Y.U. ENVTL L.J. 647, 647-48 (2005).

[75] Jho and Lee, *supra* note 21, at 53-54.

[76] *See id.* at 57.

regularly to assess the data.[77] Regional international organizations such as UNESCAP and the ADB provided forums for discussion of this issue. Non-governmental organizations in each country also formulated networks of experts, which performed better than government networks.[78] Although the regional environmental cooperative scheme is still under way in terms of formal institutional development and legally-binding instruments, the Northeast Asian environmental cooperation case demonstrates the prevailing characteristic of scientific leadership taking precedence over economic or political leadership and the emergence of the epistemic community based on such leadership.

The activities of the existing environmental cooperation mechanisms in the Northeast Asian region are assessed to be less than satisfactory. On the one hand, the slow progression of the regime from the knowledge-sharing or joint-study platform into a fully implemented and enforceable institution is a particular challenge for the future. There may be several reasons for this delayed development, e.g., competing histories and different levels of economic development of the countries concerned. On the other hand, there is yet no integrated, comprehensive institution developed in this area to cope with the environmental challenges. Multi-layered and complex cooperation networks exist, however, with a loose interconnectivity. A general lack of a systematic connection between actors and insufficient implementation has meant that the solutions offered so far have been inefficient and incomplete.

The past history and nationalism of the three countries in the Northeast Asian region impedes the formation of effective environmental regime. In terms of the leadership roles, China has been focusing on multilateral environmental regulations and has been enthusiastic to receive funds and technology transfers. Although actively initiating a number of environmental cooperation mechanisms, Korea has taken a developing country stance by not taking the leadership role in funding. By the same token, Japan has steered away from creating organizations that impose a further financial burden and prefers utilizing existing institutions. Governments of these countries so far have not made efforts to establish close relationships with other actors, such as academia, the business community or environmental NGOs.[79] Contrary to the European case, the networking of experts is at its beginning stages in the Northeast Asian region.[80] If mechanisms establish channels for environmental NGOs to

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[77] *See id.* at 54-55.
[78] *Id.* at 57.
[79] *Id.* at 57.
[80] *Id.*

provide input into mechanism activities, the capacity of mechanisms to tackle regional environmental problems will be greatly enhanced.

IV. A WAY FORWARD

Transboundary air pollution in the Northeast Asian region is very much related to climate change. This interlinkage counsels in favor of simultaneously tackling the problems of DSS and climate change. Policy coordination about climate change will effectively deal with global warming, and at the same time, can solve the transnational environmental problems such as DSS. In the past, the environmental policies of Korea, China and Japan differed vastly, but the different environmental policies are beginning to converge and harmonize. Korea and Japan, as members of the Organization for Economic Cooperation and Development ("OECD")[81], have similar levels of environmental policies, and it appears that China is moving more in line with those of the former two. Three countries have employed their own Waste Electrical and Electronic Equipment ("WEEE"), Restriction of Hazardous Substances ("RoHS"), and Registration, Evaluation, Authorization, and Restriction of Chemicals ("REACH") regulations modeled after the European Union.[82] The carbon cap-and-trade schemes are legislated in Korea and are being developed elsewhere.[83]

The three countries did not share a common vision for one reason or another in the past. In 2009, however, TEMM 11 assessed the activities of the past ten years and discussed the future of TEMM.[84] The ten

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[81] *List of OECD Member Countries—Ratification of the Convention on the OECD*, OECD, http://www.oecd.org/general/listofoecdmembercountries-ratificationoftheconvention ontheoecd.htm (last visited Apr. 30, 2013). Twenty countries originally signed the Convention on the Organization for Economic Cooperation and Development on December 14, 1960. Since then fourteen more countries have become members. *Id.*

[82] The Waste Electrical and Electronic Equipment (WEEE) Directive of 2003, the Restriction of Hazardous Substances (RoHS) Directive of 2003, and Registration, Evaluation, Authorization and Restriction of Chemicals (REACH) Regulation of 2006 are the three most important product-based European Community legislations concerning the environment. *See* Paul E. Hagan, *Product-based Environmental Regulations: Europe Sets the Pace*, 6 Sustainable Dev. L. & Pol'y, 63 (2006).

[83] *See* Min-Jeong Lee, *South Korea Approves Cap-and-Trade Plan*, THE WALL STREET JOURNAL (May 2, 2012, 9:36 AM), http://online.wsj.com/article/SB10001424052702303877604577379673881237522.html; Sangim Han, *South Korean Parliament Approves Carbon Trading System*, BLOOMBERG (May 3, 2012, 2:27 AM), http://www.bloomberg.com/news/2012-05-03/south-korean-parliament-approves-carbon-trading-system.html. Noh Hee-Jin, *The Importance of Passing Korea's Carbon Trading Bill and ETS Development*, KCMI Capital Market Opinion, May 30, 2012, *available at* http://www.ksri.org/eng/periodical/opinion_list.asp?syear=2013&pg=4&zno=427.

[84] Kim, *supra* note 5, at 28.

Cooperative Priority Areas were identified as (1) environmental education, environmental awareness and public participation; (2) climate change (co-benefits approaches, low carbon society, green growth); (3) biodiversity conservation; (4) dust and sandstorms; (5) pollution control; (6) environment-friendly society/3R/sound resource recycle society; (7) transboundary movement of e-waste; (8) sound management of chemicals; (9) environmental governance in Northeast Asia; and (10) environmental industries and technology.[85] It is evident from this list of priority areas that the vision of the three countries lies in establishing an environment-friendly, resource circulating and low-carbon society. In addition, TEMM identified the challenge of climate change as one of the most urgent tasks to be handled and suggested green growth as a means to transform the challenge into opportunities.[86] This vision will lead the three countries to move in the same direction.[87]

Unlike discrete transboundary environmental problems such as DSS, climate change requires 'revolutionary' changes in every aspect of production and consumption.[88] In the case of DSS, China's efforts to tackle climate change will directly help relieve the severe harms associated with DSS. "[I]f China promoted tree-planting projects as carbon sinks in the areas of desertification[,]"[89] it will significantly reduce the occurrence of DSS. If neighboring countries pursue the goal of a low carbon economy, the overall quality of the environment in Northeast Asia will be greatly enhanced which in turn lessen the environmental impact of DSS.[90] Northeast Asian countries need to benchmark the best practices in other countries and diffuse the model to better cope with the environmental challenges.

Such policy coordination could positively incorporate incentives for clean energy investment in China similar to the CDM under the Kyoto Protocol. Both Korea and Japan have significant experience in CDM projects.[91] As the biggest host country of CDM projects, China is well

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[85] *Id.* at 31.

[86] *Id.* at 32.

[87] *Id.*.

[88] *Id.*

[89] *Id.* at 26.

[90] *Id.*

[91] *See* Asuka Jusen, *Trends of the Clean Development Mechanism and Japan's Approach*, APEC VIRTUAL CENTER FOR ENVIRONMENTAL TECHNOLOGY EXCHANGE, http://www.apec-vc.or.jp/e/modules/tinyd00/index.php?id=132&kh_open_cid_00=32 (last visited Apr. 30, 2013); *CDM Projects by Host Region*, UNITED NATIONS ENVRIONMENT PROGRAMME RISO CENTER, CAPACITY DEVELOPMENT FOR THE CLEAN DEVELOPMENT MECHANISM, http://www.cdmpipeline.org/cdm-projects-region.htm#2 (last visited Apr. 30, 2013) [hereinafter *CDM Projects*].

equipped with implementing infrastructure.[92] Market mechanisms such as regional emissions trading for sulfur dioxide or mutual recognition of renewable energy credits could also be considered.[93] The timing is ripe and countries are capable of addressing problems through policy coordination.

V. CONCLUSION AND REFLECTIONS ON KOREA'S UNIQUE POSITION

In the case of the environmental policy coordination among three countries in the Northeast Asian region, Korea can assume a catalytic role. Korea has made several significant achievements in environmental diplomacy in recent years.[94] It has aggressively engaged with diverse dimensions of global climate change negotiations, and was successfully chosen to host the Secretariat of the Green Climate Fund ("GCF").[95] The Korean government has constructed an infrastructure to publicize so-called green growth policy. Green growth is an action-oriented paradigm that promotes a mutually supportive relationship between growth and the environment by holistically embracing the framework of sustainable growth.[96] It holds the promise of producing reliable, objective guiding principles for international policy.[97] Korea is committed to the sustained

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[92] As of February 28, 2013, China hosted 53.1% of the total registered projects. *Distribution of Registered Projects by Host Party,* UNFCCC (2013), http://cdm.unfccc.int/Statistics/Public/files/201302/proj_reg_byHost.pdf; *see* CDM Projects, *supra* note 94.

[93] Korea has recently introduced the renewable portfolio standards ("RPS") and the renewable energy credits ("REC") schemes. *See Korean Government Plans to Actively Engage in the Solar Energy Exchange Market,* ENERGY KOREA (Apr. 6, 2012), http://energy.korea.com/archives/26309.

[94] *See* Jae-Hyup Lee, John Leitner, & Minjung Chung, *The Road to Doha through Seoul: The Diplomatic and Legal Implications of the Pre-COP 18 Ministerial Meeting,* 12 J. KOR. L. 55, 74 (2012).

[95] Briefing and Press Release, Ministry of Strategy and Finance of the Republic of Korea, Briefing & Press Release: South Korea Selected to host Green Climate Fund (*in Korean*) (Oct. 20, 2012), *available at* http://www.mosf.go.kr/policy/policy01_total.jsp?boardType=general&hdnBulletRunno=&cvbnPath=&sub_category=&hdnFlag=&cat=&hdnDiv=&hdnSubject=%EB%85%B9%EC%83%89%EA%B8%B0%ED%9B%84%EA%B8%B0%EA%B8%88&&actionType=view&runno=4015330&hdnTopicDate=2012-10-22&hdnPage=1&skey=policy.

[96] *See generally* JISOON LEE, GREEN GROWTH: KOREAN INITIATIVES FOR GREEN CIVILIZATION (2010); *available at* http://www.nrcs.re.kr/english/publications/res/02_05_Green_Growth(final).pdf.

[97] *See Inclusive Green Growth: The Pathway to Sustainable Development,* WORLD BANK, http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTSDNET/0,,contentMDK:23192335~menuPK:64885113~pagePK:7278667~piPK:64911824~theSitePK:5929282,00.html (last visited Apr. 30, 2012); OECD, FOSTERING INNOVATION FOR GREEN GROWTH (2011).

use of incentives-based regulatory instruments as an integrated dimension of domestic policy to harmonize carbon emissions-reduction and sustainable development.[98] Korea's recently legislated cap-and-trade system is a prominent example of the progress already made to implement incentive instruments.[99]

One reason why Korea can be expected to exert an important influence in policy coordination in the Northeast Asian region is that the nation has a comprehensive and broadly supported domestic strategy for implementing green growth.[100] Domestic experiences like Korean green growth demonstrate the value of establishing a knowledge-sharing platform or platforms where domestic climate actions can be communicated and where states, intergovernmental organizations ("IGOs"), and NGOs can consult and collaborate with each other. These platforms can also function as forums for consulting amongst nations and between governments, IGOs, and NGOs, with the objective of promoting transparency and collaboration. This idea is not just compatible with the policy prescriptions of other approaches, but must be an essential element of the future regime, no matter what labels are applied to the underlying philosophy. Transboundary pollution problems such as DSS are well suited to be discussed within the framework of the broader policy coordination in the long run.

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[98] Prominent among these legislations is the Low Carbon Green Growth Framework Act. *See generally* John M. Leitner, *The Expansive Canopy of Korean Green Growth: Key Aspects for Forest Conservation Projects in Southeast Asia*, 10 J. KOR. L. 171 (2011).

[99] For more on the emission trading system in Korea, see Hongsik Cho, *Legal Issues Regarding the Legislation for an Emission Trading System in Korea*, 9 J. KOR. L. 161 (2009).

[100] *See Green Growth Action: Korea*, OECD, http://www.oecd.org/korea/greengrowthinactionkorea.htm (last visited Apr. 30, 2013). The National Strategy for Green Growth (2009-2050) and the Five Year Plan (2009-2013) of Korea provide a comprehensive policy framework for green growth in both the short and long term. *Id. See also* Ekaterina Zelenovskaya, *Green Growth Policy in Korea: A Case Study*, International Center for Climate Governance, *available at* http://www.iccgov.org/FilePagineStatiche/Files/Publications/Reflections/08_reflection_june_2012.pdf.

PSSA for the Black Sea

Nilufer Oral*

I. INTRODUCTION

The Black Sea is an important trade route and serves as the maritime link between Asia to Europe, which has been revived in the modern silk route known as the International Transport Corridor Europe-Caucasus-Asia ("TRACECA").[1] Moreover, one of the most important developments to take place in the Black Sea during the 1990s, following the dissolution of the former Union of Soviet Socialist Republics ("USSR"), was the opening up of vast oil and gas reserves in the Caspian region to western oil companies transforming the Black Sea and the Turkish Straits into a key global oil transport route.[2] In addition, there has been a proliferation of oil

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[1] *See* TRANSPORT CORRIDOR EUROPE CAUCASUS ASIA, *The Silk Road of the 21st Century*, http://www.traceca-org.org/en/home/the-silk-road-of-the-21st-century/ (last visited May 15, 2013).

[2] *See* Ian Bremmer, *Oil Politics: America and the Riches of the Caspian Basin*, 15 WORLD POL'Y J. 27 (1998); Ahmet Öztürk, *From Oil Pipelines to Oil Straits: The Caspian Pipeline Politics and Environmental Protection of the Istanbul and the Canakkale Straits*, 4 J. S. EUROPE & BALKANS 57 (2002).

and gas pipelines and oil terminals to transport the oil and natural gas from neighboring regions.[3]

Until the 1960s, the Black Sea was considered to be one of the most diverse and productive seas. However, by 1990 as a result of human activities the Black Sea has become one of the most environmentally degraded seas on the verge of collapse. Black Sea fish species have declined from a total of twenty-six commercial species to six.[4] One of the greatest threats to Black Sea fish stocks came from ship ballast water during the 1980s. The Black Sea is also habitat to four species of cetaceans, including the monk seal, which is considered extinct.[5] The Black Sea cetacean population has been severely depleted as a result of habitat degradation, by-catch from large-scale drift netting, trammel and bottom trawling fishing, illegal hunting and poaching practices, marine pollution, and noise pollution from a congested regional shipping traffic and nutrient overload.[6]

The International Maritime Organization ("IMO") created the *Particularly Sensitive Sea Area* ("PSSA") designation to address the risks to marine areas that are ecologically vulnerable to international shipping.[7] The IMO defines a PSSA as "an area that needs special protection through action by IMO because of its significance for recognized ecological, socio-economic, or scientific attributes where such attributes may be vulnerable to damage by international shipping activities."[8] During the past years

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[3] For a detailed analysis see Nilufer Oral, *Integrated Coastal Zone Management and Marine Spatial Planning for Hydrocarbon Activities in the Black Sea, infra* note 41, at 453-476; Nilufer Oral, *Oil Transportation Security in the Black Sea and the Turkish Straits, infra* note 41.

[4] *See* BLACK SEA ENVIRONMENTAL PROGRAMME, BLACK SEA TRANSBOUNDARY DIAGNOSTIC ANALYSIS (June 22, 1996) [hereinafter 1996 Black Sea-TDA], *available at* http://www.grid.unep.ch/bscin/tda/main/htm.

[5] *See* Mark Simmonds & Laetitia Nunny, *Cetacean Habitat Loss and Degradation in the Mediterranean Sea, in* CETACEANS OF THE MEDITERRANEAN AND BLACK SEAS: STATE OF KNOWLEDGE AND CONSERVATION STRATEGIES, A REPORT TO THE ACCOBAMS SECRETARIAT, MONACO, FEBRUARY 2002 23 (Guiseppe Notarbartolo di Sciara ed., 2002), *available at* http://www.vliz.be/imisdocs/publications/228865.pdf.

[6] *See id.*

[7] *See* Kristina M. Gjierde & David Freestone, *Particularly Sensitive Sea Areas–An Important Environmental Concept at a Turning Point*, 9 INT'L J. MARINE & COASTAL L. 431–468 (1994); Agustín Blanco-Bazán, *The IMO Guidelines on Particular Sensitive Sea Areas (PSSAs): Their Possible Application to the Protection of Underwater Cultural Heritage*, 20 MARINE POL'Y 343-349 (1996); Julian Roberts, *Protecting Sensitive Marine Environments: The Role and Application of Ships' Routeing Measures*, 20 INT'L J. MARINE & COASTAL L. 135-159 (2005); Julian Roberts et al., *The Western European PSSA Proposal: A "Politically Sensitive Sea Area"*, 29 MARINE POL'Y 431-440 (2005).

[8] International Maritime Organization Res. A.720(17), 17th Sess. (Nov. 6, 1991) [hereinafter I.M.O.]; I.M.O. Res. A.885(21), 21st Sess. (Nov. 25, 1999) amending I.M.O.

several PSSAs have been designated, including the Baltic Sea,[9] the Western European Waters and the Wadden Sea.

This paper will examine the biological and legal basis for a PSSA to be designated in the Black Sea.

II. STATE OF THE MARINE ENVIRONMENT

A. Scientific Assessments

The Black Sea is one of the most eutrophic—oxygen deprived—seas in the world.[10] Whereas, until the 1960s, the Black Sea was considered to be one of the most productive seas in the world noted for its rich biodiversity.[11] However, during the 1970s and early 1980s, the Black Sea began to change from an *oligotrophic* (high in oxygen) body of water to a *eutrophic* body of water as a result of anthropogenic factors.[12] Since the 1960s, many anthropogenic factors have had an impact on the marine environment of the Black Sea, such as organic matter from agricultural and industrial runoff, domestic sewage, nutrients, toxic substances from industries, pesticides from agriculture, toxic materials from rice culture in the northwestern coastal lowlands, dumping, sand extraction from the shelf, bottom trawling of fish, and introduction of exotic species from ship ballast water.[13]

In 1992 the United Nations Environmental Programme established its Black Sea programme followed in 1996 by the completion of the first Black Sea Transboundary Diagnostic Analysis, a scientific assessment of environmental pressures on the Black Sea ("1996 Black Sea-TDA").[14] The 1996 Black Sea-TDA identified seven major problems facing the Black Sea environment: the decline in Black Sea commercial fish stocks, loss of habitats, loss of endangered species and their genomes, introduction of

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Res. A720(17); I.M.O. Res. A.982(24), 24th Sess. (Dec. 1, 2005); revoking Annex II of Res. A.720(17).

[9] Excluding the Russian Federation.

[10] *See* Yu P. Zaitsev & B.G. Alexandrov, *Recent Man-Made Changes in the Black Sea Ecosystem, in* SENSITIVITY TO CHANGE: BLACK SEA, BALTIC SEA AND NORTH SEA 25-31 (Emin Özsoy & Alexander Mikaelyan eds., 1997).

[11] *See id.* at 25-26.

[12] *See* T.A. Shiganova, *Mnemiopsis Leidyi Abundance in the Black Sea and its Impact on the Pelagic Community, in* SENSITIVITY TO CHANGE: BLACK SEA, BALTIC SEA AND NORTH SEA 117 (Emin Özsoy & Alexander Mikaelyan eds., 1997); Karen Prodanov et al., ENVIRONMENTAL MANAGEMENT OF FISH RESOURCES IN THE BLACK SEA AND THEIR RATIONAL EXPLOITATION (Food and Agriculture Organization of the United Nations 1997).

[13] *See* Zaitsev, *supra* note 10, at 25.

[14] *See* 1996 Black Sea TDA, *supra* note 4.

exotic species, degradation of the Black Sea landscape, accidental maritime pollution and polluted beaches.[15] It also provided a list of advised actions and milestones for the six Black Sea Coastal States.[16] The 1996 Black Sea-TDA established the scientific foundation for the 1996 Black Sea Strategic Action Plan ("Black Sea-SAP").[17]

In 2007, the second Black Sea-TDA was completed, this time narrowing the problems to four categories of priority problems: eutrophication/nutrient enrichment, changes in marine living resources, chemical pollution (including oil), and biodiversity/habitat changes (including alien species introduction). This analysis served as the foundation for the 2009 Black Sea Strategic Action Plan ("2009 Black Sea-SAP").[18] While shipping activities were identified as a source of pollution for the Black Sea, no mention was made for the establishment of a Black Sea PSSA.

B. Introduction of Alien Species

One of the great calamities to visit the Black Sea has been the accidental introduction of the *Mnemiopsis leidyi* (rainbow comb jelly fish) and other alien species. Environmental pressures on the ecology of the Black Sea were exacerbated with the invasion of the *Mnemiopsis leidyi,* believed to have been introduced through ship ballast water from North America in the early 1980s.[19] Although not the first exotic species to be introduced into the Black Sea, the *Mnemiopsis leidyi* has been the most notorious of these foreign invaders. By 1988 the *Mnemiopsis leidyi* had penetrated the entire Black Sea, including the Turkish Straits and the Sea of Marmara as well as the Sea of Azov.[20] Without any natural predators, the *Mnemiopsis leidyi*

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[15] *See id.*

[16] *See id.*

[17] *See* THE COMMISSION ON THE PROTECTION OF THE BLACK SEA AGAINST POLLUTION, STRATEGIC ACTION PLAN FOR THE REHABILITATION AND PROTECTION OF THE BLACK SEA (Oct. 31, 1996), *available at* http://www.unep.ch/regionalseas/regions/black/bsep06e.pdf.

[18] *See* COMMISSION FOR THE PROTECTION OF THE BLACK SEA AGAINST POLLUTION, STRATEGIC ACTION PLAN FOR THE ENVIRONMENTAL PROTECTION AND REHABILITATION OF THE BLACK SEA (Apr. 17, 2009) (replacing the Strategic Action Plan for the Rehabilitation and Protection of the Black Sea, 1996) [hereinafter 2009 Black Sea–SAP], *available at* http://www.blacksea-commission.org/_publ-BSSAPIMPL2009.asp.

[19] The *Mnemiopsis leidyi* was first observed in November 1982 in the Sudak Bay of the Black Sea and then in 1986 in the north-eastern waters. *See* T.A. Shiganova, *Mnemiopsis leidyi Abundance in the Black Sea and its Impact on the Pelagic Community, in* SENSITIVITY TO CHANGE: BLACK SEA, BALTIC SEA AND NORTH SEA 117-130 (Emin Özsoy & Alexander Mikaelyan eds., 1997).

[20] In the autumn of 1988 the *Mnemiopsis leidyi* had penetrated all parts of the Black Sea

essentially ate and reproduced its way through the Black Sea, attaining a formidable biomass of nearly one billion tons by the end of the 1980s.[21] Feeding off the phytoplankton biomass in the Black Sea it literally starved out the Black Sea fish, especially the anchovy, which suffered a population collapse during this same period.[22] However, in 1997, the *accidental* introduction of another exotic species known as the *Beroe ovata*, also a ctenophore that most fortuitously also happened to be a natural predator of the *Mnemiopsis leidyi*, caused a collapse of the *Mnemiopsis leidyi* population.[23] Ironically, deprived of the *Mnemiopsis leidyi* as a source of food, the *Beroe ovata* has also virtually disappeared from the Black Sea. However, the possibility of the reintroduction of the *Mnemiopsis leidyi* or other invasive species continues to haunt the Black Sea as unregulated and illegal ballast discharge continue to take place in the Black Sea.

C. Marine Biodiversity in The Black Sea

The Black Sea, once characterized by its highly productive marine life and rich biodiversity, witnessed a dramatic decline of its marine living resources, biodiversity and habitats during the last three decades of the twentieth century.[24] The causes for the loss of marine living resources and biodiversity have been attributed to a combination of unsustainable fishing and hunting practices, land-based and vessel source pollution, the introduction of harmful alien species, and unsustainable coastal development.

Four species of cetacean are residents of the Black Sea: the common bottlenose dolphin (*Tursiops truncatus*), short-beaked common dolphin

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with an average biomass of 1kg.m-2 and 310 ind.m-2. The amount of biomass peaked in 1990 when a decrease began. *Id.* at 121-122. In August of 1988 *Mnemiopsis leidyi* was observed in the Azov Sea for the first and in the Marmara Sea in 1989-1990 with an average biomass of 4,2 kg.m-2. *Id.* at 119.

[21] *See* YUVENALY ZAITESEV & VLADMIR MAMAEV, BIOLOGICAL DIVERSITY IN THE BLACK SEA: A STUDY OF CHANGE AND DECLINE 87 (May 1997).

[22] *See id.*

[23] For detailed discussion of the using the *Beroe ovata* to control the *Mneiopsis leiydi*, see S.P. Volovik, *Use of Beroe Ovata to Control Meniopsis Populations in the Caspian Sea, in* CASPIAN ENVIRONMENT PROGRAMME, FIRST INTERNATIONAL MEETING OF THE CASPIAN ENVIRONMENT PROGRAMME ON THE INVASIONS OF THE CASPIAN SEA BY COMB JELLY MNEMIOPSIS-PROBLEMS, PERSPECTIVES, NEED FOR ACTION 24-26 (Apr. 26, 2001), *available at* http://caspian.iwlearn.org/caspian-1/mnemiopsis-leidyi-1/documents/use-of-beroe-ovata-to-control-mnemiopsis-populations-in-the-caspian-sea.

[24] *See* Bayram Özturk & Ayaka Özturk, *Biodiversity in the Black Sea: Threats and the Future, in* MANKIND AND THE OCEANS 155 (Miyazaki Nobuyuki, Konichi Ohwada & Adeel Zafar eds., 2005).

(*Delphinus delphis*), harbor porpoise (*Phococena phococena*)[25] and Mediterranean monk seal (*Monacus monachus*).[26] There are no whales in the Black Sea. The Black Sea cetacean population has been severely depleted as a result of habitat degradation, by-catch from large-scale drift netting, trammel[27] and bottom trawling fishing, illegal hunting and poaching practices, marine pollution, and noise pollution from a congested regional shipping traffic and nutrient overload.[28]

During the 20th Century the cetacean population in the Black Sea was decimated with over six million dolphins estimated killed.[29] In 1966 the USSR, Romania and Bulgaria, and later Turkey in 1983, outlawed the deliberate killing of cetaceans.[30] Despite the regional prohibition of killing of dolphins, an estimated three thousand dolphins die each year in the Black Sea as a result of fishing activities, bycatch,[31] illegal hunting, ballast water and intensive shipping activities. A number of protection measures have been taken at the international, regional and national levels. The bottlenose dolphin, the common dolphin, and harbor porpoise are listed in Annex II of CITES.[32] All three are also protected under the ACCOBAMS Conservation

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[25] *See Red List of Threatened Species, Phococena phococena,* INTERNATIONAL UNION FOR CONSERVATION OF NATURE (Mar. 8, 2013, 1:19 p.m.), http://www.iucnredlist.org/details/17030/0. The harbor porpoise is included in the national Red Data Books of Bulgaria and Ukraine, and in the IUCN Red Data Book. It is also protected by the Berne, Bonn and Washington CITES Convention (Appendix II) and ACCOBAMS.

[26] *See* Alexei Birkun, Jr., *The State of Cetacean Populations, in* STATE OF ENVIRONMENT REPORT 2001-2006/7, 365 (2007), *available at* http://www.vliz.be/imisdocs/publications/228882.pdf.

[27] A trammel is a three-layered fishing net. *See Trammel Definition,* DICTIONARY.COM, http://dictionary.reference.com/browse/trammel?s=t (last visited Mar. 8, 2013).

[28] *See* Simmonds, *supra* note 5.

[29] *See* Alexei Birkun Jr., *Cetacean Direct Killing and Live Capture in the Black Sea, in* CETACEANS OF THE MEDITERRANEAN AND BLACK SEA: STATE OF KNOWLEDGE AND CONSERVATION STRATEGIES, A REPORT TO THE ACCOBAMS SECRETARIAT, MONACO, FEBRUARY 2002 10-11 (Guiseppe Notarbartolo di Sciara ed., 2002), *available at* http://www.vliz.be/imisdocs/publications/228865.pdf.

[30] *See id.* at 365.

[31] Gill nets used for turbot fishing of the coast of Turkey has resulted in significant number of dolphin deaths by drowning. *See* Arda M. Tonay & Bayram Özturk, *Cetacean Bycatches in Turbot Fishery on the Western Coast of the Turkish Black Sea,* 2003 INT'L SYMP. OF FISHERIES AND ZOOLOGY 137 (2003), *available at* http://www.cetaceanbycatch.org/Papers/tonay03.pdf; *see also* Randall R. Reeves et al., *Global Priorities for Reduction of Cetacean Bycatch,* WORLD WILDLIFE FUND (2005), *available at* www.vliz.be/imisdocs/publications/243210.pdf.

[32] *See* Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 108 [hereinafter CITES], *available at* http://www.cites.org/eng/app/appendices.php.

Plan.[33] All three have been listed as endangered in the IUCN Red Book.[34] The bottlenose dolphin is listed as an endangered species in the Red Data books of Georgia, Russia, Bulgaria and Ukraine, the IUCN Red Data Book, and ACCOBAMS.[35] The bottlenose dolphin has been afforded special protected status under Annex II of the European Union's Habitats Directive.[36] The Black Sea bottlenose dolphin has also been listed endangered in the UNEP Global Action Plan on Marine Mammals.[37]

III. SHIPPING AND OFFSHORE ACTIVITIES IN THE BLACK SEA

A. Oil Transportation

One of the most important developments to take place in the Black Sea during the 1990s, following the dissolution of the former USSR, was the opening up of vast oil and gas reserves in the Caspian region to western oil companies transforming the Black Sea and the Turkish Straits into a key global oil transport route.[38] Between 1992 and 2010 the amount of oil and oil products transported from the Caspian region through the Black Sea and Turkish Straits to western markets nearly tripled from 60 million tons annually ("mta") in 1996 to nearly 147 mta in 2010.[39] The number of tankers transporting oil and products also increased significantly, from 4500 annually transiting the Turkish Straits in 1996 to some 10,000 by 2008 decreasing slightly to 9,274 in 2010.[40] Moreover, there has been a

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[33] *See* Alexei Birkun, Jr. et al., *Conservation Plan for Black Sea Cetaceans* 5 (2006), *available at* http://www.disciara.net/documents/Birkun_etal_2006.pdf.

[34] *See IUCN Red List of Threatened Species*, IUCN RED LIST (2012), http://www.iucnredlist.org.

[35] *See Tursiops Truncatus ssp. Ponticus*, IUCN RED LIST (2012), http://www.iucnredlist.org/details/full/133714/0.

[36] *See* Council Directive 92/43/EEC, May 21, 1992, 1992 O.J. (L 206) 7.

[37] *See Marine Mammals: Global Plan of Action*, UNEP REGIONAL SEAS REPORTS AND STUDIES NO. 55 70 (1985), *available at* http://www.unep.org/regionalseas/publications/reports/RSRS/pdfs/rsrs055.pdf.

[38] *See* Ian Bremmer, *Oil Politics: America and the Riches of the Caspian Basin*, 15 WORLD POL'Y J. 27 (1998); Ahmet Öztürk, *From Oil Pipelines to Oil Straits: The Caspian Pipeline Politics and Environmental Protection of the Istanbul and the Canakkale Straits*, 4 J. S. EUR. & BALKANS 57 (2002).

[39] *See* Interview with Captain Cahit Istikbal, Turkish Directorate General for Coastal Safety (Nov. 2, 2010). Data provided courtesy of the Turkish Ministry Transport Directorate of Coastal Safety.

[40] *See id.* According to the Turkish authorities, the decrease in the number of tankers passing through the Straits as recorded in 2009 is attributed to the operationalization of the Baku-Tblisi-Ceyhan pipeline.

proliferation of oil and gas pipelines and oil terminals to transport the oil and natural gas from the neighboring regions.[41]

B. Offshore Activities

In addition to serving as a transport route for oil, the Black Sea itself holds promising reserves of oil and natural gas as reflected by increased offshore exploration and exploitation activities.[42] The Ukrainian shelf and the Russian shelf have strong potential for oil and recent explorations have also shown significant potential for oil reserves off the Turkish Black Sea coast.[43] In 2009 one of the world's largest semisubmersibles, the Ocean Rig *Leiv Eiriksson*, passed through the Turkish Straits to the Black Sea off the Turkish coast to engage in oil and gas exploration.[44] Major oil companies have obtained licenses from the Turkish government for offshore exploration. This increased activity in offshore oil and gas activities raises questions of pollution risk for the Black Sea that was highlighted in the 2010 following the *Deepwater Horizon* disaster in the Gulf of Mexico.[45] For this reason, offshore oil and gas exploration activities need to be under greater scrutiny for safety and environmental reasons.

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[41] For a detailed analysis, see Nilufer Oral, *Integrated Coastal Zone Management and Marine Spatial Planning for Hydrocarbon Activities in the Black Sea*, 23 INT'L J. MARINE & COASTAL L. 3, 453, (2008) [hereinafter Hydrocarbon Activities Article]; Nilufer Oral, *Oil Transportation Security in the Black Sea and the Turkish Straits*, 5 J. INT'L LOGISTICS & TRADE 27 (2007) [hereinafter Oil Transportation Security].

[42] *See id.* Romania's offshore reserves are estimated to be 956 million barrels of oil [=127,466,666.66667 mt]. Bulgaria has 15 million barrels [=2,000,000 mt] of proven offshore oil reserves, and a significant potential for offshore oil exists in the Ukrainian and the Russian shelves. Oral, Hydrocarbon Activities Article, supra note 41, at 459.

[43] *Anonymous, Tertiary Gas Exploration Well to be First in Turkish Black Sea Waters in 5 Years*, 102 OIL & GAS J. 34 (2004).

[44] The "Leiv Eiriksson" measures 119,38 meters (391.68 ft) in overall length and 85,80 meters (278.88 ft) in overall width. *See* Leiv Eriksson, *The Effective Answer for Ultra-Deep Waters and Harsh Environments*, OCEAN RIG, http://www.ocean-rig.com/showfile.ashx?Fileinstanceid=b9f660cd-217c-4ee9-9acf-30c8b84774bd (last visited Mar. 8, 2013).

[45] On April 20, 2010, an explosion caused by methane gas occurred on the *Deepwater Horizon* semi-submersible offshore mobile drilling unit operating in the Gulf Mexico. The explosion caused the death of eleven workers and an oil spill of approximately 4.9 million barrels (780,000 m^3), making it the largest oil spill in the Gulf of Mexico and in US-controlled waters. *See* NATIONAL COMMISSION ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, *Deep Water: The Gulf Oil Disaster & the Future of Offshore Drilling* (2011), *available at* http://www.oilspillcommission.gov/sites/default/files/documents/Deepwater_Reporttothepresident_Final.pdf.

C. Accidental and Operational Vessel Source Pollution

The increased volume of shipping, especially for dangerous and hazardous products, creates enhanced risks for operational and accidental vessel source pollution in the Black Sea.[46] The possibility of a serious accidental spill in the Black Sea was highlighted in November of 2007 when thirteen vessels caught in a storm off the coast of the Taman Peninsula in the Kerch Strait and off the coast of Ukraine were stranded and sank.[47] Among the vessels was a tanker carrying 4,000 mt of fuel oil that broke into two parts; two vessels carrying 2,500 mt bulk sulphur sank and two other vessels collided. While the incident is considered to be one of the worst environmental disasters for the Black Sea proper,[48] there have been numerous serious shipping accidents in the navigationally risky Turkish Straits.[49] The most devastating of these accidents occurred when the MT *Independenta*, fully laden with crude oil, collided with the MV *Nassia Shipbroker*, resulting in the loss of approximately 95,000 tons of oil, the worst spill to date for the Turkish Straits and ranked among the most serious globally by the International Tanker Owners Pollution Federation.[50]

The 1996 Black Sea-TDA identified vessel source pollution as one of the main threats to the Black Sea marine environment.[51] The eight principal problem areas identified were: (1) ballast water, (2) illegal discharge of harmful substances, especially oil, (3) lack of harbour reception facilities, (4) lack of port state control, (5) lack of contingency plans at local and national levels, (6) lack of a regional Black Sea contingency plan, (7) lack of regional and coordinated national classification and risk assessment systems, and (8) lack of national capabilities for emergency response and regional coordination.[52] Furthermore, the Bucharest Convention imposed a clear obligation for the six Black Sea Party States either *individually* or

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[46] *See generally* G. Ferraro et al., *Long Term Monitoring of Oil Spills in European Seas*, 30 INT'L J. REMOTE SENSING 3, 627 (2009).

[47] For details on the marine accidents, see THE COMMISSION ON THE PROTECTION OF THE BLACK SEA AGAINST POLLUTION, *Kerch Report*, http://www.blacksea-commission.org/_publ-KerchReport.asp#_TOC323887696 (last visited May 22, 2013).

[48] *See id.*

[49] *See* Cahit Istikbal, *Regional Transport Demands and the Safety of Navigation in the Turkish Straits: A Balance at Risk, in* PROBLEMS OF REGIONAL SEAS 2001: PROCEEDINGS OF THE INTERNATIONAL SYMPOSIUM ON THE PROBLEMS OF REGIONAL SEAS 76 (Bayram Öztürk & Nesrin Algan eds., 2001).

[50] *See* INTERNATIONAL TANKER OWNER POLLUTION FEDERATION LIMITED, http://www.itopf.com/information-services/data-and-statistics/statistics/index.html#major (last visited Mar. 8, 2013).

[51] *See* 1996 Black Sea-TDA, *supra* note 4.

[52] *See id.*

jointly to take all appropriate measures to prevent, reduce, and control vessel-source pollution of the marine environment of the Black Sea in accordance with generally accepted international rules and standards.[53]

IV. LEGAL AND INSTITUTIONAL FRAMEWORK FOR PROTECTION OF THE BLACK SEA MARINE ENVIRONMENT

The Black Sea legal framework for protection of the marine environment at the regional level was established under the UNEP Regional Seas programme in 1992. The Bucharest Convention, made up of thirty articles, is the primary framework convention that sets out the overall objectives and obligations of the Parties.[54] The scope of the Convention is limited to the Black Sea proper, excluding the Azov Sea.[55] The southern limit of the Black Sea is defined for the purposes of the application of the Convention as the line joining Cape Kelagra and Dalyan.[56] The Convention applies to the territorial sea and exclusive economic zones of the Parties, although these limits can be extended in Protocols or other related instruments.[57]

In general, the Bucharest Convention provides for the obligations to be fulfilled by all the Contracting parties, which include, in particular, "the prevention, reduction and control of pollution."[58] In addition to the Bucharest Convention the six Black Sea States have also adopted the following implementing protocols: the Protocol on the Protection of the Black Sea Marine Environment Against Pollution from Land-based Sources ("LBS Protocol"),[59] the Protocol on Cooperation in Combating Pollution of the Black Sea Marine Environment by Oil and Other Harmful Substances in Emergency ("Emergency Protocol"),[60] the Protocol on the Protection of the

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[53] *See* Convention on the Protection of the Black Sea Against Pollution art. 8, Bulg.–Yugoslavia, April 1992, *available at* http://www.blacksea-commission.org/_convention-fulltext.asp.

[54] BLACK SEA NGO NETWORK, *NGO Support to the Process of Public Involvement and Participation,* UNDP/GEF Black Sea Ecosystem Recovery Project Final Seminar at Istanbul, Turkey (Feb. 14-15, 2008), *available at* http://iwlearn.net/publications/ll/ngo-support-to-the-process-of-public-involvement-and-participation-gileva/view?searchterm=NGO+support+to+the+process+istanbul+.

[55] *See id.*

[56] *See* Convention on the Protection of the Black Sea Against Pollution art. 1(1), *supra* note 53.

[57] *See id.* art. 1(2).

[58] *Id.* art. 5(2).

[59] *See* Protocol on Protection of the Marine Environment of the Black Sea Against Land-Based Sources and Activities, 21 Apr. 1992, 32 I.L.M. 1122.

[60] *See* Protocol on Cooperation in Combating Pollution of the Black Sea Marine Environment by Oil and Other Harmful Substances in Emergency Situations, 21 Apr. 1992, 32 I.L.M. 1127.

Black Sea Environment Against Pollution by Dumping ("Dumping Protocol"),[61] and the Black Sea Biodiversity and Landscape Conservation Protocol ("Biodiversity and Landscape Protocol").[62]

The Black Sea Commission, based in Istanbul, is the official body responsible for the implementation of the Bucharest Convention and its protocols, as well as the Black Sea-SAP.[63] The Commission is composed of one representative from each of the Black Sea Countries. It meets annually and adopts an annual work program.[64] The ultimate goal of the Commission is to "rehabilitate" the Black Sea, which is understood to mean restoring the sea to the environmental conditions observed in the 1960s.[65] The Commission is supported by the Black Sea Permanent Secretariat located in Istanbul Turkey.[66] The Black Sea Permanent Secretariat is supported by seven Advisory Groups, which include an Advisory Group on Shipping and one for Biodiversity.[67]

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[61] *See* Protocol on Protection of the Black Sea Against Pollution by Dumping, 21 Apr. 1992, 32 I.L.M. 1129. The Land-Based Source Protocol and Dumping Protocols are accompanied by Annexes containing black and grey lists. Substances listed in the Black lists (Annex I) are categorized as hazardous and need to be prevented and eliminated by the Contracting Parties. Substances listed in the grey list (Annex II) as noxious, need to be reduced and where possible eliminated. Annex III provides restrictions to which discharges of substances and matters listed in Annex II should be subject. Furthermore, a prior special permit for the dumping of wastes and materials containing noxious substances contained in Annex II is required.

[62] *See* The Black Sea Biodiversity and Landscape Conservation Protocol to the Convention on the Protection of the Black Sea Against Pollution, 14 June 2002, *available at* http://www.blacksea-commission.org/_convention-protocols-biodiversity.asp.

[63] *See The Convention,* THE COMMISSION ON THE PROTECTION OF THE BLACK SEA AGAINST POLLUTION (2009), http://www.blacksea-commission.org/_convention.asp.

[64] *See* Press Release, COMMISSION ON THE PROTECTION OF THE BLACK SEA AGAINST POLLUTION (Apr. 21, 2012), *available at* http://www.blacksea-commission.org/Anniversary_press-release.pdf.

[65] *See* COMMISSION ON THE PROTECTION ON THE PROTECTION OF THE BLACK SEA, http://www.blacksea-commission.org (last visited Dec. 4, 2013); *infra* Table 1.

[66] *See* Press Release, *supra* note 64.

[67] *See* COMMISSION ON THE PROTECTION ON THE PROTECTION OF THE BLACK SEA, http://www.blacksea-commission.org/_commission-details.asp (last visited Dec. 4, 2013).

Table 1: Black Sea Advisory Groups[68]

ESAS - Advisory Group on the Environmental Safety Aspects of Shipping
PMA - Advisory Group on the Pollution Monitoring and Assessment
LBS - Advisory Group on Control of Pollution from Land Based Sources
IDE - Advisory Group on Information and Data Exchange
ICZM - Advisory Group on the Development of Common Methodologies for Integrated Coastal Zone Management
CBD - Advisory Group on the Conservation of Biological Diversity
FOMLR - Advisory Group on the Environmental Aspects of the Management of Fisheries and other Marine Living Resources

V. PARTICULARLY SENSITIVE SEA AREA ("PSSA")

A. Development of the Concept of the Particularly Sensitive Sea Area

The IMO created the *Particularly Sensitive Sea Area* designation to address the risks to marine areas that are ecologically vulnerable to international shipping.[69] The IMO defines a PSSA as "an area that needs special protection through action by IMO because of its significance for recognized ecological, socio-economic, or scientific attributes where such attributes may be vulnerable to damage by international shipping activities."[70] In order to be designated as a PSSA by the IMO, an area proposed by a State or jointly by States must deserve protection based on ecological criteria; social, cultural, and economic criteria; or scientific and

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[68] *See Advisory Groups*, COMMISSION ON THE PROTECTION OF THE BLACK SEA AGAINST POLLUTION, http://www.blacksea-commission.org/_advisorygroups.asp (last visited Dec. 4, 2013).

[69] *See generally* JULIAN ROBERTS, MARINE ENVIRONMENT PROTECTION AND BIODIVERSITY CONSERVATION: THE APPLICATION AND FUTURE DEVELOPMENT OF THE IMO'S PARTICULARLY SENSITIVE SEA AREA CONCEPT (2007); MARKUS J. KACHEL, PARTICULARLY SENSITIVE SEA AREAS: THE IMOS ROLE IN PROTECTING VULNERABLE MARINE AREAS (2008); *see also,* Kristina M. Gjierde & David Freestone, *Particularly Sensitive Sea Areas? An Important Environmental Concept at a Turning Point,* 9 INT'L J. MARINE & COASTAL L. 431–468 (1994); Agustín Blanco-Bazán, *The IMO Guidelines on Particularly Sensitive Sea Areas (PSSAs): Their Possible Application to the Protection of Underwater Cultural Heritage,* 20 MARINE POL'Y 343, 349 (1996); Julian Roberts, *Protecting Sensitive Marine Environments: The Role and Application of Ships' Routeing Measures,* 20 INT'L J. MARINE & COASTAL L. 135-159 (2005); Roberts et al., *supra* note 7, at 433.

[70] I.M.O. Res. A.982(24), 24th Sess. (Feb. 6, 2006) revoking Annex II of Res. A.720(17), *available at* http://www.gc.noaa.gov/documents/982-1.pdf.

educational criteria.[71] In addition, when an area is designated as a PSSA by the IMO "associated protective measures" must also be "approved or adopted by IMO to prevent, reduce, or eliminate the threat or identified vulnerability."[72] According to the IMO, such measures can include routing or reporting measures for ships,[73] discharge restrictions,[74] operational criteria, prohibited activities, and any other measures that are consistent with competence of the IMO and international law, including Article 211(6) of the 1982 LOSC which allows States to adopt special mandatory measures in their EEZ where international standards and rules are inadequate to protect an area from vessel-source pollution.[75] However, the associated protective measures cannot constitute an unnecessary constraint on international shipping. For this reason, member governments of the IMO have opposed mandatory pilotage in the Torres Straits[76] and a ban on single-hull tankers in the Western European EEZs.[77]

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[71] *Id.*

[72] *Id.*

[73] *Id.* ¶ 6.1.2.

> Adoption of ships' routeing and reporting systems near or in the area, under the International Convention for the Safety of Life at Sea (SOLAS) and in accordance with the General Provisions on Ships' Routeing and the Guidelines and Criteria for Ship Reporting Systems. For example, a PSSA may be designated as an area to be avoided or it may be protected by other ships' routeing or reporting systems.

[74] *Id.* ¶ 6.1.1 (listing "designation of an area as a Special Area under MARPOL Annexes I, II or V, or a SO_x emission control area under MARPOL Annex VI, or application of special discharge restrictions to vessels operating in a PSSA").

[75] United Nations Convention on the Law of the Sea art. 211(6)(a), Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS], provides in part that:

> Where the international rules and standards referred to in paragraph 1 are inadequate to meet special circumstances and coastal States have reasonable grounds for believing that a particular, clearly defined area of their respective exclusive economic zones is an area where the adoption of special mandatory measures for the prevention of pollution from vessels is required for recognized technical reasons in relation to its oceanographical and ecological conditions, as well as its utilization or the protection of its resources and the particular character of its traffic, the coastal States, after appropriate consultations through the competent international organization with any other States concerned, may, for that area, direct a communication to that organization, submitting scientific and technical evidence in support and information on necessary reception facilities.

[76] *See* Julian Roberts, *Compulsory Pilotage in International Straits*, 37 OCEAN DEV. & INT'L L. 93, 99-104 (2006). The request for mandatory pilotage in the Torres Strait PSSA as an APM proved controversial and was not accepted by the IMO. *Id.* at 93-112; *see also* Robert C. Beckman, *PSSAs and Transit Passage-Australia's Pilotage System in the Torres Straight Challenges the IMO and UNCLOS*, 37 OCEAN DEV. & INT'L L. 325 (2006).

[77] *See* Roberts et al., *supra* note 7, at 431.

The growing recognition by States, particularly the EU following the *Erika* and *Prestige* accidents,[78] of PSSAs as an effective mechanism to protect vulnerable marine areas from harmful shipping activities has resulted in the designation of fourteen PSSAs since 1990, including entire seas such as the Baltic Sea.[79]

B. Protection of the Marine Environment and Navigational Rights

The 1982 UNCLOS marked an historic development for international law of the sea and protection of the marine environment. Beyond simply codifying existing norms of international law of the sea, the 1982 UNCLOS established a new and extensive framework for oceans and marine governance at the global level. Part XII of the 1982 UNCLOS marked the first comprehensive regime for the protection and preservation of the marine environment under international law.[80] Article 192[81] was the first codification of a clear and unqualified duty for States to protect and preserve the marine environment.[82] Article 194(1) further required that States take all measures against all sources of pollution consistent with the Convention. Article 194(5) imposed the specific duty on States to take all measures for the protection of *rare or fragile ecosystems and "habitats* of

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[78] For an excellent review of the EU support of the designation of the North Western Atlantic and the Baltic Sea as PSAA, see Markus Detjen, *The Western European PSSA—Testing a unique international concept to protect imperiled marine ecosystems*, 30 MARINE POL'Y 442 (2006).

[79] INTERNATIONAL MARITIME ORGANIZATION, *Identification and Protection of Special Areas and Particularly Sensitive Sea Areas, Designation of the Baltic Sea Area as a Particularly Sensitive Sea Area Submitted by Denmark, Estonia, Finland, Germany, Latvia, Lithuania, Poland and Sweden*, MEPC 51/8/1 (Dec. 19, 2003). The final decision excluded the Russian waters of the Baltic Sea. *Id.* at 2. The controversy over the designation of the Baltic Sea as a PSSA resulted in a review of I.M.O. Res. A.927 and the adoption of the revised guidelines on designating a PSSA in I.M.O. Res. A.982(24). *Id.*

[80] Moira L. McConnell & Edgar Gold, *The Modern Law of the Sea: Framework for the Protection and Preservation of the Marine Environment?*, 23 CASE W. RESERVE J. INT'L L. 83, 84 (1991).

[81] UNCLOS, *supra* note 75, art. 192.

[82] Article 192 of the 1982 LOSC established that all "States have the obligation to preserve and protect the marine environment." *Id. See also* Jonathan. E. Charney, *The Protection of the Marine Environment by the 1982 United Nations Convention on the Law of the Sea*, 7 GEO. INT'L ENVTL. L. REV. 731, 732 (1995); Edward L. Miles, *Approaches of UNCLOS III & Agenda 21—A Synthesis*, *in* SUSTAINABLE DEVELOPMENT AND PRESERVATION OF THE OCEANS: THE CHALLENGES OF UNCLOS AND AGENDA 21-PROCEEDINGS OF THE LAW OF THE SEA INSTITUTE TWENTY-NINE ANNUAL CONFERENCE 16-42 (Mochtar et al. eds., 1997); Alan E. Boyle, *Marine Pollution Under the Law of the Sea Convention*, 79 AM. J. INT'L L. 347, 350 (1985).

depleted, threatened or endangered species and other forms of marine life."[83] However, seeking to maintain a balance between different rights and obligations the Convention included the caveat that such pollution prevention measures could not "[*unjustifiably interfere*] with activities carried out by other States in the exercise of their rights and in pursuance of their duties[.]"[84] The obvious question is what conduct would constitute an "unjustifiable" interference and what impact does this have on the type of measures that can be adopted for a PSSA?

The question of mandatory pilotage in the Torres Strait PSSA highlighted the deep divisions between the maritime interests unwilling to forgo any limitation on high seas freedoms, even when, serious environmental risks have been established and the coastal State interests to adopt the necessary measures to protect rare and fragile ecosystems. Whereas, the purpose of the PSSA in recognizing that certain marine areas are especially vulnerable to the environmental risks of shipping is precisely to take those additional measures that would not be available otherwise under "normal" circumstances. To restrict the adoption of "necessary" measures would result in elevating freedom of navigation rights above interests to protect the environment. The International Court of Justice has recognized the natural environment to be an essential interest of the State.[85] The Court stated that "*in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage.*"[86] The key is in identifying when environmental protection attains that level of an "essential interest of the State" justifying taking measures that may otherwise restrict navigational rights.[87]

C. PSSA In The Black Sea

The increase in maritime traffic, especially oil and oil products transported through the Black Sea coupled with the high level of ecological vulnerability to the risks of maritime traffic, including accidental and operational oil spills as well as the risk from invasive species brought by ballast water, should make the Black Sea an excellent candidate for designation as a PSSA by the IMO. The key issue will no doubt be the

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[83] UNCLOS *supra* note 75, art. 194(5) (emphasis added).

[84] *Id.* art. 194(4) (emphasis added).

[85] Case concerning the Gabčykovo-Nagymoros project (Hung. V. Slov.), 1997 I.C.J. 7 (Sept. 1997).

[86] *Id.* at 78, ¶ 140 (emphasis added).

[87] *See id.*

APMs that would need to be approved by the IMO, which cannot constitute unnecessary constraints on international shipping. Given the relatively compact size of the Black Sea, technological support from a region-wide vessel monitoring and information system could also be further developed as part of a PSSA.[88] The Baltic Sea provides an excellent precedent and model for the Black Sea and similar APMs that could be adopted for the Black Sea.[89]

However, the PSSA needs to be considered and integrated within the broader and more holistic context of MSP in the Black Sea. The draft Black Sea ICZM Strategy and Action Plan lays the foundation for MSP in the Black Sea by recognizing the need to strengthen the integration of multi-sectoral activities using *a legislative framework and special management instruments.* Furthermore, in planning and management, land and sea should be considered as a non-separable unity.[90]

Oil and gas transportation provided by pipelines or seaborne tankers each pose specific and common risks to the marine and coastal environment. For example, the alignment of pipelines can pose special risks to the coastal and marine environment from factors such as leakage. Pipeline routes can also have a significant impact on the marine environment, especially if the selected route results in increased tanker traffic in coastal areas where sensitive ecosystems are found. The assessment of the potential impact of a pipeline should be considered together with its potential effect on shipping patterns, especially in areas that are environmentally sensitive because of existing marine life, habitat protection or other relevant factors. Such planning should not be restricted to localized environmental impact assessments, but should encompass an integrated regional environmental impact assessment that would assess the optimal route, that is the one that would have least negative impact on marine life and the ecosystem.

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[88] *See* Robert Hofstee & Ozkan Poyraz, *Cooperation Between Vessel Traffic Services (VTS) in the Black Sea, in* INTERNATIONAL ENERGY POLICY, THE ARCTIC AND THE LAW OF THE SEA 157-188 (Myron H. Nordquist et al. eds., 2005).

[89] APMs adopted for the Baltic Sea PSSA include two new traffic separation schemes (TSS) in the Bornholmsgat and north of Rügen, and one new inshore traffic zone was established in the TSS south of Gedser. *See* Olof Lindén et al., PSSA IN THE BALTIC SEA: PRESENT SITUATION AND FUTURE POSSIBILITIES (2006), *available at* http://www.baltic master.org/media/files/general_files_706.pdf. In addition, a new deepwater route was established leading from the TSS in the Bornholmsgat to the Gulf of Finland. *Id.* Along this deepwater route two areas to be avoided were also accepted—Norra Midsjöbanken and Hoburgsbank. *Id.*

[90] *See* BUCHAREST CONVENTION ON THE PROTECTION OF THE BLACK SEA AGAINST POLLUTION REGIONAL BLACK SEA STRATEGY FOR INTEGRATED COASTAL ZONE MANAGEMENT 2004–2007, version 4 (2004), *available at* http://www.blacksea-commission.org/_od-draft-biodiversity-strategy.asp.

Therefore, criteria for such a regional impact assessment should be developed to devise a holistic plan for the Black Sea that will minimize the risk of spills and discharges in sensitive areas and the risk of the introduction of invasive harmful species. An important tool will be in the choice of route and of ports, as well as in planning that takes into account the establishment of marine protected areas in the Black Sea, including PSSA designation under the auspices of the IMO.

VI. CONCLUSION

The Black Sea is one of the unique seas of the world. It was once rich in marine living resources and marine mammals. Since 1992 international and regional efforts have been dedicated to rehabilitating the Black Sea. Scientific assessments have shown several sources of environmental pressures on the fragile Black Sea ecosystem, including threats from shipping activities. This threat has intensified during the past two decades with the increase in oil production from the Caspian region transported through the Black Sea. The threats from shipping include operational hazards, including the introduction of invasive species through ballast water exchange and accidental pollution, such as that recently took place in the Kerch Straits.

The fragile ecosystem of the Black Sea would benefit from the additional protection provided if designated as a PSSA by the IMO. The Black Sea meets most if not all the criteria for a PSSA listed in the IMO Resolution A.982(24).[91] The key issues to be determined are whether the PSSA should cover the entire Black Sea or only certain areas of it, and whether all six coastal States should make a submission jointly. The Baltic Sea provides an example where, with the exception of the Russian Federation, all eight coastal States made a joint submission. Most important will be the determination of which APMs are needed for the Black Sea. For examples, "Areas to be Avoided"[92] in those parts where cetaceans migrate; mandatory pilotage in certain areas for tankers transporting dangerous cargo; or even restrictions on vessels that are deemed hazardous and pose a high risk for accidental pollution. The Black Sea may offer an opportunity for the coastal States to develop "new" measures, so long as they can be justified on scientific and environmental grounds. It will also provide an

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[91] I.M.O. Res. A.982(24), 24th Sess., Agenda item No. 11 (Feb. 6, 2005).

[92] *See Particularly Sensitive Areas*, INTERNATIONAL MARITIME ORGANIZATION, http://www.imo.org/OurWork/Environment/pollutionprevention/pssas/Pages/Default.aspx (last visited May 22, 2013).

opportunity for the international community through the IMO to assert the essential interests of States for the protection of the marine environment.

Images of Justice (and Injustice): Trials in the Movies of Xie Jin

Alison W. Conner*

I. INTRODUCTION

Jon Van Dyke was not only a brilliant teacher and scholar but also a wonderful colleague and friend, so it is a privilege to participate in this conference organized in his honor. During the years we were colleagues, I benefited many times from his open-door policy: I could always discuss China and international law issues with Jon, and I'm still grateful for his expertise and support. Some years ago, I remember, we both spoke at a Law School panel on China and human rights, for which I focused on criminal justice. As part of my presentation, I raised a general question for our group: when would the criminal justice system be reformed in China, when would people there enjoy the rights essential to a fair trial? "When Chinese people make these criticisms themselves and press for their rights," was Jon's immediate reply.

Since then, Chinese legal scholars and reformers have indeed worked hard to expand procedural rights in criminal trials and to limit the extra-judicial administrative procedures that too often replace them. It is their efforts, just as Jon predicted, that have led to important criminal justice reforms in China, especially since 1996. In the keynote speech for this conference, for example, Professor Jerome Cohen discussed both the newly amended Chinese criminal procedure law[1] and the possible end to re-

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[1] The Criminal Procedure Law of the People's Republic of China (Zhonghua Renmin Gongheguo Xingshi Susong Fa), as amended on March 14, 2012, effective January 1, 2013.

education through labor,[2] which would introduce reforms long advocated by Chinese experts as well as by international human rights groups.[3]

Chinese critiques of criminal justice may also be found outside the legal world: in literature and film, but especially in film and from its earliest days. Indeed, encounters with the criminal justice system in Chinese movies of the 1930s and 1940s provide some of that cinema's most striking (and terrifying) scenes. In these movies, ordinary people are wrongly arrested, leading to harsh consequences for them and their loved ones, or they are hounded and driven to acts of desperation to survive, then punished severely. The police harass and relentlessly pursue them, and such people are trapped even before they are imprisoned behind bars. Although the trial was not the central, continuous event we find in common law systems, early Chinese filmmakers also used courtroom scenes to great dramatic effect. Judges sit high above those who appear before them, remote from their concerns and deaf to their pleas for mercy; defense lawyers rarely make an appearance in these movies, so the hapless defendants invariably stand alone.[4]

Despite tighter film censorship after 1949, compelling images of justice and injustice also appear in later Chinese movies, particularly in the films of the great Xie Jin (1923-2008),[5] the most celebrated of the Third-

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[2] Andrew Jacobs, *Opposition to Labor Camps Widens in China*, N.Y. TIMES, Dec. 14, 2012, http://www.nytimes.com/2012/12/15/world/asia/opposition-to-labor-camps-widens-in-china.html?pagewanted=all&_r=0. *Necessary Reform of Labor Re-education System*, CHINA DAILY, Jan. 14, 2013, http://europe.chinadaily.com.cn/opinion/2013-01/14/content_16116574.htm. Re-education through labor (*laodong jiaoyu* or *laojiao*) is an administrative punishment allowing the police to imprison people for up to four years without court action or application of the criminal procedure law. Human Rights Watch, *China: Fully Abolish Re-Education through Labor*, HUMAN RIGHTS WATCH, Jan. 28, 2013, http://www.hrw.org/news/2013/01/08/china-fully-abolish-re-education-through-labor.
Jerome A. Cohen, Professor of Law at NYU, Keynote Address at the He Hali'a Aloha No Jon: Memories of Aloha for Jon, an International Law Symposium Tribute to Professor Jon Markham Van Dyke (Jan. 14, 2013), *available at* https://www.law.hawaii.edu/event/video-new-era-chinese-justice-reflections-bo-xilai-and-chen-guangcheng-cases.

[3] For a discussion of criminal procedure before the 2012 amendments (and the 1996 reforms that preceded them), see JIANFU CHEN, CHINESE LAW: CONTEXT AND TRANSFORMATION 299-325 (2008). For a detailed analysis of criminal procedure in practice, see MIKE MCCONVILLE, CRIMINAL JUSTICE IN CHINA: AN EMPIRICAL INQUIRY (2011).

[4] Among the most famous are GODDESS [SHENNÜ] (Lianhua Film Co. 1934), THE TWO-MAO NOTE [LIANGMAO QIAN], one of eight short films in SYMPHONY OF LIANHUA [LIANHUA JIAOXIANG QU] (Lianhua Film Co. 1937), and SONG OF THE FISHERMAN [YUQUANG QU] (Lianhua Film Co. 1934). *See* Alison W. Conner, *Movie Justice: The Legal System in Pre-1949 Chinese Film*, 12 *ASIAN-PAC. L. & POL'Y J., no. 1*, 2010.

[5] One of the most popular as well as critically acclaimed directors from the 1950s to the 1990s, Xie Jin also directed WOMAN BASKETBALL PLAYER NO. 5 [NÜLAN WUHAO] (Tianma Film Studio 1957), RED DETACHMENT OF WOMEN [HONGSE NIANGZI JUN] (Tianma Film

Generation directors who emerged in the Chinese film world after 1949.[6] Though Xie's fame may now have been eclipsed internationally by the stars of the Fifth Generation,[7] he remains one of the most important Chinese directors of the twentieth century and his films continue to be highly popular in China.[8] During his long career, Xie Jin directed a wide variety of films in different genres, ranging from comedy to drama and from historical to contemporary settings. But a concern with justice and the vindication of those wrongly punished are central, recurring themes in his work, especially in his post-Cultural Revolution movies. As Xie himself acknowledged, his filmmaking was influenced by Chinese melodrama traditions as well as by Italian realism and Hollywood conventions.[9] For that reason, his movies are sometimes dismissed as melodramas, whether

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Studio 1961), and THE OPIUM WAR [YAPIAN ZHANZHENG] (Emei Film Studio 1997) as well as the films discussed in this article. *See Xie Jin*, *in* ENCYCLOPEDIA OF CHINESE FILM 376-77 (Yingjin Zhang & Zhiwei Xiao, eds. 1998); TAN YE & YUN ZHU, HISTORICAL DICTIONARY OF CHINESE CINEMA 185-187 (2012); XIE JIN ZHUAN [Biography of Xie Jin] (Dai Xiu & Zhuang Xin, eds., 1997). Ronald Bergan, *Xie Jin: Chinese film director who survived the cultural revolution*, THE GUARDIAN, Oct. 19, 2008, http://www.guardian.co.uk/film/2008/oct/20/china-xie-jin-film. Leo Goldsmith, *The People's Director: The old new China of Xie Jin (1923-2008)*, MOVING IMAGE SOURCE (Dec. 11, 2008), http://www.movingimagesource.us/articles/the-peoples-director-20081211. Xie Jin's work has been very widely discussed, in both English and Chinese. *See, e.g.*, the essays collected in LUN XIE JIN DIANYING [THE MOVIES OF XIE JIN] (Chen Jianyu et al., ed. 1998) as well as the articles and essays cited in this article.

[6] Most "Third-Generation" directors, many trained before 1949, were active during the 1950s to the late 1970s. For a discussion of the different generations of Chinese film directors, see HARRY H. KUOSHU, CELLULOID CHINA: CINEMATIC ENCOUNTERS WITH CULTURE AND SOCIETY 2-19 (2002).

[7] PAUL CLARK, REINVENTING CHINA: A GENERATION AND ITS FILMS 192-93 (2005).

[8] For example, a two-week retrospective at the MOMA Cinemathique theater in Beijing in 2010. *2010 Retrospective of Xie Jin Movies*, CCTV.COM (Mar. 15, 2010), http://english.cctv.com/program/cultureexpress/20100315/103053.shtml. Most of Xie Jin's films are still widely available on DVD in China and his screenplays have also been edited and published (see below). Several of Xie's films were included in the 47th New York Film Festival, held September 25-October 11, 2009, "(Re)Inventing China." *See (Re)Inventing China: A New Cinema for a New Society, 1949-1966*, Shaoyi Sun's Film Review Blog (Oct. 22, 2009, 5:45 PM), http://shaoyis.wordpress.com/2009/10/22/reinventing-china-a-new-cinema-for-a-new-society-1949-%E2%80%93-1966/.

[9] Paul G. Pickowicz, *Melodramatic Representation and the "May Fourth" Tradition of Chinese Cinema*, *in* FROM MAY FOURTH TO JUNE FOURTH: FICTION AND FILM IN TWENTIETH-CENTURY CHINA 295-326 (Ellen Widmer & David Der-Wei Wang, eds., 1993); Ma Ning, *Spatiality and Subjectivity in Xie Jin's Film Melodrama of the New Period*, *in* NEW CHINESE CINEMAS: FORMS, IDENTITIES, POLITICS 15-39 (Nick Browne, Paul P. Pickowicz, Vivian Sobchack & Esther Yau, eds., 1994).

"political"[10] or "sentimental,"[11] and he has been criticized for his conventional narratives or for an old-fashioned style.[12] But Xie's best work is made with great feeling and passion[13] and that style is what makes his movies so effective, more sophisticated and perhaps more powerful than the earlier films.

This article will analyze Xie's depiction of trials—the images of justice—in three of his best-known movies: *Qiu Jin* (1983),[14] set in the last days of the Qing dynasty; *Stage Sisters* (1964),[15] set mostly in the pre-1949 Republican era;[16] and *Hibiscus Town* (1986),[17] which takes place during the mass political movements of the 1960s and 1970s. As it happens, these movies portray trials in the three different political regimes of twentieth-century China, and one might easily consider them in that chronological order. But they reflect Xie's political experiences and are very much the products of the time he made them, so considering them in the order they were filmed may prove a more illuminating approach.[18] How do these three movies reflect Xie's critique of Chinese criminal justice, and what might they suggest about legal reform today?

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[10] Nick Browne, *Society and Subjectivity: On the Political Economy of Chinese Melodrama, in* NEW CHINESE CINEMAS: FORMS, IDENTITIES, POLITICS, *supra* note 10, 40-56.

[11] Paul G. Pickowicz, *Huang Jianxin and the Notion of Postsocialism, in* NEW CHINESE CINEMAS: FORMS, IDENTITIES, POLITICS, *supra* note 9, 57, at 63.

[12] *See, e.g.*, Zhu Dake, *Xie Jin Dianying Moshi de Quexian* [The Defects of Xie Jin's Model], *in* LUN XIE JIN DIANYING, *supra* note 6, at 91-93 (this essay was written in 1986); Li Jie, *Xie Jin's Era Should End, in* CHINESE FILM THEORY: A GUIDE TO THE NEW ERA 147-48 (George S. Semsel, Xia Hong, & Hou Jianping eds., 1990).

[13] In Xie Jin's words: "The film which can generate genuine feeling is, to me, the ideal film. I like my films to touch my audience, to cause an emotional impact." George S. Semsel, *Interviews: Xie Jin, Director of the Third Generation, in* CHINESE FILM: THE STATE OF THE ART IN THE PEOPLE'S REPUBLIC 110 (George Stephen Semsel ed., 1987).

[14] QIU JIN (Shanghai Film Studio 1983).

[15] STAGE SISTERS [Wutai Jiemei] (Shanghai Film Studio 1964). The screenplay appears in XIE JIN DIANYING XUAN JI. NÜXING JUAN [ANTHOLOGY OF XIE JIN'S MOVIES. WOMEN] (Xie Jin, ed., 2007).

[16] The Republic of China, 1912-1949 on the Chinese mainland. The Qing dynasty (1644-1911), the last imperial dynasty, represented the final version of China's traditional laws and legal system.

[17] HIBISCUS TOWN [Furong Zhen] (Shanghai Film Studios 1986).

[18] MICHAEL BERRY, SPEAKING IN IMAGES: INTERVIEWS WITH CONTEMPORARY CHINESE FILMMAKERS 36-39 (2005).

II. THE TRIAL AS THEATER: *STAGE SISTERS*

One of the last Chinese films made during the "seventeen years" (1949-1965)[19] before the Cultural Revolution, *Stage Sisters* (*Wutai Jiemei* 1964)[20] is widely considered one of the best films of the era as well as Xie Jin's masterpiece.[21] Based on an original screenplay, this film is optimistic, even romantic, and it ends on a high note that one cannot find in the two post-Cultural Revolution movies discussed below.

Stage Sisters tells the story of two young women who perform in a Shaoxing Opera[22] troupe, and the film follows them from the mid-1930s until 1950. Xing Yuehong is the daughter of the opera master, and Zhu Chunhua, who becomes her close friend and "stage sister," is a runaway child bride who is allowed to join the opera on tour. During the Sino-Japanese War, the troupe master takes the sisters, his two best performers, to Shanghai, where they are bound on a three-year contract to theater manager Tang. Their performances together meet with great success, but ultimately the interests of the two sisters diverge and their lives follow very different paths. Yuehong marries Tang and ceases performing, while Chunhua moves on to star in leftist, more realistic dramas that directly challenge the political system.

In league with corrupt officials, Tang organizes an attack on Chunhua, which seriously injures her, though fortunately she recovers. Still acting on the officials' orders, Tang arranges for Yuehong to be blamed as the mastermind of the attack, and she is put on trial, with the goal of discrediting Chunhua in the process. In order to conceal the political motives behind it, the attack is cast as resulting from personal enmity

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[19] On the films of this period, see Julian Ward, *The Remodelling of a National Cinema: Chinese Films of the 17 Years (1949-66)*, *in* THE CHINESE CINEMA BOOK 87-94 (Song Hwee Lim & Julian Ward eds., 2011).

[20] Screenplay by Lin Gu, Xu Jin and Xie Jin; starring Xie Fang and Cao Yindi. The film is also known in English as *Two Stage Sisters* or *Two Actresses*.

[21] *Stage Sisters* regularly appears on lists of the best Chinese movies. *See, e.g.*, *100 Greatest Chinese films of the 20th Century as chosen by Asia Weekly Magazine* [*Yazhou Zhoukan*], CHINESECINEMAS.ORG (Dec. 19, 1999), http://www.chinesecinemas.org/china century.html, and the 2005 Hong Kong Film Awards list of the 100 best Chinese movies. *Hibiscus Town* was also among the twenty-four mainland Chinese films included in that list. *The Best 100 Chinese Motion Pictures*, HONG KONG FILM AWARDS ASSOCIATION, http://www.hkfaa.com/news/100films.html (last visited Mar. 8, 2013).

[22] Shaoxing Opera (*Yueju*), which rose to popularity in Shanghai during the 1930s, is performed by an all-female cast and often features love dramas or other "women's stories." The performers usually sing as pairs in sets, as Chunhua and Yuehong do in this movie. *See* JIN JIANG, WOMEN PLAYING MEN: YUE OPERA AND SOCIAL CHANGE IN TWENTIETH-CENTURY SHANGHAI (2009).

between the sisters. But after a dramatic courtroom confrontation, and Chunhua's defense of her stage sister, the prosecution falls apart and Tang's plans are foiled. The story then jumps to 1950, a year after the Communist victory. Chunhua belongs to a troupe that tours the countryside to present revolutionary operas, and when the troupe performs in her former hometown, she meets Yuehong again. The two stage sisters are reunited, and Yuehong also joins the opera troupe; she has apparently reformed her thinking for the new, revolutionary society. In the final scenes, Chunhua and Yuehong sit shoulder to shoulder on one of the troupe's boats, bathed in bright sunshine as they travel into the future.

Stage Sisters is the most nuanced and least obviously political of the three films discussed in this article, and its main themes would be accessible to anyone who has ever seen a Hollywood movie.[23] Theater life, with its backstage rivalries and competing artistic visions, is vividly portrayed and linked to broader themes, such as the unhappiness of a bad marriage, the reconciliation of estranged sisters, or even the plight of low-status performers. The film also contains a long and brilliantly staged courtroom sequence, in this case reflective of all the themes Xie Jin develops throughout the movie and full of his trademark emotion. Xie is known for his sympathetic and memorable film portrayals of women,[24] and in *Stage Sisters*, as in *Qiu Jin*, it is women who are brought before the authorities and tried. In both movies, the officials they must face are all men, which further underscores the women's lack of power.[25]

The sisters' later trouble with the authorities, along with the relative powerlessness of women, is prefigured in an early sequence, which also provides an instructive contrast to the trial. While Chunhua and Yuehong are still in the countryside, they are asked to give a private performance at the home of a rich local landlord, but when Chunhua spurns the man's advances, he takes his revenge. The next day the police arrive to break up

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[23] *Stage Sisters* was shown during the 2009 New York Film Festival by the Film Society of Lincoln Center in "(Re)Inventing China: A New Cinema for a New Society, 1949-1966." The movie's quality and continued appeal is also recognized by contemporary viewers; *see, e.g.*, Mike Hale, *Two 'Sisters' From Time of Mao Star Again*, N.Y. TIMES, Sept. 25, 2009, at C3. The movie does indeed use a "very Hollywood form of cinematic melodrama." Goldsmith, *supra* note 5.

[24] "And naturally this has something to do with my interests, and choices. My childhood memory remains full of oppressed, victimized women." Da Huo'er, *Interview with Xie Jin*, EJUMPCUT.ORG, http://www.ejumpcut.org/archive/onlinessays/JC34folder/XieJinInt.html (last visited Mar. 8, 2013).

[25] In *Hibiscus Town*, the main but not sole defendant is a woman, and the main though not sole judge is also a woman. At least as filmed by Xie Jin, the story is primarily Hu Yuyin's, not Qin Shutian's. Although of the three films discussed in this article only *Stage Sisters* is generally classified as one of Xie's "women's dramas," all are women-centered.

the troupe's regular performance and take Chunhua away to be pilloried, held up for shame and ridicule in the center of town. A policeman reads an announcement of her punishment, declaring that women are forbidden to perform in public and that the evidence shows she has violated the country's laws. Because it is only her first offense, he says, she will be exposed to public scorn for three days.[26] We understand then that formal justice is not available in the countryside, at least for the poor, who may be subject to punishment at the behest of rich and powerful men. Of course this episode also underscores the importance of access to impartial courts and formal procedure, a view that is reinforced when we witness the trial.

In pre-1949 Chinese movies, courtroom scenes often depicted a vast distance between judger and judged, as well as the utter helplessness of the accused, but Xie Jin stages this trial in a very different way. The *Stage Sisters* court is indeed separated from the spectators, but as a stage is from the audience, and the distance between them is not exaggerated. We see a realistic modern courtroom, with three robed judges, the prosecutor and a clerk seated on the bench, a box for the plaintiff or complainant, and a bar at which both the witnesses and the accused stand and testify. The judges are obviously professionals, though it is not through their professionalism or any of their actions that the truth comes out. Nor do lawyers take an active part; although we briefly glimpse them seated below the judges, it is Chunhua herself who plays the advocate's role and the journalists sitting behind her who provide her with support.

When the defendant Yuehong is brought into the courtroom and takes the stand, Chunhua speaks directly to her (and to the audience), and this courtroom confrontation between the two sisters marks the dramatic climax of the film. Just as *Stage Sisters* shows Yuehong and Chunhua performing on stage—and on the broader stage of life—the relationship between the two sisters, and the contrast in the lives they have chosen, plays out before an audience in these courtroom scenes. The trial is a public and open proceeding, and the court is packed with spectators, all deeply engaged in the drama being enacted before them. Indeed, the movie's courtroom bears a strong resemblance to the Shanghai theaters the two sisters appeared in together, and the lead witness against Yuehong gives what is obviously a

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[26] Apparently Chunhua is being punished under the police offenses act, which allowed the police to handle minor offenses without recourse to a court. Under the Police Offenses Act (*Weijingfa Fa*), the police during this period had the power to determine and punish minor infractions of the law, though not to handle more serious offenses, without judicial oversight. Tsung-fu Chen, *The Rule of Law in Taiwan*, *in* THE RULE OF LAW: PERSPECTIVES FROM THE PACIFIC RIM (Mansfield Dialogues in Asia, 2000), papers published by the Mansfield Foundation, *available at* www.mansfieldfdn.org. Or her treatment may be completely without legal basis.

scripted performance, though he cannot remember his lines (to the derision of the courtroom crowd).[27]

But if this judicial process is corruptible, the trial does not reach its intended result. Frozen with fear, Yuehong cannot answer the chief judge's interrogation: "Is it true you abetted others to kill Chunhua? Was it you?" But Chunhua defends Yuehong and speaks the truth about her attacker. "I know someone wanted to break our sisters' friendship, then shift the blame to leave the true criminal at large," she says, defying the judge's demand that the defendant, not the complainant, answer his questions. When Yuehong, still mute, falls into a dead faint, the crowd of spectators surges forward to support her, shouting, "find the true criminal!" to the officials on the bench. Despite their best efforts to restore order to the court, the judges are helpless to continue the case. We see that justice will triumph when the masses stand up, and that this corrupt order will be finished, swept away by the tide of revolution. As a choral interlude highlights Chunhua's triumph, the camera moves to a shot of the sun rising over the Huangpu River, marking the dawn of a new system.

III. THE TRIAL AS PERSECUTION: *QIU JIN*

Qiu Jin (1983)[28] takes place in an earlier period than the other two movies and it is usually classified as one of Xie's "historical" works.[29] Although Xie Jin was assigned to direct this movie by the Shanghai Film Studio, he said he felt a personal connection to the subject: he and Qiu Jin shared the same ancestral place and Xie's grandfather was her friend.[30] The movie portrays the life of Qiu Jin (1875-1907), the Qing activist, women's rights advocate and writer who was executed for her involvement in a failed uprising against the Manchu government. Born into a scholarly family, Qiu also earned a reputation as a poet and writer. She was married into a well-to-do family and had two children, whom she left to pursue her studies in Japan, where she joined Sun Yat-sen's revolutionary movement. On her

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[27] The whole film shows the influence of opera, with its episodic structure and its choral interludes throughout. *See* the discussion by Gina Marchetti, *Two Stage Sisters: The Blossoming of a Revolutionary Aesthetic*, EJUMPCUT.ORG, http://www.ejumpcut.org/archive/onlinessays/JC34folder/2stageSisters.html (last visited Mar. 8, 2013), *reprinted in* HARRY H. KUOSHU, CELLULOID CHINA: CINEMATIC ENCOUNTERS WITH CULTURE AND SOCIETY 32-51 (2002).

[28] Also known as QIU JIN: A REVOLUTIONARY. Screenplay by Ke Ling and Xie Jin; starring Li Xiuming in the title role.

[29] In Xie Jin's published screenplays, for example, *Qiu Jin* appears with the other historical movies. XIE JIN DIANYING XUANJI. LISHI JUAN [ANTHOLOGY OF XIE JIN'S MOVIES. HISTORY VOLUME] (Xie Jin, ed., 2007).

[30] BERRY, *supra* note 18, at 43.

return to China, she became head of the Datong School while she worked with her cousin to plan an uprising against the Qing government. When the uprising failed, Qiu might have escaped, but she stayed behind and was arrested, tried and executed.[31] Since then she has held a special place in the Chinese pantheon of revolutionary martyrs,[32] and the film portrays her as a patriotic and noble heroine who sacrifices family and a comfortable life to devote herself to her country.

In many respects, *Qiu Jin* is a less compelling movie than either *Stage Sisters* or *Hibiscus Town.* The historical setting is a relatively safe one (before the Communist Party came on the scene), the film criticizes a traditional system that was indeed harsh, and its story is told, at least in part, in shades of black and white.[33] A Chinese audience would know the main events of Qiu Jin's life, and the traditional trial scenes, a staple of Yuan drama,[34] would also have been familiar to many. Although Xie Jin invests his heroine with warm as well as heroic qualities, *Qiu Jin* thus lacks the narrative suspense one finds in the other two movies: the story follows popular accounts of Qiu's life and its outcome could hardly be in doubt.

But Xie Jin uses the courtroom scenes in this movie to great dramatic effect, with the trial portrayed as a tense clash between the Qing authorities and the woman they accused of rebellion and treason. It was a dark time for revolutionaries, and as Xie filmed them the trial sequences too are dark ones. Qiu Jin's interrogations, and later her execution, are all held in the black of night, and dark metaphors abound throughout the film: autumn is here and we know winter must be coming soon. Thus we see Qiu, during her final interrogation, write her "death poem" instead of the confession the officials demand: "Autumn's wind and rain make me die of sorrow," a theme that echoes the opening lines of the movie. Qiu's trial was simply the final step on her road to revolutionary martyrdom, and its filming so

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[31] For Qiu Jin's life and work, see Mary Backus Rankin, *The Emergence of Women at the End of the Ch'ing: The Case of Ch'iu Chin* [Qiu Jin], *in* WOMEN IN CHINESE SOCIETY 39-66 (Margery Wolf & Roxane Witke eds., 1975); see also MARY BACKUS RANKIN, EARLY CHINESE REVOLUTIONARIES: RADICAL INTELLECTUALS IN SHANGHAI AND CHEKIANG, 1902-1911 (1971). The movie, not surprisingly, follows popular accounts of Qiu's life rather than documented events. She did not, for example, write her death poem at her trial, and it may even have been written by a supporter after her death. *Id. at* 187.

[32] There is a monument to Qiu Jin in Shaoxing, her family's ancestral place, as well as at her tomb by the West Lake in Hangzhou.

[33] I was very impressed with *Qiu Jin* when I first saw the movie, in Nanjing in 1983, but I don't find that it stands up to repeated viewing, as the other two films do.

[34] The popular Yuan dynasty (1271-1368) drama (*zaju*) often included courtroom (*gongan*) stories, and social justice is a major theme. CHUNG-WEN SHIH, THE GOLDEN AGE OF CHINESE DRAMA: YÜAN *TSA-CHÜ*, 100-12 (1976).

soon after the end of the Cultural Revolution may also have contributed to the movie's dark tone.[35]

Both the trial and prison scenes highlight Qiu Jin's courage in confronting officials who hold the power of life and death over her. Of course she has no lawyer (no legal profession was officially recognized then),[36] and Xie's staging of the trial shows her standing alone yet defiant against the forces of the state. Although Qing trials were generally open to the public, here there are no spectators, and it is only Qiu Jin against the many officials she must face without help or support. Heightening the contrast between their positions, the officials all appear in splendid dress, while Qiu is very simply attired, and in the final scenes of the movie she wears plain white, the color of mourning.

Xie Jin portrays this system in all its cruelty—and the traditional system was cruel, even though torture was at least formally prohibited in 1905, shortly before Qiu's trial and this interrogation took place.[37] Of course the conclusion of these proceedings is never in any doubt: Qiu Jin is guilty and the court's only goal is to get her confession and the names of her accomplices. Qiu's whole life, as depicted in this movie, illustrates her unswerving dedication to the revolution and her choice of that duty over her own children, whom she clearly loves. But in her trial that dedication can be underscored even more dramatically; in prison she is also given one last chance to choose life (and family) over her revolutionary ideals, and once again she refuses. In the film's closing sequence, an unbowed Qiu Jin is slowly marched in chains to her execution, and in the final shot we see her blood on the stones.

IV. THE TRIAL AS PUNISHMENT: *HIBISCUS TOWN*

Hibiscus Town (*Furong Zhen* 1986),[38] which is based on the 1981 novel by Gu Hua,[39] is usually classed as "scar cinema," i.e., films that depict the

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[35] It also proved to be a dark time for the Qing dynasty, which was overthrown only a few years after Qiu Jin's trial.

[36] Lawyers were formally recognized as a profession in the 1912 Provisional Regulations on Lawyers. XIAOQUN XU, CHINESE PROFESSIONALS AND THE REPUBLICAN STATE, 107-28 (2001); Alison W. Conner, *Lawyers and the Legal Profession During the Republican Period, in* CIVIL LAW IN QING AND REPUBLICAN CHINA 215-48 (Kathryn Bernhardt & Philip C. C. Huang eds., 1994).

[37] *See* MARINUS JOHAN MEIJER, THE INTRODUCTION OF MODERN CRIMINAL LAW IN CHINA (1950).

[38] Shanghai Film Studio; starring Liu Xiaoqing and Jiang Wen. Winner of the 1987 Golden Rooster, Hundred Flowers and Golden Phoenix awards.

[39] GU HUA, FURONG ZHEN [A SMALL TOWN CALLED HIBISCUS] (Gladys Yang trans., 1982) (1981).

tremendous personal suffering caused by the mass movements of the Cultural Revolution years (1966-76).[40] Alone of the three movies discussed in this article, this touching film reflects Xie's own experience during that era, and for this reason it seems the most deeply felt. In two other deeply emotional post-Cultural Revolution movies, *The Herdsman*[41] and *The Legend of Tianyun Mountain*,[42] Xie Jin also dramatizes the wrongs suffered by those who were persecuted in political movements and their later vindication or rehabilitation,[43] but only *Hibiscus Town* includes a dramatic trial.

Hibiscus Town tells the story of Hu Yuyin, a beautiful and enterprising young woman who runs a small bean curd restaurant in a rural Chinese town. During a 1964 political campaign, she is labeled a "rich peasant" and quickly loses everything: her business, her home and even her husband, who commits suicide after being arrested. When a devastated Yuyin is assigned to manual labor sweeping the streets of the town, she is befriended by a fellow street-sweeper, the "crazy rightist" Qin Shutian. They fall in love and when she becomes pregnant they ask for permission to marry. But the town's Party leaders are outraged by their request and instead the two are severely punished, their sentences pronounced at a public meeting. Years later, when the political winds have shifted, Qin is released and returns to Yuyin, to their son and to the business Yuyin has been permitted to reopen. But the film's ending is not entirely happy: when reminded of political campaigns and their possible recurrence, Qin and Yuyin look warily into the future.

Hibiscus Town illustrates broad issues of justice and procedure—or lack of procedure—including the use of mass rallies and struggle sessions, one of which foreshadows later events. When a new Party leader with an ominous resemblance to Jiang Qing (Madame Mao) arrives in the town, Qin Shutian is called up for public criticism at a political meeting. At this

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[40] The term is an extension of "scar literature" (*shangheng wenxue*). Scar literature is a genre of Chinese literature that emerged during the late 1970s, after the downfall of the Gang of Four; like scar cinema, it portrays the personal tragedies caused by the Cultural Revolution. *See, e.g.*, PERRY LINK, THE USES OF LITERATURE: LIFE IN THE SOCIALIST LITERARY SYSTEM 4 (2000).

[41] THE HERDSMAN [MUMAREN] (Shanghai Film Studio 1982).

[42] THE LEGEND OF TIANYUN MOUNTAIN [TIANYUNSHAN CHUANQI] (Shanghai Film Studio 1980).

[43] XIE JIN DIANYING XUANJI. FANSI JUAN [ANTHOLOGY OF XIE JIN MOVIES. REFLECTIONS VOLUME] (Xie Jin, ed. 2007) These three films are all "about the rehabilitation of rightists." BERRY, *supra* note 18, at 39. *Hibiscus Town* is the best known of the three films and is probably the most accessible to outsiders; it remains a moving treatment of the period. *See* JEROME SILBERGELD, CHINA INTO FILM: FRAMES OF REFERENCE IN CONTEMPORARY CHINESE CINEMA 188-233 (1999) for a long and sympathetic analysis of the film.

session, held in the dark of night, we learn that Qin is a "bourgeois rightist" sent there for "supervised labor reform" for his attacks on socialism and the Party (he wrote a questionable play). The film thus starkly condemns the arbitrary way in which vague, ill-defined "crimes" are denounced and punished. The law is whatever the Party says it is and no defense is possible, or perhaps the law is simply irrelevant. When at the same meeting the first hint of political trouble for Yuyin appears on the horizon, she is at first defiant and tells her husband she will not sell the house they have built with their profits. "What law have we broken?" she asks him. It's an excellent question.

Yuyin's trial, or what passed for a trial during the Cultural Revolution, is held outdoors, on a large platform in the town square, and it epitomizes all that is wrong with the system. There are no impartial judges, no lawyers to defend the accused, and no possibility of appealing the decision. After Qin and Yuyin are arrested, we see them standing on the stage, facing their fellow townspeople, who have been assembled to witness the proceedings. Their heads are bowed and Qin's hands are tied behind his back. Throughout this sequence, Yuyin and Qin are shown standing alone and unprotected in the pouring rain; they cannot even face their accusers (who are also their judges), the Party officials who sit behind them, at least partly shielded from the rain. A soldier declares that, "On behalf of the public security organs and the military control committee, the rightist and counterrevolutionary Qin Shutian is sentenced to ten years of fixed-term imprisonment and the rich peasant Hu Yuyin gets three years." Even if we view this "trial" as a sentencing hearing, the proceedings are a travesty of justice: in *Hibiscus Town*, Xie Jin has put the whole political system on trial.[44]

Indeed, the dramatic way in which Xie stages these trial scenes leaves the viewer in no doubt of his perspective. Overall, *Hibiscus Town* has a closed-in, dark feeling,[45] and the trial itself is held under a dark and threatening sky, with the two accused standing in a cold, heavy rain throughout. As the pair's sentences are pronounced, there is a loud clap of thunder, underscoring their harsh treatment and perhaps reflecting Heaven's disapproval of the entire event. The final shot, taken from above as if viewed by a higher power, leaves us with this tableau of figures on the

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[44] Browne takes the analysis a step further and argues that the film "subjects that process to a critique that puts politicization itself on trial from an ethical standpoint. For its audience, the film is a kind of judicial hearing with its own rules of evidence and argument." Browne, *supra* note 10, at 47.

[45] *See* the analysis in SILBERGELD, *supra* note 43, at 217-18.

stage and the townspeople anxiously watching from below, still in the pouring rain.

V. XIE JIN'S TRIALS: IMAGES OF INJUSTICE

In some respects, *Qiu Jin* is the least interesting of the three films discussed in this article, despite any personal tie Xie Jin may have felt to its heroine. Xie's connection to his subject is much stronger in the other two films: the optimistic *Stage Sisters* is deeply grounded in Xie's own theater training and stage experience, while *Hibiscus Town* depicts events of a recent past in which he had personally suffered. But Xie's trial sequences, though filmed in different styles, are all highly affecting, not least for the way they reflect the lives of their characters and mirror the narratives of the films. The director's use of the weather and time of day in creating these scenes, which in lesser hands might have seemed too obvious a device, relies on traditional Chinese conventions[46] and actually intensifies the mood. Consequently, Xie's views on the shortcomings of the very different trials he depicts—his images of injustice—are always powerful. The audience can see that all of these trials are political, and none of them is fair.

Which of these systems receives Xie Jin's sharpest criticism, which trial seems the worst? From a political standpoint, it should be *Stage Sisters* or *Qiu Jin*, both set before the 1949 revolution that brought the Communist Party to power. Indeed, *Qiu Jin* highlights the Qing system's worst features, including its reliance on torture and the harsh treatment of prisoners, which could safely be criticized as part of China's cruel "feudal" past.[47] Qiu Jin's trial for rebellion and treason is also the most obviously political; even at the time many people believed that she was innocent and the authorities had acted tyrannically when they tried and executed her so hastily.[48]

The legal (and political) system in *Stage Sisters* should have been an equally easy target: the bourgeois capitalist system that the1949 revolution had only recently overthrown.[49] Yet that Republican-era trial arguably

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[46] *Id.* at 218-19.

[47] These features are also highlighted in Xie Jin's OPIUM WAR [YAPIAN ZHANZHENG] (Emei Film Studio 1997), which depicts the Qing system as backward and cruel.

[48] The careers of the officials who were responsible for Qiu Jin's trial and execution were soon ended. Mary Backus Rankin, *The Emergence of Women at the End of the Ch'ing: The Case of Ch'iu Chin [Qiu Jin], in* WOMEN IN CHINESE SOCIETY, *supra* note 31, at 62. Although Xie Jin did not depict those events in the movie, the aftermath of Qiu Jin's story was well known.

[49] Of course that also made the period more sensitive: the Qing system was further in

receives the kindest treatment by Xie Jin of any in these three films. To be sure, the process is corruptible and the villains seek to use it for bad political ends; the crowded courtroom and its dark paneling create a closed-in feeling and the sisters seem trapped. Perhaps this formal setting is only stage dressing and nothing more? But the trial is open to reporters as well as the public and even lawyers are present, however limited their role. Most striking of all, both the complainant and the defendant are free to speak—indeed, Chunhua does so at length, she dominates the trial. When thus boldly challenged, the case against Yuehong falls apart, and that is the end of it: both Chunhua and Yuehong are freed.

Stage Sisters is the only one of these films in which justice is done, or at least a serious miscarriage of justice is averted. Ultimately, of course, it is the revolution that frees the sisters for a new life, but in the meantime the trial process cannot be used to convict them and they escape legal punishment. We might thus conclude after viewing *Stage Sisters* that procedure alone is not everything, but it is still something. No wonder Xie was denounced for the political stance of this movie ("bourgeois humanist") as well as his sympathetic portrayal of the characters, who seem all too easily reformed. For that reason, *Stage Sisters* could not be shown in China for many years, until after the end of the Cultural Revolution.[50]

Xie Jin paints what is perhaps his bleakest picture of injustice in *Hibiscus Town,* even though the heroine survives and is seemingly restored to her previous life. Xie himself acknowledged the dark tone of this movie: in the years after the Cultural Revolution, he reported, he made tragedies because of the immense tragedies that had taken place in China during that era.[51] Some critics have argued that Xie Jin was criticizing the danger of mass movements, not the system itself; the Party is not the problem. But in *Hibiscus Town* it is the Party that organizes these "trials," and at the end of the film the Party official responsible for them has been restored to her position of power.[52] Whatever the director's intentions, therefore, a viewer

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the past and politically more removed.

[50] BERRY, *supra* note 18, at 33-35. Other post-1949 films also depict events of the Republican era, but it was a hard period to get right, politically or otherwise. *See* Paul G. Pickowicz, *The Limits of Cultural Thaw: Chinese Cinema in the Early 1960s, in* PERSPECTIVES ON CHINESE CINEMA 197, 29 (Chris Berry ed. 1985). Xie did better politically with his 1961 film RED DETACHMENT OF WOMEN, in which he wisely depicted plenty of class struggle but no trials.

[51] According to one interview, Xie did not think it was an appropriate time to make comedies or lighter films. BERRY, *supra* note 18, at 39.

[52] This message is especially clear if *Hibiscus Town* is watched in conjunction with *The Herdsman* and *The Legend of Tianyun Mountain*, the two other examples of Xie Jin's scar cinema. That is no doubt the reason that Xie's three "rehabilitation" movies were subject to serious political criticism, particularly *Tianyun Mountain*; they seem to show that the

both then and now might reasonably conclude that the Party *is* in fact the problem, an extremely sensitive political position to take. In *Hibiscus Town*, which was directed at the system of his own time, Xie was continuing the earlier progressive tradition of criticizing the administration of justice as an integral part of an unjust political system.[53] For that reason, as in the 1930s films that Xie knew well, his criticisms seem more deeply felt, and *Hibiscus Town* was also denounced for its political stance.

The trial in *Hibiscus Town*, like the trial in *Stage Sisters*, could also be viewed as theater, and it is even more obviously scripted and staged. All the characters stand or sit on a high platform, facing not each other but their audience, the townspeople compelled to witness the performance—though here they are cowed spectators, not the actively engaged crowd we find in *Stage Sisters*. But in this trial, Yuyin and Qin are denied a speaking role, and there can be no deviation from the script. Although their trial is the only one of the three that is held out-of-doors, that offers the two accused no possibility of escape. On the contrary, it subjects them to the elements, which heightens our sense of their unprotected state.

If, after viewing *Stage Sisters*, we concluded that the justice system is irrelevant as well as corrupt, then *Hibiscus Town* reminds us that it is not. No one watching Xie Jin's staging of this trial could find it good: even Qiu Jin has more of a hearing than Hu Yuyin (Qiu Jin speaks and at least in the film she does not sign a confession). But the trial in *Hibiscus Town* provides no procedure at all; it exhibits all the features of an extrajudicial proceeding, which of course is what it was. Even if we viewed this as a sentencing hearing, which it resembles more than a trial, when and how did they determine Yuyin's guilt?

VI. CONCLUSION

As a Chinese friend once reminded me, these are "only movies," not historical materials or even documentaries, on which scholars should rely. But movies can convey emotional truth, and Xie Jin's films are as powerful a critique of unfair trials as anything we might find in books. All three of his movies are set in the past, even if it is a not-too-distant one, yet the issues they raise remain of great concern: Xie's depiction of justice or—more accurately, injustice—in all three films is still relevant today. Thus

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behavior of Party regulars is the problem. BERRY, *supra* note 18, at 39-40. Paul G. Pickowicz, *Popular Cinema and Political Thought in Post-Mao China: Reflections on Official Pronouncements, Film, and the Film Audience*, *in* UNOFFICIAL CHINA: POPULAR CULTURE AND THOUGHT IN THE PEOPLE'S REPUBLIC (Perry Link, Richard Madsen & Paul G. Pickowicz, eds. 1989) 37, 41-46.

[53] For a discussion of this point, see Pickowicz, *supra* note 9, at 320-24.

Qiu Jin can be read as critical of any regime that tries and cruelly punishes its political opponents, while *Stage Sisters* reminds us that the trappings of procedure can mask what is actually a very unjust trial.

Hibiscus Town may hold the broadest lessons, though its trial is the least formal of the three and the Chinese authorities seem to have left such lawless proceedings behind. The major legal reforms of 1979 included the enactment of codes of criminal law and procedure, and the latest criminal procedure amendments were intended to address human rights concerns.[54] But many fundamental criminal justice rights, the absence of which is shown so starkly in the films of Xie Jin, exist only on paper or remain very imperfectly achieved: the right to engage counsel, to present a defense, to speak (or not to speak), or simply to face one's accusers. Of course Xie Jin's movie trials are all political—but are the days of political trials over? Today, despite the great achievements of Chinese legal reform, it seems they are not. And unfortunately, as in *Hibiscus Town*, the Party's role in the legal system still constitutes the greatest obstacle to an independent judiciary and truly fair trials in China.[55]

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[54] *See, e.g.*, Xinhua, *Newly amended criminal procedure law to take effect in China*, XINHUA, Dec. 30, 2012, http://news.xinhuanet.com/english/china/2012-12/30/c_124168420.htm.

[55] For a clear and concise statement of this position, see Jerome A. Cohen, *Courts with Chinese Characteristics*, USASIALAW.ORG (Oct. 15, 2012), http://www.usasialaw.org/?p=7391.

The Convention on the Rights of Persons with Disabilities: Using International Law to Promote Social and Economic Development in the Asia Pacific[1]

Carole J. Petersen[2]

I. INTRODUCTION

In December 2012, sixty-one members of the United States ("US") Senate voted in favor of ratifying the United Nations Convention on the Rights of Persons with Disabilities ("CRPD"),[3] falling six votes short of the two-thirds majority necessary for ratification. Senator Tom Harkin, a sponsor of the Americans with Disabilities Act ("ADA") when it was enacted in 1990,[4] expressed his frustration:

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[1] This article updates research presented by the author at *The Second CILS Conference: ASEAN's Role in Sustainable Development*, Yogyakarta, Indonesia (Nov. 21-22, 2011) and at *He Hali'a Aloha No Jon: Memories of Aloha for Jon: A symposium in honor of the late Professor Jon Markham Van Dyke*, Honolulu, Hawai'i (Jan. 31-Feb. 1, 2013). The author thanks: the William S. Richardson School of Law and the University Research Council at the University of Hawai'i at Mānoa for supporting the research and professional travel that contributed to this article; Ms. Christilei Hessler for her assistance with research; and the editors at the University of Hawai'i Law Review for editorial assistance. The article is dedicated to the memory of Professor Jon Van Dyke.

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[3] Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, U.N. Doc. A/RES/61/106 (Jan. 24, 2007) [hereinafter CRPD].

[4] Americans with Disabilities Act, 42 U.S.C. §§ 12101-12209 (1990) (as amended) [hereinafter ADA]. The ADA was amended by the Americans with Disability Act Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2009) (codified as amended at 42 U.S.C. § 12101 (2006) and 29 U.S.C. § 705 (2006)). The U.S. Department of Justice maintains a webpage with the most current version of the ADA and implementing regulations. *See* U.S. DEPARTMENT OF JUSTICE AMERICANS WITH DISABILITIES ACT, http://www.ada.gov (last visited Mar. 3, 2013).

> The arguments made against ratifying the CRPD were misinformed and damaging, and a minority of Senators blocked important progress on human rights based on fictitious rationale. This treaty would not have undermined America's sovereignty or turned over too much power to the United Nations; it would have reaffirmed America's rightful place as the world leader in rights for people with disabilities.[5]

Senator Harkin is correct that many of the senators who voted against ratification articulated concerns that the CRPD would infringe US sovereignty.[6] This reflects a fundamental (perhaps deliberate) misunderstanding of the role of treaty-monitoring bodies in the United Nations ("UN") human rights treaty system.[7] Contrary to what Senator Santorum suggested, the Committee on the Rights of Persons with Disabilities[8] ("the Committee") is not a band of UN bureaucrats seeking to make decisions about American children with disabilities. Rather, the Committee is a panel of independent experts on disability rights from around the world who serve in their personal capacities and have no coercive enforcement powers.[9] If the US eventually ratifies the CRPD, it will be obligated to submit, within two years of becoming a state party,[10] a comprehensive report on its implementation of the treaty, describing the progress that has been made and any barriers to full compliance.[11] The Committee would then review the official report and issue "concluding observations," advising the US on any concerns and on how to further

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[5] Press Release, Senator Tom Harkin, Senate Failure to Ratify CRPD "Shameful" (Dec. 4, 2012), *available at* http://www.harkin.senate.gov/press/release.cfm?i=337997.

[6] Jennifer Steinhauer, *Dole Appears, but G.O.P. Rejects a Disabilities Treaty*, N.Y. TIMES, Dec. 4, 2012, at A23.

[7] For links to the monitoring bodies for the CRPD and other core UN human rights treaties, see *Human Rights Bodies*, OFFICE OF THE U.N. HIGH COMM'R FOR HUM. RTS., http://www.ohchr.org/EN/HRbodies/Pages/HumanRightsBodies.aspx (last visited Mar. 3, 2013). For a brief review of the debate on whether national sovereignty is compromised by international human rights treaty bodies, see Carole J. Petersen, *Bridging the Gap?: The Role of Regional and National Human Rights Institutions in the Asia Pacific*, 13 ASIAN-PAC. L. & POL'Y J. 174, 176-82 (2011).

[8] CRPD, *supra* note 3, arts. 34-38 (providing for the establishment of a Committee on the Rights of Persons with Disabilities and outlining its functions).

[9] *Id.* art. 34(2)-(3) (providing that the Committee shall consist of twelve experts in the field, with high moral standing and recognized competence and experience, and shall serve in their personal capacities). For the current membership and qualifications of the Committee, see *Elected Members of the Committee on the Rights of Persons with Disabilities*, OFFICE OF THE U.N. HIGH COMM'R FOR HUM. RTS., http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Membership.aspx (last visited Mar. 3, 2013).

[10] CRPD, *supra* note 3, art. 35(1).

[11] *Id.* art. 35(1).

implement the treaty.[12] The process is essentially a dialogue between the Committee and the state party. However, civil society can contribute to the process by submitting "alternative reports" (also known as "shadow reports") commenting on the official report. Nongovernmental organizations have an interest in participating because they may be able to use the concluding observations to help lobby for reforms.[13]

The US already participates in very similar reporting processes with four UN treaty-monitoring bodies: the Human Rights Committee;[14] the Committee Against Torture;[15] the Committee on the Elimination of Racial Discrimination;[16] and the Committee on the Rights of the Child. Although the US is still only a signatory to the Convention on the Rights of the Child ("CRC"), it nonetheless reports regularly to the Committee on the Rights of the Child because the US Senate has ratified the two Optional Protocols to the CRC.[17] Experts from the US have also been elected to serve on treaty-

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[12] Although American disability law is more progressive than that of most nations discussed in this article, one should not assume that it fully complies with the CRPD. *See* Michael Ashley Stein & Michael E. Waterstone, *Finding The Gaps: A Comparative Analysis Of Disability Laws In The United States To The United Nations Convention On The Rights Of Persons With Disabilities* 1 (2008), *available at* http://www.ncd.gov/rawmedia_repository/bbae6ede_8719_48b8_b40f_33938b9a2189?document.pdf (last visited Mar. 3, 2013) (publication forthcoming).

[13] For analysis of the role of civil society in a similar process under the Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. Doc. A/RES/34/180 (Dec. 18, 1979) [hereinafter CEDAW], see Carole J. Petersen & Harriet Samuels, *The International Convention on the Elimination of All Forms of Discrimination Against Women: A Comparison of Its Implementation and the Role of Non-Governmental Organizations in the United Kingdom and Hong Kong*, 26 HASTINGS INT'L & COMP. L. REV. 1 (2002).

[14] The Human Rights Committee monitors compliance with the International Covenant on Civil and Political Rights [hereinafter ICCPR]. *See* 999 U.N.T.S. 171 (Dec. 9, 1966) (ratified by the United States in 1992).

[15] The Committee Against Torture monitors compliance with the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [hereinafter CAT]. *See* G.A. Res. 39/46, art. 1(1), U.N. Doc. A/RES/39/46 (Dec. 10, 1984) (ratified by the United States in 1994).

[16] The Committee on the Elimination of Racial Discrimination monitors the International Convention on the Elimination of All Forms of Racial Discrimination [hereinafter ICERD]. *See* 660 U.N.T.S. 195; G.A. Res. 2106 (XX), Annex, U.N. GAOR, 20th Sess. Supp. No. 14 (Vol. I), U.N. Doc. A/6014 (1966) (ratified by the US in 1994).

[17] Although the US is only a signatory (and not a state party) to the Convention on the Rights of the Child, G.A. Res. 44/25, U.N. Doc. A/RES/44/25 (Nov. 20, 1989) [hereinafter CRC], it has ratified the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, G.A. Res. 54/263, U.N. Doc. A/RES/54/263 (May 25, 2000), and the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, G.A. Res. 54/263, U.N. Doc. A/RES/54/263 (May 25, 2000), 2173 U.N.T.S. 222.

monitoring bodies.[18] It appears that the nation's sovereignty has survived, despite more than a decade of active participation in the human rights treaty system. Indeed, Helen Stacy has argued that sovereignty is now best viewed as the "measure of care" by a government for its citizens, which in the globalized economy necessarily includes interactions with the international community.[19] Under this theory, state sovereignty is enhanced, rather than undermined, when a national government participates more actively in the international legal system.

While the CRPD clearly is not a threat to US sovereignty, we also should not mischaracterize the treaty as a "toothless tiger" in order to persuade additional senators to support ratification. The CRPD is, without doubt, a landmark in the civil rights movement. Anyone who doubts the power of this movement should consider the changes in the American public school system in the past four decades. As recently as the 1970s, public schools routinely excluded or segregated children with disabilities, with approximately eighty percent being warehoused in facilities that provided little or no education.[20] Schools could classify students as uneducable or separate them from the general school population, without giving their parents an opportunity to participate in the evaluation and decision-making processes.[21] Strategic litigation[22] and the enactment of legislation, such as the Individuals with Disabilities Education Act[23] ("IDEA") and the ADA,

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[18] Professor Gerald Neuman was elected to the UN Human Rights Committee and will serve through 2014. *See Human Rights Committee—Members*, OFFICE OF THE U.N. HIGH COMM'R FOR HUM. RTS., http://www2.ohchr.org/english/bodies/hrc/ members.htm (last visited Mar. 3, 2013); Professor Carlos Manuel Vazquez was elected to the UN Committee on the Elimination of Racial Discrimination and will serve until January 2016. *See Committee on the Elimination of Racial Discrimination—Members*, OFFICE OF THE U.N. HIGH COMM'R FOR HUM. RTS., http://www2.ohchr.org/english/bodies/cerd/members.htm (last visited Mar. 3, 2013).

[19] Helen Stacy, *Relational Sovereignty*, 55 STAN. L. REV. 2029, 2045 (2003).

[20] ELLEN SCHILLER, ET AL., EXECUTIVE SUMMARY: INTERIM REPORT FOR THE STUDY OF STATE AND LOCAL IMPLEMENTATION AND IMPACT OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT 1 (2005) (prepared for the US Department of Education) (on file with author); *see also* SAMUEL R. BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT 17 (2009).

[21] *See generally* Mark C. Weber, *The Transformation of the Education of the Handicapped Act: A Study in the Interpretation of Radical Acts*, 24 U.C. DAVIS L. REV. 349 (1990).

[22] *See, e.g.*, Pa. Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279 (E.D. Pa. 1972); Mills v. Bd. of Educ. of D.C., 348 F. Supp. 866 (D.D.C. 1972).

[23] Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1487 (2010). The United States Department of Education maintains a website devoted to the IDEA legislation, its implementing regulations, and policy guidelines. *See generally Building the Legacy: IDEA 2004*, U.S. DEP'T OF EDUC., http://idea.ed.gov/explore/home (last visited Mar. 3,

have now established that every American child has a right to a meaningful public education. While the legislative framework is still evolving and is far from perfect, it has transformed the American public school system for children with disabilities. This is just one example; the disability rights movement has also promoted equal opportunities in the workplace, accessibility of public places, and independent living for persons with disabilities.[24]

American activism and legislation has been highly influential in the global disability rights movement.[25] Australian laws prohibiting disability discrimination have also inspired law reform in certain jurisdictions.[26] But the CRPD represents something much more powerful than a one-way transmission of a legislative model from one nation to another. As a multilateral human rights treaty that has already been widely ratified, the CRPD provides legal authority for the global movement away from the outdated medical and social welfare approaches to disability.[27] The medical model focused on the "affliction" and the need for treatment, while the welfare model focused on the need to protect and support "disabled" individuals.[28] In contrast, the CRPD builds upon the social model, a generic term for a theory of disability that was first articulated in the 1960s by British activists fighting for the right to live independently.[29] The social model distinguishes between "impairment" and "disability," defining the latter as a form of social oppression that is perpetuated by physical and

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[24] For an introduction to the scope of disability rights law in the United States, see generally, SAMUEL R. BAGENSTOS, DISABILITY RIGHTS LAW: CASES AND MATERIALS 1 (2010); *A Guide to Disability Rights Laws*, U.S. DEP'T OF JUSTICE, CIVIL RTS. DIV., DISABILITY RTS. SECTION (2009), http://www.ada.gov/cguide.htm.

[25] *See, e.g.*, Katharina C. Heyer, *The ADA on the Road: Disability Rights in Germany*, 27 LAW & SOC. INQUIRY 723 (2002); Michael Ashley Stein, *Disability Human Rights*, 95 CAL. L. REV. 75, 90 & n.86 (2007).

[26] For example, Hong Kong's Disability Discrimination Ordinance, enacted in 1995, was largely based upon Australian law. *See* Carole J. Petersen, *Equality as a Human Right: the Development of Anti-Discrimination Law in Hong Kong*, 34 COLUM. J. TRANSNAT'L L. 335 (1996).

[27] *See* Mary Crock et al., *Where Disability and Displacement Intersect: Asylum Seekers with Disabilities* *1 (2011), http://www.iarlj.org/general/images/stories/BLED_conference/papers/Disability_and_Displacement-background_paper.pdf.

[28] *Id.*

[29] *See generally The Fundamental Principles of Disability*, UNION OF THE PHYSICALLY IMPAIRED AGAINST SEGREGATION (1997), http://www.leeds.ac.uk/disability-studies/archive uk/UPIAS/fundamental%20principles.pdf. *See also* Vic Finkelstein, *The Social Model of Disability Repossessed*, Disability Archive UK maintained by Leeds University (2001), *available at* http://disability-studies.leeds.ac.uk/files/library/finkelstein-soc-mod-repossessed .pdf.

social barriers.[30] The human rights model is similar to the social model in that it views people who live with impairments as rights holders and recognizes that they are often more disabled by physical and attitudinal barriers than by any particular condition.[31] However, the human rights model expressly includes economic, social, and cultural rights (what some scholars refer to as "second generation rights"), which are necessary for many persons to live in dignity and achieve equality.[32] In short, ratifying the CRPD would help to strengthen the growing international consensus in favor of a rights-based approach to disability. Other human rights treaties that the US has already ratified—including the ICCPR and the CAT—are also clearly relevant to persons with disabilities. However, these treaties have never addressed disability in a comprehensive manner and their treaty-monitoring bodies lack sufficient expertise in the field.[33] A thematic treaty on the rights of persons with disabilities was thus required and the CRPD fills that gap in international law.

Universal ratification of the CRPD is important because no nation has fully implemented the human rights model of disability. However, this article focuses on the Asia-Pacific region, where the need for the CRPD is particularly evident. Part II of the article reviews the development of a disability rights movement in the region, demonstrating that the drafting of the CRPD inspired activists and generated new commitments from governments. Part II will also consider certain provisions in the treaty that are particularly significant to the Asia Pacific. Part III then considers examples of domestic law and policy reforms by state parties to the treaty from the region. A number of governments have reported on their progress, both in the annual Conference of States Parties to the CRPD[34] and also in the more detailed Initial Reports that are supposed to be submitted to the

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[30] Crock, *supra* note 27, at *2.

[31] *See id. See also* Arlene S. Kanter, *The Promise and Challenge of the United Nations Convention on the Rights of Persons with Disabilities*, 34 SYRACUSE J. INT'L L. & COM. 287, 291 (2007); Rosemary Kayess & Phillip French, *Out of Darkness Into Light? Introducing the Convention on the Rights of Persons with Disabilities*, 8 HUM. RTS. L. REV. 1, 1 (2008).

[32] Stein, *supra* note 25, at 9 n.7 (analyzing the shortcomings of the social model and the importance of including economic and social rights in the "disability human rights" model).

[33] *See generally* Gerard Quinn et al., *Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability* (2002), *available at* http://www.ohchr.org/Documents/Publications/HRDisability en.pdf.

[34] United Nations Enable maintains an excellent website with the proceedings of the Fifth Conference of States Parties, held in September 2012, supporting documents, and links to previous conferences. *See Fifth Session of the Conference of States Parties to the Convention on the Rights of Persons with Disabilities*, UNITED NATIONS ENABLE, http://www.un.org/disabilities/default.asp?id=1595 (last visited Mar. 3, 2013).

Committee on the Rights of Persons with Disabilities within two years of becoming a state party.[35] As of January 2013, the Committee had conducted a formal review of only one state party from the region, the People's Republic of China. China provides an interesting case study, partly because persons with disabilities traditionally experienced severe discrimination and isolation there.[36] Although disability rights organizations in China are necessarily constrained by the political system, this has not stopped them from learning about the CRPD and looking for ways to use it in their advocacy efforts.

II. THE SIGNIFICANCE OF THE CRPD IN THE ASIA PACIFIC

In theory, the political leaders of the Asia Pacific endorsed a rights-based approach to disability even before the CRPD was drafted. During the Asian and Pacific Decade of Disabled Persons (which was initially set to run from 1993-2002), governments adopted the Proclamation on the Full Participation and Equality of People with Disabilities in the Asian and Pacific Region, which stated that "negative social attitudes exclude persons with disabilities from an equal share in their entitlements as citizens"[37] and promised that governments would devote resources to education and empowerment.[38] Forty-three of the sixty-one governments in the UNESCAP region signed the Proclamation by the end of 2002[39] and this should have generated significant new laws and policies.

In practice, however, the first Asian and Pacific Decade of Disabled Persons generated limited results, perhaps because some nations were slow to sign, but also because it placed no legally binding obligations on

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[35] CRPD, *supra* note 3, art. 35(1).

[36] Due to space constraints, this article discusses only the Committee's review of Mainland China and not the simultaneous reviews of the Special Administrative Regions ("SARs") of Hong Kong and Macau. Although China resumed its exercise of sovereignty over Hong Kong in 1997 and over Macau in 1999, both SARs are governed under the "one country two systems" model and maintain largely separate legal systems. For an analysis of the potential impact of the CRPD in Hong Kong, see Carole J. Petersen, *China's Ratification of the Convention on the Rights of Persons With Disabilities: the Implications for Hong Kong*, 38(3) HONG KONG L. J. 611 (2008).

[37] *Proclamation on the Full Participation and Equality of People with Disabilities in the Asian and Pacific Region*, UNITED NATIONS ESCAP (1992), *available at* http://www.un.org/Depts/escap/decade/backgr.htm [hereinafter 1992 Proclamation].

[38] *Id.* ¶ 5.

[39] *See* Penny Price & Yutaka Takamine, *The Asian and Pacific Decade of Disabled Persons 1993-2002: What Have We Learned?*, 14, pt. 2, ASIA PAC. DISABILITY REHABILITATION J. 115, 117 (2003).

governments.[40] In 1999, a study by UNESCAP suggested that no more than five percent of children with disabilities were receiving an education in the Asia Pacific.[41] Research conducted in 2002, near the conclusion of the Asian and Pacific Decade of Disabled Persons, noted some progress but concluded that there was still an "alarmingly low rate of access to education for children and youth with disabilities" in the region.[42] Although seventy percent of nondisabled children were enrolled in school, less than ten percent of children with disabilities were receiving any formal education.[43] After reviewing the data on this and other indicators (including accessibility of public facilities, access to training, and employment), academic researchers concluded that the progress made during the decade "was uneven and in most cases from such a low baseline, that it would be surprising, indeed, if ten years of attention were sufficient to wipe out the decades of neglect and rejection, which persons with disabilities have experienced for generations in this region, and indeed around the world."[44]

A primary goal of the first decade was to encourage governments to enact laws prohibiting discrimination on the ground of disability. However, UNESCAP reported that only nine countries in the region had adopted legislation by the end of the decade.[45] Price and Takamine reported similar results and concluded that this was a "major constraint to achieving equality" for persons with disabilities.[46] Moreover, the few laws that had been enacted in the region tended to perpetuate stereotypes rather than promote equality.[47] A good example of this phenomenon was the 1990 Law of the People's Republic of China on the Protection of Persons with Disabilities, which was one of the first disability laws in East Asia but was strongly influenced by medical approaches and openly patronizing of persons with disabilities.[48] Hong Kong's Disability Discrimination

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[40] *Id.* at 118.

[41] *Id.* at 122.

[42] Biwako Millennium Framework for Action Towards an Inclusive, Barrier-Free and Rights-Based Society for Persons with Disabilities in Asia and the Pacific: Note by the Secretariat, ¶ 8, U.N. Doc. E/ESCAP/APDDP/4/Rev.1 (Jan. 24, 2003) (on file with author).

[43] *Id.* ¶ 24.

[44] Price, *supra* note 39, at 125.

[45] Biwako Millennium Framework for Action, *supra* note 42, ¶ 53.

[46] Price, *supra* note 39, at 118 (reporting that less than twenty-five percent of ESCAP nations had enacted comprehensive disability legislation and that only eight had anti-discrimination measures).

[47] *Disability at a Glance: A Profile of 28 Countries and Areas in Asia and the Pacific*, UNITED NATIONS ESCAP 3 (2004) (describing the methodology of the study); *see also id.* at 12 (discussing data on domestic legislation).

[48] For examples of some of the shortcomings in China's law (which was partly amended in 2008 when China ratified the CRPD), see Petersen, *supra* note 36, at 620-21.

Ordinance, which was enacted in 1995, stood out as one of the few enforceable laws prohibiting disability discrimination that was enacted during the first Asian and Pacific Decade of Disabled Persons.[49] The medical model also continued to dominate public policies and government programs.[50]

In light of the limited progress, governments agreed to extend the Asian and Pacific Decade of Disabled Persons for an additional ten years and to adopt a set of targets, known as the Biwako Millennium Framework For Action Towards an Inclusive, Barrier Free and Rights-Based Society for Persons with a Disability in Asia and the Pacific.[51] One of the targets was to enact domestic legislation prohibiting discrimination and requiring equal opportunities for persons with disabilities.[52] Five years later, at an intergovernmental meeting in Bangkok, governments in the region adopted the Biwako Plus Five, which further supplemented the Biwako Millennium Framework for Action.[53]

One of the success stories of the Asian and Pacific Decade of Disabled Persons was a significant increase in public awareness of disability rights and the rise of a regional disability rights movement.[54] As a result, NGOs and governments from the Asia Pacific were more engaged and ready to participate in the creation of the CRPD. In March 2000, representatives from international and national disability rights organizations convened at the first World NGO Summit on Disability, which was held in Beijing. The declaration issued at the conclusion of the summit called for the adoption of a specialist treaty to "promote and protect the rights of people with disabilities, and enhance equal opportunities for participation in mainstream

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[49] Theresia Degener, Report, *International Disability Law—A New Legal Subject on the Rise: The Interregional Experts' Meeting in Hong Kong, December 13-17, 1999*, 18 BERKELEY J. INTL'L L. 180, 185 (2000) (describing Hong Kong's Disability Discrimination Ordinance as "one of the most far-reaching" laws for disabled persons in Asia). For the history of the enactment of Hong Kong's anti-discrimination ordinances, see Carole J. Petersen, *Equality as a Human Right: the Development of Anti-Discrimination Law in Hong Kong*, 34 COLUM. J. TRANSNAT'L L. 335, 355-61 (1996).

[50] Lorna Jean Edmonds, *Disabled People and Development* ¶ 55 (2005), *available at* http://hpod.org/pdf/Disabled-people-and-development.pdf (noting that there were isolated examples of programs that embrace the social model but that the charity and medical models still dominated disability programming in the region).

[51] Biwako Millennium Framework for Action, *supra* note 42, § IV.

[52] *Id.* ¶ 14(1).

[53] *See* Biwako Plus Five: Further Efforts Towards An Inclusive, Barrier-Free and Rights-Based Society For Persons With Disabilities in Asia and the Pacific, U.N. Doc. E/ESCAP/APDDP(2)/2 (Nov. 13, 2007).

[54] Price, *supra* note 39, at 119-20 (describing campaigns held in various cities in the Asia Pacific and the development of NGO networks).

society."[55] The following year, the Mexican government introduced a resolution in the UN General Assembly to start the process. Adopted in December 2001, the resolution established an Ad Hoc Committee to consider proposals for drafting a treaty, as well as ways to include persons with disabilities in the drafting process.[56]

The Ad Hoc Committee began meeting in 2002 and held eight formal drafting sessions over a four-year period.[57] There was an unusually high level of input from civil society, partly because governments were encouraged to consult their citizens with disabilities and to appoint them to the official delegations.[58] A UN Voluntary Fund on Disability also supported some of the travel costs of NGO representatives[59] and those who could not travel to the UN organized meetings at the regional level or made written submissions. There were vigorous debates on the language of the treaty, not only during the meetings but also on the website of the Ad Hoc Committee where the working drafts were published. The former Secretary-General of the UN described the CRPD as "the first [human rights treaty] to emerge from lobbying conducted extensively through the Internet,"[60] highlighting the change from the days of closed-door meetings of diplomats to a more open and inclusive drafting process.

The extended Asian and Pacific Decade of Disabled Persons overlapped with the meetings of the Ad Hoc Committee on the proposed CRPD and

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[55] *Beijing Declaration on the Rights of People with Disabilities in the New Century*, ICDRI, http://www.icdri.org/News/beijing_declaration_on_the_right.htm (last visited Mar. 3, 2013).

[56] Comprehensive and Integral International Convention to Promote and Protect the Rights and Dignity of Persons with Disabilities, G.A. Res. 56/168, ¶12, U.N. Doc. A/RES/56/168 (Dec. 19, 2001) (establishing the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection of the Rights and Dignity of Persons with Disabilities).

[57] For drafts of the treaty, submissions, lists of attendees, and other documents arising from the eight sessions of the Ad Hoc Committee, see the website of the United Nations Enable. *See Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities*, UNITED NATIONS ENABLE, http://www.un.org/esa/socdev/enable/rights/adhoccom.htm (last visited Mar. 3, 2013).

[58] Tara J. Melish, *Perspectives on the Rights of Persons with Disabilities: The UN CRPD: Historic Process, Strong Prospects, and Why the U.S. Should Ratify*, 14 HUM. RTS. BRIEF 37 (2007).

[59] Don MacKay, *The United Nations Convention on the Rights of Persons with Disabilities*, 34 SYRACUSE J. INTL'L L. & COM. 323, 327-28 (2007).

[60] U.N. Secretary-General, Message of the Secretary-General on the adoption of the Convention on the Rights of Persons with Disabilities, delivered by Deputy Secretary-General, U.N. Doc. SG/SM/10797, HR/4911, L/T/4400 (Dec. 13, 2006), *available at* http://www.un.org/News/Press/docs//2006/sgsm10797.doc.htm.

there were numerous regional meetings to debate and coordinate submissions on the draft treaty. UNESCAP sponsored several workshops in Thailand, including a large Expert Group Meeting in 2003,[61] a workshop on gender issues,[62] and a meeting to produce a draft text for the treaty (elements of which were eventually included in the final version).[63] China also hosted a regional meeting, leading to the adoption of the Beijing Declaration on Elaboration of an International Convention to Promote and Protect the Rights and Dignity of Persons with Disabilities.[64]

The Asia Pacific Forum of National Human Rights Institutions ("APF") also played an important role in promoting the CRPD. The APF was established in 1996 after the first regional meeting of national human rights institutions from Asia Pacific countries.[65] The APF has significant credibility because it requires, as a condition of membership, that a national human rights institution comply with the United Nations Principles relating to the Status of National Institutions, known as the "Paris Principles."[66] This means that the members of the APF should be independent of their governments (although this can be challenging in certain political systems).[67] The APF was actively involved in creating and promoting the

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[61] Pravit Chaimongkol, *Statement Agenda Item 5* (June 17, 2003), http://www.un.org/esa/socdev/enable/rights/contrib-thailand.htm (discussing the Expert group meeting held in Bangkok on June 2-4, 2003).

[62] *See* United Nations ESCAP, FINAL REPORT OF THE UN ESCAP WORKSHOP ON WOMEN AND DISABILITY: PROMOTING FULL PARTICIPATION OF WOMEN WITH DISABILITIES IN THE PROCESS OF ELABORATION ON AN INTERNATIONAL CONVENTION TO PROMOTE AND PROTECT THE RIGHTS AND DIGNITY OF PERSONS WITH DISABILITIES 1 (2003) (summarizing the results of the UN ESCAP workshops held in Bangkok in 2003).

[63] *See Bangkok Draft: Proposed Elements of a Comprehensive and Integral International Convention to Promote and Protect the Rights of Persons with Disabilities*, UNITED NATIONS ENABLE, http://www.un.org/esa/socdev/enable/rights/bangkokdraft.htm (last visited Mar. 3, 2013).

[64] *See Beijing Declaration on Elaboration of an International Convention to Promote and Protect the Rights and Dignity of Persons with Disabilities*, UNITED NATIONS ENABLE, http://www.netzwerk-artikel-3.de/un-konv/doku/beijing-declaration.pdf (last visited Mar. 3, 2013).

[65] *See* ASIA PACIFIC FORUM: ADVANCING HUMAN RIGHTS IN OUR REGION, http://www.asiapacificforum.net/about/downloads/about-the-apf/APF_E-Brochure.pdf (last visited Mar. 3, 2013).

[66] The Paris Principles were adopted by the United Nations Commission on Human Rights in 1992 and by the United Nations General Assembly in 1993. *See* G.A. Res. 48/134, U.N. Doc. A/RES/48/134 (Dec. 20, 1993).

[67] For further analysis of the APF membership criteria and the difficulties of assessing independence of a domestic human rights institution, see Carole J. Petersen, *Bridging the Gap?: The Role of Regional and National Human Rights Institutions in the Asia Pacific*, 13 ASIAN-PAC. L. & POL'Y J. 174 (2011); Andrew Byrnes et al., *Joining the Club: the Asia Pacific Forum of National Human Rights Institutions, the Paris Principles, and the*

CRPD. In 2003, the APF held a regional workshop on disability rights in India to promote collaboration among human rights institutions in the Asia Pacific and the Commonwealth on disability rights and to develop a consensus position on the proposed treaty.[68] APF also established a special Working Group on Disability to coordinate submissions and sent a representative to meetings of the Ad Hoc Committee.[69] By adopting the CRPD as one of its main projects during the drafting period, the APF placed disability in the mainstream of human rights discourse.[70]

The activism surrounding the drafting of the CRPD also inspired a number of new disability rights organizations and alliances in the region. The Asia Pacific Disability Forum, an umbrella group coordinating a large number of national organizations, was formed in 2003.[71] The Pacific Disability Forum ("PDF"), which principally works among Pacific island nations, grew out of regional training meetings in 2002 and 2003.[72] PDF eventually joined the International Disability Alliance ("IDA").[73] Although

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Advancement of Human Rights Protection in the Region, U. NEW S. WALES L.J. 39 (2008), *available at* http://law.bepress.com/cgi/viewcontent.cgi?article=1114&context=unswwps-flrps08.

[68] The workshop had wide geographic representation, including national human rights institutions from Afghanistan, Australia, Fiji, India, Ghana, Iran, Korea, Malawi, Malaysia, Mauritius, Mongolia, Nepal, New Zealand, Nigeria, Northern Ireland, Philippines, South Africa, Sri Lanka, Thailand and Uganda. *See* "International Workshop on Promoting the Rights of People with Disabilities: Towards a New United Nations Convention" (New Delhi, India, May 2003), *available at* http://www.asiapacificforum.net/support/issues/regional-workshops/disability. A report on the workshop was also published by United Nations Enable. *See also An International Workshop on for National Human Rights Institutions from the Commonwealth and Asia Pacific Region*, UNITED NATIONS ENABLE, http://www.un.org/esa/socdev/enable/ rights/contrib-nhri.htm (last visited Apr. 25, 2013).

[69] Anuradha Mohit, from the National Human Rights Commission of India, represented the APF's Working Group on Disability at meetings of the Ad Hoc Committee. *See People with Disability: Role of the APF*, ASIA PAC. FORUM, http://www.asiapacificforum.net/support/issues/disability (last visited Mar. 3, 2013).

[70] For a summary of APF's work on disability rights and the CRPD, as well as links to documents submitted during the drafting process, see *id.*

[71] The Asia and Pacific Disability Forum was formally established, in November 2003, as an NGO network on disability and currently lists, as members, thirty-six domestic NGOs and ten international NGOs. *See Asia and Pacific Disability Forum (APDF) Member List*, APDF, http://www.normanet.ne.jp/~apdf/members.html (last visited Mar. 3, 2013).

[72] The goals of PDF include promoting and monitoring implementation of the UN ESCAP Biwako Millennium Framework and the CRPD, primarily among Pacific island states and territories. *See About Pacific Disability Forum*, PAC. DISABILITY FORUM, http://www.pacificdisability.org/about.aspx (last visited Mar. 3, 2013).

[73] *See IDA Member Organizations*, INT'L DISABILITY ALLIANCE, http://www.internationaldisabilityalliance.org/en/about-us/ida-members-organizations (last visited Mar. 3, 2013).

IDA pre-dates the CRPD, it grew more prominent during the meetings of the Ad Hoc Committee and it helped to establish the International Disability Caucus ("IDC"), a network of organizations that played a leading role in the negotiation of the new treaty.[74]

One of the most difficult points to negotiate was whether the term "disability" (or "persons with disabilities") should be defined in the CRPD. Some participants argued that any definition that employed medical or functional terminology would undermine the treaty's commitment to the social model. However, in the absence of any definition, there was a danger that governments might attempt to exclude persons with certain types of disabilities from the scope of domestic laws that purported to implement the treaty. For example, the Chinese government has long maintained a rigid classification system and has tended to underestimate the number of citizens living with disabilities.[75]

Eventually a compromise was reached: although "disability" is not defined in the definitions section of the CRPD, Article 1 states that the purpose of the treaty is to "promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities . . ." and that "[p]ersons with disabilities *include those* who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others."[76] Thus, the CRPD does not purport to define the full scope of the term "persons with disabilities." But it does describe certain groups of people who, at a minimum, should enjoy rights under the treaty and any domestic legislation that implements the treaty. Yet Article 1 also stays true to the overriding principle of the social model—that it is not simply "impairments" that hinder full participation but rather the manner in which socially constructed barriers tend to interact with our individual conditions.

The CRPD does expressly define the scope of the *discrimination* that should be prohibited in domestic law. The definition begins by stating that

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[74] *See About Us*, INT'L DISABILITY ALLIANCE, http://www.internationaldisabilityalliance.org/en/about-us (last visited Mar. 3, 2013). Now that the CRPD is in force, IDA is actively promoting its implementation and maintains an excellent website with copies of reports filed with the Committee and updates on the Committee's activities as it reviews states parties. *See* INT'L DISABILITY ALLIANCE, http://www.internationaldisabilityalliance.org/en (last visited Mar. 3, 2013).

[75] *See, e.g.*, Michael Ashley Stein, *China and Disability Rights*, 33 LOY. L.A. INT'L & COMP. L. REV. 7, 15-16 (2010) (discussing the Chinese government's classification system and its concern, which was "overtly shared" during the negotiations, that a broader definition would expand its financial obligations).

[76] CRPD, *supra* note 3, art. 1 (emphasis added).

"discrimination on the basis of disability" means: "any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."[77] This part of the definition is quite similar to the definitions of discrimination in ICERD and the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW").[78] However, the CRPD differs from the earlier treaties because it goes on to state that discrimination includes the "denial of reasonable accommodation,"[79] which is defined as "necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms."[80] Clauses like this helped to generate a debate on whether the CRPD is intended to create "new rights" or simply to ensure that persons with disabilities enjoy the rights that have been previously stated in other human rights treaties.[81] However, it was essential to include this language because the concept of reasonable accommodation was missing in many jurisdictions, particularly in the Asia Pacific where medical and social welfare models continued to dominate disability laws and policies.

The drafters of the treaty also recognized the need to take a holistic approach to rights and to move away from the false dichotomy between civil liberties and economic, social, and cultural rights. In theory, the Vienna Declaration that was adopted at the 1993 World Conference on Human Rights recognized the indivisibility of rights and thus the importance of giving equal value to economic, social and cultural rights.[82] In reality, however, Western governments (particularly the US) have tended to give precedence to civil liberties and to ignore the fact that resources are often required in order for citizens to exercise their rights. The CRPD takes a holistic approach to rights throughout the treaty, often combining, within

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[77] *Id.* art. 2.

[78] *Compare* CEDAW, *supra* note 13, art. 1, *and* ICERD, *supra* note 16, art. 1, *with* CRPD, *supra* note 3, art. 2.

[79] CRPD, *supra* note 3, art. 2.

[80] *Id.* art. 2.

[81] *See generally* Frédéric Mégret, *The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?*, 30 HUM. RTS. Q. 494, 507-16 (2008) (concluding that the CRPD innovates on traditional human rights concepts by establishing "disability human rights," which are specific to persons with disabilities yet still rooted in the universality of rights).

[82] World Conference on Human Rights, June 14-25, 1993, *Vienna Declaration and Programme of Action*, ¶ 1-5, U.N. Doc. A/CONF.157/23 (July 12, 1993).

one article, a traditional "civil liberty" with the right to accessible facilities and services.[83] For example, Article 21 affirms that persons with disabilities enjoy freedom of expression, which is sometimes categorized as a "negative right" on the theory that the state can fulfill its obligations by not interfering with citizens' rights to express opinions and access information.[84] However, the CRPD expects governments to play a more active role and to ensure that persons with disabilities can meaningfully exercise their right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice. States parties should, therefore, provide information in accessible formats and facilitate the use of sign language, Braille, and other alternative means of communication.[85] When defined in this manner, freedom of expression becomes a much richer concept, one that has meaning for citizens with different abilities and resources. In this way, the drafters of the CRPD have sought to change not only how we think about disability but also how we conceive of human rights generally.[86]

It is partly due to this holistic approach that the final version of the CRPD became significantly longer and more detailed than any of the previous specialist human rights treaties. In addition to reviewing virtually all policies and programs that affect persons with disabilities,[87] states parties are obligated to modify or repeal discriminatory laws, regulations, and customs or practices and to ensure that public authorities and institutions comply with the treaty.[88] States parties also assume an obligation to address the underlying prejudice against persons with disabilities [89] and to increase accessibility in both the public and private spheres.[90] This is a particularly important principle for the Asia Pacific where "lack of access to the physical environment has been one of the most restrictive barriers," particularly for persons who live in rural areas or in poor urban neighborhoods.[91]

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[83] *See, e.g.*, CRPD, *supra* note 3, art. 21 (freedom of expression), art. 23 (respect for home and the family), and art. 29 (political rights).

[84] *Id.* art. 21.

[85] *Id.*

[86] *See* Frédéric Mégret, *The Disabilities Convention: Towards a Holistic Concept of Rights*, 12(2) INT'L J. HUM. RTS. 261, 278 (2008); *see also* Stein, *supra* note 25, at 85 (arguing that the draft articles of the CRPD "indicate a significant shift in how the international community views human rights." *Id.*).

[87] CRPD, *supra* note 3, art. 4(1)(a), (c).

[88] *Id.* art. 4(1)(b), (d).

[89] *Id.* art. 8.

[90] *Id.* art. 9.

[91] Price, *supra* note 39, at 120.

The drafters of the CRPD also placed great emphasis on personal autonomy and legal capacity, which are all too often denied on the basis of disability. For example, Article 14 protects liberty and security of the person, providing that persons with disabilities must not be arbitrarily deprived of their liberty and that the existence of a disability alone must not be used to justify detention.[92] This provision empowers the Committee to question governments on a broad range of potential violations, including civil commitment proceedings, compulsory medical treatment, and conditions inside medical and detention facilities.[93] Article 12 protects legal capacity and requires that any safeguards "respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body."[94] The treaty is also very firm on the right to live independently[95] and to form a family,[96] and it strongly condemns any form of state-sponsored sterilization.[97]

The drafters made Article 24, on the right to education, one of the longer and more detailed provisions in the treaty.[98] This will be a delicate issue when the Committee reviews reports from countries in the Asia Pacific because school enrollment rates in many nations in the region are still surprisingly low for children living with disabilities. The consequences are devastating because a child who is denied access to education will find it almost impossible to obtain meaningful work, live independently, or participate fully in society. Under the CRPD, persons with disabilities are entitled to an inclusive, quality, and free education at all levels, on an equal basis with other students in their communities.[99] They are also entitled to reasonable accommodations and support measures, in environments that

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[92] CRPD, *supra* note 3, art. 14(1)(b).

[93] *Id.* art. 14.

[94] *Id.* art. 12(4).

[95] *Id.* art. 19.

[96] *Id.* art. 23 (providing that states parties shall "eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships" and provide them with access to reproductive and family planning education).

[97] *Id.* art. 23(1)(c); *see also* Carole J. Petersen, *Population Policy and Eugenic Theory: Implications of China's Ratification of the United Nations Convention on the Rights of Persons with Disabilities*, 8 CHINA INT'L J. 85 (2010).

[98] CRPD, *supra* note 3, art. 24. For more detailed analysis of Article 24, see Carole J. Petersen, *Inclusive Education and Conflict Resolution: Building a Model to Implement Article 24 of the Convention on the Rights of Persons with Disabilities in the Asia Pacific*, 40 HONG KONG L.J. 481 (2010).

[99] CRPD, *supra* note 3, art. 24(2)(b).

maximize academic and social development but are consistent with the goal of full inclusion.[100] The CRPD lists numerous specific measures that governments should adopt, including removing physical barriers, employing teachers with disabilities to serve as mentors, and providing teachers and educational administrators who can communicate in sign language and in Braille.[101] Although school administrators sometimes argue that it is more efficient to educate children in narrow ability levels, eighty to ninety percent of children with disabilities can be integrated into mainstream schools if the schools are accessible and students are given appropriate support.[102] Moreover, the resources that are invested in education benefit the community as a whole by promoting independent living, increasing productivity, and building a more equal society.[103]

Article 27 of the CRPD, which addresses the right to employment, is also particularly significant for the Asia Pacific. Many governments have not encouraged persons with disabilities to work or have employed them in segregated industries (sometimes referred to as "sheltered employment") where they are poorly paid and have no opportunities for promotion. Interestingly, even governments that have enacted laws prohibiting disability discrimination have sometimes maintained discriminatory employment policies because the government officials who make the hiring policies and decisions do not fully embrace the law. A prime example is Hong Kong, where several branches of the disciplined services (e.g., the police, fire services, immigration, customs and excise, and correctional services departments) refused to hire applicants who had relatives with mental illness even after Hong Kong's Disability Discrimination Ordinance had been enacted. The Hong Kong Equal Opportunities Commission ultimately had to sue the government in order to compel it to comply with the law.[104]

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[100] *Id.* art. 24(2)(c)-(e).

[101] *Id.* art. 24(4)-(5).

[102] *From Exclusion to Equality: Realizing the Rights of Persons With Disabilities: Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol*, UNITED NATIONS ENABLE 1, 77 (2007).

[103] For a review of this research, see Susan Peters, *Inclusive Education: An EFA Strategy for All Children* 24 (2004), *available at* http://siteresources.worldbank.org/EDUCATION/Resources/278200-1099079877269/547664109907999328 8/InclusiveEdu_efa_strategy_for_children.pdf.

[104] K and Others v. Secretary for Justice, [2000] 3 H.K.L.R.D. 777 (D.C. Sept. 27, 2000). For analysis of the case, see Carole J. Petersen, *The Right to Equality in the Public Sector: An Assessment of Post-Colonial Hong Kong*, 32 HONG KONG L.J. 103 (2002). Similarly, in Mainland China, disabled persons were routinely excluded from employment in the civil service even after national legislation prohibiting disability discrimination was enacted. *See* Ma Yu'e, *Disability Discrimination in Employment*, *in* TAKING EMPLOYMENT

The CRPD recognizes the right of persons with disabilities to work on an equal basis with others, which is defined as "the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities."[105] At a minimum, the Committee will expect states parties to adopt domestic legislation that prohibits discrimination on the basis of disability in all phases of employment, including recruitment, hiring, salaries, promotional opportunities, and other conditions of employment. The treaty also requires safe and healthy working conditions and mandates that persons with disabilities be allowed to exercise their labor and trade union rights on an equal basis with others. In practice, one of the most important principles in Article 27 will be the obligation to ensure that reasonable accommodation is provided to persons with disabilities in the workplace. This is consistent with the definition of discrimination in Article 2, which provides that the denial of reasonable accommodation is a form of discrimination and contravenes the treaty.

While space constraints do not allow a full discussion of every provision in the CRPD, it should be noted that the drafters also recognized the relationship between gender discrimination and disability, noting that women and girls with disabilities "are subject to multiple discrimination" and requiring states parties to take appropriate measures to ensure their full development and empowerment.[106] There is substantial evidence that girls and women with disabilities in the Asia Pacific experience intersectional discrimination and that their voices are less likely to be heard in public discussions of disability law and policy.[107] The inclusion of a specific provision on intersectional discrimination has already helped to promote law and policy reforms that are designed to empower women with disabilities in the region and to ensure that they are included in plans to implement the CRPD.[108]

DISCRIMINATION SERIOUSLY: CHINESE AND EUROPEAN PERSPECTIVES 85 (Yuwen Li & Jenny Goldschmidt eds., 2009).

[105] CRPD, *supra* note 3, art. 27.

[106] *Id.* art. 6.

[107] *See, e.g.*, Daniel Stubbs & Sainimili Tawake, *Pacific Sisters with Disabilities: At the Intersection of Discrimination*, UNDP PAC. CENTRE (2009), *available at* http://www.undppc.org.fj/_resources/article/files/Final%20PSWD%20BOOKLET.pdf; Harilyn Rousso, *Education for All: A Gender and Disability Perspective*, WORLD BANK (2003), *available at* http://unesdoc.unesco.org/images/0014/001469/146931e.pdf.

[108] For an excellent report on projects in four Asian countries, see Rangita de Silva-de Alwis, *The Intersections of the CEDAW and CRPD: Putting Women's Rights and Disability Rights into Action in Four Asian Countries*, WELLESLEY CENTERS FOR WOMEN (2010), *available at* http://www.wcwonline.org/enewsmar10.

Finally, the drafters of the CRPD also took care to establish that persons with disabilities have the right to participate in political and public life[109] and to participate fully in the implementation of the treaty and any monitoring processes.[110] States must provide effective enforcement mechanisms for the rights stated in the treaty and ensure that persons with disabilities enjoy "effective access to justice" on an equal basis with others, including any procedural and age-appropriate accommodations that may be required to facilitate their effective role as participants in legal proceedings.[111]

The Ad Hoc Committee completed the drafting of the CRPD in 2006. The United Nations General Assembly approved the text in December 2006, together with the Optional Protocol to the CRPD (a separate but related treaty that contains an individual complaints procedure and an inquiry procedure).[112] The CRPD was opened for ratification on March 30, 2007 and eighty-two nations signed that day,[113] which is the largest number of opening signatures recorded for a multilateral human rights treaty.[114] The CRPD obtained its twentieth ratification in April 2008 and came into force in May 2008. In less than six years, it has obtained 130 states parties.[115] Although the ratification rate in the Asia Pacific was initially slower than in other regions, it is encouraging that the most populated nations in the region have now ratified the treaty: China, India, Bangladesh and Indonesia are all states parties.[116]

Indonesia's decision to ratify appears to have been linked to the very active lobbying campaign by disability rights groups within the Association for South East Asian Nations ("ASEAN").[117] Governments from ASEAN

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[109] CRPD, *supra* note 3, art. 29.

[110] *Id.* art. 33.

[111] *Id.* art. 13(b).

[112] *See* Optional Protocol to the Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, U.N. Doc. A/RES/61/106 (Dec. 13, 2006), *available at* http://treaties.un.org/doc/source/RecentTexts/IV_15a_english.pdf.

[113] *See Convention on the Rights of Persons with Disabilities: Status of Ratifications*, U.N. TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en (last visited Apr. 10, 2013).

[114] *See* Kayess, *supra* note 31, at 2.

[115] *See Convention on the Rights of Persons with Disabilities: Status of Ratifications*, *supra* note 113.

[116] *Id.*

[117] For example, in December 2010, Disabled Peoples' International Asia-Pacific ("DPIAP") and the Indonesian Disabled Peoples Association ("PPCI") co-organized a regional conference, which generated the *Jakarta Declaration*, calling upon all ASEAN member states to sign, ratify, and implement the CRPD. *See DPI/AP Reports 2010: Regional Conference on ASEAN and Disability 1-2 December 2010, Jakarta, Indonesia*, DPI-AP, http://www.dpiap.org/reports/detail.php?id=0000100&year=2010&month=12 (last

nations responded by pledging to ratify and implement the CRPD, as well as to commit more resources to implementing the Biwako Millennium Framework.[118] By the time Indonesia ratified the treaty in late 2011, four other members of ASEAN (Laos, Malaysia, Philippines, and Thailand) had already become states parties.[119] Myanmar became a state party shortly after Indonesia and Cambodia ratified the treaty in 2012.[120] Vietnam, Singapore, and Brunei Darussalam are all signatories but have not yet ratified the CRPD.[121]

III. DOMESTIC IMPLEMENTATION OF THE CRPD IN THE ASIA PACIFIC

Preliminary reports indicate that states parties to the CRPD from the Asia Pacific are taking the treaty seriously and adopting legal and policy reforms to comply with it.[122] Several governments enacted new laws to prohibit disability discrimination or amended existing laws while preparing to ratify the treaty.[123] For example, the Cook Islands adopted its Disability Law in 2008 and then became a state party to the CRPD in 2009.[124] The Republic of Korea enacted its anti-discrimination law shortly before ratifying the CRPD and changed a number of government policies on disability to shift away "from the mere provision of welfare services to a human rights-based approach."[125] Although New Zealand had prohibited disability discrimination since 1993, it decided to amend its law to better comply with

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visited Mar. 3, 2013).

[118] *See, e.g., Bali Declaration on the Enhancement of the Role and Participation of the Persons with Disabilities in ASEAN Community*, ASEAN 1, 2 (2011), http://www.asean.org/archive/documents/19th%20summit/Bali_Declaration_on_Disabled_Person.pdf (on file with author).

[119] *See Convention on the Rights of Persons with Disabilities: Status of Ratifications*, *supra* note 113.

[120] *Id.*

[121] *Id.*

[122] U.N. Secretariat, Note dated Sept. 5, 2012 from the Secretariat to the Conference of States Parties to the Convention on the Rights of Persons with Disabilities, U.N. Doc. CRPD/CSP/2012/CRP.2 (Sept. 12-14, 2012) (on file with author) [hereinafter 2012 Legislative Compilation].

[123] For examples, please see the entries for the Philippines, Malaysia, New Zealand, and China. *See* 2012 Legislative Compilation, *supra* note 122.

[124] The Government of the Cook Islands, State Party Report on CRPD: The Convention on the Rights of Persons with Disabilities, advanced unedited version ¶¶ 1, 47-49 (undated) (on file with author).

[125] REPUBLIC OF KOREA, INITIAL REPORT UNDER THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES, advanced unedited version 10 (June 22, 2011) (on file with author).

the CRPD's concept of reasonable accommodation.[126] New Zealand also reviewed other laws for consistency with the CRPD, ultimately amending twenty-three statutes that contained unlawful references to disability as a criterion.[127]

Of course, government reports to international conferences are imperfect assessment tools, partly because there is little opportunity to question the governments on the details of their initiatives. That is why the Committee on the Rights of Persons with Disabilities plays such an important role. When the Committee receives an Initial Report from a state party, it begins the review process by publishing the report on its website and inviting non-governmental organizations to identify contentious issues and suggest questions for the state party.[128] The Committee then meets and decides on a list of questions and requests for information to be conveyed to the state party.[129] Once the state party has provided its written replies, the Committee schedules a formal review and invites non-governmental organizations to submit "alternative reports" commenting on the government's report and supplemental information.[130] While this process works best in countries with freedom of expression and an active NGO community, international NGOs can provide the information if local NGOs do not feel comfortable doing so. This process ensures that the Committee receives a well-balanced view of the state party rather than just a government's assessment of its own performance.

Because China ratified the treaty in 2008 and submitted its Initial Report on time,[131] it became the first state party from the Asia Pacific to be formally reviewed by the Committee on the Rights of Persons with Disabilities. The government's very willingness to participate in the treaty monitoring process represents progress. As recently as the 1980s, the Chinese government regularly condemned international commentary on human rights, considering it to be improper intervention into domestic

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[126] 2012 Legislative Compilation, *supra* note 122.

[127] OFFICE FOR DISABILITY ISSUES, FIRST NEW ZEALAND REPORT ON IMPLEMENTING THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES, advanced unedited version ¶ 15 (2011) (on file with author).

[128] Comm. On the Rights of Persons with Disabilities, Rules of Procedure of the Committee on the Rights of Persons with Disabilities, U.N. Doc. CRPD/C/4/2 (Aug. 13, 2010).

[129] *Id.*

[130] *Id.*

[131] China's report (together with the reports of Hong Kong and Macau, which are not discussed in this article) is available on the website of the Committee on the Rights of Persons with Disabilities. *See Committee on the Rights of Persons with Disabilities–8th Session*, OFFICE OF THE U.N. HIGH COMM'R FOR HUM. RTS., http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Session8.aspx (last visited Mar. 3, 2013).

affairs.[132] However, in recent decades, the Chinese government has engaged in more discussion of human rights at home and become a more active participant in the UN human rights system. It is now a state party to six of the ten core UN human rights treaties (and thus has a significantly better ratification rate than the US). Of course, ratification does not necessarily imply that China will comply with the CRPD in a meaningful way. Indeed, some commentators have asked whether Beijing's engagement with international human rights treaties is "simply a cynical exercise of legal formalism designed to fool the international community and domestic audience."[133] Given that the Chinese government did not enter any reservations with respect to the application of the CRPD in Mainland China,[134] it provides an excellent test of whether treaty ratification can influence domestic laws and policies.

In order to assess the progress that China has made, one must appreciate the severe discrimination that persons with disabilities experienced in China in earlier periods. Persons with disabilities were traditionally referred to as *canfei*, a derogatory term that translates to "useless."[135] The Chinese characters for impairments frequently included dehumanizing symbols, revealing a general intolerance of body and mind variation.[136] Mental and intellectual disabilities were viewed with particular loathing and parents

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[132] R. Randle Edwards et al., *Civil and Social Rights: Theory and Practice in Chinese Law Today, in* HUMAN RIGHTS IN CONTEMPORARY CHINA 41, 52-53 (R. Randle Edwards et al. eds., 1986).

[133] Ming Wan, *Human Rights Lawmaking in China: Domestic Politics, International Law, and International Politics*, 29 HUM. RTS. Q. 727, 728 (2007). Professor Wan concludes that China's engagement with international human rights law has had some positive impact on domestic policies, although Beijing views the treaties primarily as a tool of foreign policy, a way to "meet the West half way" while avoiding any genuine political reform that would threaten party rule. *Id.* at 753.

[134] *See Convention on the Rights of Persons with Disabilities: Status of Ratifications*, *supra* note 113. China did enter a limited reservation concerning the application of the CRPD to the Hong Kong Special Administrative Region, relating to immigration law. *Id.* n.2. This reservation was requested by the Hong Kong government, consistent with its longstanding policy of not allowing international human rights treaties to restrict its law and policy on immigration. *See* Carole J. Petersen, *China's Ratification of the Convention on the Rights of Persons With Disabilities: The Implications for Hong Kong*, 38 HONG KONG L. J. 611, 626-29 (2008).

[135] Jinming Zhang, *A Survey of the Needs of and Services for Persons with Physical Disabilities in China*, 18:2 ASIA PAC. DISABILITY REHAB. J. 49, 64-65 (2007).

[136] Emma Stone, *Modern Slogan, Ancient Script: Impairment and Disability in the Chinese Language, in* DISABILITY DISCOURSE 142 (Marian Corker & Sally French eds., 1999).

often hid children with intellectual impairments, for fear of jeopardizing the marriage prospects of other family members.[137]

Until 1980, even government-controlled media used the derogatory term of *canfei*.[138] However, in the 1980s the government began to develop a slightly different discourse and the term *canfei* was replaced by *canji*. The change in official policy was symbolized by the phrase *canji erbu canfei*, which translates to "disabled but not useless."[139] This coincided with the UN's adoption of the Decade of Disabled People (1983-1992) and China's first steps toward engaging with the UN human rights system.[140] It was also the period in which Deng Pufang, arguably China's most famous person with a disability, began his advocacy work.[141] Deng Pufang is the son of the late Deng Xiaoping, whose family was persecuted during the Cultural Revolution. In 1968, while being interrogated by Red Guards, Deng Pufang jumped from a high window and was partially paralyzed.[142] Branded as a counter revolutionary, he was given only rudimentary medical treatment.[143] In 1971, he was transferred to the Qing He Shelter, which was known as a place for *fei ren* (garbage people). Residents included injured veterans without families, children with hearing disabilities, and people with other forms of bodily difference.[144]

In mid-1971, the Deng family successfully petitioned for Deng Pufang to be moved, initially to his parents' residence in exile and later to a Beijing hospital. As the Cultural Revolution waned, Deng Xiaoping returned to politics and eventually emerged as the leader of the Communist Party. This enabled Deng Pufang to go to Canada in the early 1980s for surgery and rehabilitation services that were unavailable to ordinary Chinese citizens at the time.[145] When he returned, Deng Pufang worked to establish similar

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[137] VERONICA PEARSON, MENTAL HEALTH CARE IN CHINA: STATE POLICIES, PROFESSIONAL SERVICES AND FAMILY RESPONSIBILITIES 94 (1995).

[138] Stone, *supra* note 136.

[139] *Id.* at 136.

[140] *See The United Nations and Disabled Persons: The First Fifty Years*, UNITED NATIONS ENABLE, http://www.un.org/esa/socdev/enable/dis50y00.htm (last visited Mar. 3, 2013) (emphasis on Chapter VII: The United Nations Decade of Disabled Persons, 1983-1992).

[141] PEARSON, *supra* note 137, at 88.

[142] *See* Celestine Bohlen, *China Troupe Overcomes, As Did Man Behind It*, N.Y. TIMES, Sept. 18, 2000, at E1; *see also Deng Pufang: Promote Humanitarianism in China*, CHINA.ORG.CN (2003), *available at* http://www.china.org.cn/english/2003/Dec/83299.htm.

[143] *See* MATTHEW KOHRMAN, BODIES OF DIFFERENCE: EXPERIENCES OF DISABILITY AND INSTITUTIONAL ADVOCACY IN THE MAKING OF MODERN CHINA 1, 45-47 (2005).

[144] *See id.* at 31.

[145] *See* Deng Pufang, *My Relieving Memories*, CHINA REHAB. RESEARCH CTR. (1987), http://www.crrc.com.cn/html7/index.cbs.

rehabilitation centers in China, including the China Rehabilitation Research Centre ("CRRC").[146] At that time, Deng and his supporters embraced a rehabilitative approach to disability, believing that bodily differences needed to be corrected to the extent possible. Rehabilitative theories suited China's traditionally negative views of disability, as well as the country's post-Mao appetite for modern science.[147] Deng Pufang also created the China Welfare Fund for the Handicapped and the Kanghua Development Corporation to help fund his activities[148] (although allegations of corruption eventually compelled him to transfer control of Kanghua to the State Council).[149]

Deng Pufang and his colleagues persuaded the government to conduct the first national survey of disability. The leadership group debated how to define *canji* and ultimately adopted a mixture of medical and functional approaches, specifying five categories: (1) visual disability; (2) hearing and speech disabilities; (3) intellectual disabilities; (4) physical disabilities; and (5) psychiatric disabilities.[150] The detailed definitions specified different "grades" within each category of disability and expressly excluded certain conditions.[151] There was no category for persons living with chronic diseases although there has been pervasive discrimination in China against people deemed to be carriers of infectious diseases.[152]

The 1987 survey recorded more than fifty-one million people living with one of five recognized "categories" of disability, a higher number than the Chinese government had previously acknowledged but almost certainly

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[146] *Id.; see also* KOHRMAN, *supra* note 143, at 93.

[147] KOHRMAN, *supra* note 143, at 93-94.

[148] *Id.* at 94-96; Linda Wong, *Rehabilitation Services in China: Policy and Outcomes*, 12:2 ASIAN J. OF PUB. ADMIN. 196, 199-200 (1990).

[149] For Deng Pufang's denial of these allegations, see *Deng Pufang: Carrying forward Humanitarianism*, CHINA'S HUM. RTS., http://www.humanrights-china.org/news/2004-12-21/China2004122191604.htm (last visited Mar. 3, 2013) (transcript of interview with Deng Pufang, Dec. 3, 2004, initially broadcast by CCTV and later published in China People's Daily (overseas edition) and on the website of the China Society for Human Rights Studies); *see also* Patrick E. Tyler, *China's First Family Comes Under Growing Scrutiny*, N.Y. TIMES, June 2, 1995, at A3.

[150] KOHRMAN, *supra* note 143, at 76-77 (noting that the fifth category was added only after intense lobbying by elite Chinese psychiatrists); *id.* app. A, at 245-50.

[151] *Id.* app. A, at 248-50.

[152] This form of discrimination has generally been referred to as "health discrimination" rather than "disability discrimination" in China. Nonetheless, discrimination on the ground of an infectious disease clearly falls within the definition of discrimination in the CRPD. *See, e.g.*, Liu Yang, *A Research Report on Heath Discrimination in Employment, in* TAKING EMPLOYMENT DISCRIMINATION SERIOUSLY: CHINESE AND EUROPEAN PERSPECTIVES 49-84 (Yuwen Li & Jenny Goldschmidt eds., 2009).

lower than international estimates.[153] The survey also revealed that seventy percent of these persons were illiterate (as compared to the thirty percent national average) and that most were unemployed and received no state assistance, relying entirely upon their families.[154] The results helped Deng Pufang to argue for a national umbrella organization to advocate for the rights of persons with disabilities.[155] In 1988, the China Disabled Persons' Federation was established, with Deng Pufang as its Chairperson.[156] The Federation featured Deng Pufang prominently in its propaganda materials, recognizing that powerful people who hoped to curry favor with Deng Xiaoping would support an institution that his son had established.[157] The Federation expanded rapidly but was also criticized in its early years, in part for dampening efforts to build more grassroots disability organizations but also for hiring too many well-connected men, who had no experience with disability and "avoided their *canji* constituents or treated them paternalistically."[158] There is no doubt, however, that the Federation has become a useful tool of Chinese foreign policy. Despite its clear links to the government, it acquired "NGO status" at the UN[159] and Deng Pufang received a prestigious United Nations human rights award in 2003 for his work with the Federation.[160] The Federation leaders now regularly use the discourse of human rights[161] in international meetings[162] and reports to

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[153] *See* Katherine P. Kaup, *Empowering the Disabled: The China Disabled Persons' Federation*, AM. POLITICAL SCI. ASS'N 1, 6 (2004), *available at* http://citation.allacademic.com//meta/p_mla_apa_research_citation/0/5/9/7/3/pages59733/p59733-1.php (delivered at the 2004 Annual Meeting of the American Political Science Association, Chicago, Sept. 1-5) (on file with author).

[154] *See* Kaup, *supra* note 153, at 8.

[155] For discussion of the events leading up to the survey and the manner in which it assisted Deng Pufang and his staff, see KOHRMAN, *supra* note 143, at 69-81.

[156] In November 2008, Ms. Zhang Haidi was elected as the new Chairperson and Deng Pufang became Honorable Chairman. *See China's Disabled People Federation Elects New Chairperson*, CHINA DISABLED PERSONS' FED'N (Nov. 19, 2008), http://www.cdpf.org.cn/english/events/content/2008-11/19/content_30188855.htm.

[157] KOHRMAN, *supra* note 143, at 94-95.

[158] *Id.* at 107.

[159] *See, e.g.*, United Nations Economic and Social Council, List of non-governmental organizations in consultative status with the Economic and Social Council as of 1 September 2011: Note by the Secretary General, 22, U.N. Doc. E/2011/INF/4 (Nov. 15, 2011), *available at* http://csonet.org/content/documents/E2011INF4.pdf.

[160] Press Release, General Assembly President, General Assembly President Announces Awardees of 2003 United Nations Prize in Field of Human Rights, U.N. Press Release GA/SM/340 (Feb. 12, 2003).

[161] *See, e.g.*, *Human Rights' Interview with Shen Zhifei*, CHINA DISABLED PERSONS' FEDERATION (Apr. 10, 2008), http://www.cdpf.org.cn/english/focus/content/2008-04/10/content_84851.htm.

[162] The Federation has often participated in meetings organized by the United Nations

international bodies,[163] although its approach is often more consistent with social welfare and rehabilitative theories of disability.

The Federation also helped to develop the first national Law on the Protection of Disabled Persons ("LPDP"), enacted in December 1990[164] for the purposes of "protecting the lawful rights and interests of persons with disabilities" and ensuring their "equal and full participation in social life and their share of the material and cultural wealth of society."[165] But like many laws enacted in this time period, the 1990 LPDP defined a person with a disability as "one who suffers from abnormalities,"[166] and used patronizing language.[167] It also failed to define unlawful discrimination, making the law difficult to enforce. This was a major omission because disability discrimination was rampant in China, not only in the growing private sector but also in the public sector.[168] The Federation did try to promote employment but did so primarily by securing jobs for persons with disabilities in "sheltered" workshops and other forms of segregated employment.[169] Education for children with disabilities was also limited and has tended to be provided in segregated environments.[170]

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and its subsidiary bodies. *See, e.g.*, United Nations Economic and Social Council, Committee on Non-Governmental Organizations, Quadrennial Reports 2002-2005 submitted though the Secretary General pursuant to Economic and Social Council Resolution 1996/31, E/C.2.2007/2, pp. 5-7 (containing the report of the China Disabled Persons' Federation).

[163] *Id.*

[164] *See Law of the People's Republic of China on the Protection of Disabled Persons, 1990*, NATLEX, http://www.ilo.org/dyn/natlex/docs/WEBTEXT/31906/64869/E90CHN01.htm (last visited Mar. 3, 2013) [hereinafter 1990 Law]. For a copy of the unofficial English translation of the 2008 version of the People's Republic of China on the Protections of Persons with Disabilities, see *Law on the Protection of Persons with Disabilities*, CHINA DISABLED PERSONS' FEDERATION, http://www.cdpf.org.cn/english/law/content/2008-04/10/content_84949.htm (last visited Mar. 3, 2013). Note that the 2008 version of the laws is structured into Articles, whereas the 1990 version utilizes sections.

[165] 1990 Law, *supra* note 164, § 1.

[166] *Id.* § 2.

[167] For example, the 1990 Law encouraged disabled persons to "display an optimistic, and enterprising spirit, have a sense of self-respect, self-confidence, self-strength and self-reliance, and make contributions to the socialist construction." *Id.* § 10.

[168] Ronald C. Brown, *China's Employment Discrimination Laws During Economic Transition*, 19 COLUM. J. ASIAN L. 361, 382 (2006). *See also* MA YU'E, *supra* note 104, at 107-8; Bonny Ling & Wing Lam, *Hepatitis B: A Catalyst for Anti-Discrimination Reforms?*, 2 CHINA RTS. FORUM 67 (2007), *available at* http://hrichina.org/sites/default/files/oldsite/PDFs/CRF.2.2007/CRF-2007-2_Hepatitis.pdf.

[169] Eric G. Zhang, *Employment of People with Disabilities: International Standards and Domestic Legislation and Practices in China*, 34 SYRACUSE J. INT'L L. & COM. 517, 545-54 (2007); *see also* Ma Yu'e, *supra* note 104, at 101-02.

[170] *See* Yanhui Pang & Dean Richey, *The Development of Special Education in China*, 21:1 INT'L J. SPECIAL EDUC., 77, 81-84 (2006); Nancy J. Ellsworth & Chun Zhang, *Progress*

Despite these shortcomings in China's approach to disability, it deserves credit for being an early supporter of the movement to create a treaty on the rights of persons with disabilities and an active participant in the negotiations, although it did not always advocate for the most progressive language.[171] Soon after signing the treaty in March 2007, the Chinese government announced that it was undertaking law reform to prepare for ratification.[172] As promised, the government issued new Regulations on Employment of People with Disabilities[173] and started the process of revising the 1990 Law on the Protection of Disabled Persons. The amended Law on the Protection of Disabled Persons was enacted by the National People's Congress in April 2008 and promulgated in July 2008.[174] Unfortunately, the law still contains a medical definition of disability, lacks a definition of unlawful discrimination, and emphasizes segregated employment for people with disabilities.[175] But the amendments, combined with other regulatory changes, made the central government feel sufficiently confident to ratify the treaty. In June 2008, the Standing Committee of the National People's Congress approved the CRPD in its plenary session.[176]

By ratifying the CRPD in 2008, China became eligible to participate in the first session of the Conference of States Parties to the CRPD, which began meeting in New York in October 2008. This was an important meeting because the Conference of States Parties nominated and elected the members of the first Committee on the Rights of Persons with Disabilities.[177] China

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and Challenges in China's Special Education Development: Observations, Reflections, and Recommendations, 28:1 REMEDIAL & SPECIAL EDUC., 58, 58-63 (2007).

[171] *See generally* Stein, *supra* note 75, at 11-20; Petersen, *supra* note 36, at 616.

[172] *See Shen Zhifei Spoke at High-level Intergovernmental Meeting of ESCAP*, CHINA DISABLED PERSONS' FEDERATION (2008), http://www.cdpf.org.cn/english/exchanges/attache/2008-04/10/content_84880.htm (text of speech by the China representative, Mr. Shen Zhifei, at the High-Level Intergovernmental Meeting on the Midpoint Review of the Asian and Pacific Decade of Disabled Persons (2003-2012) Bangkok, Thailand, 18-21, 2007).

[173] *See Regulations on the Employment of Persons with Disabilities*, CHINA DISABLED PERSONS' FEDERATION (2008), http://www.cdpf.org.cn/english/lawsdoc/content/2008-04/10/content_84888.htm.

[174] *Decree by the President of the People's Republic of China*, CHINA DISABLED PERSONS' FEDERATION (2008), http://www.cdpf.org.cn/english/lawsdoc/content/2008-04/10/content_25056081.htm (an unofficial English translation of the amended Law on the Protection of Persons with Disabilities, together with the decree bringing it into force on July 1, 2008).

[175] *Id.* arts. 2, 32; *see also Regulations on the Employment of Persons with Disabilities*, *supra* note 173, art. 10.

[176] *Legislature Approves Int'l Convention on Rights of Handicapped*, GOV.CN (June 27, 2008), http://english.gov.cn/2008-06/27/content_1028927.htm.

[177] *See* CRPD, *supra* note 3, art. 45 (under article 45, the treaty enters into force for a

nominated Ms. Yang Jia, a professor and Founding Director of the Women's Committee of China's Association of the Blind and a member of the World Blind Union's Asia-Pacific Region Women's Committee.[178] The treaty states that states parties should give consideration, when forming the Committee, to the goal of achieving "equitable geographical distribution, representation of the different forms of civilization and of the principal legal systems, balanced gender representation and participation of experts with disabilities."[179] Ms. Yang was easily elected as the only nominee from East Asia and one of only seven women nominees (compared to seventeen men). Pursuant to Article 34(3), Committee members serve in their personal capacities and are not supposed to represent their governments.[180] Given that Mainland China remains a one-party state, it is unlikely that Ms. Yang has been fully independent of her government during her term, which expired at the end of 2012.[181] However, Committee members do not formally participate in the review of their own nations and it does not appear that Ms. Yang's presence on the Committee softened the Committee's recent review of China's compliance with the CRPD.

The Initial Report that China submitted to the Committee in 2010 contained significant data, demonstrating that the government took the reporting process seriously.[182] China described numerous legislative and administrative reforms[183] and programmatic activities[184] that were adopted

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new state party 30 days after it deposits its instrument of ratification with the U.N. Secretary-General). Thus, by submitting its instrument on August 1, 2008, China became a state party just in time to submit a nomination for the first Committee on the Rights of Persons with Disabilities by the due date of September 3, 2008.

[178] Jia Yang (China), OFFICE OF THE U.N. HIGH COMM'R FOR HUM. RTS., *available at* www2.ohchr.org/SPdocs/CRPD/CVMembers/JiaYANG.doc (last visited May 28, 2013).

[179] CRPD, *supra* note 3, art. 34(4).

[180] *Id.* art. 34(3).

[181] Concerns regarding independence are not limited to members of treaty-monitoring bodies from China. A comprehensive study of the U.N. human rights treaty system concluded that there are "many government surrogates" serving on the treaty-monitoring bodies and that the committees struggle to maintain their independence. *See* Anne Bayefsky, *Report: The UN Human Rights Treaty System: Universality at the Crossroads* (2001), Executive Summary, *available at* http://www.bayefsky.com/tree.php/id/9250 (last visited Apr. 25, 2013); *see also* Iona Truscan, The Independence of UN Human Rights Treaty Body Members, GENEVA ACADEMY (2012), *available at* http://graduateinstitute.ch/webdav/site/iheid/shared/outreach/APSUN/conferences/ga_inbrief_web-1.pdf.

[182] *Initial Reports Submitted by States Parties Under Article 35 of the Convention: China*, U.N. Doc. CRPD/C/CHN/1 (Feb. 11, 2011) [hereinafter *China's Initial Report*].

[183] *Id.* ¶¶ 5-6 (describing the 2008 amendments to the Law on the Protection of Persons with Disabilities, the Compulsory Education Law and regulations designed to promote employment, education, and barrier-free access).

[184] *Id.* ¶¶ 7-8.

either just before or soon after China ratified the treaty. This indicates that the decision to ratify has had at least some positive impact on the Chinese government's policies and allocation of resources.[185] Assuming that the government's statistics are accurate (which is difficult to confirm given the lack of a free press in China), there has been a significant expansion in educational opportunities for children and adults with disabilities, as well as an increase in vocational education and other forms of training, although not always in the inclusive environments that are required by Article 24 of the CRPD.[186]

The Initial Report of China also describes, in detail, its efforts to promote employment and reduce poverty among persons with disabilities.[187] It is clear that the government continues to rely on quotas and other forms of "concentrated" employment to boost the employment rate of persons with disabilities.[188] While this is not consistent with the spirit of the CRPD, one can understand why the government might be reluctant to abandon these techniques, particularly in an era of rising unemployment in China generally.[189] The Chinese government does not apologize for its reliance on these measures or for its continued use of medical and functional definitions of "disability" in its laws and policies.[190]

Although all governments are supposed to consult with civil society in preparing their reports to the treaty bodies, in the case of Mainland China this consultation process is not open to the general public. When the Committee asked the Chinese government to explain what steps it had taken to consult civil society, the government listed a number of organizations that are part of the Federation and other governmental bodies.[191] However, independent disability rights groups and academics

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[185] *Id.* ¶¶ 95-99.

[186] *Id.* ¶¶ 94, 96-97; *see also* CRPD, *supra* note 3, art. 24.

[187] *China's Initial Report*, *supra* note 182, ¶¶ 112-13, 120, 124-27.

[188] *Id.* ¶ 113; *see also Employment and Social Security*, CHINA DISABLED PERSONS' FEDERATION (Nov. 2, 2013), http://www.cdpf.org.cn/english/employment/content/2012-11/02/content_84876.htm (describing quotas, training programs for "blind masseurs" and other forms of "concentrated" employment).

[189] For further discussion of this issue, see Stein, *supra* note 75.

[190] China reportedly considered changing its medical definition of disability in 2007. *See* Eric Zhang, *The Protection of Rights of People with Disabilities in China*, no. 28, DISABILITY WORLD (Jan. 2007), http://www.disabilityworld.org/01_07/china.shtml#1. However, it did not take the opportunity to abandon the medical definition when it amended its Law on the Protection of Disabled Persons in 2008 and it described its classification system in great detail at Appendix 3 of its Initial Report. *See China's Initial Report*, *supra* note 182, at Annex 3.

[191] *See Responses by the Government of the People's Republic of China to the List of Issues (No. 1 to No. 30) by the Committee on the Rights of Persons with Disabilities*, OFFICE OF THE U.N. HIGH COMM'R FOR HUM. RTS., *available at* http://www.ohchr.org/Documents/

from Mainland China have also taken a keen interest in the CRPD and in China's Initial Report. Some disability rights activists participated in conferences and training programs on the CRPD, often supported by international organizations. The primary goal of these programs was to empower local activists and researchers to critique the government's report and to draft their own alternative reports, so as to contribute to the Committee's review.[192]

There are many organizations within China that can enrich the reporting process. For example, the Beijing Yirenping Center ("Yirenping") is dedicated to eliminating discrimination against carriers of contagious diseases, such as Hepatitis B and HIV. Yirenping has published several research reports and assisted persons with disabilities to litigate against unlawful discrimination, but it has also complained of official harassment.[193] Similarly, the founding members of Beijing Aizhixing Institute, an NGO that works on discrimination and the prevention of AIDS among vulnerable groups, has also suffered persecution.[194] The escape of Chen Guangcheng in 2012 further demonstrates the dangers of being an activist in China[195] and it is well known that lawyers who work on human rights issues in China risk persecution.[196]

HRBodies/CRPD/8thSession/CRPD.C.CHN.Q.1.Add.1_en.doc (last accessed May 29, 2013).

[192] The author was a trainer in two of these training conferences, one conducted in Hong Kong, which included numerous representatives from disability rights organizations from Mainland China, and one conducted at Wuhan University in Wuhan, China, which was sponsored by the Raoul Wallenberg Institute of Human Rights and Humanitarian Law and the Swedish International Development Cooperation Agency.

[193] For information on Yirenping's advocacy and some reports of harassment, see THE BEIJING YIRENPING CENTER, http://www.yirenping.org/english/index.htm (last visited Mar. 3, 2013).

[194] *See* Wan Yanhai, *My Departure From China: Testimony from a Human Rights Defender*, 5 EQUAL RTS. REV. 93, 93-4 (2010); Edward Wong, *AIDS Activist Leaves China for U.S., Citing Pressure*, N.Y. TIMES, May 10, 2010, at A9; Keith B. Richburg, *China's Crackdown on Nonprofit Groups Prompts New Fears Among Activists*, WASHINGTON POST (May 11, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/05/10/AR2010051004801.html; *Submission to UN on Hu Jia,* CHINA HUM. RTS. DEFENDERS (Mar. 15, 2013), *available at* http://chrdnet.com/2013/03/submission-to-un-on-hu-jia-march-15-2013/.

[195] For a summary of events and articles on Chen Guangcheng, see N.Y. TIMES, *Times Topics,* http://topics.nytimes.com/top/reference/timestopics/people/c/chen_guangcheng/index.html (last visited Mar. 3, 2013); *see also* Jerome Cohen, A New Era for Chinese Justice, Reflections on the Bo Xilai and Chen Guangcheng Cases, Keynote Address at the University of Hawai'i Law Review Symposium: *He Hali'a Aloha No Jon: A Symposium in Honor of the Late Professor Jon Markham Van Dyke*, Honolulu, Hawai'i (Jan. 14, 2013), *available at* http://blog.hawaii .edu/lawreview/symposium/event-program.

[196] *See, e.g.*, Wan, *supra* note 194, at 93-96; *Walking on Thin Ice: Control, Intimidation and Harassment of Lawyers in China*, HUM. RTS. WATCH (Apr. 28, 2008), *available at*

Thus, it is not surprising that the majority of the non-governmental reports that were submitted when the Committee on the Rights of Persons with Disabilities reviewed China[197] came from international NGOs and from organizations based in Hong Kong.[198] It appears that only two organizations from Mainland China (Beijing Aizhixing and One Plus One Beijing) were willing to have reports posted on the Committee's website under their own names.[199] Other organizations were consulted by the International Disability Alliance ("IDA") but were afraid to be named in IDA's reports to the Committee.[200] This is perhaps the strongest evidence of the fact that disability rights groups in China do not yet enjoy freedom of expression or the right to political participation, despite the promises made in Articles 21 and 29 of the CRPD.[201]

However, the lack of alternative reports from Mainland Chinese disability rights organizations did not make the Committee's review any

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http://www.hrw.org/en/reports/2008/04/28/walking-thin-ice-0; *HRIC Condemns Growing Harassment against HIV/AIDS Petitioners*, HUM. RTS. IN CHINA (Apr. 21, 2008), http://hrichina.org/content/101; *see also* CHINESE HUMAN RIGHTS DEFENDERS, http://chrdnet.com/ (last visited Mar. 3, 2013) (featuring weekly briefings of the China Human Rights Defenders ("CHRD"), which frequently report on intimidation of lawyers and activists working to advance the rights of persons with disabilities in China).

[197] The alternative reports that were submitted can be viewed on the website of the Committee on the Rights of Persons with Disabilities, see *Committee on the Rights of Persons with Disabilities*, OFFICE OF THE U.N. HIGH COMM'R FOR HUM. RTS., http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Session7.aspx (last visited Mar. 3, 2013); *Committee on the Rights of Persons with Disabilities–8th Session*, OFFICE OF THE U.N. HIGH COMM'R FOR HUM. RTS., http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Session8.aspx (last visited Mar. 3, 2013).

[198] Hong Kong has strong protection for freedom of expression and NGOs submit numerous alternative reports to the treaty-monitoring bodies when the Hong Kong government is being reviewed. *See* Carole J. Petersen, *Preserving Traditions or Breaking the Mold? Transnational Human Rights Processes in the People's Republic of China and Hong Kong*, *in* TRANSNATIONAL LEGAL PROCESSES AND HUMAN RIGHTS 127 (Kyriaki Topidi & Lauren Fielder eds., 2013).

[199] *See Chinese with Disabilities Affected by HIV/AIDS Rights Situation, Nongovernmental Organization Report*, BEIJING AIZHIXING INSTITUTE (2012), *available at* http://www.ohchr.org/Documents/HRBodies/CRPD/8thSession/BeijingAizhixingInstitute_China_CRPD8_en.doc; *One Plus One Report: Implementation in China of the United Nations Convention on the Rights of Persons with Disabilities*, ONE PLUS ONE (BEIJING) (2012), *available at* http://www.ohchr.org/Documents/HRBodies/CRPD/7thsession/ngos/OnePlusOneBeijing-Report-ENG.doc.

[200] *See Recommendations on China CRPD Committee, 8th Session*, INTERNATIONAL DISABILITY ALLIANCE (IDA) (2012), *available at* http://www.ohchr.org/Documents/HRBodies/CRPD/8thSession/IDA_China_CRPD8.doc; *IDA Proposals for the List of Issues on China, CRPD Committee, 7th Session*, INTERNATIONAL DISABILITY ALLIANCE (2012), *available at* http://www.ohchr.org/Documents/HRBodies/CRPD/7thsession/IDA_China.doc.

[201] CRPD, *supra* note 3, arts. 21, 29.

less critical. In fact, it probably made the review more intensive because the Committee received extensive information from organizations outside China, which feel a strong obligation to participate because they are aware of the constraints on Chinese activists.[202]

In April 2012, the Committee formulated its list of issues for the September 2012 review, which contained thirty detailed questions and requests for information to supplement the Initial Report of China.[203] This list included questions that had been suggested by sources from outside of Mainland China. For example, it asked the Chinese government what it was doing to prevent forced sterilization and other eugenic practices, although the Initial Report had not mentioned this subject or admitted that such practices were occurring.[204] The Committee also asked about the number of persons with disabilities living in institutions and the practice of detaining individuals simply on the ground of disability, which is not permitted under the CRPD.[205]

When the Chinese government first began reporting to UN human rights treaty bodies, it was often resistant to probing questions and sometimes even combative with the Committee.[206] However, during the review by the Committee on the Rights of Persons with Disabilities the Chinese government appeared more experienced and comfortable with the process. This can be seen from its responses to the questions submitted by the Committee, which are thirty-six pages and add considerable detail to China's Initial Report.[207] For example, the government provided information on the Draft Mental Health Law (which has since been

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[202] In addition to the two reports by IDA, *see supra* note 200, the Committee also received a detailed report from Human Rights in China, which includes Annexes that explain how China's laws and regulations on "state secrets" inhibit full disclosure of information that is directly relevant to the Committee's review of China's compliance with CRPD. *See Implementation of the Convention on the Rights of Persons with Disabilities in the People's Republic of China, CRPD Committee, 8th Session*, HUM. RTS. IN CHINA (2012), *available at* http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Session8.aspx.

[203] *List of Issues to be Taken Up in Connection with the Consideration of the Initial Report of China*, U.N. Doc. CRPD/C/CHN/Q/1 (May 16, 2012) [hereinafter *List of Issues for China*].

[204] *Id.* ¶¶ 5, 18. For further analysis of the history of sterilization and eugenic policies in certain Western nations and recent practices in China, see Petersen, *supra* note 97, at 93-96.

[205] *List of Issues for China*, *supra* note 203, ¶¶ 13, 19.

[206] *See* ANN KENT, CHINA, THE UNITED NATIONS, AND HUMAN RIGHTS: THE LIMITS OF COMPLIANCE 91-104 (1999) (noting that the Chinese government went through a "steep learning curve" as it mastered the procedural requirements and came to accept that Committee Against Torture had a right to ask challenging questions).

[207] *Responses by the Government of the People's Republic of China to the List of Issues (No. 1 to No. 30) by the Committee on the Rights of Persons with Disabilities*, *supra* note 191.

enacted) and on the number of individuals in detention. Although the content of the responses did not necessarily please the Committee, it should have been reasonably impressed by the vast quantities of information that China provided. To a large extent, that is the point of the reporting process—to compel governments to produce information and to at least consider new ways of addressing difficult issues of law and policy. This is particularly important in the area of disability rights because so many individuals with disabilities have traditionally been hidden from public view.

The Committee did thank China for being forthcoming and for participating in a constructive dialogue with the members of the Committee.[208] It also congratulated China on several accomplishments, including increased accessibility, stronger legal protections for workers with disabilities, and efforts to reduce poverty.[209] However, its Concluding Observations on China also pointed to numerous "concerns," which is a diplomatic way of telling the government that it is not complying with the treaty.[210] The Committee stated that it was "deeply concerned" regarding the practice of forced sterilization and abortion of women with disabilities.[211] It also criticized China for its continuing reluctance to adopt a legal definition of prohibited discrimination, which makes it almost impossible to prove a case of disability discrimination (particularly when the claimant alleges a failure to provide reasonable accommodation).[212]

The Committee was particularly concerned by the extent of institutionalization of persons with disabilities and the lack of protection for the right to legal capacity.[213] Interestingly, China drafted a new Mental Health Act after it submitted its Initial Report but before the Committee conducted its formal review; it appears that China initially hoped to get the new law passed before the review was conducted in September 2012.[214] The new law, which was ultimately enacted in October 2012, does make certain improvements[215] and arguably provides further evidence that the

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[208] *Concluding Observations on the Initial Report of China*, U.N. Doc. CRPD/C/CHN/CO/1 ¶¶ 2, 3 (Oct. 15, 2012) [hereinafter *Concluding Observations on China*].

[209] *Id.* ¶¶ 5, 6, 8.

[210] *See, e.g., id.* § 3.

[211] *Id.* ¶ 33.

[212] *Id.* ¶ 12.

[213] *Id.* ¶¶ 22, 23.

[214] *See, e.g., China to Enact Mental Health Care Law in 2011*, XINHUA (Mar. 3, 2013), http://news.xinhuanet.com/english2010/china/2011-03/10/c_13771463.htm.

[215] *See China: Mental Health Care Law Passes*, N.Y. TIMES, Oct. 26, 2012, at A9; *see also* HH CHEN ET AL., MENTAL HEALTH LAW OF THE PEOPLE'S REPUBLIC OF CHINA, 24(6) SHANGHAI ARCHIVES OF PSYCHIATRY 305 (2012), *available at* http://www.saponline.org/

Chinese government wants to be seen as responding to the requirements of the CRPD.[216] However, the Committee was not particularly impressed with the amendments, noting that the new legislation would not go nearly far enough in reforming the system of involuntary commitment to institutions.[217] The Committee also expressed strong concerns regarding compulsory treatment, an issue that the UN Committee Against Torture previously raised in the context of Chinese criminal law, which allows authorities to administer compulsory medical treatment to persons with medical illness who commit crimes.[218]

During the September 2012 hearing, a member of the Committee asked the Chinese delegation about the treatment of Chen Guangcheng, who suffered years of imprisonment, house arrest, and harassment for being a human rights lawyer.[219] Fortunately (both for Chen and for the Chinese delegation), Chen was allowed to leave China that summer and it was therefore relatively easy for the delegation to deflect the questions concerning him. The knowledge that the Committee on the Rights of Persons with Disabilities would be questioning the Chinese delegation in September may have contributed to the Chinese government's decision to let Chen depart. In the international community, Chen has now replaced Deng Pufang as China's most famous person with a disability and the hearing before the Committee would have been much harsher had he been in detention in September 2012.

Ultimately, the Committee's Concluding Observations were quite firm and probably did not further China's goal of being seen as a regional leader in disability rights. But that is the nature of the process; even jurisdictions with much better laws than China will receive criticism as the purpose of the review is to advance the rights of persons with disabilities and there is almost always room for improvement. There is little doubt that China has

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upload/20121220/special_article.pdf.

[216] For analysis of the draft law and its shortcomings, see Elizabeth M. Lynch, *Analysis of China's Draft Mental Health Law–An Interview*, CHINA L. & POLICY (Oct. 24, 2011), http://chinalawandpolicy.com/2011/10/24/analysis-of-china%E2%80%99s-draft-mental-health-law-%E2%80%93-an-interview/ (detailing an interview by China Law and Policy with Professor Michael Perlin).

[217] *Concluding Observations on China*, *supra* note 208, ¶ 25 (noting the Committee's concern that the Draft Mental Health Care Act and related ordinances of six major cities in China do not respect the individual will of persons with disabilities).

[218] *See Concluding Observations of the Committee Against Torture: China*, 14, U.N. Doc. CAT/C/CHN/CO/4 (Dec. 12, 2008).

[219] The Committee was urged to ask this question by international NGOs. *See, e.g.*, *China: Cooperate with First UN Disability Rights Review*, HUM. RTS. WATCH (Sept. 14, 2012), http://www.hrw.org/news/2012/09/14/china-cooperate-first-un-disability-rights-review.

made a number of important improvements in order to comply with the CRPD. But if China hopes to obtain a better review when the Committee reviews its second periodic report, it will need to do considerably more to comply with the civil liberties aspects of the CRPD. For example, the government should relax its secrecy laws so that the Committee, journalists, and disability rights organizations can obtain reliable information. In particular, the Committee highlighted the need for disclosure of the number of persons who have been involuntarily committed to institutions and the number of women with disabilities who have been sterilized.[220] The Committee also "strongly recommended" that China permit organizations other than the Federation to advocate for persons with disabilities and to participate in the monitoring process for the CRPD.[221] Recognizing that the Federation is quasi-governmental, the Committee also called for the creation of an independent enforcement body, one that could comply with the Paris Principles.[222]

IV. CONCLUSION

The 2012 review of China's compliance with the CRPD demonstrates that the Committee on the Rights of Persons with Disabilities will ask searching questions and will not hesitate to criticize governments on sensitive topics. The Asia Pacific now includes twenty-seven states parties to the CRPD,[223] several of which have filed their Initial Reports and are awaiting their first review.[224] Meanwhile, in late 2012, governments of the ESCAP region gathered in South Korea to review their own progress and to launch yet another Asian and Pacific Decade of Persons with Disabilities, which will last until 2022.[225] By itself, an additional "decade" might not be

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[220] *Concluding Observations on China*, *supra* note 208, ¶ 48.

[221] *Id.* ¶ 50.

[222] *Id.*

[223] For a list of states parties in the Asia Pacific and a summary of the regional campaign to encourage ratification, see UNITED NATIONS ESCAP, http://www.unescapsdd.org/disability/make-the-right-real (last visited Apr. 25, 2013).

[224] The Committee has posted copies of the Initial Reports that are awaiting review. *See Consideration of Reports*, OFFICE OF THE U.N. HIGH COMM'R FOR HUM. RTS., *available at* http://www.ohchr.org/EN/HRBodies/CRPD/Pages/futuresessions .aspx.

[225] The High-level Intergovernmental Meeting on the Final Review of the Implementation of the Asian and Pacific Decade of Disabled Persons, 2003–2012, was organized by ESCAP and hosted by the Government of the Republic of Korea. The Meeting marked the conclusion of the second Asian and Pacific Decade of Disabled Persons, 2003–2012, and launched the new decade. *See* UNITED NATIONS ESCAP HIGH-LEVEL MEETING & INCHEON INTERNATIONAL CONFERENCES ON DISABILITY, http://www.incheon-disability.kr/conferences/en/index.php (last visited Mar. 3, 2013).

cause for celebration. However, this time the new decade is being launched in the shadow of the CRPD and a fully functioning treaty-monitoring body. At the conclusion of the 2012 meeting, governments adopted a Ministerial Declaration on the Asian and Pacific Decade of Persons with Disabilities, 2013–2022, and the Incheon Strategy to "Make the Right Real" for persons living with disabilities.[226] The Incheon Strategy provides a set of ten regionally agreed disability-inclusive development goals (as well as twenty-seven specific targets) that were developed through consultations with governments and civil society.[227] One of the primary goals is to accelerate ratification of the CRPD and to bring national legislation and policies into compliance with the treaty. The ESCAP secretariat will report every three years, until the end of the Decade in 2022, on the implementation of the Incheon Strategy.[228] Numerous disability rights organizations participated in the meeting or in sub-regional preparatory meetings and they are quickly taking up the slogan "Make the Right Real" to pressure governments to make real progress at the regional and national levels.[229] Fortunately, for the twenty-seven nations in the Asia Pacific that have already ratified the CRPD,[230] disability rights are now much more than just a slogan. The CRPD has turned these development goals into binding obligations, filling what was previously a glaring omission in international human rights law.

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[226] *Incheon Strategy to "Make the Right Real" for Persons with Disabilities in Asia and the Pacific*, UNITED NATIONS ESCAP 1, 2 (2012), http://www.unescap.org/sdd/publications/IncheonStrategy/Incheon-Strategy.pdf [hereinafter *Incheon Strategy*].

[227] *Id.* at 13, 23-24.

[228] High-level Intergovernmental Meeting on the Final Review of the Implementation of the Asian and Pacific Decade of Disabled Persons, 2003-2012, UNITED NATIONS ESCAP, http://unescapsdd.org/disability/event/high-level-intergovernmental-meeting-final-review-implementation-asian-and-pacific (last visited Mar. 3, 2013).

[229] *See, e.g.*, *About*, S. ASIAN DISABILITY FORUM, http://sadf.asia/about/ (last visited Mar. 3, 2013).

[230] For a list of states parties and a summary of the regional campaign to encourage ratification, see UNITED NATIONS ESCAP, http://www.unescapsdd.org/disability/make-the-right-real (last visited Apr. 25, 2013).

Historical Issues between Korea and Japan and Judicial Activism: Focusing on the Recent Decisions of the Korean Constitutional Court Concerning Comfort Women†

Seokwoo Lee, Yoonkyeong Nah and Youngkwan Cho*

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† While there are differing definitions of judicial activism, this article refers to it as "the Court's active interpretation and application of the law with the attitude for realizing justice, so that the judiciary is not merely interpreting and applying provisions of the law but rather influences formation of policy through creative interpretations arising from its progressive attitude." This still poses much controversy, however. For example, under a dictatorship, the "creative interpretation of the law" through judicial activism can use the rationales of "public goodness and social stability" to justify the suppression of activists and organizations protesting against the government. Thus, an emphasis on judicial activism should be placed on the progressive attitude of the judiciary towards the weaker, with the judiciary interpreting the law with an eye towards those whose rights may not be protected without active intervention of the law. For example, John Rawls, in A THEORY OF JUSTICE, did not view justice as equality. Instead, he viewed social and economic inequality, which allows the maximum advantages to the social weaker, as an active way of realizing justice. JOHN RAWLS, A THEORY OF JUSTICE (11th ed. 1971).

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I. INTRODUCTION

The recent decisions of the two highest courts in Korea (Supreme Court and Constitutional Court)[1] concerning the issues of the past between Korea and Japan have received much attention for their affirmative decisions. These decisions are particularly significant because they put forth affirmative principles of law to relieve one of the most representative cases of state crimes that occurred during the Japanese Occupation period—crimes committed against Korean women, who have been called "Comfort Women."[2]

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[1] The Korean judicial system is a three-tiered system constituted by district courts, high courts, and the Supreme Court. The final interpretation and decision concerning statutes is made by the Supreme Court. The Supreme Court is comprised of fourteen justices including the Chief Justice, and three or more justices who form a single division. Supreme Court decisions are reached through the consensus of all fourteen justices in attendance; however where a division hears the case and the opinion of the division judges is in agreement, the division may try the case. Appeals before the Supreme Court are hearings that do not judge the facts of the case appealed from the high court but concern only the interpretation and application of the law.

The Constitution of the Republic of Korea establishes the Constitutional Court as the final adjudicatory body regarding constitutional disputes in order to protect basic rights as guaranteed by the Constitution. Where the basic rights of the people have been violated by the exercise or non-exercise of governmental powers, the Constitutional Court declares such action unconstitutional in order to protect these basic rights. Where a law that contravenes the Constitution violates the basic rights of the people, such rights are protected by declaring the law to be invalid. The Constitutional Court is comprised of nine justices, six of whom must be in agreement in order to declare something unconstitutional.

[2] "Comfort Women" have been referred to differently depending upon the perspective from which they are seen *e.g.* "comfort women," "military comfort women," "Japanese military sex slaves." For example, the term "Comfort Women" refers to those who provided "mental consolation (comfort)" to male soldiers through forced sex labor. Thus, the term, which is coined based upon male experience is not proper to refer to these women. The term "military comfort women" is also not proper because the term implies that these women "voluntarily" engaged the Japanese army and were "voluntarily" involved in the sexual labor. Also, the term "Japanese military sex slaves" has omitted these women's agency in its meaning, i.e., their resistance at the time of being forced in the past and their current criticism toward/actions against the Japanese government, such as through their weekly Wednesday protests that have continued for more than two decades. Therefore, this term is not appropriate either. Whatever term is used, it should be used with quotation marks to expose the meaning of the term and the problems that the term implies. The present authors consider "Japanese war victim *and* survivor," though rather wordy, to be most appropriate to

The Constitutional Court reached a decision recently concerning the issue of "Comfort Women for the Japanese Military," namely that a dispute of interpretation existed between Korea and Japan as to whether the compensation claim of the "comfort women" was extinguished pursuant to Article 2(1)[3] of the Agreement between the Republic of Korea and Japan Concerning the Settlement of Problems in Regard to Property and Claims and Economic Cooperation ("Claims Agreement").[4] The Court held that failure of the Respondent, the government agency, Ministry of Foreign Affairs and Trade ("MOFAT"), to resolve such dispute over its interpretation, pursuant to Article 3 of the Claims Agreement, violated the Constitution.[5]

II. THE UNCONSTITUTIONALITY OF THE FAILURE TO ACT FOR COMFORT WOMEN: COMFORT WOMEN V. THE KOREAN MINISTRY OF FOREIGN AFFAIRS AND TRADE DECISION

A. Progress

1. Damage to Comfort Women

From the early 1930s until the defeat of Japan in the Second World War in 1945, the issue of "comfort women," which were women who were taken to the battlefield and forced into sexual labor by the Japanese government and its military, has remained a psychological thorn in Korea-Japan relations. It is a representative issue of the past that still needs to be dealt with.[6]

Comfort stations were first installed by the Japanese Navy as a preventive measure for mass rape that could result in venereal diseases and opposition of local people during the 1932 Shanghai Uprising.[7] With a

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describe their identity. Nonetheless, the term of "comfort women," which is most widely used among civic groups and academia will be used in this paper.

[3] Agreement Between Japan and the Republic of Korea Concerning the Settlement of Problems in Regard to Property and Claims and Economic Cooperation, Japan-S.Kor., art. II(1), June 22, 1965, 8473 U.N.T.S. 258 [hereinafter *Claims Agreement*].

[4] Constitutional Court [Const. Ct.], 2006Hun-Ma788, Aug. 30, 2011, (23-2(A) KCCR, 366) (S. Kor.), *translated and available at* http://www.ccourt.go.kr/home/english/decisions/mgr_decision_view.jsp?seq=869&code=3&pg=2&sch_code=&sch_sel=&sch_txt=&nScale=10 (providing English summaries of recent decisions and major decisions by the Constitutional Court of Korea).

[5] *Id.*

[6] Kim, Chang Rok, *Comfort Women Constitutional Litigation*, 31 KYUNGBOOK DAEHAK BUBHAAK NONGO [KYUNGBOOK UNIVERSITY LEGAL ARGUMENT] 338 (2009).

[7] Constitutional Court [Const. Ct.], 2006Hun-Ma788, Aug. 30, 2011, (23-2(A) KCCR,

mass dispatch of its soldiers to China in the Sino-Japanese War starting in July 1937, the Japanese army began installing comfort stations in conquered areas, the number increasing after the Nanking Massacre of December 1937.[8] From 1941 and during the course of the Asia-Pacific War, Japan installed comfort stations in their conquered territories in Southeast Asia and the Pacific Regions.[9] Official documents identify that comfort stations were installed in areas invaded by Japan, i.e., Korea (Chosun dynasty then), China, Hong Kong, Macau, and the Philippines.[10] The number of "comfort women" is estimated to be between 80,000 and 100,000 with some other estimations reaching 200,000, 80% of whom were Korean women, while others also came from the Philippines, China, Taiwan, and the Netherlands.[11]

The Japanese government provided soldiers with "comfort women." Under the justification of "mental consolation," the Japanese government justified Japanese soldiers forcing sexual labor and sexually exploiting women. This was the most crucial means of colonial rule engaged by the Empire in order to pacify discontent of soldiers and to prevent desertion from a war that dragged on. Their purpose is said to prevent classified information from leaking, by "hiring" women from the colonies who could not speak Japanese. Given the fact that nationalism is supported by the ideology that one nation's reproduction is done through women's bodies, the physical violation committed upon Korean women by Japanese men must have been regarded by colonial nationalists as a violation to the Korean people as a whole. This is why the use of "comfort women" is a physical *and* cultural violation that raises the specter of complete dominion over the Korean people.

Based on these justifications, "comfort women," who were considered "stained" in the context of a nation of pure blood in a patriarchal Korean society that forced women to keep their sexual purity, could not easily discuss the issue in public even after liberation in 1945. Further, the discourse of "a homogeneous nation," designed under Park, Chung Hee's military dictatorship to overcome economic weakness and a divided nation's sense of inferiority that arose from Japanese colonial rule, made the victimized women even more invisible. But with the launching of the Korean Council for Women Drafted for Military Sexual Labor by Japan in November 1990, comfort women slowly began to voice themselves. Various activities continued among civic groups, the Korean government,

366, 379) (S. Kor.).

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

and international human rights organizations, along with weekly Wednesday protests urging for the resolution of the issue before the Japanese Embassy in Korea that reached the "1000th Wednesday" mark on Dec. 14, 2011 (1992.1.8~present).[12]

The Japanese government, however, denied the very existence of "comfort women" at first, until documents showing direct involvement of the Japanese government were uncovered in addition to the testimonies of the victims, including Kim, Hak Soon, who gave the first testimony in 1991.[13] On August 4, 1993, together with the second Government Report, the Japanese government acknowledged the involvement of the Japanese military and authorities, as well as forced conscription and labor.[14] Chief Cabinet Secretary Yohei Kono released a statement recognizing the grave violation of their human rights and expressing his apologies.[15] However, Japan maintained that legal responsibility regarding these comfort women had been settled by the 1965 Claims Agreement and refused compensation.[16]

2. Progress of the Constitutional Suit

The primary issue in resolving Japanese liability for the harm committed against "comfort the women" is whether the victims' right to claims was extinguished pursuant to the Claims Agreement concluded in 1965. Regarding this issue, until the early 2000s, the Korean government's consistent response to the victims who wished their government to come forward for settlement of the issue was that the government cannot provide diplomatic protection, and this issue should be dealt with on an individual basis. Thus, the government could not avoid the criticism of being guilty of complicity and that it avoided its responsibility in the same way as Japan by responding that the issue had already been settled by the Claims Agreement.[17] On August 26, 2005, through the decision of the Joint Government-Civic Committee for the Follow-up Measures after the Release of Documents from the Korea-Japan Summit Meeting ("joint government-

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[12] 1000th Comfort Women's Wednesday Meeting, NEWSIS, Dec. 13, 2011, http://www.newsis.com/ar_detail/view.html?cID=article&ar_id=NISX20111212_0009979476.

[13] Constitutional Court [Const. Ct.], 2006Hun-Ma788, Aug. 30, 2011, (23-2(A) KCCR, 366, 378) (S. Kor.).

[14] *Id.*

[15] *Id.*

[16] *Id.* at 379.

[17] Sihyun Cho, *Ilbungun "Wianbu" Munjehyeh Isusu Yunsahwa Beobjung Chaeim [History and Legal Responsibility in the Japanese Military "Comfort Women" Issue]*, 40 DEMOCRATIC LEGAL SOCIETY (Special Issue) 81 (2011).

civic committee"), which was installed under the Prime Minister during the Roh Moo-Hyun Administration, the Korean government made an announcement that the Claims Agreement was aimed not towards compensating for harms committed during Japanese colonization, but towards resolving the financial and civil debt/credit relationship between Korea and Japan based on Article 4 of the San Francisco Peace Treaty.[18] Regarding "crimes against humanity" where state authorities like the Japanese government may be involved, *i.e.*, the "comfort women" issue, it also announced that because the issue could not be deemed to have been settled by the Claims Agreement in this case, legal responsibility of the Japanese government had not been resolved.[19] On the contrary, the Japanese government has continued to maintain in its official announcements that the 1965 Claims Agreement settled all issues concerning the state parties and their peoples completely and finally.[20]

It was under these circumstances that the victims filed suit before the Constitutional Court in July 2006 concerning their right to claims.[21] Japan denied compensation by claiming that the Petitioners' reparations claim as "comfort women" against the state of Japan, was extinguished pursuant to the Claims Agreement.[22] The Roh Moo-Hyun Administration of the Korean government contended that the right to pursue these claims was not settled by the Claims Agreement.[23] This resulted in a conflict of interpretation between the two states. The Korean government had the duty to take measures provided in Article 3 of the Claims Agreement[24] in order

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[18] REPUBLIC OF KOREA PRIME MINISTER'S OFFICE, Statement of the Korea-Japan Joint Government-Civic Committee, Aug. 26, 2005.

[19] *Id.*

[20] Constitutional Court [Const. Ct.], 2006Hun-Ma788, Aug. 30, 2011, (23-2(A) KCCR, 366, 379) (S. Kor.).

[21] *See Id.*

[22] *Id.*

[23] *Id.*

[24] Article 3 of the Claims Agreement provides:

1. Any dispute between the High Contracting Parties concerning the interpretation or the implementation of this Agreement shall be settled primarily through diplomatic channels.

2. Any dispute which cannot be settled under the provision of paragraph 1 above shall be submitted for decision to an arbitral commission of three arbitrators; one to be appointed by the Government of each High Contracting Party within a period of thirty days from the date of receipt by the Government of either High Contracting Party from that of the other High Contracting Party of a note requesting arbitration of the dispute; and the third to be agreed upon by the two arbitrators so chosen or to be nominated by the Government of a third power as agreed upon by the two arbitrators within a further period of thirty days. However, the third arbitrator must not be a national of either High Contracting Party.

to settle the conflict of interpretation. The Korean government's failure to do so thereby violated the Constitution.

B. Decision of the Constitutional Court

1. Existence of a Dispute over the Interpretation of the Claims Agreement

With regard to the interpretation of Article 2(1) of the Claims Agreement, the Japanese government and judiciary were of the position that in this case, the reparations claim of Korean nationals, including the "comfort women" against the state of Japan, were encompassed by the Claims Agreement, and with its conclusion and implementation, compensation had been waived or terminated.[25] On the other hand, the Korean government declared, through the decision of the joint government-civic committee of August 26, 2005 that in this case, issues concerning crimes against humanity, such as that of the "comfort women" where state authorities were involved, were not settled by the Claims Agreement and therefore, the Japanese government still bore liability.[26] Consequently, the Court found that there was a difference between the two states in the interpretation of the Claims Agreement.[27] The Constitutional Court thus held that there clearly was a difference between Korea and Japan in the interpretation of Article 2(1) of the Agreement as to whether the reparations claim of the Comfort Women was included in the claim against Japan, and this fell under the meaning of "dispute" in Article 3.[28]

Concerning the Dispute Resolution Procedure provided for in Article 3 of the Claims Agreement, the Court also found that these provisions, at the time of its conclusion, anticipated disputes in the interpretation and

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3. If, within the periods respectively referred to, the Government of either High Contracting Party fails to appoint an arbitrator, or the third arbitrator or the third nation is not agreed upon, the arbitral commission shall be composed of one arbitrator to be nominated by the Government of each of two nations respectively chosen by the Government of each High Contracting Party within a period of thirty days, and the third arbitrator to be nominated by the Government of a third power decided upon by agreement between the Governments so chosen.

4. The Governments of the High Contracting Parties shall accept decisions rendered by the arbitral commission established in accordance with the provisions of this Article.

Claims Agreement, *supra* note 5, art. III.

[25] Constitutional Court [Const. Ct.], 2006Hun-Ma788, Aug. 30, 2011, (23-2(A) KCCR, 366, 386) (S. Kor.).

[26] *Id.*

[27] *Id.* at 387.

[28] *Id.* at 386-387.

established dispute resolution principles and procedures, while setting Korea and Japan as the subjects of these acts.[29] The Court ruled that since the above dispute existed, the Respondent ought to resolve the issue through diplomatic channels pursuant to the dispute resolution procedures of Article 3, and it ought to submit the case to an arbitration panel after having attempted to reach settlement.[30]

2. Recognition of a Constitutional Duty to Pursue Dispute Resolution Procedures

The core issue in the decision of the Constitutional Court was, in the midst of such a dispute over interpretation, whether the nonfeasance of the Respondent, Minister of Foreign Affairs and Trade, in not pursuing such dispute resolution procedures provided for in Article 3 of the Claims Agreement, violated the fundamental rights of the Petitioners and was therefore unconstitutional. In other words, the issue was, where there is a dispute over the interpretation of the Claims Agreement, whether the government had a specific constitutional duty to pursue the dispute resolution procedures provided for in the Claims Agreement to resolve the issue. There was disagreement among the Constitutional Court Justices concerning this issue.

a. Majority Opinion[31] and Additional Interpretation

Concerning the "duty of the Korean government to pursue dispute resolution procedures," the majority opinion of the Constitutional Court stated that in light of the language of the Preamble to the Constitution of the Republic of Korea ("Constitution"),[32] Article 2(2)[33] and Article 10 of the

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[29] *Id.* at 387.

[30] *Id.*

[31] Among the nine justices of the Constitutional Court, Justices Cho, Dae-Hyeon; Kim, Jong-Dae; Mok, Young-Joon; Song, Doo-Hwan; Park, Han-Chul; and Lee, Jung-Mi sided with the majority opinion. Constitutional Court [Const. Ct.], 2006Hun-Ma788, Aug. 30, 2011, (23-2(A) KCCR, 366, 392) (S. Kor.).

[32] The Preamble to the Constitution of the Republic of Korea states:

> We, the people of Korea, proud of a resplendent history and traditions dating from time immemorial, upholding the cause of the Provisional Republic of Korea Government born of the Independence Movement of 1 March 1919 and the democratic ideals of the uprising on 19 April 1960 against injustice, having assumed the mission of democratic reform and peaceful unification of our homeland and having determined to consolidate national unity with Justice, humanitarianism and brotherly love, and
>
> To destroy all social vices and injustice, and
>
> To afford equal opportunities to every person and provide for the fullest development

Constitution,[34] and Article 3 of the Claims Agreement, the duty to take measures of dispute resolution, pursuant to Article 3 of the Claims Agreement, was based on a Constitutional demand to protect and to cooperate towards realizing the reparations claim of state nationals whose human dignity and value were gravely violated by the systematic and continued criminal acts of the state of Japan.[35] Without the performance of this duty, there was the possibility of Petitioners' fundamental rights being gravely violated; thus, the Respondent's duty to act was one deriving from the Constitution and specifically provided for in the law.[36]

The majority further held that the Korean government was also liable for the conclusion of the 1965 Claims Agreement considering that the realization of the victims' reparations claim against the state of Japan and the restoration of their human worth and value, had come to the current state of impairment, because the Korean government had not clarified the substance of the claims, but had used a vague term of "all claims" in concluding the Claims Agreement in this case.[37] The Court stated that though the Korean government had not done any acts to directly violate the fundamental rights of the "comfort women," the Court could not deny that the Korean government had the specific duty to act in order to remove the impairment.[38] The Court also held that diplomatic measures neglecting the reparations claims of the victims did not fall within the scope of performance of the government's duties. In addition, having Japan acknowledge its wrongdoing and bear legal liability was an issue altogether

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of individual capabilities in all fields, including political, economic, social and cultural life by further strengthening the basic free and democratic order conducive to private initiative and public harmony, and

To help each person discharge those duties and responsibilities concomitant to freedoms and rights, and

To elevate the quality of life for all citizens and contribute to lasting world peace and the common prosperity of mankind and thereby to ensure security, liberty and happiness for ourselves and our posterity forever, do hereby amend, through national referendum following a resolution by the National Assembly, the Constitution, ordained and established on 12 July 1948, and amended eight times subsequently.

Daehanminkuk Hunbeob [Hunbeob] [Constitution] pmbl.(S. Kor.).

[33] "It is the duty of the State to protect citizens residing abroad as prescribed by law." *Id.* art. 2.

[34] "All citizens are assured of human worth and dignity and have the right to pursue happiness. It is the duty of the State to confirm and guarantee the fundamental and inviolable human rights of individuals." *Id.* art. 10.

[35] Constitutional Court [Const. Ct.], 2006Hun-Ma788, Aug. 30, 2011, (23-2(A) KCCR, 366, 384) (S. Kor.).

[36] *Id.*

[37] *Id.*

[38] *Id.* at 385.

different from the Korean government providing funds for social security. Thus, the provision of partial living support for the victims provided by the Korean government could not be considered as satisfying the duty to act.[39]

Lastly, the Constitutional Court declared that the harm to "comfort women," having been caused by the enforced mobilization and sexual labor by the state of Japan and its military, was a unique harm for which other precedents could not be found.[40] It thus held that the reparations claim that the "comfort women" had against Japan was not only a property right guaranteed by the Constitution, but its realization also signified the *a posteriori* restoration of their dignity and value, as well as their personal freedom, which was ruthlessly and continuously violated.[41]

The Court also noted the urgency of the need to remedy the violations of the fundamental rights as the current living "comfort women" had all advanced in age. Any further delay in time may make it impossible to restore this historical injustice and further delay violated the human worth and value of the "comfort women."[42]

In pursuing dispute resolution measures, the Court further stated that the government's reasons of "possibility of developing into exhaustive legal arguments" or "diplomatic tension" were vague and abstract. The court rejected the argument, stating that these reasons could not be considered valid grounds for neglecting the remedy for the victims and that the national interest must be seriously considered.[43]

The Japanese government has been criticized for rejecting reparations, which was based on the Claims Agreement between Korea and Japan. In addition, the Korean government's efforts or the lack thereof, was found unconstitutional on the nonfeasance of the Ministry of Foreign Affairs and

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[39] *Id.* at 389.

[40] *Id. See also* HR. J. Res. 121, 110th Cong. (2007) ("Whereas the 'Comfort Women' system of forced military prostitution by the Government of Japan, considered unprecedented in its cruelty and magnitude, included gang rape, forced abortions, humiliation, and sexual violence resulting in mutilation, death, and eventual suicide in one of the largest cases of human trafficking in the 20th century[.]").

[41] Constitutional Court [Const. Ct.], 2006Hun-Ma788, Aug. 30, 2011, (23-2(A) 366, 385) (S. Kor.).

[42] As of August 14, 1991, the number of victimized women who reported, after the public testimony of Kim, Hak Soon, to the Korean Council for Women Drafted for Military Sexual Slavery by Japan is 236, of whom the number of those currently living registered with the Ministry of Gender Equality and Family as of September 2013 is 56 both in Korea and abroad with their ages ranging between 84 and 94. *Ilbongun Wianbu Pihaeja Kim Hwaseon Halmoni Byeolse* [*Comfort Woman Victim Kim Hwaseon Deceased*], NEWSIS, June 15, 2012, http://www.newsis.com/gallery/view.htm? cID=1&pID=1&page=1&s_skin=&s_date=&e_date=&s_k=&pict_id=NISI20120615_0006512272 (last visited April 10, 2012).

[43] Constitutional Court [Const. Ct.], 2006Hun-Ma788, Aug. 30, 2011, (23-2(A) 366, 392) (S. Kor.).

Trade. The views of Korean legal scholars, therefore, are gaining ground. This view argues that legal irresponsibility and the Japanese government's rejection of compensation comes from a lack of legal and public perception in dealing with women's issues, which have been viewed as "cultural and private stuff" across nations.[44] Further, legal scholars criticize both the Korean and Japanese governments' approach of dividing rights to claim into that of the individual and that of the respective governments, contending that the matters of compensation and punishment are not only to be dealt with between an individual and the state, but also are to be resolved within the social context of both countries. The scholars propose that compensation and punishment should be regarded as communal issues of Asia, to which the two countries geographically belong.[45]

In particular, the matters that should be mentioned as Korean social problems are the suppression of human rights and democracy in the course of industrialization. Industrialization was excessively driven from the early 1960s through the late 1980s by the Korean government, resulting in the lack of perception of human rights within Korean society as a whole. The ruling of the Constitutional Court and the contention of domestic legal scholars support the criticism that the international community, the Japanese government, and the Korean government had failed to pay attention to the human rights of the "comfort women" until the joint government-civic committee's decision on August 26, 2005. In light of this, the Korean government can hardly deny their complicity with the Japanese government by not facing up to the issue of "comfort women" and avoiding its responsibility until recently.

b. Concurring Opinion of Justice Cho, Dae Hyeon in Support of Judicial Activism and Additional Interpretation

Justice Cho, Dae Hyeon added to the majority opinion, stating that in this situation, where the victims' claim to reparations, was being hindered by the Claims Agreement, there definitely lies the duty of the Korean government to pursue diplomatic negotiations or arbitration procedures.[46] Thus, the Court should also declare the Republic of Korea liable for complete compensation for the damage incurred by the Petitioners in being

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[44] The patriarchal perception that women are cultural and private beings rather than legal and public actors brought forth the effect that crimes and violence committed upon women were not to be resolved in the public arena. An awareness of this matter by feminists led them to declare the propositional slogan, "the personal is political."

[45] *See* Cho, *supra* note 17.

[46] Constitutional Court [Const. Ct.], 2006Hun-Ma788, Aug. 30, 2011, (23-2(A) KCCR, 366, 392) (S. Kor.) (Cho, J., concurring).

unable to exercise their reparations claim against the state of Japan.[47] Justice Cho reasoned that it was highly unlikely that the obstacle to the victims' exercise of their reparations claim against Japan would be removed by diplomatic negotiations or arbitration procedures. In addition, while there was a sincere concern that it would give the victims' false hope resulting in the pain of frustration and despair, the Republic of Korea's duty to completely compensate the victims for their reparations claims against Japan had to be emphasized.[48] Furthermore, Justice Cho reasoned that because the victims had all advanced in age, the state's compensation measures for the victims had to be urgently implemented.[49]

Yet, the most important point that has been missing in Justice Cho's powerful and indisputable reasoning is the criticism and self-introspection regarding Korean society's patriarchal and colonial context, where the "comfort women" were not able to voice themselves until 1991[50] because of the military regime that continued after liberation. Many "comfort women" were able to return to their home country even after liberation and for those that did, they had to live holding their breath even after coming back home. Also, they could not return to their families and get married either.[51] All of this was caused by the violence of the Korean patriarchal system.

Also, the principle of pure blood in the context of nationalism advocated by Park, Chung Hee's military regime that came after the Korean War was a typical example of patriarchy. It made these women invisible and stigmatized them since they were regarded to have contaminated the purity of the Korean people by "becoming polluted" by foreign males. The Korean government, on the basis of patriarchism *and* nationalism as well, showed a consistent response to these "comfort women" by seeking to deal with these issues on the basis that it could not provide diplomatic protection and that the issue should be dealt with on an individual basis. The government opposed any diplomatic tensions with the Japanese government and expressed its concern that these tensions could result in economic loss for Korea. This concern over diplomatic tensions reveals remnants of Japanese colonialism. Thus, the Korean government could not avoid criticism that it was guilty of complicity and that it avoided its

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[47] *Id.* at 393.

[48] *Id.*

[49] *Id.* at 394.

[50] The Korean drama, "Eyes of Dawn," broadcast from October 1991 to February 1992, was the first pop culture media series that brought the issues of "comfort women" to the public's attention. Eyes of Dawn (MBC television broadcast Oct. 1991 to Feb. 1992).

[51] Ga Young Min, *Memories and Injuries: Women within the Boundary, Women outside the Boundary*, 28 DANGDAE BIPYOUNG [DB][CONTEMPORARY CRITICISM] 30 (2004).

responsibility in the same way Japan had—responding that the Claims Agreement had already settled this issue.

Further, one feminist legal scholar once stated that the culpability of Japan's irresponsibility and refusal to provide reparation, not only lies in the Korean and Japanese governments, but also with its Allies.[52] Many Korean and Japanese citizens remained silent in dealing with comfort women's issues because of a patriarchal mentality. Patriarchal mentality has been made invisible in a multi-layered, non-linear just-making method around the world.[53]

This mentality can be a legal basis that will support the necessity of international solidarity, which non-governmental organizations of the two countries, including the Korean Council for Women Drafted for Military Sexual Slavery by Japan, have been pursuing. The main agents that have been pursuing transnational solidarity to resolve the issue of "comfort women," put an emphasis on the importance of international solidarity and resolution from both regional and global perspectives. The issue of "comfort women" concerns universal human rights issues of women. It also implicates Japan's unique identification of longing to escape the Asian region to become the part of the Western world that naturally affects the whole community of Asian nations.

c. Dissenting opinion of Justices Lee, Kang-Kook; Min, Hyeong-Ki; and Lee, Dong-Heub

Three Justices of the Constitutional Court, unlike those in the majority, held that they could not conclude under the wording of the Constitution and the Claims Agreement that "the Respondent has the duty to pursue dispute resolution measures under Article 3 of the Agreement in this case for the Petitioners."[54] The dissenting opinion further stated that no matter how grave or urgent the state of violation of the fundamental rights of the Petitioners was in this case, the interpretation of the law, namely Articles 10 and 2(2) and the Preamble of the Constitution as well as Article 3 of the Claims Agreement, could not generate the Korean government's specific duty to pursue dispute resolution procedures nor the people's right to petition for such a duty to act.[55] Rather, the Justices saw the act of pursuing

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[52] Hyun A Yang, Speaking on the Japanese "comfort women" issue at the Proceedings of the international symposium held in celebration of the 20th anniversary of founding of the Korean Council for Women Drafted for Military Sexual Slavery by Japan (Nov. 18, 2010).

[53] *Id.*

[54] Constitutional Court [Const. Ct.], 2006Hun-Ma788, Aug. 30, 2011, (23-2(A) KCCR, 366, 394) (S. Kor.).

[55] *Id.* at 395.

the dispute resolution procedure in Article 3 of the Agreement, in form and substance, a "discretionary act" of the two contracting parties.[56] Thus, they held that the constitutional claim brought by the victims that claimed that their fundamental rights were violated by the nonfeasance of the Korean government in failing to pursue the above dispute resolution procedures, was illegitimate and must be rejected.[57]

Regarding the opinions of the three dissenting Justices, it can be pointed out that they excluded the forward-looking, active interpretation of the law, which aims at bringing forth an uncommon resolution[58] for uncommon crimes committed. The dissenting Justices failed to consider the fact that the mobilized people were Koreans, even though it was during the war brought by Japan. The crime of the sexual violence on Korean women was committed not accidentally or circumstantially, but rather committed systematically and cruelly, on women detained in the custody of the Japanese military. If the violation of the basic rights of the Petitioners was grave and urgent, as the Justices themselves recognized, then the responsibility of the Korean government to protect the basic rights of the petitioners would have been as great as the violation at the time. Therefore, the feeling of unfairness that the petitioners have felt toward the Korean government, which did not fulfill its responsibility, must have accumulated and expanded over the past few decades.

Yet, it would be unclear who can claim responsibility and how the nonfeasance of the government is to be resolved if the law is to be interpreted as the three dissenting Justices had held. The Korean government did not fulfill its duty stipulated in Article 2 and 10 of the Constitution, which guarantees the well-being and basic human rights of its people. The three Justices, in interpreting the relevant laws, stated that the interpretation of the law *could not generate* the people's right to petition for such a duty to act.[59] But it can be said that *failing to generate the people's right* is *judicial sabotage*. The premise set by these Justices who think that the law defines and regulates all human behavior, and even the language of the law itself, reveals that the Justice hold a law-centered world-view.

Law is just the projection of the society from whence it came, and it cannot secure the term of "justice" until it goes through a process of constant change and evolution in its social aspects. It must include its citizens' sensibility and the resulting 're-interpretation' based on it. The language of the law is the "minimum" recourse for justice or a social

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[56] *Id.* at 398~399.

[57] *Id.* at 400.

[58] *See* Cho, *supra* note 17.

[59] Constitutional Court [Const. Ct.], 2006Hun-Ma788, Aug. 30, 2011, (23-2(A) KCCR, 398-399) (S. Kor.) (emphasis added).

consensus on the minimum standard. It itself does not mean the completion of justice. After all, the three Justices acted as if they judged objectively and neutrally, but it resulted in an extremely biased decision, letting the law stand on the side of the offenders. The Justices failed to consider the Korean patriarchal context where the victims could not voice themselves until recently, and failed to consider the historical context of Korea and Japan, particular each country's respective standing in international society, which is unequal. Their obsession with the neutrality of the law is maximized in the expression of a *discretionary act* of the two contracting parties, which implies the premise that the two nations have the same level of experience and temperature on this issue, all of which reveal their lack of historical perspective.

Judicial activism does not see that the judiciary exists merely for a *neutral* interpretation and implementation of the language of the law. Rather, judicial activism tries to seek its new role in a creative interpretation of the law in order to realize justice. The law does not exist as *being*, a non-biological existence having nothing to do with the context. It is rather *doing* as an organism that constantly interacts with the capabilities of citizens, sensibility, spirit of the times, and feeling of justice that gave birth to the law. Thus, breathing new life into the law, that is, judicial activism, is needed. This should be distinguished from arbitrariness or contrivance of the judges; rather, it means the implementation of the "living law" for the weak and minorities. After all, judicial activism is to give the law life and spirit and in that process, the spirit of the age, as well as history and the context for the weak and minorities, including the parties concerned.[60]

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[60] Concerning the active role of the law, American judge, Benjamin Cardozo (May 24, 1870–July 9, 1938) stated as follows: "[T]erms such as duress and undue influence are subject to interpretation." *Legal Realism* Definition, THE FREE DICTIONARY, http://legal-dictionary.thefreedictionary.com/Legal+Realism (last visited March 22, 2013). He argued that judges who are included to shape the law in favor of society's weaker members will construe them broadly, invalidating many contracts that stem from predatory behavior. *Id.* On the other hand, judges who are inclined to shape the law in favor of society's stronger members will construe such words narrowly, allowing particular individuals to benefit from their guile and acumen." *Id.*

C. Significance of the Decision of the Constitutional Court

1. First Decision of the Judiciary Ordering an Active Role on the Part of the Government regarding Historical Issues with Japan

The majority's decision declaring the failure to act as unconstitutional is significant in that it is the first decision of the judiciary to order an affirmative action on the part of the government, especially from the position that the issue of comfort women requires urgent legal compensation. The Constitutional Court confirmed that an interpretative dispute existed between Korea and Japan regarding the 1965 Claims Agreement, and held that the government had a positive constitutional duty to actively protect the victims' rights to make claims because the Petitioners' human dignity and value were gravely violated by the systematic and continued criminal acts of the state of Japan.[61] This appears to be an aggressive attempt of the judiciary to pressure the government that has shown a passive stance in resolving the issue of comfort women.

In the decision, in particular, the Court saw the harm to comfort women caused by the enforced mobilization and sexual labor by the state of Japan and its military as "unique harm, for which other precedents cannot be found."[62] The Court ordered an active resolution of the issue in consideration of the fact that the current living comfort women had all advanced in age; any further delay in time for realizing a reparation's claim may make it impossible to restore this historical injustice and violation of human worth and value of the comfort women.[63] Considering that ten more of the victims have passed away in the nine months following the decision of the Court,[64] leaving behind fifty-nine survivors among the 234 victims registered with the government,[65] the decision certainly has great implications.

Further, the Court rejected the Respondent's claim that the Korean government had taken necessary measures for the resolution of the comfort women issue in deciding to give financial support and compensation to the victims on its own rather than to demand monetary reparations from Japan.

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[61] Constitutional Court [Const. Ct.], 2006Hun-Ma788, Aug. 30, 2011, (23-2(A) KCCR, 383-384) (S. Kor.).

[62] *Id.* at 389.

[63] *Id.* at 390.

[64] *See supra* note 42.

[65] *Ilbongun Wianbu Pihaeja Kim Hwaseon Halmoni Byeolse* [*Comfort Woman Victim Kim Hwaseon Deceased*], NEWSIS, June 15, 2012, http://www.newsis.com/gallery/view.htm?cID=1&pID=1&page=1&s_skin=&s_date=&e_date=&s_k=&pict_id=NISI20120615_0006512272 (last visited April 10, 2012).

The Court urged instead, for the Korean government to demand of the Japanese government, a thorough fact-finding, formal apology and display of regret, implementation of proper education of history, etc., in order to continually raise the comfort women issue in international society.[66] The Court found that the diplomatic and domestic measures of the Korean government towards Japan that neglected the victims' rights to make claims could not be considered performance of its duties that were at issue in this case.[67] The Court thus held that the specific role of the Korean government in principle was to diplomatically demand reparations for the victims and, should the dispute be unresolved, to submit to arbitration pursuant to Article 3 of the Claims Agreement.[68] This appears to be a forceful reminder from the judiciary regarding the extremely passive stance the Korean government has shown in its attempts to diplomatically resolve the comfort women issue—a desire to avoid diplomatic friction with Japan.

Thus, this decision of the Constitutional Court established an unprecedented principle of law, namely the unconstitutionality of the Government's failure to take diplomatic actions. This decision is significant for a number of reasons. It criticized the passive attitude of the government, which had failed to actively resolve the compensation issue for the comfort women. In addition, the Court also held for the first time that government efforts to resolve the issue of the right to make claims for war crime victims was a duty required by the Korean Constitution. Finally, the Court provided a specific solution, thereby demonstrating an ambitious attitude of the judiciary towards historical issues.

2. Response of the Korean Government

Following the decision of the Constitutional Court, on September 15, 2011, MOFAT established a Task Force for the Resolution of the Comfort Women Issue pursuant to the Korea-Japan Claims Agreement, and proposed a bilateral meeting for the resolution of the issue, all the while urging for sincere measures on the part of Japan by summoning Deputy Ambassador Kanehara.[69] When the Japanese government did not respond, it proposed a bilateral meeting again in November.[70] At the Korea-Japan

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[66] Constitutional Court [Const. Ct.], 2006Hun-Ma788, Aug. 30, 2011, (23-2(A) KCCR 366, 385) (S. Kor.).

[67] *Id.* at 386.

[68] *Id.* at 387.

[69] *Jeongbu Ne Hanil Cheonggugwon Hyeopjeong Daechek TF Seolchi* [*TF Installed in Gov't for Countermeasures against Claims Agreement*], NEWSIS, Sept. 29, 2011, http://www.newsis.com/ar_detail/view.html?cID=&ar_id=NISX20110929_00093447 43.

[70] *Waegyobu Neil Wianbumunje TF Hwei Gechwe* [*MOFAT TF Meeting re Comfort*

summit meeting held in Tokyo on December 18, 2011, former Korean President Lee Myungbak stated, "Korea and Japan must become sincere partners for mutual prosperity of the two countries and regional peace and security. To this end, the military comfort women issue which forms a stumbling block must first be addressed, and this takes true courage." He also stated that "the comfort women issue is one that can immediately be resolved if perceived differently" and that "it is an emotional issue before a legal one."[71] He urged Japan to consider the issue from a broader perspective that would help address other issues between the two countries.[72] Prime Minister Yoshihiko Noda replied that the Japanese position concerning the Comfort Women issue was the same as before and that while "humanitarian efforts have been made, it would try to explore ideas from a humanitarian point of view."[73]

Through this process, it can be observed that the Comfort Women issue is no longer buried under the colonial theory[74] that proposes that for *future-oriented Korea-Japan relations*, it is better not to raise this issue that will bring about diplomatic tension between the two countries, because it will ultimately result in an economic loss for Korea. It has now become part of the Korea-Japan diplomatic agenda. More specifically, according to recent media reports, the MOFAT Task Force is already discussing how to constitute the arbitration committee.

Further progress has yet to be made, but the significance is clearly in line with the aggressive decision of the Constitutional Court. The long entrenched and neglected Comfort Women issue is finally being discussed with a specific purpose and direction. Even though the purpose and substance of the decision does not contain a critical introspection of the Comfort Women's experiences and harm, the issue has finally come within the frame of law and history which had been hindered due to Korea's patriarchal culture. The will of the judiciary to get back and restore the lost

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Women Tomorrow], YONHAP NEWS AGENCY, Dec. 5, 2011, *available at* http://www.yonhapnews.co.kr/bulletin/2012/08/27/0200000000AKR20120827105851043.HTML?from=search.

[71] *Onul, wianbu dangjang heigyeorul...MB, 57 bungan Noda apbak* [*President Lee Myungbak pressures Noda for 57 minutes "to Solve the Comfort Women Issue Today"*], DONGA NEWS AGENCY, Dec. 19, 2011, *available at* http://news.donga.com/3/all/20111219/42707704/1.

[72] *Id.*

[73] *Hanil Jeongsanghwedamseo Wianbu Cheot Bongyeok Jengjeomhwa* [*Comfort Women Finally Issue at Korea-Japan Summit*], YONHAP NEWS AGENCY, Dec. 18, 2011, *available at* http://www.yonhapnews.co.kr/bulletin/2011/12/18/0200000000AKR20111218014451001.HTML (last visited June 27, 2012).

[74] Lee Myung-bak, former President of the Republic of Korea, Appearance on TBS News 23 (Apr. 21, 2008) (emphasizing that the two countries should move toward the future, instead of dwelling on the past).

and silenced rights of the victimized Comfort Women is highly significant from the perspective of judicial activism.

III. CONCLUSION

Korea and Japan, having come through a history of Japanese occupation in a relationship as an occupying power and its colony, cannot be free from the important historical issues of the past. From territorial disputes to historical understanding, cultural differences and economic cooperation, there are many challenges yet to be overcome. Some of these challenges can be peacefully overcome through diplomatic efforts from a future-oriented perspective on the part of both countries.

However, as for war crimes committed during the Japanese occupation period, avoiding legal responsibility will not settle the past as long as specific identifiable victims exist. As living witnesses and victims of history, sufficient compensation and a sincere apology would be the proper way to resolve the issue. Efforts toward this end is the duty and reason for a state's existence.

The Korean government cannot be free from criticism concerning its passive attitude towards the representative historical issues of "comfort women." More specifically, in negotiating post-war compensation following liberation, it hastily used an all-inclusive term "all claims" in concluding the 1965 Claims Agreement, thereby creating an obstacle to the realization of the victims' rights to claims. It also neglected victims for a long time without having taken the initiative to remove these obstacles. In the meantime, many of the victims have passed away without having received compensation or an apology. Therefore, the intervention of the judiciary in these historical issues through affirmative decisions holds great significance.

Of course, there are concerns of the possible adverse effects that such an "active" intervention by the judiciary may have on diplomatic relations. In order to resolve the complex issues within Korea-Japan relations, there needs to be a broad range of negotiations through various means because the severely limiting aspect of judicial intervention makes resolution even more difficult. According to recent media reports, the newly elected prime minister of Japan, Abe Shincho, seems to want to reverse the Kono statement that admitted that there had been comfort stations where Korean women were sexually and physically exploited by Japanese soldiers during the war.

A further issue can be raised as to whether a treaty concluded between states as parties pursuant to international law can be invalidated *ex post facto* through the decision of its judiciary. While one can understand the

desperation of the victims, those opposed to the unconstitutionality of the decision raise the point that forcing a diplomatic resolution by overstepping previous constitutional interpretations does not adhere to the limits of the judiciary provided within the framework of separation of powers.[75]

Nonetheless, separation of powers itself cannot be the ultimate purpose. Also, considering that the fundamental purpose of the separation of powers is to affirmatively guarantee the basic rights of the people, the active role of the judiciary in guaranteeing the people's rights coincides with the substance of the principle of separation of powers. Furthermore, because ruminating on the resolution of historical issues has been left to the executive branch alone and the promotion of such issues has progressed and regressed repeatedly based on the will of the head of that branch of government, the positive implications for an active role of the judiciary in its recent decisions are great.

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[75] Constitutional Court [Const. Ct.], 2006Hun-Ma788, Aug. 30, 2011, (23-2(A) KCCR 366). (S. Kor.) (Lee, Min, and Lee, J., dissenting).

Stabilizing Democracy and Human Rights Systems in South Korea

Tae-Ung Baik*

I. INTRODUCTION

Democracy is defined as "a system of government by the whole population or all the eligible members of a state, typically through elected representatives."[1] Under this definition, South Korea is certainly considered a democratic country, and one may have little hesitation in praising the country as one of the few exemplary Asian states that have achieved both remarkable economic development and dramatic political democratization within a relatively short period of time.[2] South Korea's economy in the last half century has jumped from being one of Asia's poorest to one of the region's leading developed countries.[3] The notorious South Korean authoritarian military regimes gave way to democratic regimes during the 1980s and 1990s. These changes toward democracy and a human rights protection system in the country were strongly supported by the growth of civil society networks and people power movements.

However, it is ironic to see Park Geun-hye, the daughter of former dictator Park Chung-hee, win the most recent South Korean presidential election in 2012.[4] Park won the election as an icon of the conservative

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[1] *Democracy Definition*, OXFORD DICTIONARY, http://oxforddictionaries.com/us/definition/american_english/democracy?q=democracy (last visited May 17, 2013).

[2] Southeast Asian states under the roof of ASEAN ("Association of Southeast Asian Nations") are following South Korea's path in achieving both economic prosperity and political democratization.

[3] *What Do You Do When You Reach the Top?*, ECONOMIST (Nov. 12, 2011), http://www.economist.com/node/21538104. [BB 16.6(f)].

[4] *See* Shin Seung-keun, *Park Geun-hye elected president of South Korea*, THE

ruling *Saenuri* party (New World Party), garnering the support of 51.55% of the population.[5] In spite of her familial relationship with the former dictator, few people believe that she would be able to change Korean democracy into a dictatorship. However, Park is not free from her father's legacy. She considers the economic growth and anti-communism policies of her father as an essential part of her political identity. She has even tried to defend her father's leadership by saying that "he made the best choice in an unavoidable situation,"[6] a statement which has been met with strong criticism from the general public.[7]

At this stage, it seems worthwhile for us to ask whether democracy and human rights systems are soundly rooted in South Korean society. This inquiry is particularly relevant because of the criticisms surrounding the authoritarian governing style of Park's predecessor, former president Lee Myung-bak.[8] Is the human rights system in South Korea really sound? Can we be assured that South Korean democracy and human rights systems will continue in their development as they have in the last couple of decades?

Professor Louis Henkin stated that "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time."[9] In fact, there are many challenges for a country to apply and implement international norms and standards in domestic settings. External values and concepts are sometimes viewed as appealing, but the actual transplantation of foreign norms into domestic legal soil is not free from resistance. We often see tension between international norms and local norms, and some of the imported norms may become discarded. The development of norms and values in a country is not free from its internal dynamic process, and the external or supra-national values could be domesticated only when they pass through this filtering process. There is

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HANGYEOREH (Dec 20, 2012), http://www.hani.co.kr/arti/english_edition/e_national/566277.html.

[5] *Id.*

[6] Park Geun-Hye said during a debate organized by a journalists' association, "I think my deceased father made the best choice in an unavoidable situation." She stressed that her father laid the foundation of South Korea's rise from the ashes of the 1950-53 Korean War to become Asia's fourth largest economy. *See Park Geun-hye defends her father's 1961 military coup*, YONHAP NEWS AGENCY (Jul. 16, 2012), http://english.yonhapnews.co.kr/topics/2012/07/16/84/4604000000AEN20120716006800315F.HTML.

[7] Seong Yeong-cheol and Seok Jin-whan, *Park Defends Her Father's Coup as "the Best Possible Choice,"* THE HANKYOREH (Jul 18, 2012), http://www.hani.co.kr/arti/english_edition/e_national/543077.html.

[8] Ko Na-mu, *Abuse of Authoritarian-era Law Rife Under Lee Administration, Says DLP Chairwoman*, THE HANKYOREH (Mar. 1, 2011), http://www.hani.co.kr//arti/english_edition/e_national/465868.html.

[9] LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 47 (2nd ed. 1968).

something that has to happen within the country where new values and norms are introduced and adopted. It is important to understand the peculiarities and the particularities that develop in this value adoption process.[10]

The development of democracy and human rights systems in South Korea is an excellent example of how international norms and values are taking root in domestic soil.[11] South Korea's democracy, rule of law, constitutionalism, and the enhanced protection of human rights demonstrate that the domestic filtering mechanisms for norm adoption are functioning fairly well.

In terms of the adoption of international human rights norms, South Korea has ratified most of the major human rights treaties, such as the International Covenant on Civil and Political Rights ("*ICCPR*"),[12] the International Covenant on Economic, Social and Cultural Rights ("*ICESCR*"),[13] the Convention on the Rights of the Child ("*CRC*"),[14] and the Convention on the Elimination of All Forms of Discrimination against Women ("*CEDAW*").[15] However, the ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families ("*CMW*") has yet to happen,[16] as multiculturalism in Korea is in its early developmental stages.[17] Similarly

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[10] *See* TAE-UNG BAIK, EMERGING REGIONAL HUMAN RIGHTS SYSTEMS IN ASIA 59-68 (2012).

[11] For a general discussion on filtered universalism, see *id.*

[12] International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171 [hereinafter *ICCPR*]; *see International Convention on Civil and Political Rights*, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (last visited May 28, 2013).

[13] International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter *ICESCR*]. South Korea ratified it on Apr. 10, 1990. *See International Covenant on Economic, Social and Cultural Rights*, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-3&chapter=4&lang=en (last visited May 27, 2013).

[14] Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter *CRC*].

[15] Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter *CEDAW*]. South Korea ratified it on Dec. 27, 1984. *See Convention on the Elimination of All Forms of Discrimination Against Women*, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en#EndDec (last visited May, 27, 2013).

[16] *See International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, UNITED NATIONS TREATY SERIES, http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-13&chapter=4&lang=en (last visited May 27, 2013).

[17] Kim Young-won, *Korean Society Struggles to Embrace Multiculturalism*, JAKARTA POST (Jan 19, 2012), http://www.thejakartapost.com/news/2012/06/19/korean-society-

Korea's accession to the Second Optional Protocol to *ICCPR* on death penalty abolition is not likely to occur in the near future because of the struggle between death penalty supporters and critics that is going on in Korea. Human rights systems in South Korea develop with the country's own characteristics. Human rights principles are not adopted as a replica of foreign experience, but they develop through responding to the challenges as they are faced.

This article argues that South Korea is consolidating its democracy and human rights systems with its own strengths and weaknesses, and that the human rights norms in Korea are developing through their own filtering mechanisms, which still need continuous attention. Following this introduction, Part II discusses the historical development of human rights systems in Korea. Part III analyzes the current stage of political democratization by reviewing political changes and Korean constitutional jurisprudence. Part IV reviews the growing demands for economic democracy and the on-going tension between conservatives and progressives. Part V assesses the dynamics of social changes by discussing the efforts to abolish the death penalty along with the resistance from the retentionist camps, which lead to a conclusion that South Korea still needs to put forth greater efforts to consolidate democracy and human rights.

II. THE DEVELOPMENT OF HUMAN RIGHTS SYSTEMS IN SOUTH KOREA

The history of constitutional documents on the Korean peninsula may date back to either the *Gyunggukdaejeon* from the Chosun Dynasty or the *Taehankukje* that was adopted in 1899 under the Korean Empire, in the last days of Chosun.[18] After the liberation in 1945, Korea was divided into two, the North and the South. While North Korea became a socialist state, South Korea adopted a rather liberal constitution, influenced by the German Weimar Constitution.[19] However, for a long time, the rights established by this constitution were rendered meaningless by dictatorial regimes.[20] Law

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struggles-embrace-multiculturalism.html.

[18] *Taehankukje* was the constitutional document to set up a constitutional monarchy at the end of Chosun dynasty by Emperor Gojong.

[19] BAIK, *supra* note 10, at 118.

[20] The authoritarian regimes generally emphasized national sovereignty, economic development and anti-communism. Thomas P. Kim, *The Second Opening of Korea: U.S.-South Korean Free Trade Agreement*, KOREA POLICY INSTITUTE (Jun. 14, 2007), http:www.kpolicy.org/documents/policy/070614thomaskimsecondopening.html. Therefore, the constitutional rights provisions existed in earlier versions of the constitution, but they were not read seriously as guarantors of the rights of the people. *Cf.* BAIK, *supra* note 10, at 118 ("The Constitution of 1987 transformed the declaratory constitution, which had only been an ornament under the military dictatorship, into a meaningful document which can be

was a mere tool for the government to justify its illegitimate governance. In 1970, a labor activist named Jeon Tae-Il shouted out, while self-immolating on the street, "Abide by the Labor Standards Laws! We are not machines!"[21] It was the first occasion when the rights sanctioned in the constitution and its accompanying legal statutes were seriously claimed in the process of social movements.[22] After the adoption of the 1987 Constitution, Korea's history of real constitutionalism began. From externally imposed norms, the perception of the constitution changed and it began to be seen as a guarantee of human rights for the Korean people.[23]

When the constitution was first adopted in South Korea in 1948, the expression, "human rights" did not appear.[24] In a year where much of the world was adopting the Universal Declaration of Human Rights,[25] Korea was separate, and not a party to this movement. In contrast, the constitution of Japan has emphasized human rights since its adoption in 1947,[26] boasting its progressive characteristics adopted under the auspices of the US Military Government after WWII.[27] It was only after Korea's 1962 Constitution that the South Korean National Assembly began to use the term "human rights" in the constitution.[28] Article 8 of the 1962 Constitution provided that: "All citizens shall be assured of human dignity and worth and it shall be the duty of the State to guarantee *to the greatest extent* the fundamental human rights of individuals."[29]

The provision still shows some limitations to the protection of human rights by using the expression, "to the greatest extent."[30] This limitation was removed in the 1980 Constitution.[31] Article 9 of the 1980 Constitution

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used to protect rights."). International humanitarian laws such as Geneva Conventions and Hague Conventions were invoked during the Korean War in 1950-53, but they did not contribute much to the development of human rights in South Korea. BAIK, *supra* note 10 at 118-121.

[21] HAGEN KOO, KOREAN WORKERS: THE CULTURE AND POLITICS OF CLASS FORMATION 70 (2001).

[22] *Id.* at 127.

[23] *See* BAIK, *supra* note 10, at 119-120.

[24] 1948 DAEHANMINKUK HUNBEOB [HUNBEOB][CONSTITUTION] (July 17, 1948) (S. Kor.).

[25] Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter *UDHR*].

[26] NIHONKOKU KENPŌ [KENPŌ][CONSTITUTION] (Japan).

[27] *Id.* arts. 11 & 97.

[28] 1962 DAEHANMINKUK HUNBEOB [HUNBEOB][CONSTITUTION] (Dec. 26, 1962) (S. Kor.).

[29] *Id.* art. 8, no. 6 (emphasis added) (translation provided by the author).

[30] *Id.*

[31] *Compare* 1962 DAEHANMINKUK HUNBEOB [HUNBEOB][CONSTITUTION] (Dec. 26, 1962) (S. Kor.) *with* 1980 DAEHANMINKUK HUNBEOB [HUNBEOB][CONSTITUTION] (Oct. 27,

and Article 10 of current 1987 Constitution states that: "All citizens shall be assured of human dignity and worth and *have the right to pursue happiness*. It shall be the duty of the State *to confirm and guarantee* the fundamental and *inviolable* human rights of individuals."[32] This provision expanded the scope of human rights by acknowledging the right to pursue happiness, and also made it clear that the state bears the duty to confirm the inviolability of human rights. These changes demonstrate that the democracy movements in the 1970s and 1980s were not merely pursuing procedural democracy in the form of the election system, but they also wanted to achieve substantive democracy, which included the agenda of promoting substantive human rights.

When the Jimmy Carter administration campaigned for human rights diplomacy in the 1970s, these policies did not excite human rights activists in Korea.[33] These activists thought that human rights without democracy was insufficient. Their skepticism of this approach to human rights grew, particularly when the Carter administration turned a blind-eye to General Chun Doo-hwan's military coup in 1979-80, and when Chun moved the marine forces from the De-Militarized Zone ("DMZ") to Gwangju to suppress the Gwangju Democracy Movement.[34] Because, at that time, the armed forces were under the direct control of US Commanders, some civil society groups still allege that the U.S. is jointly responsible for the May 1980 massacre in Gwangju.[35] These criticisms increased when Ronald Reagan warmly embraced General Chun, who was specially invited to the White House, soon after Chun assumed presidential power in South Korea.[36]

The introduction of international human rights norms and values in South Korea was largely conducted by the NGOs such as the Lawyers for a

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1980) (S. Kor.).

[32] 1980 DAEHANMINKUK HUNBEOB [HUNBEOB][CONSTITUTION] art. 9 (Oct. 27, 1980) (S. Kor.) (emphasis added) (translation provided by the author).

[33] *Cf.* Tim Shorrock, *The Struggle for Democracy in South Korea in the 1980s and the Rise of Anti-Americanism*, 8 THIRD WORLD QUARTERLY 1195 (Oct. 1986).

[34] David Adesnik & Sunhyuk Kim, *If at First You Don't Succeed: The Puzzle of South Korea's Democratic Transition*, CENTER ON DEMOCRACY, DEVELOPMENT, AND THE RULE OF LAW, STANFORD (July 2008), *available at* http://iis-db.stanford.edu/pubs/22209/No_83_AdesKimSouthKorea.pdf.

[35] Tim Shorrock, *The Kwangju Uprising and US-Sanctioned Massacre*, KASAMA PROJECT (Jun. 17, 2010, 11:00 AM), http://kasamaproject.org/history/2360-92the-kangju-uprising-and-US-sanctioned-massacre.

[36] Hamesh McDonald, *Reagan's Backing for Chun Worries Seoul's Dissidents*, SYDNEY MORNING HERALD, Feb. 18, 1981, at 17, *available at* http://news.google.com/newspapers?nid=1301&dat=19810218&id=5gBkAAAAIBAJ&sjid=9OYDAAAAIBAJ&pg=6794,6197606.

Democratic Society (*Minbyun*), the People's Solidarity for Participatory Democracy (PSPD), and *Sarangbang* Human Rights Group.[37] Through the civil societies' vigorous activities, human rights became popularly supported in Korea.[38]

A country's human rights norms are found in several forms. One of the most important methods of adopting human rights norms is the ratification of international human rights treaties. Under the South Korean Constitution article 6, "treaties duly concluded and promulgated under the Constitution and generally recognized rules of international law shall have the same force and effect of law as domestic laws of the Republic of Korea."[39] South Korea has ratified or acceded to seven of the United Nation's nine major human rights treaties, including the *ICCPR*,[40] and the *ICESCR*.[41] The First Optional Protocol to the ICCPR, which allows individual communication to the Human Rights Committee, was also ratified.[42] While Korea has ratified seven of these treaties, Japan ratified six and China has ratified five.[43] South Korea's ratio of ratification of human rights treaties is on par with other developed countries in the region.

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[37] LAW AND SOCIETY IN KOREA 132 (Hyunah Yang ed., 2013).

[38] *Id.*

[39] DAEHANMINKUK HUNBEOB [HUNBEOB][CONSTITUTION] art. 6 (S. Kor.).

[40] *ICCPR*, *supra* note 12.

[41] *ICESCR*, *supra* note 13.

[42] *See infra* Table 1.

[43] *See infra* note 46.

Table 1: Human Rights Treaty Ratification by South Korea as of 2013[44]

State party	ICESCR 1966/ 1976	ICCPR 1966/ 1976	OPT1 ICCPR 1966/ 1976	OPT2 ICCPR 1989/ 1991	CERD 1966/ 1969	CEDAW 1979/ 1981	CAT 1984/ 1987	CRC 1989/ 1990	CMW 1990/ 2003	No. of treaties
Republic of Korea	1990	1990	1990		1979	1985	1995	1991		7
Reservations		22				16(1)(g)		21(a), 40(2)(b)(v)		

Interestingly, in South Korea, the ratification of human rights treaties has been closely related to the development of democracy. Five out of the seven ratified treaties were ratified in the 1990s, only after South Korea's democratization.[45]

South Korea still receives criticism for certain reservations it made concerning several provisions of the human rights treaties. South Korea originally declared that Article 14 (5) & (7) on the right to appeal and Article 22 on the right to freedom of association of the ICCPR would not be

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[44] *ICCPR*, *supra* note 12 (ratified by ROK and Japan and signed by China); *ICESCR*, *supra* note 13 (ratified by China, Japan, and ROK); *Optional Protocol to the International Covenant on Civil and Political Rights*, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&lang=en (last visited May 28, 2013) (ratified by ROK and Taiwan but not by China or Japan) [hereinafter *First Optional Protocol of the ICCPR*]; *Second Optional Protocol to the International Covenant on Civil and Political Rights*, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-12&chapter=4&lang=en (last visited May 28, 2013) (ratified by none); *International Convention on the Elimination of All Types of Racial Discrimination*, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-2&chapter=4&lang=en (last visited May 28, 2013) (ratified by all); *CEDAW*, *supra* note 15 (ratified by all); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UNITED NATIONS TREATY COLLECTION, http://treaties. un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en (last visited May, 28, 2013) (ratified by all) [hereinafter *CAT*]; *Convention on the Rights of the Child*, UNITED NATIONS TREATY COLLECTION, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-11&chapter=4&lang=en (last visited May 28, 2013) (ratified by all) [hereinafter *CRC*]; *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, UNITED NATIONS TREATY COLLECTION, http://treaties. un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-13&chapter=4&lang=en (last visited May 28, 2013) (ratified by none).

[45] *ICCPR*, *supra* note 12; *ICESCR*, *supra* note 13; *First Optional Protocol of the ICCPR*, *supra* note 44; *CRC*, *supra* note 44; *CAT*, *supra* note 44.

binding over the country.[46] It has withdrawn its reservations on Article 14(5) & (7) concerning the special criminal procedure under Social Protection Act in 2006,[47] but no action has been taken concerning Article 22 on the right to freedom of association because the State Public Officials Act prohibits public servants from participating in trade union activities.[48] With regard to the Convention on the Rights of Child, the government holds reservations about paragraph (a) of Article 21, and sub-paragraph (b) (v) of paragraph 2 of Article 40.[49] Korea declared CEDAW Article 9 and Article 16(1) (c),(d),(f) & (g) not binding concerning women's equal rights.[50] CEDAW had strongly recommended that the reservation of Article

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[46] *ICCPR*, *supra* note 14.

[47] *Id.*

[48] Article 66, GUKKA GONGMUWEONBEOP [The State Public Officials Act], Act No. 11489, Oct 22, 2012 (S. Kor.); *see also Comments by the Republic of Korea on the concluding observations of the Human Rights Committee: Republic of Korea* (2000), CCPR/C/79/Add.122, *available at* http://www.unhchr.ch/tbs/doc.nsf/0/1f3186f9f8a651148 02568ef003766a5?Opendocument (last visited May 28, 2013).

[49] *CRC*, *supra* note 14, art. 9 § 3 ("States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.").

Article 21 notes that:

> States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:
> (a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counseling as may be necessary[.]

Article 40 § 2 states:

> 2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:
> (b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:
> (v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law[.]

Id.

[50] *CEDAW* Article 9 § 1 states:

> 1. States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.
> 2. States Parties shall grant women equal rights with men with respect to the nationality of their children.

Article 16 § 1 states:

16 is incompatible with the Convention and therefore impermissible.[51] Fortunately, Korea withdrew its reservations on Article 9 & 16(1) (c),(d) &(f), sections related to discrimination, [52] but the reservation on Article 16(1)(g) of CEDAW on the right to choose a family name has not yet been withdrawn.[53]

Since recommendations from human rights bodies concerning state reports or individual communications are not binding, they are often neglected or ignored by the states. The South Korean government is not fully recognizing the recommendations made by the Human Rights Committee on the National Security Act[54] and those of the CEDAW Committee on the discrimination against women,[55] but, as stated above, it is making slow progress in selectively following some of the recommendations.

South Korea was also slow in responding to demands to adopt the National Action Plan for the Protection of Human Rights. Adopting the National Action Plan has become an important obligation of the State after the world endorsed the Vienna Declaration on Human Rights in 1993.[56] South Korea finally began the process of adopting the National Action Plan recommended by its National Human Rights Commission in 2006, and it finally adopted the National Action Plan for 2007-2011 on May 22, 2007.[57]

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1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

(g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;

CEDAW, *supra* note 15.

[51] Comm. On the Elimination of Discrimination Against Women, Rep. on its 18th & 19th Sess., Jan. 19– Feb. 6, 1998 & June 22–July 10, 1998, U.N. Doc. A/53/38/Rev. 1, GAOR, 53d Sess., Supp. No. 38 (1998).

[52] *See CEDAW*, *supra* note 15.

[53] *Id.*

[54] *The National Security Law: Curtailing Freedom of Expression and Association in the Name of Security in the Republic of Korea,* AMNESTY INTERNATIONAL (2012), http://www.amnesty.org/en/library/asset/ASA25/006/2012/en/d3eb6ce2-ab8c-4479-a012-62744223457e/asa250062012en.pdf.

[55] *See CEDAW,* UNITED NATIONS TREATY COLLECTION, *supra* note 15.

[56] *National Plans of Action for the Promotion and Protection of Human Rights,* OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, http://www.ohchr.org/EN/Issues/PlansActions/Pages/PlansofActionIndex.aspx (last visited May 28, 2013).

[57] *See Summary of the National Action Plan for the Promotion and Protection of Human Rights of the Republic of Korea*, OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, http://www.ohchr.org/Documents/Issues/NHRA/Korea_SummaryNHRAP.doc (last visited May 28, 2013).

Another important question is whether the international norms are justiciable in domestic legal systems.[58] South Korean courts are reluctant to prioritize international treaties over domestic law if they are in conflict with local law, and they tend to avoid relying solely on international legal authority.[59] International norms have persuasive influence over Korean society, but justiciability of international law is still in its early development in Korea. Customary international law is treated as part of international law, but its application in domestic court is unlikely when international custom is the only legal source.[60] International norms are generally considered through the constitution or other domestic statutes in Korea.[61]

The U.N. Human Rights Council recently conducted the second universal periodic review on the South Korean human rights situation on October 25, 2012. The Troika Working group[62] of the Human Rights Council (Djibouti, Hungary, and Indonesia), after appreciating the efforts that South Korea has made to enhance human rights protections, recommended a number of measures for a greater protection of human rights, which include:

> Enhancing protection against domestic violence and enhancing rehabilitation of victims . . . Protection from discrimination and legal recourse for victims of discrimination and adoption of the Anti-Discrimination Act as a matter of priority; Imposing an official moratorium on the death penalty and strengthening measures against torture and ill-treatment; Amending the National Security Law to prevent its arbitrary application and abusive interpretation; Ensuring the right to conscientious objection to military service and ensuring alternative military service options; Guaranteeing freedom of expression, including on the Internet, and freedom of assembly; Promoting local integration of refugees and asylum seekers and guaranteeing the full enjoyment of human rights of migrant workers . . . .[63]

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[58] *See* Gyeongsu Jeong, *Gukjae Ingweonbeopeui Guknae Jeokyonge Gwanhan Bipanjeok Bunseok: Hangukeui Gukgagwanhaengeul Daesangeuro* [*Critical Analysis of the Domestic application of international human rights law: Focusing on the Korean Practice*], 8 HANGUK HUNBEOP HAKHOE, Dec. 2002, at 12-14.

[59] *Id.* at 12.

[60] *Id.*

[61] *See, e.g.*, Supreme Court [S. Ct.], 93Do1711, Dec. 24, 1993 (S. Kor.) (deciding on violations of NSA); *see also* Supreme Court [S. Ct.], 98 Du16620, Jan 26, 1999 (S. Kor.) (deciding on the cancellation of Social Security Supervision measure).

[62] The troikas are a group of three States selected through a drawing of lots who serve as rapporteurs and who are charged with preparing the report of the Working Group on the country review with the involvement of the State under review and assistance from the OHCHR. *See Universal Periodic Review–Media Brief*, OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS (Oct. 25, 2002), http://www.ohchr.org/EN/HRBodies/UPR/Pages/Highlights25October2012pm.aspx.

[63] *Id.*

The tone of the report written by the working group is moderate,[64] but the report demonstrates that some of the South Korean human rights practices are still under scrutiny. Since the conservative party (known as the Grand National Party, or *Hannaradang,* the predecessor of President Park's *Saenuri* Party) candidate Lee Myung-bak's presidency in 2008, the democratic atmosphere in South Korea has encountered serious challenges. Strong concerns have been raised with regard to the freedoms of expression, association and religion.[65] International intellectuals have even warned the government of the possibility of regression from democracy to authoritarianism in Korea.[66] Intelligence agencies resumed monitoring domestic NGOs' activities, thus breaking the new tradition of freedom for civil society organizations under the liberal Kim Dae-jung and Roh Moo-hyun regimes (1998-2007).[67] Civic organizations and individuals were being targeted by the law enforcement agencies for unclear reasons, and former president, Roh Moo-hyun shockingly killed himself by throwing his body down a cliff when allegations of corruption were made against his family members.[68] The Lee government also refused to cooperate with international human rights institutions. For example, Mr. Frank La Rue, the U.N. Special Rapporteur on Freedom of Expression, visited South Korea, but he was not allowed to meet the president. The head of the National Human Rights Commission of Korea also refused to meet the Special Rapporteur.[69] Amnesty International expressed serious concerns on the weakening freedom of expression in Korea after a researcher visited Seoul to report on human rights conditions in 2010.[70]

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[64] Contrast the difference in the reports on North Korea. UN Human Rights Council, *Human Rights Council adopts outcomes of Universal Periodic Review on Bhutan, Dominica and DPRK*, RELIEFWEB (Mar. 18, 2010), http://reliefweb.int/report/democratic-peoples-republic-korea/human-rights-council-adopts-outcomes-universal-periodic.

[65] *Freedom on the Net: South Korea*, FREEDOM HOUSE, http://www.freedomhouse.org/report/freedom-net/2012/south-korea (last visited May 28, 2013).

[66] *South Korea: Statement from Professors in North America Concerned about Korean Democracy*, ASIA HUMAN RIGHTS COMMISSION (June 10, 2009), http://www.humanrights.asia/news/forwarded-news/AHRC-FS-049-2009.

[67] *Civic leader objects to NIS's surveillance of civil society*, THE HANKYOREH (June 19, 2009), http://english.hani.co.kr/arti/english.edition/e-national/361300.html.

[68] Justin McCurry, *Former South Korea President Leaps to Death in Ravine*, THE GUARDIAN (May 23, 2009), http://www.guardian.co.uk/world/2009/may/24/south-korea-former-president-suicide.

[69] *See* Son Jun-hyun, *U.N. rapporteur reports freedom of expression severely curtailed under Lee administration*, THE HANKYOREH (Feb. 17, 2011), http://english.hani.co.kr/arti/english_edition/e_national/463878.html.

[70] *South Korea–Amnesty International Report 2010: Human Rights in Republic of Korea*, AMNESTY INTERNATIONAL, http://www.amnesty.org/en/region/south-korea/report-2010 (last visited May 28, 2013).

This development has been an unexpected regression, especially since Korean human rights systems have been considered quite strong after the democratization in 1980s and 1990s, particularly under the liberal Kim Dae-Jung and Roh Moo-Hyun governments, which actively promoted human rights. The newly inaugurated Park Geun-hye government may try to differentiate itself from Lee Myong-bak's government, but it is still not very clear whether Korea will go ahead toward the consolidation of democracy and human rights, or whether it will experience some stagnation in human rights protection.

III. SOUTH KOREA'S POLITICAL CHANGES AND THE GROWTH OF DEMOCRACY

The presidential election campaign in December 2012 was a tight race, and it was a good illustration of the current state of South Korean democracy. Park Geun-hye, the ruling party's candidate was the favorite leading up to the election, but she had two main challengers, Moon Jae-in and Ahn Chul-soo. Moon was the former Secretary General to President Roh Moo-Hyun and the nominee of the main opposition party.[71] Independent candidate Ahn was a professor at Seoul National University and venture businessman, who was widely supported by Korea's younger generation.[72] Both Moon and Ahn's camps, realizing that their chances for winning the election were diminished by the presence of the other, decided to form a coalition. Eventually Moon was selected to be their candidate against Park. This would be unremarkable, if not for the fact that they ended up choosing the less popular candidate, Moon. Because they could not reach a negotiated agreement, Ahn voluntarily resigned, after expressing his unenthusiastic support for Moon.[73] In polls conducted where only two candidates were listed, Ahn Chul-soo was actually favored in a head-to-head election against Park Geun-hye, while in a poll pitting Park against Moon Jae-in, Moon was about seven percentage points behind in the polls.[74] Ultimately Park Geun-hye won 51.55% of the electorate to Moon's 48.02%.[75]

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[71] Seong Han-yong, *Moon Jae-in's Leadership in Depth*, THE HANKYOREH (Dec. 7, 2012), http://www.hani.co.kr/arti/english_edition/e-national/564273.html.

[72] Evan Ramstad, *Ahn Decides When He'll Decide*, THE WALL STREET JOURNAL (Sept. 11, 2012, 7:12 PM), http://blogs.wsj.com/korearealtime/2012/09/11/ahn-decides-when-hell-decide.

[73] Choe Sang-hun, *South Korea is Surprised by Departure of Candidate*, N.Y. TIMES (Nov. 23, 2012), http://www.nytimes.com/2012/11/24/world/asia/ahn-cheol-soo-unexpectedly-quits-south-koreas-presidential-race.html?_r=0.

[74] *Park Geun-hye Currently Leading Moon Jae-in In National Polls*, ROK DROP (Dec.

Park Geun-hye's father, Park Chung-hee, came into power by a military coup in May 1961, and subsequently assumed the presidency in 1963. The constitution underwent revisions under the Park regime to give him greater powers, and to allow him to be reelected beyond the constitutional term-limits.[76] He was subject to heavy criticism for human rights violations and his disregard of the constitutional rights and democratic ideals, and he was assassinated by Kim Jae-kyu, one of his own confidantes in 1979.[77]

The end of the Park Chung-hee regime was followed by another military coup in 1979. Chun Doo-hwan (1981-1988) and Roh Tae-woo (1988-1993) assumed presidency one by one after the massacre of Gwangju citizens in 1980. Chun and Roh's authoritarian regimes faced strong demand for democracy, and this procession of military regimes finally ended with the election of civilian president Kim Young-sam. Eventually, Chun Doo-hwan and Roh Tae-woo were arrested in 1995 for charges stemming from their military rebellions in 1979-80 and acts of corruption.[78] In March 1996 their public trial began. Chun was charged with leading an insurrection, conspiracy to commit insurrection, murder for the purpose of rebellion, and assorted crimes relating to bribery.[79] Roh Tae-woo was alleged to have received bribes from many corporate executives, including Kim Woo-choong, chairman of Daewoo Corp, who was accused of paying Roh a total of $31 million on seven occasions from 1988 to 1991, including a $6.5 million bribe to win a contract to build a submarine base near the southeastern port of Busan.[80] Both Chun and Roh were found guilty and in

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8, 2012, 1:57 AM), http://rokdrop.com/2012/12/08/park-geun-hye-currently-leading-moon-jae-in-in-national-polls/; Rick Gladstone & Su-Hyun Lee, *New Voice in South Korean Politics Enters Presidential Race*, N.Y. TIMES (Sept 19, 2012), http://www.nytimes.com/2012/09/20/world/asia/new-voice-in-south-korean-politics-enters-presidential-race.html.

[75] REPUBLIC OF KOREAN CENTRAL ELECTION COMMISSION, http://info.nec.go.kr/electioninfo/electionInfo_report.xhtml?electionId=0020121219&requestURI=%2Felectioninfo%2F0020121219%2Fvc%2Fvccp09.jsp&topMenuId=VC&secondMenuId=VCCP&menuId=VCCP09&statementId=VCCP09_%231&electionCode=1&cityCode=0&sggCityCode=0&x=31&y=7 (last visited May 28, 2013).

[76] Donald Gregg, *Park Chung Hee*, TIME (Aug. 23, 1999), http://www.time.com/time/world/article/0,8599,2054405,00.html.

[77] Michael Breen, *Assassination of President Park Chung-Hee in 1979*, KOREAN TIMES (Oct. 24, 2010, 4:58 PM), http://www.koreatimes.co.kr/www/news/special/2012/09/178_75100.html.

[78] Michael Breen, *Chun Doo-hwan: Last Dictator*, KOREAN TIMES (Nov. 23, 2011, 7:26 PM), http://www.koreatimes.co.kr/www/news/issues/2013/05/363_99434.html.

[79] Sheryl WuDunn, *Condemned in South Korea*, N.Y. TIMES, (Sept. 1, 1996), http://www.nytimes.com/1996/09/01/weekinreview/condened-in-south-korea.html.

[80] Teresa Watanabe, *South Korean Ex-President Arrested: Corruption: Roe Tae Woo is Jailed on Charges of Taking More than $300 Million*, L.A. TIMES (Nov. 17, 1995),

1997 were respectively sentenced to life imprisonment and a seventeen-year prison term.[81] President Kim Young-sam pardoned the prison sentences for both Chun and Roh in that same year.[82] Chun is still required to pay his massive fine and an additional monetary penalty related to his crimes, but he claims to have only 250,000 won (approximately $200) to his name. To this day, the outstanding fines have not been collected.[83]

Along with these changes, South Korea gradually moved toward democracy and constitutionalism.[84] The civilian presidents Kim Young-sam (1993-1998), Kim Dae-Jung (1998-2003), and Roh Moo-Hyun (2003-2008) have each contributed to the development of a fully functioning democracy. This democratization process has also strengthened and rejuvenated the civil and political rights provisions in the constitution, and the constitution has gained greater legal authority. The overbroad and obscure human rights restricting clauses that were greatly abused under the authoritarian regimes have since been amended.[85]

Under the 1987 Constitution, the Constitutional Court of South Korea was established, and this court has played a significant role in consolidating democracy, human rights, and constitutionalism.[86] The South Korean Constitutional Court consists of nine Justices, who serve for six-year renewable terms: three of the Justices are nominated by the President, three by the National Assembly, and three by the Chief Justice of the Supreme Court.[87] The jurisdiction of the Constitutional Court includes: ruling on

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http://articles.latimes.com/1995-11-17/news/mn-4124_1_roh-tae-woo.

[81] *See* GEORGE N. KATSIAFICAS, ASIA'S UNKNOWN UPRISINGS VOLUME 1: SOUTH KOREAN SOCIAL MOVEMENTS IN THE 20TH CENTURY 364-65 (2012); *see also* Andrew Pollack, *Seoul Court Upholds Sentences on 2 Ex-Presidents*, N.Y. TIMES (April 18, 1997), http://www.nytimes.com/1997/04/18/world/seoul-court-upholds-sentences-on-2-ex-presidents.html?ref=rohtaewoo.

[82] Andrew Pollack, *2 Ex-Dictators Leave Korea Jails, Pardoned After 2 Years*, N.Y. TIMES (Dec. 23, 1997), http://www.nytimes.com/1997/12/23/world/2-ex-dictators-leave-korea-jails-pardoned-after-2-years.html?ref=rohtaewoo.

[83] KATSIAFICAS, *supra* note 81, at 364-65.

[84] *See generally* CARL J. SAXER, FROM TRANSITION TO POWER ALTERNATION: DEMOCRACY IN SOUTH KOREA, 1987-1997 (2002).

[85] For example, Article 37 (2) of the 1987 Constitution was amended to reduce the restriction of constitutional rights as follows: "Freedoms and rights of citizens may be restricted by Act only when necessary for national security, maintenance of law and order or for public welfare. *Even when such restriction is imposed, essential aspects of the freedom or right shall not be violated.*" DAEHANMINKUK HUNEBOB [HUNEBOB][CONSTITUTION] art. 37(2) (S. Kor.) (emphasis added).

[86] *See* Dae-Kyu Yoon, *The Constitutional Court System of Korea: The New Road for Constitutional Adjudication*, 1 J. OF KOR. L. 1 (2001); *see generally* Jin-Su Yune, *Recent Decisions of the Korean Constitutional Court on Family Law*, 1 J. OF KOR. L. 133 (2001).

[87] Dae-Kyu Yoon, *supra* note 86, at 7.

the constitutionality of laws; ruling on competence disputes between governmental entities; giving final decisions on impeachments; making judgments on dissolution of political parties; and adjudicating constitutional petitions filed by individuals.[88] The Constitutional Court has been a meaningful intermediary and coordinator among different forces in Korean society by responding to the demands from social movements in the private sector, the legislative power of the National Assembly, and judiciary bodies. The Constitutional Court's decisions were considered as careful responses to the demands for social changes.[89]

A good example of the Court's prominent role was the impeachment proceeding concerning then-President Roh Moo-hyun in 2004.[90] In March 2004, the majority opposition parties (the Grand National Party ("GNP") and the New Millennium Democratic Party ("NMDP")) jointly introduced a motion for the impeachment of President Roh Moo-hyun for three charges—alleged violation of the Election Act, illegal election funds received by his staff, and jeopardizing the economy as a political move to win the imminent election.[91] Surprisingly, however, the impeachment bill passed (193 to 2) and the president was forced to stop his official duties while the Constitutional Court decided whether he should be removed from his public office.[92] While hundreds of thousands of protesters demonstrated against the illegitimate impeachment action, President Roh did not attempt to take any unusual emergency measures, and the Constitutional Court decided on May 14th, 2004, that the violations did not meet the required threshold for impeachment.[93] This impeachment case is a good indication that the Korean democracy is secure to the point where a coup or other illegitimate exercise of power is unlikely,[94] and that South Korea is now a really democratic regime.

Another prominent example of the Constitutional Court's role was shown in a lawsuit concerning discriminatory provisions in the Civil Code.[95] Article 809(1) of the Civil Act prohibited marriage between two persons

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[88] HUNBEOPJAEPANSOBEOP [Constitutional Court Act], Act. No. 105A6, Apr. 5, 2011, art. 2 (S. Kor.), *available at* english.ccourt.go.kr/home/att_file/download/constitutional_court_act.pdf.

[89] *See* Tae-Ung Baik, *Public Interest Litigation in South Korea, in* PUBLIC INTEREST LITIGATION IN ASIA 115 (Po Jen Yap & Holning Lau eds., 2011).

[90] *Id.* at 122-23.

[91] *Id.* at 122-23.

[92] *Id.*

[93] *See* Constitutional Court [Const. Ct.], 2004Hun-na1, May 14, 2004 (S. Kor.); *see also* Youngjae Lee, *Law, Politics, and Impeachment: The Impeachment of Roh Moo-Hyun from A Comparative Constitutional Perspective*, 53 AM. J. COMP. L. 403 (2005).

[94] Baik, *supra* note 89, at 124.

[95] *Id.* at 123.

having the same family name with the same ancestral line. The Seoul Family Court, after accepting the plaintiffs' complaints, suspended the case and referred the constitutionality issue to the Constitutional Court on May 29, 1995.[96] In a 7-2 decision, the Court held that Article 809(1) of the Civil Code was incompatible with the Constitution Article 10 right to pursue happiness, and that if the National Assembly did not amend it by December 31, 1998, it would become null and void, starting on January 1, 1999.[97] It took several years before the law was amended after the Court's decision. The Civil Code was finally amended on March 31, 2005 to remove the discriminatory provisions and incorporate the Constitutional Court's decision.[98] These developments demonstrate significant changes in South Korean society: people now try to use the Court as an institution to pursue social changes, rather than relying on demonstrations or other direct appeals to the government.[99]

In the same vein, regular courts are also used for public interest litigation.[100] For example, there was an interesting lawsuit called the "salamander lawsuit," which was filed in October 2003 by a group of plaintiffs, including the salamanders living in Mt. Cheonseong, the Buddhist nun *Jiyul,* some environmentalists, and a society called the Friends of Salamanders.[101] They requested that the construction of express railroad tracks by the Korea Rail Network Authority be discontinued, and invoked constitutional rights such as Article 35(1) of the Constitution on the right to environment or the right to defend nature and the provisions of relevant statutes such as the Framework Act on Environment Policy.[102] The court determined that the salamanders did not have standing, since nature does not have standing in a court, but the court proceeded with other plaintiffs. Eventually the case was dismissed, but the publicity from this case has greatly contributed to environmental awareness in Korea.[103] The public is now more accepting of the idea that the court proceedings can be a meaningful process to pursue their rights.[104] This is a very important shift

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[96] *See* Constitutional Court [Const. Ct.], 95Hun-ka6, July 16, 1997 (S. Kor.).

[97] *Id.*

[98] 235 votes out of 296 N.A. seats; 161 for the amendment, 58 against it, and 16 abstained from voting on March 2, 2005. Minbeob [Civil Code], Act No. 7427, Mar. 2, 2005 (S. Kor.) *Gukhoi 'Hojuje Pyeji' Minbeopgaejeongan Gagyeol [National Assembly Abolishes Head of Household System by Passing the Civil Code Amendments],* Donga Ilbo, (Mar. 2, 2005, 5:41PM), *available at* http://news.donga.com/3/all/20050302/8164924/1.

[99] Baik, *supra* note 89, at 115.

[100] *Id.* at 125-27.

[101] *Id.* at 115-16.

[102] Supreme Court [S. Ct.], 2004Da1148 & 1149, June 2, 2006 (S. Kor.).

[103] *See* Baik, *supra* note 89, at 125.

[104] *Id.* at 126.

of the legal consciousness of the people because traditionally, law and legal process have not been viewed in such a positive way. There has been a lack of a law-abiding spirit and consciousness of rights in Korea,[105] but now Korea is achieving a smooth transition from authoritarian regimes to democracy with an increased role for the courts.[106]

Another important move that Korean democratic governments have taken is the promotion of transitional justice measures to correct the wrongdoings of the past.[107] The Korean transition from military dictatorship to democracy was not, from an international perspective, an isolated case, but Korean democratic governments were especially active in providing remedy measures to victims of past human rights violations.[108] As many as eighteen truth commissions have been established since 1996 to deal with the historical legacies of Korea's authoritarian and colonial past,[109] and the government has worked closely with civil society to provide remedial measures to these victims to achieve justice in the transition from authoritarian regimes to a democracy.[110]

All of these changes—democratization, the development of the rule of laws, constitutionalism and human rights protection systems—were possible because there were powerful civil society networks and combatant labor movement organizations in Korea, which demanded and supported the changes.[111] However, it is hard to say that Korean democratization is complete. There are still some challenges to overcome. Among others, the emergence of combatant ultra-rightist groups in society is one of the new phenomena.[112] Traditionally, there were government-sponsored ultra-

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[105] Sang-Hyun Song, *Korean Attitude Toward Law*, *in* KOREAN LAW IN THE GLOBAL ECONOMY 129 (Sang-Hyun Song ed., 1996).

[106] There are still demands for a change in the strict procedural requirements in public interest litigation or the expansion of class action systems. Baik, *supra* note 91, at 126.

[107] For more information, see Hahm Chaihark, *Human Rights in Korea*, *in* HUMAN RIGHTS IN ASIA 265 (Peerenboom et. al. eds., 2006).

[108] Baik, *supra* note 89, at 126.

[109] *See* Byung-Wook Ahn, *Hanguk Guageo Cheongsaneui Hyeonhuanggua Guajeh* [*The Present Conditions and Tasks of Past Settlement in Korea*], 93 YEOKSA BIPYEONG 32, 45-46 (2010).

[110] *See generally* Kim Dong-choon & Mark Selden, *South Korea's Embattled Truth and Reconciliation Commission*, THE ASIA-PACIFIC JOURNAL: JAPAN FOCUS (Mar. 1, 2010), http://www.japanfocus.org/-kim-dong_choon/3313.

[111] *See generally* Gi-Wook Shin et al., *South Korea's Democracy Movement (1970-1993): Stanford Korea Democracy Project Report (2007)*, *available at* iis-db.stanford.edu/pubs/22590/kdp_report_(final)-1.pdf; *Shaping Change—Strategies of Development and Transformation: South Korea*, BERTELSMANN STIFTUNG, bti2006.bertelsmann-transformation-index.de/132.0.html?L=1 (last visited May 29, 2013) [hereinafter *Shaping Change*].

[112] *Shaping Change*, *supra* note 111.

conservative groups in Korea such as the Korea Freedom Federation,[113] Korean War Veterans Association,[114] and the Korean Marine Corps Veterans Association.[115] Their actual influence over the public was rather limited under the authoritarian regimes. However, in recent years, more aggressive activities and accusatory rhetoric such as *Bbalgaengi* (the reds) and *Jongbukseryuk* (the pro-North Korean) are being found among the rightist or new-right groups.[116] The ultra-rightist conservatives have strongly expressed their animosity against the liberal movements by labeling the civil society networks as leftists.[117] This is worrisome because the existence of North Korea has been a constant hurdle to the full achievement of human rights protection and democracy.[118] The authoritarian governments justified their repressive regimes by claiming that only a strong military-style regime can fight against the threat from North Korea.[119] The ultra-rightist conservative rhetoric may suffocate the atmosphere of freedom of expression in Korea because the devastating effects of North Korean threats or of military tensions have never been removed. Campaigns relying on the "red complex" used by the combatant ultra-rightist conservatives could be very harmful for the development of democracy, and there is evidence that Korean National Intelligence Service agents were involved in media manipulation during the election campaign.[120] In this regard, one can say that democracy in South Korea is

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[113] The Korean Freedom Federation (*Jayuchongyeonmaeng*) was first established as Asian People's National Anti-Communist League in 1954 and has been a strong right-wing organization that supported conservatives in Korea. For more information, see its homepage, KOREA FREEDOM FEDERATION, http://www.koreaff.or.kr/english/president.php (last visited Aug. 2, 2013).

[114] See the homepage of the Korean War Veterans Association. KOREAN WAR VETERANS ASSOCIATION, http://www.625war.or.kr/index.asp (last visited Aug. 2, 2013).

[115] See the homepage of the Korean Marine Corps Veterans Association. KOREAN MARINE CORPS VETERANS ASSOCIATION, http://rokmcva.kr/pwb/ (last visited Aug. 2, 2013).

[116] *See* Yuna Han, *The New Right: Political Winds in South Korea*, 29 HARVARD INTERNATIONAL REVIEW No.1 (2007).

[117] Michael Richardson, *Civil Society and the State in South Korea*, *in* 2010 SAIS U.S.-KOREA YEARBOOK 165, 166-68 (2010), *available at* uskoreainstitute.org/wp-content/uploads/2010/05/YB07-chapter13.pdf.

[118] Many of the human rights violations in South Korea took place under the name of national security, and the National Security Act is still not repealed because of that reason. *See generally*, Diane Draft, *South Korea's National Security Law: A Tool of Oppression in an Insecure World*, 24 WIS. INT'L L. J. 627 (2012).

[119] *See generally* Tae-Ung Baik, *Justice Incomplete: The Remedy for the Victims of Jeju April Third Incident, in* RETHINKING HISTORICAL INJUSTICE AND RECONCILIATION IN NORTHEAST ASIA: THE KOREAN EXPERIENCE IN REGIONAL PERSPECTIVE (Shin et al eds., 2007).

[120] *See* Choe Sang-Hun, *South Korean Intelligence Officers Are Accused of Political*

still in the process of growing. The struggle between the conservatives who support authoritarian regimes and the liberals or progressives who want to move ahead to achieve the consolidation of democracy and sound human rights systems is not over yet.

IV. DEMANDS OF ECONOMIC DEMOCRACY

One of the most hotly debated issues during the Presidential election in 2012 was how to achieve economic democracy in South Korea.[121] The ruling party leader Park Geun-hye as well as the opposition candidates were in agreement that the demand for economic democracy should be considered seriously as a main point of their campaigns. However, their actual policy to achieve the economic democracy was not the same. For example, Park only emphasized fair competition and strict implementation of law, while opposition party leaders were more decisively demanding the revival of a 30% cap on the maximum amounts of investments made from companies to their subsidiary companies.[122] The opposition party also demanded a ban on circular investment and a measure to cut off the ties between financial institutions and corporations.[123] Even after the election, Park Geun-hye is still indicating that she supports the economic democracy, but she is now merging it with the new catchphrase "creative economy."[124] In fact these policy debates reflect the public sentiments concerning *chaebols* (big conglomerates) in South Korea.

Back in 1960, South Korea was one of Asia's poorest countries, with a Gross National Income ("GNI") per capita of $79.[125] It has since grown to be the world's 10th largest trading country with a GDP per capita of $30,800.[126] The South Korean economic miracle cannot be explained without mentioning the growth of Korean *chaebols*. In Korea, *chaebols* are

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Meddling, N.Y. TIMES (Apr 18, 2013), http://www.nytimes.com/2013/04/19/world/asia/south-korean-intelligence-officers-are-accused-of-political-meddling.html.

[121] *See Park Geun-hye's Economic Democracy Pledge Focused on Fair Market Competition*, YONHAP NEWS AGENCY (Nov 16, 2012, 12:03 PM), http://english.yonhapnews.co.kr/national/2012/11/16/98/0301000000AEN20121116004600315F.HTML.

[122] Tae-Hee Lee, *A Comparison of Economic Democracy Policy of Saenuri Party and Democratic Party*, THE HANKYOREH (Mar. 20, 2012 8:44 PM), http://www.hani.co.kr/arti/politics/politics_general/524374.html.

[123] *Id.*

[124] Ahn Seon-hee, *New President Park outlines Geun-hye-nomics*, THE HANKYOREH (Feb 26, 2013, 3:25 PM), http://www.hani.co.kr/arti/english_edition/e_national/575571.html.

[125] YOUNG-IOB CHUNG, SOUTH KOREA IN THE FAST LANE: ECONOMIC DEVELOPMENT AND CAPITAL FORMATION 13 (2007).

[126] South Korea, CIA World Factbook, https://www.cia.gov/library/publications/the-world-factbook/geos/ks.html (last visited May 29, 2013) (2010 estimate in 2012 dollars).

the whole business group as a unit consisting of a number of widely diversified and legally independent affiliates, all of which are controlled by a controlling shareholder, usually the founder or his heirs, and his family members.[127] For example, Samsung, Hyundai, and LG are the names of a group of companies that have greatly diversified companies under their wings.[128]

Korean corporations, especially *chaebols* have emerged out of favorable conditions implemented by the government regarding capital accumulation, financing, market management, currency control, and labor market management, including the suppression of trade union movements.[129] This state-sponsored growth also facilitated corruption and lack of proper corporate governance; corporate money was often used to sponsor politics with illegal political funds and bribery.[130] It was publicly known that *chaebols* could get away with tax evasion and violations of fair competition laws.[131] In this regard, the Korean *chaebol* structure was criticized as being among "the least investor-protective corporate systems in the world."[132]

When South Korea was experiencing currency shortages during the financial crisis in 1997-98, people rushed to donate their gold rings and jewelry to the government to help the country overcome the crisis.[133] Housewives gave up their wedding rings; athletes donated medals and trophies; and many gave away "gold luck keys," a traditional present on the opening of a new business or a 60th birthday.[134] With this support, the government initiated broad reform measures to improve corporate governance.[135]

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[127] Ok-Rial Song, *The Legacy of Controlling Minority Structure: A Kaleidescope of Corporate Governance Reform in Korean Chaebol*, 34 LAW & POL'Y INT'L BUS. 183, 184-86 (2002).

[128] *See generally* Jiho Jang, *The State Activism Toward the Big Business in Korea, 1998-2000: Path dependence and Institutional Embeddedness*, UNIVERSITY OF MISSOURI-COLUMBIA n.1 (2001), *available at* http://www2.law.columbia.edu/course_00S_L9436_001/2005/pp010423.pdf (paper prepared for delivery at the 2001 Annual Meeting of Midwest Political Science Association, Chicago, April 19-22, 2001).

[129] *See* Andrei Shleifer and Robert Vishny, *A Survey of Corporate Governance*, 52 J. FIN. 737, 737-44 (1997).

[130] *Id.* at 742-45.

[131] *Id.* at 742.

[132] Song, *supra* note 127, at 183.

[133] *Koreans give up their gold to help their country*, BBC, (Jan. 14, 1998, 6:26 PM), http://news.bbc.co.uk/2/hi/world/analysis/47496.stm.

[134] *Id.*

[135] Song, *supra* note 127, at 220-26 (discussing corporate governance reforms); BAIK, supra note 10, at 122-23 (discussing legislative reform recognizing human rights).

After a decade, however, the public sentiment in Korea has shifted again.[136] South Koreans started to complain that the reform efforts following IMF-guidelines have failed to achieve the promised transparency and global standards.[137] The reform measures ended up strengthening a small number of *chaebols,* providing them increasingly greater benefits based on their close relationship with the government, while the public was left frustrated by the bipolarization of the industry and the unequal distribution of economic opportunity and benefits.[138] The younger generation has expressed its strong discontent, stemming from the scarcity of jobs and an unclear future.

Korea's economic success could be viewed in two different dimensions. On the one hand, it was a real economic miracle: the South Korean government even coined the term, "The Miracle on the Han River," which was named after "The Miracle on the Rhine."[139] Under the strong leaderships of Park Chung-hee and his successors, Korea achieved rapid economic development, while maintaining security and stability against the constant threat from North Korea.[140] On the other hand, the miracle was a result of the sacrifice of workers, who worked long-hours with low wages. The industrial injuries of workers were often overlooked and the distribution of the fruits of the growth was not done equally.[141] The dominant slogans of national security and economic developmentalism were used to justify the authoritarian regimes.[142]

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[136] *See generally* Bruce Klingner & Anthony B. Kim, *Economic Lethargy: South Korea Needs a Second Wave of Reforms*, HERITAGE FOUND. (Dec. 7, 2007), http://www.heritage.org/research/reports/2007/12/economic-lethargy-south-korea-needs-a-second-wave-of-reforms.

[137] *See* Gill-Chin Lim, *South Korea, Brazil and the IMF: Coping with Financial Crisis*, CENTRE FOR WORLD DIALOGUE (Summer 1999), http://www.worlddialogue.org/content.php?id=18.

[138] Lee Joo-hee, *'Economic Democratisation' buzzword of S. Korean Presidential Race*, ASIA ONE (July 6, 2012), http://www.asiaone.com/News/AsiaOne%2BNews/Asia/Story/A1Story20120706-357497.html.

[139] EUN MEE, KIM, BIG BUSINESS, STRONG STATE: COLLUSION AND CONFLICT IN SOUTH KOREAN DEVELOPMENT 2 (1997).

[140] *See generally* William H. Overholf, *Park Chung Hee's International Legacy*, HARVARD KENNEDY SCHOOL ASH CENTER FOR DEMOCRATIC GOVERNANCE AND INNOVATION (2011), http://www.ash.harvard.edu/extension/ash/docs/parkjunghee.pdf.

[141] *See generally* Hyun-Hoon Lee, *Growth Policy and Inequality in Developing Asia: Lesson from Korea*, ECONOMIC RESEARCH INSTITUTE FOR ASEAN AND EAST ASIA (2012), *available at* http://www.eria.org/ERIA -DP-2012-12.pdf.

[142] *See* MI PARK, DEMOCRACY AND SOCIAL CHANGE: A HISTORY OF SOUTH KOREAN STUDENT MOVEMENTS, 1980-2000 61-62 (2008).

As the dissatisfaction of the public grew, Article 119 of the Korean Constitution was often cited as a reference point to support the validity of the claims. Article 119 states:

> (1) The economic order of the Republic of Korea shall be based on a respect for the freedom and creative initiative of enterprises and individuals in economic affairs.
>
> (2) The State may regulate and coordinate economic affairs in order to maintain the balanced growth and stability of the national economy, to ensure proper distribution of income, to prevent the domination of the market and the abuse of economic power and *to democratize the [national] economy through harmony among the economic agents*.[143]

In other words, under this constitutional provision, the government is obligated to pursue economic democracy. From this point of view, Korean *chaebols* are again facing demands for change.

Korea is one of the most *chaebol*-driven economies. Currently the total assets of thirty *chaebols* amount to 52% of total assets in the national economy,[144] and Samsung's sales accounted for more than 20% of South Korea's GDP in 2011.[145] The controlling minority ownership structure of *chaebols* have been widely criticized due to the lack of corporate governance and transparency in the process of centralized management, diversified businesses, and internal capital markets operations.[146] Cross-shareholding among branch companies is prohibited after the 1997-98 financial crisis, but circular-shareholdings is still allowed, which is one of the greatest issues of concern.[147] President Kim Dae-jung tried to respond to the financial crisis with some forms of *chaebol* reform.[148] On the one hand, he strongly reassured a system of market economy, the opening-up of Korean markets, and the protection of foreign investment.[149] On the other hand, he initiated *chaebol* reengineering drives. He met with the Hyundai, Samsung, LG, and SK chairpersons on Jan. 3, 1998, and got them to agree

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[143] DAEHANMINKUK HUNBEOB [HUNBEOB][CONSTITUTION] art. 119 (S. Kor.) (emphasis added).

[144] *See* OECD, CORPORATE GOVERNANCE IN ASIA: A COMPARATIVE PERSPECTIVE 171 (2001).

[145] TONY MICHELL, SAMSUNG ELECTRONICS AND THE STRUGGLE FOR LEADERSHIP OF THE ELECTRONICS INDUSTRY 65 (2010).

[146] Song, *supra* note 127, at 198.

[147] *Id.* at 198-201.

[148] *See generally* SOOK JONG LEE, THE POLITICS OF CHAEBOL REFORM IN KOREA: SOCIAL CLEAVAGE AND NEW FINANCIAL RULES, 38 J. CONTEMP. ASIA 439 (2008), *available at* http://content.csbs.utah.edu/~mli/Economies%205430-6430/Lee-The%20Politics%20of%20Chaebol%20Reform%20in%20South%20Korea.pdf.

[149] *Id.* at 441-50.

to the adoption of a system of combined financial statements, a prohibition of cross-guaranteeing among branch corporations, and pledges of investments from the owner's personal assets.[150] He demanded so-called "big deals" and restructuring to enhance the efficiency of the *chaebols*' economy, and facilitated the reengineering of 106 companies during 1998-2000.[151] However, this process was also criticized, in that it has increased the *chaebols* moral hazard because Kim helped shaky corporations with governmental support.[152] For example, to bailout Daewoo group, the government is believed to have spent more than $100 billion USD of tax money.[153] In addition, to help with the restructuring, summary firing of workers was conducted under governmental auspices, and the newly adopted American-style flexible labor market system greatly weakened the labor power.

Some NGOs, such as PSPD, campaigned for shareholder activism in Korea by advocating for the participation of organized minority shareholders in the corporate decision-making process by attending shareholders' meetings, submitting shareholder proposals, convening extraordinary shareholders' meetings, inspecting books and records, filing injunctions to prevent illegal acts of management, and filing shareholder derivative actions or criminal or administrative complaints.[154] The campaign for corporate governance reform in Korea had unique meaning because it was viewed as part of the social movements to achieve economic justice. The government had backed up this movement to enhance the quality of corporate governance by amending the Commercial Act, the Securities and Exchange Act, the Securities-related Class Action Act, and the Monopoly Regulation and Fair Trade Act. Some reform measures such as mandatory hiring of outside directors, permittance of cumulative voting, and class actions in securities litigation had taken place as part of these moves.[155] However, the protection of minority shareholders' interests and

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[150] Jang, *supra* note 128, at 4.

[151] *Id.*

[152] *See, e.g.*, Charles W. L. Hill, *The Asian Financial Crises*, BLOG OF PROF. TRAN HUU DUNG, http://www.wright.edu/~tdung/asiancrisis-hill.htm (last visited May 30, 2013).

[153] Hyunwoo Goo, *Segyehwa, Sinjayujueui, geurigo Jedoronjeok Hameui: Kim Daejung Jeongbueui Gyeongjegaehyukeul Jungsimeuro* [*Globalization, Neo-liberalism, and the Institutional Implication: with a Focus on Eoconomic Reform under the Kim Daejung Government*], 6 GUKJEONGUANRI YEONGU 33, 48 (2011).

[154] Jooyoung Kim & Toongi Kim, *Shareholder Activism in Korea: A Review of How PSPD Has Used Legal Measures to Strengthen Korean Corporate Governance*, 1 J. KOREAN L. 51, 54-55 (2001).

[155] Song, *supra* note 127, at 186.

promotion of the roles of shareholder deliberative actions did not sufficiently change the corporate governance practice.[156]

In fact, the governmental policy toward *chaebols* was not very consistent. When Hyundai Motor Group Chairman Chung Mong-koo was convicted and sentenced to three years imprisonment on charges of embezzlement of company funds and bribery of government officials in 2007, President Lee Myong-bak granted him a presidential pardon in 2008, citing the chairman's important role in the South Korean economy.[157] Similarly, when Lee Kun-hee, the current Samsung chairman, was sentenced by the Korean Supreme Court to a suspended three-year prison sentence for evading tens of millions of dollars in taxes and embezzling corporate money in 2009, President Lee Myong-bak again granted a special amnesty for him so that the businessman could retain his membership in the International Olympic Committee (IOC), leading the campaign for the South Korean city of *Pyeongchang* to host the 2018 Winter Olympics.[158]

Park Geun-hye and her ruling *Saenuri* Party has vowed to pursue economic democracy by adopting some policy measures, but they refused to restrict the pre-existing circular investment.[159] It is not clear at all whether the impunity of the owners of the corporations and *chaebols* for their illegal acts will end during Park's presidency.

V. SOUTH KOREA'S DEATH PENALTY MORATORIUM

South Korea had been a death penalty retentionist state since its establishment but it is now considered abolitionist in practice.[160] The death penalty sentence has often been misused to punish political opponents of the regimes. For example, Jo Bong-am was arrested for plotting a rebellion against the country by forming a progressive party in 1958, and, based on the Syngman Rhee administration's fabricated espionage charges, he was

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[156] *Id.* at 221-22.

[157] *S. Korea Grants Amnesty for Convicted Tycoons*, AGENCY FRANCE-PRESSE–INDUSTRY WEEK (Aug. 12, 2008), http://www.industryweek.com/regulations/south-korea-grants-amnesty-convicted-tycoons.

[158] Choe Sang-hun, *Korean Leader Pardons Samsung's Ex-Chairman,* N.Y. TIMES (Dec. 29, 2009), http://www.nytimes.com/2009/12/30/business/global/30samsung.html?_r=0.

[159] Ryu Yi-geun, *Park Geon-hye Watering Down Economic Democracy Pledges*, THE HANKYOREH (Nov. 17, 2012, 3:49 PM), http://www.hani.co.kr/arti/english_edition/e_national/561085.html.

[160] *See* Kuk Cho, *Death Penalty in Korea: From Unofficial Moratorium to Abolition?*, 3 Asian J. Comp. L. 1 (2008). *See also Abolitionist and Retentionist Countries*, AMNESTY INTERNATIONAL, http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries (last visited May 29, 2013).

sentenced to death and was subsequently executed.[161] His case was finally retried by the Supreme Court of Korea in 2011, and he was found not guilty.[162] *Inhyukdang,* or the People's Revolutionary Party Incident is another notorious case, where eight people were sentenced to death under the Park Chung-hee government on April 8th, 1975 and they were executed eighteen hours after sentencing. The Supreme Court retried the case in 2007 and found them not guilty.[163] Korea has executed a total of 998 convicts since its national liberation in 1945, and the last execution of twenty-three convicts happened in 1997.[164] After President Kim Dae-Jung took office in 1998, South Korea's moratorium on executions began, and no execution has happened since then. As of July 1, 2012, fifty-eight prisoners are on death row, all of whom are males convicted of murder.[165]

The death penalty is widely supported by a majority of Asian countries.[166] For example, Singapore has the highest per capita execution rate in the world, and imposes a mandatory death penalty for murder and a range of drugs and firearms offenses, and it asserts that capital punishment is not a human rights issue.[167] Malaysia retains the death penalty and imposes the mandatory death penalty for drug trafficking.[168] The Indian Court upheld the constitutionality of the death penalty on the condition that it is applied only to the "rarest of rare cases,"[169] and the Japanese also

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[161] Andrei Lankov, *Tragic End of Communist-Turned-Politician Cho Bong-am*, The Korean Times (Jan. 9, 2011), http://koreatimes.co.kr/www/news/nation/2011/01/116_79367.html.

[162] Supreme Court [S. Ct.], 08jaedo11, Jan. 20, 2011 (S. Kor.); *see also* Park Si-soo, *Cho Bong-am case reopened after 51 years*, KOREA TIMES (Nov. 19, 2010), http://www.koreatimes.co.kr/www/news/nation/2010/11/113_76660.html.

[163] *Families of Eight Wrongfully Executed South Korean Political Prisoners Awarded Record Compensation*, THE HANKYOREH (Aug. 22, 2007), http://english.hani.co .kr/arti/english_edition/e_national/230608.html.

[164] Cho, *supra* note 160, at 17.

[165] *See* Ministry of Justice, Republic of Korea, *80 nyeondo ihu Sahyeongsu Hwakjeong deung Jaryo, [Data on Death Penalty after 1980s]*, July 1, 2012, *available at https://www.moj.go.kr/HP/COM/bbs_03/ListShowData.do?strNbodCd=noti0009&strWrtNo=1654&strAnsNo=A&strRtnURL=MOJ_10301030&strOrgGbnCd=100000* (last visited May 29, 2013); *see also* Kuk Cho, *Death Penalty Lessons from Korea: Gradual Move from Moratorium to Abolition, available at http://www.euij-waseda.jp/common/pdf/Prof._Cho.pdf* (last visited May 29, 2013).

[166] *The Death Penalty in 2012*, AMNESTY INTERNATIONAL (last visited May 29, 2013), http://www.amnesty.org/en/death-penalty/death-sentences-and-executions-in-2012.

[167] Cho, *supra* note 160, at 7.

[168] *Id.* at 7-8; *see also Malaysia*, DEATH PENALTY WORLDWIDE (last visited May 29, 2013), http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Malaysia (*citing* Dangerous Drugs Act of Malaysia, art. 39(B), 1952, revised 1980).

[169] *Id.* at 8; *see also India Has 477 People on Death Row*, BBC (Dec. 13, 2012), http://www.bbc.co.uk/news/world-asia-india-20708007.

impose death sentences in cases of murder.[170] China's death-eligible offences include a wide range of economic crimes such as corruption and the theft of antiquities.[171] Although China limits the death penalty to extremely serious crimes[172] and it is not to be applied to juveniles,[173] China's death penalty practice has been internationally criticized.[174] Amnesty International recorded 4,000 death sentences, and 2,500 executions in China in 2001.[175] According to Amnesty International, the confirmed numbers of execution in 2007 was 470,[176] 1,010 in 2006,[177] and 1,770 in 2005,[178] which ranked number one in the world.

The Universal Declaration on Human Rights is not clear in its death penalty norm. Article 3 provides the right to life, but there is no expression concerning the death penalty.[179] Article 5 provides the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment.[180] ICCPR on the other hand, provides in Article 6(1) that no one shall be arbitrarily deprived of his life.[181] It further states in Article 6(2): "In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime . . . ."[182] The

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[170] *Id.* at 9; *see also* Kawai Mikio, *The Death Penalty in Japan: How Genuine is Public Support*, NIPPON.COM (March 13, 2012), http://www.nippon.com/en/currents/d00025/#auth_profile_0.

[171] David Lague, *China Acts to Reduce High Rate of Executions*, N.Y. TIMES (Nov. 1, 2006), http://www.nytimes.com/2006/11/01/world/asia/01china.html; *see also* Calum MacLeod, *Tomb Raiders Unearth New Marketplace* (June 23, 2010 7:02 PM), http://usatoday30.usatoday.com/news/world/2010-06-23-tomb-raiders-china_N.htm?csp=webslice.

[172] Criminal Law of the People's Republic of China, RefWorld (last visited May 29, 2013), http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=3ae6b5cd2 (art. 48).

[173] *Id.* art 49.

[174] Lague, *supra* note 171.

[175] *China Questions Death Penalty*, PEOPLE'S DAILY ONLINE (Jan. 27, 2005, 3:04 PM), http://english.peopledaily.com.cn/200501/27/eng20050127_172139.html.

[176] *Death Sentences and Executions in 2007*, AMNESTY INTERNATIONAL (last visited May 29, 2013), http://www.amnesty.org/en/death-penalty/death-sentences-and-executions-in-2007.

[177] *Death Sentences and Executions in 2006*, AMNESTY INTERNATIONAL (last visited May 29, 2013), http://www.amnesty.org/en/death-penalty/death-sentences-and-executions-in-2006.

[178] *Death Sentences and Executions in 2005*, AMNESTY INTERNATIONAL (last visited May 29, 2013), http://www.amnesty.org/en/library/asset/ACT50/002/2006/en/48b12000-d451-11dd-8743-d305bea2b2c7/act500022006en.html.

[179] *UDHR*, *supra* note 25, art. 3.

[180] *Id.* art. 5.

[181] *ICCPR*, *surpa* note 12, art. 6(1).

[182] *Id.* art. 6(2).

main restriction on the death penalty is to limit the penalty to the most serious crimes.[183] Under Article 6(5), the sentence of death is prohibited against persons below eighteen years of age and pregnant women.[184] That is why the world has adopted the Second Optional Protocol to ICCPR Aiming at the Abolition of the Death Penalty in 1989, which went into effect in 1991.[185] The European Convention on Human Rights (ECHR) has had similar developments. Article 2.1 initially provided the right to life.[186] The Protocol No. 6 to the ECHR concerning the Abolition of the Death Penalty was signed in 1983 to abolish the death penalty, but it did not exclude the death penalty in respect to acts committed in time of war or of imminent threat of war.[187] Protocol No. 13 to the ECHR Concerning the Abolition of the Death Penalty in All Circumstances was finally adopted in 2002 to strengthen this move of abolishing the death penalty,[188] and no European states are currently using the death penalty, which means that death penalty abolition is now a regional customary norm in Europe.[189]

South Korea has been moving faster than many other Asian states in its restriction of the usage of death penalty, but it is still behind the level of normative development in Europe. Although Korea has placed a moratorium on executions, great numbers of crimes are still punishable by death.[190] Additionally, the Korean Supreme Court and Constitutional Court support the death penalty.[191] The Supreme Court considers the death

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[183] *Id.*

[184] *Id.* art. 6(5).

[185] *See supra* note 42.

[186] Convention for the Protection of Human Rights and Fundamental Freedoms art. 2.1, Nov. 4, 1950, E.T.S. No. 5.

[187] Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty, Apr. 28, 1983, E.T.S. 114.

[188] Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty, May 3, 2002, E.T.S. 187.

[189] Statute of the International Court of Justice, art. 38(1)(b), 59 Stat. 1055, T.S. No. 993 (June 26, 1945) [hereinafter *ICJ Statute*].

[190] Currently, the Republic of Korea's Criminal Code punishes eighteen crimes by death: Articles 87 (insurrection), 92(Inducement of Foreign Aggression), 93 (Taking Side with Enemy), 94 (Benefiting Enemy by Levying Soldiers), 95 (Benefiting Enemy by Providing Equipment), 96 (Benefiting Enemy by Destroying Equipment), 98 (Spying), 119 (Use of Explosives), 144 (Special Obstruction of Public Duty), 163 (Obstruction of Inquest over Unnatural Corpse), 164 (Setting Fire to Present Living Building, etc.), 172 (Burst of Explosive Object), 173 (Obstruction to Supply of Gas, Electricity, etc.), 177 (Inundation of Present Living Building, etc. with Water), 250 (Murder, Killing Ascendant), 324-4 (Murder of Hostage, etc.), 338 (Murder, etc. by Robbery), and 340 (Piracy).

[191] *South Korea Court Rules Death Penalty Legal*, BBC (Feb. 25, 2010, 12:43 PM),

penalty constitutional as "an extremely exceptional punishment."[192] The Constitutional Court has also considered the constitutionality of the death penalty twice: the first was in 1996 and the second was in 2010.[193] It also found that the death penalty was constitutional. The majority reasons that—"the death penalty is intended to serve several legislative purposes including crime deterrence by making a psychological threat on the people, bringing justice through a fair retribution against the criminals, and protecting society by permanently blocking recidivism of the criminals," and that "these legislative purposes are legitimate and the death penalty is a proper means to achieve the purposes."[194] Four dissenting judges contend that the death penalty violates Article 37 Section 2 of the Constitution by infringing on the essential aspect of the right to life without any legitimate reason"[195] and "contradicts with human dignity and worth enumerated by Article 10 of the Constitution."[196] A positive change is that majority support for the death penalty has decreased from seven of nine in favor of the death penalty in 1996, to five of nine in 2010.[197]

Although the death penalty has not been removed, there has been some improvement concerning the practice of death penalty norms in Korea. For example, Article 13 of the National Security Act, a provision that allows the death penalty to punish repeated crimes of Article 7(1) and (5) (enemy-benefitting activities) was found unconstitutional by the Constitutional Court in 2002[198] and Article 11(1) of the Act for Aggravated Punishments for Specific Crimes was found unconstitutional by the Constitutional Court in 2003.[199] Moreover, there have been continuous attempts to abolish the

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http://news.bbc.co.uk/2/hi/asia-pacific/8536355.stm.

[192] Supreme Court [S. Ct.], 85Do926, June 11, 1985 (S. Kor.); Supreme Court [S. Ct.], 87Do1240, Oct. 13, 1987, (S. Kor.); Supreme Court [S. Ct.], 92Do1086, Aug. 14, 1992, (S. Kor.); Supreme Court [S. Ct.], 94Do2662 Jan. 13, 1995, (S. Kor.); *see* Cho, *supra* note 162 at 16.

[193] Constitutional Court [Const. Ct.], 1995Hun-Bal, Nov. 28, 1996 (S. Kor.), Constitutional Court [Const. Ct.], 2008Hun-ka23, Feb. 23, 2010 (S. Kor.); *see also Constitutional Court Upholds Death Penalty*, THE CHOSUN ILBO (Feb. 26, 2010, 11:55 PM), http://english.chosun.com/site/data/html_dir/2010/02/26/2010022600912.html.

[194] Constitutional Court [Const. Ct.], 2008Hun-ka23, Feb. 23, 2010 (S. Kor.).

[195] See Judge Dae-hyeon Cho's dissenting opinion, Constitutional Court [Const. Ct.], 2008Hun-ka23, Feb. 23, 2010 (S. Kor.).

[196] See Judge Hee-ok Kim's dissenting opinion, Constitutional Court [Const. Ct.], 2008Hun-ka23, Feb. 23, 2010 (S. Kor.).

[197] Supreme Court [S. Ct.], 85Do926, June 11, 1985 (S. Kor.); Supreme Court [S. Ct.], 87Do1240, Oct. 13, 1987, (S. Kor.); Supreme Court [S. Ct.], 92Do1086, Aug. 14, 1992, (S. Kor.); Supreme Court [S. Ct.], 94Do2662 Jan. 13, 1995, (S. Kor.).

[198] Constitutional Court [Const. Ct.], 2002Hun-Ka5, Nov. 28, 2002 (S. Kor.); *see* Cho, *supra* note 160, at 21.

[199] Constitutional Court [Const. Ct.], 2002Hun-Ba24, Nov. 27, 2003 (S. Kor.); *see* Cho,

death penalty. For instance, a great number of National Assembly members tried to abolish the penalty, and five bills have been submitted for this purpose: 90 members (1999), 92 members (2001), 175 out of 273 total members (2004), 39 members (2008), 53 members (2009) respectively supported the bills to abolish the death penalty by replacing it with life imprisonment, but none of them passed the National Assembly.[200] In addition the National Human Rights Commission presented its opinion on April 6, 2005 that the death penalty should be abolished,[201] and the Catholic Church also continues to campaign against the death penalty.[202]

Unfortunately, however, the prospects for a complete abolishment of the death penalty are not very bright at this time. According to a poll, 69.6% of the public still supports the death penalty[203] and the new president Park Geun-hye is a retentionist.[204] The death penalty moratorium was a great development in the process of domesticating international human rights standards on Korea, but it still needs time to achieve a higher normative protection of human rights under the Korean norm filtering system. Continuous and vigorous efforts will be needed to achieve full abolition of the death penalty.

VI. CONCLUSION

South Korea has developed its mechanisms of politics, constitutional jurisprudence and human rights according to its own historical path. It was indeed a miraculous process of development. South Korea can claim to have met international standards for the most part and may be proud of its achievements. The positive changes accomplished in Korea, however, are not free from problems and flaws. The current status of normative development for democracy and human rights protection reflects its domestic political changes and norm filtering mechanisms.

The recent changes after the election process remind us of many projects yet to be completed in the areas of political democracy, economic

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supra note 162, at 21.

[200] *See* Cho, *supra* note 160, at 23.

[201] *Id. at* 24-5.

[202] SANGMIN BAE, WHEN THE STATE NO LONGER KILLS: INTERNATIONAL HUMAN RIGHTS NORMS AND ABOLITION OF CAPITAL PUNISHMENT 74 (2007).

[203] *See*, Soon-cheol Kwon, *Sahyeongje Jonsok Chanseong, 30dae Bumo Gajang Noppa [Highest Death Penalty Retention Supports Come from the Parents in their Thirties]*, 995 Magazine Kyunghyang Weekly (Oct. 9, 2012), http://newsmaker.khan.co.kr/khnm.html?mode=view&code=113&artid=201209251353171&pt=nv.

[204] Myo-ja Ser, *Debate Over Death Penalty Reignited*, KOREA JOONGANG DAILY (Sep. 12, 2012), http://koreajoongangdaily.joinsmsn.com/news/article/article.aspx?aid=2959321&cloc=rss%7Cnews%7Cjoongangdaily.

democracy and further protection of human rights. South Korea still has miles to go to consolidate its democracy and human rights systems. This change will not be given for free. To achieve this goal, more efforts from various stakeholders in South Korean society should be exerted.

A Workable Balance Between Democratic Principles and Principles of Palauan Traditional Governance in State Constitutions: What Fails and What Succeeds?

Chief Justice Arthur Ngiraklsong*

I. INTRODUCTION

The "Guaranty Clause" of the Palau Constitution reads in part: "The structure and organization of state governments shall follow democratic principles, traditions of Palau, and shall not be inconsistent with this Constitution."[1] The Constitution came into effect on January 1, 1981.[2]

The Clause is clear that tradition and democracy should coincide. But it does not say which democratic principles and which traditions must be maintained and certainly practice has shown that it cannot mean all democratic principles and all traditions be simultaneously adhered to. There must be, then, a process for discovering that balance. The Supreme Court has declared that the people of each state shall decide which democratic principles and traditions should be in their constitution as well as decide the proper balance between the two.[3]

There are sixteen states under the Constitution of Palau.[4] Traditionally, these states were known as "districts."[5] Each district was a political unit

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[1] CONSTITUTION OF THE REPUBLIC OF PALAU, Jan. 1, 1981, art. II, § 1.

[2] *Id.* art. 15, § 1.

[3] Ngara-Irrai Traditional Council of Chiefs v. Airai State Gov't, 6 ROP Intrm. 198, 203 (1997).

[4] *Palau Sixteen States,* REPUBLIC OF PALAU: NATIONAL GOVERNMENT (July 15, 2008), http://www.palaugov.net/palaugov/states/STATES.htm.

[5] *See generally* AUGUSTIN KRAMER, RESULTS OF THE SOUTH PACIFIC-EXPEDITION: 1908-1910, II. ETHNOGRAPHY B. MICRONESIA, vol. 3, Palau 2 of the vol., at 3 (Dr. G.

consisting of villages and clans and each was governed by a council of chiefs.[6] The council, headed by the highest chief, functioned as the executive, legislature, and judiciary.[7] This was the traditional Palauan governance at the district level.

When the Japanese Imperial Government took over the administration of Micronesia in 1914 under the League of Nations, and until the end of WWII, the district traditional governments were pretty much left to function without much interference or influence from the Japanese Government.

Following this period, in 1947, began the U.S. Administration of Palau.[8] During this time the area became known as the Trust Territory of the Pacific Islands.[9] The local governments under the Trust Territory times began to change. The traditional districts became known as municipalities and they were headed by magistrates, who were sometimes the high chief of the district/municipality but other times, were not. With this change in governmental structure, the position became elective. Nonetheless it was not a sought-after position. Even where there was compensation for a magistrate, it was nominal and many shied away from being elected to office in this capacity.

Once the National Constitution became effective in 1981, municipalities were converted into states with considerably more responsibilities and authority.[10] States suddenly had power to raise taxes.[11] And just like that, there was money! Becoming a governor of a state was now much more profitable and prestigious than being a magistrate of a municipality was.

II. CONSTITUTION OF THE STATE OF AIRAI

Like the other fifteen states, Airai was a chartered municipality prior to becoming a state in 1981.[12] But unlike the other fifteen states, Airai was the first to create its constitution based solely on traditional governance, as it existed before foreign influence.

The Airai Constitution was not drafted by a convention or any legal entity. It was drafted by Professor Thomas Gladwin, an anthropologist, at

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Thilenius ed., 1919).

[6] *See id.* at 3.

[7] *See id.*

[8] Exec. Order No. 9875, 12 Fed. Reg. 4837 (July 18, 1947).

[9] *Id.*

[10] *See generally* CONSTITUTION OF THE REPUBLIC OF PALAU, Jan. 1, 1981, art. 15, § 6.

[11] *Id.* art. II, § 3.

[12] *See* Teriong v. Gov't of State of Airai, 1 ROP Intrm. 664, 665 (Palau App. Div. Sept. 1989).

the direction of acting High Chief Ngiraked of Airai.[13] On December 22, 1980, the residents of Airai were called to a mass meeting.[14] It was estimated that 100 to 400 residents were in attendance.[15] It was at this meeting that an announcement was made that Airai had a constitution.[16] Speeches were given, food and drinks were served, and the residents disbursed knowing they were the first state to have a constitution.[17]

This first Airai Constitution provided for a legislature with fourteen members who were heads of their villages or clans.[18] They could only be removed by the village or clan that elected them.[19] There were no term limits. The fourteen members were to select a Governor by consensus and if not, by a majority vote.[20] Likewise, the Governor had no term limit. The only way to amend the Constitution was through a consensus of twelve of the fourteen members of the Legislature, which was not subject to a referendum.[21] This was pure district/traditional governance. The Airai Constitution took effect on January 1, 1981.[22]

This first Airai constitution existed for almost nine years.[23] In 1988, Mr. Harumi Teriong and other residents of Airai sued the Government of Airai.[24] Teriong claimed that the Airai Constitution was invalid on two grounds.[25] First, the Constitution was not subject to a referendum as was required by a then existing national statute.[26] Second, the Constitution violated the "Guaranty Clause" of the national Constitution because of the absence of "democratic principles," particularly the right of the residents to vote for key public officials to represent them in the government and the right to vote to change the Constitution.[27]

The Government of Airai argued in defense of the Constitution and contended that the mass adoption on December 22, 1980 constituted a referendum or ratification of the Constitution and therefore satisfied the

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[13] *Teriong*, 1 ROP Interm. at 665.
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] CONSTITUTION OF THE STATE OF AIRAI, Jan. 1, 1981, art. 3, § 1.
[19] *Id.*
[20] *Id.* art 3, § 2.
[21] *Id.* art. 5, § 1.
[22] *Teriong*, 1 ROP Intrm. at 665.
[23] CONSTITUTION OF THE STATE OF AIRAI, Apr. 5, 1990, art.14, § 2.
[24] *Teriong*, 1 ROP Intrm. 664.
[25] *Id.* at 667.
[26] *Id.* at 667-68.
[27] *Id.* at 668.

statute requiring a referendum on a draft constitution.[28] As to the absence of "democratic principles," the Government of Airai argued that the Traditional Government sought consensus in decision-making, and this process reflected the wishes of the governed.[29] It was, the State contended, "inherently democratic" and it met the Guaranty Clause requirement for elected representatives of the people.[30] In other words, every person's interest was accounted for by the consensus decision-making tradition.

The *Teriong* Appellate Court held that the Airai Constitution was invalid because it failed confirmation in a referendum.[31] Secondly, the Court explained that the Guaranty Clause requires that the governed must have a right to periodically vote for key public officials to represent them as well as the right to vote to amend their constitution.[32] These are minimal democratic principles required by the Guaranty Clause.

After the *Teriong* ruling, the residents of Airai went through some trying times. There was a void when the existing government was declared unconstitutional.[33] The trial court sanctioned a caretaker government and the power struggle continued.[34] Subsequently, the people of Airai through a convention, created a constitution with an elected chief executive and elected legislature.[35] They provided for ways to amend the Constitution along with the right of the people to ratify amendments at a referendum.[36] The Council of Chiefs, whose role under the first Constitution was to act as the supreme authority, was now relegated to advising the Governor on traditional laws, customs and their relationship to the Constitution and laws of the State. The new Airai State Constitution took effect on April 5, 1990.[37]

The first Airai Constitution was based solely on Palauan traditions.[38] The current Constitution is based solely on democratic principles.[39] It seems the people of Airai believed that governance could either involve the

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[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.* at 673, 680.

[32] *Id.* at 680.

[33] *See generally* Teriong v. Gov't of State of Airai, 1 ROP Intrm. 664 (Palau App. Div. Sept. 1989).

[34] *See id.* at 671 (quoting trial court order from October 4, 1988).

[35] CONSTITUTION OF STATE OF AIRAI, Apr. 5, 1990, arts. VI and VII.

[36] *Id.*

[37] *Id.* art. XIV(2).

[38] *See* Charter of Municipality of Airai (Feb. 18, 1963).

[39] CONSTITUTION OF STATE OF AIRAI, Apr. 5, 1990, art. IV, § 1.

Palauan tradition or elected chief executive and legislative branches without a meaningful role for traditional chiefs.[40]

III. CONSTITUTION OF THE STATE OF KOROR

The second state constitution that presented the Court with a challenge of balancing Palauan traditions and democratic principles is the Constitution of Koror State. Koror State was the Capitol of Palau from the time of the Japanese Era up until recently.[41] It is the most populated and the wealthiest area of the nation.[42] It is also the home of one of the two Paramount Chiefs of Palau, Ibedul.[43]

The first Koror State Constitution, unlike Airai's first Constitution, had an elected Legislature with the usual legislative powers.[44] The Koror State Constitution was also ratified by the residents of Koror at a referendum.[45] The House of Traditional Leaders ("HOTL"), however, headed by Paramount Chief Ibedul, had "the supreme authority of the State of Koror."[46] The HOTL had the power to approve bills from the Legislature or to veto them, the power to represent the State with other states and foreign countries and entities, the authority to enter into contracts or any "major agreement" with the state, and the power to appoint an executive administrator to run the administration.[47] The Koror State Constitution took effect on October 21, 1983.[48]

This was the Government and the Constitution of Koror State from 1983 until 1997, when it was first amended to make the Executive Administrator effective, and then again in 2005 when it was amended to dissolve the "supreme authority" of the HOTL and make it an advisor to the state government on traditions and customs.[49]

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[40] *See id.*

[41] *Getting to Airai,* PACIFIC WORLDS, http://www.pacificworlds.com/palau/home/getting.cfm (last visited May 22, 2013).

[42] *See id.*

[43] *Explorers,* PACIFIC WORLDS, http://www.pacificworlds.com/palau/visitors/explore.cfm (last visited May 22, 2013).

[44] CONSTITUTION OF THE STATE OF KOROR, Nov. 8, 2005, art. VII.

[45] REPUBLIC OF PALAU, KOROR STATE GOVERNMENT, http://www.kororstategov.com/constitution.html (last visited May 22, 2013).

[46] REPUBLIC OF PALAU, KOROR STATE GOVERNMENT, *House of Traditional Leaders,* http://www.kororstategov.com/hotl.html (last visited Mar. 8, 2013).

[47] *Id.*

[48] KOROR STATE CONSTITUTION, REPUBLIC OF PALAU, KOROR STATE GOVERNMENT, *available at* http://www.kororstategov.com/pdf/constitution/KS%20Constitution%20English.pdf.

[49] KOROR STATE CONSTITUTION, as amended, November 21, 2005, Article VI.

The history of these amendments began in 1986, when the Koror State Legislature adopted Resolution 43 by three-fourths of the members to amend the Constitution by requiring the Executive Administrator to be elected instead of appointed by the HOTL.[50] The HOTL vetoed the proposal and refused to place it on the ballot for the 1986 General Election.[51]

Mr. Becheserrak, a member of the Koror State Legislature, filed a lawsuit against the Koror State Government, alleging that the HOTL did not have the authority to veto Resolution 43 to amend the Constitution.[52] Secondly, the claim insisted that the HOTL was not an elected body, which was a violation of the Guaranty Clause of the National Constitution and the *Teriong* holding.[53]

The Trial Court ruled that the *Teriong* Ruling required that all key public officials had to be elected.[54] The members of the HOTL were not elected and that was declared a violation of the *Teriong* holding.[55] The Trial Court further ordered the state to hold a constitutional convention to draft a constitution to conform to the Court's opinion.[56] An appeal was taken on the trial opinion.[57]

The Appellate Court held that the HOTL did not have the authority to veto Resolution 43, the proposal to amend the Constitution.[58] The Court further ruled that democratic principles, under the Guaranty Clause, do not require that all key public officials must be elected.[59] Judges, for example, are key public officials and are not, and should not, be elected. Thus, the elected legislative body would suffice under *Teriong*. The Court also reversed the trial court's order requiring the State to hold a Constitutional Convention.[60] How the State was to amend its constitution was to be left to the people of that State.

A great deal of intense negotiations and discussions of the proper role of the traditional leaders were held from the 1990s on. Finally, the residents of Koror ratified a constitutional amendment to make the executive administrator an elective office in July 15, 1997, but also to keep the

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[50] Koror State Govt. v. Becheserrak, 6 ROP Intrm. 74, 75 (1997).
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.* at 4.
[55] *Id.*
[56] *Id.* at 3.
[57] *See id.*
[58] *See id.* at 8.
[59] *See id.* at 5.
[60] *See id.*

HOTL's "supreme authority" in the state government intact.[61] Then on November 21, 2005, the residents of Koror amended their constitution by taking the "supreme authority" of the HOTL away. Through this revision, the HOTL's role was diminished only to giving advice on traditions and customs.[62]

So under the current Constitution, the HOTL's power as the "supreme authority of the State Government" is absent and its role is relegated to traditional law.[63] The role of the HOTL under the current Constitution is similar to the role of traditional leaders in the national government and the second Constitution of Airai, which is to advise the Chief Executive on matters of traditions and customs. However, the HOTL may submit proposed bills to the Legislature.[64] But even this is a far cry from the "supreme authority" it once had.

IV. CONSTITUTION OF THE STATE OF NGATPANG

The Ngatpang State Constitution and Government present a third challenge in balancing Palauan traditional governance and the people's right to vote for some key public officials to run their government.

The Ngatpang State Constitution, like the first Airai State Constitution, was based on traditions but with one exception to be discussed later. "Ngaimis", also known as "Board of Executive", consisted of ten high ranking traditional Chiefs of the State.[65] The highest Chief by virtue of his title became the Governor.[66] The rest essentially became the Legislators.[67] The Constitution could be amended every four years if eight of the ten members of the Board of Executive gave their consent.[68] The Constitution was ratified by delegates to a convention,[69] unlike all the state constitutions (except the first Airai State Constitution discussed before) that were ratified at a referendum by the voters. The Ngatpang State Constitution took effect on January 25, 1982.[70]

The one difference between the Ngatpang Constitution and the first Airai Constitution is that there is one elected official of the Ngatpang State

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[61] *See generally* CONSTITUTION OF THE STATE OF KOROR, Apr. 13, 1983, art. IV, § 1.
[62] *Id.*
[63] *Id.*
[64] *Id.* art. IV, § 2(1).
[65] NGATPANG STATE CONSTITUTION, Jan. 25, 1982, art. IV, § 1.
[66] *Id.* art. VI, § 1.
[67] *Id.* art. VI, § 2.
[68] *Id.* art. IX.
[69] *Id.* art. XI, § 1.
[70] *Id.* art. XI, § 2.

Government. The drafters of the Ngatpang Constitution must have anticipated the *Teriong* ruling! The Executive Officer of the State Government was to be elected every three years, but candidates for this office could only come from the four main clans of the State.[71] The officer was to handle administrative duties under the supervision of the Governor, the highest unelected ranking Chief of the State.[72] The Executive Officer in this capacity is analogous to a Chief of Staff of a Chief Executive.

The National Government in 2003 sued Ngatpang State for violating the Guaranty Clause of the National Constitution.[73] The National Government contended that having only one elected official, one who did not even make policies and was under the direction of an unelected Governor, was not sufficient to meet the Guaranty Clause's requirement enunciated in *Teriong* and *Becheserrak* that the people of a state must have a right to vote for some key public officials to represent them in their government.[74]

The Court agreed with the National Government that a sole elected Chief of Staff of the Governor of Ngatpang State was not sufficient to satisfy the right of the people to vote for some key public officials in their government.[75]

The Court, however, did not declare the Ngatpang State Constitution and Government unconstitutional at the time. This was in 2003. In 1999, a constitutional amendment providing for an elected governor and elected legislature was submitted to the people of Ngatpang at a referendum twice. And each time, the people of Ngatpang rejected the proposed elective chief executive and legislative branches. Again, in 2000 the people rejected the same proposal.

The people of Ngatpang, using their right to vote on these referenda, rejected a more democratic form of government. Ironically, their doing so demonstrated a democratic principle enunciated in *Teriong* and *Becheserrak*.

The Court held that the people of Ngatpang had not been deprived yet of their right to vote for their representatives.[76] Their right to vote to amend their constitution includes their right to vote for some key public officials. As long as the people of Ngatpang could periodically express their views on the proposed amendment, the Court regarded the process as democratic.

In 2004, the people of Ngatpang State for the first time voted at a referendum to change their constitution to provide for elective branches of

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[71] *Id.* art. VI, § 3.

[72] *Id.*

[73] ROP v. Ngatpang State Government, 13 ROP Intrm. 297 (Palau Tr. Div. 2006).

[74] *Id.* at 293.

[75] *Id.* at 298.

[76] *Id.* at 296.

the Government. The Ngaimis resisted the winds of change and insisted that eight of the ten of them must still approve the amendment to their constitution. The Court then struck down that provision, the Constitution, and the Government of Ngatpang State for noncompliance with the Guaranty Clause of the National Constitution based on the *Teriong* and *Becheserrak* holdings.[77]

The people of Ngatpang now have a constitution and a government that provides for an elective chief executive and legislative branch of the Government. The Ngaimis is now vested with only "traditional powers".[78] The Ngaimis, however, may introduce bills to the Legislature.[79] The Ngaimis may also recommend one of themselves to serve in a legislative committee subject to two-thirds approval of the members of the Legislature.[80] But this is all that remains in the Constitution of the once powerful Ngaimis.

The State still has difficulties implementing its constitutional government, but they at least now have a constitution that provides for an elective chief executive and legislature, which conforms to the Guaranty Clause of the National Constitution, as interpreted in *Teriong* and *Becheserrak*.

V. CONCLUSION: THE ROLE OF TRADITIONAL LEADERS UNDER STATE CONSTITUTIONAL GOVERNMENTS AFTER *TERIONG* AND *BECHESERRAK*

It seems the traditional leaders that began with "supreme authority" in the three states constitutions ended up losing it all. Their role has been relegated to that of advisors on traditions and customs, similar to the role of traditional leaders in eight of the state constitutions. Thus, of the sixteen states constitutions, ten recognize traditional leaders only as advisors on traditions and customs.

Some argue that being advisors solely on traditions and customs is not a meaningful role and that perhaps there is an imbalance between traditional governance and democratic principles in these ten state constitutions.[81] They further argue that traditional leaders are still very much respected and at one time in the political history of Palau, it was the traditional leaders

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[77] *Id.* at 300 n.8.

[78] CONSTITUTION OF NGATPANG, as amended on May 28, 2006, Art. V.

[79] *Id.* § 5.

[80] *Id.*

[81] *See generally* WILLIAM J. BUTLER, GEORGE C. EDWARDS, MICHAEL D. KIRBY, PALAU A CHALLENGE TO THE RULE OF LAW IN MICRONESIA (1988).

and traditions that provided stability when there was a near total breakdown in the rule of law.[82]

A strong rebuttal for those advocating a more significant role of the traditional leaders than that of a mere advisory nature on traditions and customs is that the National Constitution specifically provides that the traditional leaders "shall advise the President on matters concerning traditional laws, customs and their relationship to this Constitution and the law of Palau."[83] The traditional leaders have no more role than being advisors on traditions and customs at the national level and presumably, this meets at least the minimum presence of traditions and customs on governance in the ten state constitutions.

There are, however, state constitutions where traditional leaders play a necessary role in the governments. In the Melekeok State, the Constitution provides for an executive branch headed by unelected Paramount Chief Reklai and an elected Governor.[84] The executive branch executes and enforces the law. The Constitution also provides for a legislative branch with ten traditional leaders, including the Paramount Chief Reklai and six elected members including the Governor. This is a unique structure of state government in that not only are there more traditional leaders (ten) in the Legislature than elected members (six), but that one of the two chief executives is a Paramount Chief. This is the only State Constitution that provides for the traditional leaders and elected officials to share equally in Executive Powers. It is also the only state Constitution, except for the Ngiwal State Constitution, that provides for such a great proportion of traditional leaders in the state legislature. This Constitution has existed since 1983.

A petition to amend the Melekeok Constitution to reduce the number of legislators and turn them all into elected positions was initiated on August 16, 2007.[85] Within a week, the existing Melekeok State Government enacted a law to impose detailed procedures for the circulation and filing of any petition by initiative of the people to amend their Constitution.[86] These procedures are more cumbersome than those that existed at the referendum for the adoption of the Constitution.

Petitioners filed a case in court arguing that Melekeok's law interfered with their fundamental right to vote to change the Constitution.[87] The Court

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[82] *Id.*

[83] CONSTITUTION OF THE REPUBLIC OF PALAU, Apr. 2, 1979, art. VIII, § 6.

[84] MELEKEOK STATE CONSTITUTION, Sept. 3, 1983, Art. VIII, §§ 1 & 2.

[85] Plaintiff's Exhibit 1 in Tellei v. Palau Election Commission and Melekeok State Legislature, Civil Action No. 07-358 (Tr. Div. 2008).

[86] MSL Public Law No. 16-12.

[87] *See* Tellei v. Palau Election Commission and Melekeok State Legislature, Civil

held that the procedures were valid regulations governing the petition process.[88]

Hence, the Melekeok Constitution still provides a government where traditional leaders have a significant role in both the Executive and Legislative Branches of the Government.

The Melekeok State Constitution is the Ngaraard State Constitution, which provides for an elected Governor and a bicameral legislature. One of the two houses is the House of Chiefs. No law is enacted without the approval of both Chambers.

In the state of Ngaraard, the constitution provides for an elected Governor and a bicameral legislature.[89] Membership in one house is confined to traditional leaders by virtue of their traditional titles.[90] The other is the House of elected members.[91] No law is enacted without the consent of the House of Traditional Leaders.[92]

Recently, a petition to amend the Ngaraard Constitution by eliminating the House of Chiefs and relegating that House to the role of advisor on customs and traditions was about to be voted upon. However, the existing Government enacted a seven-page law establishing procedures for any petition to amend the Constitution. This law is similar to the Melekeok's law that stopped the petition to amend its Constitution. The scheduled election for the petition was postponed because the Election Commission could not confirm that all the required procedures had been met.

The remaining four state constitutions provide for a similar degree of traditional-leader participation in their state governments. Thus far, there have not been serious attempts to amend their constitutions.

In the state of Ngchesar, a Council acts as the governing body like a parliamentary system under its Constitution. There are eight traditional leader members of the Council and nine elected members with equal voting rights.[93] The members select a Governor, and a traditional leader is not eligible to be Governor.[94]

In the State of Ngiwal, the Constitution provides for an elected Governor and Legislature. Ten members of the Legislature are traditional leaders and

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Action No. 07-358 (Tr. Div. 2008).

[88] *Id.* at *11.

[89] NGARAARD STATE CONSTITUTION, as amended on Feb. 5, 1986 and Oct. 15, 1993, Art. IV & V.

[90] *Id.* at Art. IV.

[91] *Id.*

[92] *Id.*

[93] CONSTITUTION OF THE STATE OF NGCHESAR, Sept. 13, 1981, art. V, § 5.

[94] *Id.* art. V, § 6.

seven are elected.[95] All have equal voting rights. In the State of Peleliu, the Constitution provides for an elected Governor and a Legislature. There are five traditional leader members of the Legislature and ten elected members—all with equal voting rights.[96] In Angaur State, the Constitution provides for an elected Governor and a Legislature. There are four traditional leaders in the Legislature and five elected members, all with equal voting rights.[97]

These are the six state constitutions that seem to provide an acceptable mixture of Palauan traditions and democratic principles. They are the success stories of this continuing process of balancing traditions and democratic principles. This is analogous to a similar balancing act that we Palauans undertake by incorporating traditions and western values into our daily lives. For example, a Palauan working couple may have to choose whether to have their grandparents babysit and pass on traditional values or hire foreign domestic helpers who speak English and would give the children a head start on obtaining English proficiency.

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[95] CONSTITUTION OF THE STATE OF NGIWAL, Apr. 11, 1983, art. VIII, § 2.

[96] CONSTITUTION OF THE STATE OF PELELIU, Sept. 11, 1982, art. VIII, § 1.

[97] ANGUAR STATE CONSTITUTION, Oct. 8, 1982, art. VIII, § 1.

Jon'd at the Hip: Custom and Tradition in Island Decision Making[1]

Honorable Robert J. Torres, Jr.[2]

I. INTRODUCTION

On March 15, 1988, in the state of Yap of the Federated States of Micronesia ("FSM"), Joseph Tammed sexually assaulted a high school student.[3] Ten days later, the victim's relatives lured Tammed into a car and brought him to the home of the victim's father.[4] Once there, Tammed was severely beaten; his captors taunted him and threatened him with weapons, and even urinated on him.[5] After pinning Tammed's hand, "which they referred to as having wandered mischievously," they then "smashed it with a two-by-four wood piece, breaking several bones in his hands and fingers.[6] There is some question whether his hand ever will heal properly."[7] After the beating, Tammed was left on the road.[8] Tammed was charged with and convicted of the assault on the high school student, and during his sentencing, counsel for Tammed argued that the beating should have been considered a mitigating factor when imposing the sentence. The presentence report indicated that members of the victim's family had agreed

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[1] In tribute to my friend Jon M. Van Dyke, and in recognition of his remarkable career of teaching and scholarship throughout the Pacific.

[2] Justice, Supreme Court of Guam. The author wishes to thank Ms. Sherry Broder and the William S. Richardson School of Law, University of Hawai'i at Mānoa, for inviting him to participate in this Symposium.

[3] Tammed v. FSM, 4 FSM Intrm. 266, 269 (App. 1990); *see also* Edward C. King, *Custom and Constitutionalism in the Federated States of Micronesia*, 3 ASIAN-PAC. L. & POL'Y J., no. 2, 2002 at 249, 267; Brian Z. Tamanaha, *A Battle Between Law and Society in Micronesia: An Example of Originalism Gone Awry*, 21 PAC. RIM L. & POL'Y J. 295, 317 (2012).

[4] *Tammed*, 4 FSM Intrm. at 269.

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

with Tammed's father "that in a traditional tribunal, the case would be dismissed on the ground that justice was already achieved by the beating of Tammed,"[9] and counsel for the government "essentially agreed that Tammed's beating was 'traditionally sanctioned.'"[10] The court declined to consider the beating as a mitigating factor, stating: "If I did that people would take the law into their own hands in all the other cases before me."[11]

On appeal, the FSM Supreme Court vacated the sentence and remanded the case for resentencing after determining that the trial court erred in refusing to give mitigating effect to Tammed's beating.[12] The Supreme Court stated:

> The [FSM] Constitution and the National Criminal Code both send clear signals to this Court that when a customary law or practice is raised, we are required to proceed with great care. The court must seek to assess the precise nature and implications of the practice and to arrive at a solution that does not pose unnecessary conflicts between custom and the FSM Constitution or statutes.[13]

In the FSM, custom and tradition, sometimes referred to as customary law,[14] are as important to the FSM citizens as the FSM Constitution and the

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[9] *Id.* at 270.

[10] *Id.*

[11] *Id.* at 271.

[12] *Id.* at 276.

[13] *Id.* at 278.

[14] The author recognizes that the phrase "customary law" may be considered a term of art, and that using it requires caution and not a cavalier approach. As one scholar stated:

> The question of how one should distinguish between "custom" and "customary law" is not easily resolved. Debate exists as to whether customs that are observed, but to which no penalty is attached, should be considered to be law in the same way as those customs which have penalties for breaches.

Tess Newton Cain, *Convergence or Clash? The Recognition of Customary Law and Practice in Sentencing Decisions of the Courts of the Pacific Island Region*, 2 MELB. J. INT'L L. 48, 49 n.3 (2001).

Others scholars offer straightforward definitions: "Indigenous customary law refers to the 'body of rules, values and traditions accepted in traditional . . . societies as establishing standards and procedures to be followed and upheld.'" Meghana RaoRane, *Aiming Straight: The Use of Indigenous Customary Law to Protect Traditional Cultural Expressions*, 15 PAC. RIM L. & POL'Y J. 827, 845 (2006) (quoting Sarah Pritchard, *The Significance of International Law*, *in* INDIGENOUS PEOPLES, AND THE UNITED NATIONS AND HUMAN RIGHTS 2, 14 (Sarah Pritchard ed., 1998)). RaoRane goes on to state that "[i]ndigenous customary law is so entwined with the way of life of indigenous peoples, and is such an integral part of their culture, that it has, independent of the customs it governs, been claimed to be deserving of protection as an element of the culture." *Id.* at 845 (citing S. James Anaya, *International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State*, 21 ARIZ. J. INT'L & COMP. L. 13, 49 (2004)).

FSM Code. "Customary law is not placed in an exalted or overriding posture under the Constitution and statutes of the [FSM], but neither is it relegated to its previous inferior status."[15]

The same cannot be said of the role of customary law in other Pacific island nations. In jurisdictions that have been afforded some degree of political self-determination, customary law is utilized alongside other sources. But in others, customary law is largely marginalized. This article will examine three Pacific island jurisdictions—the FSM, the Commonwealth of the Northern Marianas Islands ("CNMI"), and Guam—each having a different relationship to the United States, to determine the role that custom and tradition may or may not play in judicial decision making. Judges in the FSM and CNMI struggle to apply customary law, but they continue to recognize its importance. In Guam, by contrast, customary law is neither incorporated into existing law, nor have leaders attempted to enshrine customary law in proposed constitutions or the proposed Commonwealth Act of Guam. This article will argue that, as Guam's leaders continue to push for self-determination, we can learn from the experience of our Pacific neighbors. The judiciary should be empowered to consider custom and tradition, which can further justice without undermining the written law.

II. THE HISTORIC USE OF CUSTOMARY LAW IN THE TRUST TERRITORY OF THE PACIFIC ISLANDS

The islands of Micronesia, formerly known as the Trust Territory of the Pacific Islands ("TTPI"), consist of "2,000 small islands . . . [that] span an ocean area roughly the size of the continental United States."[16] The islands have been controlled by Spain, Germany, and Japan, and after World War II,[17] by the United States pursuant to a United Nations Trusteeship Agreement.[18] "[A]s the administering authority" the United States had "full powers of administration, legislation, and jurisdiction" over the TTPI.[19]

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[15] FSM v. Mudong, 1 FSM Intrm. 135, 139 (Pon. 1982).

[16] ARNOLD H. LEIBOWITZ, DEFINING STATUS: A COMPREHENSIVE ANALYSIS OF UNITED STATES TERRITORIAL RELATIONS 482 (1989).

[17] *Id.* at 481.

[18] Trusteeship Agreement for the Former Japanese Mandated Islands, Approved by the Security Council on April 2, 1947, *entered into force* July 18, 1947, 61 Stat. 397, T.I.A.S. No. 1665, 8 U.N.T.S. 189 [hereinafter Trusteeship Agreement]; *see generally* King, *supra* note 3.

[19] Trusteeship Agreement, *supra* note 18, arts. 2, 3.

The Trusteeship Agreement also imposed obligations upon the United States, including the duties to "promote the development of the inhabitants of the trust territory toward self-government or independence as may be appropriate to the particular circumstances of the trust territory and its peoples"[20] and to "develop their participation in government."[21] Significantly, the Trusteeship Agreement required that the United States "give due recognition to the customs of the inhabitants in providing a system of law for the territory."[22] This recognition was also mandated in the Trust Territory Code ("TTC"): "§ 14. Local Custom. Due recognition shall be given to local customs in providing a system of law, and nothing in this chapter shall be construed to limit or invalidate any part of the existing customary law, except as otherwise provided by law."[23]

But other provisions of the Trusteeship Agreement made clear that customary law was subordinate. Section 20 of the TTC sets forth the applicable laws in the TTPI: the laws of the United States (including the executive orders of the President and orders of the Secretary of the Interior), the laws of the TTPI, district orders promulgated by district administrators, and acts of legislative bodies convened under charter from the High Commissioner. All of these laws took precedence over customary laws.[24] Moreover, TTC § 21 stated:

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[20] *Id.* art. 6.

[21] *Id.*

[22] *Id.*

[23] TTC § 14 (1966) (as amended by Public Law 2-15 Sept. 2, 1966). The author cites to the 1966 TTPI Code, as this is the version available to him. The first TTPI Code was promulgated on December 22, 1952 by High Commissioner Elbert D. Thomas, pursuant to Executive Order No. 32. *See* Foreword to the 1966 Trust Territory Code. The 1952 code was revised and reissued on December 31, 1959 by High Commissioner D.H. Nucker. *Id.* The code was again revised pursuant to Public Law 1-3, enacted by the Congress of Micronesia, which resulted in the 1966 Trust Territory Code. *Id.* "Much of this first code remains [in the 1966 version]." *Id.*

[24] TTC § 20 (1966) (as amended by Public Law 2-15 Sept. 2, 1966). *See supra* text accompanying note 23 (explaining the history of the Trust Territory Code versions). Although not indicated in the statute, the courts of the Trust Territory concluded that even determinations of the previous Japanese administration took precedence over custom and tradition.

In Ngiruhelbad v. Merii, 2 T.T.R. 631 (App. Div. 1961), the Appellate Division of the High Court addressed whether the Palauan custom regarding land ownership had been superseded by administrative regulations in effect during the Japanese administration. *Id.* The court concluded that where "customary law" has been raised, it is not the sole criterion for deciding a case. The court acknowledged individual land ownership "was a foreign concept that had no place originally in Palauan customary land law." *Id.* at 634. The court further acknowledged this foreign concept "was a departure from Palauan custom" and concluded "that the very purpose of introducing the concept of individual land ownership, and registration provisions implementing the concept, were to get away from the

> The customs of the inhabitants of the Trust Territory not in conflict with the laws of the Trust Territory or the laws of the United States in effect in the Trust Territory shall be preserved. The recognized customary law of the various parts of the Trust Territory shall have the full force and effect of law, *so far as such customary law is not in conflict with the laws mentioned in Section 20.*[25]

Accordingly, courts during the Trusteeship rarely gave credence to custom and tradition. In *Lazarus v. Tomijwa*,[26] the trial court determined that the "very nature of administration" under the Trusteeship Agreement "requires that the customary law shall be subject to change by the administering authority."[27] In *Trust Territory v. Lino*,[28] the court held that no custom could nullify the plain purpose and meaning of a statute, even if the victim had forgiven the accused and, pursuant to local custom, did not wish to see the accused punished. In many cases, court decisions gave no deference to custom and tradition.

After nearly forty years, the Trusteeship ended when the islands of the TTPI—the Northern Mariana Islands,[29] the Marshall Islands,[30] the former

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complications and limitations of the matrilineal clan and the lineage system." *Id.* at 637. In Lazarus v. Tomijwa, 1 T.T.R. 123 (Trial Div. 1954), another land ownership case, the trial court agreed that the determination of the Japanese administration regarding a land dispute "was a distinct departure from Marshallese custom," but nonetheless "entirely disagree[d] with the argument that Marshallese custom can control over the clearly expressed and firmly maintained determinations of the Japanese administration." *Id.* at 127. The court relied on TTC § 21, stating that this provision "only gives effect to the customary law of the various parts of the Trust Territory 'so far as such customary law is not in conflict with the laws mentioned in Section 20.'" *Id.* The court's direct quotation of §§ 20 and 21 reveal that these provisions addressing custom were in existence in the first version of the Trust Territory Code promulgated in 1952. *See supra* note 23.

[25] TTC § 21 (1966) (emphasis added).

[26] 1 T.T.R. 123.

[27] *Id.* at 127.

[28] 6 T.T.R. 7 (1972).

[29] On February 15, 1975, the United States and the Marianas Political Status Commission concluded a Covenant to establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States. Proclamation No. 5564, 3 C.F.R. 146 (1986) [hereinafter Proclamation 5564]. This Covenant was approved by the Congress in Public Law 94-241 on March 24, 1976, 90 Stat. 263. Although many sections of the Covenant became effective in 1976 and 1978, certain sections did not enter into force until the 1986 Presidential Proclamation. *Id.*

[30] On June 25, 1983, the United States and the government of the Marshall Islands concluded a Compact of Free Association, establishing a relationship of free association between the two governments. Proclamation 5564. In the Marshall Islands, the Compact has been approved by the government in accordance with its constitutional processes, and in a United Nations-observed plebiscite on September 7, 1983, a sovereign act of self-determination. In the United States, the Compacts were approved in Public Law 99-239 on

Japanese Mandated Micronesian islands, and Palau[31]—entered into new relationships with the United States. In the process of developing constitutions and governing law, the new nations recognized the role of customary law.

III. FEDERATED STATES OF MICRONESIA

The Compact of Free Association ("Compact"),[32] which made true self-government possible, was approved by the FSM citizens during a plebiscite election held in 1983, and resulted in the FSM, consisting of the states of Chuuk (Truk), Kosrae (Kusiae), Pohnpei (Ponape), and Yap. The FSM Constitution, which had already been ratified during the Trusteeship, specifically recognizes traditional rights and contains the Judicial Guidance Clause.[33] The FSM Code similarly incorporates custom.[34]

January 14, 1986, 99 Stat. 1770. *Id.*

[31] On January 10, 1986, the United States and the government of the Republic of Palau concluded a Compact of Free Association, establishing a similar relationship of Free Association between the two governments. Proclamation 5564. On October 16, 1986, the Congress of the United States approved the Compact of Free Association with the Republic of Palau. *Id.* The Compact was approved by plebiscite on August 26, 1982. *See* Kevin Bennardo, *The Rights and Liberties of the Palau Constitution*, 12:2 ASIAN-PAC. L & POL'Y J. 1, 7 (2011).

[32] Compact of Free Association Act of 1985, Pub. L. No. 99-239, 99 Stat. 1770 (1986), amended Dec. 17, 2003, Compact of Free Association Amendments Act of 2003, Pub. L. No. 108-188, 117 Stat. 2720 (2003).

[33] Article 5 of the FSM Constitution, entitled "Traditional Rights," states:

> Section 1. Nothing in this Constitution takes away a role or function of a traditional leader as recognized by custom and tradition, or prevents a traditional leader from being recognized, honored, and given formal or functional roles at any level of government as may be prescribed by this Constitution or by statute.
>
> Section 2. The traditions of the people of the Federated States of Micronesia may be protected by statute. If challenged as violative of Article IV, protection of Micronesian tradition shall be considered a compelling social purpose warranting such governmental action.
>
> Section 3. The Congress may establish, when needed, a Chamber of Chiefs consisting of traditional leaders from each state having such leaders, and of elected representatives from states having no traditional leaders. The constitution of a state having traditional leaders may provide for an active, functional role for them.

FED. ST. MICR. CONST. art. V. The Judicial Guidance Clause is found in article 11, section 11 of the FSM Constitution.

[34] *See* 1 FSMC § 202, formerly TTC § 21 (1966), which states:

> § 202. Local customs; Customary law.
>
> The customs of the inhabitants of the Trust Territory not in conflict with the laws of the Trust Territory or the laws of the United States in effect in the Trust Territory shall be preserved. The recognized customary law of the various parts of the Trust Territory, in matters in which it is applicable, as determined by the courts, shall have

Additionally, even with a new status as a self-governing nation, a constitution with the Judicial Guidance Clause, and statutes directly on point regarding use of custom, courts in the newly formed FSM continued to struggle with the role of custom and tradition in decision making.

In *FSM v. Mudong*,[35] the FSM Supreme Court considered two separate criminal prosecutions for assault with a deadly weapon, where both defendants had sought dismissal because the cases had been resolved through customary settlement. The Ponape State Attorney General's Office had refused to dismiss the case and opposed dismissal.[36] The *Mudong*

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the full force and effect of law so far as such customary law is not in conflict with the laws mentioned in section 201 of this chapter.

Section 114 of Title 1 of the FSM Code states: "Local customs. Due recognition shall be given to local customs in providing a system of law, and *nothing in this chapter shall be construed to limit or invalidate any part of the existing customary law*, except as otherwise provided by law." This provision was derived from section 14 of the Trust Territory Code. *See* TTC § 14 (1966) (emphasis added).

There are also statutes that specifically require consideration of custom in certain family law proceedings and in criminal cases. For example, custom is addressed in annulment, divorce, or adoption proceedings through 6 FSMC § 1614, which states:

§ 1614. Proceedings in annulment, divorce, or adoption-Local custom recognized.

Nothing contained in this chapter, except for the provisions of section 1615 of this chapter, shall apply to any annulment, divorce, or adoption *effected in accordance with local custom*, nor shall any restrictions or limitations be imposed upon the granting of annulments, divorces, or adoptions *in accordance with local custom*.

6 FSMC § 1614 (emphasis added). Custom must also be considered in criminal prosecutions, *see* 11 FSMC § 108, and specifically in sentencing proceedings, *see* 11 FSMC § 1203. Section 108 states:

§ 108. Customary law.

(1) Generally accepted customs prevailing within the Federated States of Micronesia relating to crimes and criminal liability shall be recognized and considered by the national courts. Where conflicting customs are both relevant, the court shall determine the weight to be accorded to each.

(2) Unless otherwise made applicable or given legal effect by statute, the applicability and effect of customary law in a criminal case arising under this act shall be determined by the court of jurisdiction in such criminal case.

(3) The party asserting applicability of customary law has the burden of proving by a preponderance of the evidence the existence, relevance, applicability, and customary effect of such customary law.

11 FSMC § 108. This provision was originally enacted in the National Criminal Code through Public Law 1-134, and although repealed and reenacted through the Revised Criminal Code Act, Public Law 11-72, the language remained identical. Further, 11 FSMC § 1203 provides: "In determining the sentence to be imposed, the court shall apply subsection (6) of section 1202 wherever appropriate, and shall otherwise give due recognition to the generally accepted customs prevailing in the Federated States of Micronesia." 11 FSMC § 1203.

[35] 1 FSM Intrm. 135 (Pon. 1982).

[36] *Id.* at 139.

court acknowledged that section 108 of the National Criminal Code "holds out the possibility that, in appropriate circumstances, unwritten customary law may assume importance equal to, or greater than, particular written provisions in the National Criminal Code," but nevertheless concluded that "customary settlements should not be seen as requiring court dismissal of criminal proceedings."[37] The court relied on the principle of prosecutorial discretion and noted that although custom could be considered in deciding whether to initiate a case, it could not be the basis for dismissal of an existing case.[38] Chief Justice King admitted he could have dismissed the case "in deference to the customary settlements, despite lack of any showing that customary law requires dismissal," but that doing so "would [have] violate[d] the principle that neither the customary system nor the constitutional court system should control the other."[39] The court ultimately denied the motions to dismiss and concluded that customary law was more properly considered during sentencing.[40] Yet, even when customary law is applied, FSM courts struggle to define its boundaries. Chief Justice King, who wrote the *Tammed* decision described in the introduction of this piece, later gave a thorough and thought-provoking account describing the appellate panel's process in this case.[41] It is clear that the justices struggled with the definition of "customary":

> What in fact is a customary punishment? What makes it "customary," as opposed to a simple beating? When, under custom, is it appropriate to invoke a physical punishment? How is it decided? . . . [S]hould a court increase its sentence in response to a customary beating, in order to show respect for the customary judgment that the crime was sufficiently serious to require a customary response?[42]

There is no easy answer to these questions, and his solution was to adopt a case-by-case analysis.[43] This approach permits judges the flexibility to adapt to the ever-changing interplay of customary and written law.

IV. COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

The CNMI is a semi-autonomous Commonwealth under the sovereignty of the United States.[44] Saipan, Tinian, and Rota are its principal islands.[45]

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[37] *Id.* at 139-40.
[38] *Id.* at 141.
[39] *Id.* at 146.
[40] *Id.* at 148.
[41] King, *supra* note 3, at 267-81.
[42] *Id.* at 279-80.
[43] *Id.* at 281.
[44] Elizabeth Barrett Ristroph, *The Survival of Customary Law in the Northern Mariana*

About twenty percent of the total population are Chamorro,[46] descendants of the original inhabitants who arrived on the islands between 3,500 to 4,000 years ago.[47] A smaller number are Carolinians,[48] descendants of people who migrated from the neighboring East and West Carolinian islands and established permanent settlements.[49] "With them they brought and were able to maintain for a while 'much of their old social organization, customs and language.'"[50]

Like the FSM, the Northern Mariana Islands were a district within the TTPI.[51] In a 1975 plebiscite, the citizens voted for status as a U.S. commonwealth.[52] "Some aspects of the commonwealth status were implemented in 1976, and the full commonwealth became effective upon the dissolution of the trust territory for the Marianas by the U.S. government in 1986."[53] The CNMI is generally subject to U.S. federal law and the U.S. Constitution, with some exceptions.[54] In 1984, the CNMI enacted a statutory code,[55] which "contains some specific provisions for applying traditional customary law, primarily with respect to inheritance matters and the distribution of land."[56]

Section 3401 of Title 7 of the Commonwealth Code provides:

> In all proceedings, the rules of the common law, as expressed in the restatements of the law approved by the American Law Institute and, to the extent not so expressed as generally understood and applied in the United States, shall be the rules of decision in the courts of the Commonwealth, in the absence of written law or local customary law to the contrary; provided,

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Islands, 8 CHI.-KENT J. INT'L & COMP. L. 32, 34-35 (2008).

[45] *Northern Mariana Islands*, ENCYCLOPÆDIA BRITANNICA ONLINE, http://www.britannica.com/EBchecked/topic/419782/Northern-Mariana-Islands (last visited Feb. 28, 2013) [hereinafter *Northern Marianas Islands*].

[46] *Id.*

[47] Ristroph, *supra* note 44, at 33 (citing SCOTT RUSSELL, TIEMPON I MANMOFO'NA: ANCIENT CHAMORRO CULTURE AND HISTORY OF THE NORTHERN MARIANA ISLANDS 78 (1998)).

[48] *Northern Mariana Islands*, *supra* note 45.

[49] Ristroph, *supra* note 44, at 34.

[50] In re Estate of Rangamar, No. 92-029, 1993 WL 614806, at *3 (N. Mar. I. Dec. 15, 1993) (quoting Richard G. Emerick, *Land Tenure in the Marianas, in* OFFICE OF THE HIGH COMMISSIONER, TRUST TERRITORY OF THE PACIFIC ISLANDS, 1 LAND TENURE PATTERNS: TRUST TERRITORY OF THE PACIFIC ISLANDS IV (1958)).

[51] *Northern Mariana Islands*, *supra* note 45.

[52] *Id.*; *see also* discussion *supra* note 29.

[53] *Northern Marianas Islands*, *supra* note 45; *see also* discussion *supra* note 29.

[54] Ristroph, *supra* note 44, at 35.

[55] *Id.* at n.20.

[56] Ristroph, *supra* note 44, at 35 & n.21.

> that no person shall be subject to criminal prosecution except under the written law of the Commonwealth.[57]

The CNMI Supreme Court has explained the hierarchy established by section 3401 as follows:

> At the top of the hierarchy is "written law," which "includes the NMI Constitution and NMI statutes, case law, court rules, legislative rules and administrative rules, as well as the Covenant and provisions of the U.S. Constitution, laws and treaties applicable under the Covenant," and "local customary law." If there is no controlling written law or local customary law, the "restatements of the law approved by the American Law Institute" control. The Restatements control regardless of whether the relevant Restatement provision accords with United States common law. Finally, if there is no written, customary, or Restatement law on point, "the common law . . . as generally understood and applied in the United States" governs.[58]

Specific instances in which the Commonwealth Code prescribes the consideration of customary law include: adoption proceedings;[59] intestate succession;[60] and criminal sentencing.[61] For example, courts in the CNMI have repeatedly looked to traditional law when determining inheritance rights. Most recently, the court in *In re Estate of Malite*[62] looked to traditional Carolinian adoption custom to determine whether a man raised from a young age by the deceased was entitled to inherit. The court discussed eight separate factors characterizing traditional *mwei mwei* adoption.[63] It chose to uphold the trial court's determination that there had been a *mwei mwei* adoption, even absent express evidence of a conversation between the biological and adoptive parents regarding the adoption.[64] The

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[57] 7 CMC § 3401 (June 30, 2012 update).

[58] In re Buckingham, 2012 MP 15 ¶ 12 (citations omitted).

[59] *See generally* 8 CMC §§1104, 1105 (June 30, 2012 update); *see also* In re Estate of Malite, 2011 MP 4 (discussing elements of traditional Carolinian custom of *mwei mwei* adoption).

[60] *See* 8 CMC § 2902 (June 30, 2012 update) (intestate succession for "Ancestors' Land" according to Chamorro custom); 8 CMC § 2904 (June 30, 2012 update) (intestate succession for "Family Land" according to Carolinian custom); *Rangamar*, 1993 WL 614806, at *3-*5 (discussing traditional Carolinian land tenure pattern of passing property from mother to daughter, where family land is not divided when members of a lineage die, but rather is collectively owned and controlled by females).

[61] 6 CMC § 4103 (June 30, 2012 update) ("In imposing or suspending sentences in accordance with this title, due consideration shall be given to the local customs of the people of the Commonwealth in so far as a custom may provide mitigating or aggravating factors.").

[62] 2011 MP 4.

[63] *Id.* ¶¶ 20-26.

[64] *Id.* ¶¶ 27-30.

opposing party cautioned that upholding the adoption under such circumstances would encourage fraudulent claims.[65] The court disagreed, stating that it "strive[s] to preserve and protect local culture and customs and [that it is] confident today's ruling will not undermine these priorities."[66]

As in *Malite*, CNMI courts have consistently looked to customary law before considering the Restatements of the Law or general principles of U.S. common law,[67] but have been careful to apply local customs only where the circumstances warrant such application.[68] One source of this caution is the fact that "the relative number of people actually practicing the culture has been dwindling dramatically for some time[.]"[69] As a result,

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[65] *Id.* ¶ 29.

[66] *Id.*

[67] *See, e.g.*, August Healthcare Grp., LLC v. Manglona, No. 1:12-CV-00008, 2012 WL 4901250, at *5 (D. N. Mar. I. Oct. 12, 2012) (finding no specific law, statute, or custom in the CNMI governing covenants not to compete, the court looked to Restatement (Second) of Contracts); Manglona v. Baza, 2012 MP 4 ¶ 33 (finding that CNMI does not have written or customary law defining what constitutes adequate demand for rent, the court looked to Restatement (Second) of Property); In re Estate of Kaipat, 2010 MP 17 ¶¶ 12-13 (finding no Carolinian custom addressing how an estate should be distributed when natural parents' intent is unknown and remaining heirs disagree, the court turned to U.S. common law).

[68] *See, e.g., Kaipat*, 2010 MP 17 ¶ 12 ("While preserving local customs is vital, there is simply no applicable Carolinan custom in this case. Recognizing this fact and looking to other jurisdictions for guidance does not undermine local custom, but respects it by refusing to bend custom to achieve ends for which it was not intended. While custom requires that we respect a decedent's intent when ascertainable, it does not endorse denying the inheritance rights of natural children when a parent's intent is unknown."); *Rangamar*, 1993 WL 614806, at *5 ("We now hold that where the history of the land in an estate, to which the probate code is inapplicable, or the activities of the heirs in relation to the land, are consistent with Carolinian land custom, that custom should be applied and the female heirs will hold title. Otherwise, where the land is not family land or the females consented to treatment inconsistent with Carolinian land custom, the court may allow the division of the property among individual male and female heirs.").

See also Ristroph, *supra* note 44, at 63 & n.186 (the footnote discusses In re Estate of Vicente Camacho, No. 05-00251 (N.M.I. Super. Ct. Feb. 7, 2007), which concerned the son of a decedent who had incurred upon himself the decedent's funeral expenses. The claimant had taken the family's *chenchule*—the donations made to the family under the Chamorro custom for defraying funeral expenses—which exceeded the value of the funeral expenses. *Id.* slip op. at 1. Claimant then sought reimbursement from the estate for the funeral expenses on the grounds that he was saving the *chenchule* to return to the various donors at their funerals, arguing that this was in line with Chamorro custom. *Id.* slip op. at 2. Relying on his own knowledge of the custom of *chenchule*, the judge determined that the purpose of the custom was to defray funeral expenses incurred by the donee family, not to serve as the source of donations for other funerals. *Id.* The court granted the claimant an opportunity to produce expert testimony to support his claim, but he did not do so. *Id.*).

[69] Ristroph, *supra* note 44, at 63.

some worry, customary law could erroneously be used as a "trump card in a dispute about rights to proceeds from land belonging to a distant ancestor, or when a culture is so far removed from its ancestral origins that no one really knows the customary law."[70] Another concern is that "[i]n attempting to discern the customary law, courts are left to sort out the truth from dubious expert testimonies and an extremely limited source of written anthropological evidence."[71] "Sorting out the traditional customs of the [CNMI] is not likely to get . . . easier as the culture [and composition of the CNMI] continue[] to change."[72]

V. GUAM

Unlike its neighbors, Guam has been a United States territory for over a century. The landing of Ferdinand Magellan in 1521 marked the beginning of the Spanish rule over Guam, which ended nearly four centuries later upon the signing of the Treaty of Paris in 1898.[73] From that point onward, Guam has been a possession of the United States, except for the brief Japanese occupation during World War II.[74] Under early U.S. control, Guam's political status was "anomalous, with a military governor holding all legislative, executive and judicial authority over the island."[75] Guam remains "an unincorporated territory of the United States"[76] to this day, albeit with more authority to self-govern.[77] The citizens of the island now elect a civilian governor and lieutenant governor every four years,[78] and fifteen senators of the Guam Legislature every two years.[79] The citizens also elect a non-voting delegate to the U.S. House of Representatives.[80]

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[70] *Id.* (footnote omitted).

[71] *Id.*

[72] *Id.* at 64.

[73] *See* In Re: Request of Governor Felix P. Camacho Relative to the Interpretation and Application of Sections 6 and 9 of the Organic Act of Guam, 2004 Guam 10 ¶ 19, and sources cited therein.

[74] *See id.* ¶ 19.

[75] LEIBOWITZ, *supra* note 16, at 313 (quoting 25 Op. Atty. Gen. 292 (1904)).

[76] 48 U.S.C. § 1421a (2006); *see also* Jon M. Van Dyke, *The Evolving Legal Relationships Between The United States and its Affiliated U.S.-Flag Islands*, 14 U. HAW. L. REV. 445, 449-50 (1992) ("Guam is an 'organized' territory because it is subject to the terms of the Guam Organic Act of 1950. Guam remains 'unincorporated' because Congress has not taken steps to incorporate it." *Id.* at 450 (footnotes omitted)).

[77] LEIBOWITZ, *supra* note 16, at 313 (quoting 25 Op. Atty. Gen. 292 (1904)).

[78] 48 U.S.C. § 1422 (2006).

[79] 48 U.S.C. § 1423(d) (2006).

[80] 48 U.S.C. § 1711 (2006) ("The territory of Guam . . . shall be represented in the United States Congress by a nonvoting Delegate to the House of Representatives, elected as hereinafter provided.").

What is obviously lacking is a written document of self-governance; Guam has only an act of U.S. Congress, the Organic Act of Guam, serving as the functional equivalent of a constitution.[81]

Unlike the FSM Constitution and the CNMI Code, Guam law does not mandate the consideration of local custom or tradition in judicial decision making. It may be tempting to presume that the lack of such recognition is due to the absence in Guam of a truly self-governing constitution (or for that matter, a covenant or a compact).

At the same time, Guam's road to self-determination reveals that there has not been any official attempt to require the courts to consider custom and tradition in decision making. Neither of Guam's two proposed constitutions, nor its proposed Commonwealth Act of Guam contain any reference to the role of custom and tradition in judicial decision making.[82]

The first constitutional convention of Guam took place from 1969-1970.[83] The delegates met nearly every week, and several public hearings were held throughout the island. The final product of the convention was a proposed constitution that was modeled after, and served primarily as an updated version of, the Organic Act of Guam.[84]

The second constitutional convention held its first meeting on May 4, 1977.[85] The delegates held public hearings in each village and at the Guam

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[81] Organic Act of Guam, Pub. L. No. 112-207, 64 Stat. 384 (1950) (codified as amended at 48 U.S.C. § 1421 *et seq.* (2006)). *See* People v. Perez, 1999 Guam 2 ¶ 15 ("Until Guam creates its own Constitution, the Organic Act of Guam is the equivalent of Guam's Constitution."); Haeuser v. Dep't of Law, 97 F.3d 1152, 1156 (9th Cir. 1996) ("The Organic Act serves the function of a constitution for Guam.").

[82] The first proposed constitution is memorialized in the 1969-70 convention proceedings. PROCEEDINGS OF THE FIRST CONSTITUTIONAL CONVENTION OF GUAM, 1969-1970, at 637-90 (1971). The proposed constitution from the 1977 convention contained one provision, Article XI, Section 1, that specifically addressed the preservation of Chamorro culture and language:

> No law shall be passed abridging the development of the Chamorro culture, language, traditions, or customs. Places of significance to the culture, tradition, and history of the Chamorro people shall be preserved as provided by law. Study of Chamorro culture, including language, traditions, history and art, shall be an integral part of the public educational system established under article VIII of this constitution. A commission shall be established by law to study and promote the perpetuation of Chamorro culture and traditions.

PROCEEDINGS OF THE GUAM CONSTITUTIONAL CONVENTION, 1977, at 1373 (1979). Although this provision is laudable, as it recognizes the need to preserve Chamorro custom, it cannot compare to the unequivocal language found in the FSM Constitution that requires consideration of local custom and tradition in making judicial decisions.

[83] PROCEEDINGS OF THE FIRST CONSTITUTIONAL CONVENTION OF GUAM, 1969-1970 (1971).

[84] *Id.* at 637-90.

[85] PROCEEDINGS OF THE GUAM CONSTITUTIONAL CONVENTION, 1977, at 27 (1979).

Legislature.[86] They also met with students from the island's public and Catholic high schools, as well as the students and faculty at the University of Guam.[87] The proposed constitution was a marked departure from the Organic Act of Guam, but again, it did not contain any reference to the consideration of custom and tradition. The convention concluded with its final meeting on December 15, 1977, with all thirty-two delegates signing the proposed constitution.[88]

Neither the 1970 constitution nor the 1977 constitution was adopted by a majority of Guam voters. The people of Guam continued to pursue greater self-government and reframe the island's relationship with the United States. Guam's leaders turned next to the Commonwealth Act of Guam, which was introduced in Congress three separate times.[89] Like the proposed constitutions, this legislation did not contain any references to custom and tradition and did not effect change in Guam's relationship with the United States.

Why is it that Guam's leaders did not seek to incorporate custom into the push for self-determination? There is some evidence that custom and tradition may play a lesser role in Guam's legal framework. The elected local leadership has not enacted legislation regarding the consideration of custom and tradition in decision making. There is no reference in the Guam Code Annotated regarding the use of custom, tradition, or customary law.

At the same time, the judicial branch has recognized that tradition has a role to play. A Supreme Court of Guam opinion stated:

> And while we will not disturb precedent that is "well supported in law and well-reasoned," we clearly are within our authority to modify those interpretations previously addressed by federal courts. When choosing to make such changes, we will use our own independent and reasoned analysis of the issues before us. Moreover, based on our familiarity with these matters, we will give consideration to local law and *customs*, if applicable, and provide for their proper effect.[90]

While possibly only a passing reference, it perhaps suggests that the recognition of local customs will be effectuated in the courts. At least one

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[86] *Id.* at 1299-1332.

[87] *Id.* at 1299.

[88] *Id.* at 1377.

[89] H.R. 1521 was introduced in the 103rd Congress on March 29, 1993; H.R. 1056 was introduced in the 104th Congress on February 24, 1995, and H.R. 100 was introduced in the 105th Congress on January 7, 1997.

[90] Sumitomo Const. Co., Ltd. v. Zhong Ye, Inc., 1997 Guam 8 ¶ 6 (emphasis added) (citation omitted).

example is seen in the Judiciary of Guam's support of the *Inafa' Maolek* mediation and conflict resolution organization.[91]

There is no clear or easy answer as to why the leaders of Guam have not sought to officially recognize the role of custom and tradition in their previous attempts to draft a constitution or commonwealth act. It is clear from the history of the TTPI, though, that unless and until the written law acknowledges its importance, customary law will continue to be subordinate. Unless Guam follows the lead of the CNMI and FSM to seek such recognition through a constitution or commonwealth act, customary law will have a limited place in Guam's judicial system. As the CNMI and FSM's experience indicates, with constitutional and statutory support customary law can be truly effective in the judicial decision-making process and the courts can appropriately balance the guidance of customary law with that derived from written sources. After all, these two bodies of law are innately Jon'd at the hip.

[91] The literal translation of *inafa' maolek* is "to make good" or "to make right," and the Chamorro concept of *inafa' maolek* is to restore harmony and good order. *See Inafa'maolek: Striving for Harmony,* GUAMPEDIA ONLINE ENCYCLOPEDIA, http://guampedia.com/inafamaolek/ (last visited Mar. 1, 2013). This concept of restoring harmony espouses Chamorro traditional values and the *Inafa' Maolek* restorative justice program provides a new venue for "restoring order."

The Inter-American Human Rights Law of Indigenous Peoples

Dinah Shelton*

> The relationship of an indigenous community with its land must be recognized and understood as the fundamental basis of its culture, spiritual life, integrity and economic survival. For such peoples their communal nexus with the ancestral territory is not merely a matter of possession and production, but rather consists in material and spiritual elements that must be fully integrated and enjoyed by the community, so that it may preserve its cultural legacy and pass it on to the future generation.[1]

I. INTRODUCTION

Over 40 million[2] of the estimated 370 million indigenous people in the world[3] are located in member countries of the Organization of American States ("OAS"),[4] where over 400 indigenous groups[5] inhabit highly

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[1] Moiwana Cmty. v. Suriname, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (sec. C) No. 124, ¶ 131 (June 15, 2005).

[2] In 2000, the Inter-American Commission on Human Rights ("IACHR") estimated the number of indigenous people in the Americas at over forty million. Carlos M. Ayala Corao, *Situation of the Human Rights of Indigenous Persons and Peoples in the Americas*, INTER. AM. COMM'N. H.R. (Oct. 20, 2000), http://www.cidh.org/indigenas/intro.htm [hereinafter *Situation of the Indigenous People Introduction*].

[3] *Putting Rights into Practice: Addressing the Rights of Indigenous Peoples*, UNITED NATIONS POPULATION FUND, http://www.unfpa.org/rights/people.htm (last visited June 28, 2013) [hereinafter UNPFA].

[4] All thirty-five independent countries of the Western Hemisphere are members of the OAS. *See Member States*, ORGANIZATION OF AMERICAN STATES (2013), http://www.oas.org/en/member_states/default.asp.

vulnerable ecosystems rich in mineral, biological and water resources.[6] European colonization resulted in widespread dispossession of indigenous ancestral lands, but recent decades have witnessed renewed pressure on remaining traditional territories as outsiders have sought to extract or convert natural resources to supply growing global demands.[7] Once almost inaccessible indigenous territories have become major sources of hydroelectric power, minerals, hardwoods and pasture lands. Some indigenous regions are also being threatened or lost due to climate change.[8] The invasion of the outside world and the changes it has wrought have brought disease, exploitation, loss of language and culture, and in too many instances, complete annihilation of indigenous communities as distinct entities. Even now, some of the most marginalized and vulnerable people are losing their lands, their liberty, their identity and too often their lives.

Scholars and law-makers have puzzled over how to conceptualize the rights of indigenous peoples, given the history of colonization with its conflicts, removals, and genocides. An exclusive focus on equal individual rights and non-discrimination ignores the very real differences between indigenous peoples and others; many indigenous groups had pre-existing sovereignty and signed treaties to govern their external relations. Moreover, in contrast to other minorities, indigenous economies, cultures and religions are generally based on profound attachment to the land and territory. Various legal approaches have been tried, from assimilation, reflected in the first ILO Convention concerning Indigenous and Tribal Peoples,[9] to reservations, to occasional recognition of a semi-sovereign status and internal self-determination.

The international legal system, like many domestic systems, lacks coherence and full protection for indigenous rights. Most human rights treaties are individualistic in approach and do not mention indigenous peoples. The International Covenant on Civil and Political Rights

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[5] *Situation of the Indigenous People Introduction*, *supra* note 2.

[6] UNPFA, *supra* note 3.

[7] *See Environment*, UNITED NATIONS PERMANENT FORUM ON INDIGENOUS ISSUES, http://social.un.org/index/IndigenousPeoples/ThematicIssues/Environment.aspx (last visited June 28, 2013).

[8] *Id.*

[9] International Labour Organization, Indigenous and Tribal and Tribal Populations Convention, June 26, 1957, No. 107, 328 U.N.T.S. 247 [hereinafter ILO Convention No. 107]; ALEXANDRA XANTHAKI, INDIGENOUS RIGHTS AND UNITED NATIONS STANDARDS: SELF-DETERMINATION, CULTURE AND LAND 49 (2007). The Convention refers to "integration" in a manner suggesting assimilation. Significantly, however, ILO Convention No. 107 was the first binding instrument to include provisions on the rights of indigenous peoples to their lands. *See supra* ILO Convention No. 107, art. 11.

("ICCPR")[10] and the International Covenant on Economic, Social and Cultural Rights ("ICESCR")[11] guarantee collective or group rights only in respect to the family as "the natural and fundamental group unit of society,"[12] and in respect to colonial peoples,[13] and perhaps victims of the most extreme violations of the human rights of a particular group.[14] For other peoples, Article 27 of the ICCPR guarantees individual members of the group the right to enjoy their "own culture, to profess and to practice their own religion, or to use their own language,"[15] but the group as such is not protected. The claims of indigenous peoples to resources, territory, and governmental powers are not explicitly set forth in any of the general human rights treaties.[16] In a 2000 report on the rights of indigenous peoples, the Inter-American Commission found the law deficient, concluding that an "approach to the rights of indigenous peoples via the concepts of 'minorities' or 'prohibition on discrimination,' while the only mechanism in some cases, is incomplete and reductionist, and therefore inadequate . . . as it fails to recognize the nature and complexity of indigenous peoples."[17]

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[10] *See* International Covenant on Civil and Political Rights art. 23, Dec. 16, 1966, S. Treaty Doc. 95-20, 999 U.N.T.S. 171 [hereinafter ICCPR].

[11] International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

[12] *See* ICCPR, *supra* note 10, art. 23(1) ("The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."); ICESCR, *supra* note 11, art. 10 (providing that the greatest protection should be afforded to the family unit, as it is the "fundamental group unit of society").

[13] ICCPR, *supra* note 10, art. 1; ICESCR, *supra* note 11, art. 1 ("All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."). The collective right to self-determination set forth in common Article 1 of the U.N. Covenants is generally viewed as applicable only to colonial peoples. *But see* ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL *55-57* (1995) (asserting that under Article 1, indigenous people have the right to self determination which includes claims to resources, territory and power).

[14] See the extensive discussion of secession and self determination in Reference re Secession of Quebec, [1998] 2 S.C.R. 217 (Can.) and Gunme v. Cameroons, Comm. No. 266/2003 African Comm'n on Human Peoples' Rights, 45th Ordinary Sess. (May 27, 2009).

[15] *See* ICCPR, *supra* note 10, art. 27 (providing that minority groups shall not be impeded from practicing their religion, speaking their native language or taking part in the enjoyment of their culture).

[16] *See* Federico Lenzerini, *Sovereignty Revisited: International Law and Parallel Sovereignty of Indigenous Peoples*, 42 TEX. INT'L L.J. 155, 163-64 (2006) (noting that indigenous peoples often insist that they should be recognized as a state because of their claims to certain resources, territory and power).

[17] *Situation of Indigenous Peoples Introduction, supra* note 2.

Recent specialized legal instruments concluded large part as the result of litigation and lobbying efforts by indigenous peoples themselves, have advanced the recognition of indigenous rights. ILO Convention No. 169,[18] negotiated with the intent of replacing ILO Convention No. 107, includes references to "indigenous peoples" rather than "indigenous populations"[19] and recognizes the communal land rights of indigenous communities,[20] including natural resource rights.[21] Progressing even further than this Convention, the U.N. Declaration on the Rights of Indigenous Peoples[22] declares that "indigenous peoples have the right of self-determination" and states that "by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[23] Nonetheless, Article 46(1) insists on territorial integrity, with the result that the reference to self-determination is generally interpreted to limit indigenous peoples to the exercise of autonomy within existing states.[24]

At the regional level, Inter-American human rights bodies have developed a unique jurisprudence that gives prominence to the collective[25] and individual land and resource rights of indigenous peoples,[26] and a host

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[18] International Labour Organization, Indigenous and Tribal Peoples Convention, Sept. 5, 1991, No. 169, 28 I.L.M. 1382, [hereinafter ILO Convention No. 169].

[19] *Id.* art. 1.

[20] *Id.* art. 13.

[21] *Id.* art. 15.

[22] United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, Annex, U.N. Doc. A/RES/61/295 (Sept. 13, 2007), http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf [hereinafter UNDRIP].

[23] *Id.* art. 3.

[24] *See* XANTHAKI, *supra* note 9, at 30; Russell A. Miller, *Collective Discursive Democracy as the Indigenous Right to Self-Determination*, 31 AM. INDIAN L. REV. 341, 343 (2007). On the different degrees of self-determination, see Frederic Kirgis, *The Degrees of Self-Determination in the United States Era*, 88 AM. J. INT'L L. 304, 306 (1994).

[25] It is noteworthy that "in most of Europe two thousand years ago, lands were communal and were frequently reapportioned according to the changing needs of the community." Thomas T. Ankersen & Thomas K. Ruppert, *Defending The Polygon: The Emerging Human Right To Communal Property*, 59 OKLA. L. REV. 681, 690 (2006) (citing JOHN W. JEUDWINE, THE FOUNDATIONS OF SOCIETY AND THE LAND 32 (1975)). Some communal lands have persisted in Europe well into the twentieth century. *See, e.g.*, RUTH BEHAR, SANTA MARIA DEL MONTE 189-264 (1986) (describing attributes of a rural Spanish village as a communal "web of use rights").

[26] *See* Enzamaria Tramontana, *The Contribution of the Inter-American Human Rights Bodies to Evolving International Law on Indigenous Rights over Lands and Natural Resources*, 17 INT'L L.J. MINORITY & GROUP RTS. 241, 242 (2010); Mauro Barelli, *The Interplay between Global and Regional Human Rights Systems in the Construction of the Indigenous Rights Regime*, 32 HUM. RTS Q. 951 (2010); David C. Baluarte, *Balancing Indigenous Rights and a State's Right to Develop in Latin America: The Inter-American Rights Regime and ILO Convention 169*, 4 SUSTAINABLE DEV. L. & POL'Y 9, 10 (2004).

of procedural rights linked to the substance of land ownership and possession. This body of jurisprudence has been developed around the right to property, defined in cultural and religious as well as economic terms. Other rights repeatedly applied in indigenous cases include the rights to participate in government and to have judicial protection of other rights,[27] as guaranteed by the American Declaration on the Rights and Duties of Man ("American Declaration"),[28] and the American Convention on Human Rights ("American Convention").[29] The following presentation reviews and comments on the Inter-American jurisprudence to date.

II. THE INTER-AMERICAN SYSTEM AND ITS LEGAL INSTRUMENTS

Even before the creation of the OAS in 1948, periodic meetings of the independent American states discussed indigenous issues. In 1922, a resolution called for study of indigenous languages and respect for archaeological monuments.[30] A little over a decade later, a 1933 resolution proposed an international meeting to examine the "problem of Native Americans."[31] A 1938 resolution acknowledged past injustices and called for protection as a form of reparation, in paternalistic terms common to the period:

> [T]he Indians, as descendants of the first settlers of the Americas have a special right to the protection of the public authorities, in order to compensate for the inadequacy of their physical and intellectual development and, in consequence, all that may be done to improve the lot of Indians shall be just reparation for the lack of understanding with which they were treated in times past.[32]

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[27] Alex Page, *Indigenous Peoples' Free Prior and Informed Consent in the Inter-American Human Rights System*, 4 SUSTAINABLE DEV. L. & POL'Y 16, 16 (2004).

[28] Organization of American States, American Declaration of the Rights and Duties of Man, July 2003, O.A.S. Res. XXX, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser.L/V/I.4 rev. 9 (2003), http://www.corteidh.or.cr/docs/libros/Basingl01.pdf [hereinafter American Declaration]. The American Declaration is utilized as a source of international legal obligations for member States of the OAS by both the Commission and the Court. *Id.*

[29] Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter American Convention].

[30] *Situation of the Human Rights of Indigenous Persons and Peoples in the Americas*, INTER. AM. COMM'N. H.R. (Oct. 20, 2000), http://www.cidh.oas.org/indigenas/chap.1.htm [hereinafter *Situation of the Indigenous People Chap. 1*].

[31] *Id.*

[32] *Id.* (quotations and ellipsis omitted). The ILO was also working on the question of indigenous populations at this time. *See* Athanasios Yupsanis, *The International Labour*

In 1948, the year the OAS was established, the participating states adopted the Inter-American Charter of Social Guarantees, Article 39 of which continued to view indigenous peoples as a "problem" to be solved:

> Article 39. In those countries in which the problem of the native population exists, the necessary measures shall be taken to provide the Indian protection and assistance, protecting his life, liberty, and property, and defending him from extermination, and safeguarding him from oppression and exploitation, protecting him from poverty, and providing adequate education.
>
> The State shall exercise its tutelage to preserve, maintain, and develop the assets of the Indians or their tribes, and shall promote the exploitation of the nature, industrial and extractive wealth or other sources of income from such assets or related to it, so as to ensure, when appropriate, the economic emancipation of the indigenous groups.
>
> Institutions or services should be created to protect the Indians, and in particular to ensure respect for their lands, to legalize their possession by them, and to prevent the invasion of such lands by outsiders.33

None of the current OAS human rights instruments makes reference to indigenous peoples or includes a right to self-determination. A Draft American Declaration on the Rights of Indigenous Peoples remains in negotiations, having failed thus far to garner the political will of member states to finalize and adopt it.

On the institutional side, the Inter-American Commission on Human Rights ("Commission") was created in 1959 as the principal organ of the OAS with a mandate to promote the observance and protection of human rights in the member states and to serve as a "consultative organ of the OAS" on human rights matters.[34] In 1965, the Commission gained explicit competence to accept communications alleging human rights violations. In 1990, in the context of its promotional mandate, the Commission established a special rapporteurship on the rights of indigenous peoples. The rapporteurship has investigated problems of discrimination, racism, and violence suffered by members of indigenous communities, especially indigenous leaders and women. In 2010, it published a thematic report on

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Organization and its Contribution to the Protection of the Rights of Indigenous Peoples, 49 CANADIAN YB INT'L L. 2011 117, at 118-19 (2012).

[33] *Situation of the Indigenous People Introduction, supra* note 2.

[34] Organization of American States, Charter of the Organization of American States art. 106, Apr. 30, 1948, O.A.S.T.S. Nos. 1-C and 61, *reprinted in* INTER-AM. COMM'N H.R., BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM 105, 128 (2010).

the land and resource rights of indigenous peoples.[35] The choice of this topic reflects the fact that the human rights violations experienced by indigenous peoples in the Americas often have their source in conflicts over their ancestral territories.

Complaints of human rights violations allegedly committed by an OAS member state may be brought to the Commission after exhaustion of effective and available local remedies.[36] The Commission applies the rights contained in the 1948 American Declaration to all OAS member states and the rights and obligations in the 1969 American Convention to the states parties.[37] Following conclusion of Commission proceedings, the Commission may refer a case to the Inter-American Court of Human Rights, an organ established by the American Convention, if the respondent state is a party to the Convention and has accepted the Court's jurisdiction.[38] Judgments of the Court are binding and the Court has broad powers to afford remedies to victims of violations.[39]

The Commission and Court have developed several overriding principles of interpretation to give effect to what they see as the object and purpose of the human rights instruments they apply.[40] These doctrines have had enormous impact on the outcome of cases brought by or on behalf of indigenous peoples. The most prevalent doctrines are the *pro homine* principle, the notion of the *effet utile*, and the evolutionary approach or rule of dynamic interpretation. These doctrines are seen as important to ensure the effective application of human rights treaties.[41]

As a basic, even overriding element of treaty interpretation, the Inter-American bodies rely on the treaty's "object and purpose", referred to in the Vienna Convention on the Law of Treaties, Article 31(1).[42] The Commission and Court have emphasized that the general purpose of human

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[35] Indigenous and Tribal Peoples' Rights Over Their Ancestral Lands and Resources, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II, doc. 56/09 (Dec. 30, 2009).

[36] *See* INTER-AM. COMM'N H.R., BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM 179 (2010) [hereinafter BASIC DOCUMENTS].

[37] *Id.* at 171.

[38] *Id.* art. 45.

[39] American Convention, *supra* note 29, art. 63(1).

[40] The Commission has said that "the American Convention enshrines a system that constitutes a genuine regional public order the preservation of which is in the interests of each and every state party. Nicaragua v. Costa Rica, Case 01.06, Inter-Am. Comm'n H.R., Report No. 11/07, OEA/Ser.L/V/II.130, doc. 22 rev. ¶ 197 (2007).

[41] *See* Lucas Lixinski, *Treaty Interpretation by the Inter-American Court of Human Rights: Expansion at the Service of Unity of International Law*, 21 EUR. J. INT'L L. 585, 588-89 (2010).

[42] Vienna Convention on the Law of Treaties, May 23, 1969, 8 I.L.M. 679, 1155 U.N.T.S. 331.

rights treaties is to further human rights.[43] In its first decision, the Court declared that "the object of international human rights protection is to guarantee the individual's basic human dignity by means of a system established in the Convention."[44] Sustaining and reinforcing broad rules of interpretation, the American Convention's Article 29 broadly provides that no provision of the Convention can be interpreted to restrict a right recognized in the national or international law applicable to a state party, allowing reference to customary international law as well as treaties and domestic law.[45] It further allows reference to or application of the American Declaration and "other international acts of the same nature" as well as "other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government."[46] The Inter-American Court's jurisprudence frequently refers to this express mandate as one which allows the Court to call on national and international authorities to apply the rule most favorable to the individual.[47] Some critics claim that this methodology reflects a "bias" on the part of the system,[48] but it may be necessary in order to protect human rights in the face of persistent non-compliance by states parties.

Neither the Commission nor the Court adheres to a static or "originalist" interpretation of the texts, agreeing that human rights law has to be

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[43] Joseph Weiler, *Prolegomena to a Meso-theory of Treaty Interpretation at the Turn of the Century*, ILLS INTERNATIONAL LEGAL THEORY COLLOQUIUM 1, 5-6, (2008), *available at* http://iilj.org/courses/documents/2008Colloquium.Session5.Weiler.pdf; Lucius Caflisch & Antonio A. Cançado Trindade, *Les Conventions Americaine and Europeenne Des Droits de L'Homme et Le Droit International General*, 108 REVUE GEN. DE DROIT INT'L PUB. 12 (2004).

[44] In Re Viviana Gallardo et al., Advisory Opinion G101/81, Inter-Am. Ct. H. R. (ser. A), ¶ 15 (Nov. 13, 1981).

[45] American Convention Article 29 reads as follows:

> No provision of this Convention shall be interpreted as:
> a. permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein;
> b. restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party;
> c. precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or
> d. excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.

American Convention, *supra* note 29, art. 29.

[46] *Id.* art. 29(c)-(d).

[47] *See, e.g.*, Kichwa Indigenous People of Sarayaku v. Ecuador, Merits, Reparations, and Judgment, Inter-Am. Ct. H.R. (ser. C) No. 245 (June 27, 2012).

[48] *See* Lixinski, *supra* note 41, at 588.

interpreted according to present-day standards. They frequently assert that human rights treaties constitute living instruments that are differentiated to a certain degree from classical international agreements[49] and that their provisions must be interpreted and applied by taking into account "developments in the field of international human rights law that have occurred since the Inter-American instruments were first composed, and with due regard to other relevant rules of international law applicable to member states against which complaints of human rights violations are properly lodged."[50] These developments in the corpus of international human rights law may be found in the provisions of other international and regional human rights instruments.[51] In fact, the American Declaration itself may be interpreted with reference to the American Convention, "which, in many instances, may be considered to represent an authoritative expression of the fundamental principles set forth in the American Declaration."[52] The reverse does not seem to be true, although the Declaration contains a longer list of rights than is found in the Convention and Convention Article 29 would seem to call for continued application of the Declaration even with respect to states parties to the Convention. This issue is particularly relevant when it comes to cases alleging violations of economic, social and cultural rights, which are included in the Declaration, but do not figure to any significant extent in the Convention.[53]

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[49] As the Court has stated: "The evolution of the here relevant 'inter-American law' mirrors on the regional level the developments in 'contemporary international law and especially in human rights law, which distinguished that law from classical international law to a significant extent.'" Advisory Opinion OC-10/89, Inter-Am. Ct. H.R. (ser. A) No. 10, ¶ 38 (July 14, 1989) [hereinafter Advisory Opinion OC-10/89].

[50] *See id.* ¶ 37; The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, Inter-Am. Ct. H.R. (ser. A) No. 16, ¶ 114 (Oct. 1, 1999) [hereinafter Advisory Opinion OC-16/99] (endorsing an interpretation of international human rights instruments that takes into account developments in the *corpus juris gentium* of international human rights law over time and in present-day conditions); Ramón Martinez Villareal v. United States, Case 11.753, Inter-Am. Ct. H.R., Report No. 52/02, ¶ 60 (2002).

[51] *See Advisory Opinion OC-10/89*, Inter-Am. Ct. H.R. (ser. A) No. 10, ¶ 37; *Advisory Opinion OC-16/99*, Inter-Am. Ct. H.R. (ser. A) No. 16, ¶ 115; Juan Raul Garza v. United States, Case 12.243, Inter-Am. Ct. H.R., Report No. 52/01, ¶ 89 (2000).

[52] *See* Report of the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System, Inter-Am. Ct. H.R., Doc. OEA/Ser.L/V/II.106, doc. 40 rev. ¶ 38 (Feb. 28, 2000); *Garza Case*, Case 12.243, Inter-Am. Ct. H.R., Report No. 52/01, ¶¶ 88-89.

[53] The effort to litigate economic and social rights in the Inter-American system has given rise to considerable debate. *See* James L. Cavallaro & Emily J. Schaffer, *Less as More: Rethinking Supranational Litigation of Economic and Social Rights in the Americas*, 56 HASTINGS L.J. 217 (2005); Tara Melish, *Rethinking the "Less as More" Thesis:*

Given the methodology just described, it should come as no surprise that the Court and Commission look to global treaties and instruments, as well as the general context of the Inter-American system, in deciding cases. They have referred to the Geneva Conventions of 1949,[54] the United Nations Convention on the Rights of the Child,[55] the Vienna Convention on Consular Relations[56] and, most relevant to the present study, ILO Convention no. 169.[57] The Commission has stated explicitly that the provisions of ILO Convention no. 169 "provide evidence of contemporary international opinion concerning matters relating to indigenous peoples, and therefore that certain provisions are properly considered in interpreting and applying the articles of the American Declaration in the context of indigenous communities."[58] Both the Commission and the Court have similarly referred to ILO Convention no. 169 in interpreting the obligations of states party to the American Convention. The Court has referred, for example, to Article 14(3) of Convention no. 169 regarding the requirement that "adequate measures shall be established within the national legal system to resolve land claims by the peoples concerned."[59] According to the Court "[t]his international provision, in combination with Articles 8 and 25 of the American Convention, places the state under the obligation to

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Supranational Litigation of Economic, Social and Cultural Rights in the America, 39 NYY J. INT'L L. & POL. 171 (2006); James L. Cavallaro & Emily Schaffer, Rejoinder: *Justice before Justiciability: Inter-American Litigation and Social Change*, 39 NYU J. INT'L L.& POL. 345 (2006); Tara Melish, Counter-Rejoinder: *Justice vs. Justiciability? Normative Neutrality and Technical Precision, the Role of the Lawyer in Supranational Social Rights Litigation*, 39 NYU J. INT'L L. & POL. 385 (2006).

[54] *See, e.g.*, Juan Carlos Abella v. Argentina, Case 11.137, Inter-Am. Ct. H.R., Report No. 55/97, ¶¶ 157-71 (1998).

[55] *See, e.g.*, Villagrán-Morales et al. v. Guatemala, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 63, ¶ 188 (Nov. 19, 1999); Michael Domingues v. United States, Case 12.285, Inter-Am. Ct. H.R., Report No. 62/07, ¶ 56 (Oct. 22, 2002).

[56] *See, e.g., Advisory Opinion OC-16/99*, Inter-Am. Ct. H.R. (ser. A) No. 16, ¶ 137; Ramón Martinez Villareal v. United States, Case 11.753, Inter-Am. Ct. H.R., Report No. 52/02, ¶ 77 (2002).

[57] *See, e.g.*, Mary and Carrie Dann v. United States, Case 11.140, Inter-Am. Ct. H.R., Report No. 75/02, OEA/Ser.L/V/II.117, doc. 5. rev. 1, ¶ 127 (2002).

[58] Maya Indigenous Communities of the Toledo Dist. v. Belize, Case 12.053, Inter-Am. Comm'n H.R., report No. 40/04, OEA/Ser.L/V/II.122 doc. 5, rev. 1, n.123 (Oct. 12, 2004); *see also Dann*, Case 11.140, Inter-Am. Ct. H.R., Report No. 75/02, OEA/Ser.L/V/II.117, doc. 5. rev. 1, ¶¶ 127-31. Among OAS member states, ILO Convention no. 169 has been ratified by Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Ecuador, Guatemala, Honduras, Mexico, Nicaragua, Paraguay, Peru, and Venezuela. *See Ratifications of C169—Indigenous and Tribal Peoples Convention, 1989 (no. 169)*, INTERNATIONAL LABOUR ORGANIZATION, http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314:NO.

[59] ILO Convention No. 169, *supra* note 18, art. 14(3).

provide an effective means with due process guarantees to the members of the indigenous communities for them to claim traditional lands, as a guarantee of their right to communal property."[60]

The Court has used this methodology to interpret Article 21 of the American Convention, deeming it "useful and appropriate to resort to other international treaties, aside from the American Convention, such as ILO Convention no. 169, to interpret its provisions in accordance with the evolution of the inter-American system, taking into account related developments in international human rights law."[61] In the *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*,[62] the Court referred to Article 13 of Convention no. 169 in determining that indigenous peoples' collective understanding of the concepts of property and possession "deserves equal protection under Article 21 of the American Convention."[63] In the same case, the Court invoked the UN Declaration on the Rights of Indigenous Peoples ("UNDRIP") as an instrument relevant to ensuring that the rights continue to be interpreted consistent with developments in international human rights law.[64]

The Inter-American bodies have also insisted that terms in the instruments have an autonomous meaning in international law, regardless of national legislation.[65] The principle of autonomous interpretation has allowed the Commission and Court to define "property" in ways specific to indigenous peoples. The case of the *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*[66] first presented the question of the scope of the right to property, as guaranteed by American Convention Article 21. The Court, faced with an "originalist" textual interpretation which would have denied protection to indigenous communal land rights, and another more expansive reading of the term "property", concluded that "it is the opinion of this Court that Article 21 of the Convention protects the right to property in a sense which includes, among others, the rights of members of the indigenous communities within the framework of communal property,

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[60] Yakye Axa v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶¶ 95-96 (June 17, 2005).

[61] *Id.* ¶ 127.

[62] Sawhoyamaxa Indigenous Cmty. v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146 (Mar. 29, 2006).

[63] *Id.* ¶¶ 119-20.

[64] Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 174, ¶¶ 131, 136 (Nov. 28, 2007).

[65] *Id.* ¶ 146.

[66] Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001) [hereinafter *Awas Tingni v. Nicaragua*].

which is also recognized by the Constitution of Nicaragua."[67] This judgment marked a significant moment in the evolution of a jurisprudence that has recognized unique rights and corresponding special obligations of states with respect to the rights of indigenous peoples. As discussed further below, this approach raises the question of possible incorporation of cultural relativism in the interpretation of human rights treaties.

III. INTER-AMERICAN COMMISSION RESOLUTIONS AND REPORTS ON INDIGENOUS RIGHTS

The shift from an exclusive focus on individual rights towards the acknowledgment of collective rights of indigenous peoples began with a formal finding of the Commission in 1971 that indigenous peoples were in need of special legal protection due to the history of severe discrimination against them.[68] A year later the Commission resolved that: "for historical reasons and because of moral and humanitarian principles, special protection for indigenous populations constitutes a sacred commitment of the states."[69] This notion of a special status for indigenous peoples with corresponding special obligations of states has remained a consistent theme of Inter-American jurisprudence.

By the mid-1970s, the Commission was receiving a growing number of petitions from indigenous peoples and the issue of indigenous rights increasingly arose during onsite visits and country reports.[70] The Commission became aware that armed conflicts had led to forced removals and internal displacement.[71] In other instances, development projects and

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[67] *Id.* ¶ 148.

[68] Megan Mooney, *How The Organization Of American States Took The Lead: The Development Of Indigenous Peoples' Rights In The Americas*, 31 AM. INDIAN L. REV. 553 (2006).

[69] *Id.* at 558; *see also* Yanomami v. Brazil, Case 7615, Inter-Am. Ct. H.R., Res. No. 12/85, OEA/Ser.L./V/II.66, doc. 10 rev. 1 (Mar. 5, 1985) [hereinafter *Yanomami Case*].

[70] Country reports that included chapters on indigenous peoples included: Ecuador (1997); Chile (1985); Bolivia (1996); Suriname (1983, 1985); Brazil (1997); Mexico (1998); Paraguay (1978, 1987); Peru (2000). Organization of American States, Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin, OEA/Ser.L/V/II.62, doc. 26 (Nov. 29, 1983) [hereinafter Miskito Report]; Resolution on the Friendly Settlement Procedure regarding the Human Rights Situation of a Segment of the Nicaraguan Population of Miskito Origin, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.62, doc. 26 (May 16, 1984); Special Report on the Human Rights Situation in the So-Called "Communities of People in Resistance" in Guatemala, OEA/Ser.L/V/II.86, doc. 5 rev. 1 (June 16, 1994).

[71] The country reports on Colombia (1993, 1999) discussed the impact of military operations on indigenous communities and made proposals to improve the situation. The 1999 report looked at what had happened, including constitutional rights to communal lands

practices of extractive industries were resulting in pollution, land seizures, and violence against indigenous communities. On occasion, the Commission identified contemporary forms of slavery and other systematic discrimination and inequality.[72] In two reports on Guatemala, the Commission concluded that no other sector had suffered as much from prejudice and violence as had indigenous communities.[73]

In 1997, the Commission made some of its most significant statements on indigenous rights in a country report on the human rights situation in Ecuador.[74] The main concern was the impact of oil exploitation on indigenous communities.[75] After an onsite visit, the Commission found that the inhabitants were exposed to toxic byproducts in the air, soil, and their drinking and bathing water, leading to skin diseases, rashes, chronic infections, and gastrointestinal problems, as well as loss of their food supply due to contamination.[76] The Commission found that the government had failed to regulate and supervise the activities of both the state-owned oil company and its licensees.[77] The laws in place included positive measures but they were not adequately enforced.[78] The companies, in turn, had taken few if any measures to protect the affected population.[79]

The Commission considered that each government has the obligation to enforce the laws that it enacts as well as any constitutional guarantees in

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and special political participation rights. The Commission found evidence of massacres and said it was essential to take measures to enable the groups to survive and develop and maintain their ethnic and cultural diversity. Second Report on the Human Rights Situation in Colombia, Inter-Am. Comm'n H.R., OEA/ Ser.L/V/II.84 Doc. 39 rev. (Oct. 14, 1993); Third Report on the Human Rights Situation in Colombia, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.102, Doc. 9 rev. 1 (Feb. 26,1999).

[72] Captive Communities: Situation of the Guaraní Indigenous People and Contemporary Forms of Slavery in the Bolivian Chaco, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II. doc. 58 (Dec. 24, 2009).

[73] Third Report on the Situation of Human Rights in Guatemala, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.66, doc. 16 (Oct. 3, 1985); Fourth Report on the Situation of Human Rights in Guatemala, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.83, doc. 16 rev. (June 1, 1993).

[74] Report on the Situation of Human Rights in Ecuador, Inter-Am. Comm'n. H.R., OEA/Ser.L/V/II.96, doc. 10 rev. 1 (Apr. 24, 1997) [hereinafter Report on Ecuador]. The Commission first became aware of problems in this region of the country when a petition was filed on behalf of the indigenous Huaorani people in 1990. *Id.* The Commission decided that the situation was not restricted to the Huaorani and thus should be treated within the framework of the general country report. *Id.*

[75] *Id.*

[76] *Id.* ch. VIII.

[77] *Id.*

[78] *Id.*

[79] *Id.*

place.[80] The Commission was clear: "Where the right to life, to health and to live in a healthy environment is already protected by law, the Convention requires that the law be effectively applied and enforced."[81] The state must also comply with and enforce the international agreements to which it is a signatory.[82] Ecuador thus was obliged "to take the measures necessary to ensure that the acts of its agents, through the State-owned oil company, conform to its domestic and inter-American legal obligations."[83] Anticipating state objections based on the right to development, the Commission conceded the existence of the right and agreed that it implies for each state the freedom to exploit its natural resources, including through the granting of concessions and acceptance of international investment. Noting that the norms of the inter-American human rights system "neither prevent nor discourage development" the Commission specified that regional human rights norms "require that development take place under conditions that respect and ensure the human rights of the individuals affected."[84] States thus are not exempt from human rights obligations in their development projects: "the absence of regulation, inappropriate regulation, or a lack of supervision in the application of extant norms may create serious problems with respect to the environment which translate into violations of human rights protected by the American Convention."[85]

IV. CASE LAW

The early case law of the Commission was hesitant in its approach to indigenous rights. The first case considered on its merits concerned incursions of settlers and Army operatives onto indigenous ancestral lands,

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[80] *Id.*

[81] Indigenous and Tribal Peoples' Rights Over Their Ancestral Lands and Natural Resources, Inter-Am. Comm'n H.R., OEA/Ser.L./V/II, doc. 56/09 ch. VIII (Dec. 30, 2009).

[82] The Commission noted that Ecuador is party to or has supported a number of instruments "which recognize the critical connection between the sustenance of human life and the environment." Report on Ecuador, *supra* note 74, at 89; *see also* 1996 International Covenant on Civil and Political Rights, 6 I.L.M. 368 (1967); United Nations General Assembly, International Covenant on Economic, Social, and Cultural Rights, United Nations, Treaty Series, vol. 993, p.3 (1966); Declaration of the United Nations Conference of the Human Environment, 11 I.L.M. 1416 (1972); Treaty for Amazonian Cooperation, 17 I.L.M. 1045 (1978); Amazon Declaration, 28 I.L.M. 1303 (1989); World Charter for Nature, G.A. Res. 37/7, U.N. Doc. A/37/51 (1982); The Human Rights Situation of the Inhabitants of the Interior of Ecuador Affected by Development Activities, Inter-Am. Comm'n H.R., OEA/ser.L./V/II.96, doc. 10 rev. 1 ch. VIII (Apr. 24, 1997) [hereinafter Human Rights Situation of the Inhabitants].

[83] Human Rights Situation of the Inhabitants, *supra* note 82, ch. VIII.

[84] Report on Ecuador, *supra* note 74, ch. VIII.

[85] *Id.* at 89.

but the matter was discontinued without specific findings.[86] Four years later, *Ache v. Paraguay*[87] presented complaints of attacks, enforced malnutrition, and attempted enslavement, as well as loss of ancestral lands. Paraguay never responded (as was its practice during the period). The Commission presumed the truth of the allegations, found violations of the rights to life, liberty, security, family, health, fair remuneration for work, and leisure, and recommended measures to protect the rights of the Ache. Nonetheless, the Commission considered that the government policy was not aimed at eliminating the Ache, but at promoting assimilation and providing protection for them.

In 1984 a petition concerning the impact of Nicaragua's internal armed conflict on the Miskito indigenous communities resulted in preparation of a special report[88] by the Commission that described bombardments, taking of lands and forced resettlement, as well as the taking of natural resources. Specific mention was made of the denial of the right to self-determination, as well as the inherent rights of the Miskito to the lands they had traditionally occupied, based on "the peculiarities of their social and economic organization" and of political rights. Nonetheless, the report upheld some of the relocations as necessary derogations during the armed conflict. The language of the report is ambiguous as far as the approach to the rights of indigenous peoples are concerned, noting that:

> The present status of international law does recognize observance of the principle of self-determination of peoples, which it considers to be the right of a people to independently choose their form of political organization and to freely establish the means it deems appropriate to bring about their economic, social and cultural development. This does not mean, however, that it recognizes the right to self-determination of any *ethnic group* as such.[89]

Apparently seeking a middle ground, the Commission cited GA Res 1514, stating that self-determination does not justify disrupting the territorial integrity of a sovereign state, on the one hand, but nor does it allow the state "an unrestricted right to impose complete assimilation" on indigenous groups, on the other hand.[90] So, while there is no right to political autonomy or independence, indigenous people are entitled to special legal protection for the use of their language, the observance of their

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[86] *See* Guahibo v. Colombia, Case 1690, Inter-Am. Comm'n H.R., O.A.S. Doc., OEA/Ser.L./V/II.30, doc. 45, rev. 1 (1973).

[87] Ache v. Paraguay, Case 1802, Inter-Am. Comm'n H.R., O.A.S. Doc., OEA/Ser.L./V/II.43, doc. 21 (1978).

[88] *See* Miskito Report, *supra* note 70.

[89] *Id.* (emphasis added).

[90] *Id.* at pt. 2, ¶ 11.

religion,[91] and in general "all those aspects related to the preservation of their cultural identity."[92] The decision appears very much a compromise, calling for settlement and coexistence and establishment of an adequate institutional order within the state.

The important precedent of *Yanomami v. Brazil*[93] came after a petition alleged that the government had violated the American Declaration by constructing a highway through Yanomami territory and authorizing exploitation of the territory's resources. The Commission found that outsiders were invading the lands without adequate protection for the safety and health of the Yanomami, adversely affecting their lives, security, health and cultural diversity.[94] Due to the government's failure to act, the Commission found violations of the Yanomami's rights to life, liberty and personal security guaranteed by Article 1 of the American Declaration, as well as the right of residence and movement (Article 8) and the right to the preservation of health and well-being (Article 11).[95] The Commission recommended that the Government of Brazil set aside and demarcate the boundaries of the Yanomami Park to encompass more than 9 million hectares of Amazonian land home to the 12,000 Yanomamis.[96] The Commission also called for addressing health, education and social integration.[97] In emphasizing once again the "special" obligations of States towards indigenous peoples, the Commission made clear that state omissions as well as state actions can engage state responsibility for violations of human rights.[98]

Subsequent Guatemalan cases concerning land conflicts and forced recruitment of indigenous into the military[99] led to innovative decisions

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[91] Jo M. Pasqualucci, *International Indigenous Land Rights: A Critique Of The Jurisprudence Of The Inter-American Court Of Human Rights In Light Of The United Nations Declaration On The Rights Of Indigenous Peoples*, 27 WIS. INT'L L.J. 51 (2009) (arguing that the Inter-American decisions are based on religious rights, in recognition of the spiritual dimension of indigenous land rights). "The basis for indigenous land rights is the spiritual relationship that indigenous peoples have with their ancestral land." *Id.* at 56.

[92] Miskito Report, *supra* note 70.

[93] Yanomami v. Brazil, Case No. 7615, Inter-Am. Comm'n H.R., Res. 12/85, OEA/Ser.L./V/II.66 (1985).

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] Piche v. Guatemala, Case 10.975, Inter-Am. Comm'n H.R., Report No. 36/93, OEA/Ser.L./V/II.85, doc. 9 rev. at 216 (1994) (condemning enforcement of military recruitment of indigenous young men by unlawful means). The Commission found violations of art. 7, art. 11, and art. 22 of the Declaration as well as articles 8 and 25 for lack of guarantees and judicial process. *Id.*

recommending collective as well as individual reparations.[100] In Paraguay, the Commission was able to resolve land claims through friendly settlement.[101] By the 1980s cases that could not be resolved in one manner or another began being sent to the Court insofar as the states that had accepted the Court's jurisdiction.

The first indigenous case before the Court, concerning a massacre, became an issue of reparations after the government conceded its responsibility. *Aloeboetoe v. Suriname*[102] posed the question of how to determine reparations due for killings that involved a matriarchal, polygamous and non-cash society. The Court took into account the cultural traditions and social structure of the community in making its decision on this point. The Court determined that it was appropriate to recognize the polygamous family structure of the Saramakas, thereby awarding pecuniary and moral damages to the multiple wives and children of the decedents.[103] The all male Court drew the line, however, at recognizing any consequences of the matriarchal nature of the society and the special status of the senior female in the clan.[104] According to the Court, to vest reparations or decision-making about them in the female would violate Convention norms against discrimination, unlike polygamy.[105] In a related issue, in addition to having to determine individual reparations, the Court had to respond to a claim for collective reparations from the Saramakas.[106] After the Commission requested moral damages for the tribe, the Court focused on whether the Commission had proven racial motivation

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[100] Los Cimientos v. Guatemala, Case 11.197, Inter-Am. Comm'n H.R., Report No. 68103, OEA/Ser.L./V/II.118, doc. 70 rev. 2 at 642 (2003) (concerning allegations that the Army had taken lands and given them to another community for political reasons). Settlement was achieved through arbitration by a committee composed of the government and interested parties. An expert report on the conflicting titles of the two communities included proposals on compensation. *See id.* The resulting Report 19/97 involved reparation for the community as a whole in the form of schools and other development protects. *Id.*

[101] Enxet-Lamenxay and Kayleyphapopyet (Riachito) v. Paraguay, Case 11.713, Inter-Am. Comm'n H.R., Report No. 90/99, OEA/Ser.L./V/II.106, doc. 6 rev. (1999) (concerned the restoration of legitimate property rights to an indigenous community). The state acquired almost 22,000 hectares of land to transfer to the indigenous communities from third parties who had been granted title. *See id.* Commission approved the friendly settlement on March 25, 1998 that involved upholding indigenous rights to ancestral lands. *Id.*

[102] Aloeboetoe et al. v. Suriname, Reparation and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 15 (Sept. 10, 1993).

[103] *See id.*

[104] *Id.*

[105] *Id.*

[106] *Id.* ¶ 82.

underlying the killings. In the absence of such proof, the Court denied the claim.[107]

Awas Tingi Mayagna (Sumo) Indigenous Community v. Nicaragua[108] is probably the Court's most well-known judgment on indigenous land rights. The landmark case originated as an action against government-sponsored logging of timber on indigenous lands.[109] The government did not consult the Awas Tingni community before it granted the logging concession and local remedies were unavailing in providing redress to the community.[110] The Awas Tingis alleged that the government violated their rights to cultural integrity, religion, equal protection and participation in government.[111] In 1998, the Commission found in favor of the Awas Tingni and submitted the case to the Court.[112] On August 31, 2001, the court issued its judgment on the merits and awarded reparations.[113] The Court determined that the right to property guaranteed in Convention Article 21 includes the communal property of indigenous communities, and this right was violated by the state.[114] This was the first binding international ruling that recognized the collective property rights of indigenous peoples and together with the Commission's *Yanomami* decision, has provided the juridical framework for the evolving land and resource rights of indigenous peoples within the Americas.[115]

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[107] *Id.*

[108] Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001).

[109] *Id.*

[110] *Id.* at V(B).

[111] *Id.* ¶ 105(f).

[112] *Id.* ¶ 28.

[113] *See* Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001). On December 18, 2008, the Commission reported that it had closed the case following government compliance with the Court's judgment.

[114] *Id.* ¶ 148. The Court unanimously declared that the state must adopt domestic laws, administrative regulations, and other necessary means to create effective surveying, demarcating and title mechanisms for the properties of the indigenous communities, in accordance with customary law and indigenous values, uses and customs. *See generally id.* Pending the demarcation of the indigenous lands, the state must abstain from realizing acts or allowing the realization of acts by its agents or third parties that could affect the existence, value, use or enjoyment of those properties located in the Awas Tingni lands. *Id.* The Court also declared that the state must invest US$50,000 in public works and services of collective benefit to the Awas Tingni as a form of reparations for non-material injury and awarded US $30,000 for legal fees and expenses. *Id.* ¶ 133.

[115] S. James Anaya & Claudio Grossman, *The Case of Awas Tingni v. Nicaragua: A Step in the International Law of Indigenous Peoples*, 19 ARIZ.. J. INT'L. & COMP. L. 1, 2 (2002); XANTHAKI, *supra* note 9, at 32.

It is important to reflect on the Court's findings to understand the significance of the judgment. First, the Court accepted the Commission's jurisprudence that indigenous peoples are entitled to special legal protection because of past severe discrimination, which in effect treats indigenous issues at least in part as ones of reparative justice.[116] Second, as noted above, the Court applied ICCPR Article 27 and ILO Convention 169 as *lex specialis* based on Articles 29(b) and 64 of the Convention to imply that international law guarantees rights specific to the needs of indigenous people.[117] Third, the judgment recognized that the collective land rights of the indigenous extend to the resources on the land.[118] Finally, the Court reaffirmed that a government's failure to act to protect indigenous rights can be as much as violation as direct governmental action.[119]

Following the Court's judgment in *Awas Tingni,* members of the Western Shoshone Nation brought the case of *Mary and Carrie Dann v. United States.*[120] Petitioners argued for the continuation of their rights to lands traditionally used for cattle grazing and other activities.[121] The United States disagreed, asserting that the land rights had been extinguished through legal and administrative procedures, and that no human rights violations had occurred.[122] The Commission found that the United States had violated the Danns' right to equality under the law, the right to a fair trial, and the right to property as set forth in the American Declaration.[123] As the Court had done in *Awas Tingni*, the Commission interpreted the Declaration with reference to wider principles of international human rights that protect the individual and collective interests of indigenous peoples.[124] The Commission concluded that any determination with regard to indigenous land rights must be based on informed consent and participation of the community.[125]

The Commission further followed but expanded on the *Awas Tingni* judgment in the 2004 case *Maya Indigenous Communities of the Toledo District v. Belize.*[126] The Commission held Belize responsible for violating

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[116] Anaya & Grossman, *supra* note 115, at 11.

[117] *Id.* at 12.

[118] *Id.*

[119] *Id.* at 14-15.

[120] *See* Mary and Carrie Dann v. United States, Case 11.140, Inter-Am. Ct. H.R., Report No. 75/02, OEA/Ser.L/V/II.117, doc. 5. rev. 1, ¶ 127 (Dec. 27, 2002).

[121] *Id.* ¶ 2.

[122] *Id.* ¶ 3.

[123] *Id.* ¶ 172.

[124] *Id.* ¶ 131.

[125] *Id.* ¶ 171.

[126] Maya Indigenous Communities of the Toledo Dist. v. Belize, Case 12.053, Inter-Am. Comm'n H.R., report No. 40/04, OEA/Ser.L/V/II.122 doc. 5, rev. 1, n.123 (Oct. 12, 2004).

the rights guaranteed by Articles 2 (equality), 13 (property), and 18 (judicial protection) of the American Declaration, due to the government's granting of logging and oil concessions in and failing to protect indigenous lands, failing to recognize and secure the territorial rights of the Maya people in those lands, and failing to afford the Maya people judicial protection of their rights due to delays in court proceedings instituted by them.[127] The Commission by this point began to refer to a "consensus" on the need for special measures by states to compensate indigenous peoples for the exploitation and discrimination to which they have been subjected.[128] The Commission also upheld petitioners' assertions that the state's actions had impacted negatively the natural environment upon which the Maya people depend for subsistence. The Commission found that the State had violated the Maya communities' property rights, first by not fully and effectively delimiting, demarcating, and recognizing the communal lands that had traditionally been occupied and used by the Maya Communities. Further, Belize violated these property rights by granting the concessions within the lands "without effective consultations with *and the informed consent of the Maya people.*"[129] The Commission held "that the duty to consult is a fundamental component of the State's obligations in giving effect to the communal property rights of the Maya people in the lands that they have traditionally used and occupied."[130] With this ruling, the Commission articulated that in order to protect the communal property rights of indigenous peoples, consultation with the goal of obtaining consent is required.[131] As will be seen, the Court has been less willing than the Commission to declare a firm obligation to obtain prior consent, leading to uncertainty about the scope of state duties and indigenous rights.

The Court decided *Yakye Axa v. Paraguay*[132] on June 17, 2005 and a year later, in *Sawhoyamaxa*,[133] unanimously found Paraguay in violation of

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[127] *Id.* ¶¶ 193-96.

[128] The Commission took into account the fact that other human rights bodies have recognized the need for special measures to secure indigenous human rights. These bodies include the Inter-American Court of Human Rights, the International Labour Organization, the United Nations Human Rights Committee, and Committee to Eliminate All Forms of Racial Discrimination. *Id.* ¶ 97.

[129] *Id.* ¶ 153 (emphasis added).

[130] *Id.* ¶ 155.

[131] James Anaya, *Indigenous Peoples' Participatory Rights in Relation to Decisions about Natural Resource Extraction: The More Fundamental Issue of What Rights Peoples Have in Lands and Resources*, 22 ARIZ. J. INT'L & COMP. L. 7, 16 (2005).

[132] Yakye Axa v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶¶ 95-96 (June 17, 2005).

[133] Sawhoyamaxa Indigenous Cmty. v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146 (Mar. 29, 2006).

rights to property, life, and judicial protection. In both cases, the applicants asserted the responsibility of the state for failing to ensure their ancestral rights, making them vulnerable to deprivations of food, health and sanitation. In *Yakye Axa*, the Court unanimously ordered the state to identify the traditional territory of the community, "to grant it to them free of cost, and to take such domestic legislative, administrative, and other steps as may be necessary, within a reasonable term, to guarantee the effective exercise of their right to property."[134] The Court emphasized the need of the state to cooperate with indigenous communities rather than simply presenting a *fait accompli* to the community to resolve the issue. As in the *Awas Tingni* and *Yanomami* cases, domestic law in theory recognized the rights of the indigenous communities, reinforcing global and regional standards.

The *Sawhoyamaxa* case for the first time involved the issue of third party ownership rights to the lands in question pursuant to a bilateral investment treaty.[135] The Court decided: (1) traditional possession of lands by indigenous people has equivalent effects to those of state-granted full property title; (2) traditional possession entitles indigenous people to demand official recognition and registration of property title; (3) the members of indigenous peoples who have unwillingly left their traditional lands, or lost possession of them, maintain property rights thereto, even though they lack legal title, unless the lands have been lawfully transferred to third parties in good faith; and (4) the members of indigenous peoples who have unwillingly lost possession of their lands because those lands were transferred to innocent third parties, are entitled to restitution thereof or to obtain other lands of equal size and quality.[136] In sum, an enforceable right to claim traditional lands exists as long as indigenous identity is linked to their unique relationship with those lands and that relationship is maintained.[137] If restitution of ancestral lands is not possible on objective and sufficient grounds, the state must transfer alternative lands, selected by agreement with the indigenous themselves, in accordance with the community's own decision-making and consultation procedures, values, practices and customs.[138]

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[134] *See* Lilly G Ching-Soto, *Reparations in the Inter-American System of Human Rights: An Analysis of the Jurisprudence on Collective Cases of Indigenous Peoples and the Economic, Social and Cultural Aspects of Their Reparations*, 10 REVISTA DO INSTITUTO BRASILEIRO DE DIREITOS HUMANOS 219, 223-24 (2010), *available at* http://www.corteidh.or.cr/tablas/r27333.pdf.

[135] *Sawhoyamaxa Indigenous Cmty.*, Inter-Am. Ct. H.R. (ser. C) No. 146.

[136] *Id.*

[137] *See id.*

[138] *Id.* ¶ 212.

The 2007 judgment in the case of the *Saramaka People v. Suriname* added two further and important elements to the jurisprudence, the first one served to expand the range of groups entitled to collective property rights and the second to clarify the issue of surface and sub-surface mineral exploitation.[139] In common with prior cases, this litigation concerned concessions granted by the state for the exploration and extraction of natural resources.[140] Unlike prior cases no domestic laws recognized or granted specific rights to indigenous and tribal peoples[141] meaning the Court could not simply insist that the State enforce its own laws.[142]

The first issue the Court faced was whether or not the Saramaka, descendants of African slaves brought to Suriname during the 17th century, are entitled to the same special measures that are afforded indigenous peoples.[143] The ancestors of the Saramaka escaped to the interior regions of the country where they re-established autonomous communities according to their African traditions.[144] The Court found that, like indigenous peoples, the Saramaka maintain "a strong spiritual relationship" with their traditional lands, which constitute a source of life and cultural identity for the people.[145] Given this cultural link and their unique way of life, the Court held that the Saramaka people are a tribal community to which the jurisprudence regarding indigenous land and resource rights applies, requiring special measures under international human rights law to protect their physical and cultural existence.[146]

In respect to the concessions granted on Saramaka traditional lands, the Commission and representatives of the applicants alleged that living and mineral resources constitute part of the property of the Saramaka and thus are protected from exploitation without the prior informed consent of the people.[147] The state asserted, in contrast, that all land ownership vests in the state and it therefore could grant logging and mining concessions.[148] The Court drew distinctions between different resources, concluding that

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[139] Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 174 (Nov. 28, 2007).

[140] *See id.*

[141] *See generally* Kristian Myntti, *The Right of Indigenous Peoples to Participate in Development Projects*, 8 HUM. RTS. & DEV. Y.B. 225 (2002); Patrick Macklem, *Indigenous Rights and Multinational Corporations at International Law*, 24 HASTINGS INT'L & COMP. L. REV. 475 (2001); Anaya, *supra* note 131.

[142] *See Saramaka People*, Inter-Am. Ct. H.R. (ser. C) No. 174.

[143] *Id.* ¶ 86.

[144] *Id.* ¶ 80.

[145] *Id.* ¶ 82.

[146] *Id.* ¶ 86.

[147] *Id.* ¶ 137.

[148] *Id.* ¶ 124.

resources related to agricultural, hunting and fishing activities are protected property as the basis of subsistence activities of the community, necessary to their cultural and physical survival.[149] Resources not traditionally used fall within a different category, but the Court did consider the impact on subsistence resources of activities related to resources not traditionally used.[150] The Court noted, for example, that clean water is essential to the subsistence activity of fishing and that water quality is likely to be impacted by extraction of resources not traditionally used or essential for the survival of the Saramaka.[151]

The Court first observed that the protection of the right to property is not absolute and cannot be read to preclude all concessions for exploration and extraction in the Saramaka territory.[152] Like the Commission, the Court recognized the development imperative of many governments in the region and attempted to strike a balance between that imperative and the resource rights of indigenous peoples. The Court recalled that Article 21 itself provides for the limitation of property rights under certain circumstances and provided the proper conditions are met.[153] Even compliance with the conditions may not suffice to avoid a violation of the right to property, however, because the Court will assess and give crucial weight to the question of "whether the restriction amounts to a denial of the [indigenous and tribal peoples'] traditions and customs in a way that endangers the very survival of the group and its members."[154]

The Court set forth three safeguards that it deems essential to guarantee indigenous property rights.[155] First, the state must ensure the effective participation of the members of the Saramaka people, in conformity with their customs and traditions, regarding any development, investment, exploration or extraction plan within Saramaka territory.[156] This duty implies an obligation for the state to compile and to disseminate relevant information and engage in constant good faith consultations, through culturally appropriate procedures and with the objective of reaching an agreement.[157] Most importantly, the Court added an obligation of result to the procedural obligation in regard to certain activities. It held that large-scale development or investment projects that would have a major impact

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[149] *Id.* ¶ 120-23.
[150] *Id.* ¶ 125-28.
[151] *Id.* ¶ 126.
[152] *Id.* ¶ 127, 143.
[153] *Id.* ¶ 143.
[154] *Id.* ¶ 128.
[155] *Id.* ¶ 129.
[156] *Id.*
[157] *Id.* ¶ 133.

within Saramaka territory on the physical or cultural survival of the group can only proceed with the free, prior, and informed *consent* of the people, according to their customs and traditions.[158]

The second safeguard requires the state to guarantee that the Saramakas will receive a reasonable benefit from any exploitation of resources within their territory.[159] The Court viewed benefit-sharing as inherent to the right of compensation recognized under Article 21(2) of the Convention, a right that extends to any deprivation of the regular use and enjoyment of property.[160]

The third obligation of the state is to ensure that no concession is issued within Saramaka territory unless and until independent and technically capable entities, with the state's supervision, perform a prior environmental and social impact assessment.[161] As part of this "[t]he state must also ensure that members of the Saramaka people are aware of possible risks, including environmental and health risks, in order that the proposed development or investment plan is accepted knowingly and voluntarily."[162]

Applying its tests to the facts, the Court found that the concessions granted by the state failed to comply with the necessary safeguards and hence violated the right to property of the Saramaka people.[163] The logging concessions interfered with a traditional economic activity of the Saramaka and thus threatened the resources necessary for their survival as a people.[164] Furthermore, none of the three safeguards had been applied.[165] Gold-mining, although not a traditional activity of the Saramaka, was found to impact other natural resources, again requiring application of the safeguards.[166]

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[158] *Id.* ¶ 134.

[159] *Id.* ¶ 138.

[160] *Id.* ¶ 139.

[161] *Id.* ¶ 143. It is notable that these requirements parallel the Bonn Guidelines on Access and Equitable Benefit-Sharing ("BGAEB"), adopted pursuant to the Convention on Biological Diversity. Secretariat of the Convention on Biological Diversity, *Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization*, U.N.E.P. (2002), http://www.cbd.int/doc/publications/cbd-bonn-gdls-en.pdf. The Court does not cite to the BGAEB, it instead refers to views of the UN Human Rights Committee, ILO Convention No. 169, and World Bank policies, and the 2007 UN Declaration on the Rights of Indigenous Peoples. *See generally Saramaka People*, Inter-Am. Ct. H.R. (ser. C) No. 174.

[162] *Id.* ¶ 133.

[163] *Id.* ¶ 154.

[164] *Id.* ¶¶ 144-46.

[165] *Id.* ¶ 146.

[166] *Id.* ¶¶ 155-57. The Court ordered demarcation of Saramaka lands beginning within three months and to be completed within three years, and abstention from use of the territory until that is done, unless with the free, informed and prior consent of the Saramaka people;

In *Xàkmok Kàsek v. Paraguay*,[167] the Court maintained its cultural approach to the territorial claim of the community. In fact, the Tribunal several times criticized Paraguay for considering indigenous claims to land exclusively from the framework of economic "productivity."[168] Unlike prior Paraguayan cases, the Xàkmok Kàsek community resides on their ancestral lands, but title to the property is in the hands of a private owner. The Court clarified how the state should resolve and balance the competing claims of the title holder and the indigenous community. The Court did not go so far as to require the State always to give prevalence to the indigenous claim, but did call on the state, in adopting a new legislative framework, to consider the importance of traditional lands to indigenous peoples.[169] The Xàkmok Kàsek case further contributed to the inter-American jurisprudence in its finding that Paraguay violated its duty not to discriminate against the members of the community.[170] To reach this conclusion, the Tribunal considered the condition of extreme vulnerability of the members of the community.[171] The Court ruled that the failure of the state to adopt the necessary positive measures to reverse the marginalization and exclusion of the community constitutes *de facto* discrimination.[172] Finally, the Court held that even the legitimate goal of environmental protection cannot override indigenous land claims.[173]

On June 27, 2012, the Inter-American Court issued a judgment in the case of the *Kichwa Indigenous People of Sarayaku v. Ecuador*,[174] a case

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review of all concessions already granted; EIAs to be undertaken prior to any further concessions being granted, and adoption of the legislative, administrative and other measures necessary to ensure consultation with the Saramakas and effective redress for them. *Id.* ¶ 194. The Court awarded compensation for the resources already removed in the amount of $75,000; more importantly, it awarded $600,000 for the environmental damage and destruction of resources that had occurred, to be paid into a community development fund created and established by Suriname for the benefit of the Saramaka. *Id.* ¶¶ 199-202.

[167] Xàkmok Kàsek Indigenous Cmty. v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am Ct. H.R. (ser. C) No. 214 (Aug. 24, 2010).

[168] *See id.* ¶¶ 146, 170.

[169] *Id.* ¶¶ 309-10.

[170] *Id.* ¶¶ 273-75.

[171] *Id.* ¶ 259 (referring to the lack of effective remedies to protect indigenous rights, the weak provision of social services, including adequate food and potable water, health care, and education, and the prevalence of the protection of private property over indigenous territorial claims).

[172] *Id.* ¶ 274.

[173] The landowner had created a nature preserve according to Paraguayan law, which thereby would normally protect it from expropriation; thus the Court directed the state to annul the decree creating the nature preserve. *Id.* ¶ 284.

[174] Case of Kichwa Indigenous People of Sarayaku v. Ecuador, Merits, Reparations, and Judgment, Inter-Am. Ct. H.R. (ser. C) No. 245 (June 27, 2012).

concerning the granting of oil exploration and exploitation licenses within the territory traditionally occupied and used by the Kichwa People of Sarayaku.[175] The Commission contended that Ecuador violated the petitioners' right to property (Article 21) in relation to the right to freedom of thought and expression (Article 13),[176] and the right to participate in government (Article 23)[177] by failing to effectively consult the affected communities prior to the granting of the licenses and allowing activities within their territories to their detriment. The Commission argued in favor of an obligation to ensure prior consultation and effective participation of indigenous peoples with regard to any development, investment, exploration and mining on indigenous peoples' lands. Relying on *Saramaka*, the Commission indicated that the jurisprudence was unequivocal in the need to achieve consent when a project is of large enough scale to impact the survival of a people.[178]

Several elements in the case were new. First, the Court made an unprecedented on site visit to the locale of the alleged violations. Second, the representatives of the applicants sought to extend the case beyond the submissions of the Commission, expressly raising the issue of the right to culture as recognized in Article 26[179] of the Convention and the right to personal integrity and humane treatment in Articles 5[180] and 7.[181] As in

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[175] Case of the Kichwa People of Sarayaku and its Members v. Ecuador, Case 12.465, Inter-Am. Comm'n H.R., Application to the Inter-Am. Comm'n H.R., ¶¶ 56-69 (2010).

[176] American Convention, *supra* note 29, art. 13(1) ("Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.").

[177] *Id.* art. 23(1)(a) ("Every citizen shall enjoy the following rights and opportunities: a) to take part in the conduct of public affairs, directly or through freely chosen representatives[.]").

[178] *Case of the Kichwa People of Sarayaku*, Case 12.465, Inter-Am. Comm'n H.R., at ¶ 143.

[179] Convention Article 26 states:

> The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.

American Convention, *supra* note 29, art. 26.

[180] *Id.* art. 5(1)-(2) ("1. Every person has the right to have his physical, mental and moral integrity respected. 2. No one shall be subjected to torture or to cruel, inhuman or degrading treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.").

[181] American Convention Article 7 states:

> 1. Every person has the right to personal liberty and security.

some of the prior cases, the government acknowledged its responsibility for the violations and sought to move the discussion to the issue of reparations. The Court followed its usual practice, however, and proceeded to a specific determination of the events that occurred and the resulting violations.[182] Notable among the findings was the Court's recognition that oil sales generated about one quarter of the country's gross domestic product in 2005 and oil revenues covered about 40% of the national budget.[183] At the same time, the state had adjudicated an undivided area of land in the area of the Kichwa people in order to protect the ecosystems of the Amazon, improve the living standards of members of the indigenous communities and protect the integrity of their culture, without prejudice to prior title or the ability of the state to build roads and other works. The adjudication specifically recalled that natural underground resources belong to the state, which may exploit them without interference in accordance with environmental protection standards.[184] The Court found that on numerous occasions an oil company tried to gain access to the territory and obtain consent for oil exploration, but the Sarayaku held a General Assembly at which they rejected the company's offer.[185] The company proceeded through dividing the community, signing with some groups, and on at least one occasion the company destroyed a site of particular importance to the spiritual life of members of the Sarayaku People.[186] The company opened seismic trails, set up heliports, destroyed caves, water sources and underground rivers needed to provide drinking water for the community, and cut down trees and plants of environmental and cultural value, used for subsistence purposes.[187] The arrival of helicopters also destroyed part of a mountain of great value in the worldview of the community.[188] Threats were made against members of the community and their representatives.[189]

Given its ownership of subsurface mineral resources, the state questioned its obligation to carry out prior consultations in the area granted in the

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2. No one shall be deprived of his physical liberty, except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.

3. No one shall be subject to arbitrary arrest or imprisonment[.]

Id. art. 7.

[182] Case of the Kichwa Indigenous People of Sarayaku v. Ecuador, Merits, Reparations, and Judgment, Inter-Am. Ct. H.R. (ser. C) No. 245, ¶ 28 (June 27, 2012).

[183] *Id.* ¶ 60.

[184] *Id.* ¶ 62.

[185] *Id.* ¶¶ 73-74.

[186] *Id.* ¶¶ 74, 75, 127.

[187] *Id.* ¶ 311 n.353.

[188] *Id.* ¶ 105.

[189] *See id.* ¶ 250.

concession.[190] Alternatively, it asserted that various activities of the company satisfied the requirement.[191] The Court proceeded from the basis that there was no doubt regarding the right of the Sarayaku People to their territory, recognized in national as well as international law.[192] From this followed a right to be consulted and to be able to participate in the process and, if deemed appropriate, file judicial actions.[193] The Commission recognized that given the "evolutionary interpretation of Article 21 of the Convention as it pertains to indigenous peoples' rights, and based on its the ratification of ILO Convention 169, Ecuador had the obligation to consult the Sarayaku People in a free and informed manner with specific procedural safeguards prior to approving the EIA."[194] The failure to provide clear, sufficient and timely information resulted not only in a violation of property rights, but also constituted a violation of Article 13 of the Convention; moreover, the failure to guarantee the participation of indigenous peoples, through their own institutions and in accordance with their values, traditions, customs, and forms of organization, in the decisions made regarding matters and policies that affect or may affect the social and cultural life of indigenous peoples, violated Convention Article 23. The representatives of the Sarayaku agreed with the position of the Commission while the state argued that in 1996 it had no obligation to initiate a consultation process or obtain the free, prior and informed consent of the Sarayaku People.[195] The state insisted that there is no "'right of veto' over a decision made by the State concerning the exploitation of natural resources, particularly those underground."[196]

The Commission further argued a violation of Article 22, which guarantees freedom of movement, asserting that the oil exploration activities and military roadblocks hampered movement of members of the community.[197] As to the right to culture, the representatives argued that by

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[190] *Id.* ¶ 164 n.203.

[191] *Id.* ¶ 124.

[192] *Id.*

[193] *See id.* ¶¶ 299-300.

[194] *Id.* ¶ 125.

[195] *Id.* ¶ 128.

[196] *Id.* ¶ 129.

[197] American Convention Article 22 states in part:

1. Every person lawfully in the territory of a State Party has the right to move about in it, and to reside in it subject to the provisions of the law.
2. Every person has the right to leave any country freely, including his own.
3. The exercise of the foregoing rights may be restricted only pursuant to a law to the extent necessary in a democratic society to prevent crime or to protect national security, public safety, public order, public morals, public health, or the rights or freedoms of others.

granting the concession in the Sarayaku territory without consulting the people, the state violated their right to culture, given their special relationship with their territory and the actions of the company which caused a profound impact on the teaching of cultural traditions and rituals to the children and young people, as well as on the transmission and perpetuation of the elders' spiritual knowledge.[198]

The Court reiterated its prior jurisprudence on the scope of Article 21 as it protects the right to communal indigenous property, but it went on to assert that the use and enjoyment of property is necessary to ensure indigenous physical and cultural survival.[199] This means, according to the Court that "the right to use and enjoy the territory would be meaningless for indigenous and tribal communities if that right were not connected with the protection of natural resources in the territory."[200] Thus, Article 21 encompasses their control and use of natural resources, which in turn allows them to maintain their lifestyle:

> This connection between territory and natural resources that indigenous and tribal peoples have traditionally maintained, one that is necessary for their physical and cultural survival and the development and continuation of their worldview, must be protected under Article 21 of the Convention so that they can continue living their traditional lifestyle, and so that their cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected by States.
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> 147. Furthermore, lack of access to the territories and their natural resources may prevent indigenous communities from using and enjoying the natural resources necessary to ensure their survival, through their traditional activities; or having access to their traditional medicinal systems and other socio-cultural functions, thereby exposing them to poor or inhumane living

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> 4. The exercise of the rights recognized in paragraph 1 may also be restricted by law in designated zones for reasons of public interest[.]

American Convention, supra note 29, art. 22.

[198] *See Case of the Kichwa Indigenous People of Sarayaku*, Inter-Am. Ct. H.R. (ser. C) No. 245, ¶¶ 217-20. The argument was based on Article 26 of the American Convention, which states:

> The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.

American Convention, *supra* note 29, art. 26.

[199] *Case of the Kichwa Indigenous People of Sarayaku*, Inter-Am. Ct. H.R. (ser. C) No. 245, ¶ 146.

[200] *Id.*

> conditions, to increased vulnerability to diseases and epidemics, and subjecting them to extreme situations of vulnerability that can lead to various human rights violations, as well as causing them suffering and harming the preservation of their way of life, customs and language.[201]

The Court pays close attention to cultural identity as a basis for not only the right to property, but also the right to consultation.[202] In the Court's view, the close relationship between indigenous communities and their land is an essential component of their cultural identity, and "as distinct social and political actors in multicultural societies," they must be recognized and respected in a democratic society.[203] In fact, according to the Court, "the recognition of the right to consultation of indigenous and tribal communities is founded, inter alia, on respect for their rights to their own cultural or cultural identity, which should be assured in a pluralistic, multicultural and democratic society."[204] This right to consultation, said the Court, recognized in ILO Convention no. 169, is also thus guaranteed by the inter-American instruments through an evolutionary approach to the terms that also takes into account the domestic laws of OAS member states and the global community.[205]

Surveying recent state practice the Court concludes that "nowadays the obligation of States to carry out special and differentiated consultation processes when certain interests of indigenous peoples and communities are to be affected is an obligation that has been clearly recognized."[206] Parties to the Convention, pursuant to the obligation to guarantee the free and full exercise of the rights recognized in the Convention (Article 1(1)), must then structure their standards and institutions in such a way that indigenous, native, or tribal communities can be consulted effectively, in accordance with international standards.[207] Importantly, the Court does not qualify this obligation according to the level of harm a project or activity may cause, simply stating that the state "must guarantee the rights to consultation and participation in all phases of planning and implementation of a project that may affect the territory on which an indigenous or tribal community is settled."[208] The State must also carry out inspection and supervision of the actions of third parties and when appropriate deploy effective means to safeguard indigenous rights through corresponding judicial organs.

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[201] *Id.* ¶¶ 146-47.
[202] *See id.* ¶ 159.
[203] *Id.*
[204] *Id.*
[205] *See id.* ¶ 164 (noting the comparative analysis undertaken by the Court).
[206] *Id.* ¶ 165.
[207] *Id.* ¶ 166.
[208] *Id.* ¶ 167.

The judgment also goes into more detail about the nature of the right to consultation and the duty of the state to consult the community:

> [I]n an active and informed manner, and in accordance with its customs and traditions, in the context of a continuous communication between the parties. Moreover, these consultations should be undertaken in good faith, through culturally appropriate procedures and must be aimed at reaching an agreement. Similarly, the indigenous people or community must be consulted in accordance with its own traditions, during the early stages of the development or investment plan, and not only when it is necessary to obtain the communities approval. Also, the State must ensure that members of the community are aware of the potential benefits and risks so they can decide whether or not to accept the proposed development or investment plan. Finally, the consultation must take into account the traditional decision-making practices of the people or community.[209]

Beyond reiterating its consistent case law, the Court moved further into recognizing an independent right to cultural identity, linking it to the principle of non-discrimination established in Article 1(1) of the Convention.[210] According to the court, "recognition of the right to cultural identity is an ingredient and a means of broad interpretation to understand, respect and guarantee the right to enjoy and exercise the human rights of indigenous peoples and communities protected by the Convention and, pursuant to Article 29(b) thereof, also by domestic legal systems" and various international instruments.[211] Looking to the developments in international law, the Court announced that it considers the right to cultural identity to be a fundamental right—and one of a collective nature—of the indigenous communities, which should be respected in a multicultural, pluralistic and democratic society.[212] Notably, the footnote to this pronouncement discusses the right to self-determination.[213] The Court puts this together with the right to property to conclude that the failure to consult the Sarayaku People violated the right to communal property of the people, in relation to the right to cultural identity.[214] The injured party is identified

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[209] *Id.* ¶ 177.

[210] *Id.* ¶ 212-13.

[211] *Id.* ¶ 213. In addition to citing ILO Convention 169 and UNDRIP, the Court for the first time quotes Principle 22 of the Rio Declaration on the Environment and Development, which speaks of the vital role of indigenous peoples in environmental management and development. *See id.* ¶ 214. The Court also notes that UNESCO legal instruments address the right to culture and cultural identity.

[212] *Id.* ¶ 217.

[213] *Id.* ¶ 217 n.288.

[214] The Court again declined to analyze the facts of the case in light of other Articles of the Convention, i.e., Articles 7, 13, 22, 23 and 26, as sought by the Commission and the representatives of the parties. *See generally id.*

as the Kichwa Indigenous People of Sarayaku, not the individual members; this is again a first for the Court.

V. ANALYSIS

Review of the cases and judgments in the Inter-American system reveals an overwhelming focus on the right to property as the pre-eminent juridical guarantee of the rights of indigenous peoples. Other rights, such as the rights to culture, religion, political participation, and self-determination are generally held to be subsumed in or dependent on the land and resource rights, if they are mentioned at all. Indeed, property is defined in cultural terms. In *Awas Tingni*, the Inter-American Court on Human Rights noted that the right to property and community control of land and land tenure are inseparable parts of indigenous culture.[215] Other cases and reports have taken the view that communal land rights are a foundation for other human rights, including the right to religion,[216] the right to family,[217] the right to a healthy environment,[218] and the right to self-determination.[219] In the *Toledo Maya* case, for example, the Commission concluded that the "distinct nature of the right to property as it applies to indigenous people" meant that additional claims of human rights violations by Belize were "subsumed within the broad violations of Article XXIII (right to property) of the American Declaration determined by the Commission in this case and therefore need not be determined."[220]

This focus on property rights can be understood: self-determination is not guaranteed in any of the regional instruments or in ILO Convention no. 169; the right to culture is not in the American Declaration[221] or Convention

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[215] *See, e.g.*, Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001).

[216] *See* Maya Indigenous Communities of the Toledo Dist. v. Belize, Case 12.053, Inter-Am. Comm'n H.R., report No. 40/04, OEA/Ser.L/V/II.122 doc. 5, rev. 1, n.123, ¶ 155 (2004) ("[T]he concept of family and religion within the context of indigenous communities, including the Maya people, is intimately connected with their traditional land, where ancestral burial grounds, places of religious significance and kinship patterns are linked with the occupation and use of their physical territories."); *Id.* ¶¶ 114, 120 (quoting Miskito Report, *supra* note 70, ¶ 15); *Id.* ¶ 124.

[217] *Toledo Maya Case*, Case 12.053, Inter-Am. Comm'n H.R., report No. 40/04, OEA/Ser.L/V/II.122 doc. 5, rev. 1, n.123, ¶ 155.

[218] *See* Yanomami v. Brazil, Case 7615, Inter-Am. Ct. H.R., Res. No. 12/85, OEA/Ser.L./V/II.66, doc. 10 rev. 1 (Mar. 5, 1985).

[219] *Awas Tingni Case*, Inter-Am. Ct. H.R. (ser. C) No. 79.

[220] *Toledo Maya Case*, Case 12.053, Inter-Am. Comm'n H.R., report No. 40/04, OEA/Ser.L/V/II.122 doc. 5, rev. 1, n.123, ¶¶ 155-56.

[221] *See* American Declaration, *supra* note 28, art. 13 ("Every person has the right to take part in the cultural life of the community, to enjoy the arts, and to participate in the benefits

and its inclusion in the Protocol to the American Convention on Economic, Social and Cultural Rights[222] is both limited in substance[223] and non-justiciable in the system. Using the right to property to frame the conflicts, environmental degradation, dispossession, and other violence has allowed the Commission and the Court to address indigenous rights within the normative framework of the Declaration and Convention, without the need to imply unstated rights. There are limits, however, to this approach.

In the first place, the right to property is more easily limited than are other rights in the Convention. Article 21(1) provides that the use and enjoyment of property may be subordinated by law "to the interest of society."[224] Paragraph 2 adds that deprivation of property may occur, provided there is payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.[225] Often governments plead economic development as a reason for resource extraction, assert that no accessible alternative sites exist, and provide minimal benefits to the communities. It might be more difficult for states to defend such actions in the face of claims that they violate the free exercise of religion, for example. Freedom to manifest one's religion and beliefs may be limited only as provided by a law that is "necessary to protect public safety, order, health, or morals, or the rights or freedoms of others."[226] Given the spiritual foundation for the relationship of many indigenous groups with the land, a claim to religious liberty might strengthen claims to restitution of lands and protection of resources. At the least, it could ensure access to sacred sites and areas in instances where alternative lands are provided instead of restitution. In the settlement of the Kelemagategma case against Paraguay, the government and the community

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that result from intellectual progress, especially scientific discoveries"). There is no mention of cultural diversity or cultural heritage, although the cultural life of the community could be read expansively to include both.

[222] Organization of American States, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, "Protocol of San Salvador," Nov. 17, 1988, OAS Treaty Series No. 69 [hereinafter Protocol]. Organization of American States, American Declaration of the Rights and Duties of Man, July 2003, O.A.S. Res. XXX, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser.L/V/II.82 doc. 6 rev. 1 at 67 (1992).

[223] *See id.* art. 14 (recognizing the right to the benefits of culture; drafted in language quite similar to the American Declaration, *supra* note 28, art. 13, except for the addition of an obligation for parties to take steps to ensure the conservation, development and dissemination of culture).

[224] American Convention, *supra* note 29, art. 21(1).

[225] *Id.* art. 21(2).

[226] *Id.* art. 12(3)

agreed on the provision of alternative lands,[227] but issues remain of access to burial and other sacred sites in the lands that were abandoned due to the intransigence of the powerful landowner.

Another concern is the fact that the Court has guaranteed resource protection only for those resources "traditionally used."[228] This freezes economic and beneficial uses of property in the past, rather than allowing the communities to develop new uses for resources on their lands, a restriction not generally imposed on non-indigenous landowners. Finally, the jurisprudence is clear that deprivations of the right to property need not always be remedied by restitution; substitute lands or compensation may be delivered instead. While this remedy may solve the economic concerns of indigenous communities, allowing subsistence activities to resume, it does not deal with the cultural and spiritual dimension of the claim: those indigenous communities who accept substitute lands leave behind burial grounds, sacred sites, cultural heritage, and other irreplaceable aspects of their identity. This result would be less likely if indigenous rights to property were also based on the rights to religion, culture or self-determination. Some domestic laws contain provisions that could be relied upon in this respect. In Guyana, for example, Article 149G of the Constitution provides that "indigenous peoples shall have the right to the protection, preservation and promulgation of their languages, cultural heritage and way of life."[229]

A. Foundation and Scope of the Right to Property

The interpretation of Declaration Article 23 and Convention Article 21 has consistently referred to the doctrine of autonomous meaning, adapted terms to present-day conditions, and avoided a restrictive approach to the scope of rights.[230] This being said, the rationale for the Court's recognition of collective ownership rights in traditional lands is not always easy to

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[227] The settlement of this matter is reported in a press release that followed the on site visit in 2011. *See* Press Release, IACHR Concludes Working Visit to Paraguay, ORG. OF AMERICAN STATES (Aug. 12, 2011), http://www.oas.org/en/iachr/media_center/PReleases/2011/089.asp. The original petition was declared admissible in Kelyenmagategma Indigenous Community of the Enxet-Lengua People and its Members, Inter-Am. Comm'n H.R., Admissibility Report 55/07, Petition 987-04 (July 24, 2007), http://www.cidh.org/annualrep/2007eng/Paraguay987.04eng.htm.

[228] *See supra* notes 149-150.

[229] Constitution of Guyana, art. 149G, *available at* http://gina.gov.gy/wp/?page_id=134.

[230] Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79 ¶¶ 146-48 (Aug. 31, 2001); *see also* Gaetano Pentassuglia, *Towards A Jurisprudential Articulation Of Indigenous Land Rights*, 22 EUR. J. INT'L L. 165 (2011).

identify. In some instances, the Commission and the Court have reiterated their understanding that indigenous and tribal peoples have a unique way of life and a worldview based on their close relationship with land, suggesting a cultural foundation for the right. This cultural relationship "may include traditional use or presence, such as maintenance of sacred or ceremonial sites, settlements or sporadic cultivation, seasonal or nomadic gathering, hunting and fishing, the customary use of natural resources or other elements characterizing indigenous and tribal culture."[231] Elsewhere the Court has commented that "it is necessary to take into account that the land is closely linked to their oral expressions and traditions, their customs and languages, their arts and rituals, their knowledge and practices in connection with nature, culinary art, customary law, dress, philosophy, and values."[232] Other cases seem to ground the right in physical and economic security, noting that the lands indigenous peoples traditionally use and occupy are critical to their physical vitality. Either way, the right to property is accepted as instrumental—having singular importance for indigenous and tribal peoples *because* the guarantee is a fundamental basis for the maintenance and development of indigenous culture, spiritual life, integrity and economic survival.

It is not clear that the Court requires formal title, as opposed to some other secure form of land tenure, but the Commission has insisted that indigenous rights must be recognized in law as well as in practice:

> [R]ather than a privilege to use the land, which can be taken away by the State or trumped by real property rights of third parties, members of indigenous and tribal peoples must obtain title to their territory in order to guarantee its permanent use and enjoyment . . . This title must be recognized and respected, not only in practice, but also in law, in order to ensure its legal certainty.[233]

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[231] *Awas Tingni Cmty.*, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 149; Yakye Axa v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser.C) No. 125, ¶¶ 124, 131 (June 17, 2005); Plan de Sánchez Massacre v. Guatemala, Reparations and Costs, Judgment Inter-Am. Ct. H.R. (ser. C) No. 116, ¶ 85 (Nov. 19, 2004).

[232] *Yakye Axa*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 154. The Committee for the Elimination of Racial Discrimination has also concluded that indigenous peoples' territorial rights are unique, and encompass a tradition and a cultural identification of indigenous peoples with their lands. *See* Mary and Carrie Dann v. United States, Case 11.140, Inter-Am. Ct. H.R., Report No. 75/02, OEA/Ser.L/V/II.117, doc. 5. rev. 1, ¶ 130 n.97 (2002).

[233] Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 174, ¶ 115 (Nov. 28, 2007). The same rationale applies, *a fortiori*, in the event that the community becomes displaced as a result of violent attacks on its members. *See* Moiwana Cmty. v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 145, ¶ 19 (Feb. 8, 2006).

This issue is currently being explored in the follow-up to the *Saramaka* judgment.

For the future, the property rights resulting from the process of demarcation and tenure must take into account relations with and claims of other communities. After the *Awas Tingni* judgment, challenges arose to implementation,[234] most significantly from a territorial dispute with Miskito communities whose claims overlapped part of the Awas Tingni territory.[235] The Nicaraguan government alleged that the overlap prevented it from fully implementing the *Awas Tingni* decision.[236] By repeatedly raising this issue, the government exacerbated the conflict,[237] which eventually encompassed ten neighboring communities[238] and generated larger confrontations.[239] In implementing the *Moiwana* judgment, similar concerns have been raised about the competing rights of indigenous and Saramaka communities, although the Court recognized that the State should ensure "the participation and informed consent of the victims," together with "the members of the other Cottica N'djuka villages and the neighboring indigenous communities."[240] Demarcation has proven to be a complex issue and is not yet completed. An open issue is how to develop property systems that would acknowledge the nonexistence of fixed boundaries (nomadic peoples), the shared use of territories by various communities, and the rights of peoples in voluntary isolation.

B. Keeping Property: Extractive Industries and Resource Rights

Exploitation of subsurface and surface resources on indigenous land has been a consistent source of complaints by indigenous peoples in Latin America, where the property systems of many countries vest subsurface mineral rights in the state regardless of private ownership of the land.[241]

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[234] Leonardo J. Alvarado, *Prospects and Challenges in the Implementation of Indigenous Peoples' Human Rights in International Law: Lessons from the Case of Awas Tingni v. Nicaragua*, 24 ARIZ. J. INT'L & COMPL. L. 609 (2007).

[235] *Id.* at 625-26.

[236] *Id.* at 626.

[237] *Id.* at 629.

[238] *See* Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, Monitoring Compliance with Judgment, Order of the Court, 2008 Rep. Inter-Am. Ct. H.R. (May 7, 2008).

[239] Alvarado, *supra* note 234, at 623-24.

[240] Moiwana Cmty. v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 145, ¶ 210 (Feb. 8, 2006).

[241] *See, e.g*, Rodrigo Sanchez-Mejorada V., *Mining Law in Mexico*, 9 MINERAL RESOURCES ENGINEERING 129, 130 (2000), *available at* http://www.smvr.com.mx/art2e.htm (noting that during the beginning of colonization, current Mexico was subject to the laws of Spain, which gave ownership of subsurface minerals to the Spanish Crown).

Constitutional provisions often explicitly provide that the state owns subsurface and other resource rights.[242]

Increasingly, state-supported mining, hydro-electric projects, and other major development initiatives lead to confrontations between the local population, private investors and government authorities.[243] The projects often involve discharges of toxic chemicals that poison waterways and drinking water sources used by indigenous people and also contaminate their food, but these issues are overlooked by governments seeking the revenues produced by extractive industries.[244] Rarely do concession agreements ensure proper environmental standards are met or demand remediation at the end of the project.

Most efforts to develop norms to balance the competing interests of the state and indigenous peoples have focused on procedural rights, especially the contentious principle of free, prior and informed consent.[245] Indigenous communities demand not only to be consulted and participate in decisions that will affect their territory and resources, but also the right to say no.[246] In response, governments justify their decisions to support natural resources exploitation by arguments based on the "national interest" or the "greater good" to which the rights and interests of indigenous peoples and others must be subordinated.[247] Yet, the exercise of sovereign rights is circumscribed by national laws and human rights obligations.[248] In particular, the recognition of state sovereignty over natural resources is coupled with human rights demands that any proposed use of indigenous lands must be in the public interest, just compensation must be paid, and both those requirements must be subject to review.[249]

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[242] *See, e.g.*, CONSTITUCION DE LA NACION ARGENTINA, § 124; CONSTITUCION POLITICA DEL ESTADO DE BOLIVIA, 1967, arts. 136, 139; C.F. art. 20, § 1 (Braz.); CONSTITUCION POLITICA DE LA REPUBLICA DE CHILE DE 1980, art. 19, no. 24; CONSTITUCION POLITICA DE COLUMBIA, 1991, art. 332; CONSTITUCION POLITICA DE PANAMA, 1972, art. 257.

[243] Brant McGee, *The Community Referendum: Participatory Democracy and the Right to Free, Prior and Informed Consent to Development*, 27 BERKELEY J. INT'L L. 570 (2009).

[244] *Id.* at 578.

[245] Fergus Mackay, *Indigenous Peoples' Right to Free, Prior and Informed Consent and the World Bank's Extractive Industries Review*, 4 SUSTAINABLE DEV. L. & POL'Y 43, 43 (2004).

[246] *Id.* at 45.

[247] *Id.* at 50.

[248] *Id.* at 54.

[249] The public interest requirement is recognized in customary international law and specifically in the language of paragraph four of the 1962 U.N. General Assembly Resolution 1803 on Permanent Sovereignty over Natural Resources: "[n]ationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign." G.A. Res. 1803, ¶ 4, U.N. GAOR, 17th Sess.,

The provisions and jurisprudence of the inter-American system thus allow restrictions on or deprivations of property if the measures taken meet the tests of necessity, proportionality,[250] non-discrimination and public interest for the purpose of achieving a legitimate objective in a democratic society.[251] Restrictions on the right to property "must be justified by reference to collective purposes which, owing to their importance, clearly outweigh the social need for full enjoyment of the right that Article 13 guarantees . . . ."[252] Expropriation of the lands may require even greater justification when balanced against the preservation of indigenous culture, subsistence agriculture, and biodiversity. In the *Maya Toledo* case, the Commission specifically addressed resource exploitation and concluded that the requirement of free, prior, informed consent applies to "decisions by the State that will have an impact upon indigenous lands and their communities, such as the granting of concessions to exploit the natural resources of indigenous territories."[253]

The procedural obligation of meaningful consultation is different from information or announcing that a decision has been taken to grant concessions to exploit a portion of the indigenous group's land.[254] Too often a government negotiates the concession with a private company and then presents the agreement as a "proposal" after the deal has been concluded.[255] Discussions with indigenous communities are thereafter very unlikely to lead to any changes in the investment agreement.

Prior environmental and social impact assessments ("ESIAs") in the context of development or investment projects[256] should measure the individual and cumulative effects of current or future activities on the community and the environment, as well as allowing further opportunity for

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Supp. No. 17, U.N. Doc. A/5217, at 15, ¶ 4 (1962).

[250] Proportionality is "based on the restriction being closely adjusted to the attainment of a legitimate objective, interfering as little as possible with the effective exercise of the restricted right." Yakye Axa v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 145 (June 17, 2005).

[251] *Id.*

[252] *Id.*; *see also* Case of Ricardo Canese v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 111, ¶ 96 (Aug. 31, 2004); Herrera-Ulloa v. Costa Rica, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 107, ¶ 127 (July 2, 2004).

[253] Maya Indigenous Communities of the Toledo Dist. v. Belize, Case 12.053, Inter-Am. Comm'n H.R., report No. 40/04, OEA/Ser.L/V/II.122 doc. 5, rev. 1, n.123, ¶ 142 (2004); *see also* MacKay, *supra* note 245, at 4.

[254] Tara Wood, *The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights Within International Law*, 10 NW. U. J. INT'L HUM. RTS. 54, 66 (2011).

[255] *See, e.g.*, Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 174 (Nov. 28, 2007).

[256] *See id.* ¶ 41.

participation by the potentially affected communities. Based on the ESIA, benefit-sharing can be considered a form of compensation for damage resulting from the activities as well as a "form of reasonable equitable compensation" under Article 21(2).[257] The *Saramaka* judgment built on previous cases[258] to set up a kind of "prior appropriation" doctrine with regard to ownership or protection of natural resources.[259] Where there is proof of a continuing material and/or spiritual relationship of the community to "the use of natural resources associated with their customs," the state must recognize the property rights over ancestral resources.[260]

As to the issue of consent, the Court's view of the right to free, prior, and informed consultations should allow for the possibility for indigenous peoples to make independent choices about the development or exploitation of their lands and resources.[261] Nonetheless, the Court has not fully accepted the right to say no as part of the right to property or through recognition of (internal) self-determination.[262] The Commission in the *Toledo Maya* case seems to have gone further than the Court on this point, producing some confusion over the actual circumstances in which consent must be the result of prior consultations.

Notable, too, is that the Court has indicated a strong level of protection only for resources that constitute part of the indigenous traditional culture, necessary for the preservation of the cultural identity.[263] While the Court has discussed quality of life of dispossessed peoples, it has not focused on resources from the perspective of their material and economic value above the subsistence level.[264] Indeed, thus far the Court has not recognized a superior right to use or exploit those natural resources that are necessary to

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[257] *Yakye Axa*, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶¶ 138-40.

[258] *Id.* ¶ 157.

[259] *Saramaka People*, Inter-Am. Ct. H.R. (ser. C) No. 174.

[260] Sawhoyamaxa Indigenous Cmty. v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 131 (Mar. 29, 2006).

[261] U.N. Comm'n. H.R., Sub-Comm'n. on the Promotion and Protection of Human Rights Working Group on Indigenous Populations, *Working Paper: Standard-Setting: Legal Commentary on the Concept of Free, Prior and Informed Consent*, U.N. Doc. E/CN.4/Sub.2/AC.4/2005/WP.1, ¶ 57 (July 14, 2005) (*prepared by* Antoanella-Iulia Motoc & Tebtebba Foundation).

[262] Bartolome Clavero, *The Indigenous Rights of Participation and International Development Policies*, 22 ARIZ. J. INT'L & COMP. L. 41, 42 (2005); Katsuhiko Masaki, *Recognition or Misrecognition? Pitfalls of Indigenous Peoples' Free, Prior, and Informed Consent (FPIC)*, *in* RIGHTS-BASED APPROACHES TO DEVELOPMENT: EXPLORING THE POTENTIAL PITFALLS 69 (Hickey et al., eds., 2009).

[263] *Saramaka People*, Inter-Am. Ct. H.R. (ser. C) No. 174, ¶ 82.

[264] The Court has said that the right to property protects "those natural resources traditionally used and necessary for the very survival, development and continuation of such people's way of life." *Id.* ¶ 122.

improve the communities' economic or social situation, increase their investments, or create capital reserves for future generations.[265] In the *Saramaka* judgment, the Court distinguished between the concessions for exploitation of gold, a mineral that is "not traditionally" used by the Saramaka, and the concessions to exploit timber resources that are "traditionally" used by the community.[266] The Court failed to clearly establish a priority for indigenous rights over third-party concessions.[267]

C. Cultural Rights

Recognition of indigenous peoples' rights to culture and cultural heritage has gained some momentum in recent years. Indigenous cultural heritage comprises "all objects, sites and knowledge the nature or use of which has been transmitted from generation to generation, and which is regarded as pertaining to a particular people or its territory."[268] It thus includes both material manifestations, such as burial sites and rock and cave paintings, and immaterial elements, including traditional knowledge and cultural expressions, oral traditions, literature, designs, and visual and performing arts.[269]

As early as the *Moiwana* case, the Court determined that indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival.[270] Similarly, in the case of *Awas Tingni*, the Court seemed to base its recognition of indigenous communal property rights precisely on the need to respect cultural diversity.[271] The Court thus emphasized the fact that:

> The culture of the members of the indigenous communities directly relates to a specific way of being, seeing, and acting in the world, developed on the

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[265] *See generally* Ariel Dulitsky, *When Afro-Descendants became 'Tribal Peoples': The Inter-American Human Rights System and Rural Black Communities*, 15 UCLA J. INT'L & FOREIGN AFF. 29, 47 (2010).

[266] *Saramaka People*, Inter-Am. Ct. H.R. (ser. C) No. 174, ¶ 155.

[267] *Id.* ¶ 111.

[268] Special Rapporteur, Sub-Comm'n on Prevention of Discrimination and Protection of Minorities, *Principles and Guidelines for the Protection of the Heritage of Indigenous Peoples*, U.N. Doc. E/CN.4/Sub.2/1994/31, at 5, ¶ 11 (July 8, 1994) (by Erica-Irene Daes).

[269] Ciaran O'Faircheallaigh, *Negotiating Cultural Heritage? Aboriginal Mining Company Agreements in Australia*, 39(1) DEV. & CHANGE 25, 27 (2008).

[270] *See* Moiwana Cmty. v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 131 (June 15, 2005).

[271] Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001).

> basis of their close relationship with their traditional territories and the resources therein, not only because they are their main means of subsistence, but also because they are part of their worldview, their religiosity, and therefore, of their cultural identity.[272]

This interpretation of the term "property" could be seen to introduce an element of cultural relativism into the interpretation of human rights guarantees. While in the indigenous cases it has expanded the scope of the guaranteed right, there is a risk that in other circumstances, it could be invoked by those who seek to limit rights for the sake of traditional cultural practices. As noted above, in the *Aloeboetoe Case* the Court took a cultural approach in determining the meaning of "family," with legal consequences for the reparations afforded.[273] This is an issue that will likely arise in the future in the context of the rights of indigenous women, who have expressed some dissatisfaction with traditional decision-making processes and the double or triple discrimination they face as indigenous women living in poverty.[274]

In nearly all of the land rights cases, the Court has emphasized the connection between culture and protection of territory:

> The culture of the members of the indigenous communities directly relates to a specific way of being, seeing, and acting in the world, developed on the basis of their close relationship with their traditional territories and the resources therein, not only because they are their main means of subsistence, but also because they are part of their worldview, their religiosity, and therefore, of their cultural identity.[275]

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[272] Yakye Axa v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 135 (June 17, 2005); *see also* Jo M. Pasqualucci, *International Indigenous Land Rights: A Critique of the Jurisprudence of the Inter-American Court of Human Rights in the Light of the United Nations Declaration on the Rights of Indigenous Peoples*, 27 WISC. INT'L L. J. 51, 80 (2009).

[273] *See* Aloeboetoe et al. v. Suriname, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 15 (Sept. 10, 1993).

[274] In a recent report on women's rights, the Commission summarized as follows: "The Commission also concluded that the pain and humiliation that the women suffered had been aggravated by the failure of the State to consider their status as indigenous women and their different world view and language in the judicial response to the facts." Case of Fernandez Ortega et al. v. Mexico, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H R. (ser. C) No. 215 (Aug. 30 2010). In cases concerning sexual violence against indigenous women, the Court has focused on the targeted violence against indigenous women in conflicts between indigenous communities and landowners, as well as in confrontations with armed forces and police. *See, e.g., id.; see also* Ana, Beatriz, and Cecilia Gonzalez Perez v. Mexico, Case 11.565, Inter-Am. Comm'n H.R., Report No. 53/01 (Apr. 2, 2001).

[275] *Yakye Axa*, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 135; *see also* Sawhoyamaxa

Thus, the Court recognizes that "[f]or indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations."[276] As Dannenmaier concludes, this doctrine of "distinctive connection" between territory and indigenous people is what gives rise to the legal recognition of their property rights.[277]

The cultural link that the Court has emphasized is particularly important when title to indigenous lands is held by third parties. *Yakye Axa* provides criteria for a case-by-case assessment of such competing claims, in accordance with Convention Article 21(2).[278] When legal title is in the hands of private parties, the state should secure sufficient funds for "the acquisition or condemnation" of the lands.[279] Only if there are "well-founded reasons" that prevent the State from returning the traditional territory of the community,[280] can the State instead provide alternative lands chosen by "a consensus with the peoples involved, in accordance with their own mechanism of consultation, values, customs and customary law."[281] The Court is clear that the fact that the reclaimed lands have long been in private hands under domestic law and are being productively used does not constitute an "objective and reasoned ground" for dismissing *prima facie* an indigenous claim.[282] Instead, the State must consider the collective objective of preserving cultural identities in a democratic and pluralist society, but the cultural link will not always prevail over the economic link of third parties. In some cases the Court could have required the State to return the particular claimed land to the indigenous peoples and give equivalent land to the ranchers. Instead, the Court stated that it is not the case that "every time there is a conflict between the territorial interests of private individuals or of the State and those of the members of the

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Indigenous Cmty. v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 118 (Mar. 29, 2006).

[276] *Awas Tingni Cmty.*, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 149.

[277] *See* Eric Dannenmaier, *Beyond Indigenous Property Rights: Exploring the Emergence of a Distinctive Connection Doctrine*, 86 WASH. U. L. REV. 53 (2008).

[278] *Yakye Axa*, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 146.

[279] *Id.* ¶¶ 34, 35.

[280] *Id.* ¶ 33.

[281] *Id.* ¶ 151.

[282] *Sawhoyamaxa Indigenous Cmty.*, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶¶ 138. This was strongly reaffirmed in Xàkmok Kàsek Indigenous Cmty. v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am Ct. H.R. (ser. C) No. 214, ¶¶ 148-49, 170, 284 (Aug. 24, 2010).

indigenous communities, the latter must prevail over the former."[283] In the context of indigenous peoples, the Court has established that:

> [T]he States must assess, on a case by case basis, the restrictions that would result from recognizing one right over the other. Thus, for example, the States must take into account that indigenous territorial rights encompass a broader and different concept that relates to the collective right to survival as an organized people, with control over their habitat as a necessary condition for reproduction of their culture, for their own development and to carry out their life aspirations. Property of the land ensures that the members of the indigenous communities preserve their cultural heritage . . . . restriction of the right of private individuals to private property might be necessary to attain the collective objective of preserving cultural identities in a democratic and pluralist society, in the sense given to this by the American Convention; and it could be proportional, if fair compensation is paid to those affected . . . .[284]

D. Other Rights

The case law of the inter-American system has also established that states must ensure access to justice for the members of indigenous peoples, taking into account "their specific features, economic and social characteristics, as well as their special situation of vulnerability, their common law, values, uses and customs."[285] Moreover, the Court has highlighted that under Articles 8 (right to a fair trial) and 25 (judicial protection), and in light of the duty to adopt provisions of domestic law pursuant to Article 2 of the American Convention, the State is:

> [O]bliged to provide for appropriate procedures in its national legal system to process the land claim proceedings of the indigenous peoples with an interest thereon. For such purpose, the generic obligation to respect rights established in Article 1(1) of [the Convention] imposes on the States the duty to ensure an accessible and simple procedure and to provide competent authorities with the technical and material conditions necessary to respond timely to the requests filed in the framework of said procedure.[286]

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[283] *Yakye Axa*, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 149.

[284] *Id.* ¶¶ 146-48.

[285] *Id.* ¶ 63; *Sawhoyamaxa Indigenous Cmty.*, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 83; Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 174, ¶ 178 (Nov. 28, 2007).; Case of Tiu Tojin v. Guatemala, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 190 (Nov. 26, 2008).

[286] *Sawhoyamaxa Indigenous Cmty.*, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 109.

VI. CONCLUSION

Indigenous land and resource claims in the Inter-American system are grounded in a variety of rationales: cultural and physical survival; the right to practice religion; sovereign or semi-sovereign status recognized in earlier treaties with the government; and the right to self-determination.[287] Most cases decided by the Inter-American Commission and Court have focused on the first of these bases, although some pending cases concern indigenous-government treaty rights and sacred sites. Broader issues of the inequitable distribution of land, marginalization, poverty, and lack of basic public services have largely escaped regional litigation. The limited jurisdiction of the Commission and Court to apply economic, social and cultural rights may account for much of this approach, but a broader focus on equality and non-discrimination might allow exploration of systemic discrimination. The Commission and Court have said that members of indigenous and tribal peoples require certain special measures, in part to redress past injustices, and in part to ensure the full exercise of their rights in order to guarantee their physical and cultural survival.[288]

In respect to equality and non-discrimination, all human rights bodies accept that, in international law, the unequal treatment of persons in unequal conditions is not in fact discriminatory, but is necessary in equity to take into account relevant differences. To treat indigenous peoples "equally," requires recognition of their distinct culture, spirituality, languages, forms of land tenure, and situation within larger society. In *Saramaka*, the Court rejected as without merit the state's argument "that it would be discriminatory to pass legislation that recognizes communal forms of land ownership."[289] Unequal treatment towards persons in unequal situations does not necessarily amount to impermissible discrimination and legislation that recognizes the said differences is therefore not necessarily discriminatory. "Equality before the law must encompass cultural diversity and difference, or it risks being discriminatory by failing to recognize that cultural diversity."[290] At present, the right to

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[287] Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57, 98-99 (1999).

[288] Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶¶ 148-49, 151 (Aug. 31, 2001); *Sawhoyamaxa Indigenous Cmty.*, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶¶ 118-21, 131; *Yakye Axa*, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶¶ 124, 131, 135-37, 154; *Saramaka People*, Inter-Am. Ct. H.R. (ser. C) No. 174, ¶¶ 85, 91, 103.

[289] *Saramaka People*, Inter-Am. Ct. H.R. (ser. C) No. 174, ¶ 103.

[290] RACHEL SIEDER, CUSTOMARY LAW AND DEMOCRATIC TRANSITION IN GUATEMALA 53 (1997).

recognition of communal property is indeed partly founded on the right of indigenous groups to maintain their cultural identity and, related to this, the right requires that the legal norms governing communal tenure are the customary laws of the indigenous group.[291] It remains necessary to go beyond the right of occupancy of traditional lands and begin to take into account structural discrimination and broader historic claims. In *Yakye Axa*, for example, the portion of land at issue in the case was only a small part of what is traditional Chanawatsan territory, and no consequences were drawn from recognition of this fact. Examining territorial claims as matters of equality and non-discrimination would open new perspectives and could expand the scope of potential reparations.[292]

There will no doubt be continued resistance to expanding indigenous human rights and recognizing historic injustices, in particular when indigenous claims are seen by the state as blocking economic development projects. OAS member states have an uneven record at best in regard to respecting and protecting the rights of indigenous peoples and complying with decisions of the Commission and judgments of the Court. Some states have reacted with considerable anger to decisions that seek to protect the rights of indigenous peoples, especially in respect to the issuance of precautionary measures that ask for a "hold" on the projects until the merits of the indigenous claims can be decided. In a few instances, governments have demarcated and titled lands in indigenous peoples. They have cancelled concessions and removed non-indigenous settlers. In other states, violence against indigenous peoples is widespread and there is a climate of impunity. Development projects continue to lead to forced removals from ancestral lands. Compliance with human rights law remains a work in progress.

Many legal questions remain to be fully determined: What constitutes meaningful consultation? Whose responsibility it is to undertake such consultations and ensure that the conditions of concessions are fulfilled, given that most of the cases involve foreign investment? What is the impact of bilateral investment agreements on these issues? Should the Court go further in recognizing an obligation to obtain consent to economic activities on indigenous lands, given the language of ILO Convention no. 169 or would this provoke even further hostility and lack of compliance by governments.

In answering these questions it should be kept in mind that a primary objective of the indigenous rights movement has been to secure indigenous peoples' ability to own, occupy, use, and control their traditional lands and

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[291] *Awas Tingni Cmty.*, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 151.

[292] Dulitsky, *supra* note 265, at 154.

natural resources.[293] They have proposed that their land and resource rights are inextricably tied to the preservation of indigenous identity, culture, religion, and modes of subsistence. In response, as the Commission has summarized:

> [T]he organs of the inter-American human rights system have acknowledged that indigenous peoples enjoy a particular relationship with the lands and resources traditionally occupied and used by them, by which those lands and resources are considered to be owned and enjoyed by the indigenous community as a whole and according to which the use and enjoyment of the land and its resources are integral components of the physical and cultural survival of the indigenous communities and the effective realization of their human rights more broadly.[294]

Given the continued debates over issues of land, resources, self-government, justice systems, and prior informed consent, as well as the list of unanswered questions, conclusion and adoption of the pending draft Inter-American Declaration on Indigenous Peoples could contribute of achieving a regional consensus and further contribute to the protection and promotion of indigenous rights.

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[293] *See* U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm'n on the Promotion & Prot. of Human Rights, *Final Working Paper: Prevention of Discrimination and Protection of Indigenous Minorities: Indigenous Peoples and Their Relationship to Land*, U.N. Doc. E/CN.4/Sub.2/2001/21 (June 11, 2001) (*prepared by* Erica-Irene A. Daes); ECOSOC, Sub-Comm'n on the Promotion & Prot. of Indigenous Peoples, *Indigenous Peoples' Permanent Sovereignty Over Natural Resources*, U.N. Doc. E/CN.4/Sub.2/2004/30, ¶ 8 (July 13, 2004) (*prepared by* Erica-Irene A. Daes); Lillian Aponte Miranda, *Uploading The Local: Assessing The Contemporary Relationship Between Indigenous Peoples' Land Tenure Systems And International Human Rights Law Regarding The Allocation Of Traditional Lands And Resources In Latin America*, 10 OR. REV. INT'L L. 419 (2008).

[294] Maya Indigenous Communities of the Toledo Dist. v. Belize, Case 12.053, Inter-Am. Comm'n H.R., report No. 40/04, OEA/Ser.L/V/II.122 doc. 5, rev. 1, n.123, ¶ 114 (Oct. 12, 2004).

The Human Rights of Indigenous Peoples: United Nations Developments[†]

S. James Anaya[*]

I. INTRODUCTION

In the face of tremendous adversity, indigenous peoples have long sought to flourish as distinct communities, and to roll back the historical patterns and legacies of colonization. In conjunction with efforts at the domestic level, indigenous peoples have appealed to the international system, mostly through its human rights regime in recent years, to advance their cause. Indigenous Hawaiians are among the world's indigenous peoples who have survived colonial onslaught and now assert their self-determination. Largely as a result of their own advocacy at the international level, indigenous peoples are now distinct subjects of concern within the international human rights program.[1] Several developments within the

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[†] This article is adapted from parts of the author's previous work, *The Human Rights of Indigenous Peoples*, *in* INTERNATIONAL PROTECTION OF HUMAN RIGHTS: A TEXTBOOK 301 (Catarina Krause & Martin Scheinin eds., 2d ed. 2009). This adaptation is presented here in honor of the late Jon Van Dyke and with acknowledgement of his pioneering work in the areas of international law and indigenous rights, which contributed to the intellectual support for the developments discussed here.

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[1] For detailed discussions about the measures adopted by international and regional institutions concerning indigenous peoples, see S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW (Oxford Univ. Press, 2d ed. 2004); S. JAMES ANAYA, INTERNATIONAL

United Nations system over the last few decades mark the progress toward placing indigenous peoples firmly on the international human rights agenda.

These developments can be seen as progressing along two mutually reinforcing tracks. One is toward enhanced institutional commitment to the concerns of indigenous peoples, which has entailed a focus on indigenous issues by existing UN human rights bodies along with the creation of new institutions. This institutional commitment has allowed indigenous peoples themselves a measure of access to the international arena, while bringing increased depth of understanding about the their disadvantaged conditions and resulting in multiple programmatic initiatives to address those conditions. A second track, which is to a significant extent a product of the first, entails the generation of a new set of international standards for the treatment of the world's indigenous peoples. These standards can be seen to be grounded in fundamental principles of universal human rights, while being aimed at remedying the historical and continuing deprivation of those rights. They represent a quickly developing body of international policy and law, with an emphasis on protecting indigenous bonds of community and culture.

The following pages provide a discussion of the major developments along these two tracks within the UN system, including its affiliate, the International Labour Organization. Important, complementary developments have taken place within regional institutions, in particular those of the inter-American and African human rights systems. This essay, however, is limited to UN developments.

II. THE INSTITUTIONAL COMMITMENT

A watershed in the international commitment to indigenous issues was the 1971 resolution of the UN Economic and Social Council authorizing the then UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, an expert advisory body of the intergovernmental Commission on Human Rights, to conduct a study on the "Problem of Discrimination against Indigenous Populations." The resulting multivolume work by Special Rapporteur José Martínez Cobo compiled extensive data on indigenous peoples worldwide and made a series of findings and recommendations generally supportive of indigenous peoples' demands.[2] The Martínez Cobo study became a standard reference for

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HUMAN RIGHTS AND INDIGENOUS PEOPLES (2009); PATRICK THORNBERRY, INDIGENOUS PEOPLES AND HUMAN RIGHTS (2002).

[2] *See* U.N. Sub-Comm'n on Prevention of Discrimination and Prot. of Minorities, *Study of the Problem of Discrimination against Indigenous Populations*, U.N. Doc. E/CN.4/Sub.2/1986/7/ and Adds. 1–4 (1986) (José Martínez Cobo, special rapporteur). The study contains the

discussion of the subject of indigenous peoples within the United Nations system. Moreover, it initiated a pattern of multiple activities concerning indigenous peoples among United Nations, regional, and affiliated institutions.

A. The Working Group on Indigenous Populations

Upon recommendation of the Martínez Cobo study and representatives of indigenous groups, the United Nations Commission on Human Rights, and its parent body the UN Economic and Social Council, approved in 1982 the establishment of the UN Working Group on Indigenous Populations. The Working Group was created as part of the Sub-Commission on Prevention of Discrimination and Protection of Minorities with a twofold mandate: "to review developments pertaining to the promotion and protection of the human rights and fundamental freedoms of indigenous populations . . . [and] give special attention to the evolution of standards concerning the rights of indigenous populations."[3] Pursuant to its standard-setting mandate, the Working Group took the initiative of developing a draft Declaration on the Rights of Indigenous Peoples, which became the basis for subsequent discussions ultimately leading to the adoption of the Declaration in revised form by the UN General Assembly, as discussed below.

The Working Group ceased to exist after the restructuring of the UN human rights machinery in 2006. When the newly created Human Rights Council replaced the Commission on Human Rights that year, the latter's Sub-Commission, along with its working groups, including the Working Group on Indigenous Populations, expired. However, as discussed below, in late 2007, the Council established its own five-member expert advisory body to conduct studies and make recommendations to the Council on matters concerning indigenous peoples.[4]

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following definition:

> Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.

Id. ¶ 379, at 4.

[3] E.S.C. Res. 1982/44, U.N. Doc. E/RES/1982/34 (May 7, 1982).

[4] Human Rights Council Res. 6/36, Expert Mechanism on Rights of Indigenous Peoples, U.N. 6th Sess., A/HRC/RES/6/36 (Dec. 14, 2007).

During its life, the Sub-Commission's Working Group on Indigenous Populations provided an important international platform for indigenous peoples and played a major role in shaping international action in response to their concerns. The Working Group broke new ground within the UN system when it opened its sessions to and allowed oral and written submissions by all indigenous peoples and organizations, without the formal UN accreditation usually required for non-governmental organizations or other non-state actors to participate in official meetings of UN organs. Furthermore, the Working Group was a catalyst for generating heightened international concern for indigenous peoples. This concern was further elevated by the UN General Assembly's designation of 1993 as the International Year for the World's Indigenous Peoples followed by a first and second International Decade on the same theme.

B. The Permanent Forum on Indigenous Issues

The most significant achievement during the first International Decade of the World's Indigenous People was the creation of the UN Permanent Forum on Indigenous Issues, today the major venue for indigenous peoples at the United Nations. The UN Working Group on Indigenous Populations was at the lowest level in the hierarchy of the UN organizational structure, despite its significant influence and role. By contrast, the Permanent Forum answers directly to the UN Economic and Social Council, one of the UN Charter organs. The idea for creating the Permanent Forum was first launched at the 1993 World Conference on Human Rights.[5] The United Nations' General Assembly responded by asking the Commission on Human Rights and its subsidiary organs to give "priority consideration" to the idea at the same time it declared the first International Decade of the World's Indigenous People.[6]

The Economic and Social Council finally established the Permanent Forum on Indigenous Issues in July 2000.[7] Its mandate is to advise the UN agencies and programmes on matters concerning indigenous peoples and to promote awareness and coordination on indigenous issues within the UN system.[8] Eight of the sixteen members who constitute the Permanent Forum are nominated by governments and elected by the Economic and Social Council; the other eight are named by the Council's president in

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[5] *See* World Conference on Human Rights, June 14-25, 1993, *Vienna Declaration and Programme of Action*, ¶ 32, U.N. Doc. A/CONF.157/23 (July 12, 1993).

[6] G.A. Res. 48/163, U.N. Doc. A/RES/48/163 (Dec. 21, 1993).

[7] E.S.C. Res. 2000/22 (July 29, 2000).

[8] *Id.* ¶ 2.

consultation with indigenous organizations.[9] As expected, the individuals appointed by the president thus far have all been themselves leaders of indigenous organizations or people who were nominated by indigenous constituencies from the diverse regions of the world. Additionally, the elected chairperson of the Forum has been indigenous.

The Permanent Forum met for the first time in May 2002 at the UN Headquarters in New York and has since met each year at that venue around the same time. In addition to the sixteen members who constitute the Permanent Forum and a wide range of government and intergovernmental agency representatives, hundreds of representatives of indigenous peoples and organizations have attended the sessions, participating with oral and written submissions much as they did in the sessions of the Working Group on Indigenous Populations.

The Forum's work has centred principally on the review and coordination of the programmes of various UN agencies and affiliates that concern indigenous peoples, and has been organized around the topical areas of the Economic and Social Council's competency. These "mandate spheres" include social and economic development, the environment, culture, education, health, and human rights.[10] In addition to devoting attention to each of these topics at its annual sessions, the Forum focuses each year on a particular theme. The themes have included: indigenous children and youth, indigenous women, UN Millennium Goals (focusing on eradication of poverty and hunger, and the achievement of universal primary education), lands and natural resources, climate change, the impact of development policies on indigenous peoples' culture and identity, and the doctrine of discovery.[11] The Forum has also convened workshops and commissioned studies in association with these themes.

C. The Special Rapporteur on Rights of Indigenous Peoples

As part of its increasing attention to indigenous concerns, the UN Human Rights Council's predecessor, the Commission on Human Rights, authorized in 2001 the appointment of a Special Rapporteur on the rights of indigenous peoples for an initial term of three years.[12] The mandate of the

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[9] *Id.* ¶ 1.

[10] E.S.C. Res. 2000/22, *supra* note 7, at ¶ 2.

[11] *Permanent Forum on Indigenous Issues*, UNITED NATIONS (Feb. 23, 2013, 3:34 PM), http://social.un.org/index/IndigenousPeoples/UNPFIISessions.aspx.

[12] Comm'n on Human Rights, Res. 2001/57, U.N. Doc. E/CN.42002/97 (Apr. 24, 2001). When initially established, this position was given the title of "Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people." *Id.* This position is one of the several thematic mandates held by independent experts now functioning under the

Special Rapporteur on indigenous peoples was established with the authority to "gather, request, receive and exchange information and communications from all relevant sources" concerning human rights violations against "indigenous people themselves and their communities and organizations," as well as to "formulate recommendations and proposals . . . to prevent and remedy" such violations.[13] This mandate was extended by the Commission on Human Rights in 2004 and by the Human Rights Council in 2007 and in 2010. In doing so, the Human Rights Council broadened the mandate to promote collaboration between the Special Rapporteur and other UN agencies, states, indigenous peoples, and non-governmental organizations to eradicate barriers to the enjoyment of human rights by indigenous peoples and to identify best practices; and the Council also called upon the Special Rapporteur to promote application of the recently adopted Declaration on the Rights of Indigenous Peoples.[14]

The position of the Special Rapporteur began to function with the appointment of the respected anthropologist Rodolfo Stavenhagen, and has continued with the selection of the author as the second Special Rapporteur as from May 2008. The work of the Special Rapporteur has developed within four interrelated spheres of activity. First, the Special Rapporteur has engaged in or promoted research, usually in connection with seminars or conferences, around a series of topics identified as being of interest to indigenous peoples worldwide. These topics have included the impacts of development projects on indigenous communities, the implementation of domestic laws and international standards to protect indigenous rights, the relationship between formal state law and customary indigenous law, indigenous cultural rights, indigenous children, indigenous participation in policy and decision-making processes, various forms of discrimination against indigenous individuals, implementation of the UN Declaration on the Rights of Indigenous Peoples, the duty of states to consult with indigenous peoples, corporate responsibility to respect indigenous rights,

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authority of the UN Human Rights Council. For further description of these thematic mandates, see U.N. Office of the High Comm'r for Human Rights, *Fact Sheet No. 27, Seventeen Frequently Asked Questions about United Nations Special Rapporteurs* (2001), http://www.ohchr.org/Documents/Publications/FactSheet27en.pdf. *See also* Andrew Clapham, *United Nations Charter-Based Protection of Human Rights*, *in* INTERNATIONAL PROTECTION OF HUMAN RIGHTS: A TEXBOOK 79-103 (Catarina Krause & Martin Scheinin eds., 2d ed. 2009).

[13] Comm'n on Human Rights, Res. 2001/57, *supra* note 12, ¶¶ 1(a), 1(b).

[14] Human Rights Council, Res. 6/12, U.N. GAOR, 6th Sess., U.N. Doc. A/HRC/RGS/6/12 (Sept. 28, 2007), *available at* http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_6_12.pdf. The mandate was extended for another period of three years in 2010, under the new designation of "Special Rapporteur on the rights of indigenous peoples." Human Rights Council, Res. 15/14, U.N. GAOR, 15th Sess., U.N. Doc. A/HRC/RES/15/13 (Sept. 30, 2010).

violence against indigenous women and girls, and extractive industries on or near indigenous territories.

A second sphere of activity involves developing reports on particular countries with conclusions and recommendations aimed at identifying areas of concern and improving the human rights conditions of indigenous peoples in those countries. The reporting process typically involves a visit to the country under review, including the capital and selected places of interest, during which the Special Rapporteur interacts with government representatives, indigenous communities from different regions, and a cross-section of civil society working on issues of relevance to indigenous peoples. The country reports have often highlighted the topics being addressed by the Special Rapporteur through the thematic research. One of Dr. Stavenhagen's first country visits was to the Philippines.[15] That visit was linked to the Special Rapporteur's initiative to examine the impacts of large scale development projects. He reported problems concerning indigenous land rights in that country, as well as serious human rights violations resulting from development projects such as the construction of dams, large scale logging concessions, commercial plantations, and mining; and he provided recommendations on action to address those problems.[16] Other country visits have taken the Special Rapporteur to Argentina, Australia, Brazil, Bolivia, Botswana, Canada, Colombia, Chile, Ecuador, Guatemala, Kenya, Mexico, Namibia, Nepal, New Caledonia, New Zealand, Republic of the Congo, Russia, the Sami region in the Nordic countries, South Africa, and the United States.[17]

In a third area of activity, the Special Rapporteur has worked to promote good practices, advancing legal, administrative and programmatic reforms at the national and international levels to implement relevant international standards. For example, shortly after assuming the Special Rapporteur mandate in May 2008, the author, at the request of President of the Constituent Assembly of Ecuador and indigenous organizations, provided technical assistance in Ecuador's constitutional revision process for ultimately successful efforts to include affirmation of indigenous peoples' collective rights in the new constitution.[18] Also within this sphere of

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[15] Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, *Addendum: Mission to the Philippines*, U.N. Doc. E/CN.4/2003/90/Add.3 (Mar. 5, 2003) (by Rodolfo Stavenhagen), *available at* http://daccess-dds-ny.un.org/doc/UN DOC/GEN/G03/115/21/PDF/G0311521.pdf.

[16] *See id.* ¶¶ 29–56, 67.

[17] The thematic, country, and other reports of the Special Rapporteur are available at the following web sites: http://www.ohchr.org/EN/Issues/IPeoples/SRIndigenousPeoples/Pages/SRIPeoplesIndex.aspx and http://www.unsr.jamesanaya.org.

[18] *See* Special Rapporteur on the situation of human rights and fundamental freedoms of

promoting good practices, the Special Rapporteur has advised United Nations agencies and affiliated institutions in the development of their policies and practices as they relate to indigenous peoples, as was done for example, when in 2011 he provided extensive observations on the UN Development Programme draft guidelines on consultation with indigenous peoples for activities carried out in the context of the climate change mitigation initiative for reducing emissions from deforestation and forest degradation ("REDD").[19]

Finally, the Special Rapporteur receives and often takes action on written communications alleging specific violations of the human rights of indigenous individuals and groups. The usual practice is for the Special Rapporteur to forward such a communication to the government concerned if it contains sufficient and credible information, along with a request that the government respond. Summaries of the communications together with summaries of the government responses, if any, and observations by the Special Rapporteur are included in the reports to the Council.[20] The observations by the Special Rapporteur may include an evaluation of the situation and recommendations to the government concerned. The Special Rapporteur has sometimes conducted on-site visits to examine particular cases, as the author has done to investigate the situation of a mine in Guatemala[21] and the construction of hydroelectric dams in Panama[22] and Costa Rica.[23] Also, the Special Rapporteur has used visits undertaken in the context of developing country reports to intervene in situations brought to his attention through communications from indigenous groups and non-

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indigenous peoples, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, ¶ 7, U.N. Doc. A/HRC/9/9 (June 2008) (by S. James Anaya), *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/149/40/PDF/G0814940.pdf.

[19] *See* Special Rapporteur on the rights of indigenous peoples, *Extractive Industries Operating Within or Near Indigenous Territories*, ¶ 1, U.N. Doc. A/HRC/C/18/35 (July 11, 2011) (by S. James Anaya), *available at* http://www2.ohchr.org/english/bodies/hrcouncil/docs/18session/A-HRC-18-35_en.pdf.

[20] *See, e.g.*, Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, ¶¶ 5-29, U.N. Doc. E/CN.4/2003/90/Add.1 (Jan. 21, 2003) (by Rodolfo Stavenhagen) (summary of communications and observations about them from the governments of Argentina, Chile, Colombia, United States, India, Mexico, and Peru).

[21] *See* La situación de los derechos humanos de las comunidades afectadas por la mina Marlin, en las municipalidades de San Miguel Ixtahuacán y Sipacapa, Departamento de San Marcos, App., UN doc. A/HRC/18/35/Add.3 (June 7, 2011).

[22] *See* Observaciones sobre la situación de la Comunidad Charco La Pava y otras comunidades indígenas afectadas por el proyecto hidroeléctrico Chan 75, A.HRC/12/34/Add.5 (Sept. 7 2009).

[23] *See* La situacion de los pueblos indigenas afectados por el proyecto hidroelectrico El Diquis en Costa Rica, A/HRC/18/35/Add.7 (July 11, 2011).

governmental organizations. For example, during his country visit to Chile, Dr. Stavenhagen engaged in discussions with authorities there about the fate of Mapuche leaders who were being prosecuted under a Pinochet-era anti-terrorism law for their activities defending Mapuche land rights.[24]

D. Expert Mechanism on the Rights of Indigenous Peoples

As noted before, in 2007 the Human Rights Council established the Expert Mechanism on the Rights of Indigenous Peoples, which like the Special Rapporteur, reports directly to the Council, providing thematic expertise on indigenous issues. The Experts' mandate is to advise the Council and prepare studies on topics proposed by the Council. The Expert Mechanism consists of five individual experts appointed by the Council, with "due regard" being given to experts of indigenous origin.[25]

The Expert Mechanism met for the first time in Geneva in October 2008 with over 300 participants, many of whom were indigenous, in attendance.[26] During the meeting, the Experts made recommendations on the Durban Review Conference on racism that took place in 2009 at the request of the Preparatory Committee of the Conference; developed proposals for the Human Rights Council, including the use of the Declaration on the Rights of Indigenous Peoples as one of the human rights standards in the Universal Periodic Review; and began preparation for the Mechanism's first study, which focused on the theme of indigenous peoples' right to education and was submitted to the Human Rights Council in 2009.[27] Subsequent studies have address the right of indigenous peoples

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[24] *See* HURST HANNUM ET AL., INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY AND PRACTICE 1005 (4th ed. 2006); *see generally* Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, *Addendum: Mission to Chile*, ¶¶ 28-38, U.N. Doc. E/CN.4/2004/80/Add.3 (Nov. 17, 2003) (by Rodolfo Stavenhagen).

[25] The current (2012–2013) composition of the Expert Mechanism is as follows: Danfred Titus (South Africa), Anastasia Chukhman (Russia), Jannie Lasimbang (Malaysia), Wilton Littlechild (Canada) and José Carlos Morales (Costa Rica). *Independent Experts on the Expert Mechanism on the Rights of Indigenous Peoples*, UNITED NATIONS HUMAN RIGHTS, http://www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/Membership.aspx (last visited Mar. 8, 2013).

[26] *First Session of the Expert Mechanism on the Rights of Indigenous Peoples*, UNITED NATIONS HUMAN RIGHTS, http://www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/Session1.aspx (last visited Mar. 8, 2013).

[27] Human Rights Council, *Report of the Expert Mechanism on the Rights of Indigenous Peoples: Study on Lessons Learned and Challenges to Achieve the Implementation of the Right of Indigenous Peoples to Education*, 12th Sess., U.N. Doc. A/HRC/12/33/ (Aug. 31, 2009). A second study, on indigenous peoples and the right to participate in decision-making, was submitted to the Human Rights Council for its September session in 2011. Human Rights Council, *Report of the Expert Mechanism on the Rights of Indigenous Peoples: Final Report of*

in decisions affecting them, indigenous culture and languages, and access to justice. The Expert Mechanism will continue to meet annually for up to five days, including in sessions open to states, UN mechanisms and bodies, indigenous peoples' organizations, and other non-governmental organizations.

III. INTERNATIONAL STANDARD-SETTING

The commitment of institutional energies to indigenous issues that was represented by the UN Working Group on Indigenous Populations and that is now embodied by the Permanent Forum on Indigenous Issue, the mandate of the Special Rapporteur on the Rights of Indigenous Peoples of the Human Rights Council, and the Council's Expert Mechanism on Indigenous Peoples, has provided indigenous peoples important avenues of access to the international arena and has generated heightened focus on their concerns. And with this heightened focus has come a building consensus on the rights of indigenous peoples.

A. The UN Declaration on the Rights of Indigenous Peoples

1. Background

The most prominent manifestation of this building global normative consensus on a global scale is the UN Declaration on the Rights of Indigenous Peoples.[28] The UN General Assembly adopted the Declaration on September 13, 2007, after over twenty years of negotiations between UN Member States, indigenous peoples, and human rights organizations.[29] Drafting of the Declaration began in the United Nations Working Group on Indigenous Populations, pursuant to the Working Group's standard-setting mandate.[30] Representatives of indigenous peoples from around the world actively participated in the years of deliberation by the Working Group that began in the early 1980s.[31] A draft of the Declaration[32] was produced and

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the Study of Indigenous Peoples and the Right to Participate in Decision-Making, 18th Sess., U.N. Doc. A/HRC/18/42 (Aug. 17, 2011).

[28] G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007).

[29] *Id.*

[30] *See The Working Group on Indigenous Populations*, INTERNATIONAL GROUP FOR INDIGENOUS AFFAIRS, http://www.iwgia.org/human-rights/un-mechanisms-and-processes/working-group-on-indigenous-populations (last visited Mar. 8, 2013).

[31] *Id.*

[32] U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Draft United Nations Declaration on the Rights of Indigenous Peoples*, Aug. 1-26, 1994, 11,

adopted in 1993 by the UN's five-member Working Group, and it was submitted to the UN Commission on Human Rights in 1994.[33]

The Commission on Human Rights subsequently established its own working group consisting of the Commission's member states to consider the Declaration and made arrangements for indigenous participation in the working group meetings.[34] It was apparent from the outset that few states participating in the Commission working group would accept the prior draft Declaration without substantial amendments, and this resulted in a near stalemate in the deliberations for a number of years as many participating indigenous representatives insisted on nothing less than the Sub-Commission draft. Nonetheless, as the deliberations in the Commission working group proceeded over its eleven-year life, consensus on core principles and related prescriptions became increasingly apparent. In 2005, the chairperson of the Commission working group, Luis Enrique Chávez of Peru, began advancing proposals that eventually led to a complete revised text.[35] Almost all indigenous groups and states participating in the deliberations came to align themselves with the chairperson's text, and that text was adopted in 2006 by the Human Rights Council, which by that time had replaced the Commission on Human Rights. By the same resolution, the Council submitted the text to the UN General Assembly for final action.[36]

Final approval by the General Assembly, however, would not come until a year later, as dissention among African states emerged. African states had remained mostly on the sidelines in the previous discussions on the Declaration, apparently on the assumption that it would have limited or no applicability to them. But it was now clear that many African groups were claiming indigenous status and that many if not all African states could find themselves subject to scrutiny under the Declaration's standards. Led by Namibia, African states proposed a deferment in the vote on the Declaration

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U.N. Docs. E/CN.4/1995/2, E/CN.4/Sub.2/1994/56 (Oct. 28, 1994).

[33] U.N. Sub-Commission Resolution on Prevention of Discrimination and Protection of Minorities on the Rights of Indigenous Peoples, 46th Sess., U.N. Doc. E/Cn.4/Sub.2/1994/45 (Aug. 26, 1994).

[34] Comm'n on Human Rights, Res. 1995/32 Establishing of a Working Group of the Commission on Human Rights to Elaborate a Draft Declaration in Accordance with Paragraph 5 of General Assembly Resolution 49/214 of 23 December 1994, U.N. Doc. E/CN.4/1995/32 (Mar. 3, 1995).

[35] *See* Comm'n on Human Rights, Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995 on its Eleventh Session, Annex I, U.N. Doc. E/CN.4/2006/79 (Mar. 22, 2006).

[36] Human Rights Council Resolution 2006/2, Working Group of the Commission on Human Rights to Elaborate a Draft Declaration in Accordance with Paragraph 5 of the General Assembly Resolution 49/214 of 23 December 1994 (June 29, 2006).

in order to revisit some of its provisions. The General Assembly's Third Committee and then the General Assembly in plenary voted in favour of the deferment,[37] and a complex and at times opaque process of diplomatic exchanges ensued. In the end, the African states were satisfied by a package of amendments negotiated by Mexico that addressed key concerns while not altering the Declaration in its essential parts. The amendments added flexibility to some of the Declaration's provisions and emphasis on the need to contextualize its implementation in light of the wide diversity of circumstances in which it might be relevant.

On September 13, 2007, amid expressions of celebration by indigenous peoples, 144 UN Member States voted to adopt the Declaration, including most African states.[38] Notably, Australia, Canada, New Zealand, and the United States voted against it, having become isolated in their opposition to the text even with the negotiated amendments.[39] Eleven states registered abstentions; these include Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa, and Ukraine.[40]

2. The Content of the Declaration

The Chair of the UN Permanent Forum on Indigenous Issues welcomed the adoption of the Declaration, noting that it "has the distinction of being the only Declaration in the UN which was drafted with the rights-holders, themselves, the Indigenous Peoples."[41] The Declaration is anchored in the complementary human rights of equality and self-determination, declaring that indigenous peoples are equal to all other peoples[42] and that, like all other peoples, they "have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their

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[37] *See* G.A. Res. 61/178, U.N. GAOR, 61st Sess., U.N. Doc. A/RES/61/178 (Dec. 20, 2006).

[38] *Declaration on the Rights of Indigenous Peoples*, UNITED NATIONS: PERMANENT FORUM ON INDIGENOUS ISSUES, http://social.un.org/index/IndigenousPeoples/DeclarationontheRightsofIndigenousPeoples.aspx (last visited Mar. 8, 2013).

[39] *Id.*

[40] *Id.*

[41] Press Release, Chair of the U.N. Permanent Forum on Indigenous Issues, *Adoption of Indigenous Rights Declaration 'Major Victory' for United Nations*, U.N. Press Release GA/10613, HR 4932 (Sept. 13, 2007) (statement of Victoria Tauli-Corpuz, Chair of the U.N. Permanent Forum on Indigenous Issues, on the occasion of the adoption of the U.N. Declaration on the Rights of Indigenous Peoples).

[42] United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, Annex, art 2., U.N. GAOR, 61st Sess., U.N. Doc. A/RES/61/295 (Sept. 13, 2007).

economic, social and[,] cultural development."[43] On this grounding, the Declaration affirms the collective rights of indigenous peoples in relation to culture, development, education, social services, and traditional territories; and it mandates respect for indigenous-state historical treaties and modern compacts.[44]

The international attention to indigenous peoples highlighted by the Declaration is driven by concern over patterns of human rights abuses that are linked to histories of colonialism, or something like colonialism. The Declaration does not define "indigenous peoples," but it makes clear who they are by emphasizing the common pattern of human rights violations they have suffered. The Preamble specifically grounds the Declaration in the concern "that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories[,] and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests[.]"[45]

By alluding to this history at the outset, the Declaration reveals its character as essentially a remedial instrument. It is not privileging indigenous peoples with a set of rights unique to them. Rather, indigenous peoples and individuals are entitled to the human rights enjoyed by other peoples and individuals, although these rights are to be understood in the context of the particular characteristics that are common to groups within the indigenous rubric. Thus, Article 3 claims for indigenous peoples the same right of self-determination that is affirmed in common Article 1 of the widely ratified international human rights covenants as a right of "all peoples."[46] The purpose of the Declaration is to remedy the historical denial of the right of self-determination and related human rights so that indigenous peoples may overcome systemic disadvantage and achieve a position of equality vis-à-vis heretofore dominant sectors.[47]

With its remedial thrust, the Declaration contemplates change that begins with state recognition of rights of indigenous group survival that are deemed "inherent," such recognition being characterized as a matter of

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[43] *Id.* art. 3.

[44] *Id.*

[45] *Id.* preamble, ¶ 6.

[46] *Id.* art. 3; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976); International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23 1976).

[47] *See generally* S. James Anaya, *Self-Determination as a Collective Human Right Under Contemporary International Law*, *in* OPERATIONALIZING THE RIGHT OF INDIGENOUS PEOPLES TO SELF-DETERMINATION 3, 3-18 (Pekka Aikio & Martin Scheinin eds., 2000).

"urgent need."[48] Professor Erica-Irene Daes, the long-time chair of the UN Working Group on Indigenous Populations, has described this kind of change as entailing a form of "belated state-building" through negotiation or other appropriate peaceful procedures involving meaningful participation by indigenous groups. According to Professor Daes, self-determination entails a process:

> [T]hrough which indigenous peoples are able to join with all the other peoples that make up the State on mutually-agreed upon and just terms, after many years of isolation and exclusion. This process does not require the assimilation of individuals, as citizens like all others, but the recognition and incorporation of distinct peoples in the fabric of the State, on agreed terms.[49]

Accordingly, the Declaration generally mandates that "States, in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration[,]"[50] and it further includes particularized requirements of special measures in connection with most of the rights affirmed. Such special measures are to be taken with the end of building healthy relationships between indigenous peoples and the larger societies as represented by the states. In this regard, "treaties, agreements and other constructive arrangements" between states and indigenous peoples are valued as useful tools, and the rights affirmed in such instruments are to be safeguarded.[51]

Among the special measures required are those to secure "autonomy or self-government" for indigenous peoples over their "internal and local affairs";[52] in accordance with their own political institutions and cultural patterns;[53] as well as measures to ensure indigenous peoples' "right to participate fully, if they so choose, in the political, economic, social and cultural life of the State"[54] and to have a say in all decisions affecting them.[55] The affirmation of these dual aspects of self-determination—on the one hand autonomous governance and on the other participatory engagement—reflects the widely shared understanding that indigenous

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[48] United Declarations of the Rights of Indigenous Peoples, G.A. Res. 61/295, *supra* note 42, preamble ¶ 7.

[49] Erica-Irene A. Daes, *Some Considerations on the Right of Indigenous Peoples to Self-Determination*, 3 TRANSNAT'L L. & CONTEMP. PROBS. 1, 9 (1993).

[50] United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, *supra* note 42, art. 38.

[51] *Id.* preamble, art. 37.

[52] *Id.* art. 4.

[53] *See id.* art. 5.

[54] *Id.* art. 5.

[55] *Id.* arts. 18, 19.

peoples are not to be considered unconnected from larger social and political structures. Rather, they are appropriately viewed as simultaneously distinct from, yet joined to, larger units of social and political interaction, units that may include indigenous federations, the states within which they live, and the global community itself.

Also significantly, special measures are required to safeguard the right of indigenous peoples "to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired."[56] And because indigenous peoples have been deprived of great parts of their traditional lands and territories, the Declaration requires states to provide "redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation," for the taking of the lands.[57] Special measures are also required to restore and secure indigenous peoples' rights in relation to culture, religion, traditional knowledge, the environment, physical security, health, education, the welfare of women and children, the media, and maintaining traditional relations across international borders.[58]

While the Declaration articulates rights and the need for special measures in terms particular to indigenous peoples, the rights affirmed are simply derived from human rights principles that are deemed of universal application. These include, especially, principles of equality and self-determination as already stressed. Other generally applicable human rights also are foundational, including the right to enjoy culture, the right to health, right to life, and the right to property, all of which have been affirmed in various human rights instruments as applicable to all segments of humanity. Indigenous peoples' collective rights over traditional lands and resources, for example, can be seen as derivative of the universal human right to property, as concluded by the inter-American human rights institutions,[59] or as extending from the right to enjoy culture, as affirmed by the UN Human Rights Committee in light of the cultural significance of lands and resources to indigenous peoples.[60] By particularizing the rights of indigenous peoples, the Declaration seeks to accomplish what should have been accomplished without it: the application of universal human rights principles in a way that appreciates not just the humanity of indigenous individuals but that also values the bonds of community they form.[61] The Declaration, in essence, contextualizes human rights with

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[56] *Id.* art. 26(1).

[57] *Id.* art. 28(1).

[58] *See id.* arts. 31(1), 36(1).

[59] *See* DINAH SHELTON, COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 294-96 (Dinah Shelton ed., 2000).

[60] *See id.* at 288-89.

[61] *See* United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295,

attention to the patterns of indigenous group identity and association that constitute them as peoples, and demands measures to make those human rights a reality.[62]

3. The Status of the Declaration

Having been proclaimed by a resolution of the UN General Assembly, the Declaration on the Rights of Indigenous Peoples has in formal terms a status like that of the Universal Declaration of Human Rights and other numerous human rights declarations adopted by the General Assembly pursuant to its authority under the UN Charter to "make recommendations" on matters of concern to the organization, including human rights.[63] Such declarations, although arising from affirmative votes of state members of the UN acting jointly in the General Assembly, are not like treaties to which states individually commit to be bound through formal means of acceptance. Thus, in and of themselves, UN General Assembly declarations are not legally binding.[64] Nonetheless, they have some measure of authority and impact when they are invoked, given that they emanate from the most representative political organ of the world body and are typically grounded in well-established principles of world order or human rights.[65] Because of these characteristics, UN declarations and other such non-treaty documents proclaiming human rights or related standards are sometimes referred to as "soft law".[66]

But beyond seeing the Declaration on the Rights of Indigenous Peoples as soft law, it is also possible to understand the Declaration as related to legal obligation within standard categories of international law. First, as a statement of human rights the Declaration informs understanding of the general obligations that states have to promote and respect human rights under the UN Charter. Second, as already noted, the Declaration builds upon well established principles of human rights—including self-determination, equality, property, and cultural integrity—that are incorporated into widely ratified human rights treaties, such as the International Covenant on Civil and Political Rights, and the International

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supra note 42.

[62] *Id.*

[63] *See* U.N. Charter art. 13, para. 1.

[64] *Frequently Asked Questions: Declaration Rights of Indigenous Peoples*, UNITED NATIONS, http://www.un.org/esa/socdev/unpfii/documents/FAQsindigenousdeclaration.pdf (last visited Mar. 8, 2013).

[65] *Id.*

[66] *See* SHELTON, *supra* note 59, at 449-63.

Convention on the Elimination of All Forms of Racial Discrimination.[67] The work of the monitory bodies attached these treaties, discussed below, makes evident that the Declaration is in significant part interpretive of the principles found in these treaties that legally bind the states that have ratified them.

Finally, the Declaration on the Rights of Indigenous Peoples can be understood to reflect or embody, to some degree, customary or general principles of international law.[68] The Declaration undoubtedly represents widespread consensus on the rights of indigenous peoples and a certain level of global expectation that those rights will be upheld, at least in regard to its core provisions. Even those few states that voted against the Declaration did so while affirming adherence to the basic human rights standards embodied in the Declaration. They registered objections only to particular provisions of the Declaration, especially those concerning self-determination and lands and resources, interpreting certain aspects of those provisions—but not necessarily their normative foundations—as too far-reaching.[69] And now, in the aftermath of a change of governments, Australia reversed its position and endorsed the Declaration in 2009.[70] The other states (Canada, New Zealand, and USA) followed suit in 2010.[71]

The basic normative precepts embodied in the Declaration appear in several other written instruments and in decisions by several international

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[67] *See generally* United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, *supra* note 42; International Covenant on Civil and Political Rights, *supra* note 46; International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195.

[68] The International Law Association, a global consortium of international lawyers, judges, and academics, conducted a major study on the rights of indigenous peoples over several years and concluded in 2012 that key aspects of the Declaration constitute customary international law. Int'l Law Ass'n, *Rights of Indigenous Peoples: Res. 5/2012* (2012).

[69] *See* Press Release, *General Assembly Adopts Declaration on Rights of Indigenous Peoples; "Major Step Forward" Towards Human Rights for All, Says President*, U.N. Press release GA/10612 (Sept. 13, 2007).

[70] *Experts Hail Australia's Backing of UN Declaration of Indigenous Peoples' Rights*, UN NEWS CENTRE, http://www.un.org/apps/news/story.asp?NewsID=30382#.UUT-UBkvm IY (last visited Mar. 16, 2013).

[71] *See Chair of UN Forum Welcomes Canada's Endorsement of Indigenous Rights Treaty*, UN NEWS CENTRE, http://www.un.org/apps/news/story.asp?NewsID=36751#.UUT_ 2hkvmIY (last visited Mar. 16, 2013); Krissah Thompson, *U.S. Will sign U.N. Declaration on Rights of Native People, Obama Tells Tribes*, WASHINGTON POST (Dec. 16, 2010, 12:10 PM), http://www.washingtonpost.com/wp-dyn/content/article/2010/12/16/AR20101216031 36.html; *Ministerial Statements–UN Declaration on the Rights of Indigenous Peoples–Government Support*, NEW ZEALAND PARLIAMENT, http://www.parliament.nz/en-NZ/PB/ Debates/Debates/6/5/a/49HansD_20100420_00000071-Ministerial-Statements-UN-Declaration-on.htm (last visited Mar. 16, 2013).

bodies, including regional and specialized institutions.[72] Several instruments developed within United Nations processes addressed indigenous issues prior to the Declaration's proclamation by the General Assembly.[73] Resolutions adopted at the 1992 United Nations Conference on Environment and Development include provisions on indigenous people and their communities. The Rio Declaration,[74] and the more detailed environmental programme and policy statement known as Agenda 21,[75] reiterate precepts of indigenous peoples' rights and seek to incorporate them within the larger agenda of global environmentalism and sustainable development.[76] In the same vein, Article 8(j) of the Convention on Biodiversity affirms the value of traditional indigenous knowledge in connection with conservation, sustainable development, and intellectual property regimes.[77] Resolutions adopted at subsequent major UN conferences—the 1993 World Conference on Human Rights, the 1994 UN Conference on Population and Development, the World Summit on Social Development of 1995, the Fourth World Conference on Women of 1995, and the World Conference Against Racism of 2001—similarly include provisions that affirm or are consistent with prevailing normative assumptions in this regard.[78] Further still, the Convention on the Rights of

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[72] See *infra*, at 1005-08 for a discussion on the development of International Labour Organization Convention No. 169 on Indigenous and Tribal Peoples.

[73] *See, e.g.*, Rio Declaration, *infra* note 74.

[74] Rio Declaration on Environment and Development, UN Conference on Environment and Development, U.N. Doc. A/CONF.151/26 (vol. 1), Annex 1, principle 22 (June 14, 192).

[75] *Id.* (vols. 1, 2 3), Annex 2.

[76] Especially pertinent is Chapter 26 of Agenda 21. *See id.* ch. 26. Chapter 26 is phrased in nonmandatory terms; nonetheless, it carries forward normative precepts concerning indigenous peoples and hence contributes to the crystallization of consensus on indigenous peoples' rights. Chapter 26 emphasizes indigenous peoples' "historical relationship with their lands" and advocates international and national efforts to "recognize, accommodate, promote and strengthen" the role of indigenous peoples in development activities. *Id.*

[77] Convention on Biological Diversity, art. 8(j), U.N. Doc. UNEP/BIO.Div/N7–INC.5/4, 31 ILM 818 (June 5, 1992). Implementation of the Convention includes periodic meetings of State Parties (Conferences of the Parties), and a number of technical committees and working groups on specific issues covered by the convention. The issue of indigenous traditional knowledge has been the object of a specific focus by the Conference of the Parties. *See, e.g.*, Decision III/14, Implementation of Article 8(j), Report of the Third Meeting of Conference of the Parties to the Convention on Biological Diversity, U.N. Doc. UNEP/CBD/COP/3/38 (1997), Annex 2.

[78] *See, e.g.*, World Conference on Human Rights, June 14-25, 1993, *Vienna Declaration and Programme of Action*, ¶¶ 20, 28-32, U.N. Doc. A/CONF.157/23 (June 25, 1993); International Conference on Population and Development, Sept. 5-13, 1994, *Programme of Action*, ¶¶ 6.21-6.27, U.N. Doc. A/CONF.171/13 (Oct. 18, 1994); Report of the World Summit for Social Development (Copenhagen, 6–12 Mar. 1995), U.N. Doc. A/CONF.166/9 (Mar. 12, 1995), ch. 1, res. 1, Annex I, ¶¶ 26(m), 29, commitments 5(b), 4(f), 6(g); Programme of Action of the World Summit for Social Development, *id.*, Annex II, paras. 12(i), 19, 26(m), 32(f) and

the Child, a UN-sponsored treaty that has been ratified by almost all of the world's states, affirms in Article 30 the right of indigenous children to culture, religion and language.[79]

With these antecedents, the Declaration manifests a strongly rooted level of consensus about the human rights of indigenous peoples, and it also represents expectations of compliance with these rights.[80] The discussion about indigenous peoples and their rights promoted through multiple international venues has proceeded in response to demands made by indigenous groups over several years and upon an extensive record of justification.[81] The pervasive assumption has been that the articulation of norms concerning indigenous peoples has been an exercise in identifying standards of conduct that are *required* to uphold widely-shared values of human dignity.[82] Accordingly, indigenous peoples' rights can be seen to derive from previously accepted, generally applicable human rights principles, as discussed earlier.[83] The multilateral processes that build a common understanding of the content of indigenous peoples' rights—as now reflected in the Declaration—therefore also build expectations that the rights will be upheld.[84]

The customary international law character of at least the core precepts of the Declaration is reinforced by a developing pattern of domestic laws, judicial decisions, and administrative practices in various countries that are generally in line with those precepts.[85] For example, the Supreme Court of

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(h), 35(e), 38(g), 54(c), 61, 67, 74(h), 75(g); Beijing Declaration, in Report of the Fourth World Conference on Women (Beijing, 4–15 Sept. 1995), U.N. Doc. A/CONF.177/2 (Oct. 17, 1995), ch. 1, res. 1, Annex I, ¶ 32; *id.*, Annex II, ¶¶ 8, 32, 34, 58(q), 60(a), 61(c), 83(m), (n) and (o), 89, 106(c) and (y), 109(b) and (j), 116, 167(c), 175(f). However, it should be noted that, from the point of view of the indigenous representatives participating in these conferences, the provisions of these resolutions have not provided sufficient affirmation of rights of the indigenous people.

[79] Convention on the Rights of the Child, art. 30, November 20, 1989, 1577 U.N.T.S. 3.

[80] *See* United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, *supra* note 42.

[81] ANAYA, INDIGENOUS PEOPLE IN INTERNATIONAL LAW, *supra* note 1, at 61.

[82] *Id.* at 69.

[83] *Id.* at 97.

[84] *Id.* at 72.

[85] This includes a pattern of new or amended constitutions and laws favouring indigenous rights in a number of countries. *See, e.g.*, CONSTITUIÇÃO FEDERAL [C.F.][CONSTITUTION] art. 231 (Braz.); CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] arts. 171, 176, 330; CONSTITUCIÓN POLÍTICA DE LA REPÙBLICA DEL ECÙADOR art. 56-60; Constitution Act, 1982, art. 35.1 (U.K.), *reprinted in* R.S.C. 1985, app. II, no. 44 (Can.). For a survey of domestic state practice in several countries across the globe, see Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HAV. HUM. RTS. J. 57 (1999). *See also* S. James Anaya & Robert A. Williams, Jr., *The Protection of Indigenous Peoples' Rights Over Lands and Natural Resources Under the Inter-American Human Rights*

Belize affirmed that the Maya people of that country have rights to land on the basis of their customary land tenure, and it further found that these rights are protected by the general rights to property and equal protection of the Constitution of Belize.[86] In its decision the court not only applied domestic law in a manner that coincided with the land rights provisions of the Declaration, it specifically invoked the Declaration to reinforce its constitutional ruling.[87] The court held that "this Declaration, embodying as it does, general principles of international law relating to indigenous peoples and their lands and resources, is of such force that the defendants, representing the Government of Belize, will not disregard it."[88]

As indicated by the Supreme Court of Belize, the Declaration may be characterized as reflecting general principles of international law, in addition to customary international law.[89] The distinction between customary international law and general principles of international law is ambiguous in modern doctrine.[90] The rubric of general principles, however, is now often understood to include not just such shared principles of domestic law, but also principles reflected on a widespread basis in state practice in the international arena, discernible from numerous international treaties or other standard-setting documents, or which are necessary as logical propositions of legal reasoning.[91] Even before the Declaration was finally adopted, the Inter-American Commission on Human Rights identified "general international legal principles developing out of and applicable inside and outside of the inter-American system" regarding

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System, 14 HARV. HUM. RTS. J. 33 (2001) (surveying domestic state practice concerning indigenous land rights).

[86] Supreme Court of Belize, Aurelio Cal v. Basilio Teul et al., consolidate claims of Nos. 171 and 172 (2007) [hereinafter *Maya Villages Case*], *available at* http://www.law.arizona.edu/depts/iplp/advocacy/maya_belize/documents/ClaimsNos171and172of2007.pdf.

[87] The court, in *Maya Villages Case*, *id.* ¶ 131, referred especially to Article 26 of the Declaration, which provides: "Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired." United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, *supra* note 42, art. 26.

[88] *Maya Villages Case*, ¶ 132.

[89] *Id.*; *see also* Statute of the International Court of Justice, art. 38(1)(c), June 26, 1945, T.S. No. 993, 59 Stat. 1055 (including among the sources of law to be applied by the World Court "general principles of law recognized by civilized nations").

[90] The classic distinction is that, while customary international law evolves from the actual day-to-day practice of states, "general principles" embrace the principles of private and public law administered in domestic courts where such principles are applicable to international relations. *See* J.L. BRIERLY, THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE 57-63 (H. Waldock ed., 6th ed. 1963).

[91] *See generally* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 15-19 (6th ed. 2003); MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 55-59 (4th ed. 2003).

indigenous peoples.[92] It did so by reference to several international documents, including the Commission's own draft of an American Declaration on the Rights of Indigenous Peoples, which included provisions similar to those of the UN Declaration.[93]

Whatever the precise legal status of the UN Declaration on the Rights of Indigenous Peoples, given its character as a pronouncement of the major political organ of the United Nations it will continue to be applied in some measure by the Permanent Forum on Indigenous Issues, the Human Rights Council, and other UN institutions in executing their own programmes and in evaluating state conduct on the subject. In its resolution of September 2007 extending the mandate of the Special Rapporteur on indigenous peoples, the Human Rights Council directed the Special Rapporteur to "promote the United Nations Declaration on the Rights of Indigenous Peoples . . . where appropriate."[94] As a global benchmark of indigenous rights, the Declaration also bears, as it should, on the activities of regional and specialized international institutions concerning indigenous peoples, as well as on domestic state practice as exemplified by the *Maya Villages Case* in Belize.[95]

B. ILO Convention No. 169

A second major international instrument, which undoubtedly is legally binding within its ambit of application, and which reinforces the global consensus around standards of indigenous rights, is the International Labour Organization ("ILO") Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries of 1989.[96] Parallel to the developments leading to the Declaration on the Rights of Indigenous Peoples, the International Labour Organization, a specialized agency of the UN,[97] embarked on its own indigenous rights exercise which resulted in the

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[92] Dann v. United States, Case 11.140, Inter-Am. Comm'n H.R., Report No. 113/01, OEA/Ser./L/V/II.114, doc. 5 rev. ¶ 130 (2002) [hereinafter *Dann Case*].

[93] *Compare* Declaration on the Rights of Indigenous Peoples, OEA/Ser.L./V/II.110 Doc. 22 (Mar. 1, 2001), *with* United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, *supra* note 42.

[94] Human Rights and Indigenous Peoples: Mandate of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, 6th Sess., Sept. 10-28, 2007, A/HRC/6/12, ¶ 1(g) (Sept. 28, 2007).

[95] *See generally Maya Villages Case.*

[96] Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO No. 169), June 27, 1989, 28 I.L.M. 1382 [hereinafter ILO Convention No. 169].

[97] *See About the ILO*, INTERNATIONAL LABOUR ORGANIZATION, http://www.ilo.org/global/about-the-ilo/lang--en/index.htm (last visited Mar. 16, 2013).

adoption of its Convention No. 169.[98] This international treaty, opened for ratification by the ILO in 1989, is the successor to the earlier ILO Convention concerning Indigenous and Tribal Populations in Independent Countries of 1957,[99] which the ILO had developed following a series of studies and expert meetings signalling the particular vulnerability of indigenous workers.[100] ILO Convention No. 169 represents a marked departure in world community policy from the philosophy reflected in the earlier convention of promoting the assimilation of indigenous peoples into majority societies.[101] This paradigm shift, promoted by the indigenous rights movement and reflected in the contemporaneous UN developments, is indicated by the Convention's Preamble, which recognizes "the aspirations of [indigenous] peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live."[102] Upon this premise, the Convention includes provisions advancing indigenous cultural integrity,[103] land and resource rights,[104] and non-discrimination in social welfare spheres;[105] and it generally enjoins states to respect indigenous peoples' aspirations in all decisions affecting them.[106]

Convention No. 169 preceded the UN Declaration on the Rights of Indigenous Peoples in recognizing the collective rights of indigenous "peoples" as such, and not just rights of individuals who are indigenous.[107] Although in terms not as far reaching as the UN Declaration, the collective rights affirmed in Convention No. 169 include rights of ownership over

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[98] Hurst Hannum, *New Developments in Indigenous Rights*, 25 VA. J. INT'L L. 649, 652-53 (1988)

[99] Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (ILO No. 107), June 2, 1959, 328 U.N.T.S. 247 [hereinafter ILO Convention No. 107].

[100] For a description of the ILO activity leading to the adoption of Convention No. 107, see Hannum, *supra* note 98, at 652-53. For the history of the ILO's involvement in indigenous issues, see generally LUIS RODRIGUEZ-PIÑERO, INDIGENOUS PEOPLES, POSTCOLONIALISM, AND INTERNATIONAL LAW: THE ILO REGIME (1919–1989) (2005); ILO Convention No. 169, *supra* note 96.

[101] *Compare* ILO Convention No. 169, *supra* note 96, *with* ILO Convention No. 107, *supra* note 99.

[102] ILO Convention No. 169, *supra* note 97, preamble.

[103] *Id.* art. 2.

[104] *Id.* art. 15.

[105] *Id.* art. 24.

[106] *See generally id.*

[107] *Compare* ILO Convention No. 169, *supra* note 96, *with* United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, *supra* note 42.

traditional lands,[108] the right to be consulted as groups through their own representative institutions,[109] and the right as groups to retain their own customs and institutions.[110] With its affirmations of collective rights, the Convention represented a substantial innovation in international human rights law, which until then had almost exclusively been articulated in terms of individual rights.

In the Convention, a savings clause is attached to the usage of the term "peoples" to avoid implications of a right of self-determination, even though in other international instruments "all peoples" are deemed to have such a right.[111] At the time the Convention was adopted in 1989, the issue of whether or not indigenous peoples have a right of self-determination remained an especially contentious one.[112] Since then, the secretariat of the ILO has taken the position that the qualifying language of the Convention regarding use of the term "peoples . . . did not limit the meaning of the term, in any way whatsoever" but rather simply was a means of leaving a decision on the implications of the term to United Nations processes.[113] In any case, the qualifying language in no way undermines the collective nature of the rights that are affirmed in the Convention.

Yet in part because of the qualified use of the term *peoples*, and because several advocates of indigenous groups saw the Convention as not going far enough in the affirmation of indigenous rights, several representatives of indigenous peoples joined in expressing to the ILO dissatisfaction with the new Convention upon its adoption.[114] But since the ILO adopted Convention No. 169, indigenous peoples' organizations and their representatives increasingly have taken a pragmatic view and expressed support for its ratification.[115] Indigenous peoples' organizations from Latin America have been especially active in pressing for ratification[116] so that

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[108] ILO Convention No. 169, *supra* note 96, art. 14.

[109] *Id.* art. 6(1)(a).

[110] *Id.* art. 8(2).

[111] *E.g.*, as discussed *supra* note 46 and accompanying text, common Article 1 of the International Covenant on Civil and Political Rights, and the International Covenant on Economic Social and Cultural Rights.

[112] *See* Catherine J. Iorns, *Indigenous Peoples and Self Determination: Challenging State Sovereignty*, 24 CASE W. RES. J. INT'L L. 199, 209-18 (1992).

[113] Lee Swepston, former Senior Advisor of the ILO, Remarks to the U.N. Working Group on Indigenous Populations (July 31, 1989).

[114] *See* Int'l Labour Conference [ILO], *Statement of Ms. Venne, Representative of the International Work Group for Indigenous Affairs*, at 31/6, ILO Provisional Record 31, 76th Sess. (1989).

[115] *See* ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW, *supra* note 1, at 61.

[116] *Id.* at 61.

most of the countries in that region are now parties to the Convention,[117] in addition to a number of other countries in other regions of the world.[118]

In the countries that have ratified Convention No. 169, indigenous groups are invoking the Convention in domestic or ILO proceedings with some success in their efforts to gain redress for problem situations.[119] In Colombia, for example, the efforts of the U'wa people to resist oil development on their traditional lands led to a decision of the Colombian Constitutional Court, which, relying substantially on ILO Convention No. 169, found invalid a government-issued license for Occidental Petroleum to explore for oil within the U'wa reserve (resguardo) because of inadequate consultation with the U'wa people.[120] Subsequently, the government issued to Occidental a different license to explore for oil outside the U'wa reserve but within ancestral land still used by the U'wa.[121] After Occidental proceeded with the oil exploration under the second license, a Colombian labour organization, acting on behalf of the U'wa people, submitted the matter to the ILO under the procedure authorized by Article 24 of the ILO Constitution for examining "representations" alleging violations of ILO conventions.[122] The ILO Committee of Experts convened to examine the complaint and found an absence of compliance with the Convention's requirements of consultation as to both exploration licenses and recommended remedial measures.[123]

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[117] *See* Ratification of C169–Indigenous and Tribal Peoples Convention, 1989 (No. 169), INTERNATIONAL LABOUR ORGANIZATION, http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314 (last visited Mar. 21, 2013).

[118] As of January 2013, the parties to the Convention include Argentina, Bolivia, Brazil, Central African Republic, Chile, Colombia, Costa Rica, Denmark, Dominica, Ecuador, Fiji, Guatemala, Honduras, Mexico, Nepal, Netherlands, Nicaragua, Norway, Paraguay, Peru, Spain, and Venezuela. *Id.*

[119] *See generally* JAMES S. ANAYA, APPLICATION OF CONVENTION NO. 169 BY DOMESTIC AND INTERNATIONAL COURTS IN LATIN AMERICA–A CASEBOOK (2009).

[120] Corte Constitucional [C.C.] [Constitutional Court], Febrero 3, 1997, M.P.: Barrera, Sentencia SU-039/97 (Colom.).

[121] *Id.* § 3. Demanda de nulidad presentada por el Defensor del Pueblo ante el Consejo de Estado.

[122] *Id.* § 1. Hechos. For a description of the Article 24 procedure and other ILO procedures to advance adherence to ILO conventions, see Lee Swepston, The International Labour Organization and Human Rights, *in* INTERNATIONAL PROTECTION OF HUMAN RIGHTS: A TEXTBOOK (Catarina Krause & Martin Scheinin eds., 2d ed. 2009).

[123] Rep. of the Comm. set up to examine the representation alleging non-observance by Colombia of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Central Unitary Workers' Union (CUT), ILO Docs. GB.276/17/1, GB.282/14/3 (Nov. 14, 2001).

C. The Jurisprudence of UN Treaty Monitoring Bodies

Apart from the UN Declaration and ILO Convention No. 19, the rights of indigenous peoples are rooted in relevant provisions of widely ratified human rights treaties of general applicability.[124] Even though these treaties do not explicitly address indigenous peoples, relevant international institutions endowed with competent authority have interpreted them in accordance with the now prevailing assumptions about indigenous peoples and their rights.[125] The work of United Nations treaty-monitoring bodies, especially the Human Rights Committee and the Committee on the Elimination of Racial Discrimination ("CERD"), is noteworthy in this regard. Although interpreting treaties that are independent of the Declaration, these treaty-monitoring bodies have reinforced the general human rights foundations of the Declaration while evidently being influenced by the broader discussion about indigenous peoples within the UN system.[126]

As already noted, the right of self-determination is affirmed as a right of "all peoples" in the common Article 1 of the widely ratified International Covenant on Civil and Political Rights[127] and the International Covenant on Economic, Social and Cultural Rights.[128] The UN Human Rights Committee, which is charged with monitoring compliance with the Covenant on Civil and Political Rights, weighed in favour of applying Article 1 for the benefit of indigenous peoples well before the Declaration explicitly affirmed for them the right of self-determination in the same terms as Article 1.[129] It did this initially in commenting upon Canada's 1999 report under the Covenant, stating that the right of self-determination affirmed in Article 1 protects indigenous peoples, *inter alia,* in their enjoyment of rights over traditional lands, and it recommended that, in relation to the aboriginal people of Canada, "the practice of extinguishing inherent aboriginal rights be abandoned as incompatible with article 1 of the Covenant."[130] The Committee has since often examined the situations

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[124] *See e.g.*, International Covenant on Civil and Political Rights, *supra* note 46; International Covenant on Economic, Social and Cultural Rights, *supra* note 46.

[125] *See, e.g.*, Case of the Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.Hr. (ser.C) No. 172 (Nov. 28, 2007).

[126] *See, e.g., Canada: CERD is Urging to End Discrimination Against Indigenous Peoples*, INTERNATIONAL WORK GROUP FOR INDIGENOUS AFFAIRS (Mar. 16, 2002), http://www.iwgia.org/news/search-news?news_id=477.

[127] International Covenant on Civil and Political Rights, *supra* note 46.

[128] International Covenant on Economic, Social and Cultural Rights, *supra* note 46.

[129] Human Rights Comm., UN Human Rights Concluding Observations: Canada, CCPR/C/79/Add.105 (Apr. 7, 1999).

[130] *Id.* ¶ 8.

of indigenous peoples in reviewing the periodic reports by State Parties to the Covenant, applying its apparent understanding about the implications of the general right of self-determination, but often without specifically referring to Article 1.[131]

In pronouncing on the rights of indigenous peoples, the Human Rights Committee has most frequently relied on Article 27 of the Covenant, which affirms the rights of members of minorities, in community with the other members of their group, to their own culture, religion and language.[132] In its General Comment on Article 27, the Committee held this provision of the Covenant to establish affirmative obligations on the part of states with regard to indigenous peoples in particular, and it interpreted Article 27 as covering all aspects of an indigenous group's survival as a distinct culture, understanding culture to include economic or political institutions, land use patterns, as well as language and religious practices.[133] This interpretation of Article 27 is confirmed in the Committee's adjudication of complaints[134] submitted to it by representatives of indigenous groups pursuant to the Optional Protocol to the Covenant.[135]

In *Ominayak, Chief of the Lubicon Lake Band v. Canada*, the Human Rights Committee determined that Canada had violated Article 27 by allowing the provincial government of Alberta to grant leases for oil and gas exploration and for timber development within the ancestral territory of the Lubicon Lake Band.[136] The Committee found that the natural resource

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[131] Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article of the Covenant, CCPR/C/USA/CO/3/Rev.1/Add.1 (Feb. 12, 2008) (criticizing U.S. for not addressing the Committee's previous recommendation regarding the "extinguishment" of aboriginal rights and urging the U.S. to take "further steps to secure the rights of all indigenous peoples, under articles 1 and 27 of the Covenant"); Human Rights Comm., UN Human Rights Concluding Observations, Canada, CCPR/C/CAN/CO/5, ¶¶ 8-9 (Apr. 20, 2006) (applying Article 1 in evaluating Canada's land policies, which may result in extinguishment of aboriginal rights); Human Rights Comm., Concluding Observations of the Human Rights Committee: Brazil, CCPR/C/BRA/CO/2/Add.1, ¶ 6 (Dec. 5, 2005) (applying Article 1 in criticizing Brazil's slow demarcation process of indigenous lands); Human Rights Comm., Concluding Observations of the Human Rights Committee: Finland, CCPR/CO/82/FIN, ¶ 17 (Dec. 2, 2004) (applying Article 1 in assessing Saami peoples' rights); Human Rights Comm., Concluding Observations of the Human Rights Committee: Australia, ¶¶ 506-07, U.N. Doc. A/55/40, 69th Sess., Supp. No. 40 (July 24, 2000) (applying Article 1 in urging Australia to guarantee indigenous people a stronger role in decision-making over their lands and resources).

[132] International Covenant on Civil and Political Rights, *supra* note 46, art. 27.

[133] Human Rights Comm., CCPR General Comment No. 23: Article 27 (Rights of Minorities), 207-10 ¶ 7, U.N. Doc. HRI/GEN/1/Rev.9 (May 27, 2008).

[134] *Id.*

[135] Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 302 (entered into force Mar. 23, 1976).

[136] Human Rights Comm., Chief Bernard Ominayak and Lubicon Lake Band v. Canada,

development activities compounded historical inequities to "threaten the way of life and culture of the Lubicon Lake Band, and constitute a violation of article 27 so long as they continue."[137] Several other decisions by the Committee have built upon this understanding of Article 27, even while not finding a violation.[138]

The Committee has also found that indigenous religious and cultural traditions are protected by Articles 17 and 23 of the Covenant, which affirm the rights to privacy and to the integrity of the family. In a case involving people indigenous to Tahiti, the Committee determined that these articles had been violated by France when its territorial authority allowed the construction of a hotel complex on indigenous ancestral burial grounds.[139]

Mar. 26, 1990, CCPR/C/38/D/167/1984.

[137] Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada, Communication No. 167/1984, ¶ 33, Vol. 2, U.N. Doc. A/45/40, GAOR, 45th Sess., Supp. No. 40 (1990) (views adopted on Mar. 26, 1990 at 38th Sess.).

[138] *See, e.g.*, Sandra Lovelace v. Canada, Communication No. 24/1977, Report of Human Rights Committee, U.N. Doc. A/36/40, GAOR, 36th Sess., Supp. No. 40 166-75 (views adopted on July 30, 1981) (Article 27 protects right of an indigenous person to live on reserve in community with other members of her group); Kitok v. Sweden, Communication No. 197/1985, Report of the Human Rights Committee, U.N. Doc. A/43/40, GAOR, 43rd Sess., Supp. No. 40 221-30, (views adopted July 27, 1988) (Article 27 extends to economic activity "where that activity is an essential element in the culture of an ethnic community"); I. Länsmann et al. v. Finland, Communication No. 511/1992, Report of the Human Rights Committee, Oct. 26, 1994, U.N. Doc. A/50/40, GAOR, 50th Sess., Supp. No. 40 66-76 (*Länsmann I*; reindeer herding part of Saami culture protected by Article 27); J.E. Länsmann et al. v. Finland, Communication No. 671/1995, Report of the Human Rights Committee, Oct. 30, 1996, U.N. Doc. A/52/40, GAOR 52nd Sess., Supp. No. 40 191-204, ¶¶ 2.1-2.4, 10.1-10.5 (*Länsmann II*; Sammi reindeer herding in certain land area is protected by Article 27 not violated in this case); Mahuika et al. v. New Zealand, Communication No. 547/1993, Report of the Human Rights Committee, Oct. 27, 2000, U.N. Doc. A/56/40, GAOR, 55th Sess., Vol. 2, 11-29, ¶¶ 9.9, 10, (Maori interest in fishing, including for commercial purposes, protected by Article 27); Äärelä and Näkkäläjärvi v. Finland, Communication No. 779/1997, Report of the Human Rights Committee, Oct. 24, 2001, U.N. Doc. A/57/40, GAOR, 57th Sess., Supp. No. 40, Vol. 2, 117-30, (reindeer husbandry is an essential element of Saami culture recognized under Article 27); Angela Poma Poma v. Peru, Communication No. 1457/2006, Report of the Human Rights Committee, Mar. 16, 2009–Apr. 9, 2009, U.N. Doc. CCPR/C/95/D/1457/2006, GAOR, 95th Sess. (view adopted on Mar. 27, 2009) (access to water for grazing protected by Article 27). *Compare* Diergaardt et al. v. Namibia, Communication No. 760/1997, Report of the Human Rights Committee, U.N. Doc. A/55/40, GAOR, 55th Sess., Supp. No. 40 140-60, Vol. 2, ¶ 10.6 (view adopted on July 25, 2000), *with* Individual Opinion by Elizabeth Evatt and Cecilia Medina Quiroga (concurring) (cattle grazing of Afrikaner community not recognized as a protected practice under Article 27 because no clear relationship existed between cattle grazing and the distinctiveness of the community's culture or self-government practices).

[139] Hopu and Bessert v. France, Communication No. 549/1993, Report of the Human Rights Committee, U.N. Doc. A/52/40, GAOR, 52nd Sess., Supp. No. 40 70-83, Vol. 2,

CERD, the treaty-monitoring body that promotes compliance with the International Convention on the Elimination of All Forms of Racial Discrimination, has also regularly considered issues of indigenous peoples.[140] It has done so within the general framework of the non-discrimination norm running throughout that Convention, and not usually in connection with any particular article of the Convention, which like other relevant human rights treaties nowhere specifically mentions indigenous groups or individuals.[141] In its General Recommendation on indigenous peoples, CERD identifies indigenous peoples as vulnerable to patterns of discrimination that have deprived them, as groups, of the enjoyment of their property and distinct ways of life; and it hence calls upon state parties to take special measures to protect indigenous cultural patterns and traditional land tenure.[142]

CERD applied its understanding of the non-discrimination norm in examining amendments to legislation in Australia that regulates the recognition of indigenous traditional land rights.[143] Invoking its "early warning/urgent action" procedure,[144] the Committee found that the amendments discriminated against indigenous title holders in favor of non-indigenous interests and would result in Aboriginal and Torres Strait Islanders losing their "native title" rights.[145] It thus called upon Australia to suspend implementation of the amendments and engage in consultation with the indigenous people of the country in order to arrive at an acceptable alternative.[146] CERD similarly examined legislation challenged by the Maori of New Zealand that declared areas of New Zealand's foreshore and seabed as Crown, or government, land.[147] The legislation was drafted following the New Zealand Court of Appeal's decision in the *Ngati Apa*

(view adopted on July 29, 1997).

[140] *See, e.g.*, Comm. on the Elimination of Racial Discrimination, General Recommendation No. 23: Indigenous Peoples, U.N. Doc. HRI/GEN/1/Rev.9, 51st Sess., Vol. 2, 285-86 (1997).

[141] *Id.*

[142] *Id.*

[143] ATSUKO TANAKA & YOSHINOBU NAGAMINE, THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION: A GUIDE FOR NGOS (Minority Rights Group International/International Movement Against All Forms of Discrimination and Racism ("IMADR") 2001).

[144] For an explanation of the function and procedures of the early-warning measures of CERD, see *id.*

[145] Comm. on the Elimination of Racial Discrimination, Decision 2 (54) on Australia, U.N. Doc. A/54/18, 54th Sess., Supp. No. 18 6-8, (Mar. 18, 1999).

[146] *Id.* ¶¶ 11-12.

[147] Comm. on the Elimination of Racial Discrimination, Concluding Observations of the Committee on the Elimination of Racial Discrimination: New Zealand, U.N. Doc. CERD/C/NZL/CO/17, 70th Sess. (view adopted on Aug. 15, 2007).

case, in which that court held that the Maori had the right to seek customary title over the land in question.[148] CERD found that the legislation contained "discriminatory aspects"[149] and urged the state to "resume dialogue with the Maori community . . . in order to seek ways of mitigating [the legislation's] discriminatory effects, including through legislative amendment, where necessary."[150] The Committee also encouraged New Zealand to minimize any negative effects by "broadening the scope of redress available to the Maori."[151] In numerous other cases CERD has addressed concerns of indigenous peoples within the framework of the standard of non-discrimination, through its early warning/urgent action procedure.[152]

IV. CONCLUSION

Indigenous peoples have inserted themselves prominently into the international human rights agenda. In doing so they have created a movement that has challenged state-centered structures of power and practices that previously failed to value indigenous cultures, institutions, and group identities.[153] This movement has resulted in a heightened international concern over indigenous peoples and constellation of internationally accepted norms that flow from generally applicable human rights principles.[154] These norms find expression in the UN Declaration on the Rights of Indigenous Peoples and other international instruments, and are otherwise discernible in the ongoing multilateral and authoritative discussions about indigenous peoples and their rights.[155]

The full extent of international affirmation of indigenous peoples' rights is still developing as indigenous peoples continue to press their cause.[156] Nonetheless, commensurate with the degree of their acceptance by relevant international actors, new and emergent norms concerning indigenous

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[148] Attorney General v. Ngati Apa, [2003] 3 NZLR 643 (CA).

[149] Comm. on the Elimination of Racial Discrimination, Decision 1 (66) New Zealand Foreshore and Seabed Act, ¶ 6, U.N. Doc. CERD/C/DEC/NZL/1, 67th Sess. (view adopted on Apr. 27, 2005).

[150] *Id.* ¶ 7.

[151] *Id.* ¶ 8.

[152] *See* Fergus MacKay, *Indigenous Peoples and United Nations Human Rights Bodies: A Compilation of UN Treaty Body Jurisprudence and the Recommendations of the Human Rights Council Vol. IV*, FOREST PEOPLES PROGRAMME (2009-2010), http://www.forestpeoples.org/sites/fpp/files/publication/2011/02/ips-and-human-rights-bodies-jurisprudence-2009-2010.pdf.

[153] ANAYA, INDIGENOUS PEOPLE IN INTERNATIONAL LAW, *supra* note 1, at 56.

[154] *Id.* at 72.

[155] *Id.* at 233.

[156] *Id.* at 289.

peoples are grounds upon which nonconforming conduct may be subject to scrutiny within the international system's human rights programme.[157] For many indigenous peoples, such scrutiny may be a critical, if not determinative, factor in the quest for survival.[158] The movement toward a new normative order concerning indigenous peoples is a dramatic manifestation of the capacities for social progress and change for the better in the human rights frame of the contemporary international system.[159]

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[157] *Id.* at 109.
[158] *Id.* at 185.
[159] *Id.* at 51.

The Scholarship of Jon M. Van Dyke: A Bibliography

Books

JON M. VAN DYKE, SHERRY P. BRODER, SEOKWOO LEE, JIN-HYUN PAIK (EDS.), GOVERNING OCEAN RESOURCES, A TRIBUTE TO JUDGE CHOON-HO PARK (Law of the Sea Institute, Martinus Nijhoff publishers, 2013).

JON M. VAN DYKE & MELVIN M. SAKURAI, CHECKLISTS FOR SEARCHES AND SEIZURES IN PUBLIC SCHOOLS (New York: West Group, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012) (updated annually). A treatise on the constitutional standards governing searches and seizures in the public schools. Cited in *In re K.S.*, 183 Cal.App.4th 72, 81, 108 Cal.Rptr.3d 32, 37 (2010).

SEOUNG-YONG HONG & JON M. VAN DYKE (EDS.), MARITIME BOUNDARY DISPUTES, SETTLEMENT PROCESSES, AND THE LAW OF THE SEA (Law of the Sea Institute, Martinus Nijhoff Publishers, 2009).

JORDAN J. PAUST, JON M. VAN DYKE & LINDA A. MALONE, INTERNATIONAL LAW AND LITIGATION IN THE U.S. (West Group, 2000, 2d ed. 2005, 3d ed. 2009). This casebook is accompanied by a *Documents Supplement* and a *Teacher's Manual*.

JON M. VAN DYKE, WHO OWNS THE CROWN LANDS OF HAWAI'I? (University of Hawai'i Press, 2008) (selected by the Honolulu Advertiser as one of the six most memorable books of 2008; picked by the Hawai'i Book Publishers Association as the Best Non-Fiction Book of 2008, the Best Text or Reference Book of 2008, and the Best Book on Hawaiian Culture of 2008).

HEINZ STOCKINGER, JON M. VAN DYKE, MICHAEL GEISTLINGER, SARAH KATHARINA FUSSEK & PETER MACHART (EDS.), UPDATING INTERNATIONAL NUCLEAR LAW (2007).

MARK J. VALENCIA, JON M. VAN DYKE & NOEL LUDWIG, SHARING THE RESOURCES OF THE SOUTH CHINA SEA (Kluwer Law International/Martinus Nijhoff, 1997) *in* "Publications on Ocean Development" series (Judge Shigeru Oda, International Court of Justice,

ed.) (reprinted in paperback in 1999 by the University of Hawai'i Press). "[T]his book gives excellent, up-to-date coverage of what has been going on in one of the most troubled waters of the world. It thoroughly familiarizes the reader with virtually all aspects of the South China Sea disputes." Judge Choon-Ho Park, Book Review, 92 AM. J. INT'L. L. 354-55 (1998).

JON M. VAN DYKE, DURWOOD ZAELKE, & GRANT HEWISON (EDS.), FREEDOM FOR THE SEAS IN THE 21ST CENTURY: OCEAN GOVERNANCE AND ENVIRONMENTAL HARMONY (Washington: Island Press, 1993). A collection of essays addressing issues of governing and managing the resources of the high seas; received the 1994 Harold and Margaret Sprout Award from the International Studies Association as the best book on international environmental policy.

JON M. VAN DYKE, LEWIS M. ALEXANDER & JOSEPH R. MORGAN (EDS.), INTERNATIONAL NAVIGATION: ROCKS AND SHOALS AHEAD? (Honolulu: Law of the Sea Institute, 1988). Edited proceedings (with commentary and analysis) of a workshop on international navigation. Described by reviewer as an "excellent book" in 13 MARINE POLICY 358 (1989).

JON M. VAN DYKE (ED.), CONSENSUS AND CONFRONTATION: THE UNITED STATES AND THE LAW OF THE SEA CONVENTION (Honolulu: Law of the Sea Institute, 1985). Edited proceedings (with commentary and analysis) of a workshop on U.S. ocean policy, covering all aspects of the U.S. decision not to sign the 1982 Law of the Sea Treaty. A reviewer in the August 6, 1985 issue of the publication EOS stated that "The contributions of the editor to this volume are outstanding." The review in the January 1986 issue of the AMERICAN JOURNAL OF INTERNATIONAL LAW (at 215) called this book "an important contribution to the law of the sea literature," and the April 1986 review in the INTERNATIONAL AND COMPARATIVE LAW QUARTERLY (at 480) described the book as "a useful and timely contribution to the literature which can be warmly welcomed."

JON M. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS (Cambridge, Mass.: Ballinger Publishing Co., 1977). A statistical and descriptive analysis of how juries are assembled and how different selection methods affect jury verdicts. A review in the October 1977 issue of JUDICATURE stated that: "As a data source, this book is destined to become a standard reference book." It has been described in the AMERICAN BAR ASSOCIATION JOURNAL as one of the three "great products of social research into jury operations" (Jan. 1984, at

110). In 1987, it was described as "the leading treatise in the field." THE SUPREME COURT REVIEW, 1987:120. The California Supreme Court based its decision in *People v. Wheeler*, 22 Cal. 3d 258, 583 P.2d 748 (1978), in part on this book's discussion of peremptory challenges. In the U.S. Supreme Court's decision in *Batson v. Kentucky*, 476 U.S. 79 (1986), also on peremptory challenges, Justice Powell cited this book three times in his majority opinion and Justice Marshall cited it four times in his concurring opinion. The Court in *Batson* overruled an earlier decision and shifted the burden of proof in a manner similar to the recommendation made in this book. More recently, Justice Stevens quoted from it in his dissenting opinion in *Holland v. Illinois*, 493 U.S. 474 (1990).

JON M. VAN DYKE, NORTH VIETNAM'S STRATEGY FOR SURVIVAL (Palo Alto, Cal.: Pacific Books, 1972), *foreword* by Edwin O. Reischauer. A review in the September 1977 issue of the AMERICAN POLITICAL SCIENCE REVIEW stated that this book "remains, five years after its publication, the most thorough account of how [North Vietnam] responded to the American 'air war of destruction.'"

Articles and Book Chapters

Sherry P. Broder & Jon M. Van Dyke, *Shipping Industry and the Imperative to Reduce Its Air Pollution and Black Carbon Emissions*, *in* THE REGULATION OF INTERNATIONAL SHIPPING: INTERNATIONAL AND COMPARATIVE PERSPECTIVES: ESSAYS IN HONOR OF EDGAR GOLD, (Aldo Chircop, Norman Letalik, Ted L. McDorman, Susan Ralston, eds., Martinus Nijhoff Publishers, 2012).

Jon M. Van Dyke & Sherry P. Broder, *Particularly Sensitive Sea Areas; Protecting The Marine Environment In The Territorial Seas And Exclusive Economic Zones*, 40 Denv. J. Int'l Law & Pol'y 472 (2012).

Jon M. Van Dyke, *The Introduction of Western International Law into Japan The Japanese Legal System: An Era of Transition* (Tom Ginsburg and Harry N. Scheiber eds., Robbins Collection, University of California at Berkeley, 2012).

Jon M. Van Dyke & Sherry P. Broder, *Regional Maritime Cooperation in the South China Sea: COBSEA and PEMSEA*, Academia Sinica, Taiwan (2013) (publication forthcoming).

Jon M. Van Dyke, *International Agreements Providing Guidance for National and Regional Ocean Policies*, in INTEGRATED NATIONAL AND REGIONAL OCEAN POLICIES: COMPARATIVE PRACTICES AND FUTURE PROSPECTS (Biliana Cicin-Sain, David VanderZwaag, and Miriam C. Balgos eds., publication forthcoming).

Jon M. Van Dyke, *Addressing and Resolving the Dokdo Matter, in* DOKDO: HISTORICAL APPRAISAL AND INTERNATIONAL JUSTICE 29-40 (Seok-Woo Lee & Hee Eun Lee eds., 2011); also published in INSIGHT INTO DOKDO: HISTORICAL, POLITICAL AND LEGAL PERSPECTIVES ON KOREA'S SOVEREIGNTY 333-50 (Park Hyun-jin ed., Korea Herald, Insights into Korea Series, Vol.8, 2009).

Jon M. Van Dyke, *Self-Determination*, ILA COMMITTEE ON THE RIGHTS OF INDIGENOUS PEOPLES, Interim Report to the 74th ILA Conference in The Hague (2010), http://www.ila-hq.org/en/committees/index.cfm/cid/1024.

Jon M. Van Dyke & Maile Osika, *William S. Richardson: A Visionary With A Common Touch*, 33 U. HAW. L. REV. 83 (2010).

Jon M. Van Dyke, *Access to Water on the Moon: Lessons from Water Law in Hawaii and Elsewhere*, 36 J. OF SPACE L. 525-46 (2010).

Seokwoo Lee & Jon M. Van Dyke, *The 1951 San Francisco Peace Treaty and Its Relevance to the Sovereignty over Dokdo*, 9 CHINESE J. OF INT'L L. 741-62 (2010).

Jon M. Van Dyke, *The Romania v. Ukraine Decision and Its Effect on East Asian Maritime Delimitations*, 15 OCEAN & COASTAL L. J. 261-83 (2010).

Jon M. Van Dyke, *The Privacy Rights of Public School Students*, 32 U. HAW. L. REV. 305-22 (2010).

Jon M. Van Dyke, *Allocating Fish Across Jurisdictions, in* CONSERVATION AND MANAGEMENT OF TRANSNATIONAL TUNA FISHERIES 163-79 (Robin Allen, James Joseph & Dale Squires eds. 2010); previously published in LAW OF THE SEA, PROTECTION OF THE MARINE ENVIRONMENT AND SETTLEMENT OF DISPUTES 821-44 (Tafsir Malick Ndiaye & Rudiger Wolfrum eds., 2007).

Jon M. Van Dyke, *Ocean Transport of Radioactive Fuel and Waste, in* THE OCEANS IN THE NUCLEAR AGE: LEGACIES AND RISKS 147-67 (David D. Caron and Harry N. Scheiber eds., 2010).

Jon M. Van Dyke, *The Pacific Judicial Conference: Strengthening the Independent Judiciary and the Rule of Law in the Pacific*, 22 WESTERN LEGAL HISTORY 127-212 (2009); an earlier version of this paper is published *in* DROIT FONCIER ET GOUVERNANCE JUDICIAIRE DANS LE PACIFIQUE SUD (ESSAIS COMPARATISTES)-LAND LAW AND JUDICIAL GOVERNANCE IN THE SOUTH PACIFIC (COMPARATIVE STUDIES) (special issue of the COMPARATIVE LAW JOURNAL OF THE PACIFIC-REVUE JURIDIQUE POLYNÉSIENNE (A. Angelo, O. Aimot & Y-L Sage eds., 2011), *available at* www.upf.pf, recherche, Revue Juridique Polynesienne.

Jon M. Van Dyke, *Transit Passage Through International Straits, in* THE FUTURE OF OCEAN REGIME-BUILDING: ESSAYS IN TRIBUTE TO DOUGLAS M. JOHNSTON 177-232 (Aldo Chircop, Ted L. McDorman & Susan J. Rolston eds., 2009).

Jon M. Van Dyke, *Disputes Over Islands and Maritime Boundaries in East Asia,* in MARITIME BOUNDARY DISPUTES, SETTLEMENT PROCESSES, AND THE LAW OF THE SEA 39-75 (Seoung-Yong Hong & Jon M. Van Dyke eds., Law of the Sea Institute, Martinus Nijhoff Publishers, 2009).

Jon M. Van Dyke, *Searches of Public School Students and Their Lockers*, HAW. B. J., at 4-13 (Feb. 2009).

Jon M. Van Dyke, *The 1982 UN Law of the Sea Convention: The Need for Change, in* CONTEMPORARY TRANSNATIONAL CHALLENGES: INTERNATIONAL MARITIME CONNECTIVITIES 105-41 (Ravi Vohra, P.K. Ghosh & D Chakraborty eds., National Maritime Foundation, India, 2008).

Jon M. Van Dyke, *A Comparison of the Annexation of Korea with the Annexation of Hawaii, in* THE ANNEXATION OF KOREA AND THE CONTEMPORARY WORLD 449-81 (Akashi Shoten ed., 2008) (in Japanese).

Jon M. Van Dyke, *Canada's Authority to Prohibit LNG Vessels from Passing Through Head Harbour Passage to U.S. Ports*, 14 OCEAN AND COASTAL L. J. 45-72 (2008).

Jon M. Van Dyke, *Air, Land, and Sea: A Comparative Analysis, in* FREEDOM OF THE SEAS: A CONTEMPORARY OUTLOOK 31-98 (Ravi Vohra and P.K. Ghosh eds., National Maritime Foundation, India, 2008).

Jon M. Van Dyke, *The 1982 United Nations Convention on the Law of the Sea, in* OCEAN AND COASTAL LAW AND POLICY 375-407 (Don Baur, Tim Eichenberg & Mike Sutton eds., American Bar Association, 2008).

Jon M. Van Dyke, *U.S. Accession to the Law of the Sea Convention, in* OCEAN YEARBOOK 22, at 47-59 (2008).

Jon M. Van Dyke, *Navigational Freedoms in a Time of Insecurity*, 31 STRATEGIC ANALYSIS 365-99 (2007).

Jon M. Van Dyke, *Liability and Compensation for Harm Caused by Nuclear Activities*, 35 DENVER J. OF INT'L L. & POL'Y 13-46 (2006); *also in* UPDATING INTERNATIONAL NUCLEAR LAW (Heinz Stockinger, Jon M. Van Dyke, Michael Geistlinger, Sarah Katharina Fussek & Peter Machart eds., 2007).

Jon M. Van Dyke, *The Fundamental Human Right to Prosecution and Compensation*, in FEAR OF PERSECUTION: GLOBAL HUMAN RIGHTS, INTERNATIONAL LAW AND HUMAN WELL-BEING 189-221 (James D. White & Anthony J. Marsella eds., 2007); earlier version published in 29 DENVER J. INT'L L. & POL'Y 77-100 (2001).

Jon M. Van Dyke, *Legal Issues Related to Sovereignty Over Dokdo and Its Maritime Boundary*, 38 OCEAN DEVELOPMENT & INTERNATIONAL LAW 157-224 (2007); a shorter version of this paper has been published in Japanese *in* THE ANNEXATION OF KOREA AND THE CONTEMPORARY WORLD 729-95 (Yi Tae Jin & Norikatsu Sasagawa eds., Akashi Shoten 2008), and under the same title in Korean, published by Taehaksa Press in 2009, at 845-918.

Jon M. Van Dyke, *Reconciliation Between Korea and Japan*, 5 CHINESE J. INT'L L. 215-39 (2006).

Jon M. Van Dyke, *Population, Voting, and Citizenship in the Kingdom of Hawai'i*, 28 U. HAW. L. REV. 81-103 (2006).

Jon M. Van Dyke & Melody K. MacKenzie, *An Introduction to the Rights of the Native Hawaiian People*, HAW. B. J., at 63-69 (July 2006).

Jon M. Van Dyke, *Promoting Accountability for Human Rights Abuses*, 8 CHAPMAN L. REV. 153-77 (2005).

Jon M. Van Dyke, *An Analysis of the Aegean Disputes Under International Law*, 36 OCEAN DEV. & INT'L L. 63-117 (2005).

Jon M. Van Dyke, *The Disappearing Right to Navigational Freedom in the Exclusive Economic Zone*, 29 MARINE POL'Y 107-21 (2005).

Duncan E.J. Currie & Jon M. Van Dyke, *Recent Developments in the International Law Governing Shipments of Nuclear Materials and Wastes and Their Implications for SIDS,* 14:2 RECIEL 117-24 (2005).

Jon M. Van Dyke, *The Role of Customary International Law in Federal and State Court Litigation*, 26 U. HAW. L. REV. 361 (2004).

Jon M. Van Dyke, *Regionalism, Fisheries, and Environmental Challenges in the Pacific*, 6 SAN DIEGO INT'L L.J. 143-78 (2004)

Jon M. Van Dyke, *Human Rights* and *International Law*, *in* 3 Berkshire Encyclopedia of World History 939-43, 1007-10 (William H. McNeill et al. eds., 2005).

Jon M. Van Dyke, Emily A. Gardner & Joseph R. Morgan, *Whales, Submarines, and Active Sonar*, 18 OCEAN YEARBOOK 330-63 (2004).

Jon M. Van Dyke, *The Evolution and International Acceptance of the Precautionary Principle, in* BRINGING NEW LAW TO OCEAN WATERS 357-79 (David D. Caron & Harry N. Scheiber eds., 2004).

Jon M. Van Dyke, *More Bad News for the Whales*, 19 NAT. RESOURCES & ENV'T 20-22, 80 (2004).

Jon M. Van Dyke, *Balancing Navigational Freedom with Environmental and Security Concerns*, 15 COLO. J. ENVTL. L. & POL'Y 2003 Y.B. 19-28 (2004).

Jon M. Van Dyke, *Giving Teeth to the Environmental Obligations in the LOS Convention, in* OCEANS MANAGEMENT IN THE 21ST CENTURY: INSTITUTIONAL FRAMEWORKS AND RESPONSES 167-86 (A.G. Oude Elferink & D.R. Rothwell eds., 2004).

Jon M. Van Dyke, *Military Ships and Planes Operating in the Exclusive Economic Zone of Another Country*, 28 MARINE POL'Y 29-39 (2004).

Jon M. Van Dyke, *Hawai'i's Sunshine Law Compliance Criteria*, 26 U. HAW. L. REV. 21-33 (2003).

Jon M. Van Dyke, *The Republic of Korea's Maritime Boundaries*, 18 INT'L J. MARINE & COASTAL L. 509-40 (2003).

Jon M. Van Dyke, Mark J. Valencia, & Jenny Miller Garmendia, *The North/South Korea Boundary Dispute in the Yellow (West) Sea*, 27 MARINE POL'Y 143-58 (2003).

Jon M. Van Dyke, *Reparations for the Descendants of American Slaves Under International Law*, in SHOULD AMERICA PAY?–SLAVERY AND THE RAGING DEBATE ON REPARATIONS 57 (Raymond A. Winbush ed., 2003).

Jon M. Van Dyke, *Active Sonar & Shipments of Radioactive Materials*, 15 COLO. J. INT'L ENV. L & POL'Y 2002 Y.B.1 (2003).

Jon M. Van Dyke, *Northeast Asian Seas–Conflicts, Accomplishments, and the Role of the United States*, 17 INT'L J. OF MARINE & COASTAL L. 397 (2002).

Jon M. Van Dyke, *The Legal Regime Governing the Gibraltar Straits*, *in* THE PROCEEDINGS OF THE SYMPOSIUM ON THE STRAITS USED FOR INTERNATIONAL NAVIGATION (Turkish Marine Research Foundation, Bayram Ozturk & Resat Ozkan eds., 2002).

Jon M. Van Dyke, *The Legal Regime Governing Sea Transport of Ultrahazardous Radioactive Materials*, 33 OCEAN DEVELOPMENT & INT'L L. 77 (2002).

Jon M. Van Dyke, *Judge Shigeru Oda and Maritime Boundary Delimitation*, *in* LIBER AMECORUM JUDGE SHIGERU ODA 1197 (N.Ando et al eds., 2002).

Jon M. Van Dyke, *The Fundamental Right of the Marcos Human Rights Victims to Compensation*, 76 PHILIPPINE L.J. 169-93 (2001) (University of the Philippines).

Jon M. Van Dyke, *The South Pacific: Lessons Learned, in* MARITIME REGIME BUILDING: LESSONS LEARNED AND THEIR RELEVANCE FOR NORTHEAST ASIA 93 (Mark J. Valencia ed., 2001).

Jon M. Van Dyke, *Louis B. Sohn and the Settlement of Ocean Disputes*, 33 GEO. WASH. INT'L L. REV. 31 (2000).

Jon M. Van Dyke & Mark J. Valencia, *How Valid Are the South China Sea Claims Under the Law of the Sea Convention?, in* SOUTHEAST ASIAN AFFAIRS 2000, at 47 (Institute of Southeast Asian Studies, 2000).

Jon M. Van Dyke, *Maritime Delimitation in the Aegean Sea, in* THE AEGEAN SEA 2000, at 165 (Bayram Ozturk ed., 2000).

Jon M. Van Dyke, *Sharing Ocean Resources ... in a Time of Scarcity and Selfishness, in* THE LAW OF THE SEA: INHERITED DOCTRINE AND A REGIME FOR THE COMMON HERITAGE 3 (Harry Scheiber ed., 2000).

Jon M. Van Dyke, *Addressing Human Rights Concerns after Korean Reunification*, 3 INT'L STUD. REV. 117-36 (Ewha Womans University, Seoul, 2000).

Duncan E.J. Currie & Jon M. Van Dyke, *The Shipment of Ultrahazardous Nuclear Materials in International Law*, 8 RECIEL 113 (1999).

Mark J. Valencia & Jon M. Van Dyke, *Comprehensive Solutions to the South China Sea Disputes: Some Options*, in BOUNDARIES AND ENERGY: PROBLEMS AND PROSPECTS 85 (Gerald Blake, Martin Pratt, Clive Schofield and Janet Allison Brown eds. 1998).

Jon M. Van Dyke, *The Political Status of the Native Hawaiian People*, 17 YALE L. & POL'Y REV. 95-147 (1998). (This article was cited in the Supreme Court's majority opinion in *Rice v. Cayetano*, 528 U.S. 495, 518 (2000)).

Jon M. Van Dyke, *The Rio Principles and Our Responsibilities of Ocean Stewardship*, 31 OCEAN & COASTAL MGMT. 1 (1996).

Jon M. Van Dyke, *Applying the Precautionary Principle to Ocean Shipments of Radioactive Materials*, 38 OCEAN DEV. & INT'L L. 379 (1996).

Jon M. Van Dyke, *The Aegean Sea Dispute: Options and Avenues*, 20 MARINE POL'Y 397 (1996); also published in AEGEAN ISSUES: PROBLEMS—LEGAL AND POLITICAL MATRIX 59 (Seyfi Tashan ed., Foreign Policy Institute, Ankara, 1995).

Jon M. Van Dyke, *Legal and Practical Problems Governing International Straits*, *in* OCEAN YEARBOOK 12, at 109 (E.M. Borgese, N. Ginsburg, & J.R. Morgan eds., 1996); also published in THE STRAITS OF MALACCA 305-26 (Hamzah Ahmed ed., Maritime Institute of Malaysia, 1997).

Jon M. Van Dyke, *The Straddling and Migratory Stocks Agreement and the Pacific*, 11 INT'L J. MARINE & COASTAL L. 406 (1996).

Jon M. Van Dyke, Carmen Di Amore-Siah, and Gerald W. Berkley-Coats, *Self-Determination for Nonself-governing Peoples and for Indigenous Peoples: The Cases for Guam and Hawai'i*, 18 U. HAW. L. REV. 623 (1996).

Jon M. Van Dyke, *An Overview of the Jurisdictional Issues Affecting Hawai'i's Ocean Waters*, *in* OCEAN GOVERNANCE FOR HAWAI'I 5 (Thomas A. Mensah ed., 1995); also published in 11 INT'L J. MARINE & COASTAL L. 351 (1996).

Jon M. Van Dyke, *National Maritime Policies and Directions: New Initiatives on Governance of High Seas Resources under the 1982 Law of the Sea Convention*, *in* MARINE POLICY, MARITIME SECURITY AND OCEAN DIPLOMACY IN THE ASIA-PACIFIC 3 (Dalchoong Kim, Choon-ho Park, Seo Hang Lee & Jin-Hyun Paik eds., 1995); also published in 10 INT'L J. MARINE & COASTAL L. 219 (1995).

Jon M. Van Dyke, *The Kamehameha Schools/Bishop Estate and the Constitution*, 17 U. HAW. L. REV. 413 (1995).

Noelle M. Kahanu & Jon M. Van Dyke, *Native Hawaiian Entitlement to Sovereignty: An Overview*, 17 U. HAW. L. REV. 427 (1995).

Mark J. Valencia & Jon M. Van Dyke, *Vietnam's National Interests and the Law of the Sea*, 25 OCEAN DEV. & INT'L L. 217 (1994).

Jon M. Van Dyke, *The Role of Indigenous Peoples in Ocean Governance*, in OCEAN GOVERNANCE: SUSTAINABLE DEVELOPMENT OF THE SEAS (Peter Bautista Payoyo ed., 1994).

Jon M. Van Dyke, *Promoting Maritime Cooperation in the Asia-Pacific Era,* in EXPLORING MARITIME COOPERATION IN NORTHEAST ASIA—POSSIBILITY AND PROSPECTS 203-43 (Yonsei University Institute of East and West Studies, Dalchoong Kim, Choon-ho Park, Seo Hang Lee & Jih-Hyun Paik eds., 1993).

Jon M. Van Dyke, *Sea Shipment of Japanese Plutonium Under International Law*, 24 OCEAN DEV. & INT'L L. 399 (1993); also published in Japanese in four issues of the journal GENTSU (1993).

Jon M. Van Dyke & Dale L. Bennett, *Islands and the Delimitation of Ocean Space in the South China Sea, in* OCEAN YEARBOOK 10, at 54 (E.M. Borgese, N. Ginsburg & J. Morgan eds., 1993).

Jon M. Van Dyke, *The Evolving Legal Relationships Between the United States and Its Affiliated U.S. Flag Islands*, 14 U. HAW. L. REV. 445-517 (1992).

Jon M. Van Dyke, *Inseln in einem Meer von Nutzung und Plunderung: Die Rolle indigener Volker bei der Kontrolle des Ozeans, in* UN-ENDLICHES MEER (FOCUS: OKOZID 8) (Nikolaus K. Gelpke ed., 1992.

Jon M. Van Dyke, Marilyn M.L. Chung, & Teri Y. Kondo, *The Protection of Individual Rights Under Hawai'i's Constitution*, 14 U. HAW. L. REV. 311 (1992).

Jon M. Van Dyke, *The Role of a Constitution for the U.S. Oceans*, 17 OCEAN & SHORELINE MGMT. 273 (1992).

David M. Forman, M. Casey Jarman & Jon M. Van Dyke, *Filling in a Jurisdictional Void: The New U.S. Territorial Sea*, 2 TERRITORIAL SEA J. 1 (1992).

Jon M. Van Dyke & Gerald W. Berkley, *Redressing Human Rights Abuses*, 20 DENVER J. INT'L L. & POL'Y 243 (1992). A shorter version of this article appears in RESTRUCTURING FOR WORLD PEACE: ON THE THRESHOLD OF THE TWENTY-FIRST CENTURY 124 (Katherine & Majid Tehranian eds., 1992).

Jon M. Van Dyke, *Prohibiting Radioactive Waste in the Pacific,* in LAW AND SOCIETY OF SOUTH PACIFIC ISLAND STATES 111 (Hiroyuki Hata ed., 1992) (in Japanese).

Jon M. Van Dyke, *Peremptory Challenges Revisited*, 12 NAT'L BLACK L.J. 114 (1991).

Jon M. Van Dyke, *Protected Marine Areas and Low-Lying Atolls*, 16 OCEAN & SHORELINE MGMT. 87-173 (1991).

Jon M. Van Dyke, *Military Exclusion and Warning Zones on the High Seas*, 15 MARINE POL'Y 147-69 (1991). This article is also published in MOSCOW SYMPOSIUM ON THE LAW OF THE SEA 75 (Thomas A. Clingan Jr. & Anatoly L. Kolodkin eds., 1991).

Alan W. Scheflin & Jon M. Van Dyke, *Merciful Juries: The Resilience of Jury Nullification*, 48 WASH. & LEE L. REV. 165-83 (1991); *reprinted in* BEFORE THE LAW: AN INTRODUCTION TO THE LEGAL PROCESS 404 (John J. Bonsignore et al. eds. 5th ed. 1994); COURTS AND JUSTICE: A READER 154 (G. Larry Mays & Peter R. Gregware eds., 4th ed. 2009); *and* 53 GUILD PRACTITIONER 71-94 (1996).

Jon M. Van Dyke, *Environmental Impact Assessments*, *in* CULTURAL VALUES IN THE AGE OF TECHNOLOGY 93 (Effie Cameron, D.G. Malcolm Jr., & Jeanne Skog eds., 1991).

W. Jackson Davis & Jon M. Van Dyke, *Dumping of Decommissioned Nuclear Submarines at Sea: A Technical and Legal Analysis*, 14 MARINE POL'Y 467-76 (1990).

Jon M. Van Dyke, *The Role of Islands in Delimiting Maritime Zones: The Case of the Aegean Sea*, *in* OCEAN YEARBOOK 8, at 44-69 (E.M. Borgese, N. Ginsburg & J. Morgan eds., 1989); also published in THE AEGEAN ISSUES: PROBLEMS AND PROSPECTS 263-94 (Foreign Policy Institute, Ankara, Turkey, 1989).

Jon M. Van Dyke, *Prospects for the Development of Inter-Governmental Human Rights Bodies in Asia and the Pacific*, *in* NEW DIRECTIONS IN HUMAN RIGHTS 51-59 (E. Lutz, H. Hannum & K. Burke eds., 1989); also published in 16 MELANESIAN L. J. 28-33 (1988) and the PROCEEDINGS OF THE 1988 ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 363-68.

Jon M. Van Dyke, *The United States and Japan in Relation to the Resources, the Environment, and the People of the Pacific Island Region*, 16 ECOLOGY L.Q. 217-26 (1989).

Jon M. Van Dyke, Ted N. Pettit, Jennifer Cook Clark & Allen L. Clark, *The Legal Status of Johnston Atoll and Its Exclusive Economic Zone*, 10 U. HAW. L. REV. 183-204 (1988).

Jon Van Dyke, Joseph Morgan & Jonathan Gurish, *The Exclusive Economic Zone of The Northwestern Hawaiian Islands: When Do Uninhabited Islands Generate an EEZ?* 25 SAN DIEGO L. REV. 425-94 (1988).

Jon Van Dyke, *Ocean Disposal of Nuclear Wastes*, 12 MARINE POL'Y 82-95 (1988).

Jon Van Dyke, *The Influence of the U.S. Constitution on the Asia-Pacific Region*, 21 HAW. B. J. 1-7 (1988); also published in THE INFLUENCE OF THE U.S. CONSTITUTION ON PACIFIC NATIONS 85-95 (F.E. Cameron ed., 1988).

Jon Van Dyke, *Trial Juries and Grand Juries, in* 2 ENCYCLOPEDIA OF THE AMERICAN JUDICIAL SYSTEM 734-49 (R.J. Janosik ed., 1987).

Jon Van Dyke & Carolyn Nicol, *U.S. Tuna Policy: A Reluctant Acceptance of the International Norm, in* TUNA ISSUES AND PERSPECTIVES IN THE PACIFIC ISLANDS REGION 105-32 (D. Doulman ed., 1987).

Jon Van Dyke, *The Constitutionality of the Office of Hawaiian Affairs*, 7 U. HAW. L. REV. 63-94 (1985); also published in *Native Hawaiians Study Commission: Hearings Before the Senate Comm. on Energy and Natural Resources*, 98th Cong., 2d Sess. 142-235 (1984).

Jon Van Dyke, *Going It Alone is Bad for America*, THE WASHINGTON POST, May 12, 1985, Outlook section, at 1, col. 1. This article on the U.S. ocean policy was reprinted in NEWSDAY, the MANCHESTER GUARDIAN WEEKLY, the WASHINGTON POST WEEKLY EDITION, and the HONOLULU ADVERTISER.

Jon Van Dyke, *Human Rights and the Movement of Persons, in* PROCEEDINGS OF THE 78TH ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 351-53 (1984).

Jon Van Dyke, *The Riddle of Developing Clear and Workable Rules for Armed Conflicts*, 3 UCLA PACIFIC BASIN L. J. 34-41 (1984).

Jon Van Dyke, Kirk Smith, & Suliana Siwatibau, *Nuclear Activities and the Pacific Islanders*, 9 ENERGY 733-50 (1984); also published in 10 J. PAC. STUD. 1-36 (1984).

Jon Van Dyke & David Teichman, *Transfer of Seabed Mining Technology: A Stumbling Block to U.S. Ratification of the Law of the Sea Convention?*, 13 OCEAN DEV. & INT'L L. J. 427-55 (1984); also published in THE LAW OF THE SEA AND OCEAN INDUSTRY: NEW OPPORTUNITIES AND RESTRAINTS, 16 L. SEA INST. 518-50 (D. Johnston & N. Letalik eds., 1984).

Jon Van Dyke, *The Role of State Sovereignty and "Domestic Jurisdiction" in Limiting the Topics Examined by the ASEAN*, 23 INDIAN J. INT'L L. 567-74 (1983).

Jon Van Dyke, *Jury Trial*, *in* 3 ENCYCLOPEDIA OF CRIME AND JUSTICE 932-41 (S. Kadish ed., 1983).

Jon Van Dyke & Robert Brooks, *Uninhabited Islands and the Ocean's Resources: The Clipperton Island Case* in LAW OF THE SEA: STATE PRACTICES IN ZONES OF SPECIAL JURISDICTION, 13 L. SEA INST. 351-92 (T. Clingan ed., 1982).

Jon Van Dyke & Robert Brooks, *Uninhabited Islands: Their Impact on the Ownership of the Oceans Resources*, 12 OCEAN DEV. & INT'L L.J. 265-300 (1983); also published in Spanish in the law journal of the National Autonomous University of Mexico City, at 16 BOLETIN MEXICAN DE DERECHO COMPARADO 875-86 (1983).

Sherry Broder & Jon Van Dyke, *Ocean Boundaries in the South Pacific*, 4 U. HAW. L. REV. 1-59 (1982).

Jon Van Dyke & Christopher Yuen, *"Common Heritage" v. "Freedom of the High Seas": Which Governs the Seabed?*, 19 SAN DIEGO L. REV. 493-551 (1982); also published in THE LAW OF THE SEA AND OCEAN DEVELOPMENT ISSUES IN THE PACIFIC BASIN, 15 L. SEA INST. 206-76 (E. Miles & S. Allen eds., 1983); excerpts reprinted in INTERNATIONAL LAW ANTHOLOGY 20 (Anthony D'Amato ed. 1994) and in INTERNATIONAL ENVIRONMENTAL LAW ANTHOLOGY (Anthony D'Amato & Kirsten Engel eds., 1996).

Jon Van Dyke, *Growth Management and Water Rights* in GROUNDWATER IN HAWAII: A CENTURY OF PROGRESS 207-24 (F. Fujimura & W. Chang eds., 1981).

Jon Van Dyke & Susan Heftel, *Tuna Management in the Pacific: An Analysis of the South Pacific Forum Fisheries Agency*, 3 U. HAW. L. REV. 1-65 (1981).

Alan Scheflin & Jon Van Dyke, *Jury Nullification: The Contours of a Controversy*, 43:4 LAW & CONTEMPORARY PROBLEMS 51-115 (1980).

Jon Van Dyke, Williamson B.C. Chang, Nathan Aipa, Kathy Higham, Douglas Marsden, Linda Sur, Manabu Tagamori & Ralph Yukumoto, *Water Rights in Hawaii*, *in* LAND AND WATER RESOURCE MANAGEMENT IN HAWAII 141-333 (Hawai'i Dept. of Budget and Finance, 1979).

Carl M. Selinger, Jon Van Dyke, Riki Amano, Ken Takenaka & Robert Young, *Selected Constitutional Issues Related to Growth Management in the State of Hawaii*, 5 HASTINGS CONST. L. Q. 639-714 (1978); also published in GROWTH MANAGEMENT ISSUES IN HAWAII 129-201 (Hawai'i Dept. of Budget and Finance, 1977).

Jon Van Dyke, *Selecting a Jury in Political Trials*, 27 CASE WESTERN RESERVE L. REV. 609-22 (1977).

Jon Van Dyke, *Bakke v. The Regents of the University of California*, 3 HASTINGS CONST. L. Q. 891-98 (1976).

Jon Van Dyke, *The Grand Jury: Representative or Elite*, 28 HASTINGS L. J. 37-71 (1976).

Jon Van Dyke, *Voir Dire: How Should It Be Conducted To Ensure That Our Juries Are Representative and Impartial*? 3 HASTINGS CONST. L. Q. 65-97 (1976).

Jon Van Dyke & Sidney Wolinsky, *Quadra v. Superior Court of the City and County of San Francisco: A Challenge to the Composition of the San Francisco Grand Jury*, 27 HASTINGS L. J. 565-636 (1976).

Jon Van Dyke, *Jury Service Is a Fundamental Right*, 2 HASTINGS CONST. L. Q. 27-31 (1975).

Jon Van Dyke, *Parole Revocation Hearings in California: The Right to Counsel*, 59 CALIF. L. REV. 1215-59 (1971). This article was used by Justice Tobriner in his opinion in *In re Tucker*, 5 Cal. 3d 171, 186, 95 Cal. Rptr. 761, 770, 486 P.2d 657, 666 (1971) (dissenting opinion), and was cited by Justice Douglas in his opinion in *Morrissey v. Brewer*, 408 U.S. 471, 498 (1972) (dissenting opinion) and by Justice Powell in the majority opinion written for *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973).

Jon Van Dyke, *The Laws of War—Can They Ever Be Enforced?*, CENTER MAGAZINE, Vol. IV, No. 4, at 21-33 (July 1971).

Anthony A. D'Amato, Lawrence R. Velvel, Lawrence Sager, Jon M. Van Dyke, Harrop Freeman & Richard Cummings, *Brief for Constitutional Lawyers' Committee on Undeclared War as Amicus Curiae, Massachusetts v. Laird*, 17 WAYNE L. REV. 67-151 (1971).

Jon Van Dyke, *The Jury as a Political Institution*, CENTER MAGAZINE, Vol. III, No. 2, at 17-26 (Mar. 1970). This article has been reprinted in various forms in: 16 CATHOLIC LAWYER 224-241 (Summer 1970); 10 TRIAL JUDGE'S JOURNAL 75 (Oct. 1971); 1970 Supplement to Hall, Kamisar, Israel & LaFave, MODERN CRIMINAL PROCEDURE; DOWN TO EARTH SOCIOLOGY (Henslin ed., 1971); CONTEMPORARY AMERICAN ISSUES, VOL. II: SOCIAL (Giglio ed.), 1971; DEMOCRACY, LIBERALISM, AND REVOLUTION (Lamb ed., 1971); 45 FORENSIC QUARTERLY 109 (1971); and COURTS, JUDGES, AND POLITICS (Murphy & Pritchett eds., 1974). In addition, a panel discussion was based on this article, reprinted in THE CENTER MAGAZINE, Vol. III, No. 4, at 59 (July, 1970); and the September 27, 1970, program of *The Bold Ones* (an hour-long weekly television show) was based on it.

LITIGATION EXPERIENCE

Participated in a wide variety of litigation activities, ranging from filing amicus briefs in state and federal appellate tribunals to representing clients in criminal and civil trial matters (frequently in association with or as a consultant to other attorneys). Of particular note are:

(1) Co-counsel in a consumer class-action civil suit against milk, pineapple, and pesticide companies in 1982-84 for the contamination of Hawaii's milk supply with heptachlor, leading to a $4,000,000 settlement to fund scientific studies on the effect of heptachlor on children.

(2) Co-counsel in a human rights class action civil suit against Ferdinand Marcos (and later his estate) on behalf of the victims of torture, murder, and disappearances during the marital law period in the Philippines. This litigation, which began in 1986 and is still continuing, has required several appeals (*see, e.g., Trajano v. Marcos*, 978 F.2d 493 (9th Cir. 1992)), *cert. denied*, 508 U.S. 972 (1993); *Hilao v. Marcos*, 25 F.3d 1467 (9th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995), and 103 F.3d 762 (9th Cir. 1996); *Merrill Lynch, Pierce Fenner and Smith, Inc. v. ENC Corp.*, 464 F.3d 885 and 467 F.3d 1205 (9th Cir. 2006); *Republic of the Philippines v. Pimentel*, 553 U.S. 851 (2008); and many trial court hearings and motions. In September 1992, a Honolulu jury found Ferdinand Marcos to be liable to the 10,000 victims of human rights abuses, in February 1994, this jury awarded the victims $1,200,000,000 in exemplary damages, and in January 1995, the jury awarded the class members $766,000,000 in compensatory damages.

(3) Counsel in a case before the Supreme Court of the Marshall Islands in 1992 which established the due process rights of attorneys appearing before the Nuclear Claims Tribunal. *Brown v. Nuclear Claims Tribunal of the Marshall Islands*, 1 MILR (Rev.) 264 (RMI Sup.Ct. 1992).

(4) Co-counsel representing the City and County of Honolulu in successful litigation challenging the sale of message-bearing T-shirts on the sidewalks of Waikiki (*One World One Family Now v. City and County of Honolulu*, 76 F.3d 1009 (9th Cir. 1996), *cert. denied*, 519 U.S. 1009 (1996)), in successful litigation defending the newsrack consolidation program in Waikiki (*Honolulu Weekly v. Harris*, 298 F.3d 1037 (2002)), in successful litigation upholding the constitutionality of Honolulu's aerial advertising ordinance (*Center for Bio-Ethical Reform, Inc. v. City and County of Honolulu*, 455 F.3d 910 (9th Cir. 2006)), and in successful litigation upholding the constitutionality of ordinance regulation sale of adult videotapes and operation of an arcade consisting of panoram booths of *Janra Enterprises, Inc. v. City and County of Honolulu*, 107 Hawai'i 314, 113 P.3d 190 (2005).

(5) Counsel for the Clerk of the Hawai'i State Senate in successful litigation defending the 1994 ratification of six amendments to the Hawaii State Constitution. *State of Hawai'i ex rel Bronster v. Yoshina*, 932 P.2d 316 (Haw. 1996).

(6) Counsel for the Maui County Council in successful litigation challenging the power of the Mayor to hire outside attorneys without Council approval. *Maui County Council v. Thompson*, 929 P.2d 1355 (Haw. 1997).

(7) Counsel for the Senate of the Republic of Palau in successful litigation before the Supreme Court of Palau defending the Senate's right to act as sole judge to determine the qualifications of its members. *Francisco v. Chin*, Civ. Appeal No. 02-25 (Jan. 22, 2003).

(8) Counsel and co-counsel for the Office of Hawaiian Affairs in cases involving water rights, land claims, and constitutional challenges. *See, e.g., In re Wai'ola O Molokai, Inc.*, 103 Hawai'i 401, 83 P.3d 664 (2004); *In re Contested Case Hearing on Water Use Permit Application Filed by Kukui (Molokai), Inc.*, 116 Hawai'i 481, 174 P.3d 320 (2007); *Arakaki v. Lingle*, 477 F.3d 1048 (9th Cir. 2007); *State of Hawai'i v. Office of Hawaiian Affairs*, 129 S.Ct. 1436 (2009).

(9) Counsel for Greenpeace International and the World Wildlife Fund in 2010 before the International Tribunal for the Law of the Sea in *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the International Seabed Area*, submission can be accessed at the Tribunal's website, http://www.itlos.org/start2_en.html.

(10) Co-counsel for County of Maui in case involving water rights. *See, e.g., In re 'Īao Ground Water Management Area High-Level Source Water Use Permit Applications and Petition to Amend Interim Instream Flow Standards of Waihe'e River and Waiehu, 'Īao, and Waikapū Streams Contested Case Hearing*, 128 Hawai'i 228, 287 P.3d 129 (2012), submissions can be accessed at 2011 WL 9370511 and 2011 WL 9370512.

(11) Counsel for Hawai'i State Senate President Colleen Hanabusa in case involving writ of mandamus directing governor to nominate six candidates to replace "holdover" members of University of Hawai'i Board of Regents (BOR) whose terms had expired. *Hanabusa v. Lingle*, 119 Hawai'i 341, 198 P.3d 604 (Haw. 2008).

(12) Co-counsel for People of Bikini in case involving claim of Marshall Islanders that failure of the United States to adequately fund award issued by the Nuclear Claims Tribunal to compensate them for

damages caused by post-World War II testing of thermonuclear bombs on Bikini Atoll constituted a Fifth Amendment taking of their claims, *People of Bikini, ex rel. Kili/Bikini/Ejit Local Gov. Council v. U.S.*, 77 Fed.Cl. 744 (2007).

(13) Co-counsel for persons subjected to slave or forced labor, or appropriation of their property, by German government during World War II sued German business firms benefitting from government action, seeking reparations.