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The United States and Japan in Relation to the Resources, the Environment, and the People of the Pacific Island Region

Jon M. Van Dyke*

This paper will build on the fine overview of emerging ocean regimes presented by Biliana Cicin-Sain and Robert Knecht. I will discuss some of my own observations and impressions about the three Pacific island treaties and examine Japan’s role in the Pacific island region, in particular with respect to the issue of ocean dumping of radioactive wastes.

I

THE SOUTH PACIFIC ISLAND TREATIES

A. The Tuna Treaties

The idea of a multilateral tuna treaty between the sixteen Pacific island nations and the United States did not originate with the Pacific island nations. In fact, the Pacific island nations were never convinced that it was a good idea to negotiate in a multilateral forum. The United States, however, insisted upon the development of such a treaty, claiming that it was needed to satisfy the 1976 Magnuson Act (FCMA). Although the United States was successful in obtaining a treaty, the Treaty itself is not necessarily a success in terms of its benefits to the United States.

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FCMA states that the United States cannot recognize the claims of foreign governments over highly migratory species unless those nations agree to a regional management organization.\(^4\) The United States needed some way around that requirement because its failure to recognize such claims was causing difficulties in its dealings with the South Pacific island nations.\(^5\) Because an amendment to FCMA was unlikely, the United States undertook treaty negotiations to create an “international fishery agreement” that would satisfy the language of the Act.\(^6\)

Because the South Pacific nations were quite nervous about negotiating with the United States, they sought to strengthen their position against the United States by presenting a unified negotiating position. There were ten separate negotiating sessions,\(^7\) in part because the island nations constantly had to renegotiate this unified position. They first would meet together to decide their position. They would then present their position to the United States and wait for a response. The island representatives then would have to go back to their respective nations, discuss the U.S. response with their political leaders, and then meet together again to prepare their joint response.\(^8\) Thus, several months would pass between each session. Nonetheless, the negotiation was ultimately successful in creating the Treaty.

If one looks at the Tuna Treaty from the viewpoint of a U.S. taxpayer, however, it is hard to think of it as particularly successful. Under the Treaty, the U.S. Government will pay a lot more money in licensing fees and economic assistance than it would have if it had recognized the sovereignty of the island nations over the highly migratory species several years earlier and had allowed the U.S. tuna fishing industry to negotiate directly with the different island nations.\(^9\) At one point, the U.S. negotiators argued that access fees must be based on the economics of the

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\(^6\) Id. at 117.

\(^7\) Id.

\(^8\) See id. at 117-18.

\(^9\) The exact amount and types of payment under the Tuna Treaty are summarized id. at 120-22. The amounts ultimately accepted by the United States are significantly higher than the market rates paid by other distant-water fishing nations, such as the Japanese, in previous years. See id. at 120.
fishery and that U.S. fishing boats could not pay more for licenses than their commercial worth. In the end, however, the United States agreed to pay much more than that. The United States has in effect found a political means to pay these nations for past debts—for many years prior to the conclusion of this Treaty, U.S. ships fished in their exclusive economic zones without permission.

The Treaty, however, is a watershed in U.S. fishing policy. Through the Tuna Treaty, the United States finally has moved toward acknowledging the sovereignty of certain coastal nations over highly migratory species. This recognition will bring U.S. policy into line with that of virtually every other nation.

B. The South Pacific Nuclear Free Zone Treaty

The South Pacific Nuclear Free Zone Treaty (SPNFZ Treaty) must be viewed as a failure for U.S. foreign policy. The Pacific islanders feel that they compromised their positions significantly to accommodate

10. Id. at 120 (quoting Message of George P. Shultz, U.S. Secretary of State, to Pacific Islands delegations during eighth round of negotiations, in Honolulu (May 8, 1986)).
11. Id. at 112-15 (describing incidents of seizure of U.S. tuna boats as well as the U.S. justification for illegal fishing offered in 1983).
12. The United States implicitly recognized the authority of the Pacific island nations over the tuna in their exclusive economic zones when it agreed to pay for fishing rights in the region in the Tuna Treaty. The introductory paragraph of the Tuna Treaty repeats language from article 56 of the 1982 Convention, supra note 4, acknowledging that coastal states have “sovereign rights for the purpose of exploring and exploiting, conserving and managing” resources in their exclusive economic zones in accordance with international law. Tuna Treaty, supra note 2, at 1053. This language—included in a treaty explicitly concerned with highly migratory species—appears to be a recognition that the highly migratory resources are included in the “sovereign” resources of the coastal state when they are caught within the 200-mile zone of that coastal state.

A subsequent Treaty provision seems designed to enable the United States to reserve its position on this matter, at least in a formal sense. See id. annex I, pt. 1(3). The White House press release announcing the Treaty, however, acknowledged that the United States agreed to pay the island nations for a resource that it recognized to be theirs:

On October 20, 1986, negotiators from the United States and 16 Pacific island nations reached agreement on a regional fisheries treaty that will give American tuna vessels access to some 10 million square miles of rich fishing grounds in the South Pacific Ocean. The agreement provides just and fair compensation to the islands for the resource and offers the parties to the treaty a substantial development assistance package that will continue the long tradition of close and productive relations between the United States and the island States.


U.S. security interests, and they view the United States' ultimate failure to sign the Treaty's Protocol as a political insult.

The only real restrictions imposed by the SPNFZ Treaty are on stationing nuclear weapons and nuclear materials on land, testing nuclear weapons, and dumping nuclear wastes. The SPNFZ Treaty allows nuclear-powered vessels and ships carrying nuclear weapons to go through the waters of the South Pacific without any restrictions whatsoever. It also allows these vessels to come into ports in any nation that will so permit. The United States' security interests seem to be fully accommodated through this balance.

The Treaty was crafted very carefully, through the leadership of Bob Hawke, Prime Minister of Australia, to make it acceptable to the United States. A lot of the islanders, however, were dissatisfied with its language, accusing negotiators of abandoning the true feelings of the island nations. Vanuatu did not sign, for instance, because it found the Treaty too weak: parties to the Treaty may still allow nuclear vessels to visit their ports.

The United States' refusal to acknowledge these efforts at accommodation by the South Pacific nations—necessarily the message sent by rejecting the SPNFZ Treaty Protocol—has, therefore, left the islanders with a bad taste in their mouths. The islanders wonder why they went through the effort to accommodate U.S. interests if the United States was unwilling to reciprocate.

C. The Convention for the Protection of the Natural Resources and Environment of the South Pacific Region

The Convention for the Protection of the Natural Resources and Environment of the South Pacific Region (SPREP Treaty) is an accomplishment of which the whole Pacific island region and the United States can be proud. It is an exciting treaty containing initiatives on ocean dumping designed to protect the environment of this region.

After several years of negotiations, the final major disputes centered on two issues. One source of controversy was the provisions on nuclear waste dumping and the testing of nuclear weapons, both of which were

15. SPNFZ Treaty, supra note 14, art. 5(1).
16. Id. art. 6.
17. Id. art. 7.
18. Id. art. 2(2).
19. Id. art. 5(2).
20. Statement by David Lange, Prime Minister of New Zealand, in Raratonga, Cook Islands (Aug. 6, 1985); see INTERNATIONAL NAVIGATION, supra note 14, at 353.
21. Convention for the Protection of the Natural Resources and Environment of the South Pacific Region, Nov. 25, 1986, 26 I.L.M. 38 [hereinafter SPREP Treaty]. The convention takes its appellation from the South Pacific Regional Environmental Programme, which sponsored the negotiation.
highly sensitive. The other controversy was over the proper geographical delineation for the SPREP Treaty area—i.e., what area would be covered by the Treaty.

The provisions on nuclear waste dumping completely prohibit the dumping of both high- and low-level nuclear waste in the SPREP Treaty area. This is the same approach taken in the Mediterranean Treaty and in the Baltic Treaty, those treaties, however, involve much smaller, semi-enclosed areas without logical sites for dumping. The South Pacific, in contrast, has locations that many scientists would argue are acceptable for dumping low-level wastes and perhaps for the emplacement in the sea floor of high-level nuclear wastes. Nonetheless, after a number of rounds of negotiations, the United States agreed to the prohibitions.

In exchange for its concession to the dumping ban, the United States sought to limit the SPREP Treaty area more than most of the other nations involved in the negotiation wanted. Some island nations wanted a very broad treaty area. Kiribati, which has an erratic configuration across a broad ocean area, wanted to connect all its northern maritime zones and prohibit dumping within any of the gaps between those zones. The delegate from Guam wanted to include Johnston Island in the zone, and some of the Micronesian entities wanted the area to extend north of the Micronesian 200-mile zones as well. The United States refused to consider those possibilities.

The debates over the treaty area presented an interesting problem for the United States negotiating team. The SPREP Treaty negotiation was held at the South Pacific Commission, which treats all the separate island units of the U.S. political community as separate negotiating entities. American Samoa, Guam, the Northern Mariana Islands, the Feder-

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22. Id. art. 10(1). Subseabed emplacement is also prohibited. Id.
26. The U.S. position was presented at the November 1985 negotiating session in Noumea, New Caledonia. Id. at 12-13, 15.
27. Id. at 19-20.
28. Id. at 17.
29. Id.
30. See id. at 13 (stating that any U.S. concessions “were made on the basis of a Convention area limited to 200 nautical mile zones plus high seas beyond but enclosed by such zones”).
ated States of Micronesia, and the Marshall Islands each had its own seat at the negotiating table.\textsuperscript{31}

The delegates from these units frequently made suggestions and proposals quite different from those the official U.S. delegation wanted, and it was intriguing to see how the United States handled this cacophony of viewpoints. The U.S. delegation seemed to tolerate all their suggestions for a while, but late in the key 1985 negotiating session, the Ambassador representing the United States held a private meeting with the delegates from all the islands in the U.S. political community.\textsuperscript{32} Apparently the ultimate security interests of the United States were explained and the islands' cooperation was requested, because representatives of the U.S.-affiliated islands were noticeably quieter after that meeting, and an agreement was reached soon thereafter.\textsuperscript{33}

The final SPREP Treaty area does include the high seas "donut" areas—those high seas areas that are completely surrounded by 200-mile exclusive economic zones—of the Treaty parties.\textsuperscript{34} The Treaty purports to exercise jurisdiction over those high seas areas by prohibiting the dumping of nuclear wastes in them: "\textit{[T]he Parties agree to prohibit the disposal into the seabed and subsoil of the convention area of radioactive waste or other radioactive matter.}"\textsuperscript{35}

This language appears to mean that the nations agree to prohibit other nonratifying states from dumping in the SPREP Treaty area, as well as agreeing not to dump themselves. This provision in the Treaty thus constitutes a claim for jurisdiction over disposal beyond the ratifying states' 200-mile zones. Any attempts to enforce such a provision against outside nations should raise some interesting legal questions.

The SPREP Treaty also contains valuable provisions requiring environmental assessments.\textsuperscript{36} Conducting such assessments is new for many of these nations. Nonetheless, they agreed upon good language that requires environmental assessments with regard to any major activity affecting the SPREP Treaty area.

Japan sent nonparticipating observers to the SPREP Treaty negotiating session.\textsuperscript{37} In light of the scope and significance of the SPREP

\textsuperscript{31} \textit{Id.} at 35-41.

\textsuperscript{32} Personal observation of author at the Fourth Meeting of Experts on a Convention for the Protection and Development of the Natural Resources and Environment of the South Pacific Region, in Noumea, New Caledonia (Nov. 18-28, 1985).

\textsuperscript{33} By the end of that week, an agreement on the area of the zone was reached that was acceptable to the United States. \textit{Id.}


\textsuperscript{35} SPREP Treaty, \textit{supra} note 21, art. 10(1) (emphasis added).

\textsuperscript{36} \textit{Id.} art. 16.

\textsuperscript{37} The two observers at the November 1985 negotiating session were Terutaro Nishino of the Asia-Pacific Association of Japan and Shigeomi Izuhara of the Radioactive Waste Management Center in Tokyo. \textit{Fourth Meeting of Experts, supra} note 25, at 43.
Treaty, the Japanese understandably were interested in the results of the process.

II

JAPAN'S DUMPING PLANS AND THE PACIFIC ISLAND NATIONS

I now turn to the Japanese proposal for radioactive waste dumping in the South Pacific to explain the tensions between the Pacific island nations and Japan over that issue.

In the late 1970's, Japan circulated a proposal to dump large amounts of low-level radioactive wastes in an area halfway between Tokyo and the northernmost island in the Northern Marianas. Several European nations were dumping low-level nuclear wastes extensively in the Northeast Atlantic throughout the 1970's. In 1983, however, the members of the London Dumping Convention, which included Japan, voted for a moratorium on dumping low-level waste anywhere in the world. The member states have adhered to the moratorium thus far, although a few contend that it is not legally binding.

Japan joined the London Convention in 1980 at the time that it was developing its dumping plan. Because the London Dumping Convention had jurisdiction over dumping, Japan may have thought that joining the Convention and adhering to the Convention's procedures would legitimize its activity. The Pacific islanders, however, reacted negatively to Japan's dumping plan. The Japanese postponed their planned dumping for several years, and then in early 1985, Prime Minister Nakasone announced that the proposal was no longer under active consideration.

Japan, however, has not fully abandoned its ocean dumping plans. In October 1987 the Japanese delegation to the London Dumping Convention's Meeting of Experts stated that although Japan is not presently dumping radioactive wastes at sea, it regards sea dumping as "an important option for the future." A Japanese statement in September 1988 made it clear that Japan is still considering ocean dumping, adding that "efforts will be made to obtain the understanding of the parties con-

38. Radioactive Waste Management Center, Nuclear Safety Bureau, Science and Technology Agency (Japan), Dumping at the Pacific (1980). As part of an effort to convince the Pacific islanders that the project was benign and nonthreatening, the Japanese Government circulated this slick-looking brochure on the project with teams sent to the South Pacific to explain their plans.


42. Van Dyke, supra note 40, at 82.

43. Id. (quoting statement of Professor Yasumasa Tanaka on behalf of the Japanese delegation (Oct. 19, 1987)).
cerned, at home and abroad, and the matter will be handled with utmost care based on the concept that the disposal will not be carried out ignoring the anxiety of the relevant countries.44 Japan and other crowded nations inevitably will continue to look to the ocean for dumping sites as their need to dispose of waste materials continues to grow. Japan, in particular, is seismically unstable, and many Japanese feel that it has no safe locations in which to dump either high- or low-level nuclear wastes. Thus, the ocean will always be an attractive option to them.

If Japan does pursue ocean dumping in the future, it will have to address the requirement of the London Dumping Convention that an environmental assessment be done prior to any dumping operation.45 The Japanese prepared an assessment for their Pacific island dumping plan,46 but it was unsatisfactory.47 One probable reason for this result is that the Japanese do not do environmental impact assessments for every major project, as is the practice in the United States, and thus they lack extensive experience with these assessments. They have not developed a systematic approach for the assessment process, and it is difficult to integrate the process into their system. More specifically, however, Japan's problems result from the very aspects of environmental impact assessments that make them important public undertakings.

The Japanese environmental assessment had two major deficiencies: (1) it did not take an interdisciplinary approach, and (2) it provided for no public input into the process.48 The Japanese took a purely scientific approach. They completely omitted the social, political, and economic impacts and failed to compare the ocean dumping option to alternatives on land. Furthermore, the scientific survey did not review all the recent literature; it looked only at some of the physical oceanography and some of the biological material.49

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46. RADIOACTIVE WASTE MANAGEMENT CENTER, NUCLEAR SAFETY BUREAU, SCIENCE AND TECHNOLOGY AGENCY (JAPAN), ENVIRONMENTAL SAFETY ASSESSMENT ON SEA-DUMPING OF LOW-LEVEL RADIOACTIVE WASTES (1980).
47. Van Dyke, supra note 40, at 87-92.
48. Cf’ SPREP Treaty, supra note 21, art. 16(3) (calling for public comment as part of the assessment procedure).
49. Although Japanese scientists have told the author informally that they agree that a new environmental assessment would be necessary if the Japanese were to proceed with a dumping project, the official Japanese position apparently is that the earlier assessment was sufficient. See Japanese Statement, supra note 44, at 3.
Perhaps more important was the absence of a procedure for public input. In the United States, a draft environmental impact statement is prepared, everybody has a chance to critique it, and then the authors must respond to the criticism. This process did not occur in the Japanese assessment, and the product thus failed to have the benefit of competing points of view.\footnote{Van Dyke, supra note 40, at 92.}

III

OCEAN DUMPING AND THE ROLE OF PACIFIC ISLANDERS


Efforts have been made to quantify and evaluate the risks of ocean dumping. Based on the dumping that already has taken place in the Northeast Atlantic—where the British were dumping quite actively between 1970 and 1982—a panel of scientific experts concluded that 1,000 people all over the world will die or suffer grievous bodily injury over the next 10,000 years as a result of dumping-related incidents.\footnote{Van Dyke, supra note 40, at 84 (discussing Int'l Maritime Org., Report of Intersessional Activities Relating to the Disposal of Radioactive Wastes at Sea, Including the Final Report of the Scientific Review (1985)).} The study found that, if dumping is renewed at the same level, for every additional year of dumping another 100 people in the world will die or suffer grievous bodily injury over this 10,000 year period.\footnote{Id. This estimate may be low in light of the recent determination of the United Nations Scientific Committee on the Effect of Atomic Radiation (UNSCEAR) that radiation is two to three times more likely to cause cancer than had been previously thought. In a report scheduled for publication in 1988, UNSCEAR estimates the total cancer risk per sievert (a unit of radiation dose) at 4.5% to 7%, far greater than the estimate of 2.5% made a decade ago. Wilkie, Risk of Cancer from Radiation “Tripled,” The Independent (London), Sept. 29, 1988, at 3, col. 1.}

These figures are not staggeringly high as compared to other risky activities we undertake. Exploitation of any energy source obviously requires risks. But nuclear waste dumped in one location dissipates throughout the world’s oceans over thousands of years. Thus, nuclear waste dumped today presents an issue of equity: those who will die or suffer injury will not be among those who benefit from the energy produced. In other words, 1,000 people will die because of the dumping that has already taken place, and they are not among those who have benefited from the British nuclear industry. Most observers have concluded...
that if a country is going to develop a nuclear industry it ought to absorb
the costs and risks of that industry itself.54

Unwilling to bear such costs and risks for the benefit of other na-
tions, the Pacific island nations continue to support the moratorium vig-
orously. Kiribati and Nauru, in particular, have taken an active role in
trying to maintain the moratorium. They have presented an amendment
that would move low-level nuclear wastes from the “gray” area (sub-
stances that are allowed to be dumped with proper permits and under
appropriate circumstances) to the “black” list of substances that are pro-
hibited altogether.55

The Pacific island nations will, therefore, continue to work to keep
the moratorium in place, along with the Scandinavian nations, Spain,
and the Latin American nations, among others. The nuclear nations, of
course, are actively working toward the opposite end. This ongoing
struggle will require considerable efforts by all interested parties to pro-
duce equitable results. The Pacific islands can be proud of the leadership
role they have provided.

Radioactive Waste in the Northwest Atlantic (1984) (Her Majesty’s Stationery Of-
55. See generally Boehmer-Christiansen, An End to Radioactive Disposal at Sea?, 10