

The Grounding of the USS Guardian at the
Tubbataha Reefs: A Framework of the
Supreme Court Case *Most Rev. Pedro D.
Arigo, Vicar Apostolic of Puerto Princesa, et al.
v. Scott H. Swift, in His Capacity as
Commander of the U.S. Seventh Fleet*
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I. INTRODUCTION

*Arigo v. Swift*¹ is perhaps the quintessential environmental suit in the history of the Philippines. On 17 April 2013, exactly three months following the grounding date of the USS Guardian, an Avenger Class Mine Countermeasures ship of the United States (U.S.) Navy’s Seventh Fleet, a multisectoral group of environmental advocates, academicians, high government officials, and lawyers, filed a Petition for the Writ of *Kalikasan*, with prayer for Temporary Environmental Protection Order (TEPO), which was docketed as G.R. No. 206510.² Said Petition is still, as of date, pending at the Supreme Court *en banc*.

Arigo is considered to be the leading *Kalikasan* case implicating the nexus between military activity and the environment. It was filed pursuant to Rule 7 of the Rules of Procedure for Environmental Cases (Rules),³ concerning the grounding of USS Guardian (Guardian) on the Tubbataha Reefs National Park (TRNP), a United Nations (U.N.) Educational, Scientific, and Cultural Organization (UNESCO) World Heritage Site located at the heart of the Coral Triangle⁴ and protected by the TRNP Act of 2009.⁵ The

Cite as 58 ATENEO L.J. 637 (2013).

1. *Arigo v. Swift*, G.R. No. 206510 (filed April 17, 2013).
2. *Id.* at 32.
3. RULES OF PROCEDURE FOR ENVIRONMENTAL CASES, A.M. No. 09-6-8-SC, rule 7, Apr. 13, 2010.
4. *Arigo*, G.R. No. 206510 at 3.
5. An Act Establishing The Tubbataha Reefs Natural Park in the Province of Palawan as a Protected Area under the Nipas Act (R.A. 7586) and the Strategic

Arigo Petition averred that the unauthorized entry, grounding, salvage, and ongoing post-salvage operations of the Guardian violate the constitutional rights of the residents of the provinces surrounding the Tubbataha Reef on the Sulu Sea — Palawan, Antique, Aklan, Guimaras, Iloilo, Negros Occidental, Negros Oriental, Zamboanga del Norte, Basilan, Sulu, and Tawi-Tawi — to a balanced and healthful ecology.⁶

The *Arigo* Petition, for standing purposes, averred that the nature of the suit is a citizen's suit within the meaning of Section 37 of the TRNP Act of 2009⁷ and Rule 7 (Writ of *Kalikasan*), Part III, of the Rules.⁸ Pursuant to Section 1, Rule 7, of the Rules, its Petitioners are

a collective of persons who are or who represent people's organizations, non-government organizations, accredited public interest groups, environmental experts and academicians, environmental institutes, and government officials, suing on their behalf as citizens and on behalf of persons whose constitutional rights to a balanced and healthful ecology have been violated, or threatened with violation through unlawful acts and omissions of public officials and employees herein named, and/or private individuals or entities whether associated or unassociated with those public officials herein named, involving environmental damage of such magnitude as to prejudice the life, health[,] or property of inhabitants and beneficiaries of the World Heritage Site.⁹

As intimated, the *Arigo* Petition piques interest among law academics and practitioners alike because it presents a nexus between the environment and foreign military troops.

A. Tubbataha Reefs National Park

The TRNP is located in the middle of the Central Sulu Sea.¹⁰ It is approximately 98 nautical miles (150 kilometers) southeast of Puerto Princesa

Environmental Plan (SEP) for Palawan Act (R.A. 7611), Providing for its Management and for other Purposes [Tubbataha Reefs Natural Park (TRNP) Act of 2009], Republic Act No. 10067 (2009).

6. *Arigo*, G.R. No. 206510 at 3.

7. TRNP Act of 2009, § 37.

8. RULES OF PROCEDURE FOR ENVIRONMENTAL CASES, rule 7.

9. *Arigo*, G.R. No. 206510 at 3.

10. Protected Areas and Wildlife Bureau — Department of Environment and Natural Resources (PAWB-DENR), Information Sheet on TRNP, *available at* http://sites.wetlands.org/reports/ris/2PH004_RIS.pdf (last accessed Dec. 2, 2013) [hereinafter Information Sheet].

City, Palawan.¹¹ Tubbataha is a part of the Municipality of Cagayancillo Islands.¹² It is one-third of the straight distance from Puerto Princesa to Zamboanga City in Mindanao.¹³ It has a total area of 130,028 hectares, including the north and south reefs.¹⁴ Its islets, seabed, and airspace include an area of 97,030 hectares.¹⁵

Tubbataha, a word which means a long reef exposed at low tide, is considered the largest coral reef atoll in the Philippines.¹⁶ It is composed of two large coral atolls — the north atoll and the south atoll — and the Jessie Beazley Reef, a smaller coral structure about 20 kilometres north of the atolls.¹⁷ The Park contains roughly 10,000 hectares of coral reef, lying at the heart of the Coral Triangle — the global center of marine biodiversity.¹⁸ Scientists have been visiting these reefs since the 1980s, and their research has shown that TRNP is home to no less than 600 species of fish, 360 species of corals (about half of all coral species in the world), 11 species of sharks, 13 species of dolphins and whales, 100 species of birds, and also nesting Hawksbill and Green sea turtles.¹⁹ This makes the area a biodiversity hotspot.

A wide range of fishing activities are carried out around the reefs including the traditional hook-and-line fishing, commercial trawling for tuna, spear fishing, offshore long lines, aquarium fish collection, and general reef gleaning near shore.²⁰ Indigenous inhabitants of the Cagayancillo region also periodically visit the reefs to collect the eggs of nesting birds such as the boobies.²¹ No permanent inhabitants are found inside the Park. During fishing seasons, however, the indigenous inhabitants of Cagayancillo and fishermen from other parts of the Country establish temporary shelter in the area.²²

11. *Id.*

12. *Id.*

13. *Id.*

14. *Arigo*, G.R. No. 206510 at 7.

15. *Id.*

16. *Id.* at 8.

17. *Id.*

18. TRNP Official Website, Biodiversity, *available at* <http://tubbatahareef.org/wp/biodiversity> (last accessed Dec. 2, 2013).

19. *Id.*

20. *Arigo*, G.R. No. 206510 at 8.

21. Information Sheet, *supra* note 10.

22. *Id.*

The Tubbataha protected area supports the fishing communities of the Sulu Sea by means of direct spillover of fish into surrounding waters or providing food for fish living in the open sea.²³ The Sulu Sea connects to other coastal ecosystems like mangroves and seagrasses where larvae from adult fish and invertebrates in the reef can be found.²⁴ As a consequence, the impaired functioning of a reef has far-reaching effects affecting commercially important ecosystems.²⁵ Moreover, these services are the main sources of livelihood for poor coastal communities.²⁶ Hence, these resource-dependent communities will bear the brunt of the loss of the coral reef's provisioning services.²⁷

In 2007, the University of the Philippines-Visayas (UP-Visayas) conducted an important study on the distribution and dispersal of larvae in the Sulu Sea.²⁸ They discovered that Tubbataha Reefs, Jessie Beazley, and Cagayancillo are key sources of coral and fish larvae, seeding the greater Sulu Sea.²⁹ The Tubbataha Reefs have a decisive role in sustaining the fisheries in surrounding areas, by providing food and livelihood for hundreds of thousands of Filipinos.³⁰ The TRNP is one of the top scuba diving destinations in the Philippines.³¹ Although the reefs are not easily accessible, many local and foreign divers visit the reefs usually between March and June.³² Diving continues until the end of the southwest monsoon but is

23. *Arigo*, G.R. No. 206510 at 8.

24. *Id.*

25. *Id.*

26. *Id.* See also Rare, Program for Sustainable Fishing in the Philippines, *available at* <http://www.rare.org/program-sustainable-fishing-philippines> (last accessed Dec. 2, 2013).

27. *Arigo*, G.R. No. 206510 at 8.

28. TRNP Official Website, Global Ecological Significance, *available at* http://tubbatahareef.org/wp/global_ecological_significance (last accessed Dec. 2, 2013).

29. *Id.*

30. *Id.*

31. TRNP Official Website, Dive Tubbataha, *available at* http://tubbatahareef.org/wp/dive_tubbataha (last accessed Dec. 2, 2013).

32. *Id.*

limited after June.³³ Snorkeling is possible in all shallow portions of the reef.³⁴ TRNP is also becoming a popular sport fishing area.

There have been adverse factors affecting the ecological character of the site prior to the grounding of the Guardian, including physical damage on the reef from the rampant use of destructive fishing using dynamite and cyanide, observed coral rubble in areas where blast fishing occurred, and minor anchor damage in areas frequented by dive boats and fishermen.³⁵

The following conservation measures were taken to manage and protect the TRNP, prior to the creation of the Tubbataha Protected Area Management Board (TPAMB) in 1999:

- (1) Tubbataha was proclaimed as a National Marine Park by virtue of Proclamation No. 306 by then President Corazon C. Aquino in 1988 to protect and preserve the coral reef atoll with its abundant and diverse reef assemblage, including the marine turtles and water birds found roosting in the area;³⁶
- (2) In 1990, a Memorandum of Agreement was forged by the DENR and Tubbataha Foundation for the protection, conservation, and preservation of the pristine condition of the marine resources for sustenance of the marine life in Tubbataha and vicinity alongside the development of the recreation potential of the marine park under the concept of ecotourism for the benefit and enjoyment of the local and foreign tourists and of the present and future generations;³⁷
- (3) A five-year framework plan was prepared by the Protected Areas and Wildlife Bureau (PAWB) and the Tubbataha Foundation in 1992 to provide direction in the management of the Park. The plan was not implemented due to lack of funds;³⁸
- (4) A Presidential Task Force for TRNP was formed in 1995, co-chaired by the Department of Environment and Natural

33. *Id.*

34. *Arigo*, G.R. No. 206510 at 9.

35. Information Sheet, *supra* note 10.

36. Office of the President, Declaring the Tubbataha Reefs and Surrounding Waters of the Public Domain in Central Sulu Sea, Province of Palawan, as Tubbataha Reef National Marine Park, Presidential Proclamation No. 306 [P.P. No. 306] (Aug. 11, 1988).

37. See Information Sheet, *supra* note 10.

38. *Id.*

Resources (DENR) Secretary and the Palawan Council for Sustainable Development. The Task Force produced a one-year interim action plan to protect the reefs. The plan was envisioned to set the stage for the development and actual implementation of a sustained, effective, and long-term management that would ensure the conservation of the resources of Tubbataha;³⁹ and

- (5) The Environmental Legal Assistance Center, a Palawan-based non-government organization (NGO), is engaged in the prosecution of violators of environmental laws, legal defense of people harassed by these violators of environmental laws, and the conduct paralegal training. The participation of NGOs complements government efforts in the conservation of Tubbataha Reefs.⁴⁰

TRNP was bestowed a distinct honor when UNESCO included the Park on the World Heritage List on 11 December 1993.⁴¹ It was recognized as one of the Philippines' oldest ecosystems, containing excellent examples of pristine reefs and a high diversity of marine life.⁴² It is also an important habitat for internationally threatened and endangered marine species.⁴³ UNESCO cited Tubbataha's outstanding universal value as an important and significant natural habitat for conservation of biological diversity; an example representing significant on-going ecological and biological processes; and an area of exceptional natural beauty and aesthetic importance.⁴⁴ In particular, UNESCO lists the following criteria in its decision to inscribe TRNP as a World Heritage Site —

Criterion (vii): [TRNP] contains excellent examples of pristine reefs with a high diversity of marine life. The [P]roperty includes extensive reef flats and perpendicular walls reaching over 100m depth, as well as large areas of deep sea. The remote and undisturbed character of the [P]roperty and the continued presence of large marine fauna such as tiger sharks, cetaceans and turtles, and big schools of pelagic fishes such as barracuda and trevallies add to the aesthetic qualities of the property.

39. *Id.*

40. *Id.*

41. See TRNP Official Website, Global Ecological Significance, *available at* http://tubbatahareef.org/wp/global_ecological_significance (last accessed Dec. 2, 2013).

42. *Id.*

43. *Id.*

44. *Id.*

Criterion (ix): [TRNP] lies in a unique position in the middle of the Sulu Sea and is one of the Philippines' oldest ecosystems. It plays a key role in the process of reproduction, dispersal[,] and colonization by marine organisms in the whole Sulu Sea system, and helps support fisheries outside its boundaries. The property is a natural laboratory for the study of ecological and biological processes, displaying the ongoing process of coral reef formation, and supporting a large number of marine species dependent on reef ecosystems. The presence of top predator species, such as tiger and hammerhead sharks, are indicators of the ecological balance of the [P]roperty. The [P]roperty also offers a demonstration site to study the responses of a natural reef system in relation to the impacts of climate change.

Criterion (x): [TRNP] provides an important habitat for internationally threatened and endangered marine species. The [P]roperty is located within the Coral Triangle, a global focus for coral biological diversity. The reefs of the [P]roperty support 374 species of corals, almost 90% of all coral species in the Philippines. The reefs and seas of the [P]roperty also support eleven species of cetaceans, eleven species of sharks, and an estimated 479 species of fish, including the iconic and threatened Napoleon wrasse. The [P]roperty supports the highest population densities known in the world for white tip reef sharks. Pelagic species such as jacks, tuna, barracuda, manta rays, whale sharks[,] and different species of sharks also are common here and the [P]roperty is a very important nesting, resting[,] and juvenile development area for two species of endangered marine turtles: green turtles and hawksbill turtles. There are seven breeding species of seabirds and Bird Islet and South Islet are breeding grounds to seven resident and endangered breeding species of seabirds. The critically endangered Christmas Island Frigatebird is a regular visitor to the [P]roperty.⁴⁵

TRNP was included in 1999 in the Ramsar List under the Ramsar Convention, or the Convention on Wetlands, held in Ramsar, Iran, in 1971.⁴⁶ The TPAMB is the policy-making body for the Tubbataha Reef.⁴⁷ The Board consists of 20 members from national and local governments, the academe, and the private sector, all of which are considered stakeholders in

45. United Nations (U.N.) Educational, Scientific, and Cultural Organization (UNESCO) World Heritage Centre Official Website, Tubbataha Reefs Natural Park, *available at* <http://whc.unesco.org/en/list/653> (last accessed Dec. 2, 2013).

46. The Ramsar Convention on Wetlands Official Website, The Annotated Ramsar List: Philippines, *available at* http://www.ramsar.org/cda/en/ramsar-documents-list-anno-philippines/main/ramsar/1-31-218%5E16085_4000_0__ (last accessed Dec. 2, 2013).

47. TRNP Official Website, Management, *available at* <http://tubbatahareef.org/wp/management> (last accessed Dec. 2, 2013).

the future of Tubbataha.⁴⁸ The Tubbataha Management Office (TMO), which is based in Puerto Princesa City, serves as the TPAMB's executive arm, carrying out day-to-day park administration.⁴⁹

On 6 April 2010, the Philippine government approved and promulgated the TRNP Act of 2009.⁵⁰ The Law establishes TRNP in the province of Palawan as a protected area under Republic Act No. 7586 (NIPAS Act).⁵¹

B. USS Guardian

The USS Guardian is the fifth Avenger Class Mine Countermeasures ship to join the U.S. Navy's fleet and is the second to bear such name.⁵² Her mission is to counter the threat to U.S. forces and allies from all types of naval mines.⁵³ The Guardian is capable of mine detection, mine neutralization, and mine clearance in strategic U.S. and foreign ports, and key ocean areas in order to maintain vital commercial shipping lanes.⁵⁴ It is assigned to the Amphibious Forces Seventh Fleet, forward deployed to Sasebo, Japan.⁵⁵

Colorable authority for the Guardian's presence in Philippine internal waters traces itself to the Visiting Forces Agreement (VFA).⁵⁶

On 17 January 2013, the Guardian ran aground on Tubbataha Reef while transiting the Sulu Sea, approximately 80 miles southeast of Palawan,

48. *Id.*

49. *Id.*

50. TRNP Act of 2009.

51. An Act Providing for the Establishment and Management of National Integrated Protected Areas System, Defining its Scope and Coverage, and for Other Purposes [National Integrated Protected Areas System Act of 1992], Republic Act No. 7586 (1992).

52. United States (U.S.) Carriers Official Website, USS Guardian MCM 5, available at <http://www.uscarriers.net/mcm5history.htm> (last accessed Dec. 2, 2013).

53. *Id.*

54. *Id.*

55. *Id.*

56. Agreement between the Government of the Republic of the Philippines and the Government of the United States of America Regarding the Treatment of United States Armed Forces Visiting the Philippines, Phil.-U.S., Feb. 10, 1998 [hereinafter VFA].

after completing a port call at the former U.S. naval base of Subic Bay, Olongapo City and en route to her next port of call in Indonesia.⁵⁷

According to a statement by the U.S. Seventh Fleet, initial efforts to free the Guardian during high tide were not successful.⁵⁸ As a precautionary measure, 72 of the 79 total crewmembers were transferred by small boat to the MV C-Champion, a Military Sealift Command chartered ship on 18 January 2013.⁵⁹ A small complement of engineering and bridge personnel remained aboard to work with a U.S. Navy team in an attempt to free the Guardian with minimal environmental impact.⁶⁰ The remaining seven Sailors, which included Commanding Officer Lieutenant (Lt.) Commander (Cmdr.) Mark A. Rice, were to be transferred if conditions became unsafe.⁶¹

Concurring with the TRNP, *Arigo* argued that the Guardian did not have a permit to enter TRNP. The Vessel did not inform the marine park rangers of its presence and situation and was later discovered only through radar at 4:00 a.m. on 17 January 2013, with the following details at hand —

Marine park rangers radioed the USS Guardian, introducing themselves as law enforcers. They informed them of their violations and announced their intention to board the vessel. However, upon approaching, they saw soldiers taking position with their weapons and, since radio contact was unanswered, the boarding protocol was aborted.

...

The act of preventing the marine park rangers from fulfilling their duty to board vessels which illegally enter the park demonstrated lack of good faith and disrespect for Philippine authority and its agents.

Upon becoming informed of the grounding the TMO immediately reported the incident to the Philippine Naval Forces and Coast Guard and requested assistance.⁶²

57. Luis Martinez, U.S. Navy Minesweeper Runs Aground on Reef in the Philippines, available at <http://abcnews.go.com/blogs/politics/2013/01/us-navy-minesweeper-runs-aground-on-reef-in-the-philippines/> (last accessed Dec. 2, 2013).

58. The Associated Press, *Most crew leaves U.S. Navy ship stuck in Philippines*, MSN NEWS, Jan. 17, 2013, available at <http://news.in.msn.com/international/article.aspx?cp-documentid=252009558> (last accessed Dec. 2, 2013).

59. *Id.*

60. *Id.*

61. *Id.*

62. TRNP Official Website, *Tubbataha Demands Justice for the Reefs*, available at <http://tubbatahareef.org/news/622> (last accessed Dec. 2, 2013).

On 19 January 2013, U.S. Seventh Fleet Commander Vice Admiral (Adm.) Scott Swift expressed regret over the grounding of the Guardian (MCM 5) on Tubbataha Reef in the Sulu Sea. He stated that “[a]s a protector of the sea and a Sailor myself, I greatly regret any damage this incident has caused to the Tubbataha Reef,” said Swift. ‘We know the significance of the [TRNP] and its importance as a World Heritage Site. Its protection is vital, and we take seriously our obligations to protect and preserve the maritime environment.’⁶³

Swift further announced that Rear Adm. Thomas F. Carney, Commander of Logistics Group Western Pacific, was to take over on 21 January 2013 as the on-scene commander to oversee the Guardian recovery operations. Carney embarked the destroyer, USS Mustin (DDG 89), which along with several other U.S. Navy support vessels, is focused on preventing any further environmental damage to the reef and surrounding marine environment.

On 25 January 2013, U.S. Ambassador to Manila, Harry K. Thomas, said

On behalf of the U.S. government, I wish to convey to the Philippine government and people my profound regret over the grounding of the [USS Guardian] on Tubbataha Reef. This was an unfortunate accident, and I recognize the legitimate concerns over the damage caused to a unique and precious wonder of nature, internationally recognized for its beauty and biological diversity.⁶⁴

On 25 January 2013, reports purportedly announced that a U.S. Navy-led salvage team completed removing all diesel fuel from the tanks of the Guardian, that allegedly no fuel had leaked since the grounding, and that approximately 15,000 gallons of fuel were transferred to the contracted Malaysian tug *Vos Apollo* during controlled defueling operations that occurred over two days.⁶⁵

63. Greg Botelho, U.S. Navy commander apologizes for ship stuck in reef off Philippines, *available at* <http://edition.cnn.com/2013/01/20/world/asia/philippines-us-navy-ship-stuck/index.html> (last accessed Dec. 2, 2013).

64. Embassy of the U.S., Manila, Philippines Official Website, Statement by U.S. Ambassador Harry K. Thomas, Jr. On the Grounding of the *USS Guardian*, *available at* <http://manila.usembassy.gov/ambstatementtubbataha.html> (last accessed Dec. 2, 2013).

65. Pots De Leon and Philippine News Agency, U.S. ship may soon be removed from Tubbataha but it will take centuries for corals to grow back, *available at* <http://www.interaksyon.com/article/53585/u-s--ship-may-soon-be-removed-f>

In late January 2013, the U.S. Navy, purportedly worked “in close cooperation” with the Philippine Coast Guard (PCG), Philippine Navy, TPAMB, and Tubbataha Reef park rangers, while assessment teams, according to reports, purportedly continued to inspect the condition of the Guardian and the Tubbataha Reef in order to develop a plan to safely remove the ship.⁶⁶ By 28 January 2013, it was reported that the salvage crew had transferred approximately 15,000 gallons of diesel fuel, 671 gallons of lubricating oil, dry food stores, paints and solvents contained in storage lockers, and the personal effects left behind by the crew from the ship.⁶⁷

On 5 February 2013, TPAMB announced that the body and other stakeholders had endorsed the salvage plan submitted by SMIT Singapore, a salvage company contracted by the U.S. Navy.⁶⁸ In its endorsement, as the announcement goes, the Board presented the terms of its support for the plan.⁶⁹ These include the conduct of joint ecological assessments by the U.S. Navy, PCG, and representatives of TMO, installation of two on-board observers from the TMO, use of ecologically sound materials, and accountability of all ships’ captains for compliance to park rules by all crew.⁷⁰

Previously, environmental group Greenpeace was fined ₱384,000.00 (\$6,857.00) in November 2005 for damaging a coral reef in the TRNP after its flagship Rainbow Warrior II ran aground.⁷¹ Greenpeace paid the fine, but blamed the accident on outdated maps provided by the Philippine government.⁷² In a statement, Greenpeace said that “there is a serious need

rom-tubbataha-but-it-will-take-centuries-for-corals-to-grow-back (last accessed Dec. 2, 2013).

66. ABS-CBN News, US Navy ship too damaged to tow off Tubbataha, *available at* <http://www.abs-cbnnews.com/nation/regions/01/25/13/us-navy-ship-too-damaged-tow-tubbataha> (last accessed Dec. 2, 2013).

67. Luis Martinez, Stuck Minesweeper to Be Cut Into Pieces, *available at* <http://news.yahoo.com/stuck-minesweeper-cut-pieces-135952433--abc-news-politics.html> (last accessed Dec. 2, 2013).

68. TRNP Official Website, Salvage operation sets out in Tubbataha, *available at* <http://tubbatahareef.org/news/638> (last accessed Dec. 2, 2013).

69. *Id.*

70. *Id.*

71. BBC News, Greenpeace fined for reef damage, *available at* <http://news.bbc.co.uk/2/hi/asia-pacific/4395572.stm> (last accessed Dec. 2, 2013).

72. *Id.*

of updated maps and precise maritime charts of the *Tubbataha* Reef to avoid similar accidents.”⁷³

C. Response to Grounding of USS Guardian

In an official statement on 22 January 2013, TPAMB announced its intention to serve the U.S. Navy with a formal notice listing violations of the above law in the grounding incident of 17 January involving the *Guardian*.⁷⁴ TPAMB served formal notices to U.S. Ambassador Thomas and to Carney citing the TRNP of 2009 and stating —

The violations that are evident at this time [and provided for in the *Tubbataha Law*] include the following:

- (1) Section 19. Unauthorized entry;
- (2) Section 21. Non-payment of Conservation Fees; and,
- (3) Section 30. Obstruction of Law Enforcement Officer.⁷⁵

The [P]ark has suffered physical damage, the extent of which cannot be accurately estimated at this time. These violations are covered by:

- (1) Section 20. Damages to the Reef; [and,]
- (2) Section 26 (g). Destroying[, disturbing] resources.

These actions are being done without prejudice to the results of subsequent assessments that have yet to be conducted to determine the extent of damage to the Park and its resources as a direct result of the 17 January grounding, as well as incidental damage arising out of the ongoing retrieval operations.⁷⁶

Subsequent to ship retrieval and the assessment of coral damage, the TPAMB intends to serve a second formal notice that will quantify the value of destruction and the attendant fines as stipulated in the *Tubbataha Law*.

In a press briefing in Malacañang on 23 January 2013, Presidential spokesman Edwin F. Lacierda said that the Philippine government is

73. Greenpeace International Official Website, A regrettable accident, *available at* http://www.greenpeace.org/international/en/news/features/rainbow_warrior_coral_reef/ (last accessed Dec. 2, 2013).

74. *Tubbataha Reefs National Park Official Website, Tubbataha Management Board Official Statement on the USS Guardian Incident, available at* <http://tubbatahareef.org/news/624> (last accessed Dec. 2, 2013).

75. *Id.*

76. *Id.*

determined to observe the law protecting the Tubbataha Reef and press its claims for the damage caused by the Guardian.⁷⁷ He further said that the Department of Foreign Affairs would discuss the country's claims with U.S. officials after the ship is removed from the Tubbataha Reef.⁷⁸

By 28 January 2013, most of the Guardian's crew had left the Philippines to its homeport in Sasebo, Japan.⁷⁹

On 5 February 2013, President Benigno S. Aquino III said that the U.S. government will send Peace Corps volunteers to speed up the rehabilitation of the damaged Tubbataha Reef aside from the compensation it promised.⁸⁰ He mentioned that he has also met with U.S. Ambassador Thomas and U.S. Navy Rear Adm. Carney to discuss the environmental crisis.⁸¹

According to the 1 April 2013 statement on the official website of the Commander of the U.S. Pacific Fleet at Pearl Harbor, Public Respondent Lt. Cmdr. Rice, who was commanding officer of ex-Guardian, is now the commanding officer of the USS Warrior, the new home of ex-Guardian crew.⁸² All ex-Guardian crew are now assigned to this ship.⁸³ Public Respondent Rice introduced the crew to the new ship with an "awards ceremony," and handed the crew members a "letter of recognition."⁸⁴

After the meeting of Public Respondent Foreign Affairs Secretary Albert F. del Rosario with U.S. Secretary of State John F. Kerry on 2 April 2013,

77. Presidential Communication Operations Office Official Website, Philippines to insist on claims for damages of Tubbataha Reef, Palace says, *available at* http://www.pcoo.gov.ph/archives2013/jan23.htm#Tubbataha_Reef (last accessed Dec. 2, 2013).

78. *Id.*

79. Military.com, USS Guardian Crew Home; Ship Still Aground, *available at* <http://www.military.com/daily-news/2013/01/29/uss-guardian-crew-home-ship-still-aground.html> (last accessed Dec. 2, 2013).

80. Office of the President of the Philippines Official Website, Aquino says US Government to send volunteers for immediate Tubbataha Reef recovery, *available at* <http://www.president.gov.ph/news/aquino-says-us-government-to-send-volunteers-for-immediate-tubbataha-reef-recovery/> (last accessed Dec. 2, 2013).

81. *Id.*

82. Mass Communication Specialist 3rd Class Mackenzie P. Adams, Guardian Crew Gets New Home as USS Warrior Arrives in Sasebo, *available at* <http://www.cpf.navy.mil/news.aspx/030158> (last accessed Dec. 2, 2013).

83. *Id.*

84. *Id.*

Public Respondent del Rosario announced that Secretary Kerry expressed his deep regret over the incident and that he reiterated the cooperation of the U.S. in addressing the damage caused by the grounding.⁸⁵

On 5 April 2013, marine scientists reported in a meeting of the TPAMB that the area of damage to the coral reefs caused by the grounding of the Guardian measures 2,345.67 square meters. TPAMB expects the payment of ₱58.4 million or \$1.5 million in fines by the U.S. Government.⁸⁶

After the removal of the Ex-Guardian, the Philippine Investigating Team was merely given navigation maps and other documents by the U.S. Navy.⁸⁷

The TMO sent a second notice to the U.S. Embassy, imposing mandatory fines totaling ₱58 million (\$1.4–1.5 million), for violations under the TRNP Act of 2009.⁸⁸

D. Intervening Developments

On 8 April 2013, a Chinese boat ran aground at 11:40 p.m. about 1.1 nautical miles east of the marine park's ranger station.⁸⁹

It was reported that charges of poaching were filed against the 12 Chinese fishermen who grounded Tubbataha on the night of 8 April 2013.⁹⁰ They were detained in the provincial jail facility in Puerto Princesa, Palawan.⁹¹ Chinese Consul General Shen Zicheng and 3rd Secretary Li Jian flew to Palawan on 9 April 2013 and held a closed-door meeting with

85. Official Gazette of the Philippines, US reiterates commitment to address grounding of USS Guardian, full cooperation on independent probe by the Philippines, available at <http://www.gov.ph/2013/04/03/us-reiterates-commitment-to-address-grounding-of-uss-guardian-full-cooperation-on-independent-probe-by-the-philippines/> (last accessed Dec. 2, 2013).

86. TRNP Official Website, Final Measurement of Coral Damage, available at <http://tubbatahareef.org/news/699> (last accessed Dec. 2, 2013).

87. Philippine Star, *US Navy turns over data, materials to Phl probe on Tubbataha*, PHIL. STAR, Apr. 8, 2013, available at (last accessed Dec. 2, 2013).

88. TRNP Park Official Website, Final Measurement of Coral Damage, available at <http://tubbatahareef.org/news/699> (last accessed Dec. 2, 2013).

89. Redempto D. Anda, et al., *12 Chinese seamen charged*, PHIL DAILY INQ., Apr. 11, 2013, available at <http://globalnation.inquirer.net/71791/chinese-caught-in-tubbataha-face-poaching-bribery-raps> (last accessed Dec. 2, 2013).

90. *Id.*

91. *Id.*

Western Command officials while the detainees were undergoing a medical checkup.⁹²

On 10 April 2013, the official website of the Office of the President announced in a statement, entitled “Aquino Vows Swift Legal Action to Recent Tubbataha Reef Grounding,”⁹³ and referring to herein Public Respondent President Benigno S. Aquino III, that the government will execute the TRNP Act of 2009 because this law considers anyone entering the protected zone to be a poacher.⁹⁴

E. Flashback: USS Port Royal Grounding

On 5 February 2009, the USS Port Royal (Port Royal), a guided missile cruiser, ran aground atop the coral reef of the Honolulu Airport’s Reef Runway in depths of approximately 14 to 22 feet.⁹⁵ According to the State of Hawaii, the coral reef was clearly marked on all navigational charts.⁹⁶ However, according to the Navy Safety Investigation Board, the fathometer for determining water depth on the Port Royal was broken, according to a U.S. Navy’s Safety Investigation Board’s report, obtained by the Honolulu Advertiser on the accident.⁹⁷ The findings also cite a misinterpreted navigation system, a sleep-deprived skipper, faulty equipment, and an inexperienced bridge team as factors that led to the grounding.⁹⁸

The Vessel was lodged atop the reef for three full days during which several attempts were made to remove the vessel, including attempts by various other vessels, like the salvage ship USNS Salvor (T-ARS-52), the Motor Vessel Dove, and seven U.S. Navy and commercial tugboats, to tug the vessel free using tow lines.⁹⁹ In short, the Port Royal was towed out of

92. *Id.*

93. Office of the President of the Philippines Official Website, Aquino vows swift legal action to recent Tubbataha Reef grounding, *available at* <http://www.president.gov.ph/news/aquino-vows-swift-legal-action-to-recent-tubbataha-reef-grounding> (last accessed Dec. 2, 2013).

94. *Id.*

95. William Cole, *Hawaii-based ship’s grounding detailed*, THE HONOLULU ADVERTISER, July 7, 2009, *available at* <http://honoluluadvertiser.com/article/2009/Jul/07/ln/hawaii907070350.html> (last accessed Dec. 2, 2013).

96. *Id.*

97. *Id.*

98. *Id.*

99. *Arigo*, G.R. No. 206510 at 21.

the damaged area. The Port Royal was finally removed on 9 February 2009.¹⁰⁰

With regard to the primary damage caused by the Port Royal grounding on the Hawaii Reef, a letter sent from the State of Hawaii Board of Land and Natural Resources to Vice Adm. Bruce E. MacDonald, Judge Advocate General, dated 31 March 2009 discussed the mitigation and compensation of damages —

The area where the USS Port Royal ran aground was a complex spur and groove fringing reef with a relatively high biodiversity of live coral and live rock. Numerous printed resources and the evaluation by various coral reef biologists concur that this area was one of the finest remaining reef habitats around the island of Oahu.

The grounding site has been mapped and injuries have been documented by the State, its expert witnesses, USFWS, NOAA, and CSA. All parties are in agreement as to the location of the ‘main injury scar.’ The main injury scar covers an area of approximately 8,000 square meters. The documentation of the full area and extent of the damage associated with the grounding has not been completed, but it is estimated to cover an area approximately 25,000 to 40,000 square meters (approximately 6–10 acres). These estimates are preliminary and will be modified based on analysis of State, USFWS, and NOAA data.¹⁰¹

The Document also states that the grounding resulted in extensive primary damage to the reef structure, coral, and live rock, as well as the loss of habitat for green sea turtles, *Chelonia mydas*, listed as an endangered species pursuant to the Endangered Species Act of 1973.¹⁰²

Restoration according to the U.S. Navy’s remediation plan, according to the four phases above, was estimated at the time of the damage to be at \$25 million.¹⁰³

On February 2011, the U.S. Navy and State of Hawaii announced that they had reached an \$8.5 million settlement on the coral reef damage caused

100. *Id.*

101. *Id.* at 21–22.

102. *Id.* at 22. See also Endangered Species Act of 1973, 16 U.S.C. § 1531 et seq. (1973).

103. *Arigo*, G.R. No. 206510 at 22.

by the grounding of the Port Royal in 2009.¹⁰⁴ The Navy had previously spent \$6.5 million restoring the reef.¹⁰⁵ Thus, the settlement increased the amount the Navy had expended to a total of \$15 million, according to a news release.¹⁰⁶

The following is a comparative analysis of the two grounding incidents under a plausibility standard:

	USS Guardian (2013 Grounding)	USS Port Royal (2009 Grounding)
Location:	TRNP (Sulu Sea), World Heritage Site as of 1993. ¹⁰⁷	Reef Runway at Honolulu International Airport (Oahu, Hawaii). ¹⁰⁸
Main injury scar:	Estimated 2,345.67 square meters. ¹⁰⁹	Estimated 8,000 square meters. ¹¹⁰
Proposed restoration value:	\$1.4 million (₱58 M). ¹¹¹	\$25 million to 40 million, with disclaimer that cost estimates are being updated. ¹¹²

104. *Navy to pay state \$8.5 million for Port Royal grounding*, STAR-ADVERTISER, Feb. 4, 2011, available at <http://www.staradvertiser.com/news/breaking/115332679.html?id=115332679> (last accessed Dec. 2, 2013).

105. *Id.*

106. *Id.*

107. TRNP Official Website, Location, available at <http://tubbatahareef.org/wp/location> (last accessed Dec. 2, 2013).

108. Honolulu International Airport Official Website, Reef Runway, available at <http://hawaii.gov/hnl/airport-information/reef-runway> (last accessed Dec. 2, 2013).

109. *Arigo*, G.R. No. 206510 at 23.

110. *Id.* To the mind of the Author, this is perhaps due to the dragging caused by the towing of the Port Royal.

111. *Id.*

112. *Id.*

Ratio unadjusted for biodiversity concentration:	\$596 per square meter. ¹¹³	Conservative — \$3,125 per square meter. ¹¹⁴ Upper region — \$5,000 per square meter. ¹¹⁵
World Heritage Site:	Yes — Since 1993. ¹¹⁶	No.
Ramsar Wetlands of International Importance Listed:	Yes — Since 1999. ¹¹⁷	No.
Settlement value:	None, to date. ¹¹⁸	\$6.5 million in coral reef restoration from 2009-2011, and \$8.5 million settlement in 2011 — total of \$15 million. At the time, this was the largest settlement ever arrived at by the U.S. Navy. ¹¹⁹ Note that the foregoing settlement value is a pareto optimal falling below the demand of the State of Hawaii. ¹²⁰
Damage stages:	Primary damage considered. ¹²¹	Primary, secondary, and tertiary damage

113. *Id.*

114. *Id.*

115. *Arigo*, G.R. No. 206510 at 23.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Arigo*, G.R. No. 206510 at 24.

		considered. ¹²²
Biodiversity:	<p>TRNP is a unique example of an atoll reef with a very high density of marine species; the North Islet serving as a nesting site for birds and marine turtles.</p> <p>The site has been considered the biodiversity hotspot from coral reefs world wide, trumping the Great Barrier Reef in biodiversity richness. World Heritage listed for this finding.</p> <p>1000 species all up, including manta rays, lion fish, and turtles.</p> <p>Approximately 600 species of tropical fish.</p> <p>359 species of corals (about 50% of all coral species in the world).</p> <p>14 species of sharks, including tiger sharks, white tip sharks, and black tip sharks. Whale sharks have also been sighted.</p> <p>12 species of dolphins &</p>	<p>The Reef Runway is a complex spur and groove fringing reef with a relatively high biodiversity of live coral and live rock; also serving as a habitat for green sea turtles.</p> <p>The high use of the region has potentially compromised its biodiversity.</p> <p>434 species or higher taxa (36 algae, one spermatophyte, 338 invertebrate, and 59 fish) from the 15 stations sampled (in Pearl Harbor). 96 species, or 22%, are considered to be introduced or cryptogenic.</p> <p>Most of the introduced species (42%) occur in tropical or temperate oceans worldwide.</p> <p>Only 15%, with over half of these.¹²⁴</p>

^{122.} *Id.*

^{124.} *Id.* (citing Bishop Museum Technical Report No. 10, Biodiversity of Marine Communities In Pearl Harbor, Oahu, Hawaii with Observations on Introduced Exotic Species, Final Report for the U.S. Navy, available at <http://anstaskforce.gov/Documents/PearlHarbor.pdf> (last accessed Dec. 2, 2013)).

	<p>whales.</p> <p>A nesting population of endangered hawksbill and green sea turtles.</p> <p>Over 100 species of birds, including rare migratory birds.¹²³</p>	
Plausible biodiversity concentration multiplier (closest proxy):	<p>2.3</p> <p>“1,000 species all up”</p> <p>Incidence of endangered species unaccounted in this figure.</p>	<p>1 (baseline)</p> <p>“434 species or higher”</p> <p>Incidence of endangered species unaccounted in this figure.</p>
Ratio adjusted for biodiversity concentration:	<p>Conservative —</p> <p>\$7,187 per square meter.</p> <p>(\$3,125 per square meter x 2.3, using <i>Port Royal</i> as baseline)</p> <p>Upper region —</p> <p>\$11,500 per square meter.</p> <p>(\$5,000 per square meter x 2.3, using <i>Port Royal</i> as baseline)</p>	No data.
Total normative restoration value:	<p>Conservative —</p> <p>\$16,858,330</p> <p>(\$7,187 per square meter x 2,345.67 (estimate)).</p> <p>Upper region —</p> <p>\$26,975,205</p> <p>(\$11,500 per square meter x 2,345.67 (estimate)).</p>	<p>Assumed to be equal to Hawaii’s Proposed restoration value of \$25 to \$40 million, with disclaimer.</p> <p>Actual settlement: \$6.5 million in coral reef restoration from 2009-2011, and \$8.5 million settlement in 2011 — total</p>

123. *Id.*

		of \$15 million.
Total normative restoration value in Peso terms:	(\$1 = ₱41.33 as of 14 April 2013):	
	Conservative —	
	₱696,754,778	
	Upper region —	
	₱1,114,885,222	

F. U.S. Navy Regulations: “Great Green Fleet”

Under the Judge Advocate General’s Corps (OJAG) Code 11, Admiralty and Maritime Law,¹²⁵ the Admiralty and Maritime Law Division of the Judge Advocate General of the U.S. Navy advises the fleet and Navy leadership on admiralty and maritime law issues while operating the Navy’s admiralty claims and litigation office.¹²⁶ The Division is responsible for admiralty and maritime law matters, including claims and litigation related to maritime torts, contract, salvage, international law, environmental law, and maritime legislation and regulations.¹²⁷ Internally, the Admiralty and Maritime Law Division is working to increase coordination with uniformed and civilian Navy lawyers in the fleet and improve the training of lawyers in the Division.¹²⁸

The Admiralty and Maritime Law Division’s administrative claims and litigation practice carried a total of approximately 284 cases during the one-year reporting period, from July 2010 to June 2011.¹²⁹

In the same reporting period (one year), the Division adjudicated \$24 million in administrative claims against the Navy.¹³⁰ These included settlement of a major claim by the State of Hawaii for damage to a coral reef caused by the 2009 grounding of the Port Royal near the Honolulu

125. U.S. Navy, Report of the Judge Advocate General of the Navy to the American Bar Association: 2011 Annual Report 8, available at <http://www.jag.navy.mil/documents/ABARreport2011.pdf> (last accessed Dec. 2, 2013) [hereinafter JAG Report].

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

International Airport, payment of claims for minor collision/allision damage, wake damage, loss of fishing gear, damage caused ashore by carrier based aircraft, and personal injury.¹³¹

The JAG Report stated that “[a]s of the end of the reporting period, there were several pending significant claims.”¹³² The Report also states that “[t]here was a substantial increase in the Division’s support to the litigation efforts of the Department of Justice (DOJ) Aviation and Admiralty Office.”¹³³

The Division continually expanded its environmental practice, continuing to participate in inter-agency working groups on implementation of the Sunken Military Craft Act¹³⁴ and the interpretation of laws providing for the protection of sunken vessels, advising on the protection of sunken state craft of Germany, Japan, Spain, and the United Kingdom, and resolving claims for natural resource damages.¹³⁵ Working in support of the Naval History and Heritage Command, the Division helped recover or protect several artifacts of cultural significance, including the personal effects of a German sailor taken from the wreck of a World War II era U-boat off the U.S. coast and a tea set taken from USS Arizona.¹³⁶ Division attorneys also worked closely with the Office of Legislative Affairs,¹³⁷ Office of the Assistant Secretary of the Navy (Installations and Environment),¹³⁸ and Military Sealift Command¹³⁹ to coordinate with the U.S. Department of Defense position on legislation to protect coral reefs and legislation to amend the Sunken Military Craft Act.¹⁴⁰

Under OJAG Code 12, the Environmental Law Division of the Judge Advocate General of the U.S. Navy focused on ocean policy as well as environmental planning testing and training activities at sea, involving fleets

131. JAG Report, *supra* note 125, at 8.

132. *Id.*

133. *Id.*

134. *Id.* at 9. *See generally* Sunken Military Craft Act, 10 U.S.C. § 113 et seq. (2004).

135. JAG Report, *supra* note 125, at 9.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

and the many organizations involved in research, development, testing, and evaluation of existing and future systems.¹⁴¹

Under OJAG Code 12, the U.S. Navy is required to conclude environmental impact statement or overseas environmental impact statements for training activities in the Gulf of Mexico, the Northwest, the Gulf of Alaska, and testing activities in the Keyport range complex,¹⁴² among others.

Under OJAG Code 15,¹⁴³ the Claims and Tort Litigation Division adjudicates tort claims under the Federal Tort Claims Act (FTCA), the Military Claims Act, and the Foreign Claims Act.¹⁴⁴ During the period of July 2010 through June 2011, the Division processed more than 16,300 claims against the U.S. and approximately 38,000 affirmative claims against liable parties on behalf of the U.S.¹⁴⁵ At the end of the reporting period, there were 192 tort cases in litigation.¹⁴⁶

Under OJAG Code 15, the Claims and Tort Litigation Division continues to process claims pertaining to the contamination of groundwater at Marine Corps Base Camp Lejeune, North Carolina.¹⁴⁷ Since 2000, over 2,700 administrative claims have been filed under the FTCA, seeking in excess of \$54.9 billion.¹⁴⁸

Under OJAG Code 16, the Judge Advocate General of the U.S. Navy provides legal assistance everywhere the U.S. Navy has a presence, at home and abroad, whether at sea or in a combat zone.¹⁴⁹ Services are offered to all branches of military service, eligible family members, overseas U.S. Department of Defense civilians, and retirees.¹⁵⁰

141. JAG Report, *supra* note 125, at 9.

142. *Id.* at 10.

143. *Id.* at 13.

144. *Id.* See generally Federal Tort Claims Act, 28 U.S.C. (1948); Military Claims Act (1946), 10 U.S.C. § 2733 (1982); & Foreign Claims Act, 10 U.S.C. §§ 2734-2736 (1942).

145. JAG Report, *supra* note 125, at 13.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 14.

150. *Id.*

Recent U.S. Navy actions are increasingly designed towards promoting a “Great Green Fleet.”¹⁵¹ For instance, as part of its effort to decrease reliance on foreign oil, the U.S. Navy plans to deploy a Carrier Strike Group composed of ships and aircraft powered solely by alternative sources of energy by 2016.¹⁵² In making the U.S. Navy’s “Great Green Fleet” vision a reality, the Navy recently spent \$12 million on 450,000 gallons of advanced biofuel to evaluate its operational performance during a multinational maritime exercise.¹⁵³ Though expensive at \$26 per gallon, the Navy, as the reports show, “successfully” demonstrated that these fuel sources can serve as “drop-in” replacements for conventional ship and aviation fuels.¹⁵⁴

G. Visiting Forces Agreement

Colorable authority for the Guardian’s presence in Philippine internal waters traces itself to the VFA and Mutual Defense Treaty of 1951.¹⁵⁵

At the time of the Guardian’s grounding, no *Balikatan* exercise was being conducted by the *Balikatan* joint command. It was only on 27 March 2013 that the VFA Commission announced *Balikatan* exercises for the year which would start in April 2013.¹⁵⁶

At the time of the Guardian’s grounding, no declaration of war, declaration of the existence of war, any conflict rising to the level of armed conflict as defined under international law, nor an “armed attack” within the meaning of the Mutual Defense Treaty of 1951, involving the Republic of the Philippines, did exist.¹⁵⁷

151. U.S. Navy Official Website, Navy Sailing Toward Great Green Fleet, *available at* http://www.navy.mil/submit/display.asp?story_id=56757 (last accessed Dec. 2, 2013).

152. U.S. Navy, Energy, Environment and Climate Change Official Website, Great Green Fleet, *available at* <http://greenfleet.dodlive.mil/energy/great-green-fleet/> (last accessed Dec. 2, 2013).

153. *Id.*

154. *Id.*

155. Mutual Defense Treaty, Phil.-U.S., Aug. 30, 1951, 177 U.N.T.S. 133.

156. Frances Mangosing, “Balikatan” kicks off Friday amid fears of [U.S.] “major attack,” PHIL. DAILY INQ., Apr. 15, 2013, *available at* <http://globalnation.inquirer.net/71193/ph-us-balikatan-exercises-kicks-off-friday> (last accessed Dec. 2, 2013).

157. *See* Mutual Defense Treaty, *supra* note 155, art. V.

The VFA, signed on 10 February 1998 by Philippine Secretary of Foreign Affairs Domingo L. Siazon and U.S. Ambassador Thomas, grants the U.S. Armed Forces continued access and control rights to bases in the Philippines for training and military preparedness.¹⁵⁸ Under Article III, Section 2 of the VFA, U.S. military personnel are exempt from passport and visa regulations upon entering and departing the Philippines.¹⁵⁹

The VFA establishes a scheme for criminal jurisdiction over U.S. personnel.¹⁶⁰ Among the provisions, Section 1 (a), Article V states that “Philippine authorities shall have jurisdiction over [U.S.] personnel with respect to offenses committed within the Philippines and punishable under the law of the Philippines.”¹⁶¹

In the past, the presence of U.S. troops in the Philippines permitted by bilateral agreements has posed a threat to human and environmental health.¹⁶² When U.S. troops left the Philippines in the early 1990s, after the Military Bases Agreement of 1947 expired in 1991, the Department of Defense relinquished responsibility for the environmental cleanup task resulting from its presence at Subic Bay, Olongapo City (Naval Facility) and Clark, Pampanga (Air Force Base).¹⁶³ During this time, the U.S. military had discharged millions of gallons of untreated sewage into the ground and water in and around these areas, with harmful chemicals such as lead, mercury, and pesticides seeping into the soil and water.¹⁶⁴

In 1992, the U.S. General Accounting Office (GAO) estimated the clean-up would cost more than \$12-15 million per site.¹⁶⁵ While U.S. Air Force and Navy officials identified significant environmental damage at both bases, the GAO report concluded that “the current basing agreement does not impose any well-defined environmental responsibility on the [U.S.] for environmental cleanup and restoration.”¹⁶⁶

158. VFA, *supra* note 56, pmb1.

159. *Id.* art. III, § 2.

160. *Id.* art. V.

161. *Id.* art. V, § 1 (a).

162. *Arigo*, G.R. No. 206510 at 29.

163. U.S. GOV'T. ACCOUNTABILITY OFFICE, NSIAD-92-51, MILITARY BASE CLOSURES: U.S. FINANCIAL OBLIGATIONS IN THE PHILIPPINES 27-28 (1992) [hereinafter GAO Philippines Report.]

164. *Id.* at 27.

165. *Id.* at 28.

166. *Id.* at 27.

The public health risks associated with the environmental contamination in and around former U.S. military bases in the Philippines continue to plague the surrounding communities.¹⁶⁷ In the aftermath of the Mount Pinatubo eruption in 1991, wherein an estimated 20,000 families were relocated to the decommissioned and vacated Clark Air Base, hazardous substances and toxins in drinking and bathing water caused serious health issues among relocated residents, including cancer, respiratory problems, skin disease, and birth complications (i.e. miscarriages, still births, and birth defects).¹⁶⁸

On 4 April 2013, the U.S. Navy relieved Lt. Cmdr. Rice and Lt. Daniel Tyler for their roles in the grounding of the *Guardian*, along with two other officers after an investigation determined that they did not adhere to standard U.S. Navy navigation procedures.¹⁶⁹

The 29th Philippine-U.S. *Balikatan* annual joint military exercises opened on 5 April 2013.¹⁷⁰ In the past, the U.S. has not been liable for environmental damage and degradation that have resulted from the annual war games, such as coral reef destruction or toxic waste pollution from naval maneuverings and live fire exercises. In fact, current Department of Defense policy may exempt cooperative efforts with other sovereign nations from the regulation of U.S. environmental laws.¹⁷¹

II. THE *ARIGO V. SWIFT* PETITION FOR THE WRIT OF KALIKASAN

Arigo argued that the grounding, salvaging, and post-salvage operations of the *Guardian* cause and continue to cause environmental damage of such magnitude as to affect the provinces of Palawan, Antique, Aklan, Guimaras, Iloilo, Negros Occidental, Negros Oriental, Zamboanga del Norte, Basilan, Sulu, and Tawi-Tawi, which events violate the constitutional rights of

167. *Arigo*, G.R. No. 206510 at 29.

168. Hayashi Kiminori, Oshima Ken'ichi, and Yokemoto Masafum, Overcoming American Military Base Pollution in Asia, available at <http://japanfocus.org/-Hayashi-Kiminori/3185> (last accessed Dec. 2, 2013).

169. GMA News Online, US Navy relieves four USS *Guardian* officers, available at <http://www.gmanetwork.com/news/photo/35331/us-navy-relieves-four-uss-guardian-officers> (last accessed Dec. 2, 2013).

170. Mangosing, *supra* note 156.

171. U.S. DEPARTMENT OF DEFENSE, EXECUTIVE ORDER NO. 12114, ENVIRONMENTAL EFFECTS ABROAD OF MAJOR DEPARTMENT OF DEFENSE ACTIONS (1979) [hereinafter Environmental Effects Abroad of Major DOD Actions].

Petitioners to a balanced and healthful ecology within the meaning of Section 16, Article II of the Constitution¹⁷² and the *Oposa v. Factoran Jr.*¹⁷³ doctrine. It argued that the Writ of *Kalikasan* is justified because there had been an unlawful act or omission by a public official or employee, or private individual or entity, that such unlawful act or omission violates or threatens to violate the constitutional right of every person to a balanced and healthful ecology, and such unlawful act or omission involves environmental damage of such magnitude as to prejudice the life, health, or property of inhabitants in two or more cities or provinces.¹⁷⁴ *Arigo* then argued that the Guardian grounding incident satisfied the foregoing.

The Writ of *Kalikasan* is an extraordinary remedy. The underlying emphasis in the Writ is magnitude as it deals with damage that transcends political and territorial boundaries.¹⁷⁵ Magnitude is thus measured according to the qualification set forth in the Rules — when there is environmental damage that prejudices the life, health, or property of inhabitants in two or more cities or provinces.¹⁷⁶ In addition, magnitude of environmental damage is a condition sine qua non in a petition for the issuance of the Writ of *Kalikasan*.¹⁷⁷

The Petitioners' right to a balanced and healthful ecology is enshrined in Section 16, Article II of the 1987 Constitution — “The State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature.”¹⁷⁸

In the landmark case of *Oposa*, the said constitutional right was made enforceable and operational in the following —

[w]hile the right to a balanced and healthful ecology is to be found under the Declaration of Principles and State Policies and not under the Bill of Rights, it does not follow that it is less important than any of the civil and political rights enumerated in the latter. Such a right belongs to a different category of rights altogether for it concerns nothing less than self-

172. PHIL. CONST. art. II, § 16.

173. *Oposa v. Factoran Jr.*, 224 SCRA 792 (1993).

174. *Id.*

175. See Ma. Elena Catajan, *Benguet legal team okays Writ contents*, SUN STAR BAGUIO, Dec. 6, 2011, available at <http://www.sunstar.com.ph/baguio/local-news/2011/12/06/benguet-legal-team-okays-writ-contents-194260> (last accessed Dec. 2, 2013).

176. RULES OF PROCEDURE FOR ENVIRONMENTAL CASES, rule 7, § 2.

177. *Id.*

178. PHIL. CONST. art. II, § 16.

preservation and self-perpetuation — aptly and fittingly stressed by the Petitioners — the advancement of which may even be said to predate all governments and constitutions. As a matter of fact, these basic rights need not even be written in the Constitution for they are assumed to exist from the inception of humankind. If they are now explicitly mentioned in the fundamental charter, it is because of the well-founded fear of its framers that unless the rights to a balanced and healthful ecology and to health are mandated as state policies by the Constitution itself, thereby highlighting their continuing importance and imposing upon the state a solemn obligation to preserve the first and protect and advance the second, the day would not be too far when all else would be lost not only for the present generation, but also for those to come — generations which stand to inherit nothing but parched earth incapable of sustaining life.

The right to a balanced and healthful ecology carries with it the correlative duty to refrain from impairing the environment.¹⁷⁹

Case law dealing with the Writ of *Kalikasan* is progressively and quickly emerging since the advent of the 2010 Rules.¹⁸⁰

Arigo argued that because the Tubbataha Coral Reefs are important ecosystems that sustain ecological life in the Philippines, the U.S. Navy's destruction of such ecosystems results in serious, if not irreparable, ecological imbalance, for coral reefs are among nature's life-support systems.¹⁸¹ It cited *Tano v. Socrates* —¹⁸²

The destruction of the coral reefs results in serious, if not irreparable, ecological imbalance, for coral reefs are among the nature's life-support systems. They collect, retain, and recycle nutrients for adjacent nearshore areas such as mangroves, seagrass beds, and reef flats; provide food for marine plants and animals; and serve as a protective shelter for aquatic organisms. It is said that '[e]cologically, the reefs are to the oceans what

179. *Oposa*, 224 SCRA at 804-05.

180. See, e.g., *Casino, et al. v. DENR (Min Res.)*, G.R. No. 202493 and G.R. No. 202511, July 31, 2012 (unreported); *Agham Party List v. LNL Archipelago Minerals, Inc.*, G.R. No. 201918, June 13, 2012 (unreported); *Greenpeace v. Environmental Management Bureau of the DENR*, G.R. No. 201390, May 2, 2012 (unreported); & *Pimentel v. Aquino*, G.R. No. 201509, May 8, 2012 (unreported).

181. *Arigo*, G.R. No. 206510 at 32.

182. *Tano v. Socrates*, 278 SCRA 154 (1997).

forests are to continents: they are shelter and breeding grounds for fish and plant species that will disappear without them.¹⁸³

Because the Tubbataha Coral Reefs form a natural barrier, which protects the Philippine coastline, *Arigo* argued that any erosion or damage in the scale that the Respondents have so caused will compromise the natural buffer from the pounding of ocean waves.¹⁸⁴ Coral reefs form natural barriers that protect nearby shorelines from the eroding forces of the sea, thereby protecting coastal dwellings, agricultural land, and beaches.¹⁸⁵ Coral reefs serve as a buffer, protecting in-shore areas from the constant pounding of ocean waves. Without coral reefs, many beaches and buildings would become vulnerable to wave action and storm damage.¹⁸⁶ In particular, *Arigo* argued that the Guardian caused damage to natural fish nurseries in the TRNP from which fish and coral larvae populate the Sulu-Sulawesi Triangle.¹⁸⁷

The fishing industry depends on coral reefs because many fish spawn there and juvenile fish spend time there before making their way to the open sea. In fact, a study by Conservation International has confirmed that Tubbataha is the nursery for fish and coral larvae that populates the Sulu-Sulawesi Triangle — an area that not only covers the most important and productive fishing grounds of the Philippines but extends as far south as Malaysia and Indonesia.¹⁸⁸

The fish and invertebrate spawn are also important in generating vast amounts of marine produce that feed millions of people each year.¹⁸⁹ While a single square kilometer of healthy coral reef can annually generate up to 30-tonnes of fish biomass, Tubbataha produces up to 200-tonnes annually.¹⁹⁰

183. *Id.* at 184 (citing Anthony Spaeth, *Reef Killers*, TIME MAGAZINE, June 3, 1996, at 49-50).

184. *Arigo*, G.R. No. 206510 at 33.

185. *Id.*

186. *Id.*

187. *Id.* at 34 (citing Expedition Fleet Liveboards, Tubbataha, available at <http://expeditionfleet.com/destinations/philippines/tubbataha/> (last accessed Dec. 2, 2013)).

188. *Arigo*, G.R. No. 206510 at 34.

189. *Id.*

190. *Id.*

In *Arigo*, Petitioners argued that because the Philippines follows the English rule,¹⁹¹ a rule based on the territorial principle and followed in the U.S., crimes perpetrated in or around the Guardian are triable in the courts of the territory where those crimes are committed, which are the courts of the Republic of the Philippines.¹⁹² In *People v. Wong Cheng*,¹⁹³ the Court, then under the federal review powers of the Supreme Court of the United States (SCOTUS), held that courts of the Philippines have jurisdiction over crimes, like the one herein involved, committed aboard merchant vessels anchored in our jurisdictional waters.¹⁹⁴ *Wong Cheng* held that, had it been otherwise, the commission of crimes aboard the merchant vessel *Changsa* of English nationality while said vessel was anchored in Manila Bay, two and a half miles from the shores of the city, in open defiance of the local authorities, who are impotent to lay hands on him, is simply subversive of public order.¹⁹⁵

On the point of customary international law incorporated via Section 2, Article II of the Constitution,¹⁹⁶ the *Trail Smelter Arbitration Case*¹⁹⁷ is

191. LUIS B. REYES, THE REVISED PENAL CODE: CRIMINAL LAW, BOOK ONE 29 (18th ed. 2012).

192. *Arigo*, G.R. No. 206510 at 34.

193. *People v. Wong Cheng*, 46 Phil. 729 (1922).

194. *Id.* at 729. The Court stated —

There are two fundamental rules on this particular matter in connection with International Law; to wit, the French rule, according to which crimes committed aboard a foreign merchant vessel should not be prosecuted in the courts of the country within whose territorial jurisdiction they were committed, unless their commission affects the peace and security of the territory; and the English rule, based on the territorial principle and followed in the [U.S.], according to which, crimes perpetrated under such circumstances are in general triable in the courts of the country within the territory they were committed. Of these two rules, it is the last one that obtains in this jurisdiction, because at present the theories and jurisprudence prevailing in [U.S.] on this matter are authority in the Philippines which is now a territory of the [U.S.].

Id.

195. *Id.* at 733.

196. PHIL. CONST. art. II, § 2. This Section provides—

The Philippines renounces war as an instrument of national policy, adopts the generally accepted principles of international law as part of

significant because it is dispositive of the limits of environmentally permissible conduct between international boundaries, that is, nations must not perpetrate significant harm to other nations through pollution.¹⁹⁸ *Trail Smelter*, read with *Wong Cheng*, would thus require a finding by the Court to hold officers of the U.S. responsible under international law for the wrongful conduct of the *Guardian*, her grounding, and her crew. Following *Trail Smelter*, it is the duty of the *Guardian* officers of the U.S. Seventh Naval Fleet, so *Arigo* argues, to make a complete and final indemnity and compensation for all damage to the Tubbataha Reef which occurred between the grounding date of 17 January 2013, to the date of full reef restoration computed under internationally accepted methodology and best practices.¹⁹⁹

And because Philippine case law affirms that Article V, on Criminal Jurisdiction, of the VFA is a waiver of immunity from suit,²⁰⁰ the question in *Arigo* is no longer a question of immunity but a question of detention as against custody of erring U.S. Navy Officers.

On 22 May 2013, the Cmdr. of the U.S. Pacific Fleet, Pearl Harbor, Hawaii, issued a “Final Endorsement on CAPT [redacted].”²⁰¹ The subject line of this Report states, “Command investigation into the grounding of the USS *Guardian* (MCM 5) on Tubbataha Reef, Republic of the Philippines that occurred on 17 January 2013.”²⁰² In particular, the redacted U.S. Navy Report²⁰³ makes the following findings —

Opinions

Root Causes

the law of the land and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations.

PHIL. CONST. art. II, § 2.

197. *Trail Smelter Arbitration* (U.S. v. Canada), 3 U.N. Rep. Int’l Arb. Awards 1905 (1941).

198. *Id.*

199. *Arigo*, G.R. No. 206510 at 35.

200. VFA, *supra* note 56.

201. U.S. Navy, Command Investigation into the Grounding of [USS *Guardian*] (MCM 5) on Tubbataha Reef, Republic of the Philippines that Occurred on 17 January 2013, 117-18 (2013) [hereinafter U.S. Navy Report].

202. *Id.*

203. *Id.*

- (1) The grounding of USS GUARDIAN was entirely preventable. The root causes of the grounding were human error and a failure of command leadership to provide the necessary oversight and direction in developing a prudent and safe Navigation Plan. In execution, the command leadership failed to provide the most basic direction, guidance, and supervision to ensure the safe navigation of the ship as it transited one of the most complex navigation environments in the Western Pacific[;]
- (2) During interviews, it was evident that the crew did not understand and had made little to no attempt to study, learn, and apply the Commanding Officer's Standing Orders. Furthermore, the command leadership failed to rigidly enforce fundamental navigation standards outlined in the Commanding Officer's Standing Orders, the command's Navigation Bill, and the NAVDORM[;]
- (3) The Commanding Officer had developed and the command had printed the Commanding Officer's Standing Orders in booklet form for distribution to senior crew members. However, there was little to no training, oversight, and reinforcement of the requirements and standards by command leadership[;]
- (4) The CO, XO/NAV, OPS Officer, OOD, and ANAV (who was also QMOW at the time of grounding) failed to exercise their assigned responsibilities to ensure the safe navigation of the ship as prescribed by U.S. Navy Regulations, the U.S. Navy SORM, the NAVDORM, the CO's Standing Orders, and the ship's Navigation Bill[;] and
- (5) The CO, XO/NAV, and ANAV failed to ensure consistent application and compliance with prudent, safe, and sound navigation principles and standards during navigation planning GUARDIAN had atrophied to an unacceptable standard that made the ship susceptible to catastrophic failure. Command leadership failed to recognize the significant risk this placed on the ship and her crew[.]²⁰⁴

In *Nicolas v. Romulo*,²⁰⁵ the Court effectively upheld the trial court's conviction of Lance Corporal Daniel Smith of the United States Air Force (U.S.A.F.) of the crime of rape as defined under Philippine criminal statutes,²⁰⁶ and in its dispositive portion "ordered" the Secretary of Foreign Affairs "to forthwith negotiate with the [U.S.] representatives for the appropriate agreement on detention facilities under Philippine authorities as

204. *Id.* at 117-18.

205. *Nicolas v. Romulo*, 578 SCRA 438 (2009).

206. *Id.* at 453.

provided in [Article] V, [Section] 10, of the VFA.”²⁰⁷ It then follows that the sovereignty of a state is not absolute and is subject to limitations imposed by membership in the family of nations and treaty law.²⁰⁸

Petitioners in *Arigo* then argued that the U.S. Respondents are not immune from suit because the plain language of existing federal statutes is clear in that agencies of the U.S. have statutorily waived their immunity to any equitable action following *New York v. U.S. Army Corps of Engineers*²⁰⁹ and *Trudeau v. FTC*.²¹⁰ These being U.S. Federal law and case law, it may be argued that the same are applicable in full to the case at hand, and that such laws hold persuasive force among Philippine courts.²¹¹

In particular, the 2012 case of *U.S. Army Corps of Engineers*, the U.S. District Court for the Eastern District of New York held that federal defendants are not immune from suit because the plain language of existing federal statutes is clear in that the U.S. agency has waived its immunity to any equitable action.²¹² Following the reasoning of the D.C. Circuit Court in *Trudeau*, the Court found that the plain language of the waiver and the legislative history clearly applies the waiver to any equitable action, regardless of whether the Administrative Procedure Act (APA) provides the cause of action or not.²¹³

While the general rule is that injured parties are precluded from seeking compensation from the government for environmental damages unless authorized by a waiver of sovereign immunity,²¹⁴ two statutory waivers of sovereign immunity are key — the Resource Conservation and Recovery

207. *Id.* at 468.

208. *See, e.g., Tanada v. Angara*, 272 SCRA 18 (1997).

209. *New York v. U.S. Army Corps of Engineers*, 896 F.Supp.2d 180 (E.D.N.Y. 2012) (U.S.).

210. *Kevin Trudeau v. Federal Trade Commission*, 456 F.3d 178 (D.C. Cir. 2006) (U.S.).

211. *Arigo*, G.R. No. 206510 at 36.

212. *New York*, 896 F.Supp.2d at 189.

213. *Id.* (citing *Trudeau*, 456 F.3d at 186-87). *See generally* Administrative Procedure Act, 5 U.S.C. § 704 (1946).

214. *See, e.g., Lane v. Pena*, 518 U.S. 187, 192 (1996). The Decision states that “[t]o sustain a claim that the Government is liable for awards of monetary damages, the waiver of sovereign immunity must extend unambiguously to such monetary claims.” *Lane*, 518 U.S. at 192.

Act (RCRA)²¹⁵ and the FTCA.²¹⁶ The first, RCRA, waives sovereign immunity for three types of citizen suits: 1) to enforce a violation of a permit, standard, or regulation;²¹⁷ 2) to abate imminent and substantial endangerments to health or the environment;²¹⁸ and 3) to force the U.S. Environmental Protection Agency (EPA) to perform a nondiscretionary duty.²¹⁹

Even under common law tort claims, the *Arigo* Petitioners argued that the U.S. Respondents are liable for claims, *inter alia*, of negligence, trespass, and nuisance.²²⁰ It cited federal jurisprudence, applicable in full to U.S. Respondents, and which laws to the extent incorporated as domestic tort law under quasi-delicts of the Civil Code, may hold some force.²²¹

In the 2012 case of *In Re: Tennessee Valley Authority Ash Spill Litigation*,²²² the U.S. District Court for the Eastern District of Tennessee considered whether the Tennessee Valley Authority (TVA) could be held liable for the failure of a dam under claims of “negligence, negligence per se, recklessness, strict liability, trespass, private nuisance, and public nuisance.”²²³ The district court held that TVA’s conduct caused the dam failure and concluded that plaintiffs may proceed with their own individual claims of negligence, trespass, and private nuisance.²²⁴ *Tennessee Valley Authority* is a consolidated case involving 60 cases and more than 800 plaintiffs.²²⁵ The *Tennessee Valley* court reviewed prior holdings relevant to common law tort claims against the government.²²⁶ In particular, in *Mays v. Tennessee Valley*

215. Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-92 (1976).

216. 28 U.S.C §§ 1291, 1346, 1402, 2401-2402, & 2411-2412 (1946).

217. 42 U.S.C. § 6972 (a) (1) (A) (2006).

218. *Id.* § 6972 (a) (1) (B).

219. *Id.* § 6972 (a) (2).

220. *Arigo*, G.R. No. 206510 at 37.

221. *Id.* See also An Act to Ordain and Institute the Civil Code of the Philippines [CIVIL CODE], Republic Act No. 386, art. 2176 (1950).

222. *In Re: Tennessee Valley Authority Ash Spill Litigation*, No. 3:09-CV-009, 2012 WL 3647704 (E.D. Tenn. Aug. 23, 2012) (U.S.).

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

Authority,²²⁷ the court held that the TVA, as a governmental agency, may be sued in tort, provided the tort is not barred by the discretionary function doctrine.²²⁸ The discretionary function doctrine protects the TVA from liability if the challenged conduct was discretionary conduct — conduct grounded in considerations of public policy — that involved a permissible exercise of policy judgment.²²⁹

On the issue of causation in common law tort claims, the U.S. District Court in *Tennessee Valley* focused on the issue of causation, an important element in common law negligence, as the threshold issue.²³⁰ The three-pronged test to determine proximate cause, according to the district court, provides that: (1) the conduct must be a “substantial factor” in bringing about the harm; (2) there must be no policy or rule protecting the wrongdoer from liability; and (3) the harm must have been reasonably foreseeable or able to be anticipated by the average person.²³¹

Quasi-delict refers to acts or omissions which cause damage to another, there being fault or negligence on the part of the defendant, who is obliged by law to pay for the damages done.²³² The responsibility of two or more persons who are liable for quasi delict is solidary — joint tort-feasors in American law, and the history of quasi-delict drawn from Spain and U.S. common law.²³³

The *Arigo* Petitioners argued that, assuming without conceding that federal immunity statutes may be brought to bear upon Philippine courts, Petitioners have met their burden to overcome the defense tagged as the discretionary function doctrine articulated by U.S. courts — the Respondents’ acts and omissions reckoned from the point of “unauthorized clandestine” entry into TRNP, the operation and management of the Guardian, her salvage, slicing, cutting, removal, and post-salvage actions, including the acts and omissions of Respondents, their contractors, sub-contractors, and contracted vessels, all trace their causality to inexcusable

227. *Mays v. Tennessee Valley Authority*, 699 F. Supp. 2d 1014 (E.D. Tenn. 2010) (U.S.).

228. *Id.* at 1016.

229. *Id.*

230. *In Re: Tennessee Valley Authority*, 2012 WL 3647704.

231. *Id.* (citing *McClenahan v. Cooley*, 806 S.W.2d 767, 774 (Tenn. 1991) (U.S.)).

232. *See, e.g., Phoenix Construction v. Intermediate Appellate Court*, 148 SCRA 353 (1987); *U.S. v. Crame*, 30 Phil. 2 (1915); & *Air France v. Carrascoso*, 18 SCRA 155 (1966). *See also* CIVIL CODE, art. 2176.

233. *See Corpus v. Paje*, 28 SCRA 1062 (1969).

negligence of the Guardian's crew, which negligent performance of established protocol is nondiscretionary conduct within the meaning of *Tennessee Valley Authority*.²³⁴

Tennessee Valley Authority directed that for tort claimants to meet their burden, claimants need to identify the government agency's (in the said case, the TVA's) specific decisions or conduct, show it to be a nondiscretionary act, and describe how that decision or conduct caused the damage (dike failure).²³⁵ The court held that the TVA could be liable for "negligent failure to inform or train TVA personnel in the applicable policies and procedures for coal ash operations and management; negligent or inadequate performance by TVA personnel of TVA's policies and procedures; negligence in the construction and implementation of approved design and construction plans; and negligent maintenance."²³⁶ The U.S. District Court also found that the failure of the TVA to train its staff in its mandatory policies and procedures, in conjunction with the staff's negligent performance of such protocol, was nondiscretionary conduct that contributed to the dike's failure.²³⁷

Noteworthy is that in *Tennessee Valley*, the TVA failed to comply with the permit requirements, and yet the TVA continued dredging operations around the project area (North Dike).²³⁸ In like manner, Respondents made a clandestine unauthorized entry into TRNP, which wrongful act is punishable under various Philippine criminal statutes.

In *Marlys Bear Medicine v. United States ex rel. Secretary of the Department of Interior*,²³⁹ it was held that the failure to effectuate policy choices does not constitute a protected policy judgment within the meaning of the discretionary function exception and rejected the contention that "limited resources" was a policy excuse for failure to adhere to professional standards.²⁴⁰

234. *Arigo*, G.R. No. 206510 at 38.

235. *In Re: Tennessee Valley Authority*, 2012 WL 3647704 (citing *Tennessee Valley Authority Ash Spill Litigation I*, 787 F. Supp. 2d 703, 716 (E.D. Tenn. 2011) (U.S.)).

236. *Id.*

237. *In Re: Tennessee Valley Authority*, 2012 WL 3647704 at 60-61.

238. *Id.*

239. *Marlys Bear Medicine v. United States*, 241 F.3d 1201 (9th Cir. 2001).

240. *Id.* at 1216.

What of the fact that the *Arigo Kalikasan* petition had been filed after the fact that the Guardian had been sent to Sasebo, Japan?

Arigo argued that because the Guardian is an instrumentality or vessel that destroyed, caused the loss of, and injured substantial portions of the park system resources of the Tubbataha Reef, the Guardian as such is liable *in rem* to the Republic of the Philippines for response costs and damages resulting from such destruction, loss, or injury to the same extent as any person who can be made liable for causing similar destruction.²⁴¹

The heading “Conservation” (Title 16) and “National Parks, Military Parks, Monuments, and Seashores” (Chapter 1) of the U.S.C.A. provides:

(a) In general

Subject to subsection (c) of this section [i.e., defenses], any person who destroys, causes the loss of, or injures any park system resource is liable to the [U.S.] for response costs and damages resulting from such destruction, loss, or injury.

(b) Liability *in rem*

Any instrumentality, including but not limited to a vessel, vehicle, aircraft, or other equipment that destroys, causes the loss of, or injures any park system resource or any marine or aquatic park resource[,] shall be liable *in rem* to the [U.S.] for response costs and damages resulting from such destruction, loss, or injury to the same extent as a person is liable under subsection (a) of this [S]ection.²⁴²

In fact, under the FTCA, the U.S. Government is liable in tort in the same manner and to the same extent as private individuals under like circumstances, but only if the laws of the state in which the wrongful act occurred provide recovery in similar situations involving private parties does the Act take effect.²⁴³

Moreover, the U.S.C.A states that this section shall be in addition to any other liability which may arise under Federal or State law.²⁴⁴ Now, if the spirit and intent of the U.S.C.A are of persuasive force among Philippine courts, *Arigo*'s Respondents and the Guardian, so the *Arigo* Petitioners aver, have no defenses under the norms of that statute or under norms of international environmental best practices.

241. *Arigo*, G.R. No. 206510 at 39.

242. 16 U.S.C.A. § 1911-1.

243. See 28 U.S.C.A. §§ 1346 (b), 2671, and 2674.

244. 16 U.S.C.A. § 1911-1(d).

Arigo emphasizes various publicly-made admissions of its Respondents, which admissions may be considered adverse to their interests under the law on evidence.

The U.S.C.A. (on Defenses) provides —

A person is not liable under this section if such person can establish that—

- (1) the destruction, loss of, or injury to the park system resource was caused *solely by an act of God or an act of war*;
- (2) such person acted with due care, and the destruction, loss of, or injury to the park system resource was caused solely by *an act or omission of a third party*, other than an employee or agent of such person; or
- (3) the destruction, loss, or injury to the park system resource was caused by an *activity authorized by Federal or State law*.²⁴⁵

It can be seen that, at least plausibly, the burden to raise any of the foregoing defenses lies with *Arigo*'s Respondents.

A. Plausible Defenses

The Petitioners in *Arigo* made an attempt to preempt immunity defenses by the U.S. It argued that —

Respondents may not carve out an exception under discretionary decisions within the meaning of the [FTCA]: In *Myers v. United States*, the [U.S.] Court of Appeals for the [n]inth Circuit held that the discretionary function exception did not bar an injured plaintiff's FTCA claim seeking compensatory damages for thallium poisoning suffered during a Navy remediation project.²⁴⁶

Under the FTCA, the misconduct of government employees acting within the scope of their employment are nonetheless liable to pay damages.²⁴⁷

Section 2674 of the FTCA holds the government liable for tort claims to the same extent as a private person under the law of the state where the act occurred.²⁴⁸

May the Guardian carve out an exception under the discretionary function rule? May it be validly raised a defense?

245. 16 U.S.C.A. § 191j-1(d) (emphasis supplied).

246. *Arigo*, G.R. No. 206510 at 41.

247. See *Dalehite v. United States*, 346 U.S. 15, 24-27 (1953).

248. 28 U.S.C. § 2674 (2006).

To find safe harbor under the discretionary function exception, the government must satisfy the two-pronged test developed in *Berkovitz v. U.S.*²⁴⁹ First, whether the disputed action was a matter of choice for the acting employee or agency, and, second, whether Congress intended to immunize that type of discretion from liability.²⁵⁰ If a plaintiff can overcome either prong, the discretionary function exception will not apply.

Have the *Arigo* Petitioners met the threshold required of both pronged set forth by *Berkovitz*? As the case is pending, much remains to be seen.

Noteworthy is that the Plaintiffs in *Berkovitz* sued the government because their two-month old son contracted polio and became paralyzed shortly after receiving a vaccine called Orimune that was designed to treat the disease; claimed that the government wrongfully licensed a laboratory to produce Orimune; and that it wrongfully approved the release of the vaccine.²⁵¹ The Supreme Court of the United States held that agencies do not have discretion to deviate from mandated procedures because they leave no room for policy judgments.²⁵²

To reach that conclusion, Supreme Court of the United States implemented a two-pronged test.²⁵³ It concluded that the discretionary function exception does not bar claims arising out of federal regulatory programs because they are not political, social, and economic judgments.²⁵⁴ Because the agencies refused to follow mandatory guidelines, the discretionary function exception did not apply.²⁵⁵

The FTCA, in sum, imposes tort liability on the U.S. federal government, including herein U.S. Respondents, for compensatory damages, but it limits liability to non-discretionary acts and decisions based upon unprotected policy concerns.

The Petitioners in *Arigo* submit that the discretionary function exception as understood by U.S. courts finds its analogue in the “political question doctrine” in Philippine courts, which doctrine has been tempered by the grave abuse clause in Section 1, Article VIII of the Philippine

249. *Berkovitz v. U.S.*, 486 U.S. 531, 536-37 (1988).

250. *Id.* at 535-36.

251. *Id.* at 533.

252. *Id.* at 546.

253. *Id.* at 536.

254. *Id.* at 537.

255. *Berkovitz*, 486 U.S. at 546-47.

Constitution.²⁵⁶ It must also be noted that otherwise traditional conceptions of political questions existing under the pre-1986 constitutional order can now be justiciable controversies.²⁵⁷

In *Myers v. U.S.*,²⁵⁸ the U.S. Court of Appeals for the ninth Circuit held that the discretionary function exception did not bar an injured plaintiff's FTCA claim seeking compensatory damages for thallium poisoning suffered during a U.S. Navy remediation project.²⁵⁹ The Court found that mandatory directives listed in the Navy's Health and Safety Program Manual²⁶⁰ left no room for discretion, and that the standards in the Federal Facility Agreement (FFA)²⁶¹ were not based upon protected policy concerns.²⁶²

Myers requires that both the Health and Safety Program Manual of the U.S. Navy and the FFA agency guidelines are to be treated as mandatory rules and requirements, and left no room for policy choice and discretion within the meaning of the discretionary defense exception.²⁶³

In a later case, the Supreme Court of the United States used agency guidelines under the *Berkovitz* test. In *U.S. v. Varig Airlines*,²⁶⁴ the Civil Aeronautics Agency used a "Manual of Procedure" to guide the examination and certification of aircraft designs.²⁶⁵ In *Starrett v. United States*,²⁶⁶ the ninth

256. PHIL CONST. art. VIII, § 1. This Section provides, in part —

[J]udicial power includes the duty of the courts of justice to ... determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of Government.

257. See *Francisco v. House of Representatives*, 415 SCRA 44 (2003).

258. *Myers v. U.S.*, 652 F.3d 1021 (9th Cir. 2011) (U.S.).

259. *Id.* at 1030.

260. Naval Facilities Eng'g Command, U.S. Navy, NAVFACINST 5100.11J, Safety and Health Program Manual P0402.a (2000).

261. U.S. DEPARTMENT OF DEFENSE, U.S. NAVY, & STATE OF CALIFORNIA, CAMP PENDLETON MARINE CORPS BASE FEDERAL FACILITY AGREEMENT ¶ 20.1 (1990), available at http://www.pendleton.marines.mil/Portals/98/Docs/CPEN_FFA.pdf (last accessed Dec. 2, 2013).

262. *Myers*, 652 F.3d at 1029-33.

263. *Id.* at 1036-37.

264. *U.S. v. SA Empresa De Viacao Aerea Rio Grandense*, 467 U.S. 797 (1984) (U.S.).

265. *Id.* at 817-19.

266. *Starrett v. U.S.*, 847 F.2d 539 (9th Cir. 1988) (U.S.).

Circuit held that the U.S. Navy's Manual on Naval Preventive Medicine could be a source for "specific and mandatory requirements."²⁶⁷ In *Bolt v. United States*,²⁶⁸ the Supreme Court of the United States denied a claim of immunity, predicated on the discretionary function exception, because the Army handbook which "set forth specific and mandatory duties" for snow removal was ignored, thus opening the door to FTCA liability.²⁶⁹ For once an agency issues directives, they become mandatory and a failure to follow them precludes application of the immunity defense.²⁷⁰

In short, only social, economic, and political policy decisions are protected by the discretionary function exception and internal agency guidelines qualify as a source of mandatory directives.²⁷¹

In like manner, *Arigo* argued that the Guardian had no room for the kind of policy choice that would enable them to raise any variant of the discretionary function exception.

More in point, *Arigo* argued that because the Guardian chose to enter the TRNP which may qualify as a public policy choice at best, then the implementation and consequences of that choice no longer involve any discretion within the meaning of the discretionary function exception. Citing *Myers*, the Petitioners argued that "[t]he decision to adopt safety precautions may be based in policy considerations, but the implementation of those precautions is not."²⁷² The *Myers* holding finds support in the Supreme Court of the United States' holding in *Indian Towing Co. v. United States*,²⁷³ where it was held that —

[t]he Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light on Chandeleur Island and engendered reliance on the guidance afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order; and, if the light did become extinguished, then the Coast Guard was further obligated to use due care to discover this fact and to repair the light or give warning that it was not functioning. If the Coast Guard failed in its

267. *Id.* at 541.

268. *Bolt v. U.S.*, 509 F.3d 1028 (9th Cir. 2007) (U.S.).

269. *Id.* at 1035-36.

270. *See Camozzi v. Roland/Miller & Hope Consulting Grp.*, 866 F.2d 287, 292 (9th Cir. 1989) (U.S.).

271. *See Green v. United States*, 630 F.3d 1245, 1251 (9th Cir. 2011) (U.S.).

272. *Myers*, 652 F.3d at 1032 (citing *Marlys Bear Medicine*, 241 F.3d at 1215).

273. *Indian Towing Co. v. U.S.*, 350 U.S. 61 (1955).

duty and damage was thereby caused to Petitioners, the [U.S.] is liable under the Tort Claims Act.²⁷⁴

In *Indian Towing Co.*, when the Plaintiff's ship ran aground because the nearby lighthouse was not operating, the government argued that operating the lighthouse was a discretionary act.²⁷⁵ The Supreme Court of the United States held that when the government chose to operate the lighthouse, it made a discretionary decision, but once that choice was made, its obligation to use due care became non-discretionary.²⁷⁶ And, assuming without conceding that the Guardian can find safe harbor under the discretionary function exception, still their exercise of discretion, if any, in choosing to enter the TRNP, which act is the antecedent for the Guardian's grounding and all acts post-grounding, then this exercise of discretion amounts to grave abuse of discretion amounting to lack or excess of jurisdiction within the meaning of Section 1, Article VIII of the Constitution, and thus the instant case is justiciable.²⁷⁷ For where the challenged governmental activity involves environmental considerations under an established policy, rather than the balancing of competing public policy considerations, the rationale for the exception may be said to fall away and the U.S. will be held responsible for the negligence of its employees.

In the 1987 case of *ARA Leisure Services. v. U.S.*,²⁷⁸ the ninth Circuit agreed with the eighth Circuit that "[w]here the challenged governmental activity involves safety considerations under an established policy rather than the balancing of competing public policy considerations, the rationale for the exception falls away and the [U.S.] will be held responsible for the negligence of its employees."²⁷⁹ The Court affirmed prior holding and stated that the government cannot shortchange safety measures once it undertakes the responsibility of enforcing them.²⁸⁰ Because the Guardian had no prior permit to enter TRNP, nor did U.S. Respondents inform TRNP marine park rangers of the Guardian's inbound presence prior to the grounding incident on 17 January 2013, Petitioners in *Arigo* argued that their Respondents unlawfully entered the TRNP within the meaning of Section

274. *Id.* at 69.

275. *Id.* at 76.

276. *Id.* at 69.

277. See PHIL. CONST. art. VIII, § 1.

278. *ARA Leisure Servs. v. United States*, 831 F.2d 193 (9th Cir. 1987) (U.S.).

279. *Id.* at 195 (citing *Aslakson v. United States*, 790 F.2d 688, 693 (8th Cir. 1986) (U.S.)).

280. *ARA Leisure Servs.*, 831 F.2d at 196.

19 of the TRNP Act of 2009,²⁸¹ a criminal statute, and whose presence was only discovered by radar by marine park rangers two hours after the fact, at 4:00 a.m.²⁸²

Is it a settled question of fact that the Guardian's act of entering the TRNP is unauthorized? It may be well to point out that the crewmen of the Guardian did not inform marine park rangers of its presence and situation, including post-grounding developments.

Noteworthy is the fact that the Guardian ran aground on Tubbataha Reef at 2:00 a.m. on 17 January 2013, approximately 130 kilometers southeast of Palawan after completing a port call at Subic Bay, Olongapo City, supposedly en route to her next port of call in Indonesia, and marine park rangers, through radar, discovered an unidentified vessel at or about 4:00 am on the same day.²⁸³ Upon chance discovery, marine park rangers radioed the vessel, introducing themselves as law enforcers. They informed the crewmen of the vessel of their violations and announced their intention to board the vessel.²⁸⁴ However, upon approaching, they saw soldiers taking position with their weapons and, since radio contact was unanswered, the boarding protocol was aborted.²⁸⁵

It later became apparent to the rangers that the vessel belonged to the U.S. Naval Fleet, and upon further verification, that the vessel is indeed the Guardian (MCM-5), which was, prior to its decommissioning, the fifth Avenger Class Mine Countermeasures ship of the U.S. Navy.²⁸⁶ Upon becoming informed of the grounding the TMO immediately reported the incident to the Philippine Naval Forces and Coast Guard, represented by Public Respondents Vice Adm. Jose Luis M. Alano, Adm. Rodolfo D. Isorena, and Commodore Enrico Efren Evangelista in the *Arigo* suit, and requested assistance.²⁸⁷

Section 26 of the TRNP Act of 2009 sets forth the following presumption: "The unauthorized entry of a vessel in the TRNP shall be prima facie evidence of violation of this [S]ection."²⁸⁸

281. TRNP Act of 2009, § 19.

282. *Arigo*, G.R. No. 206510 at 46.

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.*

287. *Id.*

288. TRNP Act of 2009, § 26.

It was only upon discovery after the fact of grounding by Philippine park rangers that no less than Respondent seventh Fleet Commander Vice Adm. Swift expressed regret over the grounding of the Guardian on Tubbataha Reef in the Sulu Sea. *Arigo* also emphasized the fact that the Guardian is (or was) assigned to the Amphibious Forces seventh Fleet deployed to Sasebo, Japan.²⁸⁹ If Sasebo, Japan were the Guardian's primary area of concern, one cannot help but ask this question: Why was the Guardian traversing Philippine waters and in the middle of the Sulu Sea, if it was supposedly en route to Indonesia in the first place?

Now, will the failure of an Avenger-Class Mine sweeper, as in the case of the Guardian, to avoid the TRNP according to the degree of technical expertise and equipment that all Avenger-class minesweepers are expected to meet and use, amount to gross and inexcusable negligence, even if the act or omission is done by a U.S. government employee acting within the scope of his authority, office, or employment?

One can argue that because the Guardian crew failed to adhere to mandatory protocol, Navy regulations, the law of the place, and possibly international law, they are not protected by the discretionary function doctrine. Because there is no question that the Guardian's act of entering the TRNP is unauthorized, and as the argument goes, it is the Guardian's burden to overcome the presumption set forth in Section 26 of the TRNP Act of 2009.²⁹⁰ As stated, Tubbataha is a word which means "a long reef exposed at low tide."²⁹¹ TRNP is considered the largest coral reef atoll in the Philippines.²⁹² Because the Guardian is an Avenger Class mine sweeper of the U.S. Navy, will the claim that the Guardian could not have detected the risk of grounding at the Tubbataha Reef, strike the Supreme Court as a plausible claim? Or does this amount to gross and inexcusable negligence?

Acknowledged by no less than UNESCO, the TRNP lies in a unique position in the middle of the Sulu Sea and is one of the Philippines' oldest ecosystems.²⁹³ The TRNP is located within the Coral Triangle, a global focus for coral biological diversity.²⁹⁴ TRNP has an area of 97,023 hectares

289. *Arigo*, G.R. No. 206510 at 47.

290. *See Arigo*, G.R. No. 206510 at 47; and TRNP Act of 2009, § 26.

291. Tubbataha Reef Natural Park World Heritage Site, History, *available at* <http://www.tubbatahareef.org/wp/history> (last accessed Dec. 2, 2013).

292. *Arigo*, G.R. No. 206510 at 47.

293. *Id.* at 48.

294. *Id.*

and is located in the middle of the Central Sulu Sea.²⁹⁵ It is approximately 98 nautical miles (150 kilometers) southeast of Puerto Princesa City. Tubbataha is a part of the Municipality of Cagayancillo Islands. It is one-third of the straight distance from Puerto Princesa to Zamboanga City in Mindanao.²⁹⁶

As the fifth Avenger Class Mine Countermeasures ship to join the U.S. Navy's Fleet, it is the Guardian's mission to counter the threat to U.S. forces and its allies from all types of naval mines.²⁹⁷ The Guardian is capable of mine detection, mine neutralization, and mine clearance in strategic U.S. and foreign ports and key ocean areas in order to maintain vital commercial shipping lanes.²⁹⁸ To accomplish her mine countermeasures mission, she is equipped with an AN/SQQ-32 sonar system and an Alliant Techsystems AN/SLQ-48 Mine Neutralization robot.²⁹⁹

In *Premo v. United States*,³⁰⁰ the U.S. Court of Appeals, sixth Circuit, held that while sovereign immunity prevents suit against the U.S. without its consent, the FTCA waives sovereign immunity for certain actions in tort by giving district courts exclusive jurisdiction over those types of civil actions.³⁰¹ Under the FTCA, the government may be liable for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment if a private person would be liable to the claimant in accordance with the law of the place where the act or omission occurred.³⁰² The FTCA "was designed primarily to remove the sovereign immunity of the [U.S.] from suits in tort and, with certain specific exceptions, to render the Government liable in tort as a private individual would be under like circumstances."³⁰³ The FTCA "neither creates causes of action against the [U.S.] nor provides a means of enforcing federal statutory duties. Rather, it 'constitutes consent to suit and is fundamentally limited to

295. *Id.*

296. *Id.*

297. *Id.*

298. *Arigo*, G.R. No. 206510 at 48.

299. *Id.*

300. *Premo v. U.S.*, 599 F.3d 540 (6th Cir. 2010) (U.S.).

301. *Id.* at 544.

302. *See* 28 U.S.C.A. § 1346 (b) (1) (1948).

303. *Richards v. United States*, 369 U.S. 1, 6 (1962) (U.S.).

cases in which a private individual [would be liable] under like circumstances.”³⁰⁴

Tennessee Valley Authority held that “the discretionary function doctrine does not shield TVA from liability for TVA’s negligent implementation” of the decision to locate the plant in a certain area and the design of the plant, and of TVA’s failure to construct the dikes and cells in accordance with the TVA’s plans, which resulted in the location of the north dike in the geologically unique area it was constructed.³⁰⁵ Because “[n]egligent failure to follow design drawings and plans involves no discretionary function or duty,”³⁰⁶ the court concluded “that TVA’s decision and conduct in locating [n]orth [d]ike ... is not protected by the discretionary function doctrine.”³⁰⁷ The court noted that “[n]egligent failure to perform a policy decision [—] such as a failure to provide information and training to employees and/or inspectors for carrying out pre-determined policies and procedures for coal ash operation and management [—] would not involve the same policy judgments as the actual creation of those policies and procedures.”³⁰⁸ The court also concluded, with regard to inspections, that the TVA’s violation of the engineering standard of care was not protected by the discretionary function doctrine.³⁰⁹ The court also found that the TVA’s violation of this standard of care “substantially contributed” to the incident.³¹⁰

In *U.S. v. Reyes*,³¹¹ the claim of immunity was rejected when it was shown that the acts of an American official were contrary to law.³¹² Summarizing relevant doctrine, the Court, speaking through Justice Hilario G. Davide, Jr., held that while the doctrine of sovereign immunity appears to prohibit only suits against the state without its consent, it is also applicable to complaints filed against officials of the state for acts allegedly performed by them in the discharge of their duties; that is the rule if the judgment against such officials will require the state itself to perform an affirmative act to

304. *U.S. v. Cundiff*, 555 F.3d 200, 217 (6th Cir.2009) (U.S.) (citing *Myers v. United States*, 17 F.3d 890, 894 (6th Cir. 1994) (U.S.).

305. *In Re: Tennessee Valley Authority*, 2012 WL 3647704, at 194.

306. *Id.* at 197.

307. *Id.* at 198.

308. *Id.* at 207.

309. *Id.* at 227.

310. *Id.* at 127.

311. *U.S. v. Reyes*, 219 SCRA 192 (1993).

312. *Id.* at 208.

satisfy the same, such as the appropriation of the amount needed to pay the damages awarded against them.³¹³ It is a different matter where the public official is made to account in his capacity as such for acts contrary to law and injurious to the rights of plaintiff, and inasmuch as the state authorizes only legal acts by its officers, unauthorized acts of government officials or officers are not acts of the state, and an action against the officials or officers by one whose rights have been invaded or violated by such acts, for the protection of his rights, is not a suit against the state within the rule of immunity of the state from suit.³¹⁴ An action at law or suit in equity against a state officer or the director of a state department on the ground that, while claiming to act for the state, violates or invades the personal and property rights of the plaintiff, under an unconstitutional act or under an assumption of authority which he does not have, is not a suit against the state within the constitutional provision that the state may not be sued without its consent.³¹⁵ The rationale for this ruling is that the doctrine of state immunity cannot be used as an instrument for perpetrating an injustice.³¹⁶

In addition, the Court in *Reyes*, upholding good law, held that while it is equally well-settled that where a litigation may have adverse consequences on the public treasury, whether in the disbursements of funds or loss of property, the public official proceeded against not being liable in his personal capacity, then the doctrine of non-suability may appropriately be invoked; but that it has no application, however, where the suit against such a functionary had to be instituted because of his failure to comply with the duty imposed by statute appropriating public funds for the benefit of plaintiff or petitioner.³¹⁷

And, under the test set forth in *Republic of Indonesia v. Vinzon*,³¹⁸ the Court, speaking through Justice Adolfo S. Azcuna, distinguished between *jure imperii* and *jure gestionis*, stating that —

Apropos the present case, the mere entering into a contract by a foreign State with a private party cannot be construed as the ultimate test of whether or not it is an act *jure imperii* or *jure gestionis*. Such act is only the start of the inquiry. Is the foreign State engaged in the regular conduct of a business? If the foreign State is not engaged regularly in a business or commercial activity, and in this case it has not been shown to be so

313. *Id.*

314. *Id.*

315. *Id.*

316. *Id.*

317. *Reyes*, 219 SCRA at 208.

318. *Republic of Indonesia v. Vinzon*, 405 SCRA 126 (2003).

engaged, the particular act or transaction must then be tested by its nature. *If the act is in pursuit of a sovereign activity, or an incident thereof, then it is an act jure imperii.*³¹⁹

Do the events leading to the grounding incident of the Guardian rise to the level of the legal fiction of acts done in pursuit of a sovereign activity, or an incident thereof, so that Respondents may invoke immunity under Philippine courts? While it may be a plausible claim that the Guardian had no prior permit or colorable authority from the TPAMB or from any of its rangers to enter even the buffer zone of the Reef, it can still be asked whether entering the Tubbataha Reef without prior warning or advice to Philippine authorities can amount to an authorized act in pursuit of, or incidental to, the sovereign activity of the Government of the U.S. The doctrine and tests in *Vinzon* would lead to the finding that because the U.S. Respondents in *Arigo* and the Guardian's crew had been so wanting in care and diligence required of the circumstances as to be contrary to law, if not criminal law, the U.S. Respondents are deemed to have lost the privileges and immunities otherwise befitting of a sovereign.

According to international law jurists, the standard of “due diligence” is the measure by which international tribunals judge whether states have used the “best practicable means at their disposal and in accordance with their capabilities.”³²⁰ To be sure, while Section 2 of Article VIII of the VFA (a defense pact) provides that vessels of the U.S. Armed Forces may “enter” the Philippines “upon approval” of the “Government of the Philippines,”³²¹ such “approval” however refers to the agency which has primary jurisdiction over the TRNP (an ecological matter) under the TRNP Act of 2009, and not the Department of Foreign Affairs. As mentioned above, the USS Guardian's entry was unauthorized and unlawful from the beginning.

Section 2 of Article VIII of the VFA provides —

Vessels operated by or for the [U.S.] armed forces may enter the Philippines upon approval of the Government of the Philippines. The movement of vessels shall be in accordance with international custom and

319. *Id.* at 131-32 (emphasis supplied).

320. See U.N. Convention on the Law of the Sea, art. 194(2), opened for signature Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS]; & Velasquez Rodriguez Case, Merits, Judgment of July 29, 1988, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 172 (July 29, 1988).

321. VFA, *supra* note 56, art. VIII, § 2.

practice governing such vessels, and such agreed implementing arrangements as necessary.³²²

Can “approval” in the foregoing provision contemplate unauthorized entry or acts of clandestine trespass? Because the Guardian was traversing internal waters of the Philippines, do the Guardian officers have the right of innocent passage in their favor?

Because *Myers* will require *Arigo*'s Respondents to look to the law of the place where the act occurred, the principal law of the place will be the Constitution and the Bill of Rights contained therein.³²³ In *Myers*, the U.S. Navy was liable to Myers in accordance with the law of the place where the act occurred.³²⁴ In *Myers*, the law of the place was California state law.

Under the Polluter Pays Principle³²⁵ and following the *Trail Smelter Arbitration Case* and successor cases now entrenched as customary international law, it may be argued that respondent U.S. officials and the U.S. Navy are required to make complete reparations for the Guardian incident, fulfill their duty to restore the original state of the TRNP, and avoid all acts during the *Balikatan* exercises that would place the TRNP at risk of transboundary harm. The Polluter Pays Principle requires *Arigo*'s Respondents to subject themselves to legal or statutory provisions no less severe than those which would apply for any equivalent pollution occurring within their country under comparable conditions and in comparable zones.

General principles of international law generally, and international environmental law in particular, have been incorporated into the domestic law of the Philippines³²⁶ and the U.S.³²⁷ More in point, Philippine environmental laws entrench the Polluter Pays Principle.³²⁸ As early as 1977, Philippine laws have assigned liability to the polluter for violations of environmental regulations: “It shall be the responsibility of the polluter to contain, remove[,] and clean-up ... pollution incidents at his own

322. *Id.*

323. See PHIL. CONST. art. III.

324. *Myers*, 652 F.3d at 1033-37.

325. See Roy E. Cordato, *The Polluter Pays Principles: A Proper Guide for Environmental Policy 1*, available at <http://iret.org/pub/SCRE-6.PDF> (last accessed Dec. 2, 2013).

326. PHIL. CONST. art. II, § 2.

327. See *The Paquete Habana*, 175 U.S. 677 (1900) (U.S.).

328. See Philippine Environmental Code [PHILIPPINE ENVIRONMENTAL CODE], Presidential Decree No. 1152 (1977).

expense.”³²⁹ The NIPAS Act of 1992,³³⁰ the RAMSAR Convention of 1971,³³¹ the World Heritage Convention of 1972,³³² the Convention on Biological Diversity of 1992,³³³ and various provisions of the Local Government Code of 1991,³³⁴ are all supportive of the Polluter Pays Principle.

Because the U.S. also recognizes international law as domestic law, respondent U.S. officials are bound by customary international law and treaty law to pay environmental remediation costs for the Guardian incident.³³⁵

The Polluter Pays Principle is recognized in U.S. environmental laws. Section 602 (2) of the Restatement (Third) of the Foreign Relations Law of the U.S. provides —

Where pollution originating in a state has caused significant injury to person outside that state, or has created a significant risk of such injury, the state of origin is obligated to accord to the person injured or exposed to such risk access to the same judicial or administrative remedies available in similar circumstances to persons within the state.³³⁶

Moreover, the American Law Institute’s treatment of the Polluter Pays Principle simultaneously invokes the principle of nondiscrimination.³³⁷ Of

329. *Id.* § 20.

330. An Act Providing for the Establishment and Management of National Integrated Protected Areas System, Defining its Scope and Coverage, and for Other Purposes [National Integrated Protected Areas System Act of 1992], Republic Act No. 7586 (1992).

331. Convention on Wetlands of International Importance, especially as Waterfowl Habitat, *adopted* Feb. 20, 1971, 996 U.N.T.S. 246.

332. Convention Concerning The Protection Of The World Cultural And Natural Heritage, *adopted* Nov. 16, 1972, 1037 U.N.T.S. 152.

333. Convention on Biological Diversity, *adopted* May 11, 1992, 1760 U.N.T.S. 79.

334. An Act Providing for a Local Government Code of 1991 [LOCAL GOVERNMENT CODE OF 1991], Republic Act No. 7160 (1991) [hereinafter LOCAL GOVERNMENT CODE].

335. *See The Paquete Habana*, 175 U.S. at 677.

336. *See Flores v. Southern Peru Copper Corp.*, 414 F.3d 233, 240 (2d Cir. 2003) (U.S.) (citing Restatement (Third) of the Foreign Relations Law of the U.S., § 602 (2) (1987)).

337. *See Weeks v. Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228, 235 (5th Cir.1969) (U.S.).

note is the observation that the remediation provisions in the National Environmental Policy Act (NEPA), the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), commonly known as “Superfund,” of the U.S. incorporate the basic tenets of the Polluter Pays Principle under international law.³³⁸ There is no question that the U.S. has a well-developed liability regime for environmental damages and arguably may be even more established and structured than the European Community’s.³³⁹

The prohibition against transboundary harm can be found in Principle 21 of the Stockholm Declaration which provides that states will “ensure that activities within their jurisdiction and control [do] not cause damage to the environment of other states.”³⁴⁰

The Rio Declaration on Environment and Development³⁴¹ requires, through Principle 7, that “[s]tates shall cooperate in a spirit of global partnership to conserve, protect[,] and restore the health and integrity of the Earth’s ecosystem.”³⁴² The Rio Declaration, in Principle 16, states that “[n]ational authorities should endeavor to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution.”³⁴³ Principle 2 of the Rio Declaration further requires states to ensure that “activities within their jurisdictions or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.”³⁴⁴

338. See Kim David Chanbonpin, *Holding the United States Accountable for Environmental Damages Caused by the U.S. Military in the Philippines, a Plan for the Future*, 4 ASIAN-PAC. LAW & POL’Y J. 320, 327 & 352 (2003).

339. See Hila J. Alderman, *The Ghost of Progress Past: A Comparison of Approaches to Hazardous Waste Liability in the European Community and the United States*, 16 HOUS. J. INT’L L. 311, 320-24 (1993).

340. U.N. Conference on the Human Environment, Stockholm, June 5-16, 1972, *Report of the United Nations Conference on the Human Environment*, U.N. Doc. A/CONF.48/14 (Jan. 1, 1973) [hereinafter Stockholm Declaration].

341. U.N. Conference on Environment and Development, June 3-14, 1992, *Conference Report*, U.N. Doc. A/CONF.151/26 (Aug. 12, 1992) [hereinafter Rio Declaration].

342. *Id.* ¶ 7.

343. *Id.* ¶ 16.

344. *Id.* ¶ 2.

In the *Corfu Channel Case (U.K. v. Albania)*,³⁴⁵ the International Court of Justice (ICJ), following the *Trail Smelter* tribunal ruling, held that every state has the obligation not to allow its territory to be used for activities that infringe on the rights of other states.³⁴⁶

And in the 1996 *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion on Nuclear Weapons)*,³⁴⁷ the ICJ recognized that the general prohibition against transboundary harm extends to environmental issues.³⁴⁸ Here, the ICJ restated the customary norm and stated that

the environment is not an abstraction but represents the living space, the quality of life[,] and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.³⁴⁹

The ICJ's *Advisory Opinion on Nuclear Weapons* may thus require a finding that the U.S. can be held responsible under international environmental law for environmental harm caused by U.S. military presence in the Philippines.

Is the obligation not to cause transboundary harm a generally accepted principle of international law followed by the international community, if not at the level of customary international law? In the Guardian incident, the due diligence standard requires the Guardian officials to take all reasonable measures to ensure that its activities do not create substantial transboundary harm.

The Guardian grounding, admittedly, was an isolated incident. But seen at a larger scale, will Balikpapan exercises violate international law because it places the Filipino people at grave risk of environmental disaster without providing adequate legal remedies?

345. *Corfu Channel Case (U.K. v. Albania)*, Judgment, (Apr. 9, 1949), available at http://www.worldcourts.com/icj/eng/decisions/1949.04.09_corfu1.htm (last accessed Dec. 2, 2013).

346. *Id.* ¶ 67.

347. *The Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 1996 I.C.J. 226 (July 8).

348. *Id.* ¶ 30.

349. *Id.* ¶ 29.

The Polluter Pays Principle assigns liability for these two breaches of established international environmental law duties. The U.S. must pay for the environmental cleanup at the sites already damaged and assume responsibility for future environmental damage in the Philippines during the *Balikatan* exercises.³⁵⁰

Under the Organization for Economic Cooperation and Development (OECD) regime where the U.S. is a party, the Polluter Pays Principle requires Respondents to subject themselves to legal or statutory provisions no less severe than those which would apply for any equivalent pollution occurring within their country, under comparable conditions and in comparable zones.³⁵¹ This OECD recommendation addresses the disparate treatment of countries in environmental questions and acknowledges the international expectation that principles of equality and non-discrimination will be utilized in environmental law and policy.³⁵²

It may be true that had the Guardian officers acted consistently with the principle of non-discrimination in its pre- and post-salvage operations regarding the Guardian incident, they would not have removed her from Philippine territory without first expressly entering into a compliant restoration plan and environmental assessment plan with the Republic of the Philippines, or at least without first repairing and fully restoring the Tubbataha Reef to the condition prior to the grounding incident. Because each state under international law has the duty to apply environmental law even-handedly and without discrimination on the basis of citizenship, national origin, or state of development, any theory raised by any state, including its military forces in times of peace or war, in ways that would immunize foreign troops from environmental reparation, will be a theory that is inconsistent with international law.³⁵³ Expert international legal opinion and scholarship can be supportive of this finding.³⁵⁴

350. See Chanbonpin, *supra* note 338, at 349.

351. See Guidelines Governing Transfrontier Pollution and Transboundary Issues, O.E.C.D. Doc. C(74) 224 (Annex), *adopted* Nov. 14, 1974.

352. See, e.g., J. Martin Wagner & Neil A.F. Popovic, *Environmental Injustice on United States Bases in Panama: International Law and the Right to Land Free From Contamination and Explosives*, 38 VA. J. INT'L L. 401, 423-26 & 491 (1998).

353. See Weeks, 408 F.2d at 235.

354. See, e.g., Chanbonpin, *supra* note 338, at 347-55; & Anne F. Badefsky, *The Principle of Equality or Non-Discrimination in International Law*, 11 HUM. RTS. L.J. 1 (1990).

There is no question that unprincipled differential treatment violates international law.³⁵⁵ In its treatment of former military bases in the Philippines, Petitioners in *Arigo* underscored the fact that because the U.S. government in the past has failed to treat hazards created by the U.S. military outside of the country with the same degree of seriousness that it has accorded defense sites within its territorial borders, then the U.S. may have been using a double standard for the interpretation and application of its own environmental laws.³⁵⁶ If this were to be the interpretation of the VFA, then this interpretation is contrary to international law binding on both the U.S. and the Philippines.³⁵⁷ The right to non-discrimination is a basic human right under the U.N. Charter,³⁵⁸ the International Covenant on Civil and Political Rights (ICCPR),³⁵⁹ and the Universal Declaration of Human Rights (UDHR),³⁶⁰ all of which are international conventions to which the U.S. is a ratifying party; assuming that the VFA were to allow for unprincipled differential treatment among Filipino and U.S. claimants in environmental damage suits by granting immunity for one class and excluding another on the basis of citizenship or nationality, then this interpretation will be inconsistent with international convention, custom, and *jus cogens*. Under the non-discrimination principle, any state, including military forces of a foreign state, may not treat domestic efforts to restore environmental degradation differently from the efforts to do so abroad.³⁶¹

Jus cogens is defined as a set of non-derogable rules of international public policy.³⁶² Given their overriding importance, every state has a legal interest in upholding and protecting them.³⁶³ To elevate a certain norm to *jus cogens* status, it is required that it be: (1) general as opposed to regional in

355. *Arigo*, G.R. No. 206510 at 59.

356. See Chanbonpin, *supra* note 338, at 349-50.

357. See, e.g., Chanbonpin, *supra* note 338, at 349-50; & U.S. General Accounting Office, *Environmental Contamination: Cleanup Actions At Formerly Used Defense Sites 2*, GAO-01-557 (2001).

358. U.N. Charter, art. 8.

359. International Covenant on Civil and Political Rights, art. 26, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

360. Universal Declaration of Human Rights, art. 7, *adopted* Dec. 10, 1948, 590 U.N.T.S. 8547 [hereinafter UDHR].

361. See Chanbonpin, *supra* note 338, at 352.

362. See *Siderman de Blake v. Republic of Argentina*, 965 F. 2d 699, 714 (9th Cir. 1992) (U.S.).

363. *Id.*

application;³⁶⁴ (2) accepted and recognized by the international community as a whole;³⁶⁵ and (3) unaccommodating of any derogation.³⁶⁶

In this regard, *Arigo* submitted that recent international legal developments point to the fact that the protection of the environment, as well as the related right of enjoyment of a healthy environment, could now be considered as a *jus cogens* norm for the following reasons:

First, there is no doubt that various authorities in international law convey the *jus cogens* status of environmental protection. They hinge their conclusion primarily on the recognition that the right to a balanced and healthful environment is a part and parcel of the most important set of norms recognized all over the world — human rights.³⁶⁷ Scholars note that environmental degradation can result in violations of various human rights recognized around the world, including the right to life, health, privacy and family life, adequate standard of living, religion, and culture.³⁶⁸ For example, Louis Henkin hinged the importance of protecting the environment through an emphasis on the basic necessity that is human rights, to wit —

Human rights are not some abstract, inchoate [‘good;’] they are defined, particular claims listed in international instruments such as the [U.N.’s] Universal Declaration of Human Rights and the major covenants and conventions. They are those benefits deemed essential for individual well-being, dignity, and fulfillment, and that reflect a common sense of justice, fairness, and decency. [No longer are human rights regarded as grounded in or justified by utilitarianism,] natural law[,] ... social contract, or any other political theory ... [but] are derived from accepted principles, or are required by accepted ends] — [societal ends such as peace and justice; individual ends such as human dignity, happiness, [and] fulfillment. [Like the fundamental rights guaranteed by the U.S. Constitution, these rights are] inalienable and imprescriptible; they cannot be transferred, forfeited, or waived; they cannot be lost by having been usurped, or by one’s failure to exercise or assert them.³⁶⁹

Various tribunals at the international, regional, and domestic levels have “taken an ecologically literate approach to their respective human rights instruments, in order to protect basic human rights from state-sponsored

364. *Siderman*, 965 F. 2d at 715.

365. *Id.*

366. *Id.*

367. *Arigo*, G.R. No. 206510 at 60.

368. *Id.*

369. See LOUIS HENKIN, *THE AGE OF RIGHTS* (1990).

environmental harm.”³⁷⁰ In the case of *Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*,³⁷¹ it was held that existing human rights may be violated by adverse environmental conditions.³⁷² The idea is that “damage to the environment can impair and undermine all the human rights spoken of in the [UDHR] and other human rights instruments.”³⁷³

Second, all the elements for elevating a norm to a *jus cogens* norm is present in the norm of environmental protection. That the protection of the environment is one of the primary responsibilities of the international community is accepted worldwide and is not confined to a certain area or region of the globe. In fact, various treaties and international instruments, like the U.N. Convention on Desertification,³⁷⁴ the U.N. Framework Convention on Climate Change,³⁷⁵ and the Convention on Biological Diversity,³⁷⁶ clearly spell this out.³⁷⁷ It is also included in the Stockholm, Rio, and Copenhagen Declarations as its main principles to achieve sustainable development. Similarly, the North American Free Trade Agreement’s,³⁷⁸ the WTO’s,³⁷⁹ and the European Union’s³⁸⁰ economic

370. Nickie Vlavianos, *The Intersection of Human Rights Law and Environmental Law*, Address at The Symposium on Environment in the Courtroom: Key Environmental Concepts and the Unique Nature of Environmental Damage at the University of Calgary (Mar. 23–24, 2012) (transcript available at http://cirl.ca/system/files/Nickie_Vlavianos-EN.pdf (last accessed Dec. 2, 2013)).

371. *Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment, (Sep. 25, 1997), available at <http://www.icj-cij.org/docket/files/92/7375.pdf> (last accessed Dec. 2, 2013).

372. *Id.* ¶ 140.

373. *Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*, Separate Opinion of Judge Weeramantry, 92 (Sep. 25, 1997), available at <http://www.icj-cij.org/docket/files/92/7383.pdf> (last accessed Dec. 2, 2013).

374. U.N. Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, *adopted* June 17, 1994, 1494 U.N.T.S. 3.

375. U.N. Framework Convention on Climate Change, *adopted* May 9, 1992, 1771 U.N.T.S. 107 [hereinafter UNFCCC].

376. U.N. Convention on Biological Diversity, *adopted* May 5–11, 1992, 1760 U.N.T.S. 79.

377. DAVID HUNTER, ET AL., *INTERNATIONAL ENVIRONMENTAL LAW AND POLICY* 306 (2d. ed. 2002).

378. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289.

development agreements, and the European Convention³⁸¹ and the ICCPR,³⁸² which has been ratified by most countries, hold firm the importance of the same norm of sustainable development. Almost all states have, in a way or another, shown acceptance of the importance of the protection of the environment.

Third, the protection of the environment is also recognized by the international community as a whole. As intimated, the recognition of the norm worldwide not only indicates its broad scope but also its broad acceptance. To further emphasize the point, the ratification by almost all states of the world of the ICCPR³⁸³ is demonstrable of the fact that the protection of the environment is so encompassing in state acceptance. The U.N. Human Rights Committee has indicated that environmental damage is “a violation of the right to life contained in Article 6(1) of the [ICCPR].”³⁸⁴ There is scholarship supportive of the view that

[t]he Human Right to a Healthy Environment is explicitly contained in the Inter-American and African Charters, as well as in the constitution of over 50 countries worldwide. Whether it is based on treaties, CIL, or ‘basic principles[,]’ the obligation of the international community to the environment is today clearly spelled out and enforceable through international tribunals. For example, the Lhaka Honhat Amid Curiae Brief recognized the rights of the indigenous peoples of Argentina to [a]n environment that supports physical and spiritual well[-]being and development.³⁸⁵

Finally, it is generally-accepted that there could be no derogation of the norm of environmental protection. Various authorities support this. In a

379. World Trade Organization Official Website, What is the WTO?, *available at* http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm (last accessed Dec. 2, 2013).

380. European Union Official Website, How the EU works, *available at* http://europa.eu/about-eu/index_en.htm (last accessed Dec. 2, 2013).

381. The European Convention Official Website, Introduction, *available at* <http://european-convention.eu.int/EN/enjeux/enjeux2352.html?lang=EN> (last accessed Dec. 2, 2013).

382. ICCPR, *supra* note 359, art. 1.

383. See U.N. Treaty Collection Official Website, Status of the ICCPR, *available at* http://treaties.un.org/pages/ShowMTDSGDetails.aspx?src=UNTSOnline&tAbid=1&mtdsg_no=IV-4&chapter=4&lang=en#Participants (last accessed Dec. 2, 2013).

384. See ICCPR, *supra* note 359, art. 6.

385. HUNTER, *supra* note 377, at 306.

separate opinion to the *Gebecikovo* case, Judge Weeramantry, the Vice President of the ICJ, expounded on the legal basis for sustainable development as a general principle of international law.³⁸⁶ In the process, he concludes that environmental protection is a universal *erga omnes* legal norm that is both customary international law as well as a general principle of law per se.³⁸⁷ In *Gebecikovo*, ostensibly to have been decided upon the merits of the treaty governing the building of power plants along the Danube, as well as by international customary law, the ICJ held that the right to development must be balanced with the right to environmental protection by the principle of sustainable development. Even in the absence of a specific treaty provision, the concept of sustainable development has become a legal principle that is “an integral principle of modern international law.”³⁸⁸

The Stockholm Declaration provides that freedom, equality, and environmental quality are *erga omnes* fundamental freedoms and universal human rights.³⁸⁹ Among the relevant Principles of the Stockholm Declaration are:

Principle 1:

Man has the fundamental right to freedom, equality[,] and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations. In this respect, policies promoting or perpetuating apartheid, racial segregation, discrimination, colonial and other forms of oppression[,] and foreign domination stand condemned and must be eliminated.

Principle 11:

The environmental policies of all States should enhance and not adversely affect the present or future development potential of developing countries, nor should they hamper the attainment of better living conditions for all, and appropriate steps should be taken by States and international organizations with a view to reaching agreement on meeting the possible national and international economic consequences resulting from the application of environmental measures.

Principle 22:

386. See *Gabcikovo-Nagymaros Project*, Separate Opinion of Judge Weeramantry, at 88.

387. *Id.* at 117.

388. HUNTER, *supra* note 377, at 306.

389. Stockholm Declaration, *supra* note 340, ¶ 17.

States shall cooperate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction.³⁹⁰

The Stockholm Declaration is considered by international legal experts as customary international law applicable to all states.³⁹¹ If the Guardian officials were to invoke the VFA in ways that would immunize themselves, this interpretation would amount to impermissible and unprincipled differential treatment between and among developed and developing nations,³⁹² especially when under the German Supplemental Agreement, the more exacting rules of German environmental law will apply to all U.S. military activity on its bases in Germany.³⁹³ This is stated in Article 53, Paragraph 1 of the U.S.' Status of Forces Agreement (SOFA) with Germany.³⁹⁴ The U.S. SOFA with Germany indicates disparate and unprincipled differential treatment in environmental issues between and among the Philippines and Germany in a manner that is inconsistent with the principle of nondiscrimination.³⁹⁵ Under Article 2 of the UDHR, the principle of non-discrimination entitles all subjects of international law to —

[A]ll the rights and freedoms set forth in [the UDHR], without distinction of any kind[.] ... Furthermore, no distinction shall be made on the basis of the political, jurisdictional[.] or international status of the country or

390. *Id.* at ¶¶ 1, 11, & 22.

391. *Arigo*, G.R. No. 206510 at 63.

392. *Id.*

393. Agreement to Supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces with respect to Foreign Force stationed in the Federal Republic of Germany, *opened for signature* Aug. 3, 1959, 481 U.N.T.S. 330 (entered into force July 1, 1963, in accordance with Article 83) [hereinafter SOFA].

394. *Id.* art. 53, ¶ 1. This Article provides that —

(1) Within accommodation made available for its exclusive use, a force or a civilian component may take all the measures necessary for the satisfactory fulfilment of its defence responsibilities. Within such accommodation, the force may apply its own regulations in the fields of public safety and order where such regulations prescribe standards equal to or higher than those prescribed in German law.

Id.

395. *Arigo*, G.R. No. 206510 at 64.

territory to which a person belongs, whether it be independent, trust, non-self-governing[,] or under any other limitation of sovereignty.³⁹⁶

Is the UDHR binding on the Seventh Fleet of the U.S. Navy?

Because each state under international law has the duty to apply environmental law even-handedly and without discrimination on the basis of citizenship, national origin, or state of development, any theory raised to the effect that the VFA immunizes foreign troops from environmental reparation, will be a theory that is constitutionally impermissible within the meaning of equal protection under Section 1 of the Philippine Bill of Rights.³⁹⁷

Case law is replete and requires this finding. The Court has held that granting higher pay for foreign hires as opposed to Philippine nationals of equal rank is unconstitutional.³⁹⁸ Jurisprudence likewise shows that discriminatory treatment between and among overseas workers vis-à-vis non-overseas workers violates equal protection and fundamental rights.³⁹⁹ As a matter of fact, equal protection within the meaning of the Philippine Bill of Rights, incorporating customary international environmental law, may require the Guardian and her crew to make a restoration and compensation according to a threshold no less severe than the reparations which the U.S. applied within its own country, or in other countries without regard to citizenship or the state of development.⁴⁰⁰ The valuation methods in the Port Royal grounding in Hawaii in 2009 may provide a good lead for baseline measures.⁴⁰¹

Myers held that California law was applicable, and state precedent created direct liability for the Navy's non-delegable duty of reasonable care.⁴⁰² The Navy in that case conceded that the project involved "peculiar risk," so it was foreseeable that persons exposed to thallium could be harmed.⁴⁰³ Moreover, the Navy never took steps to review the air-monitoring samples

396. UDHR, *supra* note 360, art. 2.

397. *Arigo*, G.R. No. 206510 at 64-65.

398. *See International School Alliance of Educators v. Quisumbing*, 333 SCRA 13 (2000).

399. *See Serrano v. Gallant Maritime Service*, 582 SCRA 254 (2009).

400. *Arigo*, G.R. No. 206510 at 65.

401. *Id.*

402. *Myers*, 652 F.3d at 1034.

403. *Id.* at 1035.

or to ensure the contractor's compliance with safety protocol.⁴⁰⁴ Thus, the *Myers* Court found that the Navy did not act reasonably and remanded the case to determine damages.⁴⁰⁵ Discriminatory treatment on the basis of overseas workmanship is a matter involving a fundamental right under equal protection.⁴⁰⁶ *Biraogo v. Truth Commission*⁴⁰⁷ held that an executive order creating a "truth commission" to investigate graft and corruption committed in one administration and not in other administrations is a violation of equal protection.⁴⁰⁸ A statute, initially valid, can become subsequently unconstitutional on the ground that its continued operation would violate equal protection.⁴⁰⁹ Eminent jurists are also of the opinion that equal protection does not merely prohibit the state from passing discriminatory laws — it commands the state to pass laws which positively promote equality or reduce existing inequalities.⁴¹⁰

Because the Guardian officers are required under equal protection to make a restoration and compensation according to a threshold no less severe than those which they apply within their own country, or in other countries, without regard to citizenship or state of development, then, as *Arigo* argues, any administrative or executive determination below this threshold is constitutionally suspect.

The Petitioners in *Arigo* stressed that the latest TMO announcements seeking to impose upon Respondents fines totaling ₱58 million (\$1.4 million), for violations under the TRNP Act of 2009 carry only presumptive or probative weight under the general corpus of administrative law. Administrative decisions are reviewable by courts on certain grounds.⁴¹¹ The *Arigo* Petitioners underscored the doctrine that administrative determinations do not foreclose judicial determination according to better valuation methods, or methods in light of internationally accepted best practices. In

404. *Id.* at 1036–37.

405. *Id.* at 1038.

406. *Serrano*, 582 SCRA at 299.

407. *Biraogo v. Philippine Truth Commission* of 2010, 637 SCRA 78 (2010).

408. *Id.*

409. *See* *Central Bank Employees v. Banko Sentral*, 446 SCRA 299 (2004). *See generally* PHIL. CONST. art. 3, § 1.

410. *See* JOAQUIN G. BERNAS, *THE 1987 PHILIPPINE CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMPREHENSIVE REVIEWER* 39 (2010 ed.).

411. *See, e.g.,* *Antonio v. Estrella*, 156 SCRA 68 (1987); *Atlas Consolidated Mining v. Factoran, Jr.*, 154 SCRA 49 (1987); & *Timbancaya v. Vicente*, 9 SCRA 853 (1963).

the event that Respondents do proceed with final valuation, payment or settlement of both fines and costs of restoration that fall below a valuation dictated by international best practices, if not comparative state practice, makes such constitutionally impermissible under equal protection and *jus cogens* (nondiscrimination principle).

After the *Myers* court found that the discretionary function exception could not be raised by the government, the court then proceeded to analyze the claim under the standard of reasonableness.⁴¹² In particular, the ninth Circuit analyzed the reasonableness of the U.S. Navy's remediation activity.⁴¹³ Because a ₱58 million (\$1.4 million) administrative determination is considerably more severe to the Republic of the Philippines than prior valuations (such as the values in the Port Royal 2009 grounding in Hawaii), then equal protection and *jus cogens* will require a finding that ₱58 million is constitutionally impermissible.⁴¹⁴

The *Arigo* Petitioners argued that because the Guardian officials deployed numerous vessels in the flurry of activity in the salvage and post-salvage phases for purpose of cleaning up any waste, fuel, oil, or other toxic substances which endanger the natural reef community of TRNP, and because the *Arigo* Respondents have barred petitioners and their agents from supervising, inspecting, conducting interviews, or otherwise accessing the damaged site, it is plausible for waste, littering, and oil leakage to have occurred in all phases, including the process of cutting up the Guardian, thus placing Respondents in violation of Section 23 of the TRNP Act of 2009, which prohibits the dumping of waste.⁴¹⁵

No less than the following ships were present from 17 January 2013 onward:

- (1) USS Guardian (MCM-5);
- (2) MV C-Champion;
- (3) Destroyer USS Mustin (DDG 89);
- (4) Malaysian tug Vos Apollo;
- (5) SMIT Singapore, contracted by the U.S. Navy;

⁴¹² *Id.* at 1041.

⁴¹³ *Id.*

⁴¹⁴ *Arigo*, G.R. No. 206510 at 68.

⁴¹⁵ *Id.* at 73.

- (6) Heavy lift ship-borne crane M/V Jascon 25 from Malaysia;
- (7) SMIT Borneo from Singapore;
- (8) Barge S-7000, towed by Malaysian salvage vessel *Trabajador 1*;
- (9) Singaporean salvage team;
- (10) M/V Jascon 25, contracted by the U.S. Navy;
- (11) USNS *Safeguard* (T-ARS 50);
- (12) *The Intrepid*;
- (13) *The Archon Tide*;
- (14) Several PCG vessels; and
- (15) Several Philippine Navy vessels.⁴¹⁶

Section 23 of Republic Act 10067 states that —

Section 23. *Dumping of Waste and Littering*. [—] It shall be unlawful for any person or entity to dump waste inside the TRNP. It shall likewise be unlawful to clean and change oil of vessels within the TRNP.

Violation of this provision shall be punishable by imprisonment of one (1) year to three (3) years, and fine of not less than [f]ifty thousand pesos (₱50,000.00). The TPAMB shall impose an administrative fine of not less than [o]ne hundred thousand pesos (₱100,000.00) and not more than [t]hree hundred thousand pesos (₱300,000.00), and order the violator to clean up the waste or pay for the clean-up thereof.

It shall likewise be unlawful to litter within the TRNP.

Violation of this provision shall be penalized by the TPAMB with administrative fine from [f]ifty thousand pesos (₱50,000.00) to [o]ne hundred thousand pesos (₱100,000.00).⁴¹⁷

Because of heightened ship activity involving no less than 15 heavy vessels in and around the damaged area of TRNP from 17 January 2013 onward, which activities include the cutting, dismantling, drilling, towing, salvaging, and operation of mechanized equipment, most of which cause trauma to marine species in TRNP, then the Precautionary Principle would require the issuance of the Writ of *Kalikasan* and a TEPO.⁴¹⁸ Or so *Arigo* argues.

416. *Id.*

417. TRNP Act of 2009, § 23.

418. *Arigo*, G.R. No. 206510 at 74.

The impact of military sonar upon cetaceans is the source of a large amount of scholarship, because noise pollution from military sonar has a strong linkage to whale strandings.⁴¹⁹ Scholarship and research show that the impacts of military sonar upon oceanic species can be directly linked to strandings of marine mammals, and a U.S. Navy report concluded that the U.S. Navy's use of tactical mid-range frequency sonar was the "most plausible source of this acoustic or impulse trauma."⁴²⁰

If mere use of sonar and sonar waves can cause marine life trauma, it would not be implausible for the *Arigo* Petitioners to claim that the Guardian's ship activities, including the cutting, dismantling, drilling, demolishing, towing, salvaging, and operation of mechanized equipment, done either by their own fleet or their private contractors, have caused environmental and marine damage of such magnitude as to require the issuance of the Writ of *Kalikasan* and a TEPO until final resolution of the instant case.⁴²¹

Assuming without conceding that the foregoing scientific studies lack full scientific certainty, still the Precautionary Principle will require a finding that claims invoking the constitutional right of the people to a balanced and healthful ecology shall be given the benefit of the doubt.⁴²²

419. See, e.g., Alexander Gillespie, *The Limits of International Environmental Law: Military Necessity v. Conservation*, 23 COLO. J. INT'L ENVTL. L. & POL'Y 1, 9 (2012); & Damian Carrington, *Whales flee from military sonar leading to mass strandings, research shows*, THE GUARDIAN, July 3, 2013, available at <http://www.theguardian.com/environment/2013/jul/03/whales-flee-military-sonar-strandings> (last accessed Dec. 2, 2013).

420. See U.S. DEPARTMENT OF COMMERCE, NATIONAL MARINE FISHERIES SERVICE, JOINT INTERIM REPORT BAHAMAS MARINE MAMMAL STRANDING EVENT OF 15-16 MARCH 2000 47 (2001).

421. *Arigo*, G.R. No. 206510 at 75.

422. RULES OF PROCEDURE FOR ENVIRONMENTAL CASES, rule 20, §§ 1 & 2. These Sections state —

Section 1. *Applicability*. — When there is a lack of full scientific certainty in establishing a causal link between human activity and environmental effect, the court shall apply the precautionary principle in resolving the case before it.

The constitutional right of the people to a balanced and healthful ecology shall be given the benefit of the doubt.

Section 2. *Standards for application*. — In applying the precautionary principle, the following factors, among others, may be considered: (1) threats to human life or health; (2) inequity to present or future

III. CONCLUSION

In *Nicolas*, the Court effectively upheld the trial court's conviction of Lance Corporal Smith, U.S.A.F., of the crime of rape, and in its dispositive portion "ordered" the Secretary of Foreign Affairs "to forthwith negotiate with the [U.S.] representatives for the appropriate agreement on detention facilities under Philippine authorities as provided in [Section] 10, [Article] V of the VFA."⁴²³ Petitioners in *Arigo* argued that if the Court were to set forth judicially supervised guidelines under the *Kalikasan* rules and the VFA, then the Court will be breaking ground in progressive state practices concerning the environment. For during the lifetime of and in the aftermath of the Military Bases Agreement of 1947, history would show that the presence of U.S. troops in the Philippines has posed a threat to human and environmental health; because of this fact, there arises a need for the Honorable Court to check U.S. military troops, if not to prevent the *Balikatan* joint command from committing further transboundary environmental harm.

When U.S. troops left the Philippines in the early 1990s after the Military Bases Agreement of 1947 expired in 1991, the U.S. Department of Defense relinquished responsibility for the environmental cleanup task resulting from its presence at Subic Bay, Olongapo City (Naval Facility) and Clark, Pampanga (Air Force Base).⁴²⁴ During this time, the U.S. military had discharged millions of gallons of untreated sewage into the ground and water in and around these areas, with harmful chemicals such as lead, mercury, and pesticides seeping into the soil and water.⁴²⁵

As a matter of fact, in 1992, the U.S. General Accounting Office (GAO) estimated the clean-up of former U.S. naval bases would cost more than \$12-15 million per site, and, while U.S. Air Force and Navy officials identified significant environmental damage at both bases, the GAO report concluded that "the current basing agreement does not impose any well-defined environmental responsibility on the [U.S.] for environmental cleanup and restoration."⁴²⁶

generations; or (3) prejudice to the environment without legal consideration of the environmental rights of those affected.

Id.

423. See *Nicolas*, 578 SCRA at 468.

424. GAO Philippines Report, *supra* note 163, at 27-28.

425. *Id.* at 27.

426. GAO Philippines Report, *supra* note 163, at 5.

Because reef damage may be exacerbated by intervening human events such as coral reef destruction or toxic waste pollution from naval maneuverings and live fire exercises, the Precautionary Principle would require the courts of law to issue an Environmental Protection Order within the meaning of Section 4 (d), Rule 1,⁴²⁷ and Section 8, Rule 2,⁴²⁸ of the Rules.

Section 4 (d), Rule 1 of the Rules provides: “Environmental protection order (EPO) refers to an order issued by the court directing or enjoining any person or government agency to perform or desist from performing an act in order to protect, preserve[,] or rehabilitate the environment.”⁴²⁹

The 29th Philippine-U.S. *Balikatan* annual joint military exercises opened on 5 April 2013. In the past, the U.S. has not been made liable for environmental damage and degradation that have resulted from the annual war games, such as coral reef destruction or toxic waste pollution from naval maneuverings, gas leakage, and live fire exercises. In fact, current U.S. Department of Defense policy may exempt cooperative efforts with other sovereign nations from the regulation of U.S. environmental laws.⁴³⁰

Petitioners thus implore the Honorable Court to issue the Writ to preempt this policy choice to the extent permissible under the Philippine Constitution. If only to underscore a fact, public health risks associated with the environmental contamination in and around former U.S. military bases in the Philippines continue to plague the surrounding communities. In the aftermath of the Mount Pinatubo eruption in 1991, wherein an estimated 20,000 families were relocated to then recently decommissioned Clark Airbase, hazardous substances and toxins in drinking and bathing water caused serious health issues among relocated residents, including cancer, respiratory problems, skin disease, and birth complications (i.e. miscarriages, still births, and birth defects).⁴³¹

At bottom, *Arigo* is praying for the following reliefs:

- (1) Absolute restriction of joint and unilateral military activity in sensitive areas where marine species are particularly abundant[;]

427. RULES OF PROCEDURE FOR ENVIRONMENTAL CASES, rule 1, § 4 (d).

428. *Id.* rule 1, § 8.

429. *Id.* rule 1, § 4 (d).

430. Environmental Effects Abroad of Major DOD Actions, *supra* note 171.

431. Kiminori, *supra* note 168.

- (2) Reasonable safeguards for TRNP marine species, including the degree of endangerment of the species at hand, with critically endangered species given higher standards[;]
- (3) Base standards where mitigation measures are required on every proposed military activity, according to stakeholder analysis and the 'least-harm' rule[;]
- (4) Mandated 24-kilometer safety zone reckoned from any blast or blast radius[;]
- (5) Utilize lookouts to monitor marine biological activity[;]
- (6) Daily or weekly publication through official sources of military drills, their location, purposes, precautionary measures, and responsive measures in case of environmental damage[; and]
- (7) Prohibit military activities if environmental damage under the Precautionary Principle is excessive relative to the advantages gained by military action.⁴³²

The foregoing principles and standards have been deployed in prior military exercises by the Respondents.⁴³³

The TRNP budget is very modest. For 2013, the total budget to implement the conservation programs in Tubbataha, as reflected in the approved Work and Financial Plan, is ₱18,348,996 (or around \$450,000).⁴³⁴ Around 43% of the budget comes from sources such as donations, grants, etc., while 12% is unfunded.⁴³⁵ Only 45% comes from the Tubbataha Trust Fund, which is the revenue generated from tourism operations.⁴³⁶ Because the main driver of tourism revenue comes from diving, and because diving season has ended (mid-June 2013), the TRNP and TMO do not expect any new significant inflow of funds that would support its 2013 budgeted ordinary operations, much less any inflow of funds that would support extraordinary expenses caused by the Guardian's grounding sans payment by Respondents for her grounding.

The 2013 budget is insufficient to address all necessary rehabilitation efforts, considering the damages wrought by the Guardian grounding in

432. *Arigo*, G.R. No. 206510 at 86.

433. *See, e.g.*, *NRDC v. Evans*, 316 F.3d 904, (9th Cir. 2003) (U.S.); & *NRDC v. Navy*, 857 F. Supp. 734, (C.D. Cal. 1994) (U.S.).

434. E-mail between Petitioner CEC-Philippines and TMO (May 2013) (on file with Author).

435. *Id.*

436. *Id.*

addition to the general day-to-day park administration and conservation efforts geared towards continuity of the Reef.⁴³⁷

Additionally, there were unforeseen externalities that dramatically reduced the yearly budget for conservation efforts even further. On 8 April 2013, the Chinese fishing vessel *Min-Yong Lu* was stranded on the TRNP and damaged 3,902 square meters of coral, according to official pronouncements of the TMO.⁴³⁸ The Chinese crewmen from the wrecked vessel are being held on charges of poaching and attempted bribery and may face imprisonment, fines, or both.⁴³⁹ The TMO states that the additional costs incurred from this incident have exceeded ₱3.9 Million (or around \$100,000).⁴⁴⁰ Moreover, the TMO incurred and continue to incur extraordinary legal expenses in prosecuting the Chinese crewmen before the local criminal courts.⁴⁴¹

If the laws of the home state of the *Guardian* would no doubt allow for environmental claims to be processed in due course by the very residents of the U.S., against the U.S., will not then a claim of a fellow sovereign state such as the Philippines ought to be accorded the same, if not greater, weight?

Arigo is still pending resolution in the Supreme Court. It remains to be seen whether our Rules on Environmental Procedure can deliver the very just and equitable environmental rehabilitation measures which can strike the law of nations and the law of peoples as something fair and reasonable.

437. This is supported by Petitioner Atty. Edsel C. F. Tupaz's personal interviews with the TMO staff on May 20 to 25, 2013. The frontline work of day-to-day park administration lies with the marine park rangers. This work includes regular patrols around the TRNP; scientific research and monitoring; briefing visitors during the dive season and off-season special visitors; surface and underwater cleanups; and reporting and responding to unusual incidents, like crown-of-thorns starfish infestations. See TRNP Official Website, Marine Park Rangers, available at http://tubbataha-reef.org/wp/management#marine_park_rangers (last accessed Dec. 2, 2013).

438. Agence France-Presse, *Chinese boat wrecked 4,000 sq m of reef, says Tubbataha mgmt*, PHIL. DAILY INQ., May 5, 2013, available at <http://globalnation.inquirer.net/73607/chinese-boat-wrecked-4000-sq-m-of-reef-says-tubbataha-mgmt> (last accessed Dec. 2, 2013).

439. *Id.*

440. E-mail between CEC-Philippines and TMO, *supra* note 434.

441. Interview with the TMO staff (May 20-25, 2013).