

Okinawa Dugong v. Rumsfeld: Extraterritorial Operation of the U.S. Military and Wildlife Protection Under the National Historic Preservation Act

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INTRODUCTION

The U.S. military presence in Okinawa, Japan, raises important questions about the extraterritorial application of U.S. environmental laws. This paper explores whether the National Historic Preservation Act (NHPA) can stop environmentally destructive acts of the U.S. military overseas. The discussion will focus on the U.S. military's planned development in Okinawa, Japan and the threats that this new development project poses to an endangered species, the Dugong. Section II provides the background for the current environmental conflict in Okinawa associated with the presence of the U.S. military. Section III describes the legal arguments raised by grassroots organizations to protect the Dugongs from the military base construction. Section IV analyzes the legal arguments for protecting the Dugongs under the NHPA. This paper concludes that NHPA can and should be applied extraterritorially to halt the U.S. military base construction in Okinawa, Japan.

I. BACKGROUND: U.S. MILITARY PRESENCE IN OKINAWA, JAPAN

Despite being a beautiful subtropical island with gorgeous beaches, Okinawa suffers from a variety of social and environmental problems. Many of these problems are directly and indirectly related to the presence of the U.S. military. Therefore, this tension can only be understood in the context of the history between the U.S. military and the people of Okinawa.

A. U.S. Military Bases Abroad

As part of the United States' global strategy, large portions of the U.S. armed forces are deployed overseas. Long after the Cold War, vast numbers of military personnel remain stationed as "guests" in several allied countries. According to the data released by the U.S. Department of Defense on June 30, 2004,¹ the U.S. maintains 1,431,813 active military personnel, with 270,753 of them stationed overseas (not including those in or around Iraq).² Germany is the top "hosting nation" with 76,239 soldiers, followed by South Korea and Japan.³ In total, there are 94,755 personnel stationed in the East Asia and Pacific regions, including: 40,495 in South Korea, 37,338 in Japan, and 15,890 afloat on

¹ DEPARTMENT OF DEFENSE, ACTIVE DUTY MILITARY PERSONNEL STRENGTH BY REGIONAL AREA AND BY COUNTRY (June 30, 2004), available at <http://www.dior.whs.mil/mm/mid/M05/hst0406.pdf> (last visited Nov. 20, 2004).

² *Id.*

³ *Id.*

naval vessels – of which most have home ports in Japan.⁴

To legally station U.S. soldiers on foreign soil, the United States has negotiated several bilateral and multilateral treaties.⁵ A prime example is the Security Treaty made soon after WWII between the U.S. and Japan, whereby the United States “is granted the use by its land, air and naval forces of facilities and areas in Japan.”⁶ In this Security Treaty some issues are expressly addressed while other important matters are left unresolved, such as dealing with environmental problems related to U.S. military activities.⁷ And because of the complicated legal status of military bases, some environmental issues fall into the gap of jurisdictions between Japan and the U.S.

B. Military Presence in Japan

In theory, Japan has a pacifist constitution denouncing armament.⁸ Many citizens, especially of the left, oppose both Japan’s own military buildup as well as U.S. military presence.⁹ Despite constitutional restraint and opposition from the left, Japanese political leaders, particularly those affiliated with the conservative Liberal Democratic Party (LDP), promote national security through U.S. military presence.¹⁰

Some historians claim this U.S. “aid” allowed Japan to focus itself on economic development while taking a “free-ride” by way of the U.S.–Japan Security Treaty.¹¹ But, increased security did not come without a price. Deployment of the U.S. military in Japan caused a variety of problems such as environmental pollution, accidents caused by military activities, and crimes committed by soldiers.

Another problem created by the U.S. military presence in Japan is determining how to allocate the financial burdens. The Status of Forces Agreement (SOFA), implementing the Security Treaty, states that Japan is to “furnish... without cost to the United States” facilities and areas for the use of

⁴ *Id.*

⁵ SAM C. SARKESIAN ET AL., *U.S. NATIONAL SECURITY: POLICYMAKERS, PROCESSES, AND POLITICS* 158 (1989).

⁶ Treaty of Mutual Cooperation and Security, Jan. 19, 1960, U.S.-Japan, art. 6, 11 U.S.T. 1632.

⁷ See MILITARY BASE AFFAIRS OFFICE, OKINAWA PREFECTURAL GOV’T, *U.S. MILITARY ISSUES IN OKINAWA 18-19* (2004) [hereinafter U.S. MILITARY ISSUES], available at [http://www3.pref.okinawa.jp/site/contents/attach/7005/pamphlet\(English\).pdf](http://www3.pref.okinawa.jp/site/contents/attach/7005/pamphlet(English).pdf) (last visited Nov. 20, 2004).

⁸ KENPO [Constitution], ch. 2, art. 9 (Japan).

⁹ See, e.g., ANTHONY DIFILIPPO, *THE CHALLENGES OF THE U.S.-JAPAN MILITARY ARRANGEMENT: COMPETING SECURITY TRANSITIONS IN A CHANGING INTERNATIONAL ENVIRONMENT* 115-16 (2002).

¹⁰ See *id.* at 39.

¹¹ ROBERT F. REED, *THE US-JAPAN ALLIANCE: SHARING THE BURDEN OF DEFENSE I* (1983).

U.S. armed forces in Japan.¹² In turn, the U.S. legally agreed to bear “without cost to Japan all expenditures incident to the maintenance of the United States armed forces in Japan.”¹³ But since the 70’s, the United States has demanded Japan, now an economic giant, to carry its “fair share of the burden.”¹⁴ To avoid being labeled as “free-riders,” Japan has provided the so-called “*omoiyari yosan*” (sympathy budget) to the U.S. forces since 1978.¹⁵

Contrary to the agreement in the SOFA, as part of the sympathy budget, Japan currently contributes \$4.25 billion a year which covers over half of the total annual cost of the U.S. military in Japan.¹⁶ U.S. military presence operated as a security shield during the Cold War period. But with the Cold War over, many Japanese now question the benefit of hosting the U.S. military. Japanese citizens are critical of their government paying billions of yen to the United States, who use Japan as a hub for sending troops to the Persian Gulf, Afghanistan, Iraq, and other remote regions.¹⁷

C. The “Okinawa Crisis”

Problems relating to U.S. military deployment in Japan are most severe in Okinawa because U.S. military bases are disproportionately concentrated on this island. Okinawa Island is the main island of the Ryukyu, which consists of the southern tail of the Japanese Archipelago. Located between the Japanese mainland, Taiwan, China, the Korean Peninsula, and the Philippines, the U.S. military refers to Okinawa as the “keystone of the Pacific” due to its strategic importance.¹⁸ The Ryukyu Islands are also important for their rich ecological and biological environment.¹⁹ These subtropical islands separated from the

¹² Agreement Under Article VI of the Treaty of Mutual Cooperation and Security Between the United States of America and Japan: Facilities and Areas and the Status of United States Armed Forces in Japan (commonly called U.S. “Status of Forces Agreement”), Jan. 19, 1960, US-Japan, art. XXIV(2), 11 U.S.T. 1652 [hereinafter SOFA].

¹³ *Id.* art. XXIV(1).

¹⁴ See, e.g., REED, *supra* note 11, at 1-3.

¹⁵ See generally GLENN D. HOOK ET AL., JAPAN’S INTERNATIONAL RELATIONS: POLITICS, ECONOMICS, AND SECURITY 134 (2001).

¹⁶ Chalmers Johnson, *Three Rapes: The Status of Forces Agreement and Okinawa*, Japanese Policy Research Inst. Working Paper No. 97 (Jan. 2004), at <http://www.jpri.org/publications/workingpapers/wp97.html> (last visited Nov. 20, 2004).

¹⁷ See, e.g., SHINTARO ISHIHARA, THE JAPAN THAT CAN SAY NO 71-75 (Frank Baldwin trans., Simon & Schuster eds. 1991) (1989); see also Shunji Taoka, *Mamorareteiru nowa meishin da* [“We are Protected” is a Myth], ASAHI SHIMBUN WEEKLY AERA, Aug. 5, 2004, at 43.

¹⁸ E.g., U.S. Marine Corp., *Keystone of the Pacific*, at <http://www.okinawa.usmc.mil/About%20Okinawa/About%20Okinawa%20Page.html> (last visited Nov. 1, 2004).

¹⁹ See Gavan McCormack, *From the Sea that Divides to the Sea that Links: Contradictions of Ecological and Economic Development of Okinawa*, 10 CAPITALISM NATURE SOCIALISM 3 (1999), for an overview of Okinawa’s ecological values and problems in English.

continent about a million years ago creating many endemic species and a unique biodiversity.²⁰

Due to the strategic importance of the island, the people and environment of Okinawa suffer unfair burdens. Three-quarters of the U.S. military facilities in Japan are concentrated on Okinawa Prefecture, which consists only 0.6 % of the total land area of the entire country.²¹ In Okinawa Prefecture, approximately 23,687 hectares are used for U.S. military facilities, occupying 10.4% of the land.²² These bases occupy precious arable lands and impose limitations on the livelihoods of local residents by hampering Okinawa's internal development.

Two additional problems with U.S. bases in Okinawa are aircraft accidents and crimes committed by soldiers. From 1972, marking the end of U.S. occupation following World War II, to the end of 2003, Okinawa Prefecture Government recorded the following serious incidents: 275 aircraft accidents by the U.S. military, including 40 crashes; 5,269 criminal cases, including 540 serious crimes; and 977 assaults committed by U.S. servicemen.²³ Among the various crimes committed by U.S. personnel, the high number of sexual assaults is most disturbing to the locals. Moreover, the fact that U.S. military personnel enjoy quasi-extra judicial status by the Security Treaty makes it difficult for the Okinawan community to address these crimes.²⁴ Impudent excuses, such as the argument that the crime rate of U.S. servicemen in Okinawa is lower than the crime rate of servicemen on the U.S. mainland,²⁵ do not justify or erase the painful memories of these incidents.

Okinawans have continuously protested against U.S. military presence. In 1995, Japanese-American relations experienced the greatest crisis since the anti-Security Treaty struggle of 1960.²⁶ On September 4, 1995, three U.S. GIs abducted and raped a twelve-year-old Okinawan schoolgirl and abandoned her on a military beach.²⁷ Admiral Richard C. Macke, commander of U.S. military operations in the Pacific, exacerbated the situation by commenting that the

²⁰ See, e.g., Hidetoshi Ota, *Geographic Patterns of Endemism and Speciation in Amphibians and Reptiles of the Ryukyu Archipelago, Japan, with Special Reference to Their Paleogeographical Implications*, 40 RES. POPUL. ECOL. 189, 197-99 (1998).

²¹ U.S. MILITARY ISSUES, *supra* note 7, at 3-4.

²² *Id.* at 3.

²³ *Id.* at 8.

²⁴ See, e.g., *id.* at 20.

²⁵ See TED OSIUS, *THE U.S.-JAPAN SECURITY ALLIANCE: WHY IT MATTERS AND HOW TO STRENGTHEN IT* 56 (2002). *But see* Chalmers Johnson, *The 1995 Rape Incident and the Rekindling of Okinawan Protest Against the American Bases*, in *OKINAWA: COLD WAR ISLAND* 109, 114-15 (Chalmers Johnson ed., 1999).

²⁶ See *id.* at 118.

²⁷ See Andrew Pollack, *Rape Case in Japan Turns Harsh Light on U.S. Military*, N.Y. TIMES, Sept. 20, 1995, at A3.

soldiers were “absolutely stupid.... for the price they paid to rent the car [which they used for the crime], they could have had a girl.”²⁸

Expressing their smoldering resentments, Okinawan citizens protested vigorously against the U.S. military. Throughout the Okinawa prefecture, people young and old, liberal and conservative, from schoolchildren to politicians, gathered in rallies and demonstrations. One of the leading figures of the protest was Governor Ota of Okinawa, a well-known historian and anti-military liberal. Backed by the massive anti-base protest, Ota even went as far as refusing to sign land lease renewals for the U.S. bases.²⁹ To smooth over the situation, which was referred to as the “Okinawa crisis,” Washington and Tokyo created a joint task force called the Special Action Committee on Okinawa (SACO). SACO’s mission was to report to the Security Consultative Committee (SCC) with recommendations that when implemented, would “reduce the burden on the people of Okinawa and thereby strengthen the Japan-US alliance.”³⁰

After intensive studies, SACO issued its final report on December 2, 1996.³¹ The SCC endorsed the report on the same day. The main feature of the final report was a proposal to return 21% of the land used by the U.S. military back to Japan - including Futenma Air Station.³² The U.S. Marines operate the Futenma base as its major airfield. Unfortunately, the base’s uses are not well suited to its location, a densely populated neighborhood in central Okinawa.³³ For neighbors of Futenma Air Station, environmental pollution and noise are an inevitable reality. Aircraft-related accidents also pose a grave risk to the community and recently a helicopter crashed into a Japanese university campus adjacent to the base.³⁴

²⁸ *Fired Admiral Gives Public Apology*, CNN (Nov. 20, 1995), available at http://cgi.cnn.com/WORLD/9511/macke_speaks (last visited Nov. 20, 2004) (statement of Admiral Richard C. Macke at a, Nov. 17, 1995, press conference). The Admiral was forced into early retirement shortly after this undiplomatic comment.

²⁹ Eventually, Governor Ota lost an unprecedented lawsuit brought against him by the central government for refusing to sign the lease renewals. See *Prime Minister v. Governor of Okinawa*, 50 MINSHŪ 1952 (Sup. Ct. Grand Bench, Aug. 28, 1996) (Japan).

³⁰ SPECIAL ACTION COMMITTEE ON OKINAWA, THE SACO FINAL REPORT (Dec. 2, 1996), available at http://www.jda.go.jp/e/policy/SACO/saco_.htm (last visited Nov. 20, 2004) [hereinafter SACO FINAL REPORT]. See generally DiFILIPPO, *supra* note 9, at 36-42, for information on Okinawan crisis in the late 90’s and SACO’s recommendations.

³¹ SACO FINAL REPORT, *supra* note 30.

³² *Id.* (indicating that other recommendations included relocation of troops, reduction of noise by aircrafts and reduction in number of night flights).

³³ See U.S. MILITARY ISSUES, *supra* note 7, at 26.

³⁴ See, e.g., James Brook, *A Crash, and the Scent of Pizzatocracy, Anger Okinawa*, N.Y. TIMES, Sept. 13, 2004, at A4. The crash charred buildings but no civilians were hurt. *Id.* The U.S. military outraged the Japanese by closing the campus against the will of the university, and by resisting local authorities’ attempts to investigate the scene. *Id.*

Given the contentious nature of Futenma base, SACO's proposal to return this property to Japan was a rallying-point for Okinawans. For many residents, the proposal reflected a milestone in a longtime movement to reclaim their lands. But, while the final report garnered excitement from Okinawans, the celebration was short-lived because the proposal demanded the relocation of Futenma. What the Okinawans first perceived to be a victory was nothing more trading one evil for another.

D. Relocation of Futenma Base

The SACO report suggested the replacement of Futenma by either a floating or an anchored 1,500-meter-long, sea-based facility located slightly offshore of the eastern coast of Okinawa Island.³⁵ SACO also recommended the creation of a Futenma Implementation Group, a bilateral committee assigned to determine the relocation site and prepare an implementation plan for the relocation.³⁶ Despite strong local desire to reduce military bases in Okinawa, SACO was determined not to cut any of the U.S. military power on this island, which is the key to strategic dominance in the Asia-Pacific region.

SACO did not pinpoint the exact site of the proposed sea-based facility. However, there was speculation that a site offshore of Henoko, adjacent to Camp Schwab U.S. Marine Base, was at the top of the list.³⁷ Camp Schwab is one of the major U.S. military bases in Japan where live fire and amphibious training is conducted.³⁸ Henoko is also the location of a U.S. military ammunition depot.³⁹

In May 1997, only five months after release of the SACO report, the Japanese government undertook a survey in the shallow waters near Camp Schwab, signaling its intent to build off the shores of Henoko.⁴⁰ On September 29, 1997, the U.S. Department of Defense presented its "Operation Requirements and Concepts of Operations for MCAS Futenma Relocation, Okinawa, Japan,"

³⁵ SPECIAL ACTION COMMITTEE ON OKINAWA, THE SACO FINAL REPORT ON FUTENMA AIR STATION (AN INTEGRAL PART OF THE SACO FINAL REPORT) (Dec. 2, 1996), available at http://www.jda.go.jp/e/policy/SACO/futenma_.htm (last visited Nov. 20, 2004).

³⁶ *Id.*

³⁷ After its Interim Report in December 1996, SACO considered three options to relocate Futenma: moving to (1) Kadena Air Base, (2) Camp Schwab, or (3) a sea-based facility. Koichi Makishi, *SACO goi ni igi ari: shiryō ga akirakanishita shinjitsu: "kichi henkan" no nazo ni semaru [Objection to the SACO Agreement: Revealing the Truth of Return of the Bases from Documents]* 257 AGORA 58, 58-65 (2000). Analysts claim it was a fixed race to reinforce Camp Schwab. *Id.*

³⁸ U.S. MILITARY ISSUES, *supra* note 7, at 23.

³⁹ *Id.* at 28.

⁴⁰ See Masamichi Sebastian Inoue et al., *Okinawan Citizens, U.S. Bases, and the Dugong*, 29(4) BULL. OF CONCERNED ASIAN SCHOLARS 82, 83 (1997), available at http://www.bcasnet.org/campaigns/campaign2_fl.htm (last visited Nov. 20, 2004).

(hereinafter "OR") to the Japanese government.⁴¹ The OR indicates the sea-based facility shall be built off Henoko.⁴² Specifically, the OR required the sea-based facility be built for a 40-year operational life and 200-year fatigue life, with a minimum size requirement of 1500 meters by 800 meters.⁴³

In December 1997, the City of Nago, which includes the hamlet of Henoko, held a non-binding referendum.⁴⁴ The central government of Japan and the ruling LDP placed immense pressure on local voters and politicians to approve the construction of the sea-based facility in Henoko.⁴⁵ In an attempt to sweeten the deal, the central government implicitly promised large-scale economic stimuli and subsidies if they allowed the project to go forward.⁴⁶

Despite well-financed rival campaigns, fifty-three percent of the citizens voted against the relocation.⁴⁷ But three days after the referendum, the mayor met with Prime Minister Hashimoto and expressed his desire to accept the base.⁴⁸ In addition, Governor Ota, who wanted to obey the results of the referendum, was confronted by the national government and the LDP. In the following year's gubernatorial election, Tokyo supported a different candidate named Inamine who proposed to accept the relocation to "northern Okinawa."⁴⁹ Eventually, Inamine succeeded Ota in December 1998, and soon thereafter the Okinawan Prefectural Assembly passed a resolution in favor of the project.⁵⁰ Finally, on December 28, 1999, the Cabinet announced the Japanese Government's official decision to relocate the base to Henoko.⁵¹

E. Environmental Impacts of Relocation

Although building a sea-based facility may be the most economically feasible way to relocate Futenma base, it will certainly devastate fish and marine

⁴¹ DEPARTMENT OF DEFENSE, OPERATIONAL REQUIREMENTS AND CONCEPT OF OPERATIONS FOR MCAS FUTENMA RELOCATION, OKINAWA, JAPAN (Sept. 29, 1997) (copy on file with author) [hereinafter OR].

⁴² *Id.* at 3-4 fig.6.

⁴³ *See id.* at 3-1, 3-5 to 3-13, 3-17, 3-21.

⁴⁴ *See* Inoue et al., *supra* note 40, at 84; Chalmers Johnson, *The Heliport, Nago, and the End of the Ota Era*, in OKINAWA: COLD WAR ISLAND 215, 219-21 (Chalmers Johnson ed., 1999) [hereinafter *The Heliport*].

⁴⁵ *See The Heliport, supra* note 44, at 219; Inoue et al., *supra* note 40, at 84.

⁴⁶ *See* Inoue et al., *supra* note 40, at 84.

⁴⁷ *See id.* at 85.

⁴⁸ *Id.*

⁴⁹ *See The Heliport, supra* note 44, at 221-22; Jonathan Solomon Taylor, *Okinawa on the Eve of G-8 Summit*, 90 GEOGRAPHICAL REV. 123, 125 (2000).

⁵⁰ *Okinawa Agrees to Relocate US heliport*, MANICHI DAILY NEWS (Tokyo), Oct. 16, 1999, at 12.

⁵¹ *Gov't Approves Plans to Relocate Heliport*, THE DAILY YOMIURI (Tokyo), Dec. 29, 1999, at 1.

ecosystems. Of the environmental resources of Henoko, marine ecology is the most invaluable. It supports the local fishing community and provides habitat to several sensitive species, including sea turtles. In addition, the coral reef of Henoko and its surrounding area provide the most important habitat for the Dugong (*Dugong Dugon*) population in Japan.⁵²

Dugongs are sea mammals closely related to manatees, found on the coasts of the western Pacific Ocean and the Indian Ocean.⁵³ The Dugongs of the Ryukyu Islands are understudied because of their low numbers, but are believed to be the northernmost population of Dugongs.⁵⁴ Dugongs are hard to observe and information on the animal is scarce. However, after scientists began monitoring sightings of the Dugongs, it became apparent that a small population inhabits the eastern shore of Okinawa Island.⁵⁵ One of the most heavily sighted areas of Dugongs is in the shallow waters of Henoko.⁵⁶ In Henoko Bay, the presence of “Dugong trenches,” distinct sea grass bed patterns caused by Dugongs grazing, has confirmed its habitual use of the area.⁵⁷ Moreover, a baby Dugong was accidentally caught by gillnets in 1998, suggesting possible breeding activity.⁵⁸

Scientists believe the number of Dugongs in Okinawa is critically low, with some estimates of less than fifty.⁵⁹ Degradation of the coastal environment and entanglement in fishing nets threaten Dugong populations.⁶⁰ Since the Dugong population in Taiwan and the Philippines seems to be declining significantly, lack of genetic interchange makes the survival of this tiny population extremely uncertain.⁶¹ Scientists and environmentalists believe a military base in Henoko

⁵² See DUGONG NETWORK OKINAWA, FOR THE PROTECTION OF DUGONGS OFFSHORE OKINAWA 10-14 (2000) [hereinafter DUGONG NETWORK].

⁵³ See, e.g., PIETER FOLKENS ET AL., NATIONAL AUDUBON SOCIETY GUIDE TO THE MARINE MAMMALS OF THE WORLD 478-81 (2002).

⁵⁴ See *id.* at 479; MARSH HELENE ET AL., UNITED NATIONS ENVIRONMENT PROGRAMME, DUGONG: STATUS REPORT AND ACTION PLANS FOR COUNTRIES AND TERRITORIES 41 (2002), available at <http://www.unep.org/dewa/pdf/DUGONG.pdf> (last visited Nov. 20, 2004) [hereinafter UNEP REPORT].

⁵⁵ See DUGONG NETWORK, *supra* note 52, at 6-7; UNEP REPORT, *supra* note 56, at 41.

⁵⁶ See, e.g., UNEP REPORT, *supra* note 56, at 42; Mick Corliss, *Nago Airport Plan Seen as Dugong Threat*, JAPAN TIMES (Tokyo), Feb. 2, 2000, available at <http://www.japantimes.co.jp/cgi-bin/getarticle.pl5?nn20000202b1.htm> (last visited Nov. 20, 2004).

⁵⁷ See DUGONG NETWORK, *supra* note 52, at 13-14.

⁵⁸ *Id.* at 9.

⁵⁹ NIHON HONYŪRUI GAKKAI, REDDO DETA NIHON NO HONYŪRUI [THE RED DATA BOOK: JAPANESE MAMMALS] 233 (1997).

⁶⁰ UNEP REPORT, *supra* note 56, at 42-43.

⁶¹ Cf. First Amended Complaint for Declaratory and Injunctive Relief at ¶ 1, *Okinawa Dugong v. Rumsfeld*, No. C-03-4350-MHP (N.D. Cal. motion to dismiss argued Aug. 4, 2004) (alleging Okinawa Dugong is “a genetically isolated and unique population of the Dugong”), available at http://www.earthjustice.org/news/documents/11-03/03_11_24_AMENDED_DUGONG_COMPLAINT.pdf (last visited Nov. 20, 2004) [hereinafter Amended Complaint].

waters will critically endanger Okinawa Dugongs.⁶²

II. LEGAL ACTION TO PROTECT DUGONGS

Soon after the SACO report came out, conservationists such as the Dugong Network Okinawa started to get involved in the Dugong issue. Although conservationists' opinions are not identical to those of local residents, fishermen, or pacifists, the groups are forming a flexible coalition with each other. In Japan, the Dugong is protected as a Natural Monument under the "Law for the Protection of Cultural Properties."⁶³ The Cultural Properties Law prohibits any person from threatening the status quo of the Natural Monuments.⁶⁴ However, Japanese administrative law does not allow citizen's suits and standing requirements are very rigorous.⁶⁵ Hence, it is extremely difficult for citizens to ask Japanese courts to save the Dugongs. Environmentalists started political campaigns to save the Dugongs from base construction, which lead to several hot debates at the Diet (Japanese Parliament). But, the Prime Minister claimed there is insufficient scientific information to require further protections for the Dugongs.⁶⁶

On the international front, WWF Japan, Nature Conservation Society of Japan, and the Wild Bird Society of Japan have persuaded the Second World Conservation Congress of IUCN to issue a recommendation to protect the Okinawa Dugong. The recommendation "[urges] the governments of Japan and the United States of America to.... take appropriate measures to help ensure the survival of the Dugong population."⁶⁷ However, Japan and the United States seem reluctant to fully obey the resolution.

To break through the impasse, advocates decided to litigate in U.S. federal courts. In September 2003, conservationists from both sides of the Pacific filed

⁶² See, e.g., Sonni Efron, *Doing Wrong by Japan's Dugong?*, L.A. TIMES, May 19, 2000, at A5.

⁶³ Bunkazai hogo hō [Law for the Protection of Cultural Properties], Law No. 214 of 1950 (Japan) [hereinafter Cultural Properties Law], available at <http://www.tobunken.go.jp/~kokusen/english/DATA/Htmlfg/japan/japan01.html> (last visited Nov. 20, 2004). See Agency for Cultural Affairs, *The System for Protecting Cultural Properties*, at <http://www.bunka.go.jp/english/English2002/4/IV-1.html> (last visited Nov. 6, 2004), for an English outline of the statute.

⁶⁴ *Id.* art. 80, ¶ 1.

⁶⁵ See, e.g., Marcello Mollo, *Earthjustice in Japan*, Earthjustice, at <http://www.earthjustice.org/regional/international/index.html> (last visited Nov. 20, 2004); see also *A More Flexible Litigation System*, JAPAN TIMES (TOKYO), July 9, 2003, at 18.

⁶⁶ Prime Minister's Reply to the Speaker of the House of Councilors, No. 147-28 (May 19, 2000) (Japan) (copy on file with author).

⁶⁷ THE WORLD CONSERVATION UNION, IUCN WORLD CONSERVATION CONGRESS RECOMMENDATION 2.72, CONSERVATION OF DUGONG (*DUGONG DUGON*), OKINAWA WOODPECKER (*SAPHEOPIPO NOGUCHII*) AND OKINAWA RAIL (*GALLIRALLUS OKINAWAE*) (Oct. 2000), available at <http://www.iucn.org/amman/content/resolutions/rec72.pdf> (last visited Nov. 20, 2004).

a lawsuit against the Department of Defense in U.S. Federal District Court. Plaintiffs for this lawsuit include several Okinawa residents, Japanese conservation groups such as Okinawa Dugong Network and the Japan Environmental Lawyers Federation, American conservation groups such as the Center for Biological Diversity, a local anti-base group and the Okinawa Dugong itself.⁶⁸

Initially, conservationists studied the U.S. Endangered Species Act (ESA)⁶⁹ because Dugongs are listed as endangered species. Since Dugongs are protected under the ESA, basically any person can sue the U.S. federal government if there is a federal action, which may jeopardize the Dugongs.⁷⁰ However, the plaintiffs decided to base their action on the Natural Historical Preservation Act (NHPA) instead of the ESA.⁷¹ Plaintiffs feared using the ESA to protect the Dugong might provide ammunition for the Bush Administration to continue to amend and weaken the ESA.⁷² This is a legitimate concern given that the Bush Administration has already sought to exempt the military from ESA obligations in favor of military readiness.⁷³ Therefore, the conservationists have not yet pursued a cause of action for violating the ESA.

The lawsuit is still pending at the time of this writing.⁷⁴ Plaintiffs claim that the Department of Defense (DOD) acted in violation of the NHPA by not considering the adverse effects to the Okinawan Dugong, which is listed under the Cultural Properties Law of Japan.⁷⁵ NHPA provides that it is the “the policy of the Federal Government, in cooperation with other nations” to “provide leadership in the preservation of the prehistoric and historic resources of the United States and of the international community of nations.”⁷⁶ In 1980, the U.S. Congress enacted 16 U.S.C. § 470a-2 to amend the NHPA in order to comply with obligations under the Convention Concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention).⁷⁷ In § 470a-2, NHPA requires that:

⁶⁸ Amended Complaint, *supra* note 61, at ¶¶ 9-18.

⁶⁹ 16 U.S.C. §§ 1531-44 (2004).

⁷⁰ 16 U.S.C. § 1540(g)(1)(A) (2004).

⁷¹ *Okinawa Dugong v. Rumsfeld*, No. C-03-4350-MHP (N.D. Cal. motion to dismiss argued Aug. 4, 2004).

⁷² Telephone Interview with Prof. Takamichi Sekine, Board Member of Japan Environmental Lawyers Federation (June 10, 2003).

⁷³ *See, e.g.*, Save the Endangered Species Act, at <http://www.savetheendangeredspeciesact.org> (last visited Nov. 4, 2004).

⁷⁴ *Okinawa Dugong v. Rumsfeld*, No. C-03-4350-MHP (N.D. Cal. motion to dismiss argued Aug. 4, 2004).

⁷⁵ Amended Complaint, *supra* note 61, at ¶¶ 39-40.

⁷⁶ 16 U.S.C. § 470-1 (2004).

⁷⁷ Amended Complaint, *supra* note 61, at ¶ 33.

Prior to the approval of any Federal undertaking outside the United States which may directly and adversely affect a property which is on the World Heritage List or on the applicable country's equivalent of the National Register, the head of a Federal agency having direct or indirect jurisdiction over such undertaking shall take into account the effect of the undertaking on such property for purposes of avoiding or mitigating any adverse effects.⁷⁸

III. THE LEGAL BASIS FOR NHPA PROTECTION OF DUGONGS

Defendants raise at least two substantial objections to the plaintiffs' NHPA argument. First, defendants contend there is no "federal undertaking" (action) in choosing and building the sea-based facility.⁷⁹ Second, defendants claim that the Japanese listing of Dugong is not equivalent to the U.S. National Register.⁸⁰ Discussion of these issues is important because the outcomes may determine the ultimate merits of this lawsuit.

A. Military Base Relocation as "Federal Undertaking"

The U.S. Justice Department, representing defendants Rumsfeld and the DOD, argues that the Japanese government alone selected the relocation site.⁸¹ However, the defendants' argument disregards the U.S. influence on the relocation process. The NHPA, in 16 U.S.C. § 470w(7), defines "undertaking" as:

A project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including –

- (A) Those carried out by or on behalf of the agency
- (B) Those requiring a Federal permit license, or approval; and
- (C) Those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.⁸²

On behalf of SACO and SCC, groups of bi-national high-ranking officials

⁷⁸ 16 U.S.C. § 470a-2 (2004).

⁷⁹ See Defendants' Memorandum in Support of Motion to Dismiss, *Okinawa Dugong v. Rumsfeld*, No. C-03-4350-MHP (N.D. Cal. motion to dismiss argued Aug. 4, 2004), at 16 [hereinafter Def. Mot.].

⁸⁰ See *id.* at 14-15.

⁸¹ Defendants' Answer to First Amended Complaint, *Okinawa Dugong v. Rumsfeld*, No. C-03-4350-MHP (N.D. Cal. motion to dismiss argued Aug. 4, 2004), at ¶¶ 27, 28 [hereinafter Def. Answer].

⁸² 16 U.S.C. § 470w(7) (2004).

decided to relocate Futenma to the eastern coast of Okinawa.⁸³ Further, the DOD's OR mandated the facility to be built on or adjacent to the coral reef.⁸⁴ The coral reefs located off the east coast of Okinawa Island are the last habitat for the endangered Dugongs in Japan.⁸⁵ Therefore, even if the United States did not decide the exact location of the base, the U.S. government cannot deny its involvement in jeopardizing the Dugongs by agreeing to the relocation of the base in the general area that the Dugongs inhabit.⁸⁶

Furthermore, it is highly unlikely the United States would allow the Japanese government to act unilaterally in designating a relocation site for a U.S. military base. According to the SOFA, when relocation becomes a reality, "[a]greements as to specific facilities and areas shall be concluded by the two Governments through the Joint Committee."⁸⁷ These agreements are not disclosed to the public,⁸⁸ but SOFA makes it clear that base relocation decisions are made jointly. Therefore, although information is classified for security reasons, it is legitimate to conclude that the U.S. military played a role in choosing Henoko.

Plaintiffs assert that the DOD has provided several million dollars to the Futenma Implementation Group, and significant expenditure was made to draft the OR in 1997.⁸⁹ Federal financial assistance to the Henoko/Futenma relocation study seems undeniable. Plaintiffs also claim DOD has granted numerous "approvals" to Japanese agencies to enter Camp Schwab and the Camp Schwab Water Area to conduct surveys on Henoko/Futenma relocation.⁹⁰

B. NHPA Protection of Dugongs

In using the NHPA, the plaintiffs based their arguments on the Japanese government's listing of Dugongs as a "Natural Monument" under its Cultural

⁸³ See generally SACO FINAL REPORT, *supra* note 30. Two Japanese ministers, a U.S. defense secretary and a U.S. ambassador delivered the SACO report to Japan. *Id.*

⁸⁴ OR, *supra* note 41, at 2-6. Defendants, however, claim that a new OR in 2001, which does not identify any potential relocation site for Futenma, supersedes the original OR. See Def. Answer, *supra* note 81, at ¶ 27.

⁸⁵ DUGONG NETWORK, *supra* note 52, at 13.

⁸⁶ In this case, plaintiffs are challenging the DOD's OR because the SACO & SCC decision was unchallengeable due to the statute of limitations. Interview with Prof. Takamichi Sekine, Board Member of Japan Environmental Lawyers Federation (Feb. 8, 2004).

⁸⁷ SOFA, *supra* note 12, art. II(1)(a).

⁸⁸ HIROSHI HONMA, ZAINICHI BEIGUN KICHI KYŌTEI [JAPAN- U.S. STATUS OF FORCES AGREEMENT] 104-05 (1996).

⁸⁹ Memorandum of Points and Authorities in Support of Plaintiffs' Opposition to Defendants Motion to Dismiss, *Okinawa Dugong v. Rumsfeld*, No. C-03-4350- MHP (N.D. Cal. motion to dismiss argued Aug. 4, 2004), at 20-21, available at http://www.earthjustice.org/news/documents/6-04/OPPOSITION_TO_MTD_04_06_21.pdf (last visited Nov. 20, 2004).

⁹⁰ *Id.* at 20.

Properties Law.⁹¹ Plaintiffs claim that Natural Monument listing by the Cultural Properties Law is equivalent to the NHPA's National Register of Historical Places.⁹² The NHPA defines "National Register of Historic Places [to be] composed of districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, engineering, and culture."⁹³ Japanese law is not identical to the NHPA and, therefore, the defendants argue that Japanese listing of Dugongs cannot be equivalent to the National Register.⁹⁴

A number of potential counterarguments support protection of the Dugongs under the U.S. NHPA. Prior to any federal undertaking, the NHPA requires federal agencies to consider possible prevention and mitigation of adverse impacts to "a property which is on the World Heritage List or on the applicable country's equivalent of the National Register."⁹⁵ The World Heritage List includes both properties of natural heritage, as well as properties of cultural heritage.⁹⁶ Thus, even if the National Register system in the U.S. is limited to "districts, sites, buildings, structures, and objects," there is no reason to exclude natural features from protection. Congress enacted § 470a-2 to comply with the obligations of the World Heritage Convention.⁹⁷ As such, interpretation of the NHPA's extraterritorial jurisdiction must be made pursuant to the World Heritage Convention, which observes equal value between cultural and natural heritage.

Japan's Cultural Properties Law enhances opinions expressed at the World Heritage Convention in that it does not draw a clear line between natural and cultural resources. The Japanese Cultural Properties Law establishes five categories of "Cultural Properties" to protect: (1) Tangible Cultural Assets; (2) Intangible Cultural Assets; (3) Folk Culture Properties (Tangible and Intangible); (4) Monuments; and (5) Groups of Historical Buildings.⁹⁸ Tangible Cultural Assets are comprised of buildings, art, documents, textiles, etc.⁹⁹ Intangible Cultural Assets are classical performing arts, traditional

⁹¹ Amended Complaint, *supra* note 61, at ¶ 36.

⁹² *Id.*

⁹³ 16 U.S.C. § 470a(1)(A) (2004).

⁹⁴ See Def. Mot., *supra* note 79, at 14-15.

⁹⁵ 16 U.S.C. § 470a-2 (2004).

⁹⁶ Convention for the Protection of the World Cultural and Natural Heritage, Nov. 23, 1972, art. 11, 27 U.S.T. 37.

⁹⁷ Amended Complaint, *supra* note 61, at ¶ 33.

⁹⁸ Cultural Properties Law, *supra* note 63, art. 2, ¶ 1. See Agency for Cultural Affairs, *The System for Protecting Cultural Properties*, at <http://www.bunka.go.jp/english/English2002/4/IV-1.html> (last visited Nov. 6, 2004), for an English outline of the statute.

⁹⁹ Cultural Properties Law, *supra* note 63, art. 2, ¶ 1, no.1. See Agency for Cultural Affairs, *The System for Protecting Cultural Properties*, at <http://www.bunka.go.jp/english/English2002/4/IV-1.html> (last visited Nov. 6, 2004), for an English outline of the statute.

craftsmanship, and traditional festivals.¹⁰⁰ Many traditional practices have been saved from extinction by public support accompanying designation of Intangible Cultural Assets or Folk Culture Assets.

Monuments consist of three categories: Historical Sites, Places of Scenic Beauty, and Natural Monuments.¹⁰¹ All persons, including property owners, are prohibited from damaging or jeopardizing the monuments and cannot change the status quo without a government permit.¹⁰² The Natural Monument system in Japan was established in the early 20th century to protect animals, plants, and geological features important to science, as well as to the national heritage.¹⁰³

Japan now has conservation laws designed to protect endangered species, fish and wildlife, and refugees. But, even though Japan has a set of conservation laws, the Natural Monument designation is still legally significant because of its emphasis on the interrelation of natural and cultural values. Conservation laws such as the Law for Conservation of Endangered Species of Wild Fauna and Flora¹⁰⁴ protects species according to biological values.¹⁰⁵ However, the Natural Monument system under the Cultural Properties Law typically requires protecting animals and plants that hold not only scientific, but cultural value.¹⁰⁶

Japan is a nation with a long history, and its peoples' traditional livelihood and the environment are deeply interrelated and interdependent. The Japanese government views the Natural Monument system not only as a tool of biological conservation, but also of cultural preservation.¹⁰⁷ This idea is consistent with the views expressed at the World Heritage Convention.¹⁰⁸ Growing numbers of foreign governments are considering animals, and other aspects of the natural environment, as cultural resources.¹⁰⁹ As an example, the Canadian province of

¹⁰⁰ *Id.* art. 2, ¶ 1, no.2.

¹⁰¹ *Id.* art. 2, ¶ 1, no.4.

¹⁰² *Id.* art. 80, ¶ 1.

¹⁰³ See NIHON SHIZEN HOGO KYÖKAI, SEITAIGAKU KARA MITA YASEI SEIBUTSU NO HOGO TO HÖRITSU [CONSERVATION AND LAWS FOR WILDLIFE FROM ECOLOGICAL PERSPECTIVE] 23-25 (2003).

¹⁰⁴ Zetsumetsu no osore noaru yasei dōbutsushu no hozon ni kansuru hōritsu, Law No.75 of 1992 (Japan).

¹⁰⁵ See Ministry of the Environment, *Japan's Environment at a Glance: Wildlife Protection*, at <http://www.env.go.jp/en/jeg/biodiv/wp.html> (last visited Nov. 4, 2004).

¹⁰⁶ Declaration of Takamichi Sekine ¶¶ 6, 14-15, *Okinawa Dugong v. Rumsfeld*, No. C-03-4350-MHP (N.D. Cal. motion to dismiss argued Aug. 4, 2004).

¹⁰⁷ GOVERNMENT OF JAPAN, COUNCIL OF MINISTERS FOR GLOBAL ENVIRONMENTAL CONSERVATION, NATIONAL STRATEGY OF JAPAN ON BIOLOGICAL DIVERSITY pt. 3, ch. 1, § 3 (Oct. 31, 1995), at <http://www.env.go.jp/en/pol/nsj/nsj-3s3.html> (last visited Nov. 20, 2004). The Strategy has been revised as of March 2004, with similar mentions to the Natural Monument system, but translations are still in preparation.

¹⁰⁸ See United Nations Educational, Social and Cultural Organization, *Overview, World Heritage*, at <http://whc.unesco.org/pg.cfm?cid=167> (last visited Nov. 8, 2004).

¹⁰⁹ Declaration of Thomas F. King at ¶ 36, *Okinawa Dugong v. Rumsfeld*, No. C-03-4350- MHP

Newfoundland has established a register system of “heritage animals,” which are listed with consideration to their historic and cultural value.¹¹⁰

Even if the NHPA cannot be construed to uniformly accept the listings of Japanese Cultural Properties Law, Okinawan Dugongs should still be within its scope of protection. Each country should establish a list of resources protected for historical preservation based on their own cultural values. If Japan decided to list an animal in its cultural and historical preservation list, it should be honored under the NHPA. Moreover, the Japanese idea of including natural features in such a list can be supported under the World Heritage Convention.¹¹¹

Dugongs have long been regarded as a cultural icon in Okinawa. People in Okinawa believed Dugongs were sacred creatures related to creation myths and capable of causing tsunamis.¹¹² Dugong meat was served as a royal dish in the courts of the Ryukyu kings,¹¹³ and Ryukyans believed Dugong meat had medicinal value¹¹⁴ The Ryukyu Kingdom, which ruled Okinawa until annexation by the Japanese Empire in the mid 19th century, mandated that the fishers of the remote island of Aragusuku send dried Dugong meat as a special tax payment.¹¹⁵ Although Dugongs have become scarce, the folklore of Dugongs is still popular today and they are still viewed as cultural icons. On Aragusuku Island, where Dugongs were harvested as royal fish, locals continue to worship an *utaki* (sacred site) dedicated to Dugongs.¹¹⁶ It is said that Dugong bones are enshrined in the *utaki*, but little is revealed to outsiders.¹¹⁷ Villagers pay high veneration to the *utaki* and forbid outsiders from prying and intruding into their practice.¹¹⁸ With this rich history and tradition, it is evident that Okinawan Dugongs have a historical value at least equivalent to the standards required by the National Register. Thus, defendants’ narrow view undermines the NHPA’s policy, which requires the U.S. Federal government to cooperate with other nations to preserve historical resources of the international community.

(N.D. Cal. motion to dismiss argued Aug. 4, 2004) [hereinafter King Decl.].

¹¹⁰ Heritage Animals Act, S. Nfld., ch. H-2.1 (1996).

¹¹¹ See King Decl., *supra* note 109, at ¶¶ 36-44.

¹¹² See, e.g., Declaration of Isshu Maeda, Okinawa Dugong v. Rumsfeld, No. C-03-4350-MHP (N.D. Cal. motion to dismiss argued Aug. 4, 2004), at ¶ 6-9 [hereinafter Maeda Decl.]; see also Kenny Ehman, *Dugong Found in Okinawan History From Days of the Ryukyu Kingdom* (Feb. 20, 1998), at <http://www.japanupdate.com/en/?id=3766> (last visited Nov. 20, 2004).

¹¹³ See Maeda Decl., *supra* note 112, at ¶ 10.

¹¹⁴ *Id.* at ¶ 11, 12; Ehman, *supra* note 112.

¹¹⁵ See Ehman, *supra* note 112.

¹¹⁶ See, e.g., *Aragusuku jima* [*Aragusuku Island*], OKINAWA TIMES, Dec. 18, 1999, at 16 [hereinafter *Aragusuku*]; see Maeda Decl., *supra* note 112, at ¶ 30.

¹¹⁷ See *Aragusuku*, *supra* note 116.

¹¹⁸ *Id.*

CONCLUSION

The DOD and the U.S. government's planned relocation of Futenma Air Station to Henoko will destroy precious coral marine ecosystems, which is the Dugong's habitat. In Japan, the Cultural Protection Law lists Dugongs for protection. Therefore, DOD's actions to relocate Futenma conflict with the NHPA. DOD's actions may also conflict with obligations imposed by other U.S. environmental laws, such as the ESA. Furthermore, it will accelerate the resentment towards the U.S. military in Okinawa, and undermine the "good neighbor" relations, which the U.S. military has tried to establish in Japan.

From a broader perspective, destroying the coral reefs and jeopardizing the Okinawa Dugongs undermines the values that the international community seeks to preserve through the World Heritage Convention, Biodiversity Convention, and other environmental treaties. Thus, mishandling of this issue will give the international community a negative impression of the U.S. military's environmental awareness. On the Japanese side, the Japanese government should reconsider the SACO recommendation and demand the closure of Futenma without offering a relocation site.¹¹⁹

Lastly, it is ironic that this case is argued only in the United States courts. Ideally, the Japanese legislatures should amend the administrative laws to allow citizen suits. Although the parliament did revise the Administrative Litigation Law in June 2004, the revisions fell short of allowing citizens to sue the government on its environmental policies.¹²⁰ Therefore, until the political situation changes, activists must resort to legal arguments in the U.S. courts to save the endangered Dugongs.

¹¹⁹ According to the recent press, Japan and U.S. are discussing the possible relocation of U.S. Marine forces in Okinawa to other areas of Japan or to foreign countries. *Japan, U.S. to Speed up Military Talks*, JAPAN TIMES (TOKYO), Oct. 13, 2004, at 3.

¹²⁰ See Mitsuo Kobayakawa, Yasutaka Abe & Yoshikazu Shibaike, *Gyōsei soshō kentōkai no "Kangaekata" o megutte: Kendan [Roundtable-talk Concerning the Report of the Administrative Litigation Committee]*, 1263 JURISTO 6 (2004); see also Shingo Miyake, *Putting Ball in Judges' Court Compromises Judicial Reform*, THE NIKKEI WEEKLY (TOKYO), May 19, 2003.

