ENVIRONMENTAL LITIGATION BY ASIA PACIFIC STATES AT THE INTERNATIONAL COURT OF JUSTICE

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States in the Asia Pacific region have been applicants and respondents in a substantial proportion of contentious cases in the International Court of Justice ('ICJ'), with Australia, Cambodia, Indonesia, Japan, Malaysia, Marshall Islands, Nauru, New Zealand, Singapore, Thailand and Timor-Leste all appearing before the ICJ. Also noteworthy is that most of the cases in which these states have been parties have concerned environmental or natural resource management issues, ranging in subject matters from nuclear testing to whaling. This article contends that Asia Pacific states are among the most active users of the Court in cases of this type for several reasons, including the relatively high degree of regional concern in relation to environmental issues (particularly among South Pacific states). It argues that although encounters by Asia Pacific states with the ICJ have not always been straightforward, they have, in sum, made a constructive contribution to the development and functioning of key norms of international law relating to the environment and to resolving disputes over natural resources.

CONTENTS

I INTRODUCTION

This article places Australia's experience with the International Court of Justice ('ICJ') in a regional perspective, exploring key themes and trends in the cases in the Court to which Australia and other governments in the Asia Pacific have been parties or interveners. The discussion opens with an assessment of the relevance of examining ICJ litigation through a regional lens, situating this inquiry against the backdrop of regionalism in the study of international law more generally. The analysis then turns to the ICJ cases with which states in the Asia Pacific region have been involved. It is seen that a distinctive characteristic of Asia Pacific encounters with the ICJ is that almost all disputes involving states from the region have concerned environmental or natural resource issues. The reasons for this practice are examined, with the relatively high level of regional concern with environmental issues (particularly among South Pacific governments) and the

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apparent willingness of some states to return repeatedly to the ICJ after gaining experience with the Court identified as possible explanations. The prospects for future Asia Pacific disputation in the ICJ are then examined, and climate change is identified as an area of contention that may be the subject of new contentious or advisory proceedings. It is contended in conclusion that while the encounters of Asia Pacific states with the ICJ have not always been straightforward, they have, in sum, made a constructive contribution to the development and functioning of key norms of international law relating to the environment and to resolving disputes over natural resources.

II AN ASIA PACIFIC PERSPECTIVE ON ICJ LITIGATION?

There is a long history of 'regionalism' in geographical scholarship; however, traditional notions of spatially bounded groupings of states or peoples have increasingly given way to the recognition that regions are historically contingent. As Anssi Paasi notes, geographers have had to

> rethink the question of the 'objectivity' of regions and to conceive them as processes performed, limited, symbolized, and institutionalized through numerous practices, discourses, and power relations that are not inevitably bound up with some specific spatial scale …[1]

Antony Anghie similarly observes that '[t]he construction of a particular region … is not simply a question of geography — which in any event, of course, has its own complexities; it is a political and ideological construct'.[2] Illustrating this process of political and ideological construction, Simon Chesterman notes that regions are often determined exogenously rather than endogenously, as is the case with Asia, the boundaries of which are 'culturally or politically, rather than geographically, determined'.[3] Chesterman cites this as one reason why there has been limited 'self-identification' and '[r]egional coherence' in Asia.[4] Furthermore, regional definitions are not immutable and are often in a state of flux, as seen in the Indo-Pacific concept that has emerged to describe a super region of geostrategic importance extending from the east coast of Africa to the west coast of the United States.[5]

The Asia Pacific is, like all regions, susceptible to a variety of definitions reflecting geographical, political and economic considerations. For example, in the United Nations regional groups of member states, which play a key role in the allocation of roles within the organisation, the Asia Pacific Group has 55 UN members stretching from Cyprus in the Eastern Mediterranean, to Singapore in South-East Asia and to Fiji in the South Pacific but excludes Australia and

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1 A Paasi, 'Regional Geography I' in Rob Kitchin and Nigel Thrift (eds), *International Encyclopedia of Human Geography* (Elsevier, 2009) 214, 222.

2 Antony Anghie, 'Identifying Regions in the History of International Law' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press, 2012) 1058, 1059.

3 Simon Chesterman, 'Asia's Ambivalence about International Law and Institutions: Past, Present and Futures' (2017) 27(4) *European Journal of International Law* 945, 965 ('Asia's Ambivalence about International Law and Institutions').

4 Ibid.

5 See generally Rory Medcalf, *Contest for the Indo-Pacific: Why China Won't Map the Future* (La Trobe University Press, 2020).

New Zealand (which instead find themselves in the Western Europe and Others Group).[6] Despite the inherent limitations of a regional perspective in international law (including how to define the membership of regions), there is a lengthy tradition of regionalism in international law scholarship, particularly in response to the emergence of regional organisations and frameworks such as the European Union.[7] In this respect, Anghie argues that a regional approach

> does play a useful and sometimes indispensable role when used in an appropriately qualified and contextualized way, to enable an analysis and exploration of some of the fundamental features of the history and character of international law.[8]

Turning to the Asia Pacific, we find that a regional lens has been applied by multiple scholars to assess the development and implementation of several areas of international law, including human rights,[9] international environmental law[10] and the law of the sea. In the context of the latter, James Crawford suggests a useful definition of the Asia Pacific as comprising

> the area of the Pacific, north and south of the equator, bordered to the west by the countries of east Asia, south east Asia and Australia ... and [including] the whole of east Asia, the ASEAN countries, the independent Pacific islands and Australasia.[11]

A regional approach may also be extended to the study of ICJ practice in the Asia Pacific. As Margaret Young, Emma Nyhan and Hilary Charlesworth point out, from the 1960s onwards, there has been a strong interest among international law scholars with region-specific ICJ experiences.[12] There is now a large body of work on African, Asian, European and Latin American encounters with the Court, and a 'regional lens' continues to have utility for many scholars and public international lawyers where regional dynamics have some influence on litigation practice.[13] There is no compelling reason to treat the Asia Pacific any differently. Certainly, there is no clearly identifiable 'pan-Asian or pan-Pacific approach to international law',[14] and it remains the case that 'cultural diversity and the lack of

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6 See 'Regional Groups of Member States', *United Nations Department for General Assembly and Conference Management* (Web Page) <https://www.un.org/dgacm/en/content/regional-groups>, archived at <https://perma.cc/4RMX-8YCJ>.

7 See, eg, Philip Allott, *The Health of Nations: Society and Law beyond the State* (Cambridge University Press, 2002) 230 (emphasis in original), describing the EU as a 'paradoxical social form, namely, an *unimagined community*'.

8 Anghie, 'Identifying Regions in the History of International Law' (n 2) 1059–60.

9 See, eg, Hitoshi Nasu and Ben Saul (eds), *Human Rights in the Asia-Pacific Region: Toward Institution Building* (Routledge, 2011).

10 See, eg, Ben Boer, Ross Ramsay and Donald R Rothwell, *International Environmental Law in the Asia Pacific* (Kluwer Law International, 1998).

11 James Crawford, 'Introduction' in James Crawford and Donald R Rothwell (eds), *The Law of the Sea in the Asian Pacific Region: Developments and Prospects* (Martinus Nijhoff Publishers, 1995) 1, 2.

12 Margaret A Young, Emma Nyhan and Hilary Charlesworth, 'Studying Country-Specific Engagements with the International Court of Justice' (2019) 10(4) *Journal of International Dispute Settlement* 582, 585.

13 Ibid 585–6.

14 Simon Chesterman, Hisashi Owada and Ben Saul, 'Introduction' in Simon Chesterman, Hisashi Owada and Ben Saul (eds), *The Oxford Handbook of International Law in Asia and the Pacific* (Oxford University Press, 2019) 3, 14.

shared regional identity make it difficult to achieve regional integration'.[15] Nonetheless, given the Asia Pacific's economic and political significance and the establishment and operation of regional institutions over multiple decades,[16] there remains value in seeking to understand how Asia Pacific states are influencing the development of international law, including through the use of international courts and tribunals.[17] This type of regional focus carries particular relevance to a study of Australia's own engagement with the ICJ, given that all but one of its disputes before the ICJ have involved other states from the Asia Pacific.[18]

III ASIA PACIFIC STATES AND THE INTERNATIONAL COURT OF JUSTICE

A *Acceptance of the Court's Jurisdiction*

Seventy-four states have made declarations accepting as compulsory the jurisdiction of the ICJ, with European governments making up the largest group of these states, followed by African states.[19] American and Asian states have been less enthusiastic in making art 36(2) declarations. There are just seven Asia Pacific states that have done so (see Table 1 below). Nauru had declared that it accepted the compulsory jurisdiction of the ICJ in 1987 for a period of five years, and it was on this basis that it commenced proceedings against Australia in *Certain Phosphate Lands in Nauru* ('*Nauru*')[20] (the declaration was renewed and extended for a further five years from 1993).[21] Thailand had also made an art 36(2) declaration in May 1950 (and had previously accepted the jurisdiction of the Permanent Court of International Justice); however, its declaration also expired pursuant to the terms of that acceptance in 1960.[22]

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15 Hitoshi Nasu, 'Introduction' in Hitoshi Nasu and Ben Saul (eds), *Human Rights in the Asia-Pacific Region: Toward Institution Building* (Routledge, 2011) 1, 2.

16 Michael Wesley (ed), *The Regional Organizations of the Asia Pacific: Exploring Institutional Change* (Palgrave Macmillan, 2003).

17 Chesterman, Owada and Saul (n 14) 3, 14–15.

18 The exception being Portugal, the applicant in *East Timor (Portugal v Australia) (Judgment)* [1995] ICJ Rep 90. However, the case was obviously concerned with a regional issue, with Portugal seeking not only to vindicate its rights, duties and powers as the administering power for East Timor, but also to protect the right of the East Timorese people to self-determination: at 92 [1].

19 'Declarations Recognizing the Jurisdiction of the Court as Compulsory', *International Court of Justice* (Web Page) <https://www.icj-cij.org/en/declarations>, archived at <https://perma.cc/J34Y-2EB6>.

20 *Certain Phosphate Lands in Nauru (Nauru v Australia) (Preliminary Objections)* [1992] ICJ Rep 240.

21 See 'Declarations Recognizing the Compulsory Jurisdiction of the International Court of Justice under Article 36, Paragraph 2, of the Statute of the Court', *United Nations Treaty Collection* (Web Page, 12 December 2020) <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=I-4&chapter=1&clang=_en>, archived at <https://perma.cc/5BCL-NU7R>; *Declaration by Nauru Recognizing as Compulsory the Jurisdiction of the International Court of Justice, in Conformity with Article 36, Paragraph 2, of the Statute of the International Court of Justice*, 1491 UNTS 199 (registered 29 January 1988).

22 See 'Declarations Recognizing the Compulsory Jurisdiction of the International Court of Justice under Article 36, Paragraph 2, of the Statute of the Court' (n 21); *Declaration of Thailand Recognizing as Compulsory the Jurisdiction of the Court, in Conformity with Article 36, Paragraph 2, of the Statute of the International Court of Justice*, 65 UNTS 157 (registered 13 June 1950).

Table 1: Asia Pacific States Accepting as Compulsory the Jurisdiction of the International Court of Justice

State	Year of Most Recent Art 36(2) Declaration
Australia	2002
Cambodia	1957
Japan	2015
Marshall Islands	2013
New Zealand	1977
Philippines	1972
Timor-Leste	2012

In relation to Asian governments, Chesterman cites the small number of art 36(2) declarations as evidence that 'Asian states tend to be the wariest of international dispute settlement procedures'[23] in comparison with states from other regions, particularly Western Europe. However, focusing only upon art 36(2) declarations does not provide a complete picture of regional acceptance of the ICJ's jurisdiction. There are several multilateral treaties containing compromissory clauses that may be invoked by or against Asia Pacific states, as seen in the ongoing proceedings in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)*[24] in which Myanmar is the defendant. Those proceedings were instituted under art IX of the 1948 *Convention on the Prevention and Punishment of the Crime of Genocide*.[25]

Tommy Koh and Hao Duy Phan argue that contemporary practice shows that Asian states are no more or less likely to submit disputes to international courts than states from other regions. They note that there are some obvious examples of reticence in dispute settlement in the region (eg China's refusal to participate in the *South China Sea* arbitration[26] and Korea's refusal to agree to Japan's proposal to submit the dispute over Dokdo/Takeshima to the ICJ[27]). However, they point out that while '[t]hese developments may give the impression that Asians are against submitting their disputes to the international legal process … [s]uch an impression would be incorrect'.[28] They proceed to list a substantial number of cases, including disputes in the ICJ and under the 1982 *United Nations Convention*

23 Chesterman, 'Asia's Ambivalence about International Law and Institutions' (n 3) 961.

24 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar) (Provisional Measures)* (International Court of Justice, General List No 178, 23 January 2020).

25 *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951).

26 *Philippines v China (Award on Jurisdiction and Admissibility)* (UNCLOS Arbitral Tribunal, Case No 2013-19, 29 October 2015) [10]; *Philippines v China (Award)* (UNCLOS Arbitral Tribunal, Case No 2013-19, 12 July 2016) [11] (together, the '*South China Sea* arbitration').

27 Tommy Koh and Hao Duy Phan, 'The Asian Way to Settle Disputes' (2016) 1(1) *Asia-Pacific Journal of Ocean Law and Policy* 5, 5.

28 Ibid.

on the Law of the Sea ('*UNCLOS*').[29] In conclusion, they say that they 'wish to debunk the myth that Asians are hostile to using international law and arbitration and jurisdiction to settle their international legal disputes. The track record does not support this view.'[30] On the other hand, they also recognise that 'culturally Asians are more comfortable with a non-adversarial process' and 'urge them to consider settling their disputes by way of mediation, conciliation and joint development'.[31]

Looking more broadly across the Asia Pacific, there is substantial subregional variation in the acceptance of the ICJ's jurisdiction and willingness to litigate disputes in the Peace Palace. As Geoffrey Palmer notes, while Asian states may be somewhat reluctant to use the ICJ, the same cannot be said for South Pacific countries, which have been 'quite enthusiastic' about the Court both in instigating proceedings and in seeking to be heard as interveners.[32] Australia and New Zealand both fall into this category of ICJ enthusiasts.

B *Asia Pacific States in Contentious Disputes in the ICJ*

Asia Pacific states have been applicants or respondents in 16 cases that have culminated in the ICJ (see Table 2 below). This list includes all cases with Asia Pacific states as applicants and/or respondents, including those commenced in the aftermath of the first proceedings relating to the implementation or interpretation of original judgments. It should be noted that the number of participating states can be extended further to embrace states that have sought to intervene in proceedings (eg Fiji in the *Nuclear Tests* cases[33] and the Philippines in *Sovereignty over Pulau Ligitan and Pulau Sipadan*[34]).

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29 *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994); ibid 5–8.

30 Koh and Phan (n 27) 10.

31 Ibid.

32 Sir Geoffrey Palmer, 'International Law and the Reform of the International Court of Justice' in Antony Angie and Gary Sturgess (eds), *Legal Visions of the 21st Century: Essays in Honour of Christopher Weeramantry* (Kluwer Law International, 1998) 579, 579–80.

33 *Nuclear Tests (Australia v France) (Judgment)* [1974] ICJ Rep 253 ('*Nuclear Tests (Australia v France)*'); *Nuclear Tests (New Zealand v France) (Judgment)* [1974] ICJ Rep 457 ('*Nuclear Tests (New Zealand v France)*').

34 'Application for Permission to Intervene by the Government of the Philippines', *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v Malaysia)* (International Court of Justice, General List No 102, 13 March 2001).

Table 2: Contentious Disputes Involving Asia Pacific States as Applicants and/or Respondents in the International Court of Justice

Case	Introduction	Culmination
Temple of Preah Vihear (Cambodia v Thailand)	1959	1962
Nuclear Tests (Australia v France)	1973	1974
Nuclear Tests (New Zealand v France)	1973	1974
Certain Phosphate Lands in Nauru (Nauru v Australia)	1989	1993
East Timor (Portugal v Australia)	1991	1995
Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v France) Case	1995	1995
Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v Malaysia)	1998	2002
Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v Singapore)	2003	2008
Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v Thailand) (Cambodia v Thailand)	2011	2013
Whaling in the Antarctic (Australia v Japan; New Zealand intervening)	2010	2014
Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)	2013	2015
Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v Pakistan)	2014	2016
Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v India)	2014	2016
Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v United Kingdom)	2014	2016
Application for Revision of the Judgment of 23 May 2008 in the Case concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v Singapore) (Malaysia v Singapore)	2017	2018
Request for Interpretation of the Judgment of 23 May 2008 in the Case concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v Singapore) (Malaysia v Singapore)	2017	2018

It is apparent from this list that the majority of these cases have concerned environmental or natural resource management issues, either directly or indirectly. The first, the *Temple of Preah Vihear*[35] case, was brought by Cambodia against Thailand under art 36(2) of the *Statute of the International Court of Justice* ('*Statute of the ICJ*'). The dispute was primarily concerned with territory, and the enduring significance of the ICJ's decision has been in relation to the significance of error and acquiescence in sovereignty disputes. However, the Temple of Preah Vihear, an ancient Hindu temple constructed during the Khmer Empire, had (and continues to have) cultural and environmental significance. The Court described the Temple as

> an ancient sanctuary and shrine situated on the borders of Thailand and Cambodia. Although now partially in ruins, this Temple has considerable artistic and archaeological interest, and is still used as a place of pilgrimage.[36]

In relation to the sovereignty dispute, the ICJ noted that parties relied on 'arguments of a physical, historical, religious and archaeological character, but the Court is unable to regard them as legally decisive'.[37] Nonetheless, in addition to finding that the Temple was situated within Cambodian territory, the Court did hold that Thailand was under an obligation to restore to Cambodia objects removed from the Temple or the Temple area by Thai authorities.[38]

In the *Nuclear Tests* cases, Australia and New Zealand challenged the legality of French nuclear testing in the South Pacific due to concerns over the health and environmental impacts for present and future generations caused by tropospheric and stratospheric nuclear fallout. The jurisdiction of the ICJ derived from the 1928 *General Act (Pacific Settlement of International Disputes)*.[39] Although the applicants were successful in the provisional measures phase, the Court subsequently rendered a decision that avoided engaging with the merits of the applicants' claims, articulating the unilateral acts doctrine.[40] An attempt several decades later by New Zealand to reactivate the proceedings in response to a new program of French nuclear testing (this time conducted underground rather than in the atmosphere) was also unsuccessful.[41] As a result, it is only in dissenting

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35 *Temple of Preah Vihear (Cambodia v Thailand) (Merits)* [1962] ICJ Rep 6.

36 Ibid 15.

37 Ibid.

38 Ibid 34–5. See also Simon Chesterman, 'The International Court of Justice in Asia: Interpreting the *Temple of Preah Vihear* Case' (2015) 5(1) *Asian Journal of International Law* 1.

39 *General Act (Pacific Settlement of International Disputes)*, opened for signature 28 September 1928, 93 LNTS 343 (entered into force 16 August 1929) art 17.

40 *Nuclear Tests (New Zealand v France)* (n 33) 472–3 [46]–[49]. Observing that '[i]t is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations', the Court found that statements by the French government regarding the cessation of atmospheric nuclear testing were legally binding: at 472 [46].

41 *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v France) Case (Order)* [1995] ICJ Rep 288 ('*Request for an Examination of the Situation*').

and separate opinions that there was any substantial response to the serious environmental questions at issue in the proceedings.[42]

Australia was subsequently a respondent in the *Nauru* case in which the ICJ had jurisdiction by virtue of optional clause declarations by the parties.[43] Nauru contended that Australia was in breach of trustee obligations under the *Charter of the United Nations* and the 1947 *Trusteeship Agreement for Nauru*[44] and had violated Nauru's rights of self-determination and to permanent sovereignty over its natural resources. The case was settled before the merits stage, and, accordingly, the ICJ did not consider Nauru's arguments concerning the severe environmental damage to the island caused by phosphate mining.[45] The opportunity for the first substantive environmental case in the ICJ was therefore missed.[46]

Australia was again a respondent in the *East Timor* case brought by a state outside the region, Portugal, the colonial authority in East Timor, which Indonesia had invaded in 1975. Portugal objected to Australia's negotiation and conclusion with Indonesia of the 1989 *Timor Gap Treaty*[47] relating to the oil and gas resources of the continental shelf, contending that this violated the rights of the people of East Timor to self-determination. The case was brought on the basis of optional clause declarations made by both parties.[48] The ICJ, however, found that it did not have jurisdiction due to Indonesia's absence from the proceedings.[49] Portugal, in its application, referred to the right of the people of East Timor to 'permanent sovereignty over its natural wealth and resources'.[50]

In the early 21st century, two sovereignty disputes were taken to the ICJ by Indonesia, Malaysia and Singapore, and both of these also had some environmental and natural resource aspects. The first, *Sovereignty over Pulau Ligitan and Pulau Sipadan*,[51] was brought by special agreement between Indonesia and Malaysia, and it concerned disputed sovereignty over two small islands in the Celebes Sea near the coast of Borneo. The Philippines unsuccessfully sought to intervene in the proceedings.[52] After examining the respective *effectivités* of the parties, the Court preferred the Malaysian claim over that of Indonesia. Among Malaysia's relevant sovereign activities included the

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42 Ibid 317 (Judge Weeramantry), 363 (Judge Koroma), 381 (Judge ad hoc Palmer). For discussion, see Tim Stephens, *International Courts and Environmental Protection* (Cambridge University Press, 2009) 143–50.

43 *Certain Phosphate Lands in Nauru* (n 20) 242 [1].

44 *Trusteeship Agreement for the Territory of Nauru*, signed 1 November 1947, 10 UNTS 3 (entered into force 1 November 1947).

45 Antony Anghie, '"The Heart of My Home": Colonialism, Environmental Damage, and the Nauru Case' (1993) 34(2) *Harvard International Law Journal* 445 ('The Heart of My Home').

46 Malgosia Fitzmaurice, 'The International Court of Justice and International Environmental Law' in Christian J Tams and James Sloan (eds), *The Development of International Law by the International Court of Justice* (Oxford University Press, 2013) 353, 361.

47 *Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia*, signed 11 December 1989, [1991] ATS 9 (entered into force 9 February 1991) ('*Timor Gap Treaty*').

48 *East Timor* (n 18) 100 [23].

49 Ibid 105 [35].

50 Ibid 94 [10].

51 *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v Malaysia) (Judgment)* [2002] ICJ Rep 625, 630 [1]–[2].

52 Ibid 632 [8].

establishment of a bird sanctuary, control assumed over the taking of turtles and turtle eggs on Sipadan, a licensing system for fishing in the waters around the islands and the declaration of the islands as protected areas from 1997.[53] The practice of the parties as regards oil concessions granted in the area was considered irrelevant, as this did not relate specifically to the islands.[54]

The *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge*[55] case between Malaysia and Singapore was also commenced under a special agreement, and it concerned competing sovereign claims to an island, rocks and a low-tide elevation. The ICJ found that sovereignty over Pedra Branca/Pulau Batu Puteh had passed to Singapore, that sovereignty over Middle Rocks belonged to Malaysia and that sovereignty over South Ledge belonged to the state in the territorial waters of which it is located.[56] Unlike *Sovereignty over Pulau Ligitan and Pulau Sipadan*, natural resource management was not raised in any significant respect in relation to *effectivités*.[57] The judgment does, however, reference Malaysia's concerns regarding the environmental effects that might flow from a plan by Singapore in the 1970s to reclaim areas around Pedra Branca/Pulau Batu Puteh.[58] Worth noting in this respect are separate proceedings commenced by Malaysia under *UNCLOS* in 2003 in relation to land reclamation work carried out by Singapore in and adjacent to the Straits of Johor, which raised marine environmental concerns in some detail.[59] These were subsequently addressed by the parties, following the order of provisional measures by the International Tribunal for the Law of the Sea.

The *Whaling in the Antarctic*[60] case was highly anticipated for its potential contribution to international environmental jurisprudence. Commenced by Australia against Japan under art 36(2) of the *Statute of the ICJ*, and involving New Zealand as an intervener, the case as originally pleaded had multiple environmental dimensions. Australia's application raised three international environmental agreements.[61] The central argument was that Japan's research whaling program in the Southern Ocean was in violation of the 1946 *International Convention for the Regulation of Whaling*[62] ('*ICRW*') because it was not undertaken for purposes of scientific research as required by art VIII of the *ICRW*.[63] Australia's application also referred to the 1973 *Convention on International*

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53 Ibid 681 [132], 684–6 [145]–[149].

54 Ibid 664 [79].

55 *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v Singapore) (Judgment)* [2008] ICJ Rep 12 ('*Sovereignty over Pedra Branca/Pulau Batu Puteh*').

56 Ibid 101–2 [300].

57 See *Sovereignty over Pulau Ligitan and Pulau Sipadan* (n 51) 682–6 [134]–[149].

58 *Sovereignty over Pedra Branca/Pulau Batu Puteh* (n 55) 88–9 [249]–[250].

59 *Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v Singapore) (Provisional Measures)* (2003) ITLOS Rep 10.

60 *Whaling in the Antarctic (Australia v Japan; New Zealand intervening) (Judgment)* [2014] ICJ Rep 226.

61 'Application Instituting Proceedings', *Whaling in the Antarctic (Australia v Japan; New Zealand intervening)* (International Court of Justice, General List No 148, 31 May 2010) 4 [2], 18 [38] ('Application Instituting Proceedings, *Whaling in the Antarctic*').

62 *International Convention for the Regulation of Whaling*, opened for signature 2 December 1946, 161 UNTS 72 (entered into force 10 November 1948).

63 Ibid art VIII. Article VIII allows states party to issue special permits to their nationals to take whales for scientific purposes.

Trade in Endangered Species of Wild Fauna and Flora[64] ('*CITES*'), which prohibits the introduction from the sea of endangered whale species.[65] The third environmental treaty relied upon by Australia was the 1992 *Convention on Biological Diversity* ('*CBD*').[66] Among other things, Australia argued that Japan had violated the obligation in art 3 of the *CBD* to ensure that activities within its jurisdiction or control did not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.[67]

When the case progressed to the hearings, Australia withdrew its arguments in relation to *CITES* and the *CBD* and focused only on violations of the *ICRW*. Unsurprisingly, therefore, the ICJ's judgment was exclusively concerned with questions relating to the interpretation and application of the *ICRW*. The Court accepted Australia's argument that Japan's whaling program in the Southern Ocean was not undertaken 'for purposes of scientific research' as required by art VIII of the *ICRW*, and therefore the program was in breach of the moratorium on whaling for commercial purposes.[68] The Court provided a number of reasons to support its finding that Japan's design and implementation of its research program were not reasonable, including the limited evidence of cooperation by Japan with other research institutions.[69] Several judges in separate opinions went further in their analysis, drawing connections between the issues raised in the case with general questions of international environmental law. Judge Cançado Trindade noted that

> [w]hen deciding whether a programme is 'for purposes of scientific research' so as to issue a special permit under Article VIII (1), the State party concerned has, in my understanding, a duty to abide by the principle of prevention and the precautionary principle.[70]

He also referred to the principle of intergenerational equity and reasoned that it was at the centre of the *ICRW*.[71] In her separate opinion, Judge ad hoc Charlesworth considered the relevance of the precautionary principle in detail, finding that it was pertinent to the interpretation of art VIII.[72]

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64 *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, opened for signature 3 March 1973, 993 UNTS 243 (entered into force 1 July 1975).

65 Ibid arts II(1), III(5).

66 *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993).

67 'Application Instituting Proceedings, *Whaling in the Antarctic*' (n 61) 16–18 [38].

68 *Whaling in the Antarctic* (n 60) 298–9 [247].

69 Ibid 292 [222].

70 Ibid 356–7 [23] (Judge Cançado Trindade) (citations omitted).

71 Ibid 362–3 [41] (Judge Cançado Trindade).

72 Ibid 456 [10] (Judge ad hoc Charlesworth).

The final cases listed in Table 2 are the three proceedings brought by the Marshall Islands under art 36(2) of the *Statute of the ICJ* against India, Pakistan and the United Kingdom respectively, alleging in each case that these states were in breach of nuclear disarmament obligations.[73] In its applications, the Marshall Islands contended that nuclear weapons states had failed to fulfil their obligations under the 1968 *Treaty on the Non-Proliferation of Nuclear Weapons*.[74] The Marshall Islands referenced the ICJ's observation in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*[75] that nuclear weapons 'have the potential to destroy all civilization and the entire ecosystem of the planet'.[76] The Marshall Islands also highlighted the specific harm to the health of the Marshallese people and damage to the Marshall Islands' environment as a result of nuclear weapons testing from 1946 to 1958 while it was under the trusteeship of the US.[77] In its judgments on the respondents' preliminary objections, which are substantially identical, the Court determined by narrow majority that it did not have jurisdiction, as there was not in fact a dispute between the parties.[78] This relieved the Court of the need to address the merits of the environmental and other claims being made by the Marshall Islands. Only in separate and dissenting opinions are the broader humanitarian and environmental issues raised by the Marshall Islands canvassed,[79] most significantly in the lengthy dissenting opinion of Judge Cançado Trindade.[80]

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73 The Marshall Islands filed applications against nine states (China, France, India, Israel, North Korea, Pakistan, Russia, the UK and the US); however, the cases only proceeded against the three states accepting as compulsory the jurisdiction of the ICJ (India, Pakistan and the UK): *Obligations concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v Pakistan) (Jurisdiction and Admissibility)* [2016] ICJ Rep 552 ('*Marshall Islands v Pakistan*'); *Obligations concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v India) (Jurisdiction and Admissibility)* [2016] ICJ Rep 255 ('*Marshall Islands v India*'); *Obligations concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v United Kingdom) (Preliminary Objections)* [2016] ICJ Rep 833 ('*Marshall Islands v United Kingdom*').

74 *Treaty on the Non-Proliferation of Nuclear Weapons*, opened for signature 1 July 1968, 729 UNTS 161 (entered into force 5 March 1970).

75 *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226.

76 Ibid 243 [35].

77 'Letter Dated 22 June 1995 from the Permanent Representative of the Marshall Islands to the United Nations, together with Written Statement of the Government of the Marshall Islands', *Legality of the Threat or Use of Nuclear Weapons* (International Court of Justice, General List No 95, 22 June 1995).

78 *Marshall Islands v Pakistan* (n 73) 573 [56]; *Marshall Islands v India* (n 73) 277 [56]; *Marshall Islands v United Kingdom* (n 73) 856–7 [59].

79 See, eg, *Marshall Islands v United Kingdom* (n 73) 1039 (Judge Sebutinde), 1063 (Judge Robinson).

80 *Marshall Islands v Pakistan* (n 73) 615; *Marshall Islands v India* (n 73) 321; *Marshall Islands v United Kingdom* (n 73) 907.

IV ASSESSING ENCOUNTERS WITH THE ICJ

A *Why Have There Been So Many Asia Pacific Environmental Cases in the ICJ?*

There are no immediately obvious reasons why cases with environmental and natural resource dimensions dominate the disputes brought by Asia Pacific states to the ICJ. The ICJ is not an environmentally focused court and instead has general subject-matter jurisdiction. Nonetheless, it has been used to address a range of environmental disputes,[81] and it has made a contribution to the development of key principles and concepts of international environmental law, including sustainable development,[82] the prevention principle,[83] the precautionary principle[84] and environmental impact assessment.[85] While the Court has inherent limitations, particularly as regards its capacity to address expert scientific evidence,[86] it has several attributes that make it an attractive forum for environmental disputes. As the principal judicial organ of the UN, with a permanent bench of the highest standing, the Court renders decisions according to a public and rational process on the basis of reasoned argument and is arguably better suited than any other international judicial institution for independent and authoritative determination of questions of a community character.[87] The willingness of Asia Pacific governments to utilise the ICJ for environmental disputes may indicate concurrence with this view.

Nonetheless, it should be acknowledged that the total number of ICJ cases emanating from the region remains a relatively small sample in comparison, for instance, with the dockets of national courts. The fact that many of these disputes address similar themes may therefore be coincidental rather than reflecting a regionwide attitude to the ICJ and the types of disputes best suited to resolution by the Court. However, if we expand our inquiry further to include disputes under *UNCLOS*, there does appear to be a discernible willingness of Asia Pacific states to litigate environmental questions. In the *South China Sea* arbitration between the Philippines and China, for example, environmental concerns regarding China's land-reclamation activities were a major focus of the litigation.[88]

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81 Fitzmaurice (n 46).

82 See, eg, *Gabčíkovo—Nagymaros Project (Hungary v Slovakia) (Judgment)* [1997] ICJ Rep 7.

83 See, eg, *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua) (Judgment)* [2015] ICJ Rep 665 ('*Certain Activities Carried Out by Nicaragua*').

84 See, eg, *Whaling in the Antarctic* (n 60) 453 (Judge ad hoc Charlesworth).

85 See, eg, *Pulp Mills on the River Uruguay (Argentina v Uruguay) (Judgment)* [2010] ICJ Rep 14.

86 See Caroline E Foster, *Science and the Precautionary Principle in International Courts and Tribunals: Expert Evidence, Burden of Proof and Finality* (Cambridge University Press, 2011); Lucas Carlos Lima, 'The Evidential Weight of Experts before the ICJ: Reflections on the *Whaling in the Antarctic* Case' (2015) 6(3) *Journal of International Dispute Settlement* 621; Joan E Donoghue, 'Expert Scientific Evidence in a Broader Context' (2018) 9(3) *Journal of International Dispute Settlement* 379.

87 Stephens, *International Courts and Environmental Protection* (n 42) 8, 37–40.

88 See also Tim Stephens, 'The Collateral Damage from China's "Great Wall of Sand": The Environmental Dimensions of the *South China Sea* Case' (2017) 34 *Australian Year Book of International Law* 41.

This track record suggests a reasonably high level of regional concern across the Asia Pacific with environmental issues and a willingness to turn to adjudicative mechanisms to advance foreign policy objectives in this area. However, as Ben Boer argues, the region is highly diverse in terms of its adoption of environmental standards,[89] and this may have impacts on the propensity of states in the region to litigate their environmental disputes. While Asia Pacific states have adopted most multilateral environmental agreements, much regional environmental cooperation has been confined to 'non-binding declarations, resolutions, and accords, with some exceptions', and 'the achievement of a more consistent, sophisticated, and integrated environmental law regional regime may take some time'.[90] Rather than seeking to shoehorn the entire Asia Pacific within one regional conception, Boer identifies six subregions, each of which have taken different approaches to managing shared environmental challenges: South Asia, Central Asia, North-East Asia, South-East Asia, the Mekong Basin and the Pacific.[91] He notes that while the South Asian, Central Asian and North-East Asian areas have the least developed approaches to environmental issues, the South-East Asian and Mekong Basin subregions (particularly through the work of the Association of Southeast Asian Nations) and the Pacific Islands subregion show much higher levels of cooperation on environmental challenges. Boer concludes:

> The development and implementation of international and regional environmental law in the Asia-Pacific region varies considerably from one sub-region to another, with wide disparities between the sub-regions concerning the implementation of international environmental treaties and, where they exist, the regional environmental instruments.[92]

This subregional variation is in large part a product of the unique political and environmental histories of the states within them, with some states and regions particularly impacted by colonisation and trusteeship, which have both facilitated unsustainable resource exploitation and had longstanding impacts.[93]

Litigation by Asia Pacific states should be understood against this backdrop of regional diversity, and it is reasonable to conclude that the experience of states within their specific subregion has an influence on its engagement within the Asia Pacific and the world more generally, including in relation to ICJ proceedings. This seems to be confirmed by the strong correlation between the maturity of Pacific Island subregional environmental law and the engagement by those states with the ICJ, especially in relation to nuclear weapons technologies. The sizeable number of cases in Table 2 relating to this area is strongly indicative of the strength of concern in Oceania with this particular topic.[94]

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89 Ben Boer, 'International Environmental Law' in Simon Chesterman, Hisashi Owada and Ben Saul (eds), *The Oxford Handbook of International Law in Asia and the Pacific* (Oxford University Press, 2019) 170, 173.

90 Ibid.

91 Ibid 171.

92 Ibid 202–3.

93 Anghie, 'The Heart of My Home' (n 45) 445–6.

94 Sir Geoffrey Palmer, 'The ICJ in the Asia Pacific Region' in Margaret Brewster and Ivan Shearer (eds), *Colloquium to Celebrate the 50th Anniversary of the International Court of Justice* (International Law Association, 1996) 55, 57.

Furthermore, these cases have tended to be framed as *regional* cases rather than purely as the vehicles for individual state grievances. In the *Nuclear Tests* litigation, Australia and New Zealand did not advance exclusively nationally-oriented cases but also sought to speak for the South Pacific region more broadly, which had adopted an antinuclear position that was subsequently reflected in a regional treaty, the 1985 *South Pacific Nuclear Free Zone Treaty*.[95] In its application, Australia specifically contended that the conduct of 'nuclear weapon tests in the South Pacific Ocean is not consistent with applicable rules of international law'.[96] New Zealand used similar language, referring to the nuclear tests 'in the South Pacific region' as constituting a violation of New Zealand's rights under international law.[97] In its 1974 judgment for the New Zealand case, the ICJ referenced diplomatic correspondence from New Zealand to France expressing the former's resolve 'to put an end to an activity which has been the source of grave anxiety to the people of the Pacific region for more than a decade'.[98] By the time of the reactivated proceedings in 1995, New Zealand was able to point to the 1986 *Convention for the Protection of the Natural Resources and Environment of the South Pacific Region* ('*Noumea Convention*').[99] The *Noumea Convention* imposes obligations on its parties, including France, 'to prevent, reduce and control pollution in the Convention Area which might result from the testing of nuclear devices'.[100] However, the Court did not consider this or other substantive legal issues.[101] It may also be noted that Asia Pacific states made the majority of submissions to the ICJ in the advisory proceedings on the *Legality of the Threat or Use of Nuclear Weapons* and argued for the illegality of nuclear weapons.[102]

States in other subregions of the Asia Pacific have not been as engaged with the ICJ. Moreover, in other forums, some Asia Pacific states have pursued cases to resist environmental protection initiatives, as seen in the *United States — Import Prohibition of Certain Shrimp and Shrimp Products* case before the World Trade Organization, which was instigated against the US by India, Malaysia, Pakistan and Thailand to challenge an environmental measure on the grounds that it imposed an unlawful trade discrimination.[103] Another example is Japan's challenge to Canada's measures relating to domestic content requirements for its

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95 *South Pacific Nuclear Free Zone Treaty*, opened for signature 6 August 1985, 1445 UNTS 177 (entered into force 11 December 1986).

96 'Application Instituting Proceedings', *Nuclear Tests (Australia v France)* [1973] I ICJ Pleadings 1, 28 [50].

97 'Application Instituting Proceedings Submitted by the Government of New Zealand', *Nuclear Tests (New Zealand v France)* [1973] II ICJ Pleadings 3, 4 [10].

98 *Nuclear Tests (New Zealand v France)* (n 33) 465.

99 *Convention for the Protection of the Natural Resources and Environment of the South Pacific Region*, opened for signature 24 November 1986, [1990] ATS 31 (entered into force 22 August 1990).

100 Ibid art 12.

101 See also Don MacKay, 'Nuclear Testing: New Zealand and France in the International Court of Justice' (1996) 19(5) *Fordham International Law Journal* 1857.

102 These were Japan, Malaysia, Marshall Islands, Nauru, New Zealand, North Korea, Samoa and the Solomon Islands: *Legality of the Threat or Use of Nuclear Weapons* (n 75) 229 [5].

103 Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/AB/R (12 October 1998). For detailed discussion, see Margaret A Young, *Trading Fish, Saving Fish: The Interaction between Regimes in International Law* (Cambridge University Press, 2011) ch 5.

renewable power policies.[104] Accordingly, it cannot be assumed that litigation is being pursued, or will always be pursued, by states in the region to advance what might be seen to be environmentally progressive causes. Additionally, state-to-state litigation has clearly been avoided in respect of one of the region's most serious contemporary transboundary environmental problems — smoke haze from South-East Asian forest fires — with victims instead seeking remedies in domestic proceedings.[105] Another regional example that could have been framed as an interstate dispute, but has not to date, is Vietnam's claims against the US relating to the lasting effects of the widespread use of Agent Orange during the Vietnam War.[106]

Decisions by governments to pursue proceedings in the ICJ are influenced by a range of factors, including diplomatic, security and economic concerns; the applicable law; the operation of relevant international organisations; and the level of domestic public interest.[107] Karen Alter argues that, in some circumstances, the presence of international courts can have the effect of mobilising grassroots organisations, placing pressure on governments to utilise them (although the direction taken by international courts may not always satisfy these groups).[108] There is no doubt that civil society groups have had a substantial impact on decisions by some states in the Asia Pacific to litigate environmental disputes in the ICJ, with the *Nuclear Tests* and *Whaling in the Antarctic* cases as clear examples. Civil society groups are active in other Asia Pacific states as well, although the extent to which this activism impacts on governmental decisions to elevate disputes to an international court depends on the specific legal, constitutional and political characteristics of the state concerned. In an effort to strengthen the voices of Asia Pacific civil society organisations ('CSOs') in intergovernmental processes, the Asia Pacific Regional CSO Engagement Mechanism was established in 2015, and it has sought to advance an agenda of 'development justice' and 'sustainable development'.[109] In some jurisdictions, campaigns by civil society groups have been amplified by government institutions, an example being the Commission on Human Rights of the Philippines, which in

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104 Appellate Body Report, *Canada — Certain Measures Affecting the Renewable Energy Generation Sector*, WTO Docs WT/DS412/AB/R and WT/DS426/AB/R (6 May 2013).

105 Prischa Listiningrum, 'Transboundary Civil Litigation for Victims of South-East Asian Haze Pollution: Access to Justice and the Non-Discrimination Principle' (2019) 8(1) *Transnational Environmental Law* 119.

106 See generally Eliana Cusato, 'From Ecocide to Voluntary Remediation Projects: Legal Responses to "Environmental Warfare" in Vietnam and the Spectre of Colonialism' (2018) 19(2) *Melbourne Journal of International Law* 494.

107 Tim Stephens, 'International Environmental Disputes: To Sue or Not to Sue?' in Natalie Klein (ed), *Litigating International Law Disputes: Weighing the Balance* (Cambridge University Press, 2014) 284, 285.

108 Karen J Alter, 'Tipping the Balance: International Courts and the Construction of International and Domestic Politics' (2011) 13 *Cambridge Yearbook of European Legal Studies* 1.

109 See 'Asia-Pacific Regional CSO Engagement Mechanism (AP-RCEM)', S*ustainable Development Goals Knowledge Platform* (Web Page) <https://sustainabledevelopment.un.org/index.php?page=view&type=30022&nr=738&menu=3170>, archived at <https://perma.cc/248K-679L>.

late 2019 found that 'major fossil fuel companies could be held liable for climate change impacts'.[110]

An additional possible reason why environmental and natural resource questions are so prominent among the cases involving Asia Pacific states in the ICJ is because governments have confidence that the Court can make a meaningful contribution to resolving the dispute and in clarifying the applicable legal obligations. This has been the outcome in some cases, most obviously in the territorial sovereignty disputes brought by joint agreement to the Court.[111] However, the more common result has been for the ICJ to avoid addressing the factual or legal basis of major environmental disputes, most obviously in the *Nuclear Tests* litigation.[112] Table 2 shows that a number of states, particularly in the Pacific, have returned on repeated occasions to the ICJ, suggesting that past experience with the Court may influence future engagements with the Court, perhaps because this allows governments an opportunity to develop their capacity for ICJ advocacy and also to gain a deeper understanding of the legal and political dynamics of ICJ litigation.

Asia Pacific states have continued to turn to the ICJ, with all the expense and effort involved, despite being aware of ways in which the ICJ seeks to limit the scope of its decision-making to avoid entering into highly contentious disputes in which there may not be clearly applicable standards. This indicates that national and regional encounters in the ICJ possess strongly tactical and even strategic dimensions rather than purely or even predominantly legal ones.[113] States may have recourse to the ICJ not as an end in itself but as part of a broader diplomatic approach to achieve foreign policy objectives. As Vaughan Lowe notes, even if it is successful, '[l]itigation is never an end in itself: it is always a means to an end … a step towards a solution of the problem, rather than a complete solution in itself'.[114] The *Nuclear Tests* litigation is an example of Australia and New Zealand using the Court to bring global attention to an issue of national and regional concern, which, despite the outcome, contributed to France's ultimate decision to end its nuclear testing programs.[115]

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110 The Commission's report is not yet available; however, a summary of the case and key documents relating to the proceedings may be found at the Columbia Law School's climate change litigation database: Sabin Center for Climate Change Law, 'In Re Greenpeace South-East Asia and Others', *Climate Change Litigation Databases* (Web Page) <http://climatecasechart.com/non-us-case/in-re-greenpeace-southeast-asia-et-al/?cn-reloaded=1>, archived at <https://perma.cc/4SJG-J6XL>.

111 See, eg, *Sovereignty over Pedra Branca/Pulau Batu Puteh* (n 55); *Sovereignty over Pulau Ligitan and Pulau Sipadan* (n 51).

112 *Nuclear Tests (Australia v France)* (n 33) 272 [62]; *Nuclear Tests (New Zealand v France)* (n 33) 478 [65].

113 See, eg, Henry Burmester, 'Australia and the International Court of Justice' (1997) 17 *Australian Year Book of International Law* 19, 32–3.

114 Vaughan Lowe, 'The Function of Litigation in International Society' (2012) 61(1) *International and Comparative Law Quarterly* 209, 221.

115 MacKay (n 101).

B *Environmental Issues: Underlying but Not Always Explicit*

Care should be taken not to exaggerate the extent to which environmental issues have been raised in the cases examined in this article. Environmental issues have not always featured explicitly in decisions of the ICJ, even in disputes in which they have clearly been the primary underlying concerns.

In the original proceedings in the *Temple of Preah Vihear*, the ICJ made only passing mention of the cultural and religious significance of the site,[116] even though the parties referred to these issues in their submissions. In its 2013 judgment on Cambodia's request for an interpretation of the Court's original judgment, the ICJ went somewhat further, as by this stage the Temple of Preah Vihear had been listed by the United Nations Education, Scientific and Cultural Organization as a world heritage site.[117] The Court described the temple as being of 'religious and cultural significance for the peoples of the region' and noted that both Cambodia and Thailand, as parties to the 1972 *Convention for the Protection of the World Cultural and Natural Heritage*,[118] 'must co-operate between themselves and with the international community in the protection of the site as world heritage'.[119]

The *Temple of Preah Vihear* case illustrates the way in which developments in international law relating to environmental issues have had an impact on ICJ decisions and on the practice of Asia Pacific states as litigants. In short, as the law has developed, so have the opportunities to litigate. This was also a feature of the *Nuclear Tests* cases, which had two distinct phases separated by a number of decades. In the first iteration, Australia and New Zealand made a number of innovative arguments based on early developments in international environmental law to challenge the legality of France's atmospheric nuclear testing in the South Pacific.[120] These arguments were challenging to sustain given that, at that stage, the most fundamental aspects of international law relating to transboundary harm had not been clearly articulated or accepted universally as binding.[121] By the time the dispute had its later manifestation, when New Zealand sought to reactivate the proceedings in response to a new round of French nuclear testing, there was a very substantial body of international norms that were directly applicable.[122] However, New Zealand was again unsuccessful because the Court took a narrow view on the breadth of the dispute (as one relating only to *atmospheric* nuclear testing rather than nuclear testing in general).[123] The recent Marshall Islands cases appear to

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116 *Temple of Preah Vihear* (n 35) 15.

117 'Temple of Preah Vihear', *UNESCO World Heritage Centre* (Web Page) <https://whc.unesco.org/en/list/1224>, archived at <https://perma.cc/ZC9R-WENJ>.

118 *Convention for the Protection of the World Cultural and Natural Heritage*, opened for signature 16 November 1972, 1037 UNTS 151 (entered into force 17 December 1975).

119 *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v Thailand) (Cambodia v Thailand) (Judgment)* [2013] ICJ Rep 281, 317 [106].

120 Stephens, *International Courts and Environmental Protection* (n 42) 137–45.

121 Ibid 140.

122 Ibid 145–50.

123 *Request for an Examination of the Situation* (n 41) 306 [63].

confirm the great reluctance of the Court to address disputes concerning the possession, use or testing of nuclear weapons.[124]

In other litigation, the influence of subsequent normative developments in international law has also been somewhat uneven. Even in more obviously environmentally focused disputes such as *Whaling in the Antarctic*, direct questions of international environmental law were not pressed by the applicant and not addressed by the Court. As Young has noted, several emerging norms 'might have shaped' this case and others, 'but did not'.[125] Specifically, the Court did not take a whale- or ecosystem-centred approach to the issues, confining itself to the rights and duties established by the *ICRW*, and 'did not rule upon whether whales were part of nature or part of natural resources'.[126]

With the exception of disputes over nuclear technologies, and despite the continuing reticence of the ICJ in some cases to take a broader perspective when approaching environmental issues, we might expect additional cases to be brought and to be more successful in the future, as the law relating to environmental issues is further developed and becomes clearer in its reach and application. However, it is also possible that such normative development may in fact reduce the need for and likelihood of proceedings, as clearer law leaves less room for interpretation and dispute. In such circumstances, a new generation of environmental cases in the ICJ may be less concerned with questions as to the scope and application of norms and may take on more of a compliance and enforcement dimension.

V ANTICIPATING FUTURE ASIA PACIFIC ENCOUNTERS WITH THE ICJ

As Lorraine Elliott notes, fast economic growth and an accompanying increase in resource extraction and consumption, agricultural intensification and rapid urbanisation are driving multiple environmental impacts that are common to (and in some cases are shared by) many Asia Pacific states:

> On most measures, the region suffers from high levels of air and water pollution, land and ecosystem degradation, deforestation, and loss of biodiversity and species. It faces a worrying litany of climate change impacts: a decline in agricultural production and crop yield, an increase in climate-induced disease, an increased risk of hunger and water scarcity, an increase in the number and severity of glacier melt-related floods, significant loss of coastal ecosystems, many millions of people in coastal communities at high risk from flooding, and an increased risk of extinction for many species of fauna and flora.[127]

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124 See also Martti Koskenniemi, 'The Silence of Law/The Voice of Justice' in Laurence Boisson de Chazournes and Philippe Sands (eds), *International Law, the International Court of Justice and Nuclear Weapons* (Cambridge University Press, 1996) 488.

125 Margaret A Young, 'International Adjudication and the Commons' (2019) 41(2) *University of Hawai'i Law Review* 353, 379.

126 Ibid 380. See also Hope Johnson, Bridget Lewis and Rowena Maguire, 'Whaling in the Antarctic (Australia v Japan: New Zealand Intervening)' in Nicole Rogers and Michelle Maloney (eds), *Law as if Earth Really Mattered: The Wild Law Judgment Project* (Routledge, 2017) 257.

127 Lorraine Elliott, 'Environmental Regionalism: Moving In from the Policy Margins' (2017) 30(6) *Pacific Review* 952, 953.

Given these pressures, there are multiple areas in which future encounters by Asia Pacific states in ICJ disputes involving environmental questions are possible. It seems increasingly likely that one or more governments in the region will commence proceedings in the ICJ against other governments for not meeting their international legal obligations to address climate change.[128] Climate change is attracting increasing attention in the courts of multiple Asia Pacific states, particularly in Oceania.[129] It is an issue on which there is a strong sense of solidarity among many Pacific Island governments,[130] in a similar way in which nuclear testing has been a core regional concern. On becoming parties to the 1992 *United Nations Framework Convention on Climate Change*[131] ('*UNFCCC*'), several Pacific island states (Fiji, Kiribati, Nauru, Papua New Guinea, the Solomon Islands and Tuvalu) made declarations that joining the Convention in no way constituted a renunciation of any rights under international law concerning state responsibility for the adverse effects of climate change.[132] Similar declarations were made by a number of Pacific states on becoming parties to the 2015 *Paris Agreement*[133] — the Cook Islands, Marshall Islands, Micronesia, Nauru, Niue, Philippines, Solomon Islands, Tuvalu and Vanuatu.[134]

In 2002, Tuvalu announced that it intended to sue Australia and the US for not ratifying the *Kyoto Protocol to the United Nations Framework Convention on Climate Change*[135] and failing to contribute to global efforts to reduce emissions;[136] however, it did not proceed with the threatened proceedings. There are nonetheless several bases for regional or global climate litigation that may lead to ICJ proceedings.[137] These include treaty-based arguments such as a failure to comply

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128 Philippe Sands, 'Climate Change and the Rule of Law: Adjudicating the Future in International Law' (2016) 28(1) *Journal of Environmental Law* 19.

129 Tim Stephens, 'Oceania' in Lavanya Rajamani and Jacqueline Peel (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press, 2nd ed, 2021) 1091. See also Jacqueline Peel and Jolene Lin, 'Transnational Climate Litigation: The Contribution of the Global South' (2019) 113(4) *American Journal of International Law* 679.

130 See, eg, Fiftieth Pacific Islands Forum, *Forum Communiqué* (Communiqué No PIF(19)14, 2019) <https://www.forumsec.org/wp-content/uploads/2019/08/50th-Pacific-Islands-Forum-Communique.pdf>, archived at <https://perma.cc/F8TF-UZA5>, in which '[l]eaders *reaffirmed* climate change as the single greatest threat to the livelihoods, security and wellbeing of the peoples of the Pacific and our commitment to progress the implementation of the Paris Agreement': at 4 [14] (emphasis in original).

131 *United Nations Framework Convention on Climate Change*, opened for signature 9 May 1992, 1771 UNTS 107 (entered into force 21 March 1994).

132 See 'Declarations Status of Ratification of the Convention', *United Nations Framework Convention on Climate Change* (Web Page) <https://unfccc.int/process/the-convention/status-of-ratification>, archived at <https://perma.cc/746F-T5TS>.

133 *Paris Agreement*, opened for signature 22 April 2016, [2016] ATS 24 (entered into force 4 November 2016).

134 See 'Paris Agreement', *United Nations Treaty Collection* (Web Page) <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27>, archived at <https://perma.cc/4HT3-XKRV>.

135 *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, opened for signature 24 April 1998, [2008] ATS 2 (entered into force 16 February 2005).

136 'Tiny Tuvalu Sues United States over Rising Sea Level', *New Zealand Herald* (online, 29 August 2002) <https://www.nzherald.co.nz/world/news/article.cfm?c_id=2&objectid=2351809>, archived at <https://perma.cc/34H9-9843>.

137 See generally Kurt Winter, 'The Paris Agreement: New Legal Avenues to Support a Transboundary Harm Claim on the Basis of Climate Change' in Christina Voigt (ed), *International Judicial Practice on the Environment: Questions of Legitimacy* (Cambridge University Press, 2019) 188.

with the *UNFCCC* or the *Paris Agreement*. For such a case to be successful, an applicant will need to establish the existence of a clear obligation that has been breached. There are challenges in achieving this, both in relation to the *UNFCCC* and the *Paris Agreement*, as these treaties are drafted in relatively general terms and impose no quantified emission reduction obligations. However, the *Paris Agreement* does contain clear objectives and couples these with a binding procedure under which parties are required to communicate nationally determined contributions that are progressively more ambitious over time.[138]

Beyond the climate treaties, another possible avenue for litigation is based on the rule of customary international law, accepted by the ICJ,[139] that one state may not permit activities within its jurisdiction or control to damage another state. Transboundary harm cases have had a mixed record of success in the ICJ, and a climate change damage case faces particular hurdles because of the evidentiary difficulties in ascribing responsibility to one or more governments for their contribution to the global climate crisis. However, there have been developments in attribution science, which can draw a link between certain extreme weather events and human-caused climate change ('event attribution') and can also quantify the contribution made by particular states and non-state actors such as fossil fuel companies ('source attribution').[140]

Additionally, Vanuatu and other Pacific Island governments have been exploring how a request for an ICJ advisory opinion on climate change might be pursued.[141] Philippe Sands suggests that advisory proceedings may be more productive than a contentious case, noting that

> this is surely the kind of domain in which the advisory role of international courts and tribunals might be most useful, building on the increased engagement of their domestic counterparts, developing consensus, looking forward rather than backwards, offering clarification rather than pointing fingers of blame.[142]

The most obvious practical challenge is persuading a majority of UN members to support a General Assembly resolution making such a request. This is a major hurdle, as seen in Palau's unsuccessful 2011 proposal to the General Assembly that a request be made.[143] There are also legal challenges, as the ICJ would need to be presented with one or more clear legal questions on which it could provide

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138 Jonathan Pickering et al, 'Global Climate Governance between Hard and Soft Law: Can the Paris Agreement's "Crème Brûlée" Approach Enhance Ecological Reflexivity?' (2019) 31(1) *Journal of Environmental Law* 1, 12, 14.

139 *Certain Activities Carried Out by Nicaragua* (n 83) 706–7 [104].

140 Michael Burger, Jessica Wentz and Radley Horton, 'The Law and Science of Climate Change Attribution' (2020) 45(1) *Columbia Journal of Environmental Law* 57; Myles Allen, 'The Scientific Basis for Climate Change Liability' in Richard Lord et al (eds), *Climate Change Liability: Transnational Law and Practice* (Cambridge University Press, 2012) 8.

141 Margaretha Wewerinke-Singh and Diana Hinge Salili, 'Between Negotiations and Litigation: Vanuatu's Perspective on Loss and Damage from Climate Change' (2020) 20(6) *Climate Policy* 681.

142 Sands (n 128) 32–3. Although, as a counterpoint, see Anthony Aust, 'Advisory Opinions' (2010) 1(1) *Journal of International Dispute Settlement* 123, arguing that the ICJ should exercise its discretion and refuse a request for an advisory opinion when the underlying problem can be resolved only by lengthy and difficult political negotiations.

143 See Stuart Beck and Elizabeth Burleson, 'Inside the System, Outside the Box: Palau's Pursuit of Climate Justice and Security at the United Nations' (2014) 3(1) *Transnational Environmental Law* 17.

an opinion that would be of value to Vanuatu and other governments that are concerned that the international community is not achieving the goals of the *Paris Agreement*. Nonetheless, the Pacific initiative for an ICJ advisory opinion on climate change is gathering momentum. At the meeting of the Pacific Islands Forum in Tuvalu in August 2019, Pacific leaders were presented with the advisory opinion idea. While the Forum did not expressly support the proposal, the Forum communiqué did 'note' the proposal in positive terms:

> In recognising the need to formally secure the future of our people in the face of climate change and its impacts, Leaders noted the proposal for a UN General Assembly Resolution seeking an advisory opinion from the International Court of Justice on the obligations of States under international law to protect the rights of present and future generations against the adverse effects of climate change.[144]

Despite growing interest in international litigation, including in the ICJ, as a response to the global environmental crisis (the effects of which are being felt in states across the Asia Pacific), it cannot be assumed that this will engender the outcomes desired by the litigants. As Cait Storr argues in a review of two works on environmental justice and the Global South,[145] '[i]nternational law has thus far proven limited as a tool for securing environmental justice for those marginalized by the international order',[146] and it is difficult to escape the conclusion that 'the logic of international law itself is actively complicit in the environmental harm each seeks to address, rather than being passively indifferent to it'.[147]

VI CONCLUSION

This article has sought to explore the nature and extent of Asia Pacific regional engagement with the ICJ. This examination has revealed the necessary limitations of any regional perspective given the divergence between subregions, particularly in a geographic area as expansive, and as culturally and politically heterogenous, as the Asia Pacific. This diversity inevitably confounds the identification of any solidary Asia Pacific attitude to the ICJ — there is no singular regional posture towards the ICJ. Instead, it was seen that the states within some subregions (Oceania, in particular) are more engaged with the ICJ than others. Furthermore, it was noted that, in terms of subject matter, this engagement has tended to address environmental issues and territorial disputes (also having natural resource dimensions) more than any other category of issues. While the conclusions from this review of the practice can only be tentative, given the relatively small number of cases, it does appear that a distinguishing characteristic of Asia Pacific engagement with the ICJ is indeed its strong environmental focus. This article has only examined ICJ practice, and complementary research on litigation in other forums, including under *UNCLOS*, would be valuable in assessing the extent to which this conclusion applies to other forums and whether such litigation may

144 *Forum Communiqué* (n 130) 4 [16].

145 Jenny Grote Stoutenburg, *Disappearing Island States in International Law* (Brill Nijhoff, 2015); Shawkat Alam et al (eds), *International Environmental Law and the Global South* (Cambridge University Press, 2015).

146 Cait Storr, 'Islands and the South: Framing the Relationship between International Law and Environmental Crisis' (2016) 27(2) *European Journal of International Law* 519, 538.

147 Ibid.

work in tandem with ICJ decision-making to develop international law in the environmental arena.

Asia Pacific encounters with the ICJ have seldom been straightforward and have, in some cases, led to mixed or unclear results that have been disappointing to some applicant (and respondent) governments. Such outcomes are not unique to the Asia Pacific given that most ICJ disputes are complex and multivalent. Nonetheless, overall, the contribution by the ICJ has been positive for the region in several respects. The ICJ has in several cases provided a definitive resolution of territorial disputes;[148] in another, it facilitated the settlement of a trusteeship dispute over the mismanagement of natural resources.[149] It has also contributed to the resolution of a decades-old dispute over nuclear testing,[150] and more recently, it has addressed the operation of a highly disputed provision in the *ICRW*.[151] It remains to be seen where the trajectory of Asia Pacific encounters with the ICJ is heading, but, given that environmental indicators in the region are not improving, there is every likelihood that environmental and natural resource issues will remain a central characteristic of Asia Pacific litigation in the ICJ.

148 See, eg, *Sovereignty over Pulau Ligitan and Pulau Sipadan* (n 51); *Sovereignty over Pedra Branca/Pulau Batu Puteh* (n 55).

149 *Certain Phosphate Lands in Nauru* (n 20).

150 *Nuclear Tests (Australia v France)* (n 33); *Nuclear Tests (New Zealand v France)* (n 33); *Request for an Examination of the Situation* (n 41).

151 *Whaling in the Antarctic* (n 60).