

# PUBLIC TRUST DOCTRINE

- 1. Favor Nonexclusive Uses**
- 2. Favor Reversible Commitments of Resources**
- 3. Favor Ocean-Dependent Uses**
- 4. Promote and Protect Biodiversity**
- 5. Follow Precautionary Approach**

## METHODS OF ENFORCING PRINCIPLES OF OCEAN STEWARDSHIP

1. PUBLICITY
2. TRADE SANCTIONS (INTERNATIONAL)
3. JUDICIAL ACTION
  - A. WHO HAS "STANDING"?
  - B. OCEAN GUARDIANS?
  - C. ARE COURTS COMPETENT TO RESOLVE ENVIRONMENTAL DISPUTES?
4. SPECIALIZED ENVIRONMENTAL TRIBUNALS
5. ADMINISTRATIVE BODIES
  - A. WORLD BANK INSPECTION PANEL
  - B. NAFTA COMMISSION FOR ENVIRONMENTAL COOPERATION
  - C. WHO CAN BRING COMPLAINTS?
  - D. WHAT POWER DOES THE BODY HAVE?

Principles for a Comprehensive Regime of Ocean Governance  
and Stewardship

**First**, we must emphasize the continued ecological vitality of the resources of the oceans with special attention to the marine mammals, the endangered species, and the fragile ecosystems. The **Precautionary Principle** should govern decisionmaking to help attain this goal. The preparation of environmental impact assessments can play a central role in attaining this goal.

**Second**, all nations should act in the oceans with **due regard** to the interests of other nations, and must not act in a way that injures them.

**Third**, if damage or injury does result from the ocean activities of one nation or its citizens, that nation should be strictly liable for the resulting loss. This concept is now referred to as the **"polluter pays"** principle.

**Fourth**, regional governing bodies may be more appropriate to regulate the oceans than a global body.

**Fifth**, it should always be remembered that the resources of the high seas are **the common heritage of humanity** and thus that the resources are to be shared equitably. When making the difficult decisions regarding resource exploitation, the decisionmakers should draw upon principles that have been developed in protecting the **"public trust"** interest:

(1) In choosing among competing or incompatible uses a nonexclusive use should be favored over an exclusive use.

(2) Reversible commitments of resources should be favored over irreversible commitments to recognize the interests of ecological preservation and of future generations.

(3) Ocean-dependent uses should be favored over nondependent uses.

(4) Uses that promote and protect biodiversity should be favored over those that do not.

(5) A resource developer should have the burden of demonstrating that the proposed activity will not interfere with other ocean uses and will be conducted in an environmentally sound manner.

**Sixth**, the origin of this region as a **common heritage** can also be of help when determining how to allocate its limited resources.

(1) The resources are to be shared.

(2) Conflicts should be resolved in favor of keeping the oceans whole and protecting the interests of the public today and in the future.

(3) Managing resources as a commons should be preferred over privatizing such resources.

(4) If private developments are allowed, the public should receive financial benefits from such developments.

# SUBSTANTIVE PRINCIPLES FOR A CONSTITUTION FOR THE U.S. OCEANS\*

Jon M. Van Dyke, University of Hawaii

1. **The Precautionary Principle must govern decisionmaking.** This principle requires that when scientific information is in doubt, the party that wishes to develop a new project or change the existing system has the burden of demonstrating that the proposed changes will not produce unacceptable adverse impacts on existing resources and species. This principle is central to ensuring that decisionmakers are guided by an environmental protection policy designed to improve ocean resource management over time.
2. **Government agencies and private parties must prepare environmental impact statements** prior to actions that are likely to affect the marine environment substantially. The process of preparing these environmental impact statements should include active public participation and should draw upon interdisciplinary perspectives so that decisionmakers can understand fully the implications of each development.
3. **Special protection must be provided to rare and fragile ecosystems and endangered and threatened species,** in order to ensure that the biodiversity of the ecosystem is not reduced.
4. **When conflicts arise, protecting living resources should in general be given priority over exploiting nonliving resources,** nonexclusive uses should be preferred over exclusive uses, and reversible exclusive uses should be preferred over nonreversible exclusive uses. Potential conflicts should be identified early and in an orderly fashion, and equitable solutions should be developed by processes that protect and enhance public order.
5. **The Public Trust Doctrine should govern decisions** in order to protect the interests of the whole community and the interests of intergenerational equity. This doctrine requires that conflicts must be resolved in favor of keeping the oceans whole and protecting the interests of the public today and in the future. Managing resources as a commons should be preferred over privatizing such resources. If private developments are allowed, the public should receive financial benefits from such developments. The costs and benefits of each ocean development should be understood before a project is undertaken, and the benefits should be distributed fairly. All costs arising from a development should be internalized, under the "polluter pays" principle. The public must be able to protect public trust interests in the courts and administrative agencies, either through broad public interest standing or through an adequately funded ombudsman or guardian designated to protect the oceans, its natural objects, and its living creatures.
6. **The resources of the oceans should be utilized in a manner that promotes sustainable development,** but resource exploitation should not be the dominating factor in ocean resource management decisionmaking. The cumulative effects of resource exploitation should be examined and understood before new development are undertaken.
7. **The governance of the U.S. oceans should be undertaken through a system in which the states, territories, and commonwealths are full partners with the federal government** in ocean decisions that affect their economic or environmental interests.
8. **The historically-based claims of indigenous peoples to ocean space and ocean resources should be recognized,** and their traditional practices of dealing with ocean resources from a perspective of kinship and harmony should be followed whenever possible.
9. **Developed countries should assist developing countries financially** to enable them to undertake the responsibilities outlined in these principles.

\*Based on ideas from Jack Archer, Biliama Ochin-Sain, Clifton Curtis, Richard Hildreth, Casey Jarman, Robert Knecht, and many others.

This implies that some law now exists, but the Declaration leaves its precise content unspecified.

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Most commentators refer to the well-known *Trail Smelter* arbitration between the United States and Canada as one of the bases of customary law in this area.

### Trail Smelter Case (United States v. Canada)

Arbitral Tribunal, 1941  
III U.N. Rep. Intl. Arb. Awards 1905, 1907 (1949)

#### CONVENTION FOR SETTLEMENT OF DIFFICULTIES ARISING FROM OPERATION OF SMELTER AT TRAIL, B.C. . . .

##### Article III

The Tribunal shall finally decide the questions, hereinafter referred to as "the Questions," set forth hereunder, namely:

- (1) Whether damage caused by the Trail Smelter in the State of Washington has occurred since the first day of January, 1932, and, if so, what indemnity should be paid therefor?
- (2) In the event of the answer to the first part of the preceding Question being in the affirmative, whether the Trail Smelter should be required to refrain from causing damage in the State of Washington in the future, and if so, to what extent? . . .

##### Article IV

The Tribunal shall apply the law and practice followed in dealing with cognate questions in the United States of America as well as international law and practice, and shall give consideration to the desire of the high contracting parties to reach a solution just to all parties concerned. . . .

##### DECISION

Reported on March 11, 1944, to the Government of the United States of America and to the Government of the Dominion of Canada, Under the Convention Signed April 15, 1935.

## The 1987 Sandoz Chemical Fire

Thirty tons of toxic chemicals were washed into the Rhine River following a fire at the Sandoz complex near Basel, Switzerland.

500,000 fish and eels were killed along the 185-miles of the Rhine River between Basel and Rotterdam.

What was the Duty to Notify in this situation?

Is Switzerland liable for all the damage?

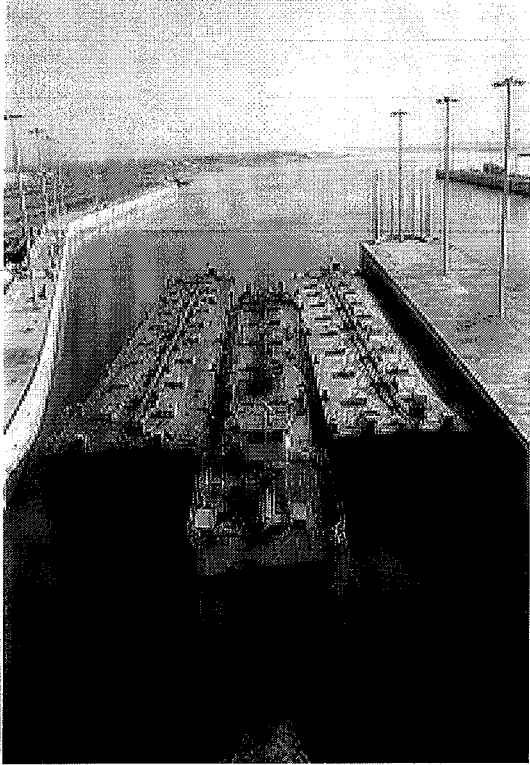
How are damages to be measured?

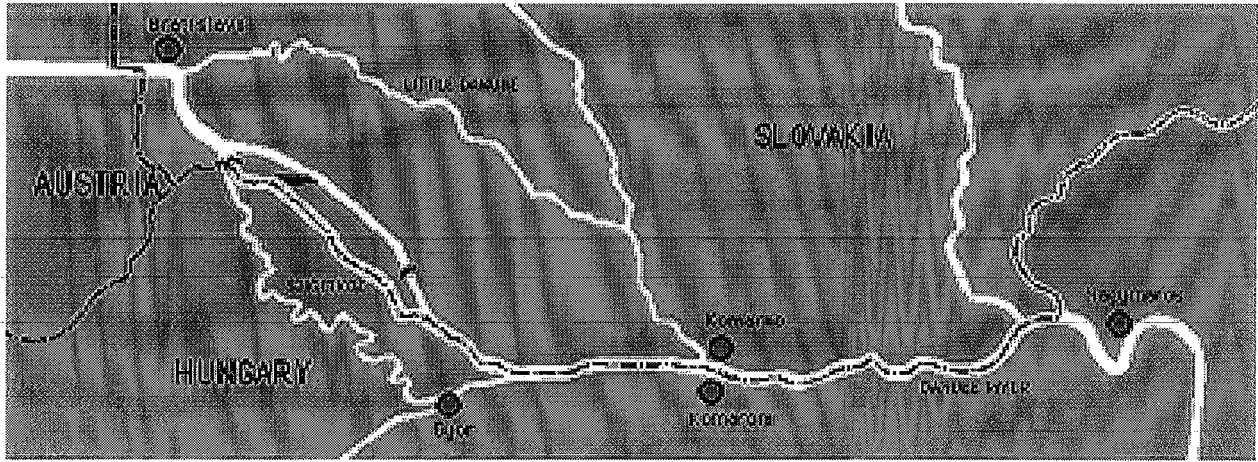
## Chernobyl

Should the Soviet Union have been held liable for all the health problems attributable to the Chernobyl disaster?

Why didn't any country bring any claim against the Soviet Union?

Does the failure to have brought a claim effect the state of the law?





CONVENTION ON INTERNATIONAL TRADE IN ENDANGERED SPECIES  
OF WILD FAUNA AND FLORA  
(CITES)

Signed at Washington on March 3, 1973

The Contracting States,  
RECOGNIZING that wild fauna and flora in their many beautiful and varied forms are an irreplaceable part of the natural systems of the earth which must be protected for this and the generation to come;

CONSCIOUS of the ever-growing value of wild fauna and flora from aesthetic, scientific, cultural, recreational and economic points of view;

RECOGNIZING that peoples and States are and should be the best protectors of their own wild fauna and flora ;

RECOGNIZING, in addition, that international co-operation is essential for the protection of certain species of wild fauna and flor against over-exploitation through international trade;

CONVINCED of the urgency of taking appropriate measures to this end;

HAVE AGREED as follows:

ARTICLE I Definitions

For the purpose of the present Convention, unless the context otherwise requires:

- (a) "Species" means any species, subspecies, or geographically separate population thereof;
- (b) "Specimen" means:
  - (i) any animal or plant, whether alive or dead;
  - (ii) in the case of an animal: for species included in Appendices I and II, any readily recognizable part or derivative thereof specified in Appendix III in relation to the species; and
  - (iii) in the case of a plant: for species included in Appendix I, any readily recognizable part of derivative thereof; and for species included in Appendices II and III, any readily recognizable part of derivative thereof specified in Appendices II and III in relation to the species;
- (c) "Trade" means export, re-export, import and introduction from the sea;

- (d) "Re-export" means export of any specimen that has previously been imported;
- (e) "Introduction from the sea" means transportation into a State of specimens of any species which were taken in the marine environment not under the jurisdiction of any State;
- (f) "Scientific Authority" means a national scientific authority designated in accordance with Article IX;
- (g) "Management Authority" means a national management authority designated in accordance with Article IX;
- (h) "Party" means a State for which the present Convention has entered into force.

## ARTICLE II Fundamental Principles

1. Appendix I shall include all species threatened with extinction which are or may be affected by trade. Trade in specimens of these species must be subject to particularly strict regulation in order not to endanger further their survival and must only be authorized in exceptional circumstances.

2. Appendix II shall include:

- (a) all species which although not necessarily now threatened with extinction may become so unless trade in specimens of such species is subject to strict regulation in order to avoid utilization incompatible with their survival; and
- (b) other species which must be subject to regulation in order that trade in specimens of certain species referred to in sub-paragraph (a) of this paragraph may be brought under effective control.

3. Appendix III shall include all species which any Party identifies as being subject to regulation within its jurisdiction for the purpose of preventing or restricting exploitation, and as needing the cooperation of other parties in the control of trade.

4. The Parties shall not allow trade in specimens of species included in Appendices I, II and III except in accordance with the provisions of the present Convention.

**A Comprehensive Study on the  
Ocean Disposal of Calcium Carbonate Residue in the Dumping  
Area of North Yellow Sea  
(Abstract)**

Jiayi ZHOU et al<sup>①</sup>

(Institute of Marine Environmental Protection, State Oceanic Administration, P. O.  
Box 303, Dalian 116023, China)

1. Introduction

Papers published on research of ocean dumping has greatly increased since early 1970s'. But until now, research on ocean dumping of calcium carbonate ( $\text{CaCO}_3$ ) residue has rarely been reported in the literature.

The Dalian Chemical Company produces 800 thousand tons of sodium carbonate annually with 300 thousand tons of calcium carbonate residue waste. How to dispose of the residue is one of the key problems in Keeping a continuous production of sodium carbonate. The preliminary comparative assessment of land-based and ocean disposal of  $\text{CaCO}_3$  residue shows that the ocean disposal of  $\text{CaCO}_3$  residue waste is less harmful to the environment and more economic. But further research is needed to provide more information to ensure that ocean disposal of  $\text{CaCO}_3$  residue is feasible and acceptable before a dumping permit can be issued by the management authority. This report presents the objectives of this study, the experiment design, and the main results and conclusions drawn from this comprehensive study.

2. Objectives of this study

2. 1 To identify the possible impact of ocean dumping of  $\text{CaCO}_3$  residue to the marine environment including water column, sediment and marine organisms.

2. 2 To determine the rate of sedimentation and the area of dispersion of  $\text{CaCO}_3$

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<sup>①</sup> The main participants are: Jiayi ZHOU, longzhang LI, Wanying QIAN, Zhenbao LI, Lianke CHANG, Hening HUANG, Hanguang XU, Defu ZHANG, Sulin JA, Cuncei SHAO and Xihou WANG.

## Cooperation and Confrontation in the Nineties

- \* 1994 Part XI Agreement
- \* 1996 Protocol to the London Convention, 1972
- \* 1995 Straddling and Migratory Stocks Agreement
- \* 1993 FAO Compliance Agreement
- \* 1992-98 Sea Transport of Ultrahazardous Radioactive Materials
- \* Whales
- \* Maritime Boundary Delimitation

**Mayaguezanos por la Salud y el Ambiente v. United States** (D.P.R. 1999), aff'd 198 F.3d 297 (1<sup>st</sup> Cir.1999).

The British-flag vessel *Pacific Swan* was carrying high-level nuclear wastes from Europe to Japan, and traveling through the the Caribbean and then through the Panama Canal.

In the process, it was traveling through the EEZ around Puerto Rico.

***Was it required to prepare an EIS under NEPA?***

***Does the United States have the power to restrict transit through the EEZ?***

District Court says no. First Circuit reserves judgment on that question, but says that since the United States has not taken any action, no “major federal action” has occurred that would trigger the NEPA requirement.

The First Circuit is also leaning toward a ***political question*** holding, saying that courts should stay clear of foreign policy questions.

# MARINE PROTECTED AREAS

- \* {WILDERNESS  
{WILD OCEAN RESERVES
  
- {SANCTUARY -- SPECIAL AREA  
{PROTECTED -- PARTICULARLY  
{AREA SENSITIVE AREA
- \* {AREA TO BE AVOIDED  
{(IMO)  
{SINGLE -SPECIES PROTECTED AREA  
{ (WHALE SANCTUARY)  
{ (SPAWNING AREA)
  
- \* MANAGEMENT AREA  
(MULTIPLE-USE APPROACH)

## FLORIDA ZONING CATEGORIES

REPLENISHMENT RESERVES  
SANCTUARY PRESERVATION AREAS  
SPECIAL-USE ZONES  
WILDLIFE MANAGEMENT ZONES  
EXISTING MANAGEMENT AREA

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**PRINCIPLES OF OCEAN STEWARDSHIP MISSING FROM THE RIO DECLARATION**

1. BIODIVERSITY SHOULD BE PROTECTED.
2. RARE AND FRAGILE ECOSYSTEMS SHOULD BE PROTECTED.
3. MARINE MAMMALS SHOULD BE PROTECTED.
4. PUBLIC VALUES IN THE OCEANS AND COASTAL AREAS SHOULD BE PROTECTED (THE PUBLIC TRUST DOCTRINE).
  - A. NONEXCLUSIVE USES SHOULD BE FAVORED OVER EXCLUSIVE USES (PUBLIC ACCESS SHOULD BE PRESERVED WHENEVER POSSIBLE).
  - B. REVERSIBLE COMMITMENTS SHOULD BE FAVORED OVER IRREVERSIBLE COMMITMENTS.
  - C. OCEAN-DEPENDENT USES SHOULD BE FAVORED OVER NON-DEPENDENT USES.

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## DRAFT PACIFIC CHARTER OF HUMAN RIGHTS

*LAWASIA (The Law Association for Asia and the Pacific) has been instrumental in promoting human rights for many years. There is a Human Rights Standing Committee under its auspices.*

*It has drafted a human rights treaty for the Pacific region. Once finalized, it will be open for signature by Pacific States.*

*Although still in draft form, the Pacific Charter of Human Rights is reproduced here.*

### Article 13 - Right to Vote and to Participate in Political Life

1. All citizens shall have the right to participate freely in the government of their country, either directly or through freely chosen representatives.
2. All citizens shall have the right of equal access to the public service of their country.
3. Every individual shall have the right of access to public property and services in strict equality of all persons before the law.
4. Every citizen shall have the right to participate effectively in the decisions affecting the citizen in relation to economic and social development in the country.

CONVENTION FOR THE PROTECTION  
OF THE NATURAL RESOURCES AND ENVIRONMENT  
OF THE SOUTH PACIFIC REGION

[Done at Noumea, New Caledonia, November 25, 1986]  
+Cite as 26 I.L.M. 38 (1987)+

Article 14

SPECIALLY PROTECTED AREAS  
AND PROTECTION OF WILD FLORA AND FAUNA

The Parties shall, individually or jointly, take all appropriate measures to protect and preserve rare or fragile ecosystems and depleted, threatened or endangered flora and fauna as well as their habitat in the Convention Area. To this end, the Parties shall, as appropriate, establish protected areas, such as parks and reserves, and prohibit or regulate any activity likely to have adverse effects on the species, ecosystems or biological processes that such areas are designed to protect. The establishment of such areas shall not affect the rights of other Parties or third States under international law. In addition, the Parties shall exchange information concerning the administration and management of such areas.

. . . . .

Article 16

ENVIRONMENTAL IMPACT ASSESSMENT

1. The Parties agree to develop and maintain, with the assistance of competent global, regional and sub-regional organisations as requested, technical guidelines and legislation giving adequate emphasis to environmental and social factors to facilitate balanced development of their natural resources and planning of their major projects which might affect the marine environment in such a way as to prevent or minimise harmful impacts on the Convention Area.
2. Each Party shall, within its capabilities, assess the potential effects of such projects on the marine environment, so that appropriate measures can be taken to prevent any substantial pollution of, or significant and harmful changes within, the Convention Area.
3. With respect to the assessment referred to in paragraph 2, each Party shall, where appropriate, invite:
  - (a) public comment according to its national procedures,
  - (b) other Parties that may be affected to consult with it and submit comments.

The results of these assessments shall be communicated to the Organisation, which shall make them available to interested Parties.

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**"FREEDOM OF THE SEA" -- A CONCEPT WHOSE TIME HAS COME AND GONE (WITH REGARD TO RESOURCES).**

**THE NOTION OF THE "LIMITLESS SEA" THAT HAS DOMINATED OUR VISION OF THE OCEAN NO LONGER HOLDS TRUE.**

**A NEW REGIME TO PROTECT THE RESOURCES OF THE HIGH SEAS IS TAKING SHAPE.**

**FURTHER COOPERATIVE WORK IS NEEDED.**

**MONITOR**

**MANAGE**

**LIMIT ACTIVITIES**

**PROTECT AND PROMOTE  
BIODIVERSITY**

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**ENVIRONMENTAL IMPACT  
ASSESSMENT**

**PRECAUTIONARY PRINCIPLE**