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Production: *The Journal is printed by Western Newspaper Publishing Co., Inc., 537 East Ohio Street, Indianapolis, IN 46204. The Journal invites the submission of articles and book reviews. Citations should conform to the most recent edition of THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION, published by The Harvard Law Review Association.*

Postmaster: *Send address changes to Connecticut Journal of International Law, 65 Elizabeth Street, Hartford, CT 06105-2290.*

Web Address: *The Journal's home page is located at <http://www.cjil.org>.*

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Vol. 34, No.2 of 2

Cite as CONN. J. INT'L L.

CONNECTICUT JOURNAL OF INTERNATIONAL LAW

2018 – 2019

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CONNECTICUT JOURNAL OF INTERNATIONAL LAW

VOLUME 34

SPRING 2019

NUMBER 2

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MADE IN TAIWAN: ALTERNATIVE GLOBAL MODELS FOR MARRIAGE EQUALITY

Stewart Chang*

Abstract

This Article comparatively analyzes the judicial decisions that led to same-sex marriage equality in Taiwan, South Africa, and the United States. After first evaluating the structural mechanisms that led Taiwan to become the first Asian nation to legalize same-sex marriage through Interpretation No. 748 of the Taiwan Constitutional Court, this Article then draws comparisons to how marriage equality was similarly affected through a delayed imposition of the court order in South Africa to allow the legislature an opportunity to rectify the law in Minister of Home Affairs v. Fourie, and finally considers how these approaches provide equally viable and more inclusive alternatives to the incrementalist strategy employed by gay rights activists in the United States that resulted in Obergefell v. Hodges. In the United States, same-sex marriage equality was accomplished through an incrementalist approach that recommends a certain ordering for judicial lawmaking – that societal values must change and evolve first, and action by the Court follows after to reflect the change in societal morals. The Taiwanese and South African decisions, on the other hand, are more proactive and suggest a different ordering for judicial change – that it is the duty of the government to define and shape the evolution of societal values, which is best accomplished when the judiciary works in tandem with the legislature to spearhead that social change.

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INTRODUCTION

On May 24, 2017, the Taiwan Constitutional Court issued *Interpretation No. 748*,¹ which declared the portion of the Taiwan Civil Code that prohibits same-sex marriage as an unconstitutional violation of the freedom to marry and the right to equality. The decision contains a delayed application clause that allows the legislature a grace period of two years to amend the Civil Code before the decision would go into effect. Notwithstanding the remedial delay, international reaction to *Interpretation 748* has been overwhelmingly positive, as it has been praised for placing Taiwan in the position of becoming the first Asian country to legalize same-sex marriage. The fact that Taiwan is being regarded by the international community as the vanguard for Asia to catch up with the rest of the world, however, is slightly problematic as it buys into the myth that Asia is primitive and grossly underdeveloped in respect to gay rights when compared to the West. Recognition of the rights of sexual minorities has increasingly become the benchmark by which the Global North has differentiated itself from the Global South in terms of progress and modernity.² Yet as of the writing of this Article, only a small minority consisting of 24 countries around the world has legalized same-sex marriage. Many Western countries, including Australia and many parts of Europe, still do not recognize same-sex marriage. In fact, Germany and Malta legalized same-sex marriage after the decision in Taiwan.³ This Article seeks to dispel the myth that Asia is necessarily behind Western countries in respect to gay rights, and looks at the Taiwan same-sex marriage equality case as a model not to be emulated only by Asia, but by the rest of the world, including the West.

Interpretation 748 has drawn comparisons to *Obergefell v. Hodges*,⁴ the case that legalized same-sex marriage equality at the national level in the United States. This comparison suggests that Taiwan is behind the United States and follows the United States in respect to gay rights. Media reports indeed indicated that the

¹ *Judicial Yuan Interpretation No. 748* (May 24, 2017, Taiwan), http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=748.

² See Katherine Franke, *Dating the State: The Moral Hazards of Winning Gay Rights*, 44 COLUM. HUM. RTS. L. REV. 1, 5 (2012) ("Modern states are expected to recognize a sexual minority within the national body and grant that minority rights-based protections. Pre-modern states do not. Once recognized as modern, the state's treatment of homosexuals offers cover for other sorts of human rights shortcomings."). See also Keith Aoki, *Space Invaders: Critical Geography, the "Third World"*, in *International Law and Critical Race Theory*, 45 VILL. L. REV. 913, 925 (2000) (describing how the Third World has been popularly characterized by "irrational local fundamentalism...technological 'backwardness,' or simply lack of modernity"); BALAKRISHNAN RAJAGOPAL, *INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS AND THIRD WORLD RESISTANCE* 248 (2003) (critiquing the way human rights in developing countries are constructed as playing "catch-up with the West").

³ Allison Smale & David Shimer, *German Parliament Approves Same-Sex Marriage*, N.Y. TIMES, June 30, 2017, <https://www.nytimes.com/2017/06/30/world/europe/germany-gay-marriage.html>; Associated Press, *Malta Legalizes Same-Sex Marriage*, N.Y. TIMES, July 12, 2017, <https://www.nytimes.com/2017/07/12/world/europe/malta-same-sex-marriage-legalized.html>.

⁴ *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

release of the *Obergefell* decision was the temporal indicator that Taipei mayor Ko Wen-Je was looking for as a signal to finally make good on his campaign promise to push for same-sex marriage in Taiwan.⁵ Subsequently in July 2015, scarcely a month following *Obergefell*, the City of Taipei became the primary petitioner to challenge the constitutionality of Taiwan's marriage law, which would lead to the landmark court decision by the Taiwan Constitutional Court with *Interpretation 748*.⁶ Then, as a rare citation to foreign law, the Taiwan Constitutional Court specifically references *Obergefell* in the decision. Thus, at first blush it does appear as though Taiwan has been following in the footsteps of the United States, and specifically Justice Kennedy's jurisprudential lead in *Obergefell*.

However, even though *Interpretation 748* cites *Obergefell*, the case strongly departs from *Obergefell*'s analytical framework. *Obergefell* is decided primarily as an issue of due process protection of the fundamental right to marry—it does not, nor does it seek to, recognize gay individuals as members of a constitutionally protected class. *Interpretation 748*, on the other hand, is at its core an equal protection case that is more expansive than *Obergefell* in deeming sexual orientation a protected classification. In this respect, Taiwan provides an alternative interpretive model for constitutional protection of gay rights that sharply diverges from the model espoused in the United States. Rather, *Interpretation 748* more closely resembles a case that it does not cite, and one that comes from another non-Western nation: *Minister of Home Affairs v. Fourie*⁷ from post-Apartheid South Africa. Both *Fourie* and *Interpretation 748* are equal protection cases that engage in delayed remedial solutions as alternative strategies to minimize public backlash against perceived judicial activism, which was also a principal motivating factor, but led to a different way gay rights was litigated in the United States.

The incrementalist litigation strategy that was employed by activists in the United States influenced the way in which the gay rights jurisprudence evolved as primarily an issue of due process rather than equal protection. In this respect, gay rights and marriage equality cases in the United States fall more squarely within the tradition of Supreme Court cases dealing with the penumbral right of privacy in matters of family formation, which starts with *Griswold v. Connecticut*⁸ and perhaps most famously culminates in *Roe v. Wade*.⁹ Gay rights jurisprudence in the United States does not emerge from the competing framework of equal protection that was evolving around the same time as *Griswold* and actually

⁵ *Taiwan Close to Recognizing Gay Unions*, TAIPEI TIMES, June 28, 2015, <http://www.taipeitimes.com/News/front/archives/2015/06/28/2003621747> (“Alliance secretary-general Chien Chih-chieh...said the US is a crucial indicator for the nation, as Taiwanese politicians look to Washington, even though same-sex unions have already been legalized in many European countries...[and in response to a question whether he would support marriage equality, mayor] Ko said he would wait until half of the US states recognized same-sex marriages.”).

⁶ Christie Chen, *Taipei City to Seek Constitutional Interpretation on Gay Marriage*, FOCUS TAIWAN (July 23, 2015, 9:10:28 PM), <http://focustaiwan.tw/news/asoc/201507230024.aspx>.

⁷ *Minister of Home Affairs v. Fourie*, 2006 (1) SA 524 (CC) (S. Afr.).

⁸ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁹ *Roe v. Wade*, 410 U.S. 113 (1973).

applied in *Loving v. Virginia*,¹⁰ which is closer akin to anti-discrimination cases like *Brown v. Board of Education*.¹¹ The primary pitfall of achieving same-sex marriage equality as a due process fundamental rights issue, however, is that it entrenches the institution of marriage as the normative goal for equality rather than dignify sexual orientation itself as a classification requiring broad constitutional protection.

In this respect, this Article also contends that contrary to popular perception, *Obergefell* is not the *Loving* of our time. Instead, *Interpretation 748* and *Fourie* pick up on the same line of inquiry that the United States abandons in respect to equal protection in marriage after *Loving*. This Article proposes that the equal protection analysis provided in *Interpretation 748* and *Fourie* is a preferable model for achieving gay rights because it does not narrow equality as a privilege to be enjoyed only within the context of privacy rights, but creates more robust protections for gay individuals against discrimination on all levels, including employment and other public spaces.

Moreover, the incrementalist approach applied in the United States is based on the premise that in order to avoid backlash, societal views must first be shifted, and only then should the judiciary follow with rulings that reflects that shift. Incrementalists point to the conservative political backlash following *Brown* and *Roe* as instances where racial and gender rights experienced a period of regression following progressive Supreme Court decisions that were regarded by the public as judicial overreaching. Through their delayed application provisions, *Interpretation 748* and *Fourie* offer another means by which to soften backlash, which at the same time suggest the alternative outlook that the duty of the Court is not to wait for social attitudes to change before making socially progressing rulings, but to spearhead the evolution of social norms by leading the call for societal progress.

Part I offers a brief history of the same-sex marriage equality movement in Taiwan, and then evaluates *Interpretation 748* and the analytical strategy taken by the Taiwan Constitutional Court in granting broader protections to the gay population beyond marriage. Part II compares *Interpretation 748* to *Fourie*, and explains how the tumultuous histories of both countries set equal protection as a priority within their countries' constitutional jurisprudence. Part III considers the pitfalls in pigeonholing same-sex marriage equality as a due process rather than an equal protection issue, as has occurred in the United States, and argues that *Interpretation 748* and *Fourie* proffer better models for the remainder of the world to follow in the future of international gay rights jurisprudence.

I. MARRIAGE EQUALITY IN TAIWAN: FOLLOWING OR LEADING?

There has been a movement for same-sex marriage equality in Taiwan for some time. As early as 1986, while Taiwan was still under martial law, Chi Chia-Wei who would eventually become one of the petitioners in *Interpretation 748*, had been appealing to all branches of the Taiwanese government—the Executive

¹⁰ *Loving v. Virginia*, 388 U.S. 1 (1967).

¹¹ *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

Yuan, the Legislative Yuan, and the Constitutional Court—for legal recognition of same-sex relationships. The government responses to his petitions were indifferent or negative over the course of two decades. In 2000, as the country was in the midst of reform under Chen Shui-Bian, the first President from the Democratic Progressive Party whose election signaled the end of the Kuomintang's continuous rule since martial law, the legislature considered a proposal allowing same-sex partners to “form a family” through marriage and adoption of children as part of the Human Rights Basic Law.¹² The law, however, encountered public opposition and was not introduced before the Legislature. In 2006, Representative Hsiao Bi-Khim attempted to introduce the Same Sex Marriage Act, but that bill was also rejected at its early stages.¹³ Thus, for three decades the move to legalize same-sex marriage in Taiwan had gone nowhere.

Sensing the need to organize to effectively advocate for change, gay activists banded together to form the Taiwan Alliance to Promote Civil Partnership Rights (TAPCPR) in 2009. After conducting extensive research for three years, TAPCPR determined that the best way to advocate for same-sex marriage equality was to decenter marriage as the foundation for recognition of family rights. Thus, it published “Three Bills for Diverse Families” that advocated for protections of all non-traditional family structures, including civil partnerships, same-sex marriages, multiple-person families, and never-married individuals with adopted children. The Diverse Families Movement, as it was called, even included those whose relationships are not based on romantic associations. Based on these principles, TAPCPR proposed three bills for the Taiwan legislature to consider in 2013: same-sex marriage; a civil partnership system without restrictions as to the gender, gender identity, or sexual orientation of the partners; and groups of friends who choose to live together and take care of one another as a family. Earlier, Legislator Yu Mei-Nu had introduced a bill in December 2012 to amend the Civil Code to include same-sex marriages among legally recognized families. Then, taking one of the draft recommendations of TAPCPR, Legislator Yu introduced a separate bill to amend the Civil Code to allow for the recognition of same-sex marriages in October 2013. Unlike their predecessors, both bills advanced to the committee stage for deliberation.¹⁴

In the meantime, as a result of organizing, the issue of same-sex marriage equality was gaining particular attention during the 2014 and 2016 election cycles. In 2014, Dr. Ko Wen-je ran for Taipei mayor as an independent, which was quite unconventional. In order to garner the support of progressive constituents, he promised to support the legalization of same-sex marriage. After he won the election, however, he stated that he would wait to see how same-sex marriage equality unfolded in the United States before taking action. Tsai Ing-Wen also committed to same-sex marriage equality as a platform issue in her 2016

¹² Victoria Hsiu-Wen Hsu, *Colors of Rainbow, Shades of Family*, 16 GEO. J. INT'L AFF. 154, 155 (2015).

¹³ *Id.*; Taiwan Constitution Interpretation No. 748, 2017, Const. Ct. Interp. ¶ 9 (Constitutional Court, May 24, 2017), https://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=748 [hereinafter Interpretation 748].

¹⁴ *Id.*

presidential election campaign.¹⁵ Following her election as President in mid-January 2016 though, momentum for legislative action on same-sex marriage equality had stalled. By late January 2016 the legislative bills to amend the Civil Code were considered dead.¹⁶ Though her party controlled the majority of the seats in legislature, President Tsai became hesitant to push through marriage equality legislation after the election due to conservative backlash.¹⁷ Though a slim majority of Taiwanese citizens supported same-sex marriage,¹⁸ moves to enact legislation sparked protests from the opposition.¹⁹ Thus, it appeared as though the Executive branch of government was not going to lead the move toward same-sex marriage equality.

Support for same-sex marriage equality in Taiwan renewed in October 2016, following the suicide of a gay professor.²⁰ Jacques Picoux, a longtime resident of Taipei who taught French at National Taiwan University, became dejected when he lacked the legal recognition to participate in medical decisions on behalf of his partner of 35 years, Tseng Ching-chao, who was dying of cancer. Following Tseng's death, Picoux committed suicide by jumping from his high-rise apartment building. His story evoked massive public sympathy and resurrected efforts to pass same-sex marriage equality in the Legislature. Legislators Yu Mei-Nu, Hsu Yu-Jen, Tsai Yi-Yu, and the caucus for the New Power Party all proposed amendments to the Civil Code to allow for same-sex marriage.²¹ In December 2016 the bills cleared the first reading after deliberation by the Judiciary and Organic Laws and Statutes Committee. However, further action on the bills again stalled and it did not appear that legal change on same-sex marriage was going to come from the Legislature either. Thus, the Constitutional Court stepped in with *Interpretation 748*, reasoning, "it is still uncertain when these bills will be reviewed on the floor of the [Legislative Yuan]. Evidently, after more than a

¹⁵ Chris Horton, *Court Ruling Could Make Taiwan First Place in Asia to Legalize Gay Marriage*, N.Y. TIMES, May 24, 2017, <https://www.nytimes.com/2017/05/24/world/asia/taiwan-same-sex-marriage-court.html?mcubz=0>.

¹⁶ *Interpretation 748*, *supra* note 13.

¹⁷ Emily Rauhala, *A Backlash Against Same-Sex Marriage Tests Taiwan's Reputation for Gay Rights*, WASH. POST, Apr. 20, 2017, https://www.washingtonpost.com/world/asia_pacific/a-backlash-against-same-sex-marriage-tests-taiwans-reputation-for-gay-rights/2017/04/19/f855c8b8-2004-11e7-bcd6-6d1286bc177d_story.html?utm_term=.cbc10960cbec; Jeff Kingston, *Same-Sex Marriage Sparks a 'Culture War' in Taiwan*, JAPAN TIMES, Dec. 10, 2016, <https://www.japantimes.co.jp/opinion/2016/12/10/commentary/sex-marriage-sparks-culture-war-taiwan/#.WaBkF63MxbU>.

¹⁸ Kingston, *supra* note 17 ("A recent poll suggests Taiwan is polarized on the issue of legalizing same-sex marriage — 46.3 percent support it, 45.4 percent oppose it").

¹⁹ *Taiwan Debates Gay Marriage*, THE ECONOMIST, Dec. 3, 2016, <https://www.economist.com/news/asia/21711096-it-would-be-first-country-asia-legalise-it-taiwan-debates-gay-marriage> ("In mid-November, as the legislature was reviewing the draft gay-marriage laws, some 10,000 protesters converged outside; some broke through the gates to stage a sit-in in the courtyard."); Jermyn Chow, *Thousands Protest Against Gay Marriage Bill in Taiwan*, STRAITS TIMES (Nov. 18, 2016, 5:00AM), <http://www.straitstimes.com/asia/thousands-protest-against-gay-marriage-bill-in-taiwan>.

²⁰ Nicola Smith, *Professor's Death Could See Taiwan Become First Asian Country to Allow Same-Sex Marriage*, THE GUARDIAN (Oct. 28, 2017, 12:00AM), <https://www.theguardian.com/world/2016/oct/28/professors-death-could-see-taiwan-become-first-asian-country-to-allow-same-sex-marriage>.

²¹ *Interpretation 748*, *supra* note 13.

decade, the LY is still unable to pass the legislation regarding same-sex marriage.”²²

In *Interpretation 748*, the Taiwan Constitutional Court considered whether the gender restriction under the Marriage Chapter of the Taiwan Civil Code violated the equal protection and fundamental rights provisions in the Taiwan Constitution. Marriage is controlled under Chapter 2 of Part IV of the Taiwan Civil Code. Article 972 of Chapter 2 provides the specific gendered language: “A betrothal agreement shall be made by the male and the female parties in their own concord.” Holding to this strict interpretation of marriage, government officials denied marriage registrations to same-sex couples. The issue before the Court came about as a consolidated case that combined two separate challenges to the law. The first petitioner was the Taipei government. Mayor Ko Wen-je, in fulfillment of his campaign pledge to advocate for same-sex marriage equality, finally began taking action soon after the *Obergefell* decision was released. In July 2015, the Taiwan Municipal Government, at the direction of Mayor Ko, requested that the Ministry of the Interior, as its supervising authority, grant the city leave to seek a constitutional interpretation of the law from the Taiwan Constitutional Court. As the statutory municipality responsible for the registration of marriages under the Household Registration Act, the Taiwan Municipal Government was prohibited from registering marriages by same-sex couples, which the city deemed to be an unconstitutional violation of equal protection under Article 7 of the Taiwan Constitution and of a fundamental freedom under Articles 22 and 23.

The second petitioner was Chi Chia-Wei, the prominent gay activist in Taiwan who had repeatedly been fighting for same-sex marriage equality in Taiwan for nearly three decades. Originally in 1986, while Taiwan was still under martial law, Chi petitioned Parliament to legalize same-sex marriage.²³ Not only was he denied, but he was subsequently detained as a political prisoner without charge for five months.²⁴ In 1988, Chi and his partner held a marriage ceremony in Taipei and were again unsuccessful in gaining legal recognition of their marriage from the government.²⁵ In 1994, Chi petitioned the Ministry of Justice and the Ministry of the Interior, divisions of the Executive Branch, for recognition of his marriage. In response, the Ministry of Justice issued *Letter of 1994-Fa-Lu-Jue-17359*, which instituted the official position on the definition of marriage under the Civil Code as between one man and one woman.²⁶ In 1998 and 2000, Chi made unsuccessful applications to the Taiwan Taipei District Court for its approval to have a marriage ceremony performed by the notary public. In 2001, the Taiwan Constitutional Court denied his appeal and dismissed his claim. Thus,

²² *Id.*

²³ *Id.* at ¶ 8.

²⁴ *Victory at Last for Taiwan's Veteran Gay Rights Champion Chi Chia-wei*, STRAITS TIMES (May 25, 2017, 1:18PM), <http://www.straitstimes.com/asia/east-asia/victory-at-last-for-taiwans-veteran-gay-rights-champion-chi-chia-wei>.

²⁵ Central News Agency, *Man to Seek Constitutional Interpretation on Gay Marriage*, TAIWAN NEWS (Dec. 24, 2014, 9:54PM), <https://www.taiwannews.com.tw/en/news/2652956>.

²⁶ *Interpretation 748*, *supra* note 13, at ¶ 8. (citing *Letter of 1994-Fa-Lu-Jue-17359*: “Therefore, the so-called “marriage” under our current Civil Code must be a union between a man and a woman, and does not include any same-sex union.”).

Chi had been unsuccessful with all three branches of government in his advocacy for same-sex marriage equality.

In 2013, Chi and his partner renewed their attempt to register their marriage at the Wanhua District household registration office in Taipei. Their application was denied, and so they made an administrative appeal with the Taipei City Government; but that appeal was also denied. Chi subsequently filed a complaint with the Taipei High Administrative Court, which ruled in March 2014 that the Wanhua office did not violate the law when it refused to register Chi's marriage. His subsequent appeal to the Supreme Administrative Court was also rejected in September 2014, which finally led to his appeal to the Taiwan Constitutional Court that became the subject of *Interpretation 748*. Like the Taipei Municipal Government, Chi also claimed that the law was unconstitutional as a violation of his Article 7 right to equal protection and his Article 22 and 23 rights. In addition, he claimed that the law also violated his Article 10 right to freedom of movement.

In *Interpretation 748*, the Taiwan Constitutional Court declares the Marriage Chapter of the Civil Code to be unconstitutional. The Court first rules that the "decisional autonomy" to determine "whether to marry" and "whom to marry" were rights protected under Article 22 the Constitution. Article 22, which functions as an Unenumerated Rights Clause, guarantees the rights of individuals so long as they are not detrimental to social order or public welfare. Previously, the Taiwan Court had applied Article 22 to delineate the right to autonomy in family formation as fundamentally protected right.²⁷ Typically in Article 22 cases, the Court applies the balancing test contained in Article 23 of the Taiwan Constitution, which reads: "All the freedoms and rights enumerated in the preceding articles shall not be restricted by law except such as may be necessary to prevent infringement upon the freedoms of others, to avert an imminent danger, to maintain social order, or to promote public welfare." Though the petitioners in the *Interpretation 748* case had requested a review under Article 23, the Court does not apply the test for determining whether the government is permitted to infringe upon the universal right to marriage. Instead, the Taiwan Court immediately shifts its line of inquiry to determine whether the restrictions on same-sex marriage violate equal protection under Article 7 of the Constitution.

In coming to this finding, the Taiwan Constitutional Court engages in an expansive reading of Article 7. Although only "sex, religion, race, class, or party affiliation," are enumerated in Article 7, the Court determines that the "five classifications of impermissible discrimination set forth in the said Article are only exemplified, neither enumerated nor exhausted. Therefore, different treatment based on other classifications, such as disability or sexual orientation, shall also be governed by the right to equality under the said Article." This move by the Taiwan Court was significant, first in interpreting the Constitution

²⁷ See Interpretation No. 712, 2013, Const. Ct. Interp. (Constitutional Court Apr. 10, 2013) (finding that it was unconstitutional for the government to restrict Taiwanese parents from adopting children from Mainland China: "Marriage and family serve as the foundation by which society develops and shapes itself, and are thus institutionally protected by the Constitution (see Judicial Yuan Interpretations Nos. 362, 552, 554, and 696). The family system is based on the free development of personality and is essential for ensuring the functions of inheritance, education, the economy and culture. It is vital for an individual's growth in society and is the foundation of the creation and development of our society.") (Taiwan) [hereinafter Interpretation 712].

expansively as to infer protections for groups not specifically enumerated, and secondly in making sexual orientation into a constitutionally protected category. In this respect, its earlier application of Article 22 functions to illustrate the ways in which the denial of marriage debases the human dignity of same-sex couples as a protected class. The Taiwan Constitutional Court finds specifically: “homosexuals, because of the demographic structure, have been a discrete and insular minority in the society. Impacted by stereotypes, they have been among those lacking political power for a long time, unable to overturn their legally disadvantaged status through ordinary democratic process. Accordingly, in determining the constitutionality of different treatment based on sexual orientation, a heightened standard shall be applied.”²⁸ The heightened standard becomes applicable not because the law restricts a fundamental right, but because the law engages in discriminatory behavior.

In *Interpretation 748*, the Taiwan Constitutional Court engages in an expansive reading of equal protection that is more progressive than in the United States. In the United States, sexual orientation, if it is protected at all, is treated as a subcategory of sex. In *Hively v. Ivy Tech Community College of Indiana*,²⁹ for instance, the Seventh Circuit held that discrimination based on sexual orientation is a form of sex discrimination prohibited under Title VI of the Civil Rights Act of 1964. In so doing, however, the Seventh Circuit recognized that it did not have the power to expand Title VII to include sexual orientation as a separately protected class. As a subcategory of sex, sexual orientation discrimination is typically presented as inequitable treatment due to gender nonconformity. As such, sexual orientation is not protected in and of itself under United States federal law, and separate protection for sexual orientation as a classification has been left to individual states.

By including sexual orientation among the statuses protected under Article 7 of the Taiwan Constitution, the Taiwan Constitutional Court is able to apply the heightened scrutiny test where different treatment must be aimed at furthering an important public interest by a means that is substantially related to that interest. The Court did find that reproduction and maintaining ethical order in society were important state interests. However, in applying the test, the Court finds that restrictions against same-sex marriage bear no rational basis to the alleged government purposes of reproduction and safeguarding basic ethical orders. The ability to procreate is not a prerequisite to marriage for heterosexual couples, and the inability to procreate does not create grounds for voiding or dissolving a heterosexual marriage. Thus, the interest in procreation does not create a valid reason to treat gay couples differently.

The Taiwan Constitutional Court further recognizes that marriage also advances certain ethical orders in society, such as “the minimum age of marriage, monogamy, prohibition of marriage between close relatives, obligation of fidelity, and mutual obligation to maintain each other.” The Court additionally finds, however, that these ethical orders that are advanced in opposite-sex marriages can identically be advanced in same-sex marriages as well. Rather than evaluate whether public morality justifies restrictions on marriage, the Taiwan Court asks

²⁸ *Interpretation 748*, *supra* note 13, at ¶ 15.

²⁹ *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017).

whether heterosexual couples are in a better position than same-sex couples to advance the morals contained in marriage. Because same-sex marriages could equally advance the principles of “the minimum age of marriage, monogamy, prohibition of marriage between close relatives, obligation of fidelity, and mutual obligation to maintain each other,” there is no reason to treat them differently from opposite-sex marriages. As a result, the Taiwan Constitutional Court rules that the gender specific language in the Marriage Chapter of the Civil Code violates the right of gay individuals to have equal protection under the law.

The case, predictably, was quite controversial prior to the ruling. One argument that had been lodged against the judiciary hearing the case at all was the fact that the legislature had already considered the issue several times over the years, and had considered multiple legislative drafts, but had never reached the point where there was critical consensus to change the law. The legislative process, as the argument goes, functions as a more accurate measure of democratic accountability in respect to the issue of same-sex marriage, and the judiciary should not override the representative role of the legislature. Even though same-sex marriage equality had come before the legislature repeated times, the legislature found no public mandate to act. Furthermore, President Tsai Ing-wen had emphasized marriage equality as a significant promise during her election campaign, and on top of that, her party controlled the majority of seats in the legislature after she was elected.³⁰ The fact that progress on marriage equality still vacillated despite this favorable political environment suggests that there was still resistance among significant constituencies within the population that the elected officials were still beholden to, and that there was not yet critical mass of support for marriage equality to push forward immediate change to the law. As such, any action by the judiciary could be seen as subverting the democratic process. Recognizing that the issue was controversial and seeking to avoid the perception of judicial activism, the Taiwan Constitutional Court issued the legislature a two-year grace period to correct the Marriage Law to conform to the decision in *Interpretation 748*.

Public perception of judicial overreach and the legitimacy of the judicial process were also significant concerns among proponents of same-sex marriage equality in the United States, as those were the very arguments that fueled conservative backlash.³¹ For opponents, gay rights were framed as a culture war where core American family values were at stake. Gay rights activists responded in kind with an incrementalist approach that focused on how gay families are not opposed to but actually align with core American family values. The incremental approach to gay rights sought to effect change by incrementally swaying public opinion through a strategy of assimilation. They presented their equal protection

³⁰ Elaine Jeffreys and Pan Wang, *Pathways to Legalizing Same-Sex Marriage in China and Taiwan: Globalization and “Chinese Values”*, in BROWYN WINTER, MAXINE FOREST, & REJANE SENAC, *GLOBAL PERSPECTIVES ON SAME-SEX MARRIAGE: A NEO-INSTITUTIONAL APPROACH* 212 (2018). See also Fiona Keating, *Tsai Ing-wen: Who is Taiwan's First Female President, Leader of the Democratic Progressive Party?*, INTERNATIONAL BUSINESS TIMES, Jan. 17, 2016, <https://www.ibtimes.co.uk/tsai-ing-wen-who-taiwans-first-female-president-leader-democratic-progressive-party-1538440>.

³¹ See, e.g., Lynn D. Wardle, *The Judicial Imposition of Same-Sex Marriage: The Boundaries of Judicial Legitimacy and Legitimate Redefinition of Marriage*, 50 WASHBURN L.J. 79 (2010).

argument not on the right to be treated equally despite being different, but that they should be treated the same because they are the same as other families. In the campaign for same-sex marriage equality, incrementalist activists showcased gay families and their similarities to other normative families. Gay individuals were presented as equal citizens through their assimilation into American norms of family,³² and their differences from the norm were underplayed. Thus, incrementalism in the United States focused first on eliminating the strongly negative stereotypes associated with the gay population that was perpetuated by the criminalization of same-sex activity, which would then set the framework for normalizing gay relationships through marriage equality. The strategy for litigating *Lawrence v. Texas*³³ underplayed the sex and overplayed the relational aspects of sexual orientation, and this remained the strategy through *United States v. Windsor*³⁴ and *Obergefell v. Hodges*.

II. MARRIAGE EQUALITY IN SOUTH AFRICA: AVOIDING THE PITFALLS OF INCREMENTALISM

In citing *Obergefell*, the Taiwan Court implicitly credits the United States as the inspiring source for reform and change. However, in actuality *Interpretation 748* appears to be more closely modeled after the South African same-sex marriage equality case, *Minister of Home Affairs v. Fourie*. David S. Law and Wen-Chen Chang have discussed the ways in which the Taiwan Court imports foreign law into its decisions, though often tacitly.³⁵ Though it never mentions *Fourie*, *Interpretation 748* closely follows *Fourie* in both its analytical framework and its remedy. *Fourie* was also decided as a matter of equal protection, and also instituted a grace period for the legislature to act before the order would take effect. The remedial delay is a particularly distinctive feature in both cases, which may have been a product of the politically tumultuous histories that both countries share; as Law and Chang have pointed out, the Apartheid and martial law regimes of the two countries' pasts may have created increased sensitivity and appreciation for more protective legal processes and safeguards.³⁶

Taiwan was under Japanese colonial rule from 1895 to 1945. Unlike their European counterparts, Japan did not criminalize sodomy in its colonial laws. As a result, Taiwan has never had an anti-sodomy statute. Thus, Taiwan was already

³² Ruthann Robson, *Assimilation, Marriage, and Lesbian Liberation*, 75 TEMP. L. REV. 709 (2002).

³³ *Lawrence v. Texas*, 539 U.S. 558 (2003).

³⁴ *United States v. Windsor*, 570 U.S. 744 (2013).

³⁵ David S. Law & Wen-Chen Chang, *The Limits of Global Judicial Dialogue*, 86 WASH. L. REV. 523, 557 (2011) ("The published opinions of the TCC give the superficial appearance of a court that makes relatively little use of foreign law. Actual citation of foreign law is rare, especially in majority opinions.").

³⁶ *Id.* at 538 ("Although the two countries may be oceans apart, the country that still formally styles itself the Republic of China shares a number of key historical and political characteristics with South Africa, the darling of constitutional comparativists. Both are recent democratic success stories. Like South Africa, Taiwan endured years of both internal and external legitimacy crises, only to rapidly establish itself over the last two decades as one of the most vibrant and robust constitutional democracies in its region of the world. And like South Africa, Taiwan possesses an independent and active constitutional court with an outstanding intellectual pedigree, a large policy footprint, and a penchant for comparative analysis.").

at a different starting point in respect to the advancement of gay rights than most other countries, including the United States, as it did not have to first contend with the issue of decriminalization. Though being gay was not necessarily seen in a positive light in Taiwan, there were not the same associations of gay behavior with criminality as in the United States and other countries with anti-sodomy laws. As a result, the same model of incrementalism that worked in the United States, which assumes decriminalization as the starting point, does not automatically apply in Taiwan. Furthermore, the resulting history of Taiwan after de-colonization sets the stage where much of public discourse on rights and liberties was already focused on equal protection.

Following Japan's defeat in World War II, the United States handed over control over Taiwan to the Kuomintang (KMT)-led government of the Republic of China. China had been in the midst of civil war between the KMT and the Communist Party of China, but during World War II the two sides temporarily suspended hostilities and formed the Second United Front to stop the Japanese Imperial Army from conquering further portions of China. However, hostilities resumed soon after the end of World War II. As the KMT gradually lost ground to the Communists, the government imposed martial law on Taiwan in May 1949, where they would eventually retreat later that year. Under martial law, the exiled KMT government barred the formation of new political parties in Taiwan, ostensibly to suppress Communist insurgence. Martial law also allowed civilians to be tried in military rather than civil courts for sedition and other charges.

During this period of martial law, Taiwan became an authoritarian state. For fear of being undermined by Communists, the KMT established strict regulations to secure its rule in Taiwan. The KMT disallowed opposition parties and arrested individuals they perceived as potentially sympathetic to Communists on the mainland. During this era, the KMT government also engaged in a re-Sinification of Taiwan, believing that the traditional "family values" contained in Chinese Confucian principles would help stabilize the nation. Confucianism promoted devotion to filial piety and respect for social authority. Governments of other Asian countries utilized a similar resurgence of Asian values in order to stabilize their nations following de-colonization. In the 1993 Bangkok Declaration, developing post-colonial Asian countries such as Singapore and Malaysia suggested that international human rights standards that sought to crack down on authoritarian policies possessed a historical bias.³⁷ Western democracies could afford to grant their populations robust civil rights and civil liberty protections because they did not need to contend with the instabilities caused by recent histories of colonialism. Singapore, in particular, justified authoritarian rule as a necessary component of ensuring stability for a fledgling economy. It also touted conservative Asian values as a legitimate alternative to overly liberal Western values.

Following the lifting of martial law in 1987, Taiwan underwent a period of rapid democratization and the Constitutional Court and the Constitution, which had remained largely dormant and underutilized during martial law, played a significant role. The development of constitutional law in Taiwan following the

³⁷ Report of the Regional Meeting for Asia of the World Conference on Human Rights, para. 8, U.N. Doc. A/Conf.157/PC/59 (1993).

end of martial law has been particularly sensitive to safeguarding civil liberties, given the severe infringements on individual freedom that occurred during martial law. Constitutional interpretation has erred on the side of respecting human rights and civil liberties typically associated with Western democracies. Whereas Confucianization and Asian values have created resistance to the import of foreign human rights ideals in other parts of Asia,³⁸ the same did not occur in Taiwan. Rather, the Taiwanese population connected Confucian Asian values with the tumultuous four decades of martial law. As Joel Fetzer and Christopher Soper note, “Specifically, pro-democracy elites identified Confucianism with the political authoritarianism and cultural imperialism of the pre-democratic KMT.”³⁹ Rather than view Western democratic values as antithetical to Confucianism as a way to justify authoritarian rule, Taiwanese Confucianism adapted in a way that was consistent with democratization.⁴⁰ Thus, post-martial law Taiwan developed a constitutional theory that embraced rather than rejected liberal individualism. Due to the severe restrictions placed on personal liberties during martial law, the population was much more receptive to creating robust protections of personal rights and freedoms. For example, even before *Interpretation 748*, Taiwan had enacted laws prohibiting sexual orientation discrimination in the workplace with the Gender Equality in Employment Act of 2002 and amendments to the Employment Service Act in 2007.⁴¹

The government of post-martial law Taiwan has also been sensitive to public perceptions on the legitimacy of power. As a result of the strict controls that the KMT established to ensure its continuing rule, many of the legislators present at the time martial law formally ended had occupied their seats since 1948.⁴² In 1990, the Constitutional Court issued a decision ordering that these incumbents vacate their positions and new elections be held.⁴³ Since the lifting of martial law, the government in Taiwan has been proactively promoting increased transparency and accountability in government. In fulfillment of another one of her other campaign promises, President Tsai Ing-wen continues to work on providing transitional justice for the victims by opening archives so that they are free to research the atrocities that occurred during the martial law period and promising to write a comprehensive report on government oppression during the martial law era.⁴⁴ The desire to legitimize the Court’s decision and to add an extra layer of process may have been another motivating factor for the remedial delay used by the Constitutional Court in *Interpretation 748*.

³⁸ See, e.g., Stewart Chang, *The Postcolonial Problem for Global Gay Rights*, 32 B.U. INT’L L.J. 309, 354 (2014) (Singapore engaged in re-Sinification and neo-Confucianism that focused on Asian values in response to decades of Western colonial domination that had created loss of cultural identity).

³⁹ JOEL S. FETZER & J. CHRISTOPHER SOPER, CONFUCIANISM, DEMOCRATIZATION, AND HUMAN RIGHTS IN TAIWAN 33 (2013).

⁴⁰ *Id.* at 69-77; see also WILLIAM THEODORE DE BARY, ASIAN VALUES AND HUMAN RIGHTS: A CONFUCIAN COMMUNITARIAN PERSPECTIVE 4 (1998) (“Taiwan, rather than pitting Confucian values against democracy and human rights, was moving in the other direction—away from one-party tutelage by the Kuomintang and toward a more representative electoral democracy”).

⁴¹ Cing-Kae Chiao, *Employment Discrimination in Taiwan*, in NEW DEVELOPMENTS IN EMPLOYMENT DISCRIMINATION LAW (Roger Blanpain et al. eds., 2008).

⁴² Law and Chang, *supra* note 35, at 543.

⁴³ Interpretation No. 261, 1990, Const. Ct. Interp. (Constitutional Court June 6, 1990).

⁴⁴ Lee Hsin-fang, *Tsai Recommits to Transitional Justice*, TAIPEI TIMES, June 25, 2017, <http://www.taipeitimes.com/News/taiwan/archives/2017/06/25/2003673259>.

Around the same time that Taiwan was under martial law, South Africa existed as an Apartheid state. South Africa exited World War II as a Union still technically within the British Commonwealth, but with a government that implemented a formal system of segregation and racial discrimination. After the National Party, which ran on an Apartheid platform, took power with the election of 1948, its government passed a series of laws that disenfranchised the majority black population in order to maintain power and dominance. The National Party also saw Communism as a threat to South Africa. Thus, the National Party implemented tactics similar to those employed by the Kuomintang to solidify its rule during martial law in Taiwan. For example, anti-Apartheid political parties and advocacy groups, such as the African National Congress, the South African Communist Party, and the United Democratic Front were all banned.

During this time, the South African government also implemented police power by declaring States of Emergency in order to neutralize political dissent and resistance. Furthermore, the National Party instituted a movement of conservative family values that condemned sex and sexuality. Thus, the post-World War II histories of both Taiwan and South Africa involved regimes that severely restricted the civil liberties of their populations. Apartheid continued in South Africa even after it achieved complete independence from the British as a Republic in 1961. Despite increasing pressure from the international community to cease Apartheid, the system persisted until the 1990s when F. W. de Klerk became State President and opened negotiations to end Apartheid. This was about the same time that martial law was finally lifted in Taiwan. Thus, the two countries became fully democratized at roughly the same time, and the restructurings of their respective government systems were extremely sensitive to the restrictions put in place by the authoritarian regimes before them.

In South Africa, reform began as De Klerk ordered the release of Nelson Mandela from prison and lifted the ban on alternative political parties, which led to extensive negotiations between the National Party and the African National Congress to end Apartheid and fully democratize the nation. The defining steps of the new reformed government would be free elections and crafting of a new Constitution. Due to the history of structural racism and discrimination, the central underlying tenet of the new democratic political structure was equality. This led to the passage of a particularly robust equal protection clause in the post-Apartheid Constitution. Section 9(3) of the South African Constitution provides: "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth." Notably, the post-Apartheid South African Constitution is the first of its kind to recognize sexual orientation as a protected classification. Along with the new Constitution, a new Constitutional Court of South Africa was established to enforce these protections.

The first test for the new Constitution and the Constitutional Court in respect to the rights of gay individuals was a challenge to the anti-sodomy laws. In *National Coalition for Gay and Lesbian Equality v. Minister of Justice*, the Constitutional Court of South Africa found that the anti-sodomy statute, Section 20A of the Sexual Offences Act, which had been inherited from Dutch colonial rule and survived through British rule, was incompatible with the new

Constitution of post-Apartheid South Africa. Section 9(3) specifically lists sexual orientation as a protected class.⁴⁵ Because the anti-sodomy laws only applied to gay men, they discriminated based on gender and sexual orientation. Furthermore, the Court retroactively applied the decision to the date that the Interim Constitution was adopted, April 27, 1994. The lifting of anti-sodomy restrictions would pave the path to increased rights for the gay community, including protections from workplace discrimination and adoption rights, and finally culminating in the recognition of same-sex marriage equality in *Minister of Home Affairs v. Fourie*.

Fourie, like *Loving*, is fundamentally an equal protection case. Though the Constitutional Court of South Africa mentions to the right of privacy and the right to marry and procreate, the case is not premised on the fundamental rights to privacy as construed in the United States. Justice Albie Sachs, the author of the decision, even explicitly states: “I do not find it necessary to consider whether it in addition constitutes a violation of their right to privacy in terms of section 14 of the Constitution.”⁴⁶ Rather, the fundamental right of privacy and the right to marry are invoked insofar as they constitute the method by which gay individuals are being treated differently from heterosexual individuals. Thus, the South African Court does not tie the dignity of individuals so much to the fundamental right to marry, but to the right to be treated equally. In *Fourie*, the Court concludes: “the rights of dignity and equality are closely related. The exclusion to which same-sex couples are subjected, manifestly affects their dignity as members of society.”⁴⁷ Though the South African Court does venerate marriage in *Fourie*, Justice Sachs does not present marriage as the necessary ends to achieving dignity. The autonomy and choice to enter marriage or not is the indicator of dignity, and denial of the right to choose becomes the crux of the unequal treatment. Sachs reasons that, “[i]f heterosexual couples have the option of deciding whether to marry or not, so should same-sex couples have the choice as whether to seek to achieve a status and a set of entitlements and responsibilities on a par with those enjoyed by heterosexual couples.”⁴⁸

Unlike in the United States and Taiwan, sexual orientation is specifically enumerated as a protected class under the South African Constitution. Section 9(3) of the South African Constitution reads: “The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.” Justice Sachs particularly notes that in the post-Apartheid era, South Africa sought to break with its past by implementing robust equal protection within its Constitution; he writes: “Finally, our Constitution represents a radical rupture with a past based on intolerance and exclusion, and the

⁴⁵ *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1998 (12) BCLR 1517 (CC).

⁴⁶ *Minister of Home Affairs v Fourie* 2006 (3) BCLR 355 (CC) at fn. 110 (S. Afr.) [hereinafter *Fourie*].

⁴⁷ *Id.* at ¶ 114.

⁴⁸ *Id.* at ¶ 72.

movement forward to the acceptance of the need to develop a society based on equality and respect by all for all.”⁴⁹

However, Justice Sachs was also sensitive to the possible perception of judicial activism and backlash.⁵⁰ In order to reinforce public trust that the judiciary was not acting contrary to the public will, Sachs issued a one-year grace period for the legislature to correct the law before the decision would come into effect. Justice Sachs justified the delay by maintaining that “[i]t needs to be remembered that not only the courts are responsible for vindicating the rights enshrined in the Bill of Rights. The legislature is in the frontline in this respect.”⁵¹ Holning Lau suggests that the remedial delay mirrors the strategy taken by *Brown v. Board of Education II*, where “the U.S. Supreme Court stated that the integration of racially segregated schools should proceed with “all deliberate speed,” thereby creating a flexible grace period for desegregation.”⁵² Whereas the remedial delay in *Brown II* drew sharp criticism for slowing integration in the United States, Lau considers the potentially positive opportunities that a remedial delay can afford.

By involving the legislature in the process, a remedial delay placates the potential for legislative backlash in response to any public perception of judicial overreaching. Judicial action against standing statutes can be perceived as overriding the will of the people, which may undermine the authority of the Court in popular opinion. Lau concludes in the case of *Fourie*, “that the grace period enhanced the perceived legitimacy of both the court and same-sex marriage.”⁵³ Furthermore, the one-year grace period opened the opportunity for opposing sides on the issue to dialogue, which reaped a more collaborative process that also helped mitigate backlash. The legislature responded and passed the Civil Union Act in 2006 to comply with the *Fourie* order with minimal resistance and backlash. In this way, the *Fourie* Court was able to spur the legislature into a leadership role to guide the public to a more tolerant and equitable position.

The incrementalist approach taken in the United States, in contrast, believes it is best to wait for societal values to change and evolve, and then let the court order reflect the change in societal morals. Two years prior to *Obergefell*, the United States Supreme Court was presented with nearly the identical issue in *Hollingsworth v. Perry*, which dealt with California’s same-sex marriage equality ban. Proposition 8 amended the California Constitution so that “only marriage between a man and a woman is valid or recognized by California.”⁵⁴ At the district court level, in *Perry v. Schwarzenegger*, the Court found that Proposition 8 violated the equal protection and due process clauses of the Fourteenth Amendment.⁵⁵ California Governor Arnold Schwarzenegger and his successor Jerry Brown had previously declined to defend the law. Thus, the State of California elected not to appeal, and interveners entered to take the place of the

⁴⁹ *Id.* at ¶ 59.

⁵⁰ Holning Lau, *Comparative Perspectives on Strategic Remedial Delays*, 91 TUL. L. REV. 259, 286 (2016).

⁵¹ *Fourie*, *supra* note 46, at ¶ 138.

⁵² Lau, *supra* note 50, at 263.

⁵³ *Id.* at 286.

⁵⁴ California Marriage Act, Proposition 8 (2008) (codified at Cal. Const. Art. I, §7.5).

⁵⁵ *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

government on appeal. The Ninth Circuit, recognizing the standing of the interveners to appeal, affirmed the district court decision, and subsequently the interveners continued the appeal to the Supreme Court.

In *Hollingsworth v. Perry*, announced the same day as *Windsor*, the Supreme Court declined to revisit the Ninth Circuit decision because the interveners lacked standing. At the time the Court decided *Hollingsworth*, only eleven states and the District of Columbia had legalized same-sex marriage. The Court avoided reviewing the substantive merits of the case by basing its ruling on standing, which is consistent with the incrementalist position that perhaps the nation as a whole was not ready for the change and therefore the Court should not yet act. Though *Windsor* had struck down a portion of the Defense of Marriage Act that prohibited same-sex marriage at the federal level, legalization of same-sex marriage was left to individual states. By the time *Obergefell* came before the Court, thirty-seven states and the District of Columbia had legalized same-sex marriage, signaling that the time was right to nationalize same-sex marriage equality.

As an alternative, *Interpretation 748* and *Fourie* stand for the notion that rather than simply reflect the values of society, lawmakers should provide direction for where the values of the society should proactively evolve. Indeed, Justice Sachs has in mind the leadership role of lawmakers as he reasons, “I believe that Parliament is well-suited to finding the best ways of ensuring that same-sex couples are brought in from the legal cold. The law may not automatically and of itself eliminate stereotyping and prejudice. Yet it serves as a great teacher, establishes public norms that become assimilated into daily life and protects vulnerable people from unjust marginalisation and abuse.”⁵⁶ The role of the government is not only to represent the will of the people, but also to lead the people.

III. MARRIAGE EQUALITY IN THE UNITED STATES AND THE ROAD NOT TAKEN: WAS LOVING EVER REALLY ABOUT LOVING?

Same-sex marriage equality jurisprudence in the United States takes the more expedient path of due process rather than equal protection largely due to a misreading of *Loving v. Virginia*. Indeed, *Loving* has developed a mythos within American culture as the case that illustrates how “love conquers hate.”⁵⁷ Though *Loving* is popularly conceived of as the precursor for *Obergefell*,⁵⁸ it actually comes from a much different analytical tradition. *Obergefell* is a due process case that only mentions equal protection. *Loving* is an equal protection case that only mentions due process. Constitutional challenges based on the equal protection and due process clauses of the Fourteenth Amendment ask fundamentally

⁵⁶ *Fourie*, *supra* note 46, at ¶ 138

⁵⁷ Osagie K. Obasogie, *Was Loving v. Virginia Really About Love?*, THE ATLANTIC, June 12, 2017, <https://www.theatlantic.com/politics/archive/2017/06/loving-v-virginia-marks-its-fiftieth-anniversary/529929/> (“*Loving* is widely praised as a case about law ceding to the power of love in the face of astonishing harassment and bigotry endured by interracial couples.”).

⁵⁸ *Id.* (“The redemptive trope coming out of the *Loving* decision that love conquers all has also influenced other social movements, such as those leading to *Obergefell v. Hodges*—the 2015 Supreme Court decision recognizing same-sex marriage.”).

different questions. Equal protection challenges ask whether there is a compelling state interest in treating individuals differently, whereas due process challenges ask whether there is a compelling state interest in placing limitations on a fundamental liberty interest.

Although *Obergefell* and its predecessor *United States v. Windsor* treat marriage equality as a matter of due process, at one point in time, marriage and procreation rights were treated primarily as issues of equal protection. *Skinner v. Oklahoma*, which is widely cited for first recognizing “[m]arriage and procreation [as] fundamental to the very existence and survival of the race,”⁵⁹ was actually an equal protection case. In *Skinner*, the Court applied strict scrutiny in respect to differentiating criminals from non-criminals under a mandatory sterilization statute. Subsequently, in *Loving* the Court applied strict scrutiny to the government justification for differential treatment of individuals based on race. The vast majority of the *Loving* decision is devoted to equal protection analysis. Citing the equal protection cases *Hirabayashi v. United States*⁶⁰ and *Korematsu v. United States*,⁶¹ the *Loving* Court asserts, as its central premise for striking down the law, that discrimination based on racial classifications are “odious to a free people whose institutions are founded upon the doctrine of equality” and subject to strict scrutiny.⁶² In applying strict scrutiny, the Court finds that the only state purpose for the law was to maintain white supremacy, which the Court condemns as illegitimate. The *Loving* Court only mentions marriage as a fundamental liberty interest briefly in closing, but the reasoning for the decision is almost entirely based on equal protection. Thus, *Loving* is more in line to *Brown v. Board of Education* as an anti-discrimination, anti-subordination case than a due process case. In fact, though *Griswold v. Connecticut*, which prominently applied due process protections within the context of marriage, had been decided two years prior, *Loving* does not engage in the same line of analysis or even mention *Griswold*. The only precedential authority that *Loving* cites in respect to its short due process section is *Skinner v. Oklahoma* and *Maynard v. Hill*.⁶³ Yet *Skinner*, again, was also an equal protection case.

Apart from *Skinner* and *Loving*, the protection of marriage rights has shifted away from being one of equal protection into one of due process liberty that is geared at protecting autonomy of the nuclear family unit. Decided two years prior to *Loving*, *Griswold* interprets *Skinner* in a way that creates a path for the due process analysis. *Griswold* cites *Skinner* in its application of strict scrutiny, but not as an issue of equal protection, but instead in respect to the fundamental liberty interests in marriage and childrearing. *Griswold* evokes *Skinner* in developing the penumbral right of privacy into a fundamental liberty interest, which then triggers strict scrutiny. In this way, the question before the Court started to move away from the equal protection question, whether there is a compelling state interest in treating people differently in respect to the right to marry and procreate,

⁵⁹ *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

⁶⁰ *Hirabayashi v. United States*, 320 U.S. 81 (1943).

⁶¹ *Korematsu v. United States*, 323 U.S. 214 (1944).

⁶² *Loving v. Virginia*, 388 U.S. 1, 8 (1967).

⁶³ *Maynard v. Hill*, 125 U.S. 190 (1888).

to the due process question, whether there is a compelling government interest in restricting the right of everyone universally to marry and procreate.

Griswold is the first in a line of privacy cases that become the foundation for *Lawrence v. Texas*,⁶⁴ which then serves as the direct precursor for the same-sex marriage equality cases *Windsor* and *Obergefell*. The Constitutional question in that line of cases shifts away from scrutinizing why individuals are being treated differently, to asking whether the government can abrogate fundamental rights relating to family formation. By the time of the *Obergefell* decision, the equal protection elements of *Skinner* and *Loving* had been largely lost and folded into the lineage of the due process privacy cases. In *Obergefell*, Kennedy shifts the attention away from the protected classifications, and onto the universal right to marry. He writes, “*Loving* did not ask about a ‘right to interracial marriage’; *Turner* did not ask about a ‘right of inmates to marry’; and *Zablocki* did not ask about a ‘right of fathers with unpaid child support duties to marry.’ Rather, each case inquired about the right to marry in its comprehensive sense, asking if there was a sufficient justification for excluding the relevant class from the right.”⁶⁵ The “comprehensive” right to marry, rather than the right of each individual class to be treated equally, becomes the driving issue before the Court in *Obergefell*.

Notably, Justice Kennedy lists *Loving* alongside *Turner v. Safley*⁶⁶ and *Zablocki v. Redhail*,⁶⁷ which are both due process cases. *Zablocki* is problematic because it peculiarly elides equal protection with fundamental liberty interests, which ultimately allows the occlusion of equal protection in favor of due process in right to marriage and procreation cases that follow. *Zablocki* applies strict scrutiny to strike down a Wisconsin statute that allowed the state to deny the right to marry to any noncustodial parent who failed to pay child support. The Court appears to rule that the statute was unconstitutional as a violation of equal protection; however, in coming to that conclusion, the Court identifies marriage as a fundamental right that cannot be abrogated absent an important state interest. As such, the scrutiny applied did not question whether there was a state purpose for discrimination against different types of individuals, but rather whether there was a state interest in limiting a fundamental freedom that is available to all. As Justice Stewart notes in his concurrence, the decision of the Court “misconceive[s] the meaning of that constitutional guarantee. The Equal Protection Clause deals not with substantive rights or freedoms but with invidiously discriminatory classifications.”⁶⁸ By folding equal protection into due process analysis, *Zablocki* appeals to a universalist conception of equal protection. Rather, than focusing on the reason for differential treatment, the Court focuses on the reason for limiting a universal right. This shift in the analytic framework away from the straight equal protection strategy employed in *Loving* has allowed

⁶⁴ *Lawrence v. Texas*, 539 U.S. 558, 564 (2003) (“There are broad statements of the substantive reach of liberty under the Due Process Clause in earlier cases, including *Pierce v. Society of Sisters*...and *Meyer v. Nebraska*...but the most pertinent beginning point is our decision in *Griswold v. Connecticut*.”).

⁶⁵ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015).

⁶⁶ *Korematsu v. United States*, 323 U.S. 214 (1944).

⁶⁷ *Zablocki v. Redhail*, 434 U.S. 374 (1978).

⁶⁸ *Zablocki v. Redhail*, 434 U.S. 374, 391 (1978) (Stewart, J. concurring).

the privileging of due process over equal protection as the preferred analytical method by which the Court deals with restrictions on sex and marriage. However, this has had the collateral consequence of mingling the two issues in a way that ultimately gives favored status to the institution of marriage.

Furthermore, due process privacy rights are often at odds with equal protection. *Pierce v. Society of Sisters*, which is cited as a central precedent that leads to the penumbral right of privacy, was fundamentally a case about parental autonomy in childrearing.⁶⁹ These privacy interests in education would come to a head with equal protection following *Brown v. Board*, which ordered desegregation at a time when private attitudes of many Americans towards integrated race relations had not yet shifted. In *Milliken v. Bradley*,⁷⁰ the Court indirectly suggested that as long as the government does not proactively promote segregation, individual privacy rights of parents to raise their children in school districts of their own choosing would allow them to engage in de-facto segregation, which directly subverts the objective of equal protection envisioned by *Brown*.⁷¹ The right to autonomy and privacy, which evolved directly from fundamental rights associated with the nuclear family, has come to supersede and obscure the interests of equal protection.

This occlusion becomes particularly problematic in respect to how the Court approaches sexual orientation. Rather than consider sexual orientation as a potentially protected class, the Court avoids the issue by considering sexual orientation within the broader penumbra of sexual privacy. *Lawrence v. Texas* was a case that should have centrally raised a question of equal protection, as Justice O'Connor notes in her concurrence;⁷² the exact same conduct which was completely legal when engaged in by heterosexual couples, was considered criminal when engaged in by gay couples. However, Justice Kennedy does not engage in an equal protection analysis, but bases the majority decision primarily on due process privacy interest grounds. In the process, Justice Kennedy imagines the litigants, John Lawrence and Tyron Garner, as a normative monogamous couple even though there was no factual basis for that assumption.⁷³ Kennedy did not present gay individuals as a protected class who should be treated the same as heterosexuals as a matter of equal protection, but rather his decision appealed to the ways gay couples were similar to committed heterosexual couples insofar as their universal due process right in forming a "personal bond that is more enduring."⁷⁴ Though Kennedy speaks of restoring dignity to gay individuals that

⁶⁹ *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

⁷⁰ *Milliken v. Bradley*, 418 U.S. 717 (1974).

⁷¹ Michael Heise, *Brown v. Board of Education, Footnote 11, and Multidisciplinarity*, 90 CORNELL L. REV. 279, 290 (2005).

⁷² *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J. concurring).

⁷³ Melissa Murray, *The New "Illegitimacy": Revisiting Why Parent Age Should Not Depend on Marriage: What's So New About the New Illegitimacy?*, 20 AM. U.J. GENDER SOC. POL'Y & L. 387, 398 (2012); Dale Carpenter, *The Boundaries of Liberty After Lawrence v. Texas: The Unknown Past of Lawrence v. Texas*, 102 MICH. L. REV. 1464, 1507 (2004).

⁷⁴ *Lawrence v. Texas*, 539 U.S. 558, 567 (2003); Craig Willse & Dean Spade, *Freedom in a Regulatory State?: Lawrence, Marriage and Biopolitics*, 11 WIDENER L. REV. 309, 314 (2005) ("They do so by addressing homosexuality in terms of 'coupled' behavior, rather than specific acts of sodomy, thereby constructing a homosexual identity more parallel to incentivized heterosexual family norms.").

was robbed from them in *Bowers v. Hardwick*,⁷⁵ he dignifies them within the framework of a committed relationship. Indeed, Kennedy avoids the central issue of sex. For a case about sodomy, the decision is strangely sanitized. Kennedy constructs Lawrence and Garner not as two men wanting to have sex with each other, but as two men wanting to enter a “more enduring” committed relationship with one another.⁷⁶

Kennedy further venerates monogamous commitments in his subsequent decisions on marriage equality in *United States v. Windsor* and *Obergefell v. Hodges*, which are similarly based on due process liberty rather than equal protection. In *Windsor*, Kennedy directly associates marriage as the next logical step in the pursuit of “a personal bond that is more enduring” that he sets in *Lawrence*.⁷⁷ Again, rather than engage in equal protection analysis and question whether gay individuals should be treated the same as heterosexual individuals, the Court employs a universalist argument that marriage is a fundamental right that should be enjoyed by all individuals.⁷⁸ Yet by facilitating equality through the protected space of marriage, the Court now sets marriage as the condition for equality. In other words, the Court limits protection to a discreet group of citizens who concede to conventional norms of sexuality, namely through marriage. Moreover, Kennedy appears to suggest that gay individuals achieve dignity only through marriage, which debases and marginalizes those who remain outside of marriage as “condemned to live in loneliness.”⁷⁹ Thus, rather than protect the autonomy of individuals to decide whether to enter marriage or not, *Obergefell* sets marriage as the necessary context to enjoy dignity.⁸⁰

In *Obergefell*, Justice Kennedy presents marriage as the natural choice for those who desire to publicly affirm their love and commitment. Marriage becomes not only the right choice, but the *only* choice for gay Americans to be treated like everyone else. The elevation of marriage, rather than equality, into the principle value in *Obergefell* skirts the question of whether married and unmarried people should be treated differently, which further obscures the more important question of whether married people should be granted beneficial treatment from the state in the first place. When access to marriage becomes the

⁷⁵ *Bowers v. Hardwick*, 478 U.S. 186 (1986).

⁷⁶ DALE CARPENTER, FLAGRANT CONDUCT: THE STORY OF LAWRENCE V. TEXAS 193 (2012) (discussing how the legal team for Lawrence and Garner “carefully focused on sex as normatively desirable in connection with stability, commitment, and family—not in connection with a broader sexual liberation”); see also Dahlia Lithwick, *Extreme Makeover: The Story Behind the Story of Lawrence v. Texas*, NEW YORKER, Mar. 12, 2012, <http://www.newyorker.com/magazine/2012/03/12/extreme-makeover-dahlia-lithwick> (“The litigation strategy, as the case made its way up through the trial courts and appeals courts, was deliberately framed to highlight the need to decriminalize homosexual conduct as a means of recognizing and legitimatizing same-sex ‘relationships’ and ‘families.’ In short, the legal issue was not that free societies must let drunken gay Texans have sex; it was that gay families around the country, in the words of one of the lawyers in the case, ‘are essentially just like everybody else.’”).

⁷⁷ *United States v. Windsor*, 570 U.S. 744, 769 (2013).

⁷⁸ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015) (“Like choices concerning contraception, family relationships, procreation, and childrearing, all of which are protected by the Constitution, decisions concerning marriage are among the most intimate that an individual can make.”).

⁷⁹ *Id.* at 2608.

⁸⁰ See Stewart Chang, *Is Gay the New Asian?: Marriage Equality and the Dawn of A New Model Minority*, 23 ASIAN AM. L.J. 5, 25 (2016).

measure of equality, the right to marry becomes a mandate to marry. State recognition and protection of individuals become matters of personal responsibility and choice: those who opt into the system avail themselves of those rights and those who do not opt in can be said to have purposely chosen to be left out, which then can justify rather than diminish further discriminatory conduct.

CONCLUSION

The strategy employed to achieve same-sex marriage equality in the United States, and which led to the *Obergefell* decision, was motivated by avoiding backlash.⁸¹ As Bill Eskridge proposed: “A process that is incremental and persuades people or their representatives of the acceptability or even desirability of minority rights is much more likely to stick. The incremental process will take a lot longer, but it will be more lasting.”⁸² By framing the issue within a universally valued principle like marriage, which the general population can relate to, granting some rights and protections to the gay population is made more palpable to the public at large.⁸³ The danger of reaching this result in this manner, however, is that marriage equality becomes an illusion of complete equality for the gay community. Indeed, public attention and discourse on gay and lesbian issues has largely moved on since *Obergefell*. The accomplishment of marriage equality suggests that the work of gay rights has reached completion in the United States, at least defined by incrementalists who mark legalization of sexual relations as the beginning of gay rights and marriage as the end.⁸⁴ If, as the incrementalists had suggested, marriage equality indeed signified the “end” of gay rights, then the fight was over. For example, Empire State Pride Agenda, a leading gay rights advocacy group in New York, announced that it was ceasing operations in 2016, citing the fulfillment of its campaign for equality.⁸⁵ Without a driving cause, activists and donors moved on to different projects. According

⁸¹ Roberta A. Kaplan, “*It’s All About Edie, Stupid*”: Lessons From Litigating *United States v. Windsor*, 29 COLUM. J. GENDER & L. 85, 87 (2015) (discussing the litigation strategy for *United States v. Windsor*: “Our goal, however, wasn’t to write a ‘Harlequin romance.’ Rather, what we hoped to do was to show that Edie and Thea, who spent forty-four years together in sickness and in health ‘til death did them part, lived their lives with the same decency and dignity as anyone else. By showing that truth, we demonstrated that Edie and Thea had the kind of marriage that any single one of us—straight or gay—would be so lucky to have.”).

⁸² WILLIAM N. ESKRIDGE JR., EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS 148 (2002).

⁸³ Chang, *supra* note 80, at 23 (“incrementalist activists showcased gay families and their similarities to other normative families, and avoided the negative stereotypes of gays as sensual and promiscuous”).

⁸⁴ Jeremiah A. Ho, *Weather Permitting: Incrementalism, Animus, and the Art of Forecasting Marriage Equality After U.S. v. Windsor*, 62 CLEV. ST. L. REV. 1, 7 (2014) (“By consensus, [William] Eskridge, [Yuval] Merin, and [Kees] Waaldijk all prescribe those steps in the following sequence: (1) the decriminalization of consensual same-sex intimacy occurs first; (2) then anti-discrimination against sexual minorities is furthered; and (3) lastly, the relationships of same-sex couples are then legally recognized. Once a state has crossed these three steps, the conditions for marriage equality will then be most evident.”).

⁸⁵ Jesse McKinley, *Empire State Pride Agenda to Disband, Citing Fulfillment of Its Mission*, N.Y. TIMES, Dec. 12, 2015, <https://www.nytimes.com/2015/12/13/nyregion/empire-state-pride-agenda-to-disband-citing-fulfillment-of-its-mission.html?mcubz=0>.

to one of the leaders of the Empire State Pride Agenda, “We ran out of causes, and donors.”⁸⁶

However, even with marriage equality as an actualized reality in present-day America, the gay community remains the target of hate crimes⁸⁷ and discrimination in the workplace.⁸⁸ In his dissent in *Obergefell*, Chief Justice Roberts portends a coming backlash, saying “Stealing this issue from the people will for many cast a cloud over same-sex marriage, making a dramatic social change that much more difficult to accept.”⁸⁹ Indeed, there was a rise in discriminatory acts targeting the gay individuals immediately following *Obergefell*; for example, gay employees who got married following the decision were fired when they returned to work.⁹⁰ Yet these same individuals who could now enjoy same-sex marriage equality were left without recourse because sexual orientation was not a protected class in the jurisdictions in which they lived. As Linda Bell suggests, backlash is often hidden and more insidious than patent discrimination.⁹¹ The minority group is seen as receiving special treatment and privileges, and the public begins to focus their attention on those privileges rather than recognizing and addressing surrounding inequities and biases that persist. In order to address these and other continuing inequalities, it is necessary to reexamine the legacy of privacy that leads to this result, and to revisit Justice Stewart’s concurrence in *Zablocki* and Justice O’Connor’s concurrence in *Lawrence*.

The better path to accomplishing full and complete rights for gay individuals, rather, is through equal protection. Whereas gay rights jurisprudence in the United States may have painted itself into a due process corner that cannot likely be undone, Taiwan and South Africa offer alternative models for gay rights that has ramifications beyond marriage equality, but which also avoid backlash. *Interpretation 748* and *Fourie* take the bold step of recognizing sexual orientation as a protected class. They also provide a jurisprudential model that can aligns with laws that more broadly protect gay individuals in other areas of life outside of the private realm of marriage, such as against discrimination in the workplace and in education. By issuing mandates to their legislatures to enact change within a specific context of equal protection, the Taiwanese and South African Constitutional Courts provide a larger framework to legislate laws that can offer equal protection beyond the confines of marriage. *Interpretation 748* and *Fourie* also assert that the legitimacy of the government does not necessarily depend on whether judicial decisions or legislation reflect values that the public is

⁸⁶ Richard Socarides, *North Carolina and Gay Rights Backlash*, NEW YORKER, Mar. 28, 2016, <http://www.newyorker.com/news/news-desk/north-carolina-and-the-gay-rights-backlash>.

⁸⁷ Steven Maize, *How the Orlando Massacre Affects the Fight for LGBT Rights*, THE ECONOMIST, June 23, 2016, <http://www.economist.com/blogs/democracyinamerica/2016/06/gay-rights-and-wrongs>.

⁸⁸ Katherine Franke, *Giving Obergefell the “Roe-Treatment”*, PUBLIC RIGHTS/PRIVATE CONSCIENCE PROJECT (July 13, 2015), <http://blogs.law.columbia.edu/publicrightsprivateconscience/2015/07/13/giving-obergefell-the-roe-treatment/>.

⁸⁹ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2612 (2015) (Roberts, J., dissenting).

⁹⁰ Franke, *supra* note 88.

⁹¹ Linda Bell, *Women in Philosophy: A Forty Year Perspective on Academic Backlash*, in *THEORIZING BACKLASH: PHILOSOPHICAL REFLECTIONS ON THE RESISTANCE TO FEMINISM* (Anita M. Supreson & Ann E. Cudd, eds., 2002).

comfortable with. Rather, the Taiwanese and South African Constitutional Courts offer decisions that view their governments as leaders and not followers. By working in tandem, the judiciary and the legislature can guide the public in directions of deeper tolerance and equity, which are applicable not only for countries in the Global South, but in the Global North as well.



RESTRICTIONS ON POST-EMPLOYMENT
COMPETITION:
COMPARING THE UNITED STATES WITH JAPAN

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CONNECTICUT JOURNAL OF INTERNATIONAL LAW

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INTRODUCTION

Restricting employees, especially those who have resigned from their employment, from competing with their employers may result in severe conflicts between the rights, benefits, and interests of both parties.

Economic enterprises create and develop all sorts of beneficial information that gives them advantageous positions in their market. This information is often more valuable than their tangible property. But in today's information-oriented society, such business information can be duplicated and transferred more readily than can material assets. To protect their investment in this information, careful employers often want to impose on former, as well as current, employees non-competition agreements and other restrictive covenants, such as non-solicitation agreements. These agreements (or clauses in larger employment contracts) stipulate the duties of employees for the post-employment relationship (hereinafter simply referred to as "restrictive covenants").¹ A "non-competition obligation" in the field of employment law, imposed by the restrictive covenants, means an employee's obligation not to compete with the employer or not to work for the employer's competitors; and the term of "compete" includes "soliciting customers and recruiting employees," as peripheral activities, in a broad sense.²

On the other hand, employees accumulate knowledge, experience, and know-how, and improve their own vocational abilities and skills through on-the-job training from their employers. In some cases, the employees then quit and set up their own business or jump to another firm that can more fully use or reward their vocational competence. Thus, employees frequently resist enforcement of the restrictive covenants in order to protect their privilege to engage in their own economic activities.³

In balancing these interests of the parties to the restrictive covenants, courts in many jurisdictions in the United States employ the common-law "reasonableness rule."⁴ This rule focuses on the employer's interest and the scope of the contractual

¹ See RESTATEMENT OF EMPLOYMENT LAW §8.06, cmt. a. (AM. LAW INST. 2015) (referring to "restrictive covenants" as "[c]ontractual restrictions on former employees working activities").

² *Id.* §8.05. For Japanese law, see, e.g., Hiroshi Ishibashi, *Kaishakan-rōdōidō to Kyōgyō-hishi-gimu: Taishokugo no Rōdōsha no Kyōgyō-hishi-gimu o chūshin ni* [Intercompany Labor Movement and Non-competition Obligation: With a Focus on Former Employees' Non-competition Obligation], 84 RŌDŌ 105, 112 (1994) and Takuyuki Kawata, *Kyōgyō-hishi-gimu* [Non-competition Obligation], in 4 KŌZA NIJŪISSEIKI NO RŌDŌHŌ 133, 133-134 (Nihon Rōdōhō Gakkai ed., 2000). However, this study targets various forms of "restrictive covenants," not limited to non-competition agreements, and distinguishes the types of "restrictive covenants."

³ The major legal issues relating to restrictive covenants are (i) the requirement for enforcement or validity of the covenants and, (ii) the remedies based on enforceable covenants. This article focuses on the former.

⁴ See Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 644 (1960); Kenneth R. Swift, *Void Agreements, Knocked-Out Terms, and Blue Pencils: Judicial and Legislative Handling of Unreasonable Terms in Noncompete Agreements*, 24 HOFSTRA LAB. & EMP. L. J. 223, 224-26 (2007); Angie Davis et al., *Developing Trends in Non-Compete Agreements and Other Restrictive Covenants*, 30 A.B.A. J. LAB. & EMP. L. 255, 256 (2015).

restriction on post-employment competition in order to judge the enforceability of the covenants.⁵ Similarly, courts in Japan adopt a “reasonableness test” to determine the validity of the restrictive covenants as their case law doctrine.⁶ However, whether the restrictive covenant at issue is enforceable or not is unpredictable in many cases for courts, lawyers, and scholars in both countries, because each element of reasonableness in both countries creates room for problems of interpretation and application. Furthermore, some courts have developed doctrines to address situations where a reasonable covenant is found lacking, such as the “blue-pencil doctrine”⁷ and the “inevitable disclosure doctrine.”⁸

This study chooses to compare Japanese law with the American legal system. The reason for this is that both countries’ regulations on restrictive covenants stipulating post-employment duties are substantially analogous, even though the fundamental thoughts on job protection are totally different in the two countries.⁹ This study supposes that certain profound doctrines commonly underlie both of these legal systems. Therefore, comparing them will be suggestive to each other in elucidating the reasonableness rules.

Only one previous research note has introduced the Japanese law about the issue of enforceability of restrictive covenants.¹⁰ However, it did not compare Japanese and American law. Moreover, the study is so old that its achievement should be updated. When it was published, the reasonableness test was a developing doctrine in Japan, because there were only a handful of cases. Today, disputes over restrictive covenants have become a significant issue in Japan since the mobility of workers has increased.¹¹

⁵ Blake, *supra* note 4, at 648-649; Benjamin Aaron & Matthew Finkin, *The Law of Employee Loyalty in the United States*, 20 COMP. LAB. L. & POL’Y J. 321, 325 (1999); Swift, *supra* note 4, at 231-32; Davis et al., *supra* note 4, at 256, 263.

⁶ Ryuichi Yamakawa, *Transnational Dimension of Japanese Labor and Employment Laws: New Choice of Law Rules and Determination of Geographical Reach*, 31 COMP. LAB. L. & POL’Y J. 347, 363 (2010); Miwako Ogawa, *Noncompete Covenants in Japanese Employment Contracts: Recent Developments*, 22 HASTINGS INT’L & COMP. L. REV. 341, 345 (1999). See generally 2 ABA SECTION OF LABOR AND EMPLOYMENT LAW, RESTRICTIVE COVENANTS AND TRADE SECRETS IN EMPLOYMENT LAW: AN INTERNATIONAL SURVEY 74 (Wendi S. Lazar & Gary R. Siniscalco eds., 2010).

⁷ E.g. BDO Seidman v. Hirshberg, 93 N.Y.2d 382, 394-395 (1999).

⁸ E.g. PepsiCo, Inc. v. Redmond, 54 F.3d 1262, 1269, 1271 (7th Cir. 1995).

⁹ In the United States, most states employ the default rule of “at-will,” which means that both, employers and employees, can terminate their employment relationship at any time with or without a just cause. See RESTATEMENT OF EMPLOYMENT LAW §2.01 (AM. LAW INST. 2015). In contrast, employers must have a just cause to dismiss their employees lawfully in Japan. Article 16 of the Labor Contract Act provides “[i]f a dismissal lacks objectively reasonable grounds and is not considered to be appropriate in general societal terms, it is treated as an abuse of rights and is invalid.” Rōdō keiyakuhō [Rōkeihō] [Labor Contract Act], Law No.128 of 2007, art. 16, translated in (Japanese Law Translation [JLT DS]), <http://www.japaneselawtranslation.go.jp/> (Japan). This is a mandatory rule rather than a default rule and therefore cannot be modified by contracts. Consequently, the mobility of workers was traditionally low under the lifetime employment custom. Ogawa, *supra* note 6, at 342.

¹⁰ Ogawa, *supra* note 6.

¹¹ Yamakawa, *supra* note 6, at 363.

This study also provides an overview of American system through the Restatement of Employment Law,¹² among others, in order to compare it with Japanese law. Although the Restatement of Law is not a source of law but merely a secondary source, it is highly informative and offers a synthesis of the common law in the 50 states. The reasonableness rules among the states subtly vary in detail, but their general principles are sufficiently clear to offer a useful contrast to the reasonableness rules in Japan.¹³

This study attempts not only to assist in understanding the rule of restrictive covenants in Japan, but also to compare it with the law in the United States, as adopted in many jurisdictions. Part I of this article surveys the American law briefly. Part II illustrates the Japanese legal system in detail. In each of these parts, this article analyzes (A) the concept of reasonableness which is a requirement for the enforceable covenant and elements of the reasonableness, (B) the blue-pencil doctrine or a similar rule, and (C) the inevitable disclosure doctrine or a pertinent theory. Finally, Part III learns some lessons from the comparison between American and Japanese law concerning the restrictive covenants.

I. THE COMMON LAW REASONABLENESS RULE IN THE UNITED STATES

Before introducing the Japanese system, this part presents an overview of the American system through the Restatement of Employment Law. The Restatement employs the reasonableness rule to regulate restrictive covenants.¹⁴

A. Reasonableness Rule

While employed, employees owe a duty of loyalty to their employer that generally includes an obligation not to compete with their employers.¹⁵ However, on account of “the public interest in competition and in employee mobility,”¹⁶ former employees who have already left their employers will not owe an obligation not to compete with the employers, unless the employees specifically sign an enforceable agreement¹⁷ or misappropriate the employers’ trade secrets.¹⁸ Therefore, employers

¹² RESTATEMENT OF EMPLOYMENT LAW (AM. LAW INST. 2015).

¹³ Swift, *supra* note 4, at 224-225; Davis et al., *supra* note 4, at 256, 263; Michael Selmi, *Trending and the Restatement of Employment Law's Provisions on Employee Mobility*, 100 CORNELL L. REV. 1369, 1375 (2015). See generally BRIAN M. MALSBERGER, COVENANTS NOT TO COMPETE: A STATE-BY-STATE SURVEY (David J. Carr, Arnold H. Pedowitz, & Eric Akira Tate eds., 11th ed. 2017).

¹⁴ RESTATEMENT OF EMPLOYMENT LAW §§8.06-8.08 (AM. LAW INST. 2015).

¹⁵ See *id.*, §§8.01(2), 8.04(a)-(c).

¹⁶ *Id.* §8.05, cmt. a.

¹⁷ *Id.* §8.05(a); see also *id.* §§8.06, 8.07.

¹⁸ *Id.* §8.05(b); see also *id.* §8.03(c).

who want to protect their non-trade-secret beneficial information should conclude restrictive covenants governing the post-employment relationship.¹⁹

However, not all restrictive covenants become enforceable because, while employers may maintain legally protectable information and interests, employees have the freedom to leave their current employers and to initiate their own economic activities including the acquisition of other employment.²⁰ Such acceleration of competition furthers the public interest in an open market.²¹ Employees also have a right to earn a living.²² To reconcile the opposing interests of employees and employers, common law in many states has established a balancing rule with regard to the regulation on restrictive covenants, which is known as the reasonableness rule.^{23, 24, 25} However, some states have enacted statutes imposing their unique regulations in this field²⁶ and the Restatement, of course, acknowledges these specific regulations.²⁷ An outstanding example of these statutory regulations is the Business and Professions Code in California.²⁸

Briefly, the reasonableness rule requires courts to examine whether the employer has a legitimate protectable interest and, if so, whether the restrictive covenant is “reasonably tailored” in its duration, geography, and scope of activities to protect that interest. Restrictive covenants without a protectable interest or exceeding the bounds necessary to protect those interests are unreasonable and therefore, unenforceable.²⁹

Legitimate Interest: First, a legitimate interest of an employer is indispensable to enforceability of the restrictive covenant. This element justifies the contractual restriction on the former employee’s economic activities under the public interest theory in favor of competition.³⁰ The legitimate interests include an employer’s trade secrets,³¹ but may also consist of other “confidential” or “proprietary” information not amounting to a trade secret,³² such as customer lists. The employers may also

¹⁹ *Id.* §8.05(a). Misappropriation of a trade secret is actionable regardless whether the parties have concluded the covenants or not. *Id.* §8.05(b).

²⁰ *Id.* §8.06 cmt. a.

²¹ *Id.*

²² Davis et al., *supra* note 4, at 256.

²³ See *supra* note 5 and accompanying text.

²⁴ The reasonableness rule also applies to covenants providing forfeiture of employee benefit in the event of the former employee’s competition. RESTATEMENT OF EMPLOYMENT LAW §8.06 REP.s’ note cmt. b. (AM. LAW INST. 2015).

²⁵ Despite §8.07(b)(4), the reasonable rule is less applicable in the case of a sale of a business, even if the vendor of the business is an employee of the employer (the acquirer). *Id.* §8.07 cmt. e.

²⁶ *Id.* §8.06 REP.s’ note cmt. a.

²⁷ *Id.* §8.06 (providing “[e]xcept as otherwise provided by other law or applicable professional rules”).

²⁸ BUS. & PROF. §16600 (providing “[e]xcept as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void”). The Supreme Court of California held that this provision did not embody the common law “reasonableness” rule and rejected the “narrow restraint” exception to this provision. *Edwards v. Arthur Andersen LLP*, 44 Cal. 4th 937 (2008).

²⁹ RESTATEMENT OF EMPLOYMENT LAW §8.06 cmt. c. (AM. LAW INST. 2015).

³⁰ *Id.* §8.07 cmt. b.

³¹ *Id.* §8.07(b)(1). The Restatement also defines a trade secret in the context of employment law. *Id.* §8.02.

³² *Id.* §8.06 cmt. d; *id.* §8.07 cmt. b.

have legitimate interests in their customer relationships³³ and investment in the employee's reputation in the market.³⁴

However, the line of demarcation between legitimate interests and unprotectable information is indistinct.³⁵ Whether the information constitutes a legitimate interest or not is a fact-sensitive matter.³⁶ The relevant factors include: written texts of the covenant in question; the character of the information which the covenant aims to protect; and the possibility of unfairly benefiting a competitor of the employer through its disclosure or use.³⁷ More specifically, "a clear economic advantage to the employer" generated by the confidential information and the employer's treatment of the information as confidential are decisive factors.³⁸ Consequently, information regarded as "the general experience, knowledge, training, and skills that an employee acquires in the course of employment" cannot be a legitimate interest.³⁹ For instance, information on the employer's products, services, know-how, customers, and business plans regarding financial matters, marketing, pricing, and compensation, may amount to legitimate interests⁴⁰ under this rule.

There is no doubt that the legitimate interest is one of the elements of the reasonableness rule. The Restatement has proceeded further by restating a black letter on the legitimate interest⁴¹ independent of the general provision of the rule.⁴² The purport of this scheme seems to clarify that the legitimate interest is the core element in the reasonableness rule.

The Reporters' Note to the Restatement mentions that the Restatement has selected "a functional assessment of the employer's legitimate interest" approach instead of "a test based on the skill level" of the employee who has signed the covenant.⁴³ According to this statement, even rank-and-file employees may owe a non-competition obligation as long as an employer establishes that legitimate interests exist.⁴⁴

Scope of Restriction: Second, to be an enforceable restrictive covenant, the terms of the covenant cannot be broader than necessary to protect the employer's legitimate interest.⁴⁵ The character or feature of the legitimate interests, therefore,

³³ *Id.* §8.07(b)(2); *id.* §8.06 cmt. d.; *id.* §8.07 cmt. c.

³⁴ *Id.* §8.07(b)(3); *id.* §8.07 cmt. d. §8.07(b)(3) only protects the employer's investment "in reputation and goodwill." *Id.* §8.07 REP.s' note cmt. d.

³⁵ One scholar criticized that the relevant section in the Restatement did not provide enough guidelines for "when customer relations or an employee's reputation in the market will justify a restrictive covenant." Selmi, *supra* note 13, at 1385.

³⁶ RESTATEMENT OF EMPLOYMENT LAW §8.07 cmt. b. (AM. LAW INST. 2015).

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* §8.07 REP.s' note cmt. b. (citing Speechworks International v. Cote, No. 024411BLS, 2002 WL 31480290, at *2 (Mass. Super. Ct. Oct. 11, 2002)).

⁴¹ RESTATEMENT OF EMPLOYMENT LAW §8.07 (AM. LAW INST. 2015).

⁴² *Id.* §8.06.

⁴³ *Id.* §8.07 REP.s' note cmt. b.

⁴⁴ *Id.* But see Selmi, *supra* note 13, at 1388 (criticizing that the Restatement should have directly addressed the issue of the restrictive covenants for low-ranked employees).

⁴⁵ RESTATEMENT OF EMPLOYMENT LAW §8.06 cmt. c. (AM. LAW INST. 2015).

influences the determination of the reasonable duration, geography, and scope of activities in the covenants.⁴⁶

As for the duration, restrictive covenants with an undefined length tend to be unreasonable.⁴⁷ On the other hand, some employer's information becomes stale in a short period of time, such as six months, so the covenant with a longer term restriction, even as seemingly short as one year, should be unenforceable.⁴⁸ When a former employee has not worked for their employer long enough to capitalize on the employer's legitimate interest, such as its customer relationships, the broad restrictive covenant cannot bind the employee, at least to the extent the covenant provides (the blue-pencil doctrine may be applicable as described below).⁴⁹

When it comes to the geographical element, restrictive covenants preventing former employees from competing worldwide may be enforceable in the current globalized economy, if they are otherwise reasonable.⁵⁰ However, this does not mean that the geographical limitation has become useless or meaningless.⁵¹

While the reasonableness rule restated by § 8.06 applies to all types of restrictive covenants,⁵² importantly, non-competition agreements are basically unenforceable, in circumstances where the employers attempt to merely protect their customer relationships.⁵³ It is not necessary for the employers to rely on the non-competition agreements that restrict the former employees' freedom of activities more extensively because non-solicitation agreements sufficiently protect the legitimate interest of employers' customer relationships.⁵⁴ Thus, restrictive covenants prohibiting only a limited scope of activities are likely to be reasonable and therefore, enforceable.

Professional staffs, such as an attorney of law, are entitled to an extensive right to compete with their former employers, whose activities are less likely to be confined by enforcement of restrictive covenants than non-professional employees.⁵⁵ The rationale is that the clients of a professional service have a right to choose service providers, and this right gains priority over the employer's legitimate interest.⁵⁶ However, the enforceability of reasonable covenants signed by doctors, accountants,

⁴⁶ *Id.*; see also *id.* §8.06 REP.s' note cmt. c.

⁴⁷ *Id.* §8.06 cmt. c. illus. 5.

⁴⁸ *Id.* §8.06 cmt. c. illus. 4.

⁴⁹ *Id.* §8.07 cmt. c.

⁵⁰ See *id.* §8.06 cmt. c. illus. 7.

⁵¹ See *id.* §8.06 cmt. c. illus. 6.

⁵² For instance, the rule also applies to non-solicitation agreements and confidentiality agreements. *Id.* §8.06 REP.s' note cmt. b. See also *supra* note 1 and accompanying text.

⁵³ The Restatement repeatedly points out the nature of customer relationships. *Id.* §8.07 cmt. c. Provided, the former employee managed investments for some of his employer's clients as an investment manager, and he signed a non-competition agreement, the employer has no legitimate interest in preventing the former employee from competing, beyond non-solicitation, unless other factors support its protectable interest. *Id.* §8.07 cmt. c. illus. 4.; see also *id.*, §8.06 cmt. b. (commenting that "[d]ifferent types of restrictive covenants may be necessary to protect different types of employer interests").

⁵⁴ *Id.* §8.07 cmt. c.

⁵⁵ *Id.* §8.06 cmt. h.

⁵⁶ *Id.*

or other professionals depends on the state rules concerning the professions and public needs with respect to the professional services.⁵⁷

The nature and details of the employer's legitimate interest are determinant elements in demarcating the justified extent of the contractual restriction, as stated above.⁵⁸ This framework lucidly balances the conflicts between the employer's interests and the former employee's interests surrounding restrictive covenants.

Consideration: Third, although strictly not an element of reasonableness, consideration is also an issue. In accordance with the general rule in contract law, restrictive covenants must be supported by adequate consideration. According to the Restatement, while some jurisdictions "require 'new' or 'additional' consideration" to enforce the covenants, most courts hold that "continuing employment of an at-will employee is sufficient consideration to support the enforcement of" reasonable covenants.⁵⁹

Public Interest: Fourth, the reasonableness rule leaves room for public interest to nullify a restrictive covenant that is otherwise reasonable.⁶⁰

B. Blue-Pencil Doctrine – Partial Enforcement

A restrictive covenant is unreasonable and unenforceable if it provides more restrictive conditions than necessary to protect the employer's legitimate interest, as described above.⁶¹ However, the Restatement recognizes the authority of the judiciary to delete or modify the terms in certain overbroad covenants to protect the employer's legitimate interests as long as the authority⁶² is executed properly.⁶³ The rule governing such modifications is often referred to as the blue-pencil doctrine.⁶⁴ Under this rule, courts may modify the overly broad contractual restriction to a reasonably tailored covenant if the employer has a reasonable and good-faith belief of enforceability.⁶⁵ As a matter of course, the employer also must possess a legitimate interest to be protected by this rule. According to the Restatement, a minority of jurisdictions embrace the strict model of the blue-pencil doctrine, which

⁵⁷ *Id.*

⁵⁸ See *supra* note 46 and accompanying text.

⁵⁹ *Id.* §8.06 cmt. e. But see Selmi, *supra* note 13, at 1386 (stating that it is unclear that continuing employment will necessarily be an adequate consideration).

⁶⁰ RESTATEMENT OF EMPLOYMENT LAW §8.06(d) (AM. LAW INST. 2015).

⁶¹ See *supra* note 45 and accompanying text.

⁶² The courts exercise this authority as an "equitable discretion." *Id.* §8.08 REP.s' note cmt. b.

⁶³ *Id.* §8.08. See also *id.* §8.08 cmt a. (stating that the courts' "discretion should be exercised with care so as not to create an incentive for employers to draft overbroad restrictive covenants that in some instances will be taken by employees at face value as enforceable").

⁶⁴ *Id.* §8.08 cmt. a.

⁶⁵ See *id.* §8.08 cmt. a. (stating that so clear overbreadth of the covenant itself can constitute lack of good faith and "[o]nce overbreadth has been shown, the employer has the burden of demonstrating good faith in order to justify a modification")

limits the authority of courts to only erasing “grammatically severable portions of the text” and does not allow courts to rewrite or append words to the covenants.⁶⁶

One of the rationales behind this rule in the Restatement is that over time the courts would generate an unreasonable rule under an all-or-nothing approach that prohibits courts from making any revisions. Suppose, for example, the court is faced with an 18-month restriction on competition when it thinks 15 months is best. Under an all-or-nothing approach, the court might be tempted to uphold the covenant, leading to a precedent that 18 months is enforceable.⁶⁷ Another justification for the blue pencil doctrine is that it is more appropriate to affirm the presumed intent of the parties to the covenant by rewriting it, as long as the covenant has been signed in good-faith.⁶⁸

If there are changes in the factual circumstances, especially concerning the legitimate interest, between the time of signing the covenant and the time of enforcing it, and these changes make the information that was assumed as the legitimate interest obsolete, the covenant may be regarded as unreasonable. Restrictive covenants must be reasonable both at the time of their signing and at the time of their enforcement.⁶⁹ As mentioned above, the employer’s legitimate interest justifies the covenant restricting the former employee’s right of economic activities and mobility. When the legitimate interest becomes old-fashioned, that interest is no longer worth contractually protecting for the employers, and thus, the courts will not enforce covenants protecting such interests. However, the courts may still modify restrictive covenants that have become unreasonable after the signing.⁷⁰

Some argue that the blue-pencil doctrine creates confusion for employees, employers, and the court system.⁷¹ For example, an employee wanting to leave their employer to compete may hardly know the enforceable extent of the restrictive covenant under the blue-pencil doctrine.⁷² The blue-pencil doctrine may also confuse the courts since it imposes a burden to rewrite the covenants in addition to determining the legitimate interest and reasonableness of the restriction.⁷³ Even for an employer, the blue-pencil doctrine is confusing as to how broad a covenant the employer can draft.⁷⁴ Additionally, while some courts partially enforce the overbroad covenants in order to conserve the agreements as far as possible unless they violate public policy, other courts have denied partial enforcement on the basis of the private parties’ freedom-of-contract.⁷⁵

⁶⁶ *Id.* §8.08 REP.s’ note cmt. a.

⁶⁷ *See id.* §8.08 cmt. a.

⁶⁸ *See id.*

⁶⁹ *Id.* §8.08 cmt. b.

⁷⁰ *Id.* §8.08 REP.s’ note cmt. a.

⁷¹ Griffin Toronjo Pivateau, *Putting the Blue Pencil Down: An Argument for Specificity in Noncompete Agreements*, 86 NEB. L. REV. 672, 691 (2008).

⁷² *Id.*

⁷³ *Id.* at 693.

⁷⁴ *Id.* at 692.

⁷⁵ Jeffrey G. Grody, *Partial Enforcement of Post-Employment Restrictive Covenants*, 15 COLUM. J.L. & SOC. PROBS. 181, 195-196 (1979).

C. Inevitable Disclosure Doctrine – Enjoining Competition without Restrictive Covenants

It is controversial whether if, in the absence of a reasonable restrictive covenant, the infringement of an employer's trade secret may justify a ban on competition itself, beyond just proscribing the disclosure and use of a trade secret.⁷⁶

In addition to regulating the contractual restrictions, the Restatement forbids former employees from actually "disclos[ing]" or "us[ing]", and "threaten[ing] to disclose or use" the employers' trade secrets in competing with the employers.⁷⁷ Under this rule, the employers must show four strict requirements to enjoin former employees' competition without the covenants.⁷⁸ However, this section, §8.05(b), does not mention "inevitable disclosure." While the minority broader opinion would grant an injunction in the case of "inevitable" disclosure, the Restatement espouses the majority narrower solution to the effect that, when an employee engages in actual or threatened disclosure or use of the trade secrets, courts may enjoin the employee not simply from disclosing or using the employer's trade secrets, but also from competing.⁷⁹

Under either approach, a few courts will issue injunctions. Nevertheless, it is apparent that the courts sometimes may issue an injunction banning the former employee from competition without a restrictive covenant according to the Restatement.

II. REASONABLENESS RULE BASED ON PUBLIC POLICY IN JAPAN

To preface the discussion, a sample contractual clause imposing a post-employment non-competition obligation in Japan is presented below:

"[F]or six months after the Termination Date the Employee shall neither obtain employment nor assume the office of an officer in a business operator or its affiliated companies which is a competitor to the Company, nor open, establish, or otherwise control a business that is a competitor to the Company."⁸⁰

In Japan, current employees owe a non-competition obligation (競業禁止義務 [*kyōgyō-hishi-gimu*]) to their employer, including duties not to engage in other

⁷⁶ RESTATEMENT OF EMPLOYMENT LAW §8.05 REP.s' note cmt. b. (AM. LAW INST. 2015).

⁷⁷ *Id.* §8.05(b), §8.03.

⁷⁸ *Id.* §8.05 cmt. b. (stating four requirements for an injunction and commenting that the injunction should be for a limited period, no longer than necessary to restrain a new employer of the former employee from unfairly profiting against the former employer).

⁷⁹ *Id.* §8.05 REP.s' note cmt. b.

⁸⁰ NISHIMURA & ASAH LAW OFFICE, WABUN-EIBUN TAISHŌ MODERU SHŪGYŌKISOKU: JAPANESE-ENGLISH MODEL WORK RULES 414-417 (Michihiro Mori et al. eds., 3d ed. 2019).

peripheral activities, even if their employment contracts contain no clause prohibiting competition.⁸¹ The “good faith principle (信義則 [*shin-gi-soku*])”⁸² in employment contracts generally imposes a duty of good faith upon employees, and this duty includes the employees’ non-competition obligation during the course of employment.⁸³ In addition, employees in certain special positions owe a statutory non-competition obligation under the corporate law or commercial law.⁸⁴

On the other hand, no statutory provision regulates the non-competition obligation of former employees.⁸⁵ According to the predominant opinion on the matter, former employees do not owe the non-competition obligation unless they have signed restrictive covenants (競業禁止特約 [*kyōgyō-hishi-tokuyaku*]) with their employers separately from the terminated employment contracts,^{86, 87} since

⁸¹ E.g., KAZUO SUGENO, RŌDŌHŌ [EMPLOYMENT AND LABOR LAW] 153 (11th ed. rev. 2017) (for a translation of the 5th ed. 2nd rev., see KAZUO SUGENO, JAPANESE EMPLOYMENT AND LABOR LAW 81 (Leo Kanowitz trans., Carolina Academic Press 2d ed. 2002) (2001) [hereinafter Kanowitz trans.]); TAKASHI ARAKI, RŌDŌHŌ [LABOR AND EMPLOYMENT LAW] 281 (3rd ed. 2016); see also Ishibashi, *supra* note 2, at 107; Kawata, *supra* note 2, at 136-37.

⁸² The Labor Contract Act, *supra* note 9, art. 3, para. 4 and MINPŌ [MINPŌ] [CIV. C.] 1896, art. 1, para. 2, translated in (Japanese Law Translation [JLT DS]), <http://www.japaneselawtranslation.go.jp/> (Japan).

⁸³ E.g., SUGENO, *supra* note 81, at 151, 153 (Kanowitz trans., *supra* note 81, at 81); ARAKI, *supra* note 81, at 279-281; see also Ishibashi, *supra* note 2, at 107; Kawata, *supra* note 2, at 136-37.

⁸⁴ Director-employees may owe a non-competition obligation to the companies to the extent to which the corporate law applies to them. See Kaishahō [Kaishahō] [Companies Act], Law No.86 of 2005, art. 356, para. 1, no. 1, translated in (Japanese Law Translation [JLT DS]), <http://www.japaneselawtranslation.go.jp/> (Japan); SUGENO, *supra* note 81, at 174-175 (Kanowitz trans., *supra* note 81 at 94-95); KENJIRO EGASHIRA, KABUSHIKIGAISHAHŌ [LAW OF STOCK CORPORATIONS] 385, 454 (7th ed. 2017). Managers under the corporate law or commercial law also owe a non-competition obligation to the companies. The Companies Act, art. 12, para 1, no. 1-4; SHŌHŌ [SHŌHŌ] [COMM. C.] 1899, art. 23, para. 1, no. 1-4, translated in (Japanese Law Translation [JLT DS]), <http://www.japaneselawtranslation.go.jp/> (Japan).

⁸⁵ Yamakawa, *supra* note 6, at 363; see also Ogawa, *supra* note 6, at 344.

⁸⁶ Employers are allowed to impose the non-compete obligation in the form of work rules in lieu of individual agreements in Japan. See the Labor Contract Act, *supra* note 9, art. 7 and art. 10; Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Oct. 16, 1995, Hei 7 (yo ㊦) no. 3587, 690 RŌDŌ HANREI [RŌHAN] 75, 85 (Japan) – Tokyo Legal Mind case; Ōsaka Chihō Saibansho [Osaka Dist. Ct.] Oct. 23, 2009, Hei 21 (yo ㊦) no. 10020, 1000 RŌDŌ HANREI [RŌHAN] 50, 59 (Japan) – Morikuro case; Ogawa, *supra* note 6, at 343, 345 (note that, cases which involve employment and labor law in Japan are generally identified by the parties’ names on the employer’s part, no matter whether the employer is a plaintiff or a defendant). However, this study does not distinguish between the non-competition obligation based on work rules and one based on individual agreements. Cf. SATOSHI NISHITANI, RŌDŌHŌ [EMPLOYMENT AND LABOR LAW] 191 (2nd ed. 2013) (arguing that an explicit individual agreement is generally necessary to impose a post-employment non-competition obligation because the work rule provision imposing such an obligation cannot be equated with an individual covenant). Compare with the American law. See RESTATEMENT OF EMPLOYMENT LAW §2.05 cmt. a. (AM. LAW INST. 2015).

⁸⁷ E.g. Toshio Yamaguchi, Rōdōsha no Kyōgyō-hishi-gimu: Tokuni Rōdō-keiyaku Shūryōgo no Hōritsukankei ni suite [Employees’ Non-competition Obligation: Particularly on Legal Relationship After Terminations of the Labor Contract], in ISHII TERUHISA SENSEI TSUITO RONSHŪ: RŌDŌHŌ NO SHOMONDAI 409, 430-431 (Tōkyō Daigaku Rōdōhō Kenkyūkai, 1974); Ishibashi, *supra* note 2, at 107; Humiko Obata, Rōdōsha no Taishokugo no Kyōgyō-hishi-gimu [Employees’ Non-competition Obligation After Terminating the Employment] 441 RŌKEN 25, 26 (1997); MICHIO TSUCHIDA, RŌDŌ-KEIYAKU-HŌ [LABOR CONTRACT LAW] 710 (2nd ed. 2016). On the contrary, a few scholars and judicial precedents

they no longer assume an obligation to their employers based on the contract.⁸⁸ In addition, employees are guaranteed the freedom to choose their occupations under article 22, paragraph 1 of the Constitution of Japan,⁸⁹ which grants them the privilege to engage in any economic activities that they want to pursue by utilizing the knowledge and experience they gained while working for their former employers. This constitutional right prevents the good faith principle from imposing the post-employment obligation without agreements. Thus, the after-effect of an employment contract based on the good faith principle must be denied.

Similar to the practice in the United States, employers' motives to impose the contractual restrictions are: (i) protection against leakage of trade secrets and other confidential information, such as technological or customer information; (ii) prevention of competitors or former employees themselves from seizing the benefits of investment in training and nurture of employees provided by the employers; and (iii) reservation of the employers' competitive superiority.⁹⁰ The law may, however, limit the enforcement or validity of the restrictive covenant confining a worker's mobility, even though a former employee and an employer have signed an additional

advocate that even though the employer and the former employee have not otherwise concluded the restrictive covenant, the former employee's non-competition obligation may remain after the termination in a certain case or extent. *E.g.*, Kazuo Morioka, *Nō-Hau no Boei: Kōyō-kankei-shūryōgo no Kyōgyō-kinshi* [Defense of Know-How: Non-competition After Termination of Employment Relationship] 5 NIHON KŌGYŌ SHŌYŪKEN HŌ GAKKAI NENPŌ, 31, 36 (1982); Yoshihiko Kashihara, *Rōdōsha no Taishokugo ni okeru kyōgyō-kinshi ni kansuru keiyaku* [Contract Not to Compete After Employees' Termination], in MINJISEKININ NO GENDATEKI-KADAI: NAKAGAWA JUN SENSEI KANREKI SHUKUGARONSHŪ 442, 449-450 (Nakagawa Jun Sensei Kanreki Shukugaronshū Kankōkai ed., 1989); Toru Hayakawa, *Eigyō Himitsu no Hogo to Yakuin/Jūgyōin no Shuhigimu/Kyōgyō-hishi-gimu* [Protection of Trade Secrets and the Confidentiality Obligation/Non-competition Obligation of Officers/Employees], in CHITEKI-ZAISAN NO HŌTEKI-HOGO. 171, 206-207 (Kansaidaiigaku Hōgaku Kenkyūjo, 1997); Miki Kawaguchi, *Rōdō-keiyakujō no Kenri/Gimu: Jinken-hoshō o Naihoshita Kōyō/Rōdōjōken-hoshō* [Rights and Duties Based on the Labor Contracts: Guarantee of Employment and Working Conditions Connoting Human Rights Guarantee], in 2 KŌZA RŌDŌHŌ NO SASEI 173 (Nihon Rōdōhō Gakkai ed., 2017); Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Jan. 28, 1993, Hei 2 (wa 7) no. 4912, 651 RŌDŌ HANREI [RŌHAN] 161, 164-165 (Japan) – *Chescom Secretary Center* case (holding that employees do not owe non-competition obligations to their employer after the termination, in principle, but they cannot solicit current employer's customers by using the customer information obtained during the course of employment. However, this is relatively old and is not a typical case of a restrictive covenant, because this case involved the former employees who entered the company or its subsidiary for the purpose of acquiring the employer's business secrets. The court found that the employees' manners of soliciting the customers in violation of their obligation were extremely malicious).

⁸⁸ Yamaguchi, *supra* note 87, at 431; Ishibashi, *supra* note 2, at 107-108; TSUCHIDA, *supra* note 87, at 710; *see also* Ogawa, *supra* note 6, at 367.

⁸⁹ NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 22, para. 1, translated in CONSTITUTION AND GOVERNMENT OF JAPAN, THE CONSTITUTION OF JAPAN, http://japan.kantei.go.jp/constitution_and_government/frame_01.html (Japan) (stating "[e]very person shall have freedom to choose and change his residence and to choose his occupation to the extent that it does not interfere with the public welfare (emphasis added).") *See also* Yamakawa, *supra* note 6, at 363; *see also* Ogawa, *supra* note 6, at 345.

⁹⁰ *See* Ishibashi, *supra* note 2, at 116.

agreement not to compete with the employer.⁹¹ This is not only due to the employee's constitutional right, but also because the enforcement of the covenant may deprive the employee of the means to make a living.⁹²

It is well-established that the courts scrutinize whether the restrictive covenant in question violates public policy (公序 [*kōjo*]),⁹³ and accordingly, whether it is invalid, by examining the reasonableness (合理性 [*gōri-sei*]) of the restriction on post-employment competition.⁹⁴ As far as the remedies are concerned, when the covenant fulfills the reasonableness condition and is therefore valid, the employer is entitled to damages⁹⁵ and an injunction⁹⁶ for breach of contract. In addition, many employers set forth a condition in the employment contracts, to the effect that if an employee competes with their employer or works for a competitor of the employer, before a certain number of years lapse from the date of termination, the employer will not pay employee benefits, such as a severance payment (also referred to as "retirement payment (allowance)")⁹⁷ or pension. When the employee competes

⁹¹ In some cases, the courts have negated the formation of the restrictive covenants themselves, before they scrutinized the enforceability of the agreements. *See e.g.* Ōsaka Kōtō Saibansho [Osaka High Ct.] Oct. 5, 2006, Hei 17 (ra ㄱ) no. 1362, 927 RŌDŌ HANREI [RŌHAN] 23, 28 (Japan) – *A Patent Office* case (holding that the court should consider the formation of the agreement prudently because the restrictive covenant is the agreement to which the employee consents to be restricted his/her freedom to choose his/her occupation).

⁹² Ōsaka Chihō Saibansho [Osaka Dist. Ct.] Jan. 22, 2003, Hei 13 (wa ㄱ) no. 11749, 846 RŌDŌ HANREI [RŌHAN] 39, 47 (Japan) – *Shin Nippon Biomedical Laboratories* case; Ōsaka Chihō Saibansho [Osaka Dist. Ct.] Oct. 23, 2009, Hei 21 (yo ㄱ) no. 10020, 1000 RŌDŌ HANREI [RŌHAN] 50, 59-60 (Japan) – *Morikuro* case; Ōsaka Chihō Saibansho [Osaka Dist. Ct.] Mar. 4, 2011, Hei 20 (wa ㄱ) no. 17056 and Hei 21 (wa ㄱ) no. 2392, 1030 RŌDŌ HANREI [RŌHAN] 46, 66 (Japan) – *Morikuro* case; *see also* Ishibashi, *supra* note 2, at 120.

⁹³ The provision regarding public policy is the Civil Code, *supra* note 82, art. 90 (providing "[a] juristic act with any purpose which is against public policy is void"). Under this interpretation, public policy which prohibits private sector employers from depriving employees of constitutional rights has been formed. The Constitution Law, *supra* note 89, in Japan does not have the power to regulate the private sectors as the United States Constitution basically does not. *See* NOBUYOSHI ASHIBE, KENPŌ [CONSTITUTIONAL LAW] 115-117 (Kazuyuki Takahashi rev. 6th ed. 2015).

⁹⁴ Yamakawa, *supra* note 6, at 363; Ogawa, *supra* note 6, at 345.

⁹⁵ *See* the Civil Code, *supra* note 82, art. 415 (providing that "[i]f an obligor fails to perform consistent with the purpose of its obligation, the obligee shall be entitled to demand damages arising from such failure.").

⁹⁶ *See* the Civil Code, *supra* note 82, art. 414, para 3 (providing that "[w]ith respect to any obligation for an inaction, a request may be made to the court at the expense of the obligor seeking the removal of the outcome of the action performed by the obligor, or an appropriate ruling against any future action.").

⁹⁷ Note that this severance allowance is different from the payment of the average wages for a period of no less than 30 days in lieu of the 30 days' advance notice of dismissal, mandated by the Labor Standard Act. Rōdō kijinhō [Rōkihō] [Labor Standard Act], Law No.49 of 1947, art. 20, para 2, translated in (Japanese Law Translation [JLT DS]), <http://www.japaneselawtranslation.go.jp/> (Japan).

⁹⁸ There are two types of severance payments. One is a general severance payment and another is a premium severance payment based on the early retirement program. For the general severance payment, *see e.g.* Saikō Saibansho [Sup. Ct.] Aug. 9, 1977, Sho 51 (o ㄱ) no. 1289, 958 RŌDŌ KEIZAI HANREI SOKUHŌ [RŌKEISOKU] 25 (Japan) – *Sankosha* case; Nagoya Kōtō Saibansho [Nagoya High Ct.] Aug. 31,

and does not satisfy the term to receive those benefits, the employer may obtain the right of forfeiture of the benefits.⁹⁹ However, the requirement for the forfeiture is not clear since the retirement plans vary widely among companies.¹⁰⁰ The non-competition obligation would lead the strong remedies, such as damages and an injunction, for violation of the covenants, but the conditions of the severance payment are designed to secure the employer's countermeasure based on the nature of the specific benefits (principally, a reward for meritorious services). In accordance with such a nature, many courts have adopted the employee's "bad faith" test in place of the reasonableness test in forfeiture cases.¹⁰¹ However, the focus of this article is on cases where the employer may be entitled to damages or an injunction for an employee's breach of contract in violating a restrictive covenant. Moreover, any measure of damages, an injunction, and forfeiture has remedial requirements independent of reasonableness (the bad faith in the forfeiture cases can be said one of them), but the issues of remedies are beyond the objective of this paper.

This part examines the rules on restrictive covenants through a study of judicial precedents.

A. Reasonableness Test

In analyzing whether a covenant is void as against public policy, courts engage in a comprehensive consideration of various factual circumstances centering on the

1990, Hei 1 (ne ね) no. 386 and 435, 569 RÔDÔ HANREI [RÔHAN] 37 (Japan) – *Chubu Nihon Kokokusha* case. For the premium severance payment, see Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Oct. 3, 2005, Hei 15 (wa ㍿) no. 15572, 907 RÔDÔ HANREI [RÔHAN] 16 (Japan) – *Fujitsu* case; Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Jan. 15, 2016, Hei 25 (wa ㍿) no. 26113, 2276 RÔDÔ KEIZAI HANREI SOKUHÔ [RÔKEISOKU] 12 (Japan) – *Daiichi Paper* case; Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Mar. 31, 2016, Hei 26 (wa ㍿) no. 25956, 1144 RÔDÔ HANREI [RÔHAN] 37 (Japan) – *Nomura Securities* case. The general severance payment is a hybrid of deferred payment of wages and a reward for meritorious services. Ogawa, *supra* note 6, at 375; SUGENO, *supra* note 81, at 422-424 (Kanowitz trans., *supra* note 81, at 225-226). The premium severance payment is a special benefit as a consideration for early retirement. *Daiichi Paper* case, at 25; SUGENO, *supra* note 81, at 707.

⁹⁹ See Ogawa, *supra* note 6, at 344.

¹⁰⁰ Compare with the American law. See *supra* note 24 and accompanying text (applying the same rule to covenants of forfeiture of employee benefit). However, the ERISA, as "other law" (§8.06 of the Restatement), federally protects employees' pension benefits. 29 U.S.C. § 1053(a). Moreover, some cases recognize the distinction between the restrictive covenants and the non-competition forfeiture clauses (in other words, "bad boy clauses"). See e.g., *Clark v. Lauren Young Tire Center Profit Sharing Trust*, 816 F.2d 480, n.1 (9th Cir. 1987) ("a non-competition forfeiture clause in a pension plan is not like a non-competition agreement in the employment contract, which may unreasonably restrain trade or endanger the employee's livelihood").

¹⁰¹ E.g., Nagoya Kōtō Saibansho [Nagoya High Ct.] Aug. 31, 1990, Hei 1 (ne ね) no. 386 and no. 435, 569 RÔDÔ HANREI [RÔHAN] 37, 46 (Japan) – *Chubu Nihon Kokokusha* case. See also Saikō Saibansho [Sup. Ct.] Aug. 9, 1977, Sho 51 (o オ) no. 1289, 958 RÔDÔ KEIZAI HANREI SOKUHÔ [RÔKEISOKU] 25, 26 (Japan) – *Sankosha* case; Ogawa, *supra* note 6, at 375; SUGENO, *supra* note 81, at 423 (Kanowitz trans., *supra* note 81, at 226).

following elements: (1) the employer's legitimate interest; (2) the former employee's position and job content with the employer; (3) the scope of the restriction in its duration, geography, type of business or job, and employee's activities after their leaving; and (4) the presence or absence of a compensatory measure for the restriction and, if present, its contents.¹⁰² In other words, the courts strike a balance between the intensity of the contractual restriction against the former employee's freedom to choose their occupation—(3)—and the justification for the imposition of the restriction—(1), (2), and (4).¹⁰³ This four-prong scrutiny is called the reasonableness test.

The first case that applied this public policy scrutiny to the restrictive covenant was the *Foseco Japan Limited* case.¹⁰⁴ In this case, two former employees, after approximately ten-year long service periods in the research department, left Foseco Japan Limited, a manufacturer and distributor of sub-material for metal casting, one after another.¹⁰⁵ The employees signed agreements not to disclose secrets during and after their employment and agreements not to compete with the employer for two years after the termination.¹⁰⁶ These agreements were designed to protect their employer's technical secrets, but the two employees launched their business immediately after they left.¹⁰⁷ The court held that “in determining the reasonable scope [of the restriction on competition], it is necessary to carefully consider the *duration* and the *geographical scope* of the restriction, the scope of *job categories* subject to the restriction, the existence or non-existence of *compensation* for the restriction, and other factors, from the three perspectives of the [employer's] interests (protection of business secrets), the [employee's] disadvantage (inconveniences of their change of career and re-employment), and social interests (threat of monopolized concentration and accompanying general consumers' interests).”¹⁰⁸ The court concluded that the restrictive covenant was not unreasonable and thus was

¹⁰² This public policy scrutiny is also applicable in the case where a company and its officer have entered into a restrictive covenant for their terminated relationship. See e.g., EGASHIRA, *supra* note 84, at 443; Makiko Shigeta, *Torishimariyaku-tainingo no Kyōgyō to Hōkisei* [Competition After Directors Resigned and Legal Regulations], 9 KAIKEI PROFESSION 97, 107 (2014); Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] May 19, 2009, Hei 20 (wa 7) no.30691, 1314 Hanrei Taimuzu [Hanta] 218, 230 (Japan). However, this scrutiny does not apply to the case of the sale of a business. Rather, the commercial law and corporate law provide default rules that the seller of its business owes the non-competition obligation to the purchaser in some extent. The Commercial Code, *supra* note 84, art. 16; the Corporation Law, *supra* note 84, art. 21. Compare with the American law. See *supra* note 25 and accompanying text.

¹⁰³ Each element, thus, has a correlative relationship with other elements. Noda Susumu, *Rōdōryoku-ido to Kyōgyō-hishi-gimu* [Workforce Mobility and Non-competition Obligation], 160 KIRŌ 49, 57 (1991). See also Wendi S. Lazar, *Confidentiality, Trade Secret and Other Restrictive Covenants in a Global Economy*, AMERICANBAR.ORG 1, 17 (2009), <http://apps.americanbar.org/labor/intlcomm/mw/papers/2010/pdf/lazar.pdf>.

¹⁰⁴ Nara Chihō Saibansho [Nara Dist. Ct.] Oct. 23, 1970, Sho 45 (yo 3) no.37, 21 KAKYŪ SAIBANSHO MINJI SAIBAN REISHŪ [KAMINSHŪ] 1369, 1380 (Japan).

¹⁰⁵ *Id.* at 1374.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 1380 (emphasis added).

enforceable.¹⁰⁹ It found that the two-year duration was relatively short; that the job categories subject to the restriction were relatively narrow, since this occupation was the employer's business, which was an uncommon field; that although the covenants contained no geographical limitation, it was inevitable because the employer's business secrets were technological secrets; and that the employer had not paid its employees compensation for the restriction, but had paid a secret duty allowance.¹¹⁰ This case is well-known as the leading case on the non-competition obligation based on restrictive covenants.¹¹¹ The Supreme Court has not explicitly applied the reasonableness test up to the present day. It has only decided the recent case of tort¹¹² and the old case of forfeiture of severance payment.¹¹³ However, there is no case with the fact pattern that the test assumes.

The following subsections consider the details of each element.

1. Legitimate Interest of the Employer

As the first element, the employer's need to restrict competition (hereinafter simply referred to as the "legitimate interest" (正当な利益 [*seitō-na-rieki*])) is a core and essential element for reasonable covenants. The law requires this element to justify the imposition of restraints on the former employee's freedom to choose their occupation.¹¹⁴ Courts have regarded restrictive covenants as reasonable even though some of the other elements are found to be lacking,¹¹⁵ but it is exceptional for courts to enforce restrictive covenants without any legitimate interest.¹¹⁶ The legitimate interest is not merely one element of reasonableness but rather is a prerequisite for restrictive covenants.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* See also, *infra* notes 137, 146, 163, 184, and 219 and accompanying text.

¹¹¹ Ogawa, *supra* note 6, at 346.

¹¹² Saikō Saibansho [Sup. Ct.] Mar. 25, 2010, Hei 21 (ju 受) no. 1168, 1005 RŌDŌ HANREI [RŌHAN] 5 (Japan) – *Success and other (Miyoshi Tec)* case.

¹¹³ Saikō Saibansho [Sup. Ct.] Aug. 9, 1977, Sho 51 (o オ) no. 1289, 958 RŌDŌ KEIZAI HANREI SOKUHŌ [RŌKEISOKU] 25 (Japan) – *Sankosha* case.

¹¹⁴ See Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Feb. 23, 2005, Hei 15 (wa ㊦) no. 7588 and no. 26800, 902 RŌDŌ HANREI [RŌHAN] 106, 116 (Japan) – *Artnature* case.

¹¹⁵ See *infra* notes 159, 182, 183, and 234 and accompanying text.

¹¹⁶ One court required neither the legitimate interest nor the necessity of the restriction on competition in the case where the former employee appeared to act in bad faith. Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Sept. 27, 2005, Hei 16 (wa ㊦) no. 4703, 909 RŌDŌ HANREI [RŌHAN] 56, 65 (Japan) – *Aimex* case (finding that the employees collectively resigned and solicited the employer's customers before and after severance, affecting the employer's operation and holding that the employees violated the restrictive covenant). *But cf.* Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Sept. 29, 1994, Hei 5 (wa ㊦) no. 5056 and no. 11762, 1543 HANREI JIHŌ [HANJI] 134, 136 (Japan) – *Kepner-Tregoe Japan* case (inconsistent with the current doctrine of the reasonableness test, holding that the restrictive covenant did not violate public policy only from elements of the duration and the scope of job without detailed analysis).

The key question of this element is what information constitutes the legitimate interest. However, courts have not specified what the legitimate interest itself is.¹¹⁷ This part explores the rule of the legitimate interest by analyzing precedents and their findings.

For instance, in the *Aflac* case, the employee was an executive officer in Aflac Japan.¹¹⁸ The executive-officer contract provided that the employee may not compete with the employer for two years after termination, but he joined another insurance company the day after the termination.¹¹⁹ Aflac had business secrets including mid-to long-term and annual management plans, marketing strategies, know-how, and insurance agency information.¹²⁰ The court held that these interests constituted legitimate interests and concluded that the non-competition clause was reasonable.¹²¹ The reasons provided were: the employee had access to the secrets and developed the human relationships through his former position of executive officer; the scope of the restriction was narrow (with reducing its duration from two years to one year); and the annual payment, stock options, and his severance payment were a decent amount.¹²²

Similarly, the *American Life Insurance* case involved an employee serving as an executive officer.¹²³ The employer set forth a non-competition clause declaring that the employer would not pay a severance payment if the employee joined any of the employer's competitors within two years after termination.¹²⁴ The court found that this clause was designed to prevent the hollowing out of human resources in order to protect customer information and sales know-how.¹²⁵ It held that the employee acquired his personal connections and negotiation skills through his ability and effort and that those were generally utilized after his transfer; that the employer failed to show that it had a trade secret; and that the prohibition of transferring to the competitor was an excessively restrictive measure for the purpose of preventing the leakage of customer information.¹²⁶

Focusing on the categories of information that the employer aims to protect through the covenants, the courts have considered: (i) technological information and know-how;¹²⁷ (ii) business information—such as management plans and financial

¹¹⁷ See Ogawa, *supra* note 6, at 368.

¹¹⁸ Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Sept. 30, 2010, Hei 22 (yo ㊦) no. 3026, 1024 RŌDŌ HANREI [RŌHAN] 86, 87 (Japan).

¹¹⁹ *Id.*

¹²⁰ *Id.* at 89.

¹²¹ *Id.* at 91.

¹²² *Id.* at 89-91. See also *infra* notes 128, 129, 131, 140, 142, 155, 175, 177, 182, 197, 215, and 270 and accompanying text.

¹²³ Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Jan. 13, 2012, Hei 22 (wa ㊦) no. 732, 1041 RŌDŌ HANREI [RŌHAN] 82, 82 (Japan).

¹²⁴ *Id.* at 83.

¹²⁵ *Id.* at 86.

¹²⁶ *Id.* See also *infra* notes 132, 138, 153, 175, 180, 191, 201, and 216 and accompanying text.

¹²⁷ E.g., Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Nov. 18, 2008, Hei 18 (wa ㊦) no. 22955, 980 RŌDŌ HANREI [RŌHAN] 56, 63 (Japan) – *Total Service* case (however, the appellate court quashed this district court's decision and dismissed the employer's claim (Tōkyō Kōtō Saibansho [Tokyo High Ct.] May 27,

information;¹²⁸ product or price information, sales, and school operating know-how;^{129 130} and (iii) customer lists or customer relationships,¹³¹ as legitimate interests in past cases.¹³² However, these sorts of information do not necessarily form

2009, Hei 21 (ne ね) no. 356, SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 1, 8-10, <http://www.courts.go.jp> (Japan)); Ōsaka Chihō Saibansho [Osaka Dist. Ct.] Oct. 23, 2009, Hei 21 (yo ㇏) no. 10020, 1000 RŌDŌ HANREI [RŌHAN] 50, 58-59 (Japan) - *Morikuro* case; Ōsaka Chihō Saibansho [Osaka Dist. Ct.] Dec. 22, 1998, Hei 5 (wa ㇒) no. 8314, 30 CHITEKI ZAISANKEN KANKEI MINJI GYŌSEI SAIBAN REISHŪ [CHITEKI SAISHŪ] 1000, 1044 (Japan) - *Iwaki Glass and other* case; Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Jan. 15, 2016, Hei 25 (wa ㇒) no. 26113, 2276 RŌDŌ KEIZAI HANREI SOKUHŌ [RŌKEISOKU] 12, 23 (Japan) - *Daiichi Paper* case.

¹²⁸ E.g., Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Apr. 24, 2007, Hei 17 (wa ㇒) no. 24499, 942 RŌDŌ HANREI [RŌHAN] 39, 49 (Japan) - *Yamada Denki* case; Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Sept. 30, 2010, Hei 22 (yo ㇏) no. 3026, 1024 RŌDŌ HANREI [RŌHAN] 86, 89 (Japan) - *Aflac* case.

¹²⁹ E.g., Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Sept. 22, 2004, Hei 16 (yo ㇏) no. 1832, 882 RŌDŌ HANREI [RŌHAN] 19, 27 (Japan) - *Torre Lazur Communications* case; Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Sept. 30, 2010, Hei 22 (yo ㇏) no. 3026, 1024 RŌDŌ HANREI [RŌHAN] 86, 89 (Japan) - *Aflac* case; Ōsaka Chihō Saibansho [Osaka Dist. Ct.] Sept. 27, 2013, Hei 24 (wa ㇒) no. 7562 (Japan), available at LEX/DB 25502050 - *Matsui* case; Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Dec. 19, 2016, Hei 28 (wa ㇒) no. 52 (Japan), available at LEX/DB 25544793 - *Digital Power Station* case.

¹³⁰ Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Oct. 16, 1995, Hei 7 (yo ㇏) no. 3587, 690 RŌDŌ HANREI [RŌHAN] 75, 87 (Japan) - *Tokyo Legal Mind* case; Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] May 24, 2006, Hei 18 (yo ㇏) no. 21021, 1229 HANREI TAIMUZU [HANTA] 256, 261 (Japan) - *PM Concepts* case; Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Oct. 27, 2010, Hei 22 (wa ㇒) no. 10138, 2105 HANREI JIHŌ [HANJI] 136, 139 (Japan) - *Powerfull Voice* case.

¹³¹ E.g., Ōsaka Chihō Saibansho [Osaka Dist. Ct.] Oct. 15, 1991, Hei 2 (mo ㇑) no. 53128, 596 RŌDŌ HANREI [RŌHAN] 21, 24 (Japan) - *Shin-Osaka Boeki* case; Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Oct. 16, 1995, Hei 7 (yo ㇏) no. 3587, 690 RŌDŌ HANREI [RŌHAN] 75, 87 (Japan) - *Tokyo Legal Mind* case; Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Sept. 22, 2004, Hei 16 (yo ㇏) no. 1832, 882 RŌDŌ HANREI [RŌHAN] 19, 27 (Japan) - *Torre Lazur Communications* case; Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Nov. 18, 2008, Hei 18 (wa ㇒) no. 22955, 980 RŌDŌ HANREI [RŌHAN] 56, 64 (Japan) - *Total Service* case; Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Jan. 23, 2012, Hei 21 (wa ㇒) no. 43395 (Japan), available at LEX/DB 25490870 - *Planer* case; Ōsaka Chihō Saibansho [Osaka Dist. Ct.] Mar. 12, 2015, Hei 25 (wa ㇒) no. 10955, SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 1, 24, <http://www.courts.go.jp> (Japan) - *Seigakusya* case; Ōsaka Chihō Saibansho [Osaka Dist. Ct.] Sept. 27, 2013, Hei 24 (wa ㇒) no. 7562 (Japan), available at LEX/DB 25502050 - *Matsui* case; Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Dec. 19, 2016, Hei 28 (wa ㇒) no. 52 (Japan), available at LEX/DB 25544793 - *Digital Power Station* case. For the relationship between the life insurance company employer and insurance agencies, *see also* Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Sept. 30, 2010, Hei 22 (yo ㇏) no. 3026, 1024 RŌDŌ HANREI [RŌHAN] 86, 89 (Japan) - *Aflac* case.

¹³² On the other hand, the employer's intent to merely prevent the hollowing out of human resources does not create legitimate interest unless the employer has other interests mentioned above. Ōsaka Chihō

legitimate interests. One scholar defined the legitimate interest as “a company-specific interest which forms a significant portion of the company’s competitiveness.”¹³³

On the other hand, paying attention to the legal nature of the information at issue, if the information falls within the ambit of a “trade secret,”¹³⁴ the information constitutes a legitimate interest.¹³⁵ The legitimate interest is a broader notion than a trade secret, however, so being the trade secret is not strictly necessary to establish the legitimate interest.¹³⁶ As for information not amounting to the trade secret, courts determine whether the information is a legally protectable legitimate interest by considering the following facts: (i) whether the information is the employer’s original, unique, or proprietary information,¹³⁷ or general knowledge which is

Saibansho [Osaka Dist. Ct.] Dec. 25, 1996, Hei 4 (wa 7) no. 3217 and no. 3532, 711 RÔDÔ HANREI [RÔHAN] 30, 47 (Japan) - *Japan Convention Services* case; Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Jan. 13, 2012, Hei 22 (wa 7) no. 732, 1041 RÔDÔ HANREI [RÔHAN] 82, 86 (Japan) - *American Life Insurance Company* case.

¹³³ Yamaguchi, *supra* note 87, at 421; *see also* Kawata, *supra* note 2, at 145 (stating that the legitimate interest is its opportunity to compete fairly with its former employee).

¹³⁴ Under Japanese law, the Unfair Competition Prevention Act protects “trade secret” by granting remedies of injunction, damages, and so on. Fusei kyōsō bōshihō [Fukyōhō] [Unfair Competition Prevention Act], Law No. 47 of 1993, art.3-15, translated in (Japanese Law Translation [JLT DS]), <http://www.japaneselawtranslation.go.jp/> (Japan). “Trade secret” is defined as “technical or business information useful for business activities, such as manufacturing or marketing methods, that are kept secret and that are not publicly known.” *Id.* art. 2, para. 6. Accordingly, the necessary conditions of “trade secret” are (i) “kept secret,” (ii) “useful information,” and (iii) “not publicly known.” For details of each prerequisite, *see* CHIKUJŌ KAISETSU FUSEI-KYŌSŌ-BŌSHIHŌ [ANNOTATIONS OF THE UNFAIR COMPETITION PREVENTION ACT] 40-44 (Keizai-sangyōshō Chiteki-zaisan-shitsu [the Intellectual Property Policy Office of the Ministry of Economy, Trade and Industry] ed., 2016).

¹³⁵ The fact that information at stake constitutes “trade secret” indicates that the information is significant enough to be protected by the restrictive covenant. *E.g.*, Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Oct. 16, 1995, Hei 7 (yo 3) no. 3587, 690 RÔDÔ HANREI [RÔHAN] 75, 87 (Japan) - *Tokyo Legal Mind* case;

Ōsaka Chihō Saibansho [Osaka Dist. Ct.] Dec. 22, 1998, Hei 5 (wa 7) no.8314, 30 CHITEKI ZAISANKEN KANKEI MINJI GYŌSEI SAIBAN REISHŪ [CHITEKI SAISHŪ] 1000, 1044 (Japan) - *Iwaki Glass and other* case. Besides, one court has said that, even if the information does not exactly meet trade secret requirements, the information that is substantially equivalent to trade secret will hold a higher degree of need of protection. Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Nov. 18, 2008, Hei 18 (wa 7) no. 22955, 980 RÔDÔ HANREI [RÔHAN] 56, 64 (Japan) - *Total Service* case.

¹³⁶ Furthermore, as one judge in Osaka District Court has pointed out, it is not necessary for courts to decide whether the information forms a trade secret in the cases of restrictive covenants or not. Daisuke Yokochi, *Jūgyōintō no Kyōgyō-hishi-gimu-tō ni kansu sho-ron ten ni suite (jō)* [Various Issues of Non-competition Obligation etc. of Employees etc. vol. 1] 1388 HANTA 5, 10 (2013). This opinion is arrived at from the fact that a trade secret is not a requirement for the enforceability of restrictive covenants. *See also* Ogawa, *supra* note 6, at 354.

¹³⁷ Nara Chihō Saibansho [Nara Dist. Ct.] Oct. 23, 1970, Sho 45 (yo 3) no. 37, 21 KAKYŪ SAIBANSHO MINJI SAIBAN REISHŪ [KAMINSHŪ] 1369, 1377, 1378 (Japan) - *Foseco Japan Limited* case; Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] May 24, 2006, Hei 18 (yo 3) no. 21021, 1229 HANREI TAIMUZU [HANTA] 256, 261 (Japan) - *PM Concepts* case; Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Nov. 18, 2008, Hei 18 (wa 7) no. 22955, 980 RÔDÔ HANREI [RÔHAN] 56, 64 (Japan) - *Total Service* case (holding that because of the originality of technological information, although strictly not a trade secret, the information is

acquirable through daily work¹³⁸; (ii) whether the information has high economic value—in other words, whether the information establishes the employer's advantageous position in the market,¹³⁹ or whether the information would provide competitors with a competitively favorable position against the employers¹⁴⁰; (iii) how important the information is for management of the employer—that is, whether the information is related to fundamentals of the employer's business,¹⁴¹ or whether the information contributes considerably to the employer's profits¹⁴²; (iv) whether the employer has invested tremendous resources, such as time, expenses and workforce in the development of the information¹⁴³; (v) whether the employer took

equivalent to it. *See supra* note 135); Ōsaka Chihō Saibansho [Osaka Dist. Ct.] Oct. 23, 2009, Hei 21 (yo ㊦) no. 10020, 1000 RŌDŌ HANREI [RŌHAN] 50, 58-59, 60 (Japan) - *Morikuro* case; Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Oct. 27, 2010, Hei 22 (wa ㊦) no. 10138, 2105 HANREI JIHŌ [HANJI] 136, 139 (Japan) - *Powerfull Voice* case.

¹³⁸ Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Feb. 23, 2005, Hei 15 (wa ㊦) no. 7588 and no. 26800, 902 RŌDŌ HANREI [RŌHAN] 106, 116 (Japan) - *Artnature* case; Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Jan. 13, 2012, Hei 22 (wa ㊦) no. 732, 1041 RŌDŌ HANREI [RŌHAN] 82, 86 (Japan) - *American Life Insurance Company* case.

¹³⁹ Ōsaka Chihō Saibansho [Osaka Dist. Ct.] Dec. 22, 1998, Hei 5 (wa ㊦) no.8314, 30 CHITEKI ZAISANKEN KANKEI MINJI GYŌSEI SAIBAN REISHŪ [CHITEKI SAISHŪ] 1000, 1044 (Japan) - *Iwaki Glass and other* case; Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Sept. 22, 2004, Hei 16 (yo ㊦) no. 1832, 882 RŌDŌ HANREI [RŌHAN] 19, 26 (Japan) - *Torre Lazur Communications* case; Ōsaka Chihō Saibansho [Osaka Dist. Ct.] Oct. 23, 2009, Hei 21 (yo ㊦) no. 10020, 1000 RŌDŌ HANREI [RŌHAN] 50, 58-59, 60 (Japan) - *Morikuro* case.

¹⁴⁰ Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Aug. 30 2002, Hei 13 (wa ㊦) no. 21277, 838, RŌDŌ HANREI [RŌHAN] 32, 40 (Japan) - *Daijohs Services* case; Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Sept. 22, 2004, Hei 16 (yo ㊦) no. 1832, 882 RŌDŌ HANREI [RŌHAN] 19, 26 (Japan) - *Torre Lazur Communications* case; Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Apr. 24, 2007, Hei 17 (wa ㊦) no. 24499, 942 RŌDŌ HANREI [RŌHAN] 39, 49 (Japan) - *Yamada Denki* case; Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Sept. 30, 2010, Hei 22 (yo ㊦) no. 3026, 1024 RŌDŌ HANREI [RŌHAN] 86, 89 (Japan) - *Aflac* case.

¹⁴¹ Ōsaka Chihō Saibansho [Osaka Dist. Ct.] Oct. 15, 1991, Hei 2 (mo ㊦) no. 53128, 596 RŌDŌ HANREI [RŌHAN] 21, 24 (Japan) - *Shin-Osaka Boeki* case; Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Aug. 30 2002, Hei 13 (wa ㊦) no. 21277, 838, RŌDŌ HANREI [RŌHAN] 32, 40 (Japan) - *Daijohs Services* case.

¹⁴² Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Sept. 30, 2010, Hei 22 (yo ㊦) no. 3026, 1024 RŌDŌ HANREI [RŌHAN] 86, 89 (Japan) - *Aflac* case; Ōsaka Chihō Saibansho [Osaka Dist. Ct.] Mar. 12, 2015, Hei 25 (wa ㊦) no. 10955, SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 1, 24, <http://www.courts.go.jp> (Japan) - *Seigakusya* case.

¹⁴³ Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Nov. 18, 2008, Hei 18 (wa ㊦) no. 22955, 980 RŌDŌ HANREI [RŌHAN] 56, 64 (Japan) - *Total Service* case; Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Oct. 27, 2010, Hei 22 (wa ㊦) no. 10138, 2105 HANREI JIHŌ [HANJI] 136, 139 (Japan) - *Powerfull Voice* case; Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Jan. 23, 2012, Hei 21 (wa ㊦) no. 43395 (Japan), available at LEX/DB 25490870 - *Planer* case; Ōsaka Chihō Saibansho [Osaka Dist. Ct.] Mar. 12, 2015, Hei 25 (wa ㊦) no.

appropriate measures to maintain confidentiality of the information¹⁴⁴; and (vi) whether the information is otherwise difficult for competitors to obtain.¹⁴⁵ The courts seem to have emphasized the first factor, originality and uniqueness. They have examined the other factors in order to determine originality and uniqueness,¹⁴⁶ although no courts have presented the general line drawn between protectable interests and ordinary information.¹⁴⁷

A restrictive covenant in a post-employment relationship is a problem comprising a conflict of the employer's legitimate interest and the former employee's exercise of professional ability guaranteed by the freedom to choose their occupation. Therefore, in order to respond to the crucial question of whether the valuable business information belongs to the employer as its legitimate interest or not, courts consider the relevance of the information to the employer's business, the support offered by the information to competitiveness, and the management efforts to obtain and keep information confidential.

Courts also emphasize the difference between the customer lists or relationships and other information such as business information including management plans, product information, and know-how. Some courts and researchers pose a problem of the relationship between a restrictive covenant and a confidentiality agreement¹⁴⁸ as well. When an employer could sufficiently cover its interests through a confidentiality agreement or other measures, may it impose a more intense non-competition agreement on former employees? This article will discuss these issues in a later subsection, because they are also related to the elements of the scope of the restriction in the reasonableness test. (*See* subsection 3.d.)

10955, SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 1, 24-25, <http://www.courts.go.jp> (Japan) – *Seigakusya* case.

¹⁴⁴ Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] May 24, 2006, Hei 18 (yo ㊦) no. 21021, 1229 HANREI TAIMUZU [HANTA] 256, 261 (Japan) – *PM Concepts* case. According to the decision of the court, this “appropriate measure to maintain confidentiality of the information” does not appear to be similar to the concept of a “kept secret,” one of the requirements for a trade secret. For example, the employer's effort against external parties not to leak their own textbooks outside can be one of the appropriate measures to maintain confidentiality of information. However, a “kept secret” in the Trade Secrets Law (the Unfair Competition Prevention Act, *supra* note 134), more strictly, requires measures against internal parties of the company. TRADE AND INDUSTRY OF MINISTRY OF ECONOMY, EIGYŌ HIMITSU KANRI SHISHIN [GUIDELINE OF MANAGING TRADE SECRET] (Jan. 28, 2015), <http://www.meti.go.jp/policy/economy/chizai/chiteki/pdf/20150128hontai.pdf>.

¹⁴⁵ Ōsaka Chihō Saibansho [Osaka Dist. Ct.] Sept. 27, 2013, Hei 24 (wa ㊦) no. 7562 (Japan), available at LEX/DB 25502050 – *Matsui* case.

¹⁴⁶ *See* Nara Chihō Saibansho [Nara Dist. Ct.] Oct. 23, 1970, Sho 45 (yo ㊦) no. 37, 21 KAKYŪ SAIBANSHO MINJI SAIBAN REISHŪ [KAMINSHŪ] 1369, 1376-77, 1377-78 (Japan) – *Foseco Japan Limited* case; Ōsaka Chihō Saibansho [Osaka Dist. Ct.] Oct. 23, 2009, Hei 21 (yo ㊦) no. 10020, 1000 RŌDŌ HANREI [RŌHAN] 50, 58-59 (Japan) – *Morikuro* case.

¹⁴⁷ *See* Yokochi, *supra* note 136, at 10 (enumerating similar factors); Ishibashi, *supra* note 1, at 117-119; Yamaguchi, *supra* note 87, at 421-422.

¹⁴⁸ In Japan, restrictive covenants and confidentiality agreements are usually discussed separately, although, of course, they are closely related to each other. *E.g.*, SUGENO, *supra* note 81, at 151-153 (Kanowitz trans., *supra* note 81, at 78-80); ARAKI, *supra* note 81, at 279-283. Compare with the American law. *See supra* note 52 and accompanying text.

2. The Former Employee's Position and the Job Content During Their Employment

The former employees' position and role in the employer's organization are important elements in determining the reasonableness of the restriction as well as the employer's legitimate interest. In order for a restrictive covenant to bind a former employee, it is necessary that the former employee has had some access, authority, or responsibility relating to the employer's legitimate interests during their employment because the interest must be linked with the former employee. Thus, if the former employee has not been in a position to use the employer's confidential information during their work, the individual lacks a precondition for the prohibition of competition.¹⁴⁹ Some courts have not mentioned this element in their reasonableness test.¹⁵⁰ However, these courts seem to have considered the former employee's position or job specification by integrally examining this element in the legitimate interest element, rather than having entirely ignored it.

Some commentators have pointed to the superiority of the former employee's position,¹⁵¹ but the height of the employee's position or the amount of compensation is not necessarily essential for this element.¹⁵² Instead, the advanced status and high compensation will be considered as part of the element of compensatory measure (see subsection 4.). For example, in the *American Life Insurance* case, the court held that "the plaintiff's position before his resignation was considerably high-grade because the executive officer was a member of the Board of Officers of the defendant's Japan branch," but concluded that the non-competition clause was unenforceable because the former employee did not have access to and was not an authority over any confidential information, despite his assigned high position.¹⁵³

¹⁴⁹ Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Mar. 13, 2012, Hei 22 (wa 7) no. 46502 and Hei 23 (wa 7) No. 34037, 2144 RŌDŌ KEIZAI HANREI SOKUHŌ [RŌKEISOKU] 23, 29 (Japan) – *Kanto Industry* case.

¹⁵⁰ Ōsaka Chihō Saibansho [Osaka Dist. Ct.] Oct. 27, 2005, Hei 17 (yo 3) no. 10006, 908 RŌDŌ HANREI [RŌHAN] 57, 69 (Japan) – *A Patent Office* case; Ōsaka Chihō Saibansho [Osaka Dist. Ct.] Oct. 23, 2009, Hei 21 (yo 3) no. 10020, 1000 RŌDŌ HANREI [RŌHAN] 50, 59-60 (Japan) – *Morikuro* case; Ōsaka Chihō Saibansho [Osaka Dist. Ct.] Mar. 4, 2011, Hei 20 (wa 7) no. 17056 and Hei 21 (wa 7) no. 2392, 1030 RŌDŌ HANREI [RŌHAN] 46, 66 (Japan) – *Morikuro* case; Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Mar. 13, 2012, Hei 22 (wa 7) no. 46502 and Hei 23 (wa 7) No. 34037, 2144 RŌDŌ KEIZAI HANREI SOKUHŌ [RŌKEISOKU] 23, 29 (Japan) – *Kanto Industry* case.

¹⁵¹ Wataru Nemoto, *Rōdōsha no Kyōgyō-hishi-gimu* [Employees' Non-competition Obligation], 41 HANTA 4, 12 (1990) (pointing out that rank-and-file workers have a disadvantage by the restricted career change); Noda, *supra* note 103, at 57 (arguing that the mobility of rank-and-file workers is so high that it is difficult to affirm that the restrictive covenants can bind them).

¹⁵² Yokochi, *supra* note 136, at 11 (arguing that the courts should not consider the element of the former employee's position merely based on the height of his/her position or the amount of his/her compensation).

¹⁵³ Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Jan. 13, 2012, Hei 22 (wa 7) no. 732, 1041 RŌDŌ HANREI [RŌHAN] 82, 86-87 (Japan); see also the appealed court decision, Tōkyō Kōtō Saibansho [Tokyo High Ct.] June 13, 2012, Hei 24 (ne 3) no. 920 and 3013, SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 1, 3-5, <http://www.courts.go.jp> (Japan) – *MetLife Alico Insurance* (*American Life Insurance Company*) case.

The main point in assessing the elements of the former employee's position and job content is to analyze the actual operations of the employee's work and the employer's business by examining their access or authority to the business information or their influence over and inducement to the customers, rather than to superficially focus on a contractual relationship between the employer and the former employee (whether it is a mandate contract or an employment contract), or their title (whether the individual is an executive officer or not).¹⁵⁴ For example, in the *Aflac* case, the court evaluated the former employee's position by carefully examining his access and authority regarding business information, but not by a superficial glance over a title of his position.¹⁵⁵ Even part-time workers may owe a non-competition obligation if their employer has entrusted them with unique and valuable information.¹⁵⁶

The length of the employment period can also be a factor in the reasonable duration of the restrictive covenant (*see* the next subsection 3.a.).

3. Scope of the Restriction

When contractual restriction on the former employee's competition exceeds the reasonable range to protect the legitimate interest, the restrictive covenant will violate public policy and will thereby be void because of the undue constraint imposed on the freedom to choose one's own occupation.¹⁵⁷ The provisions in the restrictive covenants should be a reasonable response to the employer's legitimate interests, with respect to: (i) its duration; (ii) its geography; (iii) the type of business or job; and (iv) the employee's activity. In determining reasonableness, the satisfaction of or lack of these individual factors is not decisive. Courts must also consider other elements, especially the legitimate interest, correlatively.¹⁵⁸

(affirming the district court's decision, but finding that the employee's actual job condition was not considered as one having high authority or trust as a director, although the employee held a position as the general manager). *See also* Ōsaka Chihō Saibansho [Osaka Dist. Ct.] Dec. 22, 1998, Hei 5 (wa ㊦) no.8314, 30 CHITEKI ZAISANKEN KANKEI MINJI GYŌSEI SAIBAN REISHŪ [CHITEKI SAISHŪ] 1000, 1044 (Japan) - *Iwaki Glass and other* case (holding that the necessity to impose the non-competition obligation was higher than other ordinary employees since the employees were involved in a core part of the employer's business); Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Sept. 22, 2004, Hei 16 (yo ㊦) no. 1832, 882 RŌDŌ HANREI [RŌHAN] 19, 27 (Japan) - *Torre Lazur Communications* case (finding that the employee was in charge of the planning and production section, that he understood the product information, and that he was familiar with the trade secrets and know-how).

¹⁵⁴ *See* Yokochi, *supra* note 136, at 10-11; Ishibashi, *supra* note 2, at 119; Masaru Saito, *Rōdōsha no Taishokugo no Kyōgyō-hishi-gimu* [Employees' Non-competition Obligation After Terminating the Employment], 51 HANTA 13, 21 (2000).

¹⁵⁵ Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Sept. 30, 2010, Hei 22 (yo ㊦) no. 3026, 1024 RŌDŌ HANREI [RŌHAN] 86, 89-90 (Japan) - *Aflac* case.

¹⁵⁶ Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Oct. 27, 2010, Hei 22 (wa ㊦) no. 10138, 2105 HANREI JIHŌ [HANJI] 136, 139 (Japan) - *Powerful Voice* case.

¹⁵⁷ Ishibashi, *supra* note 2, at 119; Kawata, *supra* note 2, at 143.

¹⁵⁸ *See supra* note 103 and accompanying text.

i. Duration

While some courts have considered permanent restrictions unreasonable,¹⁵⁹ others have considered them reasonable.¹⁶⁰ Setting aside a conclusion on reasonableness, and focusing only on the evaluation of the length of restricted periods, there are a variety of cases. For example, courts have variously estimated that a five-year restriction after termination is (considerably) long¹⁶¹; a three-year is (relatively) long¹⁶²; a two-year is (relatively) short¹⁶³; a two-year is (relatively) long,¹⁶⁴ a one-year is (relatively) short¹⁶⁵; a one-year is (relatively) long¹⁶⁶; and a six-

¹⁵⁹ *E.g.*, Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Feb. 23, 2001, Hei 11 (wa ㊦) no. 27058, 1768 RŌDŌ KEIZAI HANREI SOKUHŌ [RŌKEISOKU] 16, 19 (Japan) – *Software Kaihatsu and Soliton Giken* case; Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Jan. 15, 2016, Hei 25 (wa ㊦) no. 26113, 2276 RŌDŌ KEIZAI HANREI SOKUHŌ [RŌKEISOKU] 12, 23 (Japan) – *Daiichi Paper* case (a permanent restriction in the general work rule provision).

¹⁶⁰ *E.g.*, Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Nov. 18, 2008, Hei 18 (wa ㊦) no. 22955, 980 RŌDŌ HANREI [RŌHAN] 56, 64 (Japan) – *Total Service* case; Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Jan. 15, 2016, Hei 25 (wa ㊦) no. 26113, 2276 RŌDŌ KEIZAI HANREI SOKUHŌ [RŌKEISOKU] 12, 23 (Japan) – *Daiichi Paper* case (a permanent restriction in the individual agreement).

¹⁶¹ *E.g.*, Ōsaka Chihō Saibansho [Osaka Dist. Ct.] Dec. 22, 1998, Hei 5 (wa ㊦) no. 8314, 30 CHITEKI ZAIKANKEN KANKEI MINJI GYŌSEI SAIBAN REISHŪ [CHITEKI SAISHŪ] 1000, 1045 (Japan) – *Iwaki Glass and other* case; Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Jan. 23, 2012, Hei 21 (wa ㊦) no. 43395 (Japan), available at LEX/DB 25490870 – *Planer* case.

¹⁶² Hukuoka Chihō Saibansho [Hukuoka Dist. Ct.] Apr. 19, 1994, Hei 4 (wa ㊦) no. 365, 1360 RŌDŌ HŌRITSU JUNPŌ [RŌJUN] 48, 54 (Japan) – *Seibu Shoji* case; Ōsaka Chihō Saibansho [Osaka Dist. Ct.] Aug. 3, 2015, Hei 25 (wa ㊦) no. 3282 (Japan), available at LEX/DB 25541202 – *Link Staff* case; Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Dec. 19, 2016, Hei 28 (wa ㊦) no. 52 (Japan), available at LEX/DB 25544793 – *Digital Power Station* case.

¹⁶³ Nara Chihō Saibansho [Nara Dist. Ct.] Oct. 23, 1970, Sho 45 (yo ㊦) no. 37, 21 KAKYŪ SAIBANSHO MINJI SAIBAN REISHŪ [KAMINSHŪ] 1369, 1380 (Japan) – *Foseco Japan Limited* case; Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Oct. 16, 1995, Hei 7 (yo ㊦) no. 3587, 690 RŌDŌ HANREI [RŌHAN] 75, 90 (Japan) – *Tokyo Legal Mind* case; Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Aug. 30 2002, Hei 13 (wa ㊦) no. 21277, 838, RŌDŌ HANREI [RŌHAN] 32, 40 (Japan) – *Daijohs Services* case; Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Sept. 22, 2004, Hei 16 (yo ㊦) no. 1832, 882 RŌDŌ HANREI [RŌHAN] 19, 27 (Japan) – *Torre Lazur Communications* case; Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Nov. 26, 2008, Hei 20 (wa ㊦) no. 853, 1293 Hanrei Taimuzu [Hanta] 285, 295 (Japan) – *Dance Music Record* case.

¹⁶⁴ Hukuoka Chihō Saibansho [Hukuoka Dist. Ct.] Oct. 5, 2007, Hei 18 (wa ㊦) no. 2157, 956 RŌDŌ HANREI [RŌHAN] 91, 94 (Japan) – *Asahi Pretec* case.

¹⁶⁵ Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Nov. 9, 2009, Hei 20 (wa ㊦) no. 8488, 1005 RŌDŌ HANREI [RŌHAN] 25, 29 (Japan) – *Mita Engineering* case.

¹⁶⁶ Ōsaka Chihō Saibansho [Osaka Dist. Ct.] Mar. 4, 2011, Hei 20 (wa ㊦) no. 17056 and Hei 21 (wa ㊦) no. 2392, 1030 RŌDŌ HANREI [RŌHAN] 46, 66 (Japan) – *Morikuro* case.

month is (relatively) short.¹⁶⁷ As a rough guide, courts tend to determine that a restriction for longer than two years (or for three or more years) is too long.¹⁶⁸

However, as courts usually consider all factors of the reasonableness test comprehensively,¹⁶⁹ reasonableness is not judged merely by the length of the period of restriction. The relationship with the nature of the legitimate interest is especially decisive. The key questions to be asked are: how long can the information maintain its confidentiality, and when is it expected to become obsolete? The answers to these questions depend on the character of the information.¹⁷⁰ Of course, even a short restriction such as six months is not enforceable if the employer lacks a protectable interest.¹⁷¹

For instance, once technological information has become prevailing information, such information will no longer be a basis to forbid competition, because it will become generalized or even obsolescent according to technology renovation.¹⁷² To protect customer information, the reasonable duration seems to be the time necessary to recover a decline in the employer's inducement to its customers, such as a dilution of customer relationships, and a reduction of the forces to solicit new customers, caused by the resignation of the employee.¹⁷³ The values of business strategies, business plans and other business information generally expires after a year because employers create this type of business information every fiscal year, and plan to modify or renew the information in response to changes in the market.¹⁷⁴ The courts indicate, in the cases of insurance companies, that

¹⁶⁷ Ōsaka Chihō Saibansho [Osaka Dist. Ct.] Sept. 27, 2013, Hei 24 (wa 7) no. 7562 (Japan), available at LEX/DB 25502050 – *Matsui* case (however, invalidating the restrictive covenant because the necessity to protect the information was insufficient.); see also Ōsaka Chihō Saibansho [Osaka Dist. Ct.] June 19, 2000, Hei 11 (wa 7) no. 5880, 791 RŌDŌ HANREI [RŌHAN] 8, 14 (Japan) – *Kiyo System* case.

¹⁶⁸ See Yokochi, *supra* note 136, at 11 (analyzing that, if limited to the issue of the duration, the courts are likely to evaluate the restrictions for longer than two years as too long).

¹⁶⁹ See *supra* note 102 and accompanying text.

¹⁷⁰ See Ogawa, *supra* note 6, at 369. On the contrary, one scholar argues that approximately one year will be a maximum reasonable period unless there is a special need to exceed it or a high amount compensatory measure because the development of informatization has shortened the lifetime of business secrets, know-how, and other confidential information. NISHITANI, *supra* note 86, at 192. Although this theory which assumes that a reasonable period is basically one year or shorter is too rigid and too inflexible, indeed, those kinds of confidential information naturally have terms of validity.

¹⁷¹ Ōsaka Chihō Saibansho [Osaka Dist. Ct.] June 19, 2000, Hei 11 (wa 7) no. 5880, 791 RŌDŌ HANREI [RŌHAN] 8, 14 (Japan) – *Kiyo System* case; Ōsaka Chihō Saibansho [Osaka Dist. Ct.] Sept. 27, 2013, Hei 24 (wa 7) no. 7562 (Japan), available at LEX/DB 25502050 – *Matsui* case.

¹⁷² See Michio Tsuchida, *Kyōgyō-hishi-gimu to Shuhi-gimu no Kankei ni Tsuite: Rōdōhō to Chiteki-zaisan-hō no Kōsaku* [Relationship between Non-competition Obligation and Confidentiality Obligation: Complication of Employment and Labor Law and Intellectual Property Law] in NAKAJIMA SHIGEYA SENSEI KANREKI KINEN RONSHŪ: RŌDŌ-KANKEI-HŌ NO GENDAI-TEKI-TENKAI 189, 216 (Nakajima Shigeya Sensei Kanreki Kinen Henshū Kankō Inkai ed., 2004).

¹⁷³ Kawata, *supra* note 2, at 145.

¹⁷⁴ In the *Yamada Denki* case, the court held that the one-year non-competition clause was not unduly long for the purpose of preventing the leakage of company-wide management strategies. Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Apr. 24, 2007, Hei 17 (wa 7) no. 24499, 942 RŌDŌ HANREI [RŌHAN] 39, 50 (Japan).

confidential management information of life insurance companies has a shorter useful life than manufacturers' information does, holding that while manufacturers use their technological secrets over a number of years, the life insurance companies' information includes information on new products and new price systems which is ever-changing in the fluid market, and becomes open to the public after a certain period of time passes.¹⁷⁵

The period of the restrictive covenant should be proportional to the former employee's period of employment. The court has invalidated covenants imposing a three-year restriction by comparing that length to the employment period of one year, reasoning that the duration is extensively long.¹⁷⁶ When an employee's period of employment was too short to find an opportunity to access business secrets, the reasonable period of restriction is shorter.¹⁷⁷

In summary, the courts seem to understand that a standard reasonable term of restrictive covenants is two years or shorter, and the nature of the legitimate interest at issue may redraw this baseline. Accordingly, the employers should show a rational necessity for a longer period if they desire to impose a longer prohibition on the employees.¹⁷⁸

ii. Geography

In practice, some restrictive covenants contain little or no geographical limitation.¹⁷⁹ In some cases, courts have deemed covenants with no geographical

¹⁷⁵ Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Sept. 30, 2010, Hei 22 (yo ㊦) no. 3026, 1024 RŌDŌ HANREI [RŌHAN] 86, 91 (Japan) – *Aflac* case; see also Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Jan. 13, 2012, Hei 22 (wa ㊦) no. 732, 1041 RŌDŌ HANREI [RŌHAN] 82, 87 (Japan) – *American Life Assurance Company* case.

¹⁷⁶ E.g., Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Oct. 30, 2015, Hei 25 (wa ㊦) no. 21848, 2268 RŌDŌ KEIZAI HANREI SOKUHŌ [RŌKEISOKU] 20, 27 (Japan) – *TSP* case.

¹⁷⁷ See Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Sept. 30, 2010, Hei 22 (yo ㊦) no. 3026, 1024 RŌDŌ HANREI [RŌHAN] 86, 90-91 (Japan) – *Aflac* case (taking account into the one-year term of the employee's position as the executive officer and reducing the duration to one year).

¹⁷⁸ In the *Powerfull Voice* case, the court held that the three-year restriction was reasonable to protect useful and proprietary know-how that the employer had established over a long period of time. Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Oct. 27, 2010, Hei 22 (wa ㊦) no. 10138, 2105 HANREI JIHŌ [HANJI] 136, 139 (Japan).

¹⁷⁹ A restrictive covenant without geographical limitations probably prohibits the competition only all over Japan, so such a covenant does not appear to ban competition worldwide.

limitations void,¹⁸⁰ but in other cases they have judged such covenants valid. One court even eliminated the geographical factor from the reasonableness test.¹⁸¹

Courts have permitted covenants without geographical limitations where the employers are expanding their businesses throughout Japan,¹⁸² or where the employers' customers are major companies in certain fields or markets.¹⁸³ These decisions indicate that the nationwide legitimate interests provide the employers with a reasonable ground to execute the covenants with little or no limitation in restricted geography. In other cases, courts have enforced covenants with no geographical limitation, as long as other elements remained within a reasonable range. The rationale here is that information is very easy to copy and disclose in modern society, and therefore employers need restrictive covenants without geographical limitations to protect their legitimate interests satisfactorily. Technological information, compared to customer information, can exert its power no matter where it is used.¹⁸⁴ Even in the context of customer information, the region-based character of the

¹⁸⁰ Ōsaka Chihō Saibansho [Osaka Dist. Ct.] Dec. 22, 1998, Hei 5 (wa 7) no.8314, 30 CHITEKI ZAISANKEN KANKEI MINJI GYŌSEI SAIBAN REISHŪ [CHITEKI SAISHŪ] 1000, 1045 (Japan) - *Iwaki Glass and other* case; Ōsaka Chihō Saibansho [Osaka Dist. Ct.] Oct. 27, 2005, Hei 17 (yo 3) no. 10006, 908 RŌDŌ HANREI [RŌHAN] 57, 70 (Japan) - *A Patent Office* case; Hukuoka Chihō Saibansho [Hukuoka Dist. Ct.] Oct. 5, 2007, Hei 18 (wa 7) no. 2157, 956 RŌDŌ HANREI [RŌHAN] 91, 94 (Japan) - *Asahi Pretect* case; Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Nov. 9, 2009, Hei 20 (wa 7) no. 8488, 1005 RŌDŌ HANREI [RŌHAN] 25, 30 (Japan) - *Mita Engineering* case; Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Jan. 13, 2012, Hei 22 (wa 7) no. 732, 1041 RŌDŌ HANREI [RŌHAN] 82, 87 (Japan) - *American Life Insurance Company* case; Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Jan. 23, 2012, Hei 21 (wa 7) no. 43395 (Japan), available at LEX/DB 25490870 - *Planer* case; Ōsaka Chihō Saibansho [Osaka Dist. Ct.] Sept. 27, 2013, Hei 24 (wa 7) no. 7562 (Japan), available at LEX/DB 25502050 - *Matsui* case; Ōsaka Chihō Saibansho [Osaka Dist. Ct.] Aug. 3, 2015, Hei 25 (wa 7) no.3282 (Japan), available at LEX/DB 25541202 - *Link Staff* case; Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Dec. 19, 2016, Hei 28 (wa 7) no. 52 (Japan), available at LEX/DB 25544793 - *Digital Power Station* case.

¹⁸¹ Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Nov. 26, 2008, Hei 20 (wa 7) no. 853, 1293 Hanrei Taimuzu [Hanta] 285, 294 (Japan) - *Dance Music Record* case.

¹⁸² Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Apr. 24, 2007, Hei 17 (wa 7) no. 24499, 942 RŌDŌ HANREI [RŌHAN] 39, 50 (Japan) - *Yamada Denki* case (a consumer electronics retailer); Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Sept. 30, 2010, Hei 22 (yo 3) no. 3026, 1024 RŌDŌ HANREI [RŌHAN] 86, 91 (Japan) - *Aflac* case.

¹⁸³ Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Sept. 22, 2004, Hei 16 (yo 3) no. 1832, 882 RŌDŌ HANREI [RŌHAN] 19, 27 (Japan) - *Torre Lazur Communications* case. See also Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Aug. 30 2002, Hei 13 (wa 7) no. 21277, 838, RŌDŌ HANREI [RŌHAN] 32, 40 (Japan) - *Daiohs Services* case (holding the restriction was relatively geographically broad as the prefecture where the employee had been in charge of during the employment and its adjacent prefectures but it was reasonable because the employer had the huge customer and the geographical restriction was roughly limited to "adjacent").

¹⁸⁴ Nara Chihō Saibansho [Nara Dist. Ct.] Oct. 23, 1970, Sho 45 (yo 3) no.37, 21 KAKYŪ SAIBANSHO MINJI SAIBAN REISHŪ [KAMINSHŪ] 1369, 1380 (Japan) - *Foseco Japan Limited* case. See also Saito, *supra* note 154, at 17.

information¹⁸⁵ is feeble when the employer itself operates its business in all, or a very wide area, of the country or when the employer's customers are large-scale companies. Geographically limited restrictions are thus often useless or off point. Whether the restriction contains a geographical limitation does not relate too much to the strength of the restrictive effects on the employee's freedom to choose their own occupation, at least in Japan.¹⁸⁶

Consequently, a geographical limitation is less necessary in determining the reasonableness of covenants, in comparison with other elements.¹⁸⁷

iii. Type of Business or Job Category

To be enforceable, restrictive covenants should be reasonably tailored also in a type of business of the new employer or the former employee's new enterprise, or a job category of the former employee in the new employment subject to the restrictions. The type of the business or the job category subject to the restriction must be rationally related to the employer's legitimate interest.¹⁸⁸ Therefore, courts will deny the satisfaction of this element where former employees categorically would not infringe the legitimate interests by working in the business or the jobs stipulated in the covenants,¹⁸⁹ because such covenants too broadly constrain the freedom to choose their occupation.¹⁹⁰ The courts will also declare restrictions as being too broad when the restrictive covenants forbid competing in broader types of business or in other job categories than those in which the former employees could use the information.¹⁹¹ In addition, the courts are reluctant to enforce restrictive

¹⁸⁵ An example of a highly region-based business is a cram school business. TSUCHIDA, *supra* note 87, at 716. See also Ōsaka Chihō Saibansho [Osaka Dist. Ct.] Mar. 12, 2015, Hei 25 (wa 7) no. 10955, SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 1, 25, <http://www.courts.go.jp> (Japan) – *Seigakusya* case.

¹⁸⁶ As apparent from the jurisdictions of the cases cited in this research, most of the recent disputes over restrictive covenants have occurred in the places that come under the jurisdiction of Tokyo or Osaka, two of the largest economic spheres in Japan.

¹⁸⁷ Noda, *supra* note 103, at 57; Masami Shimomura, KYŌGYŌ-KINSHI NO GŌI NI MOTOZUKU KARISHOBUN [PROVISIONAL DISPOSITION BASED ON AGREEMENT NOT TO COMPETE] in 4 SAIBAN-JITSUMU-TAIKEI MINJI-HOZEN-HŌ 298, 306 (Toru Tanno & Yoshimitsu Aoyama ed., 1999); Yokochi, *supra* note 136, at 11.

¹⁸⁸ See *supra* note 157 and accompanying text.

¹⁸⁹ See e.g., Ōsaka Chihō Saibansho [Osaka Dist. Ct.] Oct. 27, 2005, Hei 17 (yo 3) no. 10006, 908 RŌDŌ HANREI [RŌHAN] 57, 70 (Japan) – *A Patent Office* case.

¹⁹⁰ Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] May 24, 2006, Hei 18 (yo 3) no. 21021, 1229 HANREI TAIMUZU [HANTA] 256, 261 (Japan) – *PM Concepts* case (holding that the constraint on the freedom to choose his/her occupation was limited because the covenant only restrict education and consulting business of a project management that is the employer's business but the project management business itself).

¹⁹¹ See Ōsaka Chihō Saibansho [Osaka Dist. Ct.] Dec. 22, 1998, Hei 5 (wa 7) no.8314, 30 CHITEKI ZAIKANKEN KANKEI MINJI GYŌSEI SAIBAN REISHŪ [CHITEKI SAISHŪ] 1000, 1044-45 (Japan) – *Iwaki Glass and other* case (pointing out that the restrictive covenant was not limited to the job categories relevant to the know-how); Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Jan. 13, 2012, Hei 22 (wa 7) no. 732, 1041 RŌDŌ HANREI [RŌHAN] 82, 87 (Japan) – *American Life Insurance Company* case (holding that the

covenants that may inhibit workers with professional skills obtained by their longtime working life.¹⁹²

With regard to the restricted business and jobs, many covenants provide comprehensive language, such as “competing business,” “business identical or similar to the ‘company,’” or “companies in the same business,” instead of specific business areas or job specifications. Courts are reluctant to immediately strike down these terms because of their abstractness, and instead, interpret them to limit the meaning of the provisions in a fair manner. (see Subsection B.)

iv. Activity of the Employee – Types of Restrictive Covenants

The non-competition obligation, as an object of the restrictive covenants, is defined as an employee’s obligation not to compete with their employer or not to work for the employer’s competitors, and the word “compete” encompasses the solicitation of customers.¹⁹³ There is a substantive difference, however, between forbidding the former employee’s competition *per se* and just banning the employee’s circumjacent activities, such as soliciting the employer’s customers.¹⁹⁴ The prohibition of all competition, beyond controlling the means of the competition, more intensively restricts the core of the former employee’s right.¹⁹⁵

Non-solicitation Agreements or Clauses: Some courts have decided that the employer’s customer lists or customer relationships are less protectable than other categories of confidential information.¹⁹⁶ One court has held that the interests in relationships with insurance agencies, unlike business information such as management plans, products information, sales know-how, and the like, have a

covenant forbidding the employee’s transfer to life insurance companies operating bank insurance business beyond restricting the sales of bank insurance business was overbroad, since the employee’s know-how acquired through the employment was mainly about the sales of bank insurance business); see also TSUCHIDA, *supra* note 87, at 715 (arguing that the job categories subject to restrictive covenants basically should be limited to the job identical or similar to the former employees’ job during their employment).

¹⁹² Ōsaka Chihō Saibansho [Osaka Dist. Ct.] Jan. 22, 2003, Hei 13 (wa ㊦) no. 11749, 846 RŌDŌ HANREI [RŌHAN] 39, 47-48 (Japan) – *Shin Nippon Biomedical Laboratories* case; Ōsaka Chihō Saibansho [Osaka Dist. Ct.] Mar. 4, 2011, Hei 20 (wa ㊦) no. 17056 and Hei 21 (wa ㊦) no. 2392, 1030 RŌDŌ HANREI [RŌHAN] 46, 66 (Japan) – *Morikuro* case.

¹⁹³ See *supra* note 2 and accompanying text.

¹⁹⁴ See Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Aug. 30 2002, Hei 13 (wa ㊦) no. 21277, 838, RŌDŌ HANREI [RŌHAN] 32, 40-41 (Japan) – *Daiohs Services* case; Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Nov. 9, 2009, Hei 20 (wa ㊦) no. 8488, 1005 RŌDŌ HANREI [RŌHAN] 25, 30 (Japan) – *Mita Engineering* case.

¹⁹⁵ Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Dec. 19, 2016, Hei 28 (wa ㊦) no. 52 (Japan), available at LEX/DB 25544793 – *Digital Power Station* case.

¹⁹⁶ Ōsaka Chihō Saibansho [Osaka Dist. Ct.] Oct. 15, 1991, Hei 2 (mo ㊦) no. 53128, 596 RŌDŌ HANREI [RŌHAN] 21, 24 (Japan) – *Shin-Osaka Boeki* case; see also Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Nov. 18, 2008, Hei 18 (wa ㊦) no. 22955, 980 RŌDŌ HANREI [RŌHAN] 56, 64 (Japan) – *Total Service* case.

personal or an individual nature and that the courts, therefore, must consider other elements, being careful not to overestimate the value of those interests.¹⁹⁷ Another court has noted that the purpose of merely preventing the former employee from soliciting the employer's customers does not justify a non-competition clause and that, in such cases, the courts must decide whether there are protectable interests, by carefully considering how the customer information is confidential¹⁹⁸ and what expenses the employers have invested in establishing and maintaining relationships.^{199, 200} In addition, when the covenant merely restricts the means of the competition, such as solicitation of the employer's customers, the restriction against the employee's constitutional right to choose their occupation is less intense, because it only controls a part of the employee's privilege.²⁰¹ Likewise, many commentators have advocated that the contractual measure which the employer may reasonably take depends on the nature of the information and that customers' relationships are less important than other interests.²⁰²

In principle, employers should make non-solicitation agreements to protect the legitimate interests of customer information or relationships. Non-competition agreements to protect customer information are reasonable only if the scope of the restriction is considerably limited or if the legitimate interests are managerially essential, such that they are directly linked to profits.²⁰³ Depending on the business of the employer and the former employee, however, the restriction on the former employee's freedom may be intense even if the agreement only forbids the employee

¹⁹⁷ Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Sept. 30, 2010, Hei 22 (yo ㊦) no. 3026, 1024 RŌDŌ HANREI [RŌHAN] 86, 89 (Japan) – *Aflac* case.

¹⁹⁸ This is the factor equivalent to “(v) whether the employer took appropriate measures to maintain confidentiality of the information” and “(vi) whether the information is otherwise difficult to obtain for the competitors.” See *supra* notes 144, 145 and accompanying text.

¹⁹⁹ This is the factor equivalent to “(iv) whether the employer has invested tremendous resources, such as time, expenses and workforce in the development of the information.” See *supra* note 143 and accompanying text.

²⁰⁰ Hukuoka Chihō Saibansho [Hukuoka Dist. Ct.] Oct. 5, 2007, Hei 18 (wa ㊦) no. 2157, 956 RŌDŌ HANREI [RŌHAN] 91, 92 (Japan) – *Asahi Pretec* case. See also Tsuchida, *supra* note 172, at 214.

²⁰¹ Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Nov. 9, 2009, Hei 20 (wa ㊦) no. 8488, 1005 RŌDŌ HANREI [RŌHAN] 25, 29-30 (Japan) – *Mita Engineering* case (holding that prohibition of working for the competitor without limitation to the solicitation of customers is the overbroad restriction on the freedom of occupation); Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Jan. 13, 2012, Hei 22 (wa ㊦) no. 732, 1041 RŌDŌ HANREI [RŌHAN] 82, 86 (Japan) – *American Life Insurance Company* case (holding that prohibition of working for the competitor is an excessively restrictive measure compared to the purpose to prevent the leakage of customer information).

²⁰² Saito, *supra* note 154, at 16; YOSHIYUKI TAMURA, FUSEI-KYŌSŌ-BŌSHIHŌ GAISETSU [SURVEY OF UNFAIR COMPETITION PREVENTION ACT] 466-467 (2nd ed. 2003).

²⁰³ Ōsaka Chihō Saibansho [Osaka Dist. Ct.] Mar. 12, 2015, Hei 25 (wa ㊦) no. 10955, SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 1, 24, <http://www.courts.go.jp> (Japan) – *Seigakusya* case.

from contacting the former customer.²⁰⁴ Courts sometimes also interpret the meaning or the scope of the term “customers” in an appropriate way. (see Subsection B.)

Confidentiality Agreements/Clauses: Similar to the non-competition obligation,²⁰⁵ current employees owe a confidentiality obligation to their employer, but former employees do not owe this duty unless information constitutes trade secrets.²⁰⁶ Therefore, the former employee’s confidentiality obligation requires a confidentiality agreement.²⁰⁷ The confidentiality obligation, as well as the non-competition obligation, functions to protect industrial secrets. One issue regarding the confidentiality obligation is whether courts should reject a non-competition agreement when other measures can also protect the employer’s interest.

Some courts have implied that an employer has no legitimate interest in a non-competition agreement if a confidentiality agreement can sufficiently protect the confidential information.²⁰⁸ Some scholars agree.²⁰⁹ Indeed, the confidentiality obligation is less restrictive than the non-competition obligation.

Based on this view, there is no legitimate interest to support the non-competition agreement, or that the courts have to consider other elements of reasonableness more carefully, if the employer can sufficiently mitigate the risk of leakage of its confidential information with a confidentiality agreement alone.²¹⁰ One court pointed out that the confidentiality agreement had been so useful for the employer’s business that “it does not usually occur such that the information ... would be leaked to the other competing pharmaceutical companies,” holding that the risk of leakage

²⁰⁴ Ōsaka Chihō Saibansho [Osaka Dist. Ct.] Apr. 26, 2012, Hei 22 (wa 7) no. 6766, SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 1, 19, <http://www.courts.go.jp> (Japan) – *Miwa Accounting Office* case (holding that general prohibitions of solicitation of the customers and acceptance of the customers’ offers are overbroad restrictions, even though those new contracts are based on the relationship before the severance, in *obiter dictum*).

²⁰⁵ See *supra* notes 81-89 and accompanying text.

²⁰⁶ E.g., SUGENO, *supra* note 81, at 151-152 (Kanowitz trans., *supra* note 81, at 78-79); ARAKI, *supra* note 81, at 279-281.

²⁰⁷ Like the non-competition agreements, the enforceable confidentiality agreements are required to be reasonable. The elements of reasonableness are similar to those for non-competition agreements, but not so strict as them. See TSUCHIDA, *supra* note 87, at 708-709.

²⁰⁸ Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Apr. 24, 2007, Hei 17 (wa 7) no. 24499, 942 RŌDŌ HANREI [RŌHAN] 39, 49 (Japan) – *Yamada Denki* case (holding that it is not unreasonable to impose a non-competition obligation in addition to a confidentiality obligation in order to protect the employer’s management information); Ōsaka Chihō Saibansho [Osaka Dist. Ct.] Aug. 3, 2015, Hei 25 (wa 7) no. 3282 (Japan), available at LEX/DB 25541202 – *Link Staff* case (holding that the non-competition obligation is not so necessary because a confidentiality obligation can also cover the employer’s information enough).

²⁰⁹ Humiko Obata, *Eigyō Himitsu no Hogo to Rōdōsha no Shokugyō Sentaku no Jiyū* [Protection of Trade Secrets and Freedom to Choose Occupation] 1469 JURI 58, 63 (2014); Hiroshi Ishibashi, *Kigyō no Zaisanteki-jyōhō no Hogo to Rōdō-keiyaku* [Protection of Enterprises’ Proprietary Information and Labor Contracts] 105, RŌDŌ 16, 31 (2005).

²¹⁰ This means that the “legitimate interest” of the non-competition agreement is narrower than that of the confidentiality agreement.

of the confidential information by the former employee was not so high.²¹¹ On the other hand, one scholar has said that it is practically difficult to monitor the performance of the former employee's confidentiality obligation in many cases.²¹² It remains unclear when the courts can determine that the confidentiality agreement sufficiently protects the interest at stake, such that the employer has no legitimate interest in a full non-competition agreement.

Courts do not examine the issue of whether or not a confidentiality obligation sufficiently protects an employer's interest in all cases. This is not a requirement for the legitimate interest or the enforcement of a covenant. This study, therefore, finds that the courts determine this question to evaluate a risk of the misappropriation of the interest (practically, the greater value of the interest, the greater the risk).

4. Compensatory Measure for the Restriction

As a general rule, Japanese contract law does not require contracting parties to supply any consideration to enforce their promise. Nevertheless, many courts using the reasonableness test have noted that employers have failed to provide the outgoing employees with compensatory measures for the contractual restrictions. The compensatory measure (代償措置 [*daishō-sochi*]) is a proper monetary measure mitigating disadvantage caused by imposing a duty not to compete after the termination of employment.²¹³ There are two issues regarding the concept of compensatory measure: what sorts of measures are assumed as the "compensatory measures"; and whether the employers must always provide the compensatory measures to establish the reasonableness of the restrictions.

i. Contents of Compensatory Measure

Courts typically mention a high amount of compensation, such as wages/bonus,²¹⁴ or severance payments,²¹⁵ as the compensatory measures. In

²¹¹ Ōsaka Chihō Saibansho [Osaka Dist. Ct.] Jan. 22, 2003, Hei 13 (wa 7) no. 11749, 846 RŌDŌ HANREI [RŌHAN] 39, 47 (Japan) – *Shin Nippon Biomedical Laboratories* case (in *obiter dictum*).

²¹² See TSUCHIDA, *supra* note 87, at 715.

²¹³ See Ogawa, *supra* note 6, at 365 (defining the compensatory measure as "a monetary payment made in exchange for the future restraints on freedom of competition, but it is not necessarily a bargained-for exchange or an inducement to a contract.").

²¹⁴ See Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Sept. 22, 2004, Hei 16 (yo 3) no. 1832, 882 RŌDŌ HANREI [RŌHAN] 19, 27 (Japan) – *Torre Lazur Communications* case (the second highest position in the company); Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Sept. 27, 2005, Hei 16 (wa 7) no. 4703, 909 RŌDŌ HANREI [RŌHAN] 56, 64 (Japan) – *Aimex* case; Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] May 24, 2006, Hei 18 (yo 3) no. 21021, 1229 HANREI TAIMUZU [HANTA] 256, 261 (Japan) – *PM Concepts* case.

²¹⁵ See Ōsaka Chihō Saibansho [Osaka Dist. Ct.] Oct. 23, 2009, Hei 21 (yo 3) no. 10020, 1000 RŌDŌ HANREI [RŌHAN] 50, 60 (Japan) – *Morikuro* case; Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Sept. 30, 2010, Hei 22 (yo 3) no. 3026, 1024 RŌDŌ HANREI [RŌHAN] 86, 91 (Japan) – *Aflac* case (including stock

contrast, they often indicate insufficiency of wages²¹⁶ or severance payments,²¹⁷ or the meager total amount of compensation,²¹⁸ when they invalidate restrictive covenants. Moreover, courts also focus on allowances, such as a “confidentiality obligation allowance” or a “secret preservation allowance,” that are as small as several thousand Japanese Yen (equivalent to tens of US dollars) per month. Many courts have judged that paying such minor allowances is inadequate as the compensatory measures, because of the small sum.²¹⁹ These courts’ decisions indicate that the courts do not require the employer to pay an exact and strict consideration for the contractual restrictions. However, some courts have considered whether the employers have paid a consideration corresponding to the former employee’s disadvantage, by comparing with other employees who do not owe the non-competition obligation to the employers.²²⁰

In one rare case, the court held that the employee’s option to become a franchisee of the employer, with better conditions than the usual, was the compensatory measure.²²¹ In a recent case, the court found that the premium severance payment

options); Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Jan. 15, 2016, Hei 25 (wa 7) no. 26113, 2276 RŌDŌ KEIZAI HANREI SOKUHŌ [RŌKEISOKU] 12, 23 (Japan) – *Daichi Paper* case.

²¹⁶ Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Jan. 13, 2012, Hei 22 (wa 7) no. 732, 1041 RŌDŌ HANREI [RŌHAN] 82, 87 (Japan) – *American Life Insurance Company* case; Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Dec. 19, 2016, Hei 28 (wa 7) no. 52 (Japan), available at LEX/DB 25544793 – *Digital Power Station* case.

²¹⁷ Ōsaka Chihō Saibansho [Osaka Dist. Ct.] Dec. 22, 1998, Hei 5 (wa 7) no.8314, 30 CHITEKI ZAISANKEN KANKEI MINJI GYŌSEI SAIBAN REISHŪ [CHITEKI SAISHŪ] 1000, 1045 (Japan) – *Iwaki Glass and other* case; Ōsaka Chihō Saibansho [Osaka Dist. Ct.] Mar. 4, 2011, Hei 20 (wa 7) no. 17056 and Hei 21 (wa 7) no. 2392, 1030 RŌDŌ HANREI [RŌHAN] 46, 66 (Japan) – *Morikuro* case.

²¹⁸ Ōsaka Chihō Saibansho [Osaka Dist. Ct.] June 19, 2000, Hei 11 (wa 7) no. 5880, 791 RŌDŌ HANREI [RŌHAN] 8, 14 (Japan) – *Kiyo System* case; Ōsaka Chihō Saibansho [Osaka Dist. Ct.] Sept. 27, 2013, Hei 24 (wa 7) no. 7562 (Japan), available at LEX/DB 25502050 – *Matsui* case; Ōsaka Chihō Saibansho [Osaka Dist. Ct.] Aug. 3, 2015, Hei 25 (wa 7) no.3282 (Japan), available at LEX/DB 25541202 – *Link Staff* case.

²¹⁹ Ōsaka Chihō Saibansho [Osaka Dist. Ct.] Jan. 22, 2003, Hei 13 (wa 7) no. 11749, 846 RŌDŌ HANREI [RŌHAN] 39, 48 (Japan) – *Shin Nippon Biomedical Laboratories* case. *But see* Nara Chihō Saibansho [Nara Dist. Ct.] Oct. 23, 1970, Sho 45 (yo 3) no.37, 21 KAKYŪ SAIBANSHO MINJI SAIBAN REISHŪ [KAMINSHŪ] 1369, 1376, 1380 (Japan) – *Foseco Japan Limited* case.

²²⁰ Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Sept. 22, 2004, Hei 16 (yo 3) no. 1832, 882 RŌDŌ HANREI [RŌHAN] 19, 27 (Japan) – *Torre Lazur Communications* case (holding that the compensation did not amount to a consideration corresponding to the disadvantage but it was considerably favorable treatment); Ōsaka Chihō Saibansho [Osaka Dist. Ct.] Dec. 22, 1998, Hei 5 (wa 7) no.8314, 30 CHITEKI ZAISANKEN KANKEI MINJI GYŌSEI SAIBAN REISHŪ [CHITEKI SAISHŪ] 1000, 1045-1046 (Japan) – *Iwaki Glass and other* case; Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Sept. 27, 2005, Hei 16 (wa 7) no. 4703, 909 RŌDŌ HANREI [RŌHAN] 56, 64 (Japan) – *Aimex* case.

²²¹ Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Nov. 18, 2008, Hei 18 (wa 7) no. 22955, 980 RŌDŌ HANREI [RŌHAN] 56, 64 (Japan) – *Total Service* case. In a case note of this case, one lawyer cast a doubt if the

that is originally characterized as “a special benefit as a consideration for early retirement” based on the employer’s early retirement program,²²² combined with the general severance payment, has the nature of the compensatory measure.²²³

In the *Yamada Denki* case, an employee worked for Yamada Denki, a large consumer electronics retailer, as its area manager and signed an agreement not to transfer to “companies in the same business” for “at least one year” after a termination.²²⁴ Despite this non-competition agreement, he joined Gigas K’s Denki, a competing large consumer electronics retailer, two months after his resignation.²²⁵ Yamada Denki filed the lawsuit for damages.²²⁶ The court held that the former employee came to know the employer’s sales methods, HR management style, company-wide business policy, and business strategies through his position during the period of employment; that the business categories subject to the agreement and the one-year duration of the restriction were not unduly broad; and that the court can consider the deficiency of the compensatory measure in the calculation of the amount of damages even though the employer had failed to take sufficient measures, and concluded that the agreement was reasonable.²²⁷

However, this judgment is unreliable, especially regarding the compensatory measure. In this case, calculating the damages as a remedial matter factitiously influenced the existence or non-existence of the substantive obligation. This unnaturalness might be explained with difficulty by the flexibility of the compensatory measure. Nevertheless, while this construction could be adopted if the dispute involves only damages, like this case incidentally did, the same rule never applies to the case where the employer asks only for the injunctive relief because there is no room to consider the issue of calculation of damages. Therefore, this rule would irrationally result in different substantive duties not because of the circumstances surrounding the obligation or the agreement, but merely because of the employer’s claim. Moreover, if the compensatory measure were unnecessary when the courts can adjust the damages, this element would entirely hollow out.

As shown by the precedents discussed above, some recent cases have modified the “compensatory measure” term in the reasonableness test into a more searching inquiry of “extent of the employer’s treatment or compensation toward its

offer of the franchise constitutes the compensatory measure. Kenji Tokuzumi, *Kyōgyō-hishi-gimu-ihan to Songai-baishō/Sashitome Seikyū no Seihī* [Violation of Non-competition Obligation and Issues of Claim of Damages and Injunction] 1385 JURI 132, 134 (2009).

²²² See *supra* note 97 and accompanying text.

²²³ Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Jan. 15, 2016, Hei 25 (wa 7) no. 26113, 2276 RŌDŌ KEIZAI HANREI SOKUHŌ [RŌKEISOKU] 12, 23 (Japan) – *Daiichi Paper* case.

²²⁴ Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Apr. 24, 2007, Hei 17 (wa 7) no. 24499, 942 RŌDŌ HANREI [RŌHAN] 39, 42, 47, 48 (Japan).

²²⁵ *Id.* at 42, 48.

²²⁶ *Id.* at 42.

²²⁷ *Id.* at 49-50. See also *supra* notes 128, 140, 174, 182 and 208, *infra* notes 265 and 273, and accompanying text.

employee.”²²⁸ Courts seem to regard the compensatory measures element as a flexible notion.

ii. Necessity of Compensatory Measure

The second question is whether or not the compensatory measure is a prerequisite for reasonableness of restrictive covenants. There are a variety of views on this issue, as many commentators have actively discussed it. Broadly, there are three opinions: a compensatory measure is a prerequisite²²⁹; it is not a prerequisite, but one element²³⁰; or, it is a prerequisite when the employer entirely prohibits competition, but just one element when the employer prohibits only outer activities, such as customer solicitation.²³¹

Courts have mentioned appropriate compensatory measures in most cases of restrictive covenants. Some courts have held that the compensatory measure is a prerequisite to the contractual restriction.²³² Other courts think of the compensatory measure as an element of reasonableness, and some of those tribunals have negated the reasonableness because the employers have not taken adequate compensatory measures,²³³ while others have affirmed it.²³⁴ Although judicial opinion is divided, a

²²⁸ Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Feb. 23, 2005, Hei 18 (wa 7) no. 7588 and no. 26800, 902 RŌDŌ HANREI [RŌHAN] 106, 116 (Japan) - *Artnature* case; Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Nov. 26, 2008, Hei 20 (wa 7) no. 853, 1293 Hanrei Taimuzu [Hanta] 285, 294 (Japan) - *Dance Music Record* case.

²²⁹ Yamaguchi, *supra* note 87, at 428; Noda, *supra* note 103, at 57; Humiko Obata, *Taishoku-shita Rōdōsha no Kyōgyō Kisei* [Regulation on the Former Employees' Competition] 1066 JURI 119, 120-121 (1995); NISHITANI, *supra* note 86, at 192.

²³⁰ TAMURA, *supra* note 202, at 467; Shimomura, *supra* note 187, at 300-301 (arguing that the compensatory measure is an auxiliary element only relating to the duration).

²³¹ Ishibashi, *supra* note 2, at 120; Kawata, *supra* note 2, at 147-48; Tsuchida, *supra* note 172, at 218.

²³² Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Dec. 18, 2000, Hei 8 (wa 7) no. 613, 807 RŌDŌ HANREI [RŌHAN] 32, 47 (Japan) - *Tokyo Kamotsu sha* case; Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Mar. 13, 2012, Hei 22 (wa 7) no. 46502 and Hei 23 (wa 7) No. 34037, 2144 RŌDŌ KEIZAI HANREI SOKUHŌ [RŌKEISOKU] 23, 29 (Japan) - *Kanto Industry* case.

²³³ E.g., Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Nov. 9, 2009, Hei 20 (wa 7) no. 8488, 1005 RŌDŌ HANREI [RŌHAN] 25, 30 (Japan) - *Mita Engineering* case; Ōsaka Chihō Saibansho [Osaka Dist. Ct.] Aug. 3, 2015, Hei 25 (wa 7) no. 3282 (Japan), available at LEX/DB 25541202 - *Link Staff* case; Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Dec. 19, 2016, Hei 28 (wa 7) no. 52 (Japan), available at LEX/DB 25544793 - *Digital Power Station* case.

²³⁴ E.g., Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Oct. 16, 1995, Hei 7 (yo 3) no. 3587, 690 RŌDŌ HANREI [RŌHAN] 75, 87-88 (Japan) - *Tokyo Legal Mind* case (holding that it is not unreasonable not to take the compensatory measure because the duration and the scope of the job categories subject to the restriction were limited); Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Aug. 30 2002, Hei 13 (wa 7) no. 21277, 838, RŌDŌ HANREI [RŌHAN] 32, 40-41 (Japan) - *Daihs Services* case (holding that the lack of the compensatory measure did not make the restrictive covenant unreasonable since the duration was as short as two years and the covenants only restricted solicitation of the customers); Ōsaka Chihō Saibansho [Osaka Dist. Ct.] Mar. 12, 2015, Hei 25 (wa 7) no. 10955, SAIBANSHO SAIBANREI JŌHŌ [SAIBANSHO WEB] 1, 25, <http://www.courts.go.jp> (Japan) - *Seigakusya* case (holding that the lack of the compensatory

majority of the courts' standpoints seem to be that the compensatory measure is an element, rather than a prerequisite. Based on this view, the employers will be asked to supply a considerable amount of the measures when the contractual terms significantly restrict the former employees' freedom of occupation in duration, geography, business or job, and activities. Conversely, the employers may impose non-competition obligations by paying a larger amount of the compensatory measures even if the necessity to protect the legitimate interest is not high.²³⁵

In connection with this issue, another question arises: how do the courts determine whether the employers have given the appropriate compensatory measure in each circumstance? Courts have never articulated what the employer should have provided or done at the time of signing the restrictive covenants.²³⁶ Rather, they evaluate the compensatory measures only after they examine other elements. Importantly, the courts retroactively assess the entire compensation paid during the employment relationship, including wages, bonus, allowances, and severance payments, although those were not supposed to be compensatory measures at the time of payment. Subsequently, the courts only determine whether or not the compensatory measures were sufficient to support the reasonableness. The required amount and contents of the compensatory measures are not self-evident, but rather rely heavily on the legitimate interests and the scope of the restrictions, because, as stated above, the reasonableness test is a rule that strikes a balance between the intensity of the contractual restriction against the former employees' rights and the justification for the restriction, and the courts examine all the elements correlatively.²³⁷ Consequently, the compensatory measures will be unnecessary or a small measure will be sufficient when the scope of the contractual restrictions is relatively narrow. Typically, if the restrictive covenants merely forbid the former employees from soliciting their employers' customers, a compensatory measure is unnecessary.²³⁸ This process of judgment is another aspect of the flexibility of the compensatory measure element.

This trend of the courts' decisions is inconsistent with the opinion which argues that the compensatory measure is a requirement of reasonableness without assuming that the measures may be unnecessary in some cases. If the courts were to employ

measure did not affect the enforceability because the restrictive covenant merely restricted the establishment of the own cram school in very narrow geographical range for two years after the termination but did not forbid working for competitors within the same scope).

²³⁵ Hukuoka Chihō Saibansho [Hukuoka Dist. Ct.] Oct. 5, 2007, Hei 18 (wa 7) no. 2157, 956 RŌDŌ HANREI [RŌHAN] 91, 93 (Japan) – *Asahi Pretec* case.

²³⁶ Some commentators indicated that it is important to elucidate the compensatory measure. Ogawa, *supra* note 6, at 374; Saito, *supra* note 154, at 16.

²³⁷ See *supra* notes 103, 158 and accompanying text; see also Noda, *supra* note 103, at 57 (stating that the degree and amount of compensatory measures cannot be determined spontaneously but correlatively with other elements).

²³⁸ Therefore, the opinion advocating that the compensatory measure is merely an element but becomes the requirement in the case of the non-competition is somehow persuasive in that a level of the compensatory measure varies depending on the strength of the restriction. See *supra* note 231 and accompanying text.

this view, they would have indicated the rule of the compensatory measures in order to specify the amount of the measure that the employers would be mandated to pay. However, the courts have not explicitly ordered employers to pay a certain amount or an amount based on a certain method of calculation.²³⁹ In addition, it is practically difficult to demarcate the demanded level of the compensatory measures independently from other elements. Therefore, this opinion is not persuasive.

5. Other Elements

Some courts have mentioned other elements in order to judge whether the restrictive covenant in question is reasonable, in addition to the four typical elements above. These elements include the procedural factor and the former employee's attitudes.

i. Procedural Factors – Obligation of Explanation

One court appended another element to the list in the reasonableness test. This element is “whether the employee's sincere consent exists based on equal bargaining power,” and concluded that there was no such consent in the case because of the negotiation process leading to the agreement.²⁴⁰ However, the weight of this procedural factor in the reasonableness test was indeterminate because the court also evaluated the other four elements negatively.²⁴¹ Some scholarly comments that emphasize the gravity of disparity in bargaining power between the employer and former employees²⁴² seem to be consistent with this decision.

Another court held that the employer owes a duty to clearly explain the meaning of the non-competition clause and to provide the necessary information so as to facilitate the employee's performance (however, forbearance) of the clause, on the ground of the good faith principle,²⁴³ where the clause regarding the business and job subject to the restriction is ambiguous.²⁴⁴ In such case, however, the court should have determined that the limitation of the scope of the business and the job are insufficient, and therefore the clause is substantively unreasonable.²⁴⁵

²³⁹ Some commentators attempt to develop the formula of the proper compensatory measure. Noda, *supra* note 103, at 57; Yokochi, *supra* note 136, at 14-15 (suggesting a formula as if calculating the lost profits which would occur by the restrictions (however, his framework overlooks the aspect that the legitimate interest justifies the restriction.)).

²⁴⁰ Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Jan. 23, 2012, Hei 21 (wa ㊦) no. 43395 (Japan), available at LEX/DB 25490870 – *Planer* case.

²⁴¹ *Id.*

²⁴² Ogawa, *supra* note 6, at 363; Saito, *supra* note 154, at 14-15.

²⁴³ See *supra* note 82 and accompanying text.

²⁴⁴ Ōsaka Chihō Saibansho [Osaka Dist. Ct.] Oct. 27, 2005, Hei 17 (yo ㊦) no. 10006, 908 RŌDŌ HANREI [RŌHAN] 57, 70 (Japan) – *A Patent Office* case; see also TSUCHIDA, *supra* note 185, at 711 (arguing that the employer owes such duty as an accessory obligation).

²⁴⁵ *Id.* at 717. However, the appealed court decision denied the formation of the restrictive covenant before moving on to the application of the reasonableness test. See *supra* note 91 and accompanying text; see also Urawa Chihō Saibansho [Urawa Dist. Ct.] Jan. 27, 1997, Hei 7 (mo ㊦) no. 2319, 1680 RŌDŌ KEIZAI

The four basic elements of the reasonableness test are designed to actualize the freedom of occupation of the former employees with weak bargaining power.²⁴⁶ The courts will consider the factual circumstances regarding the process of signing the covenants through the other elements. In conclusion, the procedural factor is neither conclusive nor effective for the courts' decisions.

ii. The Former Employee's Attitudes – Bad Faith

Some courts have taken into account the former employee's circumstances or attitudes. If the employee acts in bad faith toward the employer, the courts may strike a balance between the employers' legitimate interests and the employees' right of economic activities in favor of the former.²⁴⁷ For instance, one court pointed out that the former employee had spoiled the employer's interest and derogated its competitiveness although the employee was highly responsible for the defense of the employer's profit.²⁴⁸ In this case, the legitimate interests were only customer information (the court held that it does not require a special confidentiality relationship as much as patent right or know-how), the duration of the restriction was so long as three years, and there was no compensatory measure. However, the court upheld the restrictive covenant by finding that the employee had disclosed little customer information to the employer when he resigned; that he had used the information for his own business; that he had recruited other employees of the employer; and that he had falsely represented to the customers that the employer had accepted his business.²⁴⁹ Another court held that the former employees had violated their non-competition obligation on the ground that they had collectively left the employer such that the employer could not afford the time to secure a sufficient number of replacements.²⁵⁰ Although these decisions were made prior to the

HANREI SOKUHŌ [RŌKEISOKU] 3, 7 (Japan) – *Tokyo Kamotsu* case (mentioning the “legitimate procedure” element (however, the court should have directly pointed out the inadequacy of the severance payment in determination of compensatory measure.)).

²⁴⁶ E.g., Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Dec. 18, 2000, Hei 8 (wa 7) no. 618 and other, 807 RŌDŌ HANREI [RŌHAN] 32, 47 (Japan) – *Tokyo Kamotsu* case; Ōsaka Chihō Saibansho [Osaka Dist. Ct.] Jan. 22, 2003, Hei 13 (wa 7) no. 11749, 846 RŌDŌ HANREI [RŌHAN] 39, 47 (Japan) – *Shin Nippon Biomedical Laboratories* case; Ōsaka Chihō Saibansho [Osaka Dist. Ct.] Sept. 27, 2013, Hei 24 (wa 7) no. 7562 (Japan), available at LEX/DB 25502050 – *Matsui* case.

²⁴⁷ Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Sept. 22, 2004, Hei 16 (yo 3) no. 1832, 882 RŌDŌ HANREI [RŌHAN] 19, 27 (Japan) – *Torre Lazur Communications* case; Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Jan. 23, 2012, Hei 21 (wa 7) no. 43395 (Japan), available at LEX/DB 25490870 – *Planer* case; see also Saito, *supra* note 154, at 18.

²⁴⁸ Ōsaka Chihō Saibansho [Osaka Dist. Ct.] Oct. 15, 1991, Hei 2 (mo 3) no. 53128, 596 RŌDŌ HANREI [RŌHAN] 21, 24 (Japan) – *Shin-Osaka Boeki* case

²⁴⁹ *Id.*

²⁵⁰ Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Apr. 17, 1990, Shō 61 (wa 7) no. 12320, 581 RŌDŌ HANREI [RŌHAN] 70, 73 (Japan) – *Tokyo Gakushu Kyoryokukai* case.

adoption of the reasonableness test,²⁵¹ they demonstrate that the precedents have considered the factor of bad faith by former employees under the current doctrine, as the courts have occasionally mentioned in recent cases.

The employer is likely to have a cause of action based on tort law if the former employee has acted in bad faith, but the remedy is limited to damages.²⁵² The theoretical significance of enforcing the restrictive covenants because of the bad faith is to grant injunctive relief under circumstances similar to the tort cases.²⁵³ The rationale here seems that the law will not guarantee the former employee's privilege of choosing an occupation, or the former employee's conduct is no longer a proper exercise of the right, when the former employee acts disloyally to the employer, deviating from free competition. The former employee's conduct may be actionable even though the employers cannot sufficiently show the legitimate interests and the compensatory measures.²⁵⁴ However, this factor's actual function may be limited, since the former employee's conduct rarely amounts to bad faith nor is a deviation from free competition. Indeed, the recent decisions which have referred to the bad faith under the reasonableness test just pointed it out as nothing more than a secondary element to reinforce the determinations of four basic prongs of reasonableness, like the factor of the signing process above.²⁵⁵ This factor is commonly considered in the case of forfeiture of severance payments.²⁵⁶

B. The Japanese Version of the Blue-pencil Doctrine? – Reasonable Limiting Interpretation

Sometimes the courts narrowly interpret the terms or conditions written in restrictive covenants, rather than nullify them. However, this approach contains some problems.

This issue arises in the following two situations. [*Situation 1*]: One is where the restrictive covenants provide comprehensive clauses regarding the scope of the restrictions. Can the courts limitedly interpret and specify those words? [*Situation*

²⁵¹ See Ogawa, *supra* note 6, at 356.

²⁵² Since torts cannot be a basis for an injunction in Japan. The Civil Code, *supra* note 82, art. 709. See also Ogawa, *supra* note 6, at 352. Therefore, absent the reasonable covenant, an illegal competitive conduct, socially deviating from free competition, is necessary to file based on torts. See Saikō Saibansho [Sup. Ct.] Mar. 25, 2010, Hei 21 (ju) no. 1168, 1005 RŌDŌ HANREI [RŌHAN] 5, 8 (Japan) – *Success and other (Miyoshi Tec)* case.

²⁵³ Yokochi, *supra* note 136, at 16.

²⁵⁴ Hukuoka Chihō Saibansho [Hukuoka Dist. Ct.] Apr. 19, 1994, Hei 4 (wa 7) no. 365, 1360 RŌDŌ HŌRITSU JUNPŌ [RŌJUN] 48, 54 (Japan) – *Seibu Shoji* case; Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Sept. 27, 2005, Hei 16 (wa 7) no. 4703, 909 RŌDŌ HANREI [RŌHAN] 56, 65-66 (Japan) – *Aimex* case.

²⁵⁵ Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Sept. 22, 2004, Hei 16 (yo 3) no. 1832, 882 RŌDŌ HANREI [RŌHAN] 19, 27 (Japan) – *Torre Lazur Communications* case; Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Jan. 23, 2012, Hei 21 (wa 7) no. 43395 (Japan), available at LEX/DB 25490870 – *Planer* case.

²⁵⁶ See *supra* note 101 and accompanying text. However, the basis of considering the bad faith in each test are different.

2]: Another is where, although the provisions are defined, the scope of the restrictions is overbroad if it is interpreted literally. Can the courts curtail the terms and conditions to maintain the effect of the covenant?

Situation 1: Many courts have narrowly interpreted the comprehensive ambiguous terms such as “competing business,” “business identical or similar to the ‘company,’” “companies in the same business,” [section A. subsection 3.c.] and the meaning of “customers” [section A. subsection 3.d.]. Some scholars complain that covenants or clauses that are ambiguous regarding the scope of the employees’ obligation create a chilling effect on the former employee’s economic activities,²⁵⁷ and that the courts’ authority to retroactively and extrinsically modify the agreement the parties have concluded is unclear.²⁵⁸

This style of interpretation is legally permissible as an execution of judicial discretion.²⁵⁹ The courts must consider the disparity in bargaining power between an employee and an employer under the Labor Contract Act art. 3, para 1.²⁶⁰ However, it seems rational to interpret the condition of the restrictive covenant in accordance with the parties’ intent and expectations. Generally, the purpose of the restrictive covenant is to protect the employer’s legitimate interest. It is obvious, for both parties and courts, that the restrictive covenant can prohibit all such conduct that typically involves a high risk of infringement of the legitimate interest even if the language of the covenant is more or less abstract. Not only the employer, but also the former employee who has had access to the interest in the course of their service—namely, the employee who satisfies the second element of the reasonableness test—can predict the sort of information that will amount to the legitimate interest and the extent of the activities that is forbidden on and after the day of resignation. Moreover, it is difficult even for the employer to accurately recognize what information constitutes the legitimate interest demarcating the reasonable extent of the restriction and to strictly specify it, refraining from using general terms, at the time of signing the covenant.²⁶¹ This is because reasonableness, including the legitimate interest, is a normative requirement²⁶² determined by comprehensive consideration of various circumstances,²⁶³ and because the employer’s business and the work that the

²⁵⁷ Obata, *supra* note 229, at 120; TSUCHIDA, *supra* note 87, at 713-714.

²⁵⁸ TSUCHIDA, *supra* note 87, at 714.

²⁵⁹ Saito, *supra* note 154, at 19.

²⁶⁰ The Labor Contract Act, *supra* note 9, art. 3, para. 1 (providing “[a] labor contract is to be concluded or changed between a Worker and an Employer by agreement on an equal basis”); ARAKI TAKASHI, SUGENO KAZUO, & YAMAKAWA RYUICHI, SHŌSETSU RŌDŌ-KEIYAKU-HŌ [EXPLICATION OF LABOR CONTRACT LAW] 83 (2nd ed. 2014).

²⁶¹ Some judge commentators have pointed out that if such a limiting interpretation is totally unacceptable, the employer would bear the heavy responsibility of drawing up a restrictive covenant which is neither too broad nor too narrow in order to protect its interest effectively even though this decision is highly legal and unpredictable. Yokochi, *supra* note 136, at 15; Saito, *supra* note 154, at 18-19.

²⁶² YAMAKAWA RYUICHI, RŌDŌ-FUNSO-SHORI-HŌ [LABOR DISPUTE RESOLUTION LAW] 238 (2012).

²⁶³ See *supra* notes 137-145 and accompanying text.

employees engage in are often fluid.²⁶⁴ Consequently, it is impractical to generally frown upon the limiting interpretation of the comprehensive conditions.

For example, the courts limited: the term “companies in the same business” to “consumer electronics retailer identical to [the employer]”²⁶⁵; the term “employees” subject to the restrictive covenants to those who were involved in the employer’s trade secret and other protectable confidential information²⁶⁶; and the term “customers” to the “companies that had already formed business relationships” with the employer.²⁶⁷ These courts have focused on the nature of the legitimate interests or the extent to which the interests would be exposed to the risk of misappropriation. As a consequence, needless to say, there are limitations to this interpretation technique.²⁶⁸

When former employees compete with their employers in bad faith, the courts also have interpreted the covenants at issue as restricting such competition.²⁶⁹

Situation 2: As for the elements of the restricted duration, one court interpreted the restrictive covenant by reducing the duration to make it reasonable when it would be unreasonably long if read literally.²⁷⁰ This interpretation technique can be called

²⁶⁴ Especially for employees’ work, Japanese law acknowledges employers’ broad right to order a transfer (a change in employees’ job contents or work location) on the assumption that the law limits their right of dismissal (see *supra* notes 9 and accompanying text). SUGENO, *supra* note 81, at 684-85, 688 (Kanowitz trans., *supra* note 81, at 443-44, 446-47) (citing Saikō Saibansho [Sup. Ct.] Jul. 14, 1986, Sho 59 (o ㊦) no. 1318, 477 RŌDŌ HANREI [RŌHAN] 6, 9 (Japan) – *Toa Paint* case); ARAKI, *supra* note 81, at 418, 420-21 (citing the *Toa Paint* case at 9); see also TAKASHI ARAKI, LABOR AND EMPLOYMENT LAW IN JAPAN 135-136 (2002). In practice, typical employers actively transfer their workforce within the firms under the lifetime employment custom. See SUGENO, *supra* note 81, at 684 (Kanowitz trans., *supra* note 81, at 443); ARAKI, *supra* note 81, at 417; see also ARAKI, LABOR AND EMPLOYMENT LAW IN JAPAN at 133-34.

²⁶⁵ Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Apr. 24, 2007, Hei 17 (wa ㊦) no. 24499, 942 RŌDŌ HANREI [RŌHAN] 39, 50 (Japan) – *Yamada Denki* case.

²⁶⁶ Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Oct. 16, 1995, Hei 7 (yo ㊦) no. 3587, 690 RŌDŌ HANREI [RŌHAN] 75, 88 (Japan) – *Tokyo Legal Mind* case.

²⁶⁷ Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] May 24, 2006, Hei 18 (yo ㊦) no. 21021, 1229 HANREI TAIMUZU [HANTA] 256, 262 (Japan) – *PM Concepts* case (excluding the companies merely under negotiation from “customers”).

²⁶⁸ Hukuoka Chihō Saibansho [Hukuoka Dist. Ct.] Oct. 5, 2007, Hei 18 (wa ㊦) no. 2157, 956 RŌDŌ HANREI [RŌHAN] 91, 94 (Japan) – *Asahi Pretec* case (rejecting the employer’s assertion that the court should limit and enforce the non-competition clauses).

²⁶⁹ Hukuoka Chihō Saibansho [Hukuoka Dist. Ct.] Apr. 19, 1994, Hei 4 (wa ㊦) no. 365, 1360 RŌDŌ HŌRITSU JUNPŌ [RŌJUN] 48, 54 (Japan) – *Seibu Shoji* case; Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Sept. 27, 2005, Hei 16 (wa ㊦) no. 4703, 909 RŌDŌ HANREI [RŌHAN] 56, 64 (Japan) – *Aimex* case.

²⁷⁰ Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Sept. 30, 2010, Hei 22 (yo ㊦) no. 3026, 1024 RŌDŌ HANREI [RŌHAN] 86, 91 (Japan) – *Aflac* case (limiting the two-year duration to one year and granting an one year injunction). Incidentally, this court seemed to err in judging the reasonableness of the scope (duration, geography, and business) from the contents of the petition for an order of provisional disposition not to compete rather than from the conditions of the restrictive covenant (an order of provisional disposition in Japan is the equivalent of a preliminary injunction in the United States). The court in the *Torre Lazur Communications* case also did likewise. Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Sept. 22, 2004, Hei 16 (yo ㊦) no. 1832, 882 RŌDŌ HANREI [RŌHAN] 19, 27 (Japan). Properly speaking, the interpretation

a Japanese version of the “blue-pencil doctrine.”²⁷¹ Nevertheless, only a handful of cases have adopted such a method, whereas other courts have rejected or not accepted this interpretation.²⁷² The rationale behind a majority of the decisions that have opted not to use the blue-pencil method seems that the duration and scope of activities are essential terms of the restrictive covenant, so that a modification of these terms would result in an interpretation that contradicts the parties’ intentions or expectations.²⁷³ In addition, the basis of the courts’ authority to modify the agreement in which the conditions have been specified by the parties is not clear.²⁷⁴ Instead of blue-penciling, courts may issue an injunction with a limitation to the extent necessary to protect the employer’s certain interest.²⁷⁵

What if the employer’s information loses its value as a legitimate interest before the restricted period expires? Although no precedent involves this issue, the employer’s information should be protected entirely or partially as long as the parties to covenants reasonably expected that the legitimate interest exists for the time being. Therefore, the courts may shorten the period of the covenants rather than entirely reject them, not on the ground of a partial enforcement or blue-penciling, but because the covenant has lost the subject due to the loss.²⁷⁶ Or, also here, they can shorten the period of injunctions as an interpretation of the requirement for the injunctive relief without severing the covenants.²⁷⁷

technique used in these cases cannot be said to be the reducing modification or blue-penciling of the restrictive covenant. The reasonableness of the restriction on competition must be determined by whether the employee’s substantive obligation which will be imposed by the restrictive covenant remains reasonable extent or not. The substantive obligation should never depend on the contents of the petition for injunction.

²⁷¹ Some commentators agree with this interpretation. *E.g.*, Ogawa, *supra* note 6, at 347-349; Ishibashi, *supra* note 2, at 125.

²⁷² Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Feb. 23, 2005, Hei 15 (wa 7) no. 7588 and no. 26800, 902 RŌDŌ HANREI [RŌHAN] 106, 116 (Japan) - *Artnature* case (refusing to reducingly modify the restrictive covenant from the prohibition of the competition *per se* to a restriction upon solicitation of the customers because such interpretation would not be objective).

²⁷³ In the *Yamada Denki* case, the court rejected the employee’s assertion that the restrictive covenant providing “at least one year” is so unambiguous that it causes a chilling effect on a job-change. Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Apr. 24, 2007, Hei 17 (wa 7) no. 24499, 942 RŌDŌ HANREI [RŌHAN] 39, 44, 50 (Japan). This decision can be controversial. On the one hand, “at least one year” could be considered insufficiently limited since the duration is an easy matter to set forth clearly. On the other hand, the employee could readily construe that “at least one year” meant “one year” from the legitimate interest, his position, and the negotiation process.

²⁷⁴ TSUCHIDA, *supra* note 87, at 714.

²⁷⁵ Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Nov. 18, 2008, Hei 18 (wa 7) no. 22955, 980 RŌDŌ HANREI [RŌHAN] 56, 65 (Japan) - *Total Service* case.

²⁷⁶ Ishibashi, *supra* note 209, at 32.

²⁷⁷ See *supra* note 275 and accompanying text.

C. Enjoining Competition without Restrictive Covenants?

Under Japanese law, employer claims against competing former employees are based on reasonable restrictive covenants, torts,²⁷⁸ and trade secret protection law.²⁷⁹ Can the employer seek an injunction not to compete, beyond enjoining the use and disclosure of the trade secret, on the basis of the Unfair Competition Prevention Act without the reasonable covenants?

In the *Tokyo Legal Mind* case, two employees—one the auditor-employee and attractive lecturer and another the representative director—left Tokyo Legal Mind, a preparatory school for a bar exam, and started their own competing preparatory school business.²⁸⁰ Tokyo Legal Mind filed a petition for an order of provisional disposition not to do business.²⁸¹ The court indicated that, on the one hand, the parties' agreement can establish a non-competition obligation, and on the other hand, the Unfair Competition Prevention Act can create such an obligation as well, even without the restrictive covenant, if necessary to protect the employer's trade secret. The court held that "where the former employee carries out actions competing with the former employer's business, the court is compelled to affirm the non-competition obligation so as to secure the obligation not to disclose the trade secret, as long as the competing actions inevitably entail the use of the trade secret."²⁸² This theory is the so-called "bifurcated approach," since the court distinguished the basis of and the prerequisites for the non-competition obligation.²⁸³

Nevertheless, some scholars have opposed this court's decision because the Unfair Competition Prevention Act imposes only a confidentiality obligation to protect the trade secrets, but does not regulate the broader non-competition obligation.²⁸⁴ Indeed, after the *Tokyo Legal Mind* case, no case that applied the bifurcated approach can be found. Rather, in the case that involved both a trade secret and restrictive covenant, the court analyzed each claim separately.²⁸⁵

In conclusion, the courts currently do not grant injunctive relief not to compete with the employer in the absence of a reasonable restrictive covenant, but grant only

²⁷⁸ However, the remedy based on torts is limited to damages. The Civil Code, *supra* note 82, art. 709. See *supra* note 252 and accompanying text.

²⁷⁹ The Unfair Competition Prevention Act, *supra* note 134, art. 3, para. 1 and para. 2.

²⁸⁰ Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Oct. 16, 1995, Hei 7 (yo ㊦) no. 3587, 690 RŌDŌ HANREI [RŌHAN] 75, 78-80 (Japan).

²⁸¹ *Id.* at 78.

²⁸² *Id.* at 84-85.

²⁸³ Ogawa, *supra* note 6, at 347-349.

²⁸⁴ Tsuchida, *supra* note 172, at 209; Hatsu Morita, *Kansayaku to Torishimariyaku no Tainigo no Kyōgyō-hishi-tokuyaku no Kōryoku* [Enforceability of the Restrictive Covenants of Audit and Director after Resignation] 1131 JURI 125, 127 (1998) (however, agreeing with the position which mitigates the requirement for the reasonableness if the court finds that the employee owes a confidentiality obligation under the Unfair Competition Prevention Act); see also Yokochi, *supra* note 136, at 8. See also *supra* note 135 and accompanying text.

²⁸⁵ Ōsaka Chihō Saibansho [Osaka Dist. Ct.] Dec. 22, 1998, Hei 5 (wa ㊦) no.8314, 30 CHITEKI ZAISANKEN KANKEI MINJI GYŌSEI SAIBAN REISHŪ [CHITEKI SAISHŪ] 1000, 1040-1041, 1046-1047 (Japan) - *Iwaki Glass and other case*. See also Tsuchida, *supra* note 172, at 203-204.

an injunction not to use or disclose the trade secret under the Unfair Competition Prevention Act, or provide damages based on the Act—if trade secrets are involved—or torts—if not a trade secrets case.

III. COMPARATIVE ANALYSIS

A. Similarity

As this study has discussed thus far, both American common law and Japanese case law apply very similar reasonableness rules to the post-employment restrictive covenants. Their elements and applications of reasonableness are analogous. First, in both countries the barometer of what information constitutes a legitimate interest generally depends on whether the information is the employer's proprietary secret handled carefully, or it is general knowledge or skills that employees can readily learn through daily services.²⁸⁶ The legitimate interest, as the core element, demarcates the line of the durational, geographical, and vocational extent to be justified.²⁸⁷ For instance, both countries share similar ideas regarding the restricted duration.²⁸⁸ Both courts are also similar in that customer lists or relationships are less protectable than other business information, and therefore those interests, in principle, should be protected merely by non-solicitation agreements rather than agreements not to compete.²⁸⁹

The understanding and rationales of both the United States and Japan apply in complementary ways to the decisions of the other country. For example, American law may apply judgmental factors of the legitimate interest that can be read from the accumulation of cases in Japan.²⁹⁰ Restrictive covenants against professionals are less likely to be enforceable both in the United States and in Japan.²⁹¹ While the Restatement explains that clients of the professional service have a right to choose service providers,²⁹² the courts in Japan have not indicated a clear reason for the experts (such cases are few). However, the Japanese courts can apply the same rationale. The clients' or the customers' right to choose the most economically reasonable service provider can be a good reason for why the customer information or relationship is less protectable than other confidential business information in both jurisdictions. Under fair competition, customers can change their service providers whenever they want. The employer's position as the service provider of its client is

²⁸⁶ See *supra* notes 37-39, 137-147 and accompanying text.

²⁸⁷ See *supra* notes 45, 46, 157 and accompanying text.

²⁸⁸ Compare *supra* note 47 and accompanying text with *supra* notes 159, 168 and accompanying text; *supra* note 48 and accompanying text with *supra* notes 170-175 and accompanying text; and *supra* note 49 and accompanying text with *supra* notes 176-177 and accompanying text.

²⁸⁹ See *supra* notes 53, 54, 194-203 and accompanying text; see also *supra* notes 184, 231 and accompanying text.

²⁹⁰ See *supra* notes 137-147 and accompanying text.

²⁹¹ See *supra* notes 55, 204 and accompanying text.

²⁹² See *supra* note 56 and accompanying text.

not stable unless solid and competitive technologies and management abilities support its position.

The material policy is common to both countries that the laws protect trade secrets which are possibly the heart of the legitimate interests for the purpose of preventing unfair competition.²⁹³ It is also common that restrictive covenants and the non-competition obligation have the distinctive significance of protecting information not covered by the trade secret protection rule.²⁹⁴

It can be said that these similarities derive from the resemblance of the equilibrium of interests that founded the rules, that is, a clash between the employers' interests to develop their business and technology²⁹⁵ and the former employees' rights to move in the market²⁹⁶ or choose their jobs,²⁹⁷ and to live.²⁹⁸ Public policy aims at the realization of fair competition by prevention of unfairly maintaining or transferring competitiveness. Both jurisdictions share the common perception of the public policy to adjust the conflict because the balancing creates the public policy without a statutory regulation. On the other hand, if a statutory rule applies, such as California State Law, that rule controls.²⁹⁹ It can be assumed that the rule of the Restatement and Japanese case law will apply in jurisdictions where the intrinsic and spontaneous public policy of the common rule is not modified legislatively (in another word, extrinsically).

The fundamental difference between the two employment systems concerning job security³⁰⁰ does not alter the major rules regarding restrictive covenants, but it does result in a minor distinction as described next.

Incidentally, the reasonableness test, as constructed by the *Foseco Japan Limited* case,³⁰¹ was not immediately established as the rule regulating restrictive covenants in Japanese courts. While scholars, sometimes through a comparative law methodology, advocated the public policy scrutiny by the reasonableness test,³⁰² the courts continued to determine the enforceability of the restrictive covenants mainly by the former employee's bad faith for a while after the *Foseco Japan Limited* case.³⁰³ However, the reasonableness test has been well established today. In addition to the current comparative analysis, the doctrinal history that the courts eventually have chosen the reasonableness test suggests that this test is the desirable rule to apply to the restrictive covenants.

²⁹³ See *supra* notes 31, 134, 135 and accompanying text.

²⁹⁴ See *supra* notes 19, 136 and accompanying text.

²⁹⁵ See *supra* notes 19, 90 and accompanying text; see also RESTATEMENT OF EMPLOYMENT LAW §8.03 cmt. a. (AM. LAW INST. 2015) (stating that the trade secret protection by §8.03 promotes employers to "develop socially useful and commercially valuable information.").

²⁹⁶ See *supra* note 16 and accompanying text.

²⁹⁷ See *supra* notes 21, 89 and accompanying text.

²⁹⁸ See *supra* notes 22, 92 and accompanying text.

²⁹⁹ See *supra* note 28 and accompanying text.

³⁰⁰ See *supra* note 9 and accompanying text.

³⁰¹ Nara Chihō Saibansho [Nara Dist. Ct.] Oct. 23, 1970, Sho 45 (yo ㊦) no. 37, 21 KAKYŪ SAIBANSHO MINJI SAIBAN REISHŪ [KAMINSHŪ] 1369, 1380 (Japan); see also *supra* note 111 and accompanying text.

³⁰² E.g., Yamaguchi, *supra* note 87, at 418-419.

³⁰³ See *supra* notes 247-251 and accompanying text.

B. Difference

First, the substance of the two reasonableness rules is largely the same. However, the two rules differ in a trifling matter. Both rules focus on the legitimate interest element, but only the American rule emphasizes the importance of this element by making it a specific provision (black letter).³⁰⁴ This study finds that the Restatement intends to clarify the reason for the existence of the legitimate interest element. In addition, the legitimate interest in American law explicitly includes trade secrets.³⁰⁵ However, the courts in Japan do not list trade secrets as an example of the legitimate interest.³⁰⁶

Unlike in Japan, American law does not list “the former employee’s position and job content” element. However, it is taken into consideration in the legitimate interest element³⁰⁷ and the application of the factor of the position or skill level is similar to Japanese law.³⁰⁸ This is because this element is to tie the legitimate interest to the former employee having signed the covenant and, therefore, it can be evaluated within the element of the legitimate interest.

Both American and Japanese laws consider the geographic element³⁰⁹ and in both jurisdictions it is not conclusive. Especially, the Japanese courts have not emphasized this element³¹⁰ and, indeed, have not denied the reasonableness merely because of the lack of a geographical limit. It is easily conceivable that the restriction all over the United States is much broader than in Japan as a whole. This subtle difference may stem from their geographical feature including their land areas, populations, population densities, or economic scales and spheres.

In the United States, the consideration doctrine under the contract law requires the employers to supply some benefits, including a continuing employment relationship, in order to bind the parties by the covenants.³¹¹ In Japan, the reasonableness test considers the payment or the offer of some compensatory measures in order to assess the degree of mitigation of the disadvantage achieved by the measures.³¹² Despite the difference, both of these are highly pliable requirements.³¹³ The crucial difference between the consideration and the compensatory measure is whether or not they include continuing employment. This

³⁰⁴ See *supra* notes 41, 42 and accompanying text.

³⁰⁵ See *supra* note 31 and accompanying text.

³⁰⁶ See *supra* note 135 and accompanying text.

³⁰⁷ See *supra* notes 43, 44 and accompanying text.

³⁰⁸ See *supra* notes 152-156 and accompanying text.

³⁰⁹ See *supra* notes 50, 51, 180 and accompanying text.

³¹⁰ See *supra* notes 181, 187 and accompanying text.

³¹¹ See *supra* note 59 and accompanying text.

³¹² See *supra* notes 214-223 and accompanying text.

³¹³ See Ogawa, *supra* note 6, at 364 (introducing the compensatory measure as a similar notion to the consideration).

difference seemingly occurs because the employer's right to discharge its employee is subject to the strict limitation only in Japan.^{314, 315}

The rule of enforceability of restrictive covenants in Japan is to scrutinize whether the covenants violate the public policy (article 90 of the Civil Code) through an examination of the reasonableness of the restrictions on competition.³¹⁶ Japanese law interprets and applies the public policy in consideration of the purport of the constitutional right to choose one's occupation.³¹⁷ On the other hand, the public policy in the United States also has established similar doctrines to control enforceability of the covenants, even though there is no constitutional guarantee of such freedom. Accordingly, the reasonableness test would have existed as a fair rule in Japan, even if the Constitution did not guarantee the right.

Second, doctrines external but relevant to the reasonableness rules differ considerably between the two countries. According to the Restatement, courts can blue-pencil (modify) the overly broad contractual restrictions to reasonably tailored covenants.³¹⁸ On the other hand, Japanese courts are reluctant to rewrite or even only cut away problematic clauses in the covenants.³¹⁹ Instead, they merely interpret the terms reasonably.³²⁰ Both jurisdictions are aware of the issues of freedom-of-contract³²¹ or the parties' intents or expectations,³²² and the courts' authority.³²³ They take different positions but both opinions are possible and more or less rational. The blue-pencil doctrine may play a role in creating the rule and guideline regarding how to draft or determine the reasonable covenants in the United States where the precedents constitute the law under the common-law system.³²⁴ On the other hand, both countries' rules are common in some aspects. For example, both rules reject the enforcement of the covenants if the legitimate interests have vanished by the time of enforcement. In the United States, the courts apply the blue-pencil doctrine.³²⁵ In Japan, the courts will not issue an injunction or they will only issue a limited-term injunction.³²⁶

³¹⁴ See *supra* note 9 and accompanying text.

³¹⁵ Contrary to this expectation, the Supreme Court of Montana, where the statutory uniquely rules out the employment at-will (MONT. CODE ANN. §39-2-904(2), "Wrongful Discharge from Employment Act"), did not allow continuing employment as consideration to support the covenant signed after the inception of employment (*Access Organics, Inc. v. Hernandez*, 175 P.3d 899, 904–05 (2008)), although it "decline[s] to broadly hold that continued employment may never serve as sufficient consideration. For example, where an at-will employee is specifically guaranteed a definite period of continued employment, the employee receives consideration in the form of contracted-for job security." *Id.* at 904.

³¹⁶ See *supra* note 94 and accompanying text.

³¹⁷ See *supra* note 93 and accompanying text.

³¹⁸ See *supra* note 65 and accompanying text.

³¹⁹ See *supra* note 272 and accompanying text.

³²⁰ See *supra* note 259 and accompanying text.

³²¹ See *supra* note 75 and accompanying text.

³²² See *supra* notes 72, 74, 273 and accompanying text.

³²³ See *supra* notes 73, 274 and accompanying text.

³²⁴ See RESTATEMENT OF EMPLOYMENT LAW §8.08 cmt. a. (AM. LAW INST. 2015).

³²⁵ See *supra* notes 69, 70 and accompanying text.

³²⁶ See *supra* notes 276, 271 and accompanying text.

The courts in most jurisdictions in the United States may grant injunctions not to compete in order to prevent the use or disclosure of the employers' trade secrets even without restrictive covenants.³²⁷ The current Japanese courts do not grant such strong injunctions even if the former employees misappropriate the trade secrets.³²⁸

To explore the blue-pencil doctrine and the non-covenant-based injunction further, a more in-depth analysis of the issues of the remedies in each jurisdiction, such as the judicial authorities, as well as the study of public policy (and the contract law doctrine), is necessary.³²⁹

C. Suggestions

i. To the United States

Japanese law can justify the broader extent of restrictions when the employers have paid a larger amount as compensatory measures than when they have only paid ordinary compensation.³³⁰ From this point of view, Japanese law suggests that American law should permit broader restrictions if the employers have paid high-level monetary benefits as consideration. For example, compared to an ordinary non-competition agreement, garden leave will provide the former employee with better payment.³³¹ The employer does not have to provide garden leave, but it will support the reasonableness of the restrictive covenant.³³² Strictly speaking, compensation constitutes a factor of consideration to bind the parties, a concept of contract law, rather than the element of the reasonableness test justifying the contractual restrictions like Japanese law. Nevertheless, the courts should be able to determine that the covenants are reasonable because the former employees' disadvantage of their mobility is covered monetarily and economically, if they find decent compensation including but not limited to garden leave. Even in this case, the employers should have their legitimate interests to justify the restrictions.

However, the public interest underlying the reasonableness rule is not only the individual employee's mobility or free competition³³³. It is also the preservation of

³²⁷ See *supra* notes 77-79 and accompanying text.

³²⁸ See *supra* note 285 and accompanying text.

³²⁹ See Charles A. Sullivan, *Restating Employment Remedies*, 100 CORNELL L. REV. 1391, 1396 (2015) (stating that section 8.08 "could easily have been placed in the 'Remedies' chapter").

³³⁰ See *supra* note 235 and accompanying text.

³³¹ See RESTATEMENT OF EMPLOYMENT LAW §8.06 cmt. c. (AM. LAW INST. 2015) (stating that "[a] provision compensating the former employee during the term of the restrictive covenant" are sometimes called "garden leave"). Note that, the garden leave is not a typical category of post-employment restrictive covenants because it usually assumes the continuing (unterminated) employment contract so that the non-competition obligation of the current employees (*see supra* note 15 and accompanying text) remains. As a result, the employer should pay compensation equivalent to wages to its leaving (but current) employee during the garden leave period. See Simone M. Sepe & Charles K. Whitehead, *Paying for Risk: Bankers, Compensation, and Competition*, 100 CORNELL L. REV. 655, 660 n.24 (2015).

³³² *Id.* §8.06 REP.' note cmt. c.

³³³ See *supra* note 16 and accompanying text.

the service provided by specialists, such as a medical professional.³³⁴ Thus, the relationship between the high compensation and the element of public interest for the purpose of ensuring professional service is debatable. In other words, can the courts waive the public interest element because of a large payment? The answer to this question is not clear from the Restatement but such a covenant impeding the realization of public interest probably cannot be justified even by decent compensation.

Thus, American law may think of consideration more flexibly as does the Japanese compensatory measure, broadening or narrowing the extent to which the courts find the covenant reasonable; although there are naturally some limitations.

The reasonableness test in Japan includes the framework considering the former employee's bad faith,³³⁵ which mainly applies to the case of the forfeiture of a severance payment, but is currently not often used for covenants imposing the non-competition obligation.³³⁶ The Restatement does not mention bad faith. However, the reasonableness rule in the United States is similarly designed to balance the employer's legitimate interest and the employee's freedom of pursuing economic activities.³³⁷ If the former employee acts in bad faith such that they swerve from free competition, they do not have interests worth protecting any longer by nullifying the covenant (however, it is less meaningful to remedy the employer by taking into account the bad faith in enforceability of the covenant, because the employer can win an injunction for torts in the United States,³³⁸ unlike in Japan).

The restrictive covenant is the agreement that calls for the employee's inaction or forbearance in the specified range. This "range" (specifically, the duration, geography, and scope of activities) subject to the obligation often can be the essential portion of the covenant. In Japan, few courts have blue-penciled the restrictive covenants,³³⁹ probably because modification of the essentials of the covenants is against the parties' intents.³⁴⁰ With the parties' freedom-of-contract,³⁴¹ the courts in the United States also should execute their competence to blue-pencil the covenants cautiously even though they have such authority.³⁴² In applying the clause of the Restatement, for instance, they should interpret the term "the agreement does not allow for modification" or "the employer lacked a reasonable and good-faith basis for believing the covenant was enforceable" (§ 8.08) broadly.³⁴³ Seeking suggestions from Japanese law, the courts may find "a reasonable and good-faith basis" and interpret covenants to limit the employees' business or job category that they engage in after termination, since this element is not necessarily easy to specify.

³³⁴ See RESTATEMENT OF EMPLOYMENT LAW §8.06 cmt. i. (AM. LAW INST. 2015).

³³⁵ See *supra* notes 247-250 and accompanying text.

³³⁶ See *supra* notes 251-256 and accompanying text.

³³⁷ See *supra* note 21 and accompanying text.

³³⁸ See RESTATEMENT OF EMPLOYMENT LAW §9.10 (AM. LAW INST. 2015).

³³⁹ See *supra* note 272 and accompanying text.

³⁴⁰ See *supra* text accompanying notes 273.

³⁴¹ See *supra* note 75 and accompanying text.

³⁴² See *supra* note 63 and accompanying text.

³⁴³ Allocating the burden of proof of these terms to employers is also a possible construction. See also *supra* note 65 and accompanying text.

This study also moves to question the rationale behind the adoption of the blue-pencil doctrine by the Restatement.³⁴⁴ The Restatement illustrates that, under a “binary ‘enforce or reject’ choice,” the court might choose to enforce a seven-month restriction rather than void it when it finds seven-month to be overbroad but six-month reasonable, because the court is unwilling to entirely reject a partially valid covenant.³⁴⁵ However, this exemplification seems irrelevant. The premise of the “binary ‘enforce or reject’ choice” should be that the court must invalidate the covenant even if it exceeds the reasonable scope slightly in the sample case above. If so, the reasoning that the court may create an inadequate precedent is not so proper.

ii. To Japan

The Restatement designed the rules to protect confidential information centering around the trade secret by emphasizing the legitimate interests in the independent black letter.³⁴⁶ On the other hand, many cases in Japan have only enumerated the legitimate interest as one of the elements of reasonableness without specifying the significance of this element, the requirements or factors of the interest, or the relationship with trade secrets.³⁴⁷ Moreover, although many Japanese lawyers and scholars might recognize the weight of the legitimate interest element in the reasonableness test,³⁴⁸ many scholars have focused on the compensatory measure element among others,³⁴⁹ perhaps underestimating the legitimate interest and misunderstanding the conflict of interest between the employer and the former employee. In the view of the importance of the element, the Restatement in the United States suggests that Japanese law should clearly and accurately provide the rules regarding the restrictive covenants, especially about the legitimate interest, in the statute, the administrative guidelines, other soft laws, or, at least, judicial decisions. However, a recent history shows that the legislation of the non-competition obligation has been aborted since practitioners and scholars have still not established common recognition of the obligation in Japan.³⁵⁰

³⁴⁴ See *supra* note 67 and accompanying text.

³⁴⁵ RESTATEMENT OF EMPLOYMENT LAW §8.08 cmt. a. (AM. LAW INST. 2015).

³⁴⁶ See *supra* notes 41, 42 and accompanying text.

³⁴⁷ See *supra* note 117 and accompanying text.

³⁴⁸ See *supra* notes 114, 116 and accompanying text.

³⁴⁹ See *supra* notes 229-231 and accompanying text.

³⁵⁰ According to “the Report of the Study Group on the Labor Contract Legislation in the Future,” “there were some opinions that it is necessary to provide the ground and extent to which employees will be bound even though their [employment] contracts have been terminated” in the Study Group. However, others said that the consensus on concrete criteria to determine restrictive covenants as enforceable have not been developed, for instance, about whether the compensatory measure is a requirement or not (see *supra* notes 229-231 and accompanying text). The following suggestions were made in the Study Group: the statute should clarify that, be they an individual contract, a work rule, or a collective bargaining agreement, contractual basis is required to impose the post-employment non-competition obligation on employees (see *supra* notes 86 and accompanying text); the prerequisites of the restrictive covenants are (i) impairment of the employer’s legitimate interest which would be caused by the competitive activity and (ii) the balance between the employee’s interest which would be invaded by the restriction and the employer’s necessity to impose the obligation; and the guideline should encourage that the employers

The consideration of restrictive covenants is still more flexible than Japanese compensatory measures. Some commentators in Japan argue that the compensatory measures are a prerequisite for reasonableness³⁵¹ and that the employer should pay the employee the amount calculated as if lost profits.³⁵² However, American law, coupled with a comparison with Japanese law, suggests that the Japanese courts should basically resolve the conflict of interests between the parties by the legitimate interests and the extent of the restrictions. Consequently, as many current Japanese courts understand, the compensatory measures are a secondary element instead of a requirement.

This study supposes that Japanese courts can adopt the partial enforcement approach, like the American blue-pencil doctrine. However, this method should be limited to exceptional cases in Japan. The provided duration, geography, and scope of the former employee's activities are essential components of the restrictive covenant.³⁵³ Therefore, facile modification of the agreement creates an unexpected outcome for the parties.

This study finds a lesson from the rule of the Restatement that courts may modify the overbroad covenant if the employer has had a reasonable and a good-faith belief in enforceability of the covenant.³⁵⁴ Applying this rule to Japanese law, when the court finds that, for instance, the covenant is overly broad in its terms but the employer has paid the compensation which would be a sufficient consideration of the restriction if it were inconsiderably narrower than actually written, the court may limit the covenant in accordance with the compensation instead of nullifying it. Generally, the payment or performance made by the parties based on the invalid contract is subject to the restitution of unjust enrichment.³⁵⁵ However, the compensatory measures have inseparably melted into the wages or other compensation in all likelihood due to their flexibility. Therefore, the employer is not entitled to any restitution even though the restrictive covenant is invalid. The court may blue-pencil and partially enforce the covenant in order to match the result with the parties' intents in such cases. A certain level of the payment may correspond to the employer's "good-faith" in the Restatement. The problem with this approach is that, similar to American contract law, it would be difficult for the courts to determine whether the employer's payment was sufficient as the compensatory measures.

should define the duration, geography, type of business, and job categories subject to the obligation, and explain them documentarily at the employee's termination. After much discussion, the legislature shelved the stipulation of the rules of the restrictive covenants in the Labor Contract Act whereas some written case law doctrines, such as regulation on dismissal, secondment, discipline, and binding effects of work rules, have put in the Act. Kongo no Rōdō-keiyaku-hōsei no Arikata ni kansuru Ken-kyū-kai Hōkokusho [Report of the Study Group on the Labor Contract Legislation in the Future] (Sept. 15, 2005), <http://www.mhlw.go.jp/shingi/2005/09/dl/s0915-4d.pdf>; see also ARAKI, SUGENO & YAMAKAWA, *supra* note 260, at 286; the Labor Contract Act, *supra* note 9.

³⁵¹ See *supra* note 229 and accompanying text.

³⁵² See *supra* note 239 and accompanying text.

³⁵³ See *supra* text accompanying notes 273.

³⁵⁴ See *supra* note 65 and accompanying text.

³⁵⁵ See the Civil Code, *supra* note 82, art. 703 (providing that "[a] person who has benefited ... from the property or labor of others without legal cause and has thereby caused loss to others shall assume an obligation to return that benefit, to the extent the benefit exists").

CONCLUSION

The rules on enforceability of post-employment restrictive covenants are remarkably similar despite the totally different job protections between the United States and Japan. In both countries, the rules emphasize reasonableness: whereby the legitimate interest is necessary; the restricted duration, geography, and the scope of the activities must be reasonably tailored to protect the interest; and some consideration must support the covenant. The background for these rules is the same conflict of interest between the employer and the former employee. These rules have been developed by the case law defining the contours of public policy, unless the legislature enacts otherwise. As a consequence, the rationale and the interpretation of American law can be applied to Japanese law, and vice versa.

On the other hand, there are some minor differences in the elements of each reasonableness rule and the relevant doctrines. One difference regarding the consideration for the restrictive covenants has come from the divergence of job protections. The other remarkable differences have arisen from the authorities of the courts, in other words, remedial theories, in both countries. In the United States, the courts have developed the blue-pencil doctrine as a partial enforcement theory, and the injunctions not to compete without the covenant, including the inevitable disclosure doctrine. However, while Japanese judges seem to be aware of those theories, the courts have rejected these remedies.

Comparing both systems is instrumental in understanding the rationale underlying each rule and therefore, mutually suggestive. I would feel amply rewarded for my efforts if present research is of some help to the lawyers and researchers of the laws of both countries (especially American law because this paper has mainly showcased Japanese law). The future focus of this research is to deepen the remedial doctrines surrounding the restrictive covenant.



INTERNATIONAL AGREEMENT FOR A HEALTHY ARCTIC FUTURE

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* J.D., University of Connecticut School of Law, Class of 2019. I am immensely grateful to the great number of colleagues, friends, and family that took the time to help me with this article. First, and foremost, to the staff of the Connecticut Journal of International Law: I will be eternally grateful for your devotion to the success of the Journal and endless hours helping to correct my imperfect paper. Thank you to Lt. Gim Kang for your tireless edits, mastery of the English language, and love of history. You truly helped me to polish a very rough draft. Thank you to my wife, Christine, and our kids, Brianna and Paul Jr., for your unbelievable support during a grueling three years.

CONNECTICUT JOURNAL OF INTERNATIONAL LAW

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INTRODUCTION

Melting ice and receding coastlines have provided new opportunities for Arctic nations to expand their geopolitical and economic reach north of the Arctic Circle. Commercial entities are rushing to take possession of newly accessible oil fields, shipping companies are making preparations to operate on newly available navigational lanes, and Arctic nations are developing arguments to maintain sovereignty over previously unclaimed sections of the Continental Shelf. Unlike the "Antarctic Treaty", there are no international treaties to set ground rules for political or commercial activities in the Arctic. Arctic nations and commercial entities have, instead, moved quickly to take control of their preferred part of the region by simply rushing to arrive first. In some instances, native populations with limited political power stand to lose economic opportunities after being overpowered by multinational corporations or land-grabbing countries. There is little international guidance on the protection of natural resources, which are diminishing with the destabilizing effects of a changing climate. The implementation of a comprehensive "Arctic Treaty" would stimulate cooperation in the Arctic and place limitations on activities that have a detrimental impact on native populations and environmentally sensitive areas.

I. HISTORY OF EXPLORATION IN THE REGION

Based upon the documented history of the Arctic region, many would draw the understandable conclusion that exploration started with white British and American explorers. Volumes upon volumes of Arctic literature exists from the late 1800's and early 1900's. An exploration class emerged during this time and set their sights on the last remaining untouched areas of the earth. These explorers, men all, were often well educated and well-funded. The literature and scholarship left behind by these men was immense. They and their co-adventurers risked their lives in the face of the harshest environment on earth and emerged with a deeper understanding of the area and some insight as to how it could be used to expand the capital of their nations during a time of colonial growth. However, despite what the scholarship may lead a casual observer to believe, these white explorers were not the first inhabitants of the arctic.

A. Arctic Arrival and Decline of Paleo-Eskimos Coincides with Settlement of Inuit People

Scientists and historians have indicated that the first inhabitants of the Arctic region ventured across a land bridge that linked Siberia with modern day Alaska.¹ These early humans moved into the area around 3,000 B.C. and “lived in isolation for almost 4,000 years, before disappearing.”² This migration was a part of the third of four successive waves of humans that made the voyage to the Americas.³ The first of these waves commenced “at least 15,000 years ago through Beringia, a land bridge between Asia and America that existed during the ice ages.”⁴ The group of people that made the turn north, vice the southward migration of the first two waves, came to be known as the Paleo-Eskimos, and they were the first to colonize “Arctic Canada and Greenland from Alaska.”⁵ Paleo-Eskimo migrants are not the forefathers of the natives that reside in the modern Arctic. Archeological research shows that they were seemingly “bad at vital Inuit skills such as making skin clothing, constructing igloos, and tending oils lamps.”⁶ They also crafted tools out of soft, flaking stone which was detrimental to their ability to hunt.⁷ Records indicate that the last of these original arctic inhabitants, whose numbers had been consistently dwindling perished in the winter of 1902 from a disease introduced by whalers.⁸

The successors to the Paleo-Eskimo’s were the Thule people, who arrived in the Arctic region in the final wave across the Bering Sea land bridge.⁹ The Thule people are the ancestors of the modern-day inhabitants of the Arctic, the Inuit.¹⁰ They adapted well to the desolate land, in contrast with their predecessors. The Thule “developed larger boats, more advanced weapons, and mastered the ability to hunt whales.”¹¹ In time, they traversed the Arctic, settling in northern Canada and Greenland by using a series of well-defined trails which connected “communities to their distant neighbors,” passing by the fishing and hunting grounds that fell between.¹²

¹ Mary Beth Griggs, *The First People to Settle Across North America’s Arctic Regions Were Isolated for 4,000 Years*, SMITHSONIAN (August 28, 2014), <https://www.smithsonianmag.com/smart-news/isolated-culture-thrived-arctic-4000-years-180952505/>.

² *Id.*

³ David Reich et. al., *Reconstructing Native American Population History*, 488 NATURE 370 (2012).

⁴ *Id.*

⁵ Robert W. Park, *Stories of Arctic Colonization*, 345 SCIENCE 1004 (2014).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ See Griggs, *supra* note 1.

¹⁰ According to Canadian archaeologist Robert McGhee, the name “Inuit” replaced the name “Eskimo” among the “arctic peoples of Canada and Greenland from whose language the term comes.” See ROBERT MCGHEE, ANCIENT PEOPLE OF THE ARCTIC 5 (2001).

¹¹ See Griggs, *supra* note 1.

¹² See Claudio Aporta, *The Trail as Home: Inuit and Their Pan-Arctic Network of Routes*, 37 HUMAN ECOLOGY 131, 132 (2009). Professor Aporta discovered evidence of these trails during his studies. Inuits did not use maps, rather the knowledge was passed on through generations orally, and with great detail.

The Inuit people expanded their reach throughout the Arctic upon their arrival.¹³ Separate Inuit groups established their own communities, altered their native languages, and developed new hunting and fishing practices adapted for the region in which they resided. Shifting environmental conditions dictated where the disparate groups of Inuit would end up, but by 1000 B.C. “the basic cultural patterns of the historic period were in place across most of the territory that is Canada.”¹⁴ Of particular note was the settlement of the Labrador region on the Canadian Atlantic coast which provided Inuit communities “ready access to an unprecedented diversity and wealth of marine and terrestrial resources, resources that by the eighteenth century supported large Inuit communities.”¹⁵ In addition, the Labrador current provided a cooling effect on Arctic coasts which pushed an abundance of seals and bowhead whales, both vital to the Inuit diet, closer to the shore.¹⁶ The abundance of marine resources in the region served to attract Europeans closer to these shores as well.

B. Arctic Inuit Encounter Europeans for the First Time

Scandinavians were the first to reach the Inuit on the east coast of the Canadian arctic.¹⁷ They had been moving west across the Atlantic Ocean for decades. In 986 A.D., the famous Viking “Eirik the Red ... and a small group of colonists left the Norse settlement in Iceland to found a new colony in Greenland.”¹⁸ In the same year, a fellow Norseman, Bjarni, set sail for Greenland but was pushed off course and found himself in a location that meets the description of New England or Newfoundland.¹⁹ Word of Bjarni’s discovery did not generate much interest in Greenland but caught the fancy of Norway’s ruler.²⁰ “Norwegian excitement over possible new lands and sources of ivory spread back to Greenland when Bjarni returned in about 1002.”²¹ The next year, Eirik’s son, Leif, purchased Bjarni’s boat to lead his own crew of 35 back to this supposed untouched land. Instead of reaching the mountainous landscape described by Bjarni, however, Leif sailed to “a barren and rocky coast with distant ice mountains.”²² Naming the area “Helluland,” Leif

¹³ CONCISE HISTORICAL ATLAS OF CANADA 2 (William G. Dean et al. eds., 1998).

¹⁴ *Id.*

¹⁵ Susan A. Kaplan & James M. Woollett, *Labrador Inuit: Thriving on the Periphery of the Inuit World*, in THE OXFORD HANDBOOK OF THE PREHISTORIC ARCTIC 851 (T. Max Friesen & Owen K. Mason eds., 2016).

¹⁶ *Id.*

¹⁷ It is worth noting that a significant lack of documentation exists about the travels of Norse explorers during this period. Indications of the travels of famed Norwegians were passed down orally through generations. See *Vinland History*, SMITHSONIAN INSTITUTE, <https://naturalhistory.si.edu/vikings/voyage/subset/vinland/history.html> (last visited Feb. 17, 2018).

¹⁸ Alison S. Brooks, “*Vinland*” *Revisited: 986-1986*, 8 ANTHRO-NOTES 1 (1986).

¹⁹ See *id.* at 1-2.

²⁰ *Id.* at 2.

²¹ *Id.*

²² *Id.*

likely sailed upon the eastern shore of Baffin Island, which is “a location in the Canadian high arctic.”²³ He then changed course to the south where he founded “Markland,” a densely forested land likely to have been southern Labrador.²⁴ His last stop was “Vinland,” which he discovered to be a wooded land, abundant with resources from the land and sea.²⁵

Most historians have settled on the fact that Norwegian explorers were the first documented Europeans to reach North America and land north of the Arctic Circle.²⁶ Less consensus exists around when Europeans and Inuit made their first encounter in the arctic.²⁷ There are certainly stories of violent interactions between Norse settlers and natives south of the Arctic Circle.²⁸ Evidence does show that meetings existed in the Arctic. For example, “on a prehistoric Inuit house floor, less than 800 miles from the North Pole, a fragment of European chain mail was excavated in 1978.”²⁹ Several more examples of Inuit-Norse interaction are dated from the 12th, 13th, and 14th centuries.³⁰ However, no European settlers ever made an attempt to live in the region.³¹ The area was much less forgiving than a more southern coast which is why Europeans opted for settlements in New England first, and more southern regions later.³²

C. *European and American Explorers Gravitate Towards the Poles in Search of Adventure and Opportunity*

After the failed settlements of the Norse people in Vinland, few other Europeans made the attempt to transit into the Arctic. Much of the world had little to no idea that there was a whole population of people living in the Arctic wilderness. The first known expedition chartered purely for the purposes of finding the Arctic, the North Pole specifically, was led by an Englishman, Robert Thorne.³³ Thorne was commissioned in 1527 by King Henry VIII and, if successful, would have been the first European to ever place a flag on the North Pole. Unfortunately for the crews of his two ships, he departed under-provisioned and “the men, having little to eat on

²³ *Id.*

²⁴ *See id.*

²⁵ *See id.*

²⁶ *See, e.g.*, JOHN J. SHILLINGLAW, A NARRATIVE OF ARCTIC DISCOVERY 8 (2nd ed. 1851).

²⁷ *See, e.g.*, ROBERT MCGHEE, THE LAST IMAGINARY PLACE: A HUMAN HISTORY OF THE ARCTIC WORLD (Univ. of Chicago Press 2007); JOHN F. HOFFECKER, A PREHISTORY OF THE NORTH: HUMAN SETTLEMENT OF THE HIGHER LATITUDES (2005).

²⁸ *See, e.g.*, Brooks, *supra* note 18, at 2. A Vinland settler, Thorvald, murdered eight natives. In return, the natives murdered Thorvald.

²⁹ *Id.* at 3.

³⁰ *See id.* at 14. (“Norse contact with Native Americans appears to have ceased around the time of the first Spanish colonies in the 16th centuries.”); *see also* GWYN JONES, THE NORSE ATLANTIC SAGA (1964).

³¹ HOFFECKER, *supra* note 27.

³² English settlers first landed in Provincetown, MA and settled in Plymouth, MA. While colonial English travelled into modern-day Canada, there is no indication of arctic travels. *See* EDMUND J. CARPENTER, THE PILGRIMS AND THEIR MONUMENT (1919).

³³ *See* J. DOUGLAS HOARE, ARCTIC EXPLORATION 4 (New York, 1906).

board and finding themselves unable to supplement their scanty store on land, took to cannibalism, and would all have perished but for the timely arrival of a French ship.”³⁴ Thorne returned to the King with less men and without having made any headway into the arctic but in possession of the Frenchmen’s ship. For this, he was rewarded by the King.³⁵ Several more sailors were commissioned to find a northwest passage to Asia. The most significant of whom was John Davis, who between 1585 and 1857 made three voyages into the arctic, discovering an abundance of ice but also significant marine wildlife.³⁶ While he failed to find the Northwest Passage, his discoveries were a boon to the English whaling fleet.³⁷

Voyages to the north, in search of an arctic passage, continued apace as the shipping industry struggled to keep up with the rate of colonization around the globe. Over time, the Northwest Passage was reached at various points via land by explorers and was finally transited in 1906 by Roald Amundsen, a Norwegian.³⁸ While commercial and economic endeavors remained at the forefront, a spirit of adventure was growing within the North American continent. The people of a very young United States were developing a national identity as independent frontiersmen at its border crept towards the Pacific Ocean. Adventurers set their sights on an exciting, frozen horizon to the north. In an effort for the United States to join the global superpowers, many American explorers set out to plant the United States flag on the elusive North Pole. The most famous of these explorers was Admiral Robert Peary. During the span of his eight arctic voyages, Peary, seeking to be freed of “discussions, entanglements and social complications, gained notoriety for his exploits and adventures and for founding the Peary Arctic Club, “a wealthy group of East Coast patrons” that assisted in the funding of his heavily manned excursions.³⁹

Touching the North Pole was a cause that both motivated and eradicated explorers for hundreds of years preceding its conquest. Any explorer reaching the top of the earth would have been showered with glory and been elevated to the upper echelon of the explorer class for eternity. By the early 1900’s it was “one of the last remaining laurels of earthly exploration, a prize for which countless explorers from

³⁴ *Id.* at 5.

³⁵ *See id.*

³⁶ *See id.* at 8-10. *See also* the “Franklin Expedition.” A British naval officer, Franklin presided over the infamous voyages of HMS Erebus and HMS Terror in 1845. The vessels were last seen in Baffin Bay and were never seen again. Leslie H. Neatby & Keith Mercer, *Sir John Franklin*, THE CANADIAN ENCYCLOPEDIA (Mar. 8, 2018), <https://www.thecanadianencyclopedia.ca/en/article/sir-john-franklin>.

³⁷ Several other European countries commissioned expeditions to discover northern passages. Of particular note were the expeditions featuring the Dutch explorer and navigator, William Barents, who made significant discoveries while searching for a northeast passage. *See* GERRIT DE VEER, THE THREE VOYAGES OF WILLIAM BARENTS TO THE ARCTIC REGIONS (Koolemans Beynen & Charles T. Beke eds., Cambridge Univ. Press 2010) (1609).

³⁸ *See Northwest Passage*, ENCYCLOPEDIA.COM, <http://www.encyclopedia.com/places/oceans-continent-and-polar-regions/arctic-physical-geography/northwest-passage> (last visited Oct. 28, 2018). The first commercial ship to transit the Northwest Passage was the SS Manhattan in 1969.

³⁹ MICHAEL F. ROBINSON, THE COLDEST CRUCIBLE: ARCTIC EXPLORATION AND AMERICAN CULTURE 2 (2006).

many nations had suffered and died for 300 years.”⁴⁰ This was all the motivation Admiral Peary needed. He was well connected and was one of the lucky few to have the ability to generate the funds to make repeated trips to the region. With controversy⁴¹, he reached the pole in 1909 during his eighth and final trip and has indeed been showered in glory ever since.⁴² At the North Pole, he found glory for both himself and his young nation:

When the wires tell the world that the Stars and Stripes crown the North Pole, every one of us millions from child to centenarian, from laborer and delver in mines, so the ‘first gentleman’ in the land, will pause for a moment from consideration of his own individual horizon and life interests, to feel prouder and better that he is an American, and by proxy *owns the top of the earth*.⁴³

D. Interaction Between Arctic Explorers and Inuit

One commonality between explorers, regardless of their birthplace, was their general mistreatment of Arctic natives, continuing a tradition that paralleled the treatment of indigenous people throughout a period of heavy European colonization. Violence dated back to the Norse landings, when Thorvald the Norse murdered a group of natives, and continued with European explorers both capturing and being captured by Arctic tribes.⁴⁴

The white explorers’ belief of their own superiority over the Inuit was on full display in expedition documentation and follow-up presentations. Peary had a particularly paternal attitude towards the Inuit people and demonstrated a troublingly old-fashioned view of Inuit women as property to be distributed to his men.⁴⁵ In fact, Peary, a married man, fathered children with an Inuit woman, Aleqasina, whom he met when she was 14.⁴⁶ Despite the condescension and outright mistreatment, a

⁴⁰ Bruce Henderson, *Who Discovered the North Pole?*, SMITHSONIAN MAGAZINE (Apr. 2009), <https://www.smithsonianmag.com/history/who-discovered-the-north-pole-116633746/>.

⁴¹ *Id.*

⁴² *Id.*

⁴³ ROBINSON, *supra* note 39, at 9 (emphasis added).

⁴⁴ As was the case with English explorer Martin Frobisher. Frobisher established what he believed was a friendly relationship with natives when he came ashore in 1576. He was taken aback when a day after amicable dialogue, five men from his crew were captured. During rescue efforts he captured a native, parading him through the English streets upon his return home. He made an attempt to retrieve his men when he returned to the area in 1577. He was subsequently unsuccessful but did depart with the distinction of being the “first Englishman known to have been wounded by an Eskimo.” WENDELL H. OSWALT, *ESKIMOS AND EXPLORERS* 28 (1999).

⁴⁵ Murielle Nagy, *Sex, Lies and Northern Explorations: Recent Books on Peary, MacMillan, Stefansson, Wilkins, and Flaherty*, 32 *ÉTUDES INUIT STUDIES* 169, 172 (2008). (“Peary assumed the role of patriarch, dispensing Inughuit women to his employees as if they were his property ... Peary’s ‘philanthropy’ extended to offering women in pre-existing conjugal relationships to other Inughuit men.”).

⁴⁶ See *id.* at 171; see also Charles J. Hanley, *Eskimo Son of Explorer Peary has Few Regrets*, L.A. TIMES, Sept. 13, 1987, http://articles.latimes.com/1987-09-13/news/mn-7456_1_american-explorer-peary (“I

gradual, begrudging admiration of the native Arctic people crept into the lexicon as the years and voyages passed. Explorers such as Peary started to adapt their hunting and travelling methods based upon methods used by the Inuit. Often, their very survival was dependent on skills learned through Eskimos.⁴⁷

Despite the typically demeaning manner in which indigenous arctic people were treated by visiting foreigners, they understood the advantages of trading with visitors. On the Cumberland Peninsula, Inuit offered "baleen from their own whale hunts and provisions from their seal hunt" in exchange for "metal items, needles, and food supplies such as bread and molasses."⁴⁸ The superior skill of the Inuit created an environment where competing ships would attempt to curry their favor. As early as 1748, a noted improvement is detected in the Inuit-European relationship when the orders of one whaling ship required the crew to treat the Inuit civilly.⁴⁹ In order to earn an upper hand, some governments created regulations to improve the attractiveness of their crews to trade-friendly indigenous people. In the 1760's, for example, the Netherlands "issued a new decree prohibiting attacks on, and ill treatment of, Greenlanders."⁵⁰ In reality, the relationship was one of dependence for both explorers and commercial visitors into the arctic. While the Inuit had lived in the arctic for centuries, developing a stable livelihood, travelers were frequently unprepared for the brutal conditions they experienced and relied upon native's techniques just to survive, let alone press on.

The adaptability of the Inuit people developed into the most useful lesson learned by explorers. The ability to mobilize and relocate had become essential to the Inuit people as no two winters were alike and ice did not travel in cognizable patterns. Specifically, the climate varied throughout the centuries.⁵¹ Over time, human beings had "learned to modify their behavior and their environment to manage and take advantage of their local climatic conditions."⁵² The Arctic Inuit had proven especially deft at managing a wavering climate. By necessity, they had much less room for error. This has been proven by studies showing that the Inuit have historically been dexterous in the face of a changing environment.⁵³ This

lived only by hunting and for hunting, and not by looking for help. I watched out for my dogs. I used my eyes, not my ears. I wasn't listening for help from my father ... I enjoyed my old life.").

⁴⁷ See JERI FERRIS, *ARCTIC EXPLORER: THE STORY OF MATTHEW HENSON* 25 (1989) ("Matt learned how to build a snow igloo when he hunted with the Eskimos, far from the camp. Two Eskimos could cut 50 to 60 snow blocks (each block 6-by-18-by-24-inches) with their long snow knives and build a whole igloo in just one hour.").

⁴⁸ RENÉE FOSSETT, *IN ORDER TO LIVE UNTRoubLED: INUIT OF THE CENTRAL ARCTIC, 1550-1940*, at 168 (2001).

⁴⁹ See William Barr, *The Eighteenth Century Trade Between the Ships of the Hudson's Bay Company and the Hudson Strait Inuit*, 47 *ARCTIC* 236, 237 (1994).

⁵⁰ See FOSSETT, *supra* note 48, at 52. These prohibitions provided little comfort to native communities that were still subject to violence from crews outside the eyes of governmental officials.

⁵¹ *Arctic Climate History*, USGS.GOV (Dec. 15, 2016), <http://geology.er.usgs.gov/egpsc/arcticpaleoceanography/arcticclimatehistory.html>.

⁵² James D. Ford, et. al., *Vulnerability to Climate Change in the Arctic: A Case Study From Arctic Bay, Canada*, 16 *GLOB. ENVTL. CHANGE* 145, 146 (2006).

⁵³ *Id.* ("Research has shown that indigenous groups in the Arctic have historically demonstrated adaptability and resilience in the face of changing conditions."); see also Asen Balikci, *The Netsilik*

flexibility was of particular importance to whalers, who relied upon natives to track the massive animals.

II. MELTING ICE GRANTS NEW OPPORTUNITIES BUT PRESENTS NEW CHALLENGES

The effect of shifting and melting ice has always been felt by the Inuit. Entire communities were forced to move due to “the climate change that had affected wildlife resources during the centuries between the arrival of Thule people on Baffin Island and the mid-nineteenth century.”⁵⁴ In fact, the dedication to mobility has played a major role in the continued existence of Arctic communities.⁵⁵ Unfortunately, the Arctic climate is being altered well beyond what is normal and has started to negatively impact native communities.

Climate change has regressed into one of the most heavily debated topics in the world.⁵⁶ For mostly political reasons, those at the highest levels of government cannot agree on whether the activities of humans is raising the earth’s temperature.⁵⁷ Regardless of who is right or wrong in the discussion, the ice is melting in the Arctic and native communities are feeling the results. Because of their relation to the North Pole, Arctic Inuit communities will feel the greatest impact of a warming planet. Many climatologists have predicted that “future climate change is to be experienced earlier and more acutely in the polar regions.”⁵⁸ There have already been examples of the deadly implications of reduced ice in Inuit communities.⁵⁹

Inuit rely on oral storytelling to pass down history through generations and have been able to accurately predict where the ice will be, and when it will arrive.⁶⁰ Because the ice is melting and not reliably returning, means of subsistence for the

Eskimos: Adaptive Processes, in MAN THE HUNTER 78-82 (R.B. Lee & I. DeVore eds., 1968); GEORGE SABO, LONG TERM ADAPTATIONS AMONG ARCTIC HUNTER-GATHERERS (1991); Julie Cruikshank, *Glaciers and Climate Change: Perspectives From Oral Tradition*, 54 ARCTIC 377 (2001).

⁵⁴ FOSSETT, *supra* note 48, at 168.

⁵⁵ See *id.* at 197.

⁵⁶ See, e.g., ANDREW E. DESSLER & EDWARD A. PARSONS, THE SCIENCE AND POLITICS OF GLOBAL CLIMATE CHANGE: A GUIDE TO THE DEBATE (2d ed. 2010).

⁵⁷ See Ryan Teague Beckwith, *President Trump Won't Say if He Still Thinks Climate Change is a Hoax. Here's Why.*, TIME, Sept. 27, 2017, <http://time.com/4959233/donald-trump-climate-change-hoax-question/>; Dylan Matthews, *Donald Trump has Tweeted Climate Change Skepticism 115 Times. Here's all of it.*, VOX (June 1, 2017, 5:00 PM), <https://www.vox.com/policy-and-politics/2017/6/1/15726472/trump-tweets-global-warming-paris-climate-agreement>. But see Justin Worland, *Donald Trump Used to Say Climate Change is a Hoax. The Government Just Confirmed it Isn't.*, TIME, Nov. 3, 2017, <http://time.com/5007913/climate-change-report-trump/>; Stephen Stromberg, *So Much for the Climate Change 'Hoax'*, THE WASHINGTON POST, Sept. 19, 2017, https://www.washingtonpost.com/blogs/post-partisan/wp/2017/09/19/so-much-for-the-climate-change-hoax/?utm_term=.4035d2119233; Sydney Pereira, *Why Snow in the South Doesn't Mean Climate Change is a Hoax*, NEWSWEEK (Dec. 12, 2017, 10:46 AM), <http://www.newsweek.com/why-snow-south-doesnt-mean-climate-change-hoax-745368>.

⁵⁸ Ford, et al., *supra* note 52.

⁵⁹ See *id.* (“In the small Inuit community of Kugluktuk, for example, unusual ice conditions have been linked to the deaths of two residents who went through the ice on a snowmobile in 2004.”).

⁶⁰ See Dyanna Riedlinger & Fikret Berkes, Contributions of Traditional Knowledge to Understanding Climate Change in the Canadian Arctic, 37 POLAR RECORD 315 (2001).

Inuit are negatively impacted. Therefore, “traditional knowledge, which underpins safe and successful hunting, is less dependable.”⁶¹ This reality is especially devastating for a culture that has been using the same hunting and fishing grounds for thousands of years. To make matters worse, the natural resources that the Inuit have been relying upon are undergoing their own changes in response to the shifting geography. In almost every case, this reality is not good for the subsistence or survival of the Inuit.

A. Destabilization of Natural Resources

A warming arctic is not only negatively impacting indigenous populations but also the bounty of arctic wildlife. The slightest increase in temperature can have significant impacts. The effects are the most pronounced on arctic marine mammals and seabirds, all of which depend on a lengthy pack ice period to reproduce and feed.⁶² Studies have shown that the balance of coexisting and interdependent wildlife in the area will face a grim future as a result of melting ice. For instance, a study conducted in the early 1990’s proved that the mean weight of female polar bears declined between 1980 and 1990 as arctic temperatures increased. Reduced access to ice floes results in a reduction in access to seals for polar bears which, of course, leads to leaner females. The study concluded that if the ice break-up “began to occur two or more weeks earlier than it does at present, fewer adult female polar bears would be able to store enough body fat to produce and successfully wean cubs.”⁶³ Leaner polar bears may even pose a threat to Inuit communities. Less food in the region would likely lead to an increase in “negative human-bear interaction.”⁶⁴

While the effect on polar bears has become a popular call for climate change awareness⁶⁵, other species are set to decline due to melting Arctic ice. Because the annual temperature has increased at “almost twice the rate in the arctic compared to

⁶¹ Ford, et al., *supra* note 52; see also James Ford & Barry Smit, *A Framework for Assessing the Vulnerability of Communities in the Canadian Arctic to Risks Associated With Climate Change*, 57 ARCTIC 389 (2004).

⁶² See Ian Stirling & Andrew E. Derocher, *Possible Impacts of Climatic Warming on Polar Bears*, 46 ARCTIC 240 (1993) (“The presence of sea ice is critical to polar bears because it provides the platform from which they hunt the seals they feed on. Similarly, the seals, especially ringed seals that are the main food of polar bears, depend on the sea ice to provide a platform on which they can give birth to and nurse their pups.”).

⁶³ *Id.* at 242.

⁶⁴ See *id.* at 244 (“[B]ears will become progressively more food stressed and eventually have no alternative but to scavenge wherever they can and occasionally prey upon people.”); see also Joshua Rapp Learn, *Polar Bear Attacks on People set to Rise as Climate Changes*, DAILY NEWS, July 14, 2017, <https://www.newscientist.com/article/2140701-polar-bear-attacks-on-people-set-to-rise-as-climate-changes/> (Biologist Todd Atwood of the US Geological Survey has stated that a perfect storm is set up where “[y]ou’ve got bears that are spending increasing amounts of time on land becoming nutritionally stressed, moving into areas of human settlements.”).

⁶⁵ See Sarah Gibbens, *Heart-Wrenching Video Shows Starving Polar Bears on Iceless Land*, NATIONAL GEOGRAPHIC, Dec. 7, 2017, <https://news.nationalgeographic.com/2017/12/polar-bear-starving-arctic-sea-ice-melt-climate-change-spd/>.

the rest of the world,”⁶⁶ nearly every animal is affected. A change in the smallest animals leads to dramatic effects on the animals higher up the food chain. For instance, a decline in tundra invertebrates and arthropods will reduce the number of migratory birds in the area. As the temperature rises, the tundra is slowly starting to disappear because, as precipitation increases, the snow cover is decreasing.⁶⁷ A reduction in tundra necessarily decreases the arthropod population, the most common food for arctic migratory sea birds. Scientists believe that “if birds cannot respond to changes in the timing of prey abundance, this may affect their breeding success and population size.”⁶⁸

B. Displacement of Indigenous Populations

The reduction in resources available to Inuit communities has pushed a resolutely adaptable people to their limits. As the ice shifts and permafrost melts, access to food is diminishing for many Inuit people. Communities that struggle to meet the minimum subsistence requirements are the most at risk. One such study of the Inuit in Nunavut, the largest and northernmost province in Canada, found that “56% of Inuit households in Nunavut experience difficulties in obtaining sufficient food, which significantly exceeds the Canadian average of 15%, with community specific studies indicating prevalence of food insecurity in excess of 80% in some locations.”⁶⁹ Further exacerbating the reduction in food is the modern-day increase in Inuit dependence on permanent facilities.

Especially in Canada, where the federal government has increased control over nomadic communities since the 1950’s, Inuit “were re-settled from semi-nomadic hunting camps to fixed communities.”⁷⁰ This alteration has put Inuit communities in a challenging position. They are simultaneously attached to small stores for supplies while the reduction in ice drives Arctic wildlife, their primary food source, further away. The catching of caribou, for example, has been greatly impacted. Caribou migration routes have moved further away from some villages, often out of reach even of native hunters on snowmobiles.⁷¹ Further, in 2011, caribou calving occurred four weeks later than usual, which created difficulty in storing the meat,

⁶⁶ Ingrid Tulp & Hans Schekkerman, *Has Prey Availability for Arctic Birds Advanced With Climate Change? Forecasting the Abundance of Tundra Arthropods Using Weather and Seasonal Variation*, 61 ARCTIC 48, 49 (2007).

⁶⁷ See Vladimir M. Kattsov & Erland Källén, *Future Climate Change: Modelling and Scenarios for the Arctic*, in ARCTIC CLIMATE IMPACT ASSESSMENT 99-150 (Carolyn Symon et al. ed., Cambridge Univ. Press 2005).

⁶⁸ Tulp & Schekkerman, *supra* note 66; see also Christiaan Both, et al., *Climatic Effects on Timing of Spring Migration and Breeding in a Long-Distance Migrant, the Pied Flycatcher*, 36 J. AVIAN BIO. 368 (2005).

⁶⁹ Maude Beaumier, *Vulnerability of Inuit Women’s Food System to Climate Change in the Context of Multiple Socio-Economic Stresses* (Dec. 2011) (unpublished M.A. thesis, McGill University) (on file with author).

⁷⁰ Maude Beaumier, et al., *The Food Security of Inuit Women in Arviat, Nunavut: The Role of Socio-Economic Factors and Climate Change*, 51 POLAR RECORD 550 (2015).

⁷¹ *Id.* at 556.

which must be frozen once prepared.⁷² Even the preparing of the meat, *pirujuaq*, has become more difficult. The dilemma is summarized well by an Inuit man:

Today, I think it's useless [to do *pirujuaq*] because of polar bears or grizzly bears will eat it ... Back then, there were hardly any polar bears, and today, they are all over ... Polar bears used to eat only sea animals, but today they eat anything they can find.⁷³

While the Inuit continue to rely upon their historical traditions to adapt to the rapidly changing reality for their survival, many powerful nations are waiting to move in as the ice moves out. Indigenous arctic communities, whose interaction with the rest of the world remains very limited, could soon be watching massive inter-oceanic commercial ships pass through the waterways that make up their once ice-covered landscapes.

III. RACE TO THE NORTH: ARCTIC NATIONS MOVE QUICKLY

The lack of clarity in management of the arctic is often referred to as the "Ice Fog."⁷⁴ The metaphor plays both to the environmental and military realities of the region. Ice fog is "created when water vapor meets Arctic air that's so cold it is unable to absorb any more water."⁷⁵ For strategists, the "Fog of War" is described by military theorist Karl von Clausewitz as "the realm of uncertainty; three quarters of the factors on which action is based are wrapped in a fog of greater or lesser uncertainty and all action takes place ... in a kind of fog, which often tends to make things seem grotesque and larger than they really are."⁷⁶ Through this fog, the international community has struggled to determine who should have rights to the Arctic, including the newly exposed areas once considered out of territorial reach. There are currently eight arctic states.⁷⁷ Despite some acknowledgement of jurisdiction, history has proven that these countries, and competing non-arctic superpowers, will continue to struggle to find a solution that is universally satisfying. Further compounding the problem is that the application of international law has not proven capable of instilling consistency due to the close proximity in which nations abut each other's territory.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ BARRY SCOTT ZELLEN, *ON THIN ICE: THE INUIT, THE STATE, AND THE CHALLENGE OF ARCTIC SOVEREIGNTY I* (Roman & Littlefield 2009).

⁷⁵ *Id.*

⁷⁶ CARL VON CLAUSEWITZ, *ON WAR* 101, 140 (Michael Eliot Howard & Peter Paret eds, trans., Princeton Univ. Press 1989).

⁷⁷ *Member States*, ARCTIC COUNCIL, <http://arctic-council.org/index.php/en/about-us/member-states> (last updated Sept. 10, 2015) (member states are Canada, Denmark, Finland, Iceland, Norway, the Russian Federation, Sweden, and the United States of America).

A. Expanding Military Presence and Debates Over Sovereignty

1. Territorial Boundaries

As the polar ice cap melts and commercial resources are made more available in the Arctic, the logical outcome is an international debate over which nations have sovereignty over the area.⁷⁸ While explorers from various nations have attempted voyages through the region for centuries, it was not until the mid-1900's that "the southern world was able to begin to make inroads into the Arctic on a sustained basis."⁷⁹ A rapid movement into the north occurred as a result of Cold War tensions and the developing nuclear technology being developed by the United States and the Soviet Union.⁸⁰ In fact, both countries developed weapons to use the Arctic ice to their strategic advantage, which included the development of "bombers and intercontinental ballistic missiles that would overfly the Arctic" and nuclear submarines that would "sail under the ice to launch their own missiles and to attack the other side's submarines."⁸¹ Quickly realizing the strategically important role that the region would play in their military capabilities, the Soviet Union forcibly moved their own citizens to populate expanding cities in the north, providing manpower to support this increased role.⁸²

The mounting Soviet threat through the arctic corridors quickly forced Canada into the action. As the reach of the Soviet military crept closer to Canada's unprotected northern frontiers, the Canadian government had "little choice but to turn to the United States for military presence and weapons."⁸³ The rapid and necessary response by Canada served to protect its citizens but came at a potential cost to sovereignty over its own land. Many Canadian citizens regard the assistance of the United States with dismay, some remarking that "Canada did not gradually dissociate with Britain just to be absorbed by the United States."⁸⁴ The Canadian claim of sovereignty, particularly over the Northwest Passage, stemmed from land transfers to the Canadian government from the United Kingdom.⁸⁵ As this new reality of Arctic expansion began to crystalize after the Cold War, the Canadian government struggled to both protect itself and maintain control of the region. In the past, its limited population in the northern territories did not help their situation. Several other countries had noted that the lack of settlements or outposts indicated that "Canada certainly did not have effective possession of the islands of the Arctic

⁷⁸ MICHAEL BYERS, *INTERNATIONAL LAW AND THE ARCTIC* 1 (2013) ("No country will ever 'own' the North Pole, which is located about 400 miles north of Greenland and the northernmost islands of Canada and Russia.").

⁷⁹ ZELLEN, *supra* note 74, at viii.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at ix.

⁸³ Andrea Charron, *The Northwest Passage Shipping Channel: Sovereignty First and Foremost and Sovereignty to the Side*, 7 J. MIL. & STRATEGIC STUD. 1, 5 (2005).

⁸⁴ NATHANIEL FRENCH CALDWELL, *ARCTIC LEVERAGE: CANADIAN SOVEREIGNTY AND SECURITY* 2 (1990).

⁸⁵ *Id.* The two primary transfers of land occurred in 1870 and 1880. "In 1895, the Canadian government indicated that the transfers included the Arctic Archipelago, an area claimed but not occupied by Britain."

Archipelago.”⁸⁶ However, displaying a tacit understanding of its strategic maritime interests during World War II, and staving off becoming dependent on the United States, Canada ended World War II with the third largest navy on earth.⁸⁷

Despite Canadian efforts to deter encroaching nations, the United States persisted. At the heart of the argument was a dispute of territorial jurisdiction. Canada claimed only three miles of territorial sea, which allowed the U.S. to make the claim that a Northwestern Passage transit would therefore be a “high seas” transit.⁸⁸ The attempted transit of the *SS Manhattan*, an Exxon tanker, through the Northwest Passage used this justification in 1969 and the Canadian government responded by extending their territorial boundary to 12 miles.⁸⁹ In 1985, the *Polar Star*, a U.S. Coast Guard ice breaker, transited the Northwest Passage after the United States refused to acknowledge Canada’s claim to the packed ice channel.⁹⁰ Canadian scholars immediately realized the implications of this voyage, where the *Polar Star* left behind a less powerful Canadian ice breaker that had been purportedly “escorting” the American ship.⁹¹ The U.S. was clear in its intentions: the *Polar Star* voyage was an “exercise of navigational rights and freedoms not requiring prior notification.”⁹² Public outcry in Canada demanded that the Canadian government do *something* to assert its claim. First, it granted permission for the U.S. transit despite the fact that no permission was ever first requested.⁹³ Then Canada pursued the 1988 Arctic Co-Operation Agreement, where the U.S. would “seek permission prior to a transit without recognizing any Canadian claim to jurisdiction over the waters of the Arctic Archipelago.”⁹⁴

This territorial dispute with a belligerent country was hardly the first, or only, suffered by the Canadian government. For instance, the tiny Hans Island on the west coast of Canada has been in dispute since 1973 between Canada and Denmark, with both nations realizing there was “a difference of opinion concerning title over the land.”⁹⁵ Located in Kennedy Channel between Canada’s Ellesmere Island and Greenland, within the authorized territorial jurisdiction of both, Hans Island has been subject of relatively good-natured debate ever since.⁹⁶ The Dutch claim ownership

⁸⁶ *Id.* at 89. In response to this claim, Canada established a Mounted Police unit in 1922.

⁸⁷ See ZELLEN, *supra* note 74, at 73.

⁸⁸ Robert S. Reid, *The Canadian Claim to Sovereignty Over the Waters of the Arctic*, 12 CANADIAN Y.B. INT’L L. 111, 120 (1974).

⁸⁹ BYERS, *supra* note 78, at 134. In order to complete the transit, the *Manhattan* required assistance from a Canadian ice breaking tug.

⁹⁰ ZELLEN, *supra* note 74, at 75.

⁹¹ *Id.* at 76.

⁹² *Id.* at 136.

⁹³ *Id.*

⁹⁴ CALDWELL, *supra* note 84, at 67. The agreement indicated that while the U.S. must make notifications, Canada was unauthorized to deny. Notably, President Reagan refused to include the U.S. Navy in the agreement.

⁹⁵ *Id.* at 11.

⁹⁶ *Id.*

of the island because it was discovered by an explorer from Greenland in 1853.⁹⁷ Canadians believe their rights to the island stem from the 1880 land transfer from the British and because Canada had a base on the island during World War II.⁹⁸ Once the dispute was made known, the two governments convened what some scholars describe as “ridiculous and expensive forms of posturing, including the deployment of military aircraft and ships over long distances.”⁹⁹ However, the nations have remained generally convivial despite the disagreement. Since 1984, Canadian and Dutch visitors have taken turns planting their flags and leaving a bottle of either Canadian whiskey or Dutch schnapps on the island.¹⁰⁰

It should be noted that the disagreement over Hans Island was not Denmark’s first Arctic dispute. Despite the lack of physical proximity between Denmark and the Arctic Circle, an Arctic claim is retained through its control of Greenland. While the Norsemen were the first known European settlers in Greenland, their control dissipated as Norway’s global strength reduced in direct correlation with the arrival of the Plague in 1349.¹⁰¹ In later centuries, Denmark seized the opportunity and claimed Greenland as its own in the 1800’s. In 1931, Norway “proclaimed sovereignty over Eastern Greenland,” questioning the long-standing claim by Denmark that the whole of Greenland was under Denmark’s sovereign control.¹⁰² The issue was settled in 1933 by the Permanent Court of International Justice which found in favor of the Dutch, stating that Dutch sovereignty was maintained because Norway “could not make out a superior claim.”¹⁰³ To this day, Denmark remains in control over Greenland despite Greenland’s growing autonomy over its own affairs.¹⁰⁴

Noticeably absent from a historical role in determining management of the Arctic region were its original inhabitants, the Inuit. Certainly, their expertise and survival skills were put to use throughout the 1900’s. Many countries reaching into the Arctic hired indigenous people to assist with the construction of facilities that would eventually overtake native communities. The movement of southerners to the north “fundamentally altered” the Inuit way of life.¹⁰⁵ Inuit people of working age

⁹⁷ *Id.* However, the discovery was part of an American expedition. Regardless, the U.S. has never claimed sovereignty over the island.

⁹⁸ *Id.* at 12.

⁹⁹ *Id.* at 13.

¹⁰⁰ Jeremy Bender, *2 Countries Have Been Fighting Over an Uninhabited Island by Leaving Each Other Bottles of Alcohol for Over 3 Decades*, BUS. INSIDER (Jan. 10, 2016, 10:30 AM), <http://www.businessinsider.com/canada-and-denmark-whiskey-war-over-hans-island-2016-1>.

¹⁰¹ Iqbal Akhtar Khan, *Plague: The Dreadful Visitation Occupying the Human Mind for Centuries*, 98 TRANSACTIONS OF THE ROYAL SOC’Y OF TROPICAL MED. & HYGIENE 270, 271 (2004). It is believed that the sickness arrived on a British ship.

¹⁰² BYERS, *supra* note 78, at 22. Denmark’s historical claim was provided credence by the United States in 1916 when the U.S. publicly declared their support as part of a transfer of possession of the Virgin Islands.

¹⁰³ Legal Status of Eastern Greenland Case (Denmark v. Norway), Judgement, 1933 P.C.I.J. (ser. A/B) No. 53, at 46.

¹⁰⁴ See *Greenland in Figures*, STATISTICS GREENLAND (2012), <http://www.stat.gl/publ/en/GF/2012/content/Greenland%20in%20Figures%202012.pdf>. Greenland self-government was established in 2009.

¹⁰⁵ ZELLEN, *supra* note 74, at vii.

moved closer to military sites for economic purposes even as the “Ice Curtain” of the Cold War divided communities that once “moved without concern about borders across the Bering Strait.”¹⁰⁶ Inuit residents have been used as arguments as to why a nation should, or should not, have jurisdiction over an arctic region. For instance, Canada has referenced Inuit use of Ellesmere Island as one of the factors justifying its claim for Hans Island. Despite the dismissive historical treatment of Inuit populations, a recent acknowledgement of their role in the region is beginning to emerge. As a gesture of recognition, the Arctic Council has granted permanent participant status to “six international organisations representing Arctic Indigenous Peoples.”¹⁰⁷

2. Maritime Boundaries and the Application of International Law

Traditionally, debates on Arctic sovereignty over dry land have existed for centuries. However, disputes over maritime boundaries are becoming much more important to the international community. In fact, over 20% of the cases heard by the International Court of Justice (ICJ) since 1947 have been in reference to “the boundaries between coastal states that adjoin or oppose each other.”¹⁰⁸

Any discussion regarding maritime boundaries must begin with an acknowledgement of the United Nations Convention on the Law of the Sea (UNCLOS or “the Law of the Sea”).¹⁰⁹ UNCLOS was a landmark international agreement that the United Nations defined as “a defining moment in the extension of international law to the vast, shared water resources of our planet.”¹¹⁰ The importance of the Convention to the diplomatic and commercial interests of the sea-going world was so vital that it was regarded the “most significant legal instrument of this century.”¹¹¹ The Convention came into force in 1992, and while there is still some debate as to whether it has become customary international law, it remains the pre-eminent maritime international agreement and “currently has more than 164 parties.”¹¹²

While the Law of the Sea does not specifically mention the waters within the Arctic Circle, its effect is felt throughout, most notably with the revised application of territorial boundaries. Clarifying some international confusion on how much ocean individual nations could claim, the Convention settled on 12 nautical miles,

¹⁰⁶ *Id.*

¹⁰⁷ ARCTIC COUNCIL, *supra* note 77.

¹⁰⁸ BYERS, *supra* note 78, at 29.

¹⁰⁹ United Nations Convention on the Law of the Sea, Part II, § 2, art. 3, Dec. 10, 1982, 1833 U.N.T.S. 397. UNCLOS defines the baseline as the “low-water line along the coast as marked on large-scale charts officially recognized by the coastal state.”

¹¹⁰ *Oceans and the Law of the Sea*, UNITED NATIONS (last accessed Mar. 25, 2018), <http://www.un.org/en/sections/issues-depth/oceans-and-law-sea/>.

¹¹¹ *The United Nations Convention on the Law of the Sea: A Historical Perspective*, UNITED NATIONS (1998), https://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm.

¹¹² *Law of the Sea Convention*, U.S. DEPT. OF STATE (last accessed Mar. 25, 2018), <https://www.state.gov/e/oes/lawofthesea/>.

“measured from the baseline.”¹¹³ Of equal, if not greater, importance was the 200-mile Exclusive Economic Zone (EEZ).¹¹⁴ UNCLOS defines the EEZ as:

The area where coastal States have “sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superadjacent to the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents, and winds.”¹¹⁵

Maintaining a standard EEZ throughout international waters was incredibly useful for understanding the rights of nations with access to the oceans. The Convention did make sure to note, however, that control over the EEZ did not necessarily mean that a nation was permitted to disallow vessels to transit. UNCLOS Article 58 states that any nation, landlocked or otherwise, may use a coastal nations EEZ for “internationally lawful uses” such as “the laying of submarine cables and pipelines.”¹¹⁶ Further, the freedom of navigation was of paramount importance when defining territorial seas. In its keys to the Convention, the UN explains that coastal states must allow for “innocent passage” through the 12-mile territorial limits and that ships are allowed “transit passage through straits used for international navigation.”¹¹⁷ The Convention also requires coastal states to share revenues with the international community for any exploitation of resources beyond the EEZ.¹¹⁸

Annex VIII of the Convention delegates authority over “the field of navigation, including pollution from vessels and by dumping” to the International Maritime Organization (IMO).¹¹⁹ The IMO was granted this control to avoid a system where 130+ coastal nations were capable of setting and changing jurisdictional standards thereby reducing the “flexibility of ships to interchange voyages and routes through time.”¹²⁰ Under UNCLOS, disputes can be submitted “to the International Tribunal for the Law of the Sea, to the International Court of Justice, or to arbitration.”¹²¹

¹¹³ United Nations, *supra* note 109.

¹¹⁴ *Id.* at Part V, art. 57.

¹¹⁵ *Id.* at Part V, art. 56.

¹¹⁶ *Id.* at Part V, art. 58.

¹¹⁷ *United Nations Convention on the Law of the Sea of 10 December 1982: Overview and Full Text*, UNITED NATIONS (last updated May 4, 2017), http://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm.

¹¹⁸ *Id.*

¹¹⁹ The IMO Convention entered into force in 1958 and is “the global standard-setting authority for the safety, security and environmental performance of international shipping.” The main role of the IMO is “to create a regulatory framework for the shipping industry that is fair and effective, universally adopted and universally implemented.” *Introduction to the IMO*, International Maritime Organization (2018), <http://www.imo.org/en/About/Pages/Default.aspx>.

¹²⁰ Anna Mihneva-Natova, *The Relationship Between United Nations Convention on the Law of the Sea and the IMO Conventions*, UNITED NATIONS (2005), http://www.un.org/depts/los/nippon/unff_programme_home/fellows_pages/fellows_papers/natova_0506_bulgaria.pdf.

¹²¹ *United Nations Convention on the Law of the Sea of 10 December 1982: Overview and Full Text*, *supra* note 117.

Once settled, states are required to comply with the determination of the final decision maker.¹²²

3. Settling Boundary Disputes Through Diplomatic Means

Part XV of the Law of the Sea, Settlement of Disputes, may be considered the most important. Article 279 of UNCLOS requires states to “settle any dispute between them ... by peaceful means” and Article 281 provides procedures for instances “where no settlement has been reached by the parties.”¹²³

Disputes over Arctic maritime boundaries and shipping channels have typically been settled through treaties.¹²⁴ Nations physically present in the Arctic have agreed upon several arrangements to ease any potential boundary disagreements and to facilitate coordination, thereby increasing their authority in the region. One such example followed the voyage of the *SS Manhattan*, when Canada extended its territorial sea to 12 miles. The 1973 Canada-Denmark Boundary Treaty settled a dispute when Canada’s newly claimed waterways extended into Greenland territory by dividing the space between the countries based on 127 “turning points” that were the same distance from each countries coast.¹²⁵ As mentioned, this agreement ignored the status of Hans Island, setting off a dispute that continues through the present.¹²⁶

While the Cold War expedited a large scale introduction of military movement into the arctic, its conclusion generated good will and a conciliatory spirit between the U.S. and Russia. The 1990 Bering Sea Treaty is an example of two countries preempting future conflict.¹²⁷ The ambitious treaty created a 1,600 mile “all-purpose maritime boundary in the Bering Sea, Bering Strait, and Chukchi Sea.”¹²⁸ However, in the confusion of the shift from the Soviet Union to the Russian Federation, the agreement has not been signed by the Russian government.¹²⁹ It has been approved by the U.S. however, and both nations abide by its terms. The agreement reached back to the original acquisition of Alaska by the U.S. from Russia and settled what had previously been a “disputed zone of approximately 15,000 square miles” by essentially cutting the zone in half.¹³⁰ To some, the landmark treaty was an attempt by the U.S. to take advantage of the Soviet Union’s weakened state because “while both countries ceded territory from their previous claims, the U.S. still controlled a

¹²² United Nations, *supra* note 109, at Part XV, art. 296.

¹²³ *Id.* at Part XV, arts. 279-99.

¹²⁴ BYERS, *supra* note 78, at 29.

¹²⁵ Agreement Between the Government of Canada and the Government of the Kingdom of Denmark Relating to the Delimitation of the Continental Shelf Between Greenland and Canada, Can.-Den., Dec. 17, 1973.

¹²⁶ *Id.*

¹²⁷ Agreement Between the United States of America and the Union of Soviet Socialist Republics on the Maritime Boundary, U.S.-Russ., June 1, 1990, S. TREATY DOC. NO. 101-22 (1990). The agreement was made at the conclusion of the Cold War as Russia declared itself the successor to the U.S.S.R.

¹²⁸ BYERS, *supra* note 78, at 33.

¹²⁹ *Id.*

¹³⁰ BYERS, *supra* note 78, at 34.

far greater amount of area in the Bering Sea,” including many fertile fishing grounds.¹³¹

Of course, not every maritime boundary is settled through cooperation or conciliation. The dispute between Denmark and Norway arising from control over the island of Jan Mayen was settled by the ICJ.¹³² Jan Mayen, about 360 miles from Iceland and 600 miles from Norway, was used by Danish whalers in the seventeenth century,¹³³ but was annexed by Norway in 1930, after the Norwegian Meteorological Institute established a weather station on the island.¹³⁴ Historically, nations have used small islands to extend their claim over large swaths of the ocean floor and the fishing grounds that lay above.¹³⁵ This practice is infrequent, however, and parameters are addressed by the Law of the Sea.¹³⁶ Well aware of the useful fishing grounds that surrounded the island, and its useful EEZ, Denmark sought to reclaim its right to the property in 1993 through the ICJ.¹³⁷ After substantial international litigation over the dispute, the ICJ concurred tacitly with the Danish claim by stating that the boundary line between Iceland and Norway should be altered “to allow Denmark equitable access to certain fish stocks.”¹³⁸

While most maritime boundary disputes in the Arctic have been settled either by treaty or bilateral agreement, some disputes remain unresolved. The dispute over control of the Beaufort Sea, between the United States and Canada, highlights the growing importance of the Continental Shelf in maritime border disputes. The Beaufort Sea is a shallow body of water “located between Alaska and Canada’s High Arctic islands.”¹³⁹ The disagreement arises from a discrepancy in the interpretation of the Treaty of Saint Petersburg, an 1825 agreement between Great Britain and Russia, which extended Canada’s territory to the 141°W meridian and significantly to the north.¹⁴⁰ Responsibility for the treaty shifted from Russia to U.S. control upon the purchase of Alaska and from Britain to Canada once Canada was declared a

¹³¹ Vlad M. Kaczynski, *US-Russian Bering Sea Marine Border Dispute: Conflict Over Strategic Assets, Fisheries and Energy Resources*, RUSSIAN ANALYTICAL DIGEST (ETH Zurich, Ctr. for Sec. Stud., Zurich, Switz.) (2007), at 3.

¹³² Maritime Delimitation in the Area Between Greenland and Jan Mayen (Den. v. Nor.), Judgment, 1993 I.C.J. Rep. 38, (Jun. 14).

¹³³ BYERS, *supra* note 78, at 36.

¹³⁴ *Id.*

¹³⁵ See e.g., David H. Gray, *Canada’s Unresolved Maritime Boundaries*, 5 INT’L BOUNDARIES RES. UNIT BOUNDARY & SEC. BULL. 61, 61 (1997). Canada and Denmark have disputed the status of Beaumont Island, a tiny island barely projecting from the Lincoln Sea. Canada has claimed the island to be too insignificant to allow for a 200-mile EEZ claim. Further proving the importance of small islands to jurisdictional claims, China has been creating artificial reefs, or small islands, in the South China Sea to expand the reach of its jurisdictional capabilities; see also Tom Phillips, et. al., *Beijing Rejects Tribunal’s Ruling in South China Sea Case*, THE GUARDIAN (Jul. 12, 2016, 1:21 PM), <https://www.theguardian.com/world/2016/jul/12/philippines-wins-south-china-sea-case-against-china>.

¹³⁶ United Nations, *supra* note 109, at Part VIII, art. 121. Para. 3 states that “rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.”

¹³⁷ Den. v. Nor., 1993 I.C.J. Reports at 38.

¹³⁸ *Id.*

¹³⁹ BYERS, *supra* note 78, at 57.

¹⁴⁰ *Id.* at 66.

sovereign nation.¹⁴¹ The difference in the interpretation of the factors of the treaty between U.S. and Canada has resulted in a triangle shaped body of disputed water covering about 6,250 square nautical miles.¹⁴²

The Canadian claim for the area relies on a textual interpretation of the 1825 treaty. Additionally, the U.S. had acknowledged the validity of the terms of the arrangement when making alterations in 1990.¹⁴³ Indeed, the U.S. position is ironic in that it is “virtually saying that the same treaty that delimits a maritime boundary in the west does not delimit a maritime boundary in the east.”¹⁴⁴ Though the U.S. has not explicitly denounced the Canadian legal claim, they have made their position known. Relying on the more modern 200-mile EEZ, the U.S. believes that the maritime boundary would push to the east if it followed the principle of equidistance.¹⁴⁵ The U.S. argument relies on the 1958 Geneva Convention on the Continental Shelf.

The Convention on the Continental Shelf was entered into force with 43 signatories and 58 parties.¹⁴⁶ It has been deemed somewhat irrelevant, based upon its 200 mile limit, because of the rapid development of underwater mining equipment since 1958.¹⁴⁷ Article 6 of the Convention, however, provides some guidance to territorial disputes by stating that when the continental shelf is adjacent “to the territories of two adjacent states ... the boundary shall be determined by application of the principle of equidistance from the nearest points of the baselines.”¹⁴⁸ The concept of equidistant lines was altered by UNCLOS, which indicated that disputes would be settled “in order to achieve an equitable solution”¹⁴⁹ and by international case law when the ICJ declared an updated “relevant circumstances” test¹⁵⁰ to determine boundary delimitations. Interpretation is further muddled by the importance of the Continental Shelf to scientific and economic exploitation. Article 77 of the Law of the Sea states that “the coastal state exercises over the continental shelf sovereign rights for the purposes of exploring it and exploiting its natural resources.”¹⁵¹ As such, a body of water as large as the Beaufort Sea is considered prime real estate.

¹⁴¹ *Id.* at 58.

¹⁴² *Id.* at 59.

¹⁴³ *Id.* at 65.

¹⁴⁴ Camille M. Antinori, *The Bering Sea: A Maritime Delimitation Dispute Between the United States and the Soviet Union*, 18 OCEAN DEV. & INT'L L 1, 34 (1987).

¹⁴⁵ *Beaufort Dispute*, ARCTICECON (Jan. 10, 2011), <https://arcticecon.wordpress.com/2011/01/10/beaufort-sea-dispute/>.

¹⁴⁶ *Law of the Sea*, UNITED NATIONS TREATY COLLECTION (last accessed Mar. 25, 2018), https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXI-4&chapter=21&clang=_en. The Convention defines the “continental shelf” as “the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres and ... similar submarine areas adjacent to the coasts of island.”

¹⁴⁷ See HAGUE ACAD. OF INT'L LAW, A HANDBOOK ON THE NEW LAW OF THE SEA 329 (Rene Jean Dupuy & Daniel Vignes eds., 1991).

¹⁴⁸ United Nations Convention on the Continental Shelf, Apr. 29, 1958, 499 U.N.T.S. 311.

¹⁴⁹ United Nations *supra* note 109, Part VI, art. 83.

¹⁵⁰ Territorial and Maritime Dispute (Nicar. v. Colom.), Judgment, 2012 I.C.J. Rep. at 190 (Nov. 19).

¹⁵¹ United Nations, *supra* note 113, Part VI, art. 77.

Despite the boundary dispute, the U.S. and Canada have often worked together to correct the discrepancy and to find an amicable solution.¹⁵² Still, there is no agreement in place as to which nation will end up in control of the area. In the most likely scenario, the dispute will either continue to be ignored or an arrangement will be finalized which benefits the economic interests of both nations.¹⁵³

B. Commercial Enterprises and the Exploitation of Natural Resources

As the race to exploit the Arctic for fossil fuels intensifies, the importance of the Continental Shelf has never been greater. The owner of the Continental Shelf will receive the economic benefit of its underwater resources. Currently, five nations possess territorial seas within the Arctic Circle: the United States, Canada, Russia, Denmark and Norway. Each of these nations is authorized to exploit the seabed within their EEZ and can grant permission to commercial enterprises to do the same. Any boundary conflict that emerges will necessarily either expand or reduce the availability of economic resources for the disputing nations. The Beaufort Sea, for example, has been found to possess billions of dollars' worth of oil and gas, yet multi-national corporations eager to drill are kept at bay. There remains a large swath of the Beaufort Sea where corporations such as Exxon Mobil and British Petroleum do not have access and would otherwise be unsure under which nations regulations or permitting procedures they would fall.¹⁵⁴

A significant factor for a corporation such as Exxon to consider is the differing environmental standards of permit granting nations. Arctic Ocean oil reserves are relatively untapped and there is little subject matter knowledge or understanding of how drilling will affect the delicate Arctic ecosystems. Oil spills are a widely known risk with an historical background to indicate the potential for overwhelming damage.¹⁵⁵ Responses to an oil spill are already difficult and response in an Arctic climate is sure to be even worse. A delayed response to a major spill could "contaminate ice and shorelines for many thousands of kilometers, kill seabirds and mammals, and severely pollute the natural ecosystem that traditional indigenous users and wildlife rely upon."¹⁵⁶

The speed in which corporations are attempting to gain access to the Arctic seafloor, combined with a lack of institutional knowledge about the potential

¹⁵² BYERS, *supra* note 78, at 56. From 2008-2011, Icebreakers from both countries partnered to map the seabed to determine "the extent of their sovereign rights to an 'extended continental shelf' more than 200 nautical miles from the shore."

¹⁵³ See DAVID ROTHWELL, *THE POLAR REGIONS AND THE DEVELOPMENT OF INTERNATIONAL LAW* 124 (Cambridge Univ. Press 1996).

¹⁵⁴ BYERS, *supra* note 78, at 58.

¹⁵⁵ See, e.g., Alan Taylor, *The Exxon Valdez Oil Spill: 25 Years Ago Today*, THE ATLANTIC, Mar. 24, 2014, <https://www.theatlantic.com/photo/2014/03/the-exxon-valdez-oil-spill-25-years-ago-today/100703/>; *Gulf of Mexico Oil Leak 'Worst US Environment Disaster'*, BBC NEWS (May 30, 2010), <http://www.bbc.com/news/10194335>.

¹⁵⁶ Ed Struzik, *Oil Drilling in Arctic Ocean: A Push Into Uncharted Waters*, YALE ENVIRONMENT 360 (June 8, 2015), https://e360.yale.edu/features/oil_drilling_in_arctic_ocean_a_push_into_uncharted_waters.

catastrophic effects of an environmental emergency, creates an uncomfortable predicament for Arctic nations attempting to find a balance between their economic and environmental interests. Canada is particularly at risk given its proximity to the Northwest Channel, which is on pace to be the next major seafaring route.¹⁵⁷ Any major environmental disaster would likely affect Canada first. Of Canada's most grave concerns is its Inuit population. Just one major oil spill could permanently damage the Inuit population, a group already fearing the ramifications of melting ice.¹⁵⁸ Since the transit of the *SS Manhattan* in 1969, when they embraced "environmental security as a fundamental sovereign right," Canada has attempted to protect the security of its northern Inuit population.¹⁵⁹ In fact, in 2016, Canada and the U.S. declared a ban on drilling in Arctic waters, including placing a moratorium "on new oil and gas leasing," pleasing both Inuit populations and concerned environmental groups.¹⁶⁰ While the ban remains in effect on the aforementioned part of Canada, recent changes in U.S. leadership and environmental standards has facilitated a rollback in regulations. Quickly upon assuming control of the government, the Trump administration announced plans to reopen the area for drilling as a part of a new focus on domestic energy production.¹⁶¹ The rollback in policy occurred over the protestations of Alaskan Inuit, who fear the implications for the Bering Sea and Arctic Ocean, bodies of water that have sustained Inuit communities for millennia.¹⁶²

It is clear that the melting ice is driving economic interests toward the Arctic. Arctic nations are struggling to maintain coherent and permanent policies to keep up with the changing reality of the region. With the entry of "near-Arctic" powers, such as China, into the Arctic economic landscape, cooperation and coordination appears to be more vital now than ever.¹⁶³

¹⁵⁷ Transit through the Passage has become so commonplace that even privately-owned pleasure crafts are attempting the transit. See Chris Mooney, *Even Small Boats are Tackling the Fabled Northwest Passage. The Ice Doesn't Always Cooperate*, WASH. POST, Aug. 9, 2017, https://www.washingtonpost.com/news/energy-environment/wp/2017/08/09/we-wanted-to-be-early-northwest-passage-adventurers-held-back-by-lingering-ice/?utm_term=.e623de058d36.

¹⁵⁸ Paul Brown, *Global Warming is Killing us too, say Inuit*, THE GUARDIAN, Dec. 10, 2013, <https://www.theguardian.com/environment/2003/dec/11/weather.climatechange>.

¹⁵⁹ ZELLEN, *supra* note 74, at 33. In response to the transit, Canada passed the 1970 Arctic Waters Pollution Prevention Act which "extended Canadian jurisdiction for the prevention of pollution in waters ... to zone 100 miles from the baseline."

¹⁶⁰ *U.S., Canada ban Offshore Drilling in Arctic Waters*, CBC NEWS (Dec. 20, 2017, 1:41 PM), <http://www.cbc.ca/news/technology/obama-ban-offshore-drilling-arctic-atlantic-1.3905384>.

¹⁶¹ Eleanor Huffines, *Offshore Plan Threatens the Health of Arctic Marine Ecosystem*, PEW (Jan. 23, 2018), <http://www.pewtrusts.org/en/research-and-analysis/blogs/compass-points/2018/01/23/offshore-drilling-plan-threatens-arctic-marine-ecosystem>.

¹⁶² *Id.*; see also *Crews in Alaska Fight Elements*, CNN (Jan 1, 2013, 2:02 PM), <https://www.cnn.com/2012/12/31/us/gallery/alaska-oil-rig/index.html>.

¹⁶³ Clay Dillow, *Russia and China Vie to Beat the US in the Trillion-Dollar Race to Control the Arctic*, CNBC (Feb. 6, 2018, 11:45 AM), <https://www.cnbc.com/2018/02/06/russia-and-china-battle-us-in-race-to-control-arctic.html>.

C. *Working Together to Move Forward*

Arctic nations have historically settled their maritime border disputes through traditional methods, such as treaties. At the heart of this cooperation, however, was an understanding that the Arctic ice was a permanent fixture. Fortunately, the established precedent of Arctic nations working together have continued into modern day.

1. Arctic Council Mediation

The Arctic Council (AC) was established in 1996 as a “high level intergovernmental forum” with a mandate to “promote cooperation, coordination and interaction among the Arctic States.”¹⁶⁴ Displaying a keen awareness of the potentially unrecoverable damage a major environmental disaster could inflict on the region, the seven Arctic nations, along with Inuit representation, have promulgated three legally binding preventative agreements.¹⁶⁵ The agreements acknowledge the close proximity of Arctic domestic territory and, as such, display a cooperative spirit. The 2011 Agreement on Aeronautical and Maritime Search and Rescue in the Arctic developed “an international instrument for cooperation on search and rescue operations in the Arctic.”¹⁶⁶ Subsequently, the 2013 agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic was a mandate to “prepare an international instrument on Arctic Marine pollution preparedness and response.”¹⁶⁷ Finally, the 2017 Agreement on Enhancing International Arctic Scientific Cooperation mandated the creation of “a task force to work towards an arrangement on improved scientific research cooperation among the eight Arctic states.”¹⁶⁸

Notable in the Arctic Council’s mandate is the explicit exclusion of military security issues from consideration.¹⁶⁹ While the rising tension that occurred in the Arctic during the Cold War has subsided, the strategic importance of the area remains. Still, while Arctic nations generally believe that there is little threat to military conflict in the region, “arctic countries have nevertheless taken steps to improve their military capabilities in the North.”¹⁷⁰ Both Russia and the U.S.

¹⁶⁴ *History of the Arctic Council*, Arctic Council (last updated Nov. 4, 2016), <http://www.arctic-council.org/index.php/en/about-us/arctic-council>. The forerunner of the AC was the Arctic Environmental Protection Strategy, which was established in 1989 to “discuss cooperative measures to protect the Arctic environment.”

¹⁶⁵ *Agreements*, ARCTIC COUNCIL (last updated May 25, 2017), <http://www.arctic-council.org/index.php/en/our-work/agreements>.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *The Arctic Council: A Backgrounder*, Arctic Council (last updated Jan. 3, 2018), <http://www.arctic-council.org/index.php/en/about-us>.

¹⁷⁰ BYERS, *supra* note 78, at 249.

continue to operate nuclear submarines in the region, causing “undue excitement in neighboring countries.”¹⁷¹

Perhaps military show of force demonstrations will continue to increase parallel with the rate of melting ice but, for now, the primary, and more immediate, security concerns occur along its southern region with non-state actors.¹⁷² Drug smuggling into native communities that are already at a high risk for addiction¹⁷³ is a constant fear, as is the illegal transportation of migrants through newly opened waterways.¹⁷⁴

2. United Nations Intervention & the “Polar Code”

While military preparedness will always play a role in the behavior of Arctic nations, territorial claims will prove to be the most important motive for Arctic partnerships. The Arctic is on track to lose “74,000 square kilometers worth of ice each year – adding up to a loss of over two million square kilometers since the late 1970’s.”¹⁷⁵ An exposed waterway will increase the desire of nations to pursue avenues to gain control of Arctic territory. Territorial claims using an extension of continental shelves have already proven to be an effective method for arctic nations to expand their reach northward. As the ice continues to melt, these claims will necessarily overlap, and it will be up to the United Nations to determine the outcome.¹⁷⁶ Per the Law of the Sea, a Commission on the Limits of the Continental Shelf was established to “consider the data and other material submitted by coastal States concerning the outer limits of the continental shelf in areas where those limits extend beyond 200 nautical miles.”¹⁷⁷ The Commission’s power is limited, however, because it does not have a mandate to create policy.¹⁷⁸

Currently, there is no system in place to establish concrete policy to settle territorial claims. However, there is precedent of a UN organization which has the authority to establish arctic policy: The International Maritime Organization (IMO). The IMO’s “Polar Code”, adopted in 2014 and entered into force in 2017, was

¹⁷¹ *Id.* at 251. Two Russian jets were intercepted only 90 miles from the Canadian coast during a 2009 visit from then U.S. President Barack Obama.

¹⁷² *Id.* at 261.

¹⁷³ Venla Lehti et al., *Mental Health, Substance Use and Suicidal Behavior Among Young Indigenous People in the Arctic: A Systematic Review*, 69 SOC. SCI. & MED. 1194 (2009).

¹⁷⁴ BYERS, *supra* note 78, at 265 (“It is likely that illegal immigration will increase in the Arctic ... because the same general process of climate change will force hundreds of millions of people to leave their homes.”).

¹⁷⁵ Adam Lajeunesse, *Lock, Stock, and Icebergs? Defining Canadian Sovereignty from Mackenzie King to Stephen Harper*, 1 CALGARY PAPERS IN MIL. & STRATEGIC STUD. 1 (2008).

¹⁷⁶ U.N., Office of Legal Affairs, Div. for Ocean Affairs and the Law of the Sea, Advice and Assistance to States General Information, http://www.un.org/depts/los/clcs_new/commission_advice.htm (last updated Apr. 8, 2009).

¹⁷⁷ *Id.*

¹⁷⁸ Barbara Kwiatkowska, *Submissions to the UN Commission of the Limits of the Continental Shelf: The Practice of Developing States in Cases of Disputed and Unresolved Maritime Boundary Delimitations or Other Land or Maritime Disputes*, 28 INT’L J. MARINE & COASTAL L. 219, 235 (2013) (“The CCLS has no mandate to settle boundary disputes, nor can it make any decisions that will bias future resolution to such disputes. Any boundary disagreements must be resolved between the States.”).

created to “supplement existing IMO instruments in order to increase the safety of ships’ operation and mitigate the impact on the people and environment in the remote, vulnerable and potentially harsh polar waters.”¹⁷⁹ The Polar Code covers all elements of shipping in both the Arctic and Antarctica, including “ship design; construction and equipment; operational and training concerns; search and rescue and environmental protection matters.”¹⁸⁰ The Code provides “Polar Ship Certificates” to those vessels that meet the stipulations of the agreement which cannot be granted without important elements such as hull thickness, appropriate crew training, and the availability of the Polar Water Operational Manual.¹⁸¹

While the Polar Code has been a useful addition to international maritime shipping regulations, it has been criticized for being too lax. Environmental groups have unanimously agreed that the Code was a step in the right direction, but many have criticized the agreement as not going far enough. One concern is the continued use of heavy fuel oil in the Arctic, which is extraordinarily dangerous to marine and coastal wildlife.¹⁸² While the dumping of garbage is authorized not less than 12 miles from “nearest land, nearest ice shelf, or nearest fast ice,”¹⁸³ the fact that it is allowed in the first place is concerning to some. The Polar Code only applies to large scale ships of over 500 Gross Tons.¹⁸⁴ Smaller vessels, including pleasure craft and fishing vessels, are not included in the criteria nor are they bound by its requirements. Additionally, some have raised concerns that the Polar Code does not require the appropriate structural guidelines to protect ships and thereby protect the habitats around shipping channels.¹⁸⁵ In fact, non-ice strengthened ships are “still allowed to operate in ice covered waters.”¹⁸⁶

Operating outside of the IMO and the Polar Code, is the Arctic Coast Guard Forum (ACGF). The ACGF was officially established at the United States Coast Guard Academy on October 30th, 2015. “All eight coast guard agencies of the Arctic nations” signed a Joint Statement to create an “operationally focused, consensus-based organization with the purpose of leveraging collective resources to foster safe, secure and environmentally responsible maritime activity in the Arctic.”¹⁸⁷ Included

¹⁷⁹ *Shipping in Polar Waters: Adoption of International Code of Safety of Ships Operating in Polar Waters (Polar Code)*, INT’L MAR. ORG. (2018), <http://www.imo.org/en/mediacentre/hottopics/polar/pages/default.aspx>.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² Eric Haun, *Environmental Groups: IMO Polar Code Too Weak*, MAR. LINK (Nov. 21, 2014), <https://www.marinelink.com/news/environmental-groups381260.aspx>.

¹⁸³ INTERNATIONAL CODE FOR SHIPS OPERATING IN POLAR WATERS (POLAR CODE), INT’L MAR. ORG., 40-41 (2017), <http://www.imo.org/en/MediaCentre/HotTopics/polar/Documents/POLAR%20CODE%20TEXT%20AS%20ADOPTED.pdf>.

¹⁸⁴ Richard O.G. Wanerman, *Freezing Out Noncompliant Ships: Why the Arctic Council Must Enforce the Polar Code*, 47 CASE W. J. INT’L L. 429, 440 (2015). Some fishing vessels are treated by the IMO, but most are bound by domestic policies.

¹⁸⁵ HAUN, *supra* note 182.

¹⁸⁶ *Id.*

¹⁸⁷ Katie Braynard, *Establishment of the Arctic Coast Guard Forum*, COAST GUARD COMPASS (Oct. 30, 2015), <http://coastguard.dodlive.mil/2015/10/establishment-of-the-arctic-coast-guard-forum/>

in the strategic goals of the ACGF are to “strengthen multilateral cooperation and coordination within the Arctic, work collaboratively to advance the protection of the maritime environment, and maximizing the potential for maritime activities to positively impact the lives and culture of arctic communities.”¹⁸⁸ The forum rotates chairmanship every two years and “holds two annual meetings every year.”¹⁸⁹

An important strategic goal of the ACGF, and one that will help facilitate arctic cooperation in the future, is the collaboration “with the Arctic Council through the sharing of information.”¹⁹⁰ Much of this information will be collected through live operational exercises planned and executed by the ACGF. The first of these multinational operations was Arctic Guardian 2017. The ACGF labeled “Arctic Guardian as the first live exercise and an important step towards achieving even closer cooperation between the agencies representing the coast guards in eight Arctic countries.”¹⁹¹ The goal of the exercise was to “test cooperation between search and rescue units/services and to test an information exchange system between Rescue Coordination Centres (RCC’s) in both countries.”¹⁹² Arctic Guardian involved three exercises. In the first, participants cooperated “to assist a fictional cruise line operator who lost communications with their cruise ship transiting the Denmark Strait from Greenland to Iceland.”¹⁹³ The second exercise involved “all maritime and air assets” successfully coordinating their search and rescue efforts to retrieve a missing crewmember from a “fictional vessel transiting the Denmark Strait.”¹⁹⁴ The final exercise focused on internal damage control capabilities onboard the *Pierre Radisson*, a Canadian Coast Guard ship. “Crew members from different maritime units worked together to solve” damage control scenarios while “medics from each crew worked together on two medical emergency response scenarios.”¹⁹⁵

The ACGF will use lessons learned during Arctic Guardian when participating in the next exercise, Polaris 2019. Polaris 2019 will be held in the Gulf of Bothnia, a body of water between Finland and Sweden, and aims to further foster the cooperation between Arctic nations, expanding on the mission of the Arctic Council. As an increasing number of vessels transit Arctic waters both for commercial transit and eco-tourism, the strengthening of relationships between coast guards is absolutely a step in the right direction.

(membership includes Canada, Denmark, Finland, Iceland, Norway, Sweden, the Russian Federation, and the United States).

¹⁸⁸ *About the ACGF*, THE ARCTIC COAST GUARD FORUM, <https://www.arcticcoastguardforum.com/about-acgf> (last visited Oct. 10, 2018).

¹⁸⁹ *Id.* (Finland holds the chair from 2017-2019).

¹⁹⁰ *Id.*

¹⁹¹ *Arctic Guardian – The ACGF’s First Operational Exercise Successfully Completed*, THE ARCTIC COAST GUARD FORUM (Sept. 11, 2017), <https://www.arcticcoastguardforum.com/news/arctic-guardian-acgfs-first-operational-exercise-succesfully-completed>.

¹⁹² *Id.*

¹⁹³ Diana Sherbs, *Historic Exercise Tests Search and Rescue Capabilities in the Arctic*, COAST GUARD COMPASS (Oct. 24, 2017), <http://coastguard.dodlive.mil/2017/10/historic-exercise-tests-search-and-rescue-capabilities-in-the-arctic/>.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

IV. LOOKING FORWARD

This paper has focused on two primary matters concerning the modern arctic: navigation and environmental protection. While the international community has taken some steps to create standardized practices regarding both, the resulting guidelines and agreements are too weak to appropriately protect the vast resources available in the north. If monitored correctly, the opening arctic waterways can be an incredibly important international resource. Both the Northwest and Northeast Passages reduce maritime travel by several thousands of miles for some voyages.¹⁹⁶ To retain Arctic navigation standardization and to protect the Arctic environment and its inhabitants from a destruction of their ecosystem through pollution and drilling, the United Nations could enact a treaty to regulate expansion. Regardless of politicized debates as to how or why, the Arctic is melting and the polar ice is receding.¹⁹⁷ It is in the common interest of the international community to adapt and prepare for a further thaw.

A. Using the “Antarctic Treaty” as an Example

Precedent exists for U.N. intervention into the polar zones. The Antarctic Treaty was entered into force in 1959 to ensure that Antarctica “shall continue forever to be used exclusively for peaceful purposes and shall not become the scene or object of international discord.”¹⁹⁸ It was the first in a series referred to as the Antarctic Treaty System (ATS).¹⁹⁹ The original signatures on the Treaty belonged to the 12 countries that had a presence, mostly for scientific research, on the otherwise uninhabited continent.²⁰⁰ Over time, as the global reach of other nations became more pronounced, more parties signed on. There are currently “53 Parties to the Treaty, of which 29 are Consultative Parties having the right to participate in decision-making.”²⁰¹

¹⁹⁶ An open Northeast Passage “cuts the voyage from Shanghai to Hamburg by 4,000 miles compared to a southern journey through the Suez Canal. See *Snow Dragons*, THE ECONOMIST, Sept. 1, 2012, <https://www.economist.com/node/21561891>; the Northwest Passage transit of the M/V Nordic Orion trimmed “about 1,000 miles from the usual route through the Panama Canal.” See Wendy Stueck, *Ship Crosses Northwest Passage, Sails Into History*, THE GLOBE AND MAIL, Sept. 25, 2013, <https://www.theglobeandmail.com/news/british-columbia/bulk-carrier-becomes-first-to-successfully-traverse-northwest-passage/article14516278/>.

¹⁹⁷ See Natasha Vizcarra, *Arctic Sea Ice Maximum at Second Lowest in the Satellite Record*, NAT’L SNOW & ICE DATA CTR. (Mar. 23, 2017), <http://nsidc.org/arcticseaicenews/2018/03/arctic-sea-ice-maximum-second-lowest/> (“the four lowest maximum extents in the satellite record have all occurred in the past four years.”).

¹⁹⁸ *The Antarctic Treaty*, SECRETARIAT OF THE ANTARCTIC TREATY, <https://www.ats.aq/e/ats.htm>.

¹⁹⁹ Included in the ATS is the Convention on the Conservation of Antarctic Marine Living Resources, and the Convention for the Conservation of Antarctic Seals. See *Key Documents of the Antarctic Treaty System*, SECRETARIAT OF THE ANTARCTIC TREATY, https://www.ats.aq/e/ats_keydocs.htm.

²⁰⁰ Original 12 were Argentina, Australia, Belgium, Chile, France, Japan, New Zealand, Norway, South Africa, the U.S.S.R. the U.K., and the U.S. See The Antarctic Treaty Preamble, Dec. 1, 1959, 402 U.N.T.S. 71.

²⁰¹ *Antarctic*, U.S. DEPT. OF STATE, <https://www.state.gov/e/oes/ocns/opa/c6528.htm>.

The most noticeable feature of the Antarctic Treaty is Article I, which prohibits acts of a military nature, establishing military bases, or carrying out military maneuvers unless used for scientific research “or for any other peaceful purposes.”²⁰² Scientific discovery is at the heart of the Treaty and it includes several clauses requiring the open sharing of scientific observations and results.²⁰³ However, the Treaty does not spell out dispute resolution measures. Instead, it implores disputing countries to settle differences amongst themselves and provides the option, with consent of the countries, to settle disputes through the ICJ.²⁰⁴ One instructive point within the Treaty is Article 4, which states that no territorial claims prior to the agreement shall be questioned but also forbids any new territorial claims while the Treaty is in force.²⁰⁵ This Article put a full stop to potential Antarctic land-grabbing and, importantly, the ever-present wandering eye of multinational oil corporations.²⁰⁶

There are clearly several significant differences between Antarctica and the Arctic that would preclude the application ATS to the Arctic. Most notably, the Arctic is heavily populated, with about 4 million people living within the Arctic Circle worldwide.²⁰⁷ While the vast majority of these populations are indigenous, and represented in the Arctic Council, every populated area has been claimed as sovereign territory by an Arctic nation. Also, it is unlikely that the international community would be able to put a stop to the military maneuvers that have been taking place both on, and under, the water since the Cold War. There are some similarities between the Arctic and Antarctica. Both regions are ripe for scientific exploration and experimentation. Oil and gas are in great supply in the Arctic and it is likely that fossil fuels exist in Antarctica as well. Finally, the ecosystem and wildlife in the areas are similarly dependent on a climate that, while harsh to visitors, is in a state of increasing fragility.

B. Implementing an Arctic Treaty

The possibility of an Arctic Treaty is one that has been raised frequently, but the matter has never been formally initiated. The concept is not without controversy. Opponents in the United States argue that an Arctic Treaty is unnecessary. From their perspective, to sign away rights in the Arctic could mean handing over “one of the

²⁰² The Antarctic Treaty, *supra* note 200, 402 U.N.T.S. at 71. The U.S. Coast Guard Cutter *Polar Star*, technically a warship, frequently travels to Antarctica to support “the U.S. military’s contribution to the National Science Foundation-managed U.S. Antarctic Program.” See Nick Ameen, *Introduction to Operation Deep Freeze 2018*, COAST GUARD COMPASS (Jan. 10, 2018), <http://coastguard.dodlive.mil/2018/01/introduction-to-operation-deep-freeze-2018/>.

²⁰³ See The Antarctic Treaty, *supra* note 200, 402 U.N.T.S. at 71.

²⁰⁴ See *id.*

²⁰⁵ See *id.*

²⁰⁶ But see Tim Treadgold, *Arctic Drilling is off so Explorers Head Towards the Antarctic*, FORBES (Oct. 20, 2015, 06:25 AM), <https://www.forbes.com/sites/timtreadgold/2015/10/20/arctic-oil-drilling-is-off-so-explorers-head-towards-the-antarctic/#6251f9b414b5>.

²⁰⁷ *Arctic People*, NAT’L SNOW & ICE DATA CTR., <https://nsidc.org/cryosphere/arctic-meteorology/arctic-people.html> (last visited Oct. 21, 2018).

largest and most resource-rich continental shelves in the world – extending at least 600 miles off Alaska.”²⁰⁸ This nationalist perspective as it relates to the grasping of available resources proves the necessity of treaty or some other binding agreement. The Arctic has been divided and remapped for centuries and “parts of the Arctic are national territories. But, as a whole, it is a global common.”²⁰⁹ Inconsistent domestic energy regulation in drilling and mining could lead to a catastrophic pollution incident that would have international ramifications. Inconsistent domestic fisheries policies could result in a “free-for-all that could lead to a drastic depletion of fish and crab stocks.”²¹⁰ Finally, the impact on the indigenous Arctic communities that have already been affected by the melting ice must not be overlooked. It is true that indigenous people as a group have a seat at the Arctic Council table, but they are just one vote. Inarguably, they would be the first to suffer the most consequential, and detrimental, impact of an Arctic catastrophe.

The modern-day agreements that control and monitor the activities of competing states within the Arctic Circle are incapable of managing the effects of receding ice. An Arctic Treaty could establish guidelines and procedures to slow the pace down: It could resolve disagreements such as the U.S.-Canada Beaufort Sea dispute. The Arctic Council is unprepared to mediate or resolve these types of disagreements and does not have a mandate to create international law. While the Arctic Coast Guard Forum has held successful joint exercises, its members are competing Arctic states. Any escalation in tension between two member nations could result in one pulling out of the agreement thereby dismantling its progress. An Arctic Treaty could concretely set procedures and policy and serve as a forward-thinking document that could potentially save the Arctic as we know it.

²⁰⁸ John B. Bellinger, Opinion, *Treaty on Ice*, N.Y. TIMES, June 23, 2008, at A21, <https://www.nytimes.com/2008/06/23/opinion/23bellinger.html>. Bellinger served the U.S. Dept. of State under the Presidency of George W. Bush.

²⁰⁹ *Without a Treaty to Share the Arctic, Greedy Countries Will Destroy It*, SCIENTIFIC AM., Dec. 1, 2017, <https://www.scientificamerican.com/article/without-a-treaty-to-share-the-arctic-greedy-countries-will-destroy-it/>.

²¹⁰ *Id.*



PULLING OUT OF PARIS AND FOLLOWING
CONNECTICUT: AGGRESSIVE STATE ENERGY
POLICY IN THE TRUMP ERA

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* J.D., University of Connecticut School of Law, Class of 2019. I would like to thank Vincent Pace for being the first to inspire my interest in the case central to this article; Professor Joseph MacDougald for his help and advice on all things environmental and energy over the last four years; my fellow members of the Connecticut Journal of International Law—especially the editorial board members who have helped make this presentable for publication; and, most of all, my wife Ashley for her unwavering support and saintly patience during my time in law school.

CONNECTICUT JOURNAL OF INTERNATIONAL LAW

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I. THE OPENING SHOT

President Donald Trump, fulfilling one of his campaign promises¹, announced on June 1, 2017, that it was his intention to withdraw from the Paris Agreement and that the official notification would be forthcoming². On August 4, 2017, that promise was realized when the United Nations Secretary General, António Guterres, received official notification from the United States' delegation that the United States would be withdrawing from the Paris Agreement.³ Citing economic concerns held by the people who elected President Trump to represent their interests and a study produced by the National Economic Research Associates⁴, President Trump stated that the United States could participate only in the Paris Agreement if it was renegotiated to have terms that are more favorable to the United States.⁵ This suggestion has been met with resistance from the international community involved in the creation of the Paris Agreement.⁶

The Paris Agreement is the culmination of decades of efforts made by the international community to combat the dangers of climate change by curbing the main driver of climate change, anthropogenic carbon dioxide and other greenhouse gases that humans have contributed to the atmosphere.⁷ As one of the largest contributors of greenhouse gases in the world,⁸ it is seen as vitally important that the United States continues its participation in the Paris Agreement.⁹

¹ *Donald Trump Would 'Cancel' Paris Climate Deal*, BBC NEWS (May 27, 2016), <http://www.bbc.com/news/election-us-2016-36401174> (last visited Feb. 20, 2018).

² Michael D. Shear, *Trump Will Withdraw U.S. From Paris Climate Agreement*, N.Y. TIMES, June 1, 2017, <https://www.nytimes.com/2017/06/01/climate/trump-paris-climate-agreement.html> (last visited Feb. 20, 2018).

³ *UN officially notified of US intention to withdraw from Paris climate pact*, UN NEWS (Aug. 4, 2017), <https://news.un.org/en/story/2017/08/562872-un-officially-notified-us-intention-withdraw-paris-climate-pact> (last visited Feb. 20, 2018).

⁴ PAUL BERNSTEIN, PH.D. ET AL., NATIONAL ECONOMIC RESEARCH ASSOCIATES, IMPACTS OF GREENHOUSE GAS REGULATIONS ON THE INDUSTRIAL SECTOR 53 (2017) (The National Economic Research Associates issued a statement after President Trump's speech clarifying the results of the study and the president's use of the study).

⁵ Statement by President Trump on the Paris Climate Accord (June 1, 2017), <https://www.whitehouse.gov/briefings-statements/statement-president-trump-paris-climate-accord/> (last visited Feb. 20, 2018).

⁶ See Tom Batchelor, *Paris Agreement: Macron Says Climate Deal Will not be Renegotiated Despite Trump's Demands*, THE INDEPENDENT (Sept. 19, 2017, 17:54 BST), <http://www.independent.co.uk/news/world/politics/paris-agreement-trump-macron-climate-deal-renegotiated-france-says-no-a7956036.html> (last visited Feb. 20, 2018).

⁷ See Erin L. Dedy, *Why the Law of Climate Change Matters: From Paris to A Local Government Near You*, FLA. B.J., November 2017, at 54, 54–55.

⁸ See Batchelor, *supra* note 6.

⁹ See Ed Maibach & Anthony Leiserowitz, *Should the U.S. Stay in the Paris Agreement?*, U.S. NEWS (June 1, 2017 11:18 a.m.), <https://www.usnews.com/news/best-countries/articles/2017-06-01/a-bipartisan-majority-thinks-the-us-should-stay-in-the-paris-agreement> (last visited Feb. 20, 2017).

II. THE UNITED STATES AND INTERNATIONAL CLIMATE AGREEMENTS: MAKING-UP AND BREAKING-UP

The United States has had a rather tumultuous relationship with international climate agreements stretching back at least 25 years.¹⁰ The Paris Agreement (“the Agreement”) is simply the latest instance of the United States hesitating at the precipice of commitment.¹¹ An examination of that history will show how and why the Agreement came to take the shape that it did in 2015.

The first thing to understand is that the Agreement is not a treaty in its own right, rather it is built on an existing treaty that was developed in 1992, the United Nations Framework Convention on Climate Change (“UNFCCC”).¹² For years the United Nations General Assembly had expressed concern over the deteriorating condition of the environment.¹³ Having found success addressing the depletion of the ozone with the Montreal Protocol,¹⁴ the U.N. turned its attention to the matter of climate change. The UNFCCC was the result of those efforts.

Adopted at the “Rio Earth Conference” in 1992, the UNFCCC has been ratified by 197 countries, including the United States, and came into force on March 21, 1994,¹⁵ with some ambitious goals. The ultimate goal of the UNFCCC is to limit the harmful effects of climate change by preventing “dangerous anthropogenic interference with the climate system.”¹⁶ It enumerated several guiding principles, among those principles it placed the burden of leading international efforts and easing the way for developing nations on the industrialized member nations, perceived to be the greatest contributors of greenhouse gases (“GHGs”), requiring them to make the greatest reductions in their national contributions to anthropogenic GHGs.¹⁷

Building on the framework established by the UNFCCC, the signatories to the treaty began holding yearly meetings, called the Conference of the Parties (“COP”), to develop agreements between the member nations to address the issue of climate change. The first major agreement was adopted on December 11, 1997, at the Third Session of the Conference of the Parties held in Kyoto, Japan and bears the name of

¹⁰ See Deady, *supra* note 7.

¹¹ *Id.*; see also CENTER FOR CLIMATE AND ENERGY SOLUTIONS, <https://www.c2es.org/content/congress-climate-history/> (last visited Feb. 23, 2018).

¹² See Deady, *supra* note 7.

¹³ G.A. Res. 44/228, at 152 (Dec. 22, 1989) (“Recognizing also that the global character of environmental problems, including climate change...necessitates action at all levels, including the global, regional and national levels, and the commitment and participation of all countries”).

¹⁴ See *Montreal Protocol*, UNITED NATIONS DEVELOPMENT PROGRAMME, <http://www.undp.org/content/undp/en/home/sustainable-development/environment-and-natural-capital/montreal-protocol.html> (last visited Feb. 23, 2018). (Between its adoption in 1987 and its end in 2014 the Montreal Protocol successfully eliminated 98% of controlled Ozone Depleting Substances); see also United Nations Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc. No. 102-38.

¹⁵ See *First Steps to a Safer Future: Introducing The United Nations Framework Convention on Climate Change*, UNITED NATIONS CLIMATE CHANGE, http://unfccc.int/essential_background/convention/items/6036.php (last visited Feb. 23, 2018).

¹⁶ *Id.*

¹⁷ *Id.*; see also UNFCCC, *supra* note 15, at Art. 2.

that city, the Kyoto Protocol (“the Protocol”).¹⁸ While the United States signed the Kyoto Protocol on November 12, 1998¹⁹, the Senate refused to make it binding on the United States and did not ratify the Protocol.

The Kyoto Protocol required the 37 industrialized nations and the European Community, called “Annex 1 nations” in the Kyoto Protocols²⁰, to cut emissions of GHGs to five percent below 1990 levels by 2012.²¹ It exempted over 100 nations the Protocol classified as “developing”, including China, India, Mexico, South Korea and Brazil²². Even before the United States signed the Kyoto Protocol, the Senate effectively preempted the country’s participation in the Protocol when it unanimously passed the Byrd-Hagel Resolution in June of 1997, condemning—for two reasons—any international climate agreement that did not also require “developing nations” to be bound by the same requirements as the Annex 1 nations.²³

First, the senators were worried that it did not make environmental sense because the GHG emissions of the developing nations were rapidly increasing and would soon surpass those of the United States.²⁴ As it turned out, the fears of the senators on this point were well founded but optimistic; the emissions of China surpassed those of the United States in 2005, a full decade earlier than estimated in the Byrd-Hagel Resolution.²⁵

The second reason for condemning the Kyoto Protocol was that it placed the United States and other Annex 1 nations in an economically disadvantaged position relative to the developing nations.²⁶ The five nations of greatest concern named in the Byrd-Hagel Resolution were entering their economic ascendancy,²⁷ with the gross domestic product of China, India, Brazil, and Mexico in 1997 growing at rates of 9.20%, 4.05%, 3.39% and 6.96%, respectively.²⁸ The United States, meanwhile, was finally recovering from the recession of the early Nineties²⁹ and was not eager

¹⁸ Status of Ratification of the Kyoto Protocol, UNFCCC, http://unfccc.int/kyoto_protocol/status_of_ratification/items/2613.php.

¹⁹ *Id.*

²⁰ UNFCCC, *supra* note 15, at 32.

²¹ See *Kyoto Protocol Fast Facts*, CNN Library (Mar. 24, 2017, 2:23pm) <https://www.cnn.com/2013/07/26/world/kyoto-protocol-fast-facts/index.html> (last visited Mar. 2, 2018).

²² See *id.*

²³ See *Congress Climate History*, Center for Climate and Energy Solutions <https://www.c2es.org/content/congress-climate-history/> (last visited Mar. 2, 2018); see also S. Res. 98, 105th Cong. (as passed by Senate, July 25, 1997).

²⁴ S. Res. 98, *supra* note 23, at 3 (The Senate predicted that the emissions would surpass the US’s emissions by 2015).

²⁵ *Id.*; see also Johannes Friedrich and Thomas Damassa, *The History of Carbon Dioxide Emissions*, WORLD RESOURCES INSTITUTE (May 21, 2014) <http://www.wri.org/blog/2014/05/history-carbon-dioxide-emissions> (last visited Mar. 2, 2018).

²⁶ S. Res. 98, *supra* note 23, at 3.

²⁷ See generally JONATHAN LEMCO, ARE EMERGING MARKETS STILL BUILT ON THE BRICS? (Vanguard Research, 2016); see also *South Korea*, CENTRAL INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/resources/the-world-factbook/geos/ks.html> (last visited Mar. 3, 2018).

²⁸ LEMCO, *supra* note 27, at 3, Fig. 2.

²⁹ See Christian E. Weller, *Learning Lessons From the 1990s*, ECONOMIC POLICY INSTITUTE (Apr. 10, 2002) http://www.epi.org/publication/webfeatures_viewpoints_l-t_growth_lessons/ (last visited Mar. 3,

to increase the regulatory burdens on the economy without assurances that potential competitors would be bound by the same restrictions.³⁰

So, it was those conditions, growing foreign competition and a recent recession still fresh in the minds of the people, into which the Kyoto Protocol was born that doomed the United States' participation. It was into a similar world that the Paris Agreement emerged.³¹ However, the Obama administration had learned the lessons of past attempts the United States had made to participate in an international climate agreement and determined that the Agreement would be an executive agreement rather than a treaty.³² The Obama administration also had the distinct advantage of being able to regulate GHG emissions through the Environmental Protection Agency thanks to the Supreme Court's decisions in *Massachusetts v. The Environmental Protection Agency*,³³ *American Electric Power Co. v. Connecticut* ("AEP"),³⁴ and *Utility Air Regulatory Group v. EPA* ("UARG").³⁵ These decisions taken together give the president the ability to enter an international agreement—instead of a treaty—and avoid the need for a new legislative action to give life to the Agreement by regulating GHGs through an existing regulatory scheme,³⁶ as well as allow the Obama administration to sidestep the need for Senate approval as required by the Constitution.³⁷ The weakness of this course of action is that it also means subsequent presidents may unilaterally terminate this country's participation in the Agreement.³⁸

2018) (The period from 1991 through 1995 was characterized by "[s]luggish economic, employment and wage growth").

³⁰ See S. Res. 98, *supra* note 23, at 3-4.

³¹ See generally Robert Rich, *The Great Recession: December 2007-June 2009*, Federal Reserve History (Nov. 22, 2013), https://www.federalreservehistory.org/essays/great_recession_of_200709 (The Great Recession of 2008 was the longest lasting recession since World War II though it is generally agreed that it did not rise to the level of a depression.); see also Prableen Bajpai, *The World's Top 10 Economies*, Investopedia (July 7, 2017, 10:39 AM), <https://www.investopedia.com/articles/investing/022415/worlds-top-10-economies.asp> (The United States is still the largest economy in the world as measured by gross domestic product; however, when gross domestic product measured by purchasing power parity then China has a larger GDP than the United States.).

³² See STEPHEN P. MULLIGAN, CONG. RESEARCH SERV., R44761, WITHDRAWAL FROM INTERNATIONAL AGREEMENTS: LEGAL FRAMEWORK, THE PARIS AGREEMENT, AND THE IRAN NUCLEAR AGREEMENT 16 (2017); see also Dave Boyer, *Obama, Chinese President Ratify Climate-Change Agreement*, WASH. POST, Sept. 3, 2016, <https://www.washingtontimes.com/news/2016/sep/3/obama-xi-ratify-climate-change-agreement/>.

³³ *Mass. v. EPA*, 549 U.S. 497 (2007) (Massachusetts brought suit against the EPA challenging the agency decision that the Clean Air Act did not grant it authority to regulate GHGs from mobile sources. The Supreme Court held that carbon dioxide met the criteria of an "air pollutant" under the act and that the agency decision could not stand).

³⁴ *Am. Elec. Power Co. v. Conn.*, 546 U.S. 410 (2011) (the Supreme Court unanimously held that the EPA's authority to regulate GHG emissions under the Clean Air Act, including emissions from stationary sources under § 111(d) of the Act, displaced any common law tort claims against power plants).

³⁵ *Util. Air Reg. Group v. EPA*, 573 U.S. 302 (2014) (In striking down an EPA regulation to regulate GHG emissions under the Prevention of Significant Deterioration permitting trigger as an impermissible agency interpretation of an organic statute, the court affirmed EPA's authority to regulate GHGs from stationary sources that would be captured in an emission regulatory scheme anyway).

³⁶ See MULLIGAN, *supra* note 32.

³⁷ U.S. Const. art II, § 2, cl. 2.

³⁸ See MULLIGAN, *supra* note 32.

As stated above, President Trump cited the economic concerns of the people who voted for him as the reason for his decision to withdraw from the Paris Agreement.³⁹ The question is no longer whether the United States will cease its participation in the Paris Agreement, but how quickly that withdrawal will proceed. The timeline of withdrawal depends on whether President Trump is satisfied with terminating the United States' participation in the Paris Agreement or if he attempts to withdraw from the treaty—the UNFCCC—that provides the framework upon which it was built.⁴⁰

III. TIMELINES, OPTIONS, AND LEGAL CONSIDERATIONS FOR WITHDRAWAL FROM THE PARIS CLIMATE AGREEMENT

For the time being, President Trump has decided only to terminate the United States' participation in the Paris Agreement in accordance with the terms of the Agreement,⁴¹ contained in Article 28 of the Agreement.⁴² Under the terms of the Agreement, parties to the Agreement cannot withdraw until three years after the Agreement comes into force for that country,⁴³ November 4, 2016, for the United States,⁴⁴ at which time a party may give written notification of its intent to withdraw to the Depositary.⁴⁵ That withdrawal from the Agreement then becomes effective upon the expiration of a one year waiting period,⁴⁶ which would be November 4, 2020, one day after the next presidential election. Article 28 of the Agreement provides an alternative way to withdraw, stating that: "[a]ny Party that withdraws from the Convention shall be considered as also having withdrawn from this Agreement."⁴⁷ The UNFCCC also requires signatory countries to wait for three years after the treaty's effective date before being able to give notification to the Depositary of any intention to terminate participation, but that period has long since

³⁹ Post-election survey show that economic concerns were actually the fourth and fifth reasons people voted for Donald Trump and that party identity, fear of cultural displacement and immigration concerns were the three most common reasons for voting for the Republican candidate. See Daniel Cox, et al., *Beyond Economics: Fears of Cultural Displacement Pushed the White Working Class to Trump* | *PRRI/The Atlantic Report*, PUBLIC RELIGION RESEARCH INSTITUTE (May 9, 2017), <https://www.prri.org/research/white-working-class-attitudes-economy-trade-immigration-election-donald-trump/>.

⁴⁰ See MULLIGAN, *supra* note 32, at 16-17.

⁴¹ See Shear, *supra* note 2.

⁴² Adoption of the Paris Agreement, U.N. Framework Convention on Climate Change, Dec. 12, 2016, U.N. DOC.FCCC/CP/2015/10/Add.1, art. 28 [hereinafter Paris Agreement].

⁴³ *Id.*

⁴⁴ Paris Agreement-Status of Ratification, U.N. Climate Change, http://unfccc.int/paris_agreement/items/9444.php.

⁴⁵ Paris Agreement, *supra* note 42 (The office of the Secretary-General of the United Nations acts as the Depositary of documents for the UNFCCC).

⁴⁶ *Id.*

⁴⁷ Paris Agreement, *supra* note 42, art. 28(3).

expired⁴⁸ for the UNFCCC and now there is only a required one-year notification period remaining.⁴⁹

Choosing this expedited method of withdrawal presents a question of constitutional powers and their division between the executive and legislative branches: does the president have the power to unilaterally terminate a treaty that has been ratified by the Senate in accordance with the Advice and Consent Clause?⁵⁰ The Constitution of the United States provides the method for ratification of treaties that have been negotiated by the executive in Art. II, section 2, clause 2, the aforementioned Advice and Consent Clause. What the Constitution does not tell us is the procedure for how to *unmake* a treaty, and there are—unsurprisingly—two schools of thought on the issue.⁵¹

The first school of thought claims that the power to terminate a treaty resides solely in the president as the "sole organ" of communication with foreign powers⁵² and as such is a plenary power of the Executive.⁵³ The power to unilaterally terminate a treaty has been likened to the president's power to dismiss political appointees that are also subject to the Advice and Consent Clause.⁵⁴ The fact that the exercise of this supposedly plenary power of the Executive has increased over the Twentieth Century with little controversy or protest from the legislative branch⁵⁵ may indicate that such an exercise has become accepted practice; however, it has not gone completely unchallenged in that time.⁵⁶

The opposing school of thought has challenged the notion that the president has exclusive power to terminate treaties for several reasons. First, it has been argued that the Founding Fathers could not possibly have intended that power to vest solely in the Executive because the Senate was explicitly given the role of approving any treaty by the Advice and Consent Clause.⁵⁷ It is further argued that the Founding Fathers placed enormous importance on providing assurances to other nations that the newly formed United States would honor its international obligations.⁵⁸

Second is a structural argument. It is argued that the Supremacy Clause treats legislation and treaties as equally preemptive and this requires that, like the repeal of legislation, the process to terminate a treaty must be symmetrical to the process of ratification..⁵⁹ This concept is supported by case law requiring that the repeal of

⁴⁸ "[B]ecause the UNFCCC entered into force in 1994, the three-year withdrawal prohibition expired in 1997." Mulligan, *supra* note 32, at 18.

⁴⁹ UNFCCC art. 25; *see also* MULLIGAN, *supra* note 32, at 18.

⁵⁰ *See* MULLIGAN, *supra* note 32, at 2.

⁵¹ *See* James J. Moriarty, *Congressional Claims for Treaty Termination Powers in the Age of the Diminished Presidency*, 14 CONN. J. INT'L L. 123, 132 (1999).

⁵² *See e.g.*, Mulligan, *supra* note 32, at 7-8.

⁵³ *Id.*

⁵⁴ *Id.* at 8.

⁵⁵ *Id.* at 10.

⁵⁶ *Id.* at 10.

⁵⁷ *Id.* at 9.

⁵⁸ Barry M. Goldwater, *Treaty Termination is a Shared Power*, 65 A.B.A. J. 198, 199 (1979) [hereinafter *Treaty Termination*] (Shortly after filing suit against President Carter for terminating the Mutual Defense Treaty of 1954, discussed *infra*, Sen. Goldwater authored an argument against such unilateral power citing James Madison's statements as to the importance of honoring treaties for the U.S.'s standing in the world.).

⁵⁹ *See* MULLIGAN, *supra* note 32, at 7.

statutes must conform to the same process as passing legislation, namely that it be passed by both houses of Congress (bicameralism) and presented to the president for signature (presentment).⁶⁰

Unfortunately, there is no clear answer as to which side of this dust up would win if President Trump attempted to terminate this country's participation in the UNFCCC without seeking approval from the Senate and a suit was brought to challenge the president's power to take such an action. The most prominent lawsuit to take on this issue in recent decades, *Goldwater v. Carter*,⁶¹ ran the gamut of possible outcomes. At a time when the United States was opening diplomatic relations with the People's Republic of China ("PRC"), there was concern that the president would terminate the Mutual Defense Treaty of 1954⁶² – in which the United States agreed to provide protection for the Republic of China (Taiwan) from the PRC⁶³ – prompting Congress to pass the International Security Assistance Act. This act, in part, expressed Congress' view that the president should consult with Congress prior to taking actions "affecting the continuation in force of the Mutual Defense Treaty of 1954."⁶⁴ Importantly though, the Act did not require the president to actually obtain Congress' consent before taking such an action.⁶⁵

On December 15, 1978, President Carter announced his intent to recognize the PRC and that he would be unilaterally terminating the Mutual Defense Treaty.⁶⁶ Sixteen members of the House of Representatives and nine Senators sued the president, challenging his authority under the Constitution to unilaterally terminate a treaty. The resulting decisions (the District, Circuit and Supreme Courts all weighed in) ultimately provided no clear answer to the issue. The District Court enjoined the State Department from issuing a notice of termination, reasoning that the power to terminate a treaty is "generally a shared one,"⁶⁷ and citing historical practices of providing a procedure, though one is not defined by the Constitution.⁶⁸

The D.C. Circuit Court of Appeals reversed, finding that historical practice varied⁶⁹ and that the treaty, as approved by the Senate, contained a termination clause that did not place any condition or restriction on withdrawal that would prevent the

⁶⁰ See *INS v. Chadha*, 462 U.S. 919, 954 (1983).

⁶¹ 481 F. Supp. 949, (D.D.C. 1979), rev'd, 617 F.2d 697 (D.C. Cir. 1979) (en banc) (per curiam), vacated and remanded with instructions to dismiss, *Goldwater v. Carter*, 444 U.S. 996 (1979) (plurality op.).

⁶² See MULLIGAN, *supra* note 32, at 9-10.

⁶³ See Dr. Alexander Chieh-cheng Huang, *The United States and Taiwan's Defense Transformation*, BROOKINGS INSTITUTE (Feb. 16, 2010), <https://www.brookings.edu/opinions/the-united-states-and-taiwans-defense-transformation/>.

⁶⁴ *Id.* at 11; see also International Security Assistance Act of 1978, P.L. 95-384, § 26(b), 92 Stat. 730, 746.

⁶⁵ See MULLIGAN, *supra* note 32, at 13.

⁶⁶ See *Treaty Termination* *supra* note 58, at 198.

⁶⁷ *Goldwater*, 481 F. Supp., at 964; see also MULLIGAN, *supra* note 32, at 11.

⁶⁸ *Goldwater*, 481 F. Supp., at 960; see also MULLIGAN, *supra* note 32, at 11.

⁶⁹ *Goldwater v. Carter*, 617 F.2d 697, 706-07 (D.C. Cir. 1979) (en banc) (per curiam). Judge MacKinnon wrote a lengthy and vigorous dissent in which he criticized the majority's finding that the history of terminating treaties was too varied to be a useful guide and cited the writings of Thomas Jefferson and James Madison to bolster the claim that the Founding Fathers believed that treaties were most readily comparable to legislative acts and should therefore be bound by the same procedural requirements to unmake as well as make them. *Id.* at 721-23 (MacKinnon, J., dissenting).

president from acting without the consent of the Senate.⁷⁰ The matter was then brought to the Supreme Court where the Circuit Court's decision was vacated and remanded to the District Court with instructions to dismiss on the grounds that it was a nonjusticiable political question.⁷¹ The Supreme Court has historically been reluctant to hear, much less decide, matters that fall into the shadow of the Political Question Doctrine.⁷²

Thus, based on the Court's invocation of the canon of constitutional avoidance, there is altogether very little evidence to suggest with any degree of confidence that President Trump does or does not have the authority to unilaterally terminate the United States' participation in the UNFCCC in order to hasten this country's withdrawal from the Paris Agreement.⁷³

IV. REACTION TO THE UNITED STATES' WITHDRAWAL FROM THE PARIS AGREEMENT AT HOME AND ABROAD

When President Trump announced that he intended to withdraw the United States from the Paris Agreement, the international response was less than enthusiastic.⁷⁴ The leaders of France, Germany and Italy issued a joint statement in response to President Trump's assertion that the United States may rejoin a renegotiated Agreement under better terms for the United States,⁷⁵ declaring "[w]e deem the momentum generated in Paris in December 2015 irreversible, and we firmly believe that the Paris [A]greement cannot be renegotiated, since it is a vital instrument for our planet, societies and economies."⁷⁶ There also does not seem to be consensus among the European leaders regarding the possibility of the United States rejoining the Agreement on the same terms that were negotiated at the COP 21.⁷⁷ However, President Trump's announcement of his intentions seems to have

⁷⁰ *Id.* at 708; *see also* MULLIGAN, *supra* note 32, at 12.

⁷¹ *Goldwater v. Carter*, 444 U.S. 996 (1979) (plurality op.); *see also* MULLIGAN, *supra* note 32, at 12.

⁷² *See Baker v. Carr*, 369 U.S. 186, (1962); *see also The Political Thicket*, Radiolab Presents: More Perfect (June 10, 2016, 3:00AM), http://www.radiolab.org/story/the_political_thicket/ (voter challenge of a Tennessee apportionment statute that, when it reached the Supreme Court, is reported to have sparked such vigorous and acrimonious debate between the justices over whether or not to decide the matter that the nervous breakdown of Associate Supreme Court Justice Charles Evans Whittaker is attributed to the stress of the process).

⁷³ Though it is beyond the scope of this note, there is the interesting question of what happens when there is enacted legislation that is necessary for the implementation of a treaty that a president seeks to terminate. In the normal course of things, the legislation is created because the treaty requires it. In the case of the Paris Agreement, it would be implemented through existing legislation, like the Clean Air Act.

⁷⁴ *See* Laura Smith-Spark, *World Leaders Condemn Trump's Decision to Quit Paris Climate Deal*, CNN (June 3, 2017 4:47AM), <https://www.cnn.com/2017/06/02/world/us-climate-world-reacts/index.html>.

⁷⁵ *See* Tom DiChristopher & Jacob Pramuk, *Trump is Withdrawing from Paris Climate Agreement but Wants to Renegotiate*, CNBC.com (June 1, 2017 6:30PM), <https://www.cnbc.com/2017/06/01/trump-announces-paris-climate-agreement-decision.html>.

⁷⁶ Jonathan Watts & Kate Connolly, *World Leaders React After Trump Rejects Paris Climate Deal*, THE GUARDIAN (June 1, 2017 11:33PM), <https://www.theguardian.com/environment/2017/jun/01/trump-withdraw-paris-climate-deal-world-leaders-react>.

⁷⁷ *See* Roger Harrabin, *Climate Change: Trump Will Bring US Back Into Paris Deal-Macron*, BBC.com (Dec. 12, 2017), <http://www.bbc.com/news/world-europe-42322968> (French President Emmanuel

had a galvanizing effect on the rest of the world: the last two countries in the United Nations have become signatories to the Agreement⁷⁸ and countries like China⁷⁹ and India⁸⁰ have reaffirmed their commitment to cutting GHG emissions and promoting clean energy.⁸¹

Opinion of President Trump's decision is not much better on the domestic front. Reports of support in the media, or lack thereof, for the President's decision split largely along party lines, with Republican politicians voicing support and Democrats expressing condemnation.⁸² A poll taken shortly after the 2016 election shows that nearly 70% of registered voters in the United States believe that the country should participate in the Agreement.⁸³ The same poll shows that 86% of Democrats, 61% of Independents, and 51% of Republicans believe the country should not leave the Agreement.⁸⁴

It bears repeating that the Paris Agreement was negotiated by the Obama administration with the full knowledge of the United States' tumultuous history with international climate agreements and the political and economic climate of the country at that time.⁸⁵ The Obama administration recognized the challenge this presented and negotiated an agreement whose only requirements could be implemented through existing laws and agencies and also remained consistent with existing international agreements.⁸⁶ The administration was also very careful to keep

Macron believes that President Trump will bring the U.S. back into the Agreement); *see also* Justin Carissimo, *Angela Merkel at G-20: "I Deplore" U.S. Leaving Paris Climate Accord*, CBSNews.com (July 8, 2017 12:55PM), <https://www.cbsnews.com/news/angela-merkel-donald-trump-paris-agreement-i-deplore-this/> (German Chancellor Merkel does not share British Prime Minister Theresa May's view that the U.S. could return to the Agreement someday.).

⁷⁸ *See* Paris Agreement-Status of Ratification, United Nations, http://unfccc.int/paris_agreement/items/9444.php (Nicaragua acceded on Oct. 23, 2017 and Syria on Nov. 13, 2017).

⁷⁹ *See* Justin Worland, *It Didn't Take Long for China to Fill America's Shoes on Climate Change*, TIME.COM (June 8, 2017), <http://time.com/4810846/china-energy-climate-change-paris-agreement/> (China reaffirmed its commitment to peak emissions by 2030).

⁸⁰ *See* Karl Mathiesen, *India Reaffirms Paris Climate Commitments*, CLIMATE HOME NEWS (Nov. 5, 2017 12:06PM), <http://www.climatechangenews.com/2017/05/11/indian-energy-minister-reaffirms-paris-climate-commitments/> (India will pursue clean energy "irrespective of what others do").

⁸¹ A substantial criticism of President Trump's decision to withdraw the U.S. from the Agreement is that it leaves China to take the lead in the development of the clean energy industry. *See* Worland, *supra* note 79.

⁸² *See* Nolan McCaskill & Lily Mihalik, *U.S. and Global Leaders React to Trump's Exit from Paris Climate Change Pact*, POLITICO.COM (June 1, 2017, 6:30PM), <https://www.politico.com/interactives/2017/trump-paris-climate-change-agreement-reaction/> (reporting statements made by politicians of both parties).

⁸³ *See* Jennifer Marlon, et al., *Majorities of Americans in Every State Support Participation in the Paris Agreement*, YALE PROGRAM ON CLIMATE CHANGE COMMUNICATION (May 8, 2017), http://climatecommunication.yale.edu/publications/paris_agreement_by_state/.

⁸⁴ *Id.*

⁸⁵ *Infra* at 6-7.

⁸⁶ *See* Ed King, *Paris Agreement 'Does not Need Senate Approval' Say Officials*, CLIMATE HOME NEWS (Dec. 15, 2015 11:55AM), <http://www.climatechangenews.com/2015/12/15/paris-agreement-does-not-need-senate-approval-say-officials/>; *compare* Paris Agreement, *supra* note 42, with UNFCCC, *supra* note 15; *see also* *Util. Air Reg. Group v. E.P.A.*, 134 S.Ct. 2427 (2014).

almost all binding terms out of the Agreement in order to avoid the need for Senate approval.⁸⁷ So, what does the Agreement actually require of its participants? In the simplest terms, the Paris Agreement requires communication,⁸⁸ resiliency and adaptation,⁸⁹ transparency⁹⁰ and facilitation.⁹¹

Although the Agreement does require all nations to *consider* measures aimed at improving resiliency and adaptation to the negative impacts of climate change⁹² as well as providing financial assistance to aid developing countries in that same endeavor,⁹³ no amounts are mandated and nations are not required to adopt any measures considered. Even the requirement to communicate nationally determined contributions ("NDCs"), voluntarily set target reductions in GHG emissions, lacks a binding cap on emissions,⁹⁴ and the Agreement doesn't provide for any punitive measure if a nation fails to provide the required communications or meet its intended NDC.⁹⁵ The Agreement is all carrot and no stick,⁹⁶ and as toothless a document as it actually is, it does function beautifully as a manifesto and a statement of two goals: limiting the rise of global average temperature and mitigating the harm that will result from rising global average temperatures. These are goals that sub-national actors in the United States can pursue even in the absence of federal participation in the international agreement.

V. THE RISE OF SUB-NATIONAL CLIMATE ACTIVISM IN THE UNITED STATES

After President Trump's statement, support for the Agreement and its goals was widespread enough that, almost immediately, over 1,200 United States mayors, companies, university administrators and governors pledged to pursue the goals of the Paris Agreement,⁹⁷ including a bi-partisan coalition of governors who formed the United States Climate Alliance.⁹⁸ States are prohibited from making treaties with

⁸⁷ See King, *supra* note 86.

⁸⁸ See Paris Agreement, *supra* note 42, art. 3, 4, 13, 14.

⁸⁹ *Id.* art. 6, 7.

⁹⁰ *Id.* art. 4(8), (9), 13.

⁹¹ *Id.* art. 9.

⁹² *Id.* art. 6, 7.

⁹³ *Id.* art. 9.

⁹⁴ See King, *supra* note 86; see also Paris Agreement, art. 4 ("[e]ach party shall prepare, communicate and maintain successive nationally determined contributions that it *intends* to achieve." (emphasis added)).

⁹⁵ See Daniel Gross, *The Paris Agreement is the Shove the World Needs*, SLATE.COM (Dec. 14, 2015 1:54PM),

http://www.slate.com/articles/business/moneybox/2015/12/the_paris_agreement_won_t_punish_countries_that_fall_short_but_it_s_still.html.

⁹⁶ *Id.*

⁹⁷ See Madeleine Sheehan Perkins, *A Group Representing \$6.2 Trillion of the U.S. Economy Says They're 'Still in' the Paris Climate Agreement*, BUSINESSINSIDER.COM (June 5, 2017 6:49PM), <http://www.businessinsider.com/we-are-still-in-group-represents-62-trillion-of-the-us-economy-plans-to-stay-in-paris-agreement-2017-6>; see also *About*, WEARESTILLIN.COM, <https://www.wearestillin.com/about>.

⁹⁸ See Carter Evans, *California, New York Form Climate Alliance After Trump Withdraws from Paris Accord*, CBS NEWS (June 2, 2017, 7:23PM), <https://www.cbsnews.com/news/california-ny-form-u-s-climate-alliance-after-trump-withdraws-from-paris-accord/>.

foreign governments by the Constitution⁹⁹ and can only make an agreement with another country with the consent of Congress,¹⁰⁰ but the foundational goals of the Agreement are well within the reach of state, municipal and business leaders.

California Governor Jerry Brown and former New York City Mayor Michael Bloomberg have launched the America's Pledge initiative to aggregate and report steps taken and progress made by sub-national signatories to reduce GHG emissions in the United States.¹⁰¹ On November 11, 2017, the first America's Pledge report¹⁰² was released at COP 23 in Bonn, Germany, detailing the scope of commitment in the United States.¹⁰³

Considered in the context of the Paris Agreement's stated aim of holding global average temperature increase to less than 2° Celsius¹⁰⁴ the America's Pledge signatories will have to make deep cuts in GHG emissions economy wide. As the economy is weaned off of carbon intensive sources of energy like fossil fuels, it will increasingly depend on electricity supplied through electric utilities, and without an aggressive energy policy those efforts will not produce the requisite reduction in GHG emissions.

While the federalist structure of energy regulation in the United States¹⁰⁵ allows states, counties and cities to pursue their own energy goals in the absence of federal leadership, it also places distinct jurisdictional limitations on that ability.¹⁰⁶ States attempting to navigate this passage may view it much the same as Odysseus sailing between Scylla and Charybdis,¹⁰⁷ but the states, unlike Odysseus, have a guide in the state of Connecticut.

⁹⁹ U.S. Const. art. I, § 10, cl. 1.

¹⁰⁰ U.S. Const. art. I, § 10, cl. 3.

¹⁰¹ *About America's Pledge*, AMERICA'S PLEDGE, <https://www.americaspledgeonclimate.com/about/>.

¹⁰² This report is designated Phase 1 and "maps current non-federal climate policies and actions and identifies promising areas to step up near-term action." *See* America's Pledge Phase 1 Report 10 (Bloomberg Philanthropies, Nov. 2017).

¹⁰³ Press Release, *America's Pledge Co-Chairs Mike Bloomberg and Governor Jerry Brown Reaffirm U.S. Commitment to Paris Agreement on Climate Change, Present Report on U.S. Climate Action at UN Talks*, AMERICASPLEDGEONCLIMATE.COM (Nov. 11, 2017), <https://www.americaspledgeonclimate.com/news/americas-pledge-co-chairs-mike-bloomberg-governor-jerry-brown-reaffirm-u-s-commitment-paris-agreement-climate-change-present-report-u-s-climate-action-un-talks/> (the signatories represent over half the U.S. population and economy and in the aggregate would be the third largest economy in the world).

¹⁰⁴ Paris Agreement, art. 2(1)(a).

¹⁰⁵ *See* Jim Rossi, *The Brave New Path of Energy Federalism*, 96 TEX. L. REV. 399, 399 (2016).

¹⁰⁶ *See* Steven Ferrey, *Law of Independent Power*, § 1:1 (West 2018) ("[t]he field of independent energy development is entangled in legal tentacles at every level"); *see also* Federal Power Act of 1935, 16 U.S.C.A. §§ 791-828c (West 2018) (the Act draws a jurisdictional line between federal and state regulation of the electricity industry).

¹⁰⁷ Odysseus was faced with a narrow passage between the six-headed monster, Scylla, and the whirlpool, Charybdis. They were close enough that avoiding made it certain that he would lose sailors to the other, if not the whole boat.

VI. CONNECTICUT: NAVIGATING BETWEEN THE WHIRLPOOL AND THE SHOALS

The energy policy that Connecticut has crafted has been shaped by the pressures placed on it by several factors. Factors that involve the jurisdictional division between state and federal schemes are shared by all states, whereas the factors resulting from efforts to deregulate the energy industries only affect some. The result is that energy regulation in the United States is far from uniform.¹⁰⁸

First, the Federal Power Act of 1935 ("FPA") creates a boundary between the regulatory authority of the federal and state governments,¹⁰⁹ forming an initial bisection of the regulatory spheres. The FPA also created the Federal Power Authority in 1978, later reorganized as the Federal Energy Regulatory Commission ("FERC"), vesting in it the duty and authority to regulate the interstate transmission and wholesale sale of energy. The FPA reserved to the States the power to regulate retail sales, distribution, and intrastate wholesale sales of electricity.¹¹⁰ However, Congress created a limited exception to that bright line rule with the Public Utilities Regulatory Policy Act of 1978 ("PURPA"),¹¹¹ the implementation of which was given partially to the States, requiring them to regulate wholesale transactions involving efficient generation facilities, called Qualified Facilities ("QFs"), that met certain requirements.¹¹²

Second, given how important a reliable supply of electricity is to the health and safety of its citizens and how unique the requirements of each state are in meeting that need, every state has developed a regulatory scheme adapted to its own unique set of requirements.¹¹³ For example, states in the Northeast have moved to replace oil and coal fired generation with natural gas fired turbines in response to the proximity of the Marcellus Shale providing plentiful natural gas resources and to move to generation that is less carbon intensive.¹¹⁴ Coal producing states, on the other hand, have continued to use coal as a source of fuel for generating electricity.¹¹⁵

¹⁰⁸ See, Lincoln L. Davies, *Power Forward: The Argument for a National RPS*, 42 CONN. L. REV. 1339, 1341 (2010) (discussing the multiplicity of Renewable Portfolio Standards, which are creations of state law, in the U.S. and arguing for the creation of a federal Renewable Portfolio Standard).

¹⁰⁹ Federal Power Act of 1935, 16 U.S.C.A. § 824(a) (West 2018).

¹¹⁰ *Id.* at 824(b)(1) (guaranteeing that the provisions of the Act will only apply to "the transmission of electricity energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce"); see also, Michael C. Dotten & Zachary A. Kearns, *Debating Federal and State Electricity Market Jurisdiction*, LAW360.COM (Mar. 25, 2016 3:01PM), <https://www.law360.com/articles/776329/debating-federal-and-state-electricity-market-jurisdiction>.

¹¹¹ Public Utilities Regulatory Policy Act of 1978, 16 U.S.C.A. §§ 2601-2645 (West 2018).

¹¹² Public Utilities Regulatory Policy Act of 1978, Pub. L. No. 95-617, § 210.

¹¹³ See *Allco Finance Fin. Ltd. v. Klee*, 861 F.3d 82, 101 (2d. Cir. 2017) ("[T]he regulation of utilities one of the most important functions traditionally associated with the police power of the States." Quoting *Ark. Elec. Co-op. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983)).

¹¹⁴ See, CONN. DEPT. OF ENERGY AND ENVTL. PROT., COMPREHENSIVE ENERGY STRATEGY 9 (2018).

¹¹⁵ See *West Virginia: State Profile and Energy Estimates*, U.S. ENERGY INFORMATION ADMINISTRATION (July 20, 2017), <https://www.eia.gov/state/?sid=WV> (in 2016, West Virginia was the second largest coal producer in the U.S. and 94% of the state's net electricity generation was fueled by coal).

Third, a wave of enthusiasm for the deregulation of the electric utility industry in the mid-Nineties,¹¹⁶ enthusiasm based on the belief that promoting competition in energy markets would yield benefits for ratepayers in the form of lower prices,¹¹⁷ prompted 16 states to restructure their electricity markets.¹¹⁸ This meant requiring the traditionally vertically-integrated electric utilities in those states to divest their generation assets¹¹⁹ and move to a system where utilities purchased electricity on a competitive market.¹²⁰ It also meant exposing the energy markets to competitive forces and the risk of market manipulation, suspected in the destabilization of the California market in 2000-2001,¹²¹ to such an extreme that it resulted in rolling black-outs across the region and caused many states to reconsider any taking any steps towards deregulation.¹²²

Finally, as part of the federal government's effort to promote market competition through deregulation, FERC issued orders¹²³ encouraging states to transfer control of the transmission system, the high-voltage system for transmitting electricity over long distances, to independent organizations called Independent System Operators ("ISOs") or Regional Transmission Operators ("RTOs"). The purpose of this was to ensure that the new class of independent generators of electricity would have non-discriminatory access to the wholesale markets.¹²⁴

This is the complex system of regulation which Connecticut has managed to successfully navigate in pursuing its energy goals; all four of these factors are at play and the State has developed a policy that plays off these barriers in a way that has been held to be constitutional.¹²⁵ The other governors who have joined the U.S. Climate Alliance do not all face the same set of factors, six of the seventeen govern states that have not undergone deregulation and restructuring,¹²⁶ but the lessons to be learned from the Circuit Court's decision in *Allco Finance Ltd. v. Klee* can be adapted for use in regulated states. The remainder of this paper will focus on the ways that Connecticut procures and encourages the development of renewable energy.

¹¹⁶ See SEVERIN BORENSTEIN & JAMES BUSHNELL, ENERGY INSTITUTE AT HAAS, THE U.S. ELECTRICITY INDUSTRY AFTER 20 YEARS OF RESTRUCTURING 2 (2014).

¹¹⁷ *Id.*

¹¹⁸ See *Electricity Deregulation Map*, ELECTRICITYLOCAL.COM (Apr. 2014), <https://www.electricitylocal.com/resources/deregulation/>.

¹¹⁹ *Id.* at 6.

¹²⁰ *Id.* at 13-14.

¹²¹ *Id.* at 2.

¹²² *Id.*

¹²³ See FERC Order 888.

¹²⁴ See *Id.*

¹²⁵ See *Allco Finance Ltd.*, 861 F.3d 82.

¹²⁶ Compare *Governors*, UNITED STATES CLIMATE ALLIANCE, <https://www.usclimatealliance.org/governors-1/> (last visited Apr. 1, 2018), with *Map of Deregulated Energy States and Markets (Updated 2017)*, ELECTRICCHOICE.COM (June, 2017), <https://www.electricchoice.com/map-deregulated-energy-markets/>.

VII. RFP, RPS, AND RECS: THE THREE "RS" OF RENEWABLE ENERGY PROCUREMENT

The Request for Proposals ("RFP") is a standard method of procurement, the use of which goes well beyond government. Simply put, it is an invitation to enter a competitive bid to provide a product or service.¹²⁷ This is a tool that Connecticut has used to procure both grid-scale renewable generation¹²⁸ as well as behind-the-meter projects aimed at making solar installations available to lower income neighborhoods.¹²⁹ This process will become more important for the implementation of Connecticut's energy policy as the State has recognized that grid-scale renewables are more cost effective and has decided to cap the annual investment in distributed generation required of utilities at \$35 million for residential solar program in coming years.¹³⁰

Renewable Portfolio Standards require utilities to procure or generate from renewable energy facilities a certain percentage of the energy supplied to consumers.¹³¹ The purpose of such a requirement is to encourage the development of renewable energy sources¹³² and in some states, like Connecticut, the utilities are required to increase the percentage of renewable energy procured at regular intervals.¹³³

Renewable Energy Credits ("RECs") are creations of state property law¹³⁴ that allow utilities to fulfill their RPS obligation by purchasing RECs from renewable sources.¹³⁵ RECs in Connecticut are divided into different classes based on attributes such as fuel source (solar, biomass, etc.) and may also be treated differently depending on the location of the generation facility.¹³⁶

¹²⁷ See *Government Contracting, Recent Developments*, 37 STETSON L. REV. 615, 681 (2008).

¹²⁸ See 2013 Conn. Pub. Acts 13-303, *An Act Concerning Connecticut's Clean Energy Goals*; see also 2015 Conn. Pub. Acts 15-107, *An Act Concerning Affordable and Reliable Energy*; see also 2017 Conn. Pub. Acts 17-3, *An Act Concerning Zero Carbon Solicitation and Procurement*.

¹²⁹ See 2015 Conn. Pub. Acts 15-194, *An Act Concerning the Encouragement of Local Economic Development and Access to Residential Renewable Energy* (the Act directs the Connecticut Green Bank to "structure and implement a residential solar investment program" with the goal of deploying 300 megawatts of new residential solar photovoltaic installations).

¹³⁰ See CONN. DEPT. OF ENERGY AND ENVTL. PROT. *supra* note 101, at 37 (CT DEEP evaluated 6 different approaches for cost/benefit for ratepayers, including continuing the current Residential Solar Investment Program and LREC/ZREC as they are, capping generation to a specified amount of power, and the investment cap).

¹³¹ See *Most States Have Renewable Portfolio Standards*, ENERGY INFORMATION ADMINISTRATION (Jan. 2012), <https://www.eia.gov/todayinenergy/detail.php?id=4850>.

¹³² *Id.*

¹³³ See Conn. Gen. Stat. § 16-245a(a)(1)-(15) (2017).

¹³⁴ *Wheelabrator Lisbon, Inc. v. Conn. Dep't of Pub. Util. Control*, 531 F.3d 183, 186 (2d. Cir. 2008) (per curiam).

¹³⁵ Conn. Gen. Stat. § 16-245a(b) (2017).

¹³⁶ See *Allco Fin. Ltd. v. Klee*, 861 F.3d at 93-94 (bidders in the Connecticut RFPs with generation facilities located in control areas adjacent to ISO-NE to pay additional transmission cost to transmit electricity into the regional system).

VIII. ALLCO FINANCE LTD. V. KLEE: THE ROAD TO PARIS

Recently, a decision issued by the U.S. Second Circuit Court of Appeals¹³⁷ began to push aside the looming specter of federal preemption and dormant Commerce Clause challenges of state energy policy¹³⁸. The state of Connecticut, by rejecting the bids of Allco Finance in a 2013 Request for Proposals (“RFP”),¹³⁹ spurred a series of lawsuits challenging Connecticut’s energy policies and the laws passed to enact those policies. What this case, and its predecessor cases, represent is the maturation of four decades of awkward growth in energy policy.¹⁴⁰

A. Background

In the 40 years since its passage, the Public Utilities Regulatory Policy Act of 1978 (“PURPA”),¹⁴¹ in combination with the FPA,¹⁴² has limited the scope of a state’s ability to craft energy policy within its borders¹⁴³. The FPA was passed to regulate the expanding electrical system in the first half of the Twentieth century¹⁴⁴, which until shortly before the passage of the FPA had consisted largely of unconnected systems run by budding monopolies¹⁴⁵, because the system was developing to the point that there was greater interconnectedness of electrical infrastructure between the states.¹⁴⁶

In addition to the need to regulate the industry because of its increasing presence and interstate spread, was the need to regulate the utility industry because of its monopolistic nature.¹⁴⁷ Federal regulation was also necessary to protect customers, who had become dependent on electricity, from the hardships encountered by the utility.¹⁴⁸ The FPA also created the Federal Energy Regulatory Commission¹⁴⁹

¹³⁷ See *Allco Fin. Ltd. v. Klee*, 861 F.3d 82 (2017).

¹³⁸ Adrienne Thompson and Jasmine C. Hites, *Second Circuit Upholds Connecticut's Renewables Solicitation Program And RPS Against Preemption, Dormant Commerce Clause Challenges*, MONDAQ (July 20, 2017), <http://www.mondaq.com/unitedstates/x/612254/Renewables/Second+Circuit+Upholds+Connecticuts+Renewables+Solicitation+Program+and+RPS+Against+Preemption+Dormant+Commerce+Clause+Challenges>.

¹³⁹ *Id.*

¹⁴⁰ Harvey Reiter, *Removing Unconstitutional Barriers to Out-of-State and Foreign Competition from State Renewable Portfolio Standards: Why the Dormant Commerce Clause Provides Important Protection for Consumers and Environmentalists*, 36 ENERGY L.J. 45 (2015).

¹⁴¹ 16 U.S.C.A. §§ 2601-2645 (West 2018).

¹⁴² 16 U.S.C.A. §§ 791-828c (West 2018).

¹⁴³ Joel B. Eisen, *Who Regulates the Smart Grid?: FERC's Authority over Demand Response Compensation in Wholesale Electricity Markets*, 4 SAN DIEGO J. CLIMATE & ENERGY L. 69, 95 (2013).

¹⁴⁴ *New York v. F.E.R.C.*, 535 U.S. 1, 1 (2002).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ Shelley Welton, *Clean Electrification*, 88 U. COLO. L. REV. 571, 611–12 (2017).

¹⁴⁸ *History of Electricity*, INSTITUTE FOR ENERGY RESEARCH (Aug. 29, 2014), <http://instituteforenergyresearch.org/history-electricity/#Rise>.

¹⁴⁹ FPA, 16 U.S.C.A. § 791.

(“FERC”) to oversee the interstate transmission of electricity, gas and oil.¹⁵⁰ To achieve that regulation of interstate electricity, FERC has the authority to set and regulate wholesale electricity prices.¹⁵¹

PURPA was passed at another time of significant change and hardship for the energy industry when the energy crises of the early 1970s emphasized the country’s need to reduce its dependence on foreign fossil fuels.¹⁵² To this end, PURPA encouraged the development of more efficient and renewable methods of electricity generation,¹⁵³ and to achieve this the Act contained a “must buy” provision¹⁵⁴ for generation facilities that met certain standards, or QFs.¹⁵⁵

In the suit brought against the state of Connecticut (“the State”) by Allco Finance Ltd. (“Allco”) in federal court, the Company claimed that the State’s renewable energy credit (“REC”) system and its 2013 and 2015 Requests for Proposals (“RFPs”) for renewable energy were unconstitutional on two grounds. First, that they were preempted by PURPA and the FPA and, second, that they were violations of the dormant Commerce Clause¹⁵⁶. This is not the first time in recent years that a state’s attempts to increase its supply of renewable energy has been challenged in courts,¹⁵⁷ but it is following a trend of narrowing decisions that states have given heed to and tailored their energy policies accordingly.¹⁵⁸

B. The Litigious History of Allco in Connecticut

In addition to the suits that Allco has filed against the State, it has also filed suit in Massachusetts against that state as well as several utilities.¹⁵⁹ That lawsuit, while it also makes claims that the state’s energy policy encroaches on federal power, focuses in good part on the determination of avoided cost¹⁶⁰ and forecasting the contractual price of electricity.¹⁶¹

In Connecticut, Allco filed its first suit (*Allco I*) when bids that Allco submitted in response to a 2013 RFP (“2013 RFP”) for renewable energy were rejected.¹⁶² Allco sought damages and equitable relief through the voiding of the contract

¹⁵⁰ FPA, 16 U.S.C.A. § 813.

¹⁵¹ FPA, 16 U.S.C.A. § 824d.

¹⁵² Chris Warren, *Once an Obscure Law, PURPA Now Drives Utility-Scale Solar. Regulatory Conflict Quickly Followed*, GREEN TECH MEDIA (Feb. 23, 2017), <https://www.greentechmedia.com/articles/read/purpa-is-causing-conflict-in-montana>.

¹⁵³ PURPA, 16 U.S.C.A. § 2611.

¹⁵⁴ PURPA, 16 U.S.C.A. § 2621.

¹⁵⁵ 10 C.F.R. § 451.4.

¹⁵⁶ *Allco IV*, 861 F.3d at 89.

¹⁵⁷ *F.E.R.C. v. Elec. Power Supply Ass’n*, 136 S. Ct. 760, 766, 193 L. Ed. 2d 661 (2016), *as revised* (Jan. 28, 2016) (“EPSCA”).

¹⁵⁸ *Id.*; *see also Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 194 L. Ed. 2d 414 (2016) (Court held Maryland regulation forcing utilities to enter contracts for electrical capacity to be pre-empted by the FPA).

¹⁵⁹ *Allco Renewable Energy Ltd. v. Massachusetts Elec. Co.*, 208 F. Supp. 3d 390 (D. Mass. 2016), *reconsideration denied*, 235 F. Supp. 3d 320 (D. Mass. 2017).

¹⁶⁰ *Id.* at 392.

¹⁶¹ *Id.* at 393.

¹⁶² *Allco IV*, 861 F.3d at 89.

between the utilities in Connecticut and one of the winning bidders. Allco claimed that the State's RFP "fixed" the wholesale price of electricity, which is a power reserved for FERC by the FPA.¹⁶³ This case was dismissed for lack of standing and because its injuries "were not likely to be redressed by a favorable outcome."¹⁶⁴

Allco brought suit against the State three more times¹⁶⁵ with similar challenges under the doctrine of preemption and the dormant Commerce Clause; all of Allco's suits stemming from the Connecticut RFPs have been unsuccessful. *Allco III* was brought after the State issued a draft RFP in 2015 ("2015 RFP"). Allco refused to participate, claiming that there was a substantial likelihood that the 2105 RFP would be similar in form to the 2013 RFP, which resulted in no winning bids for Allco, and that it would likely result in the State compelling utilities and winning generators to enter into contracts for the supply of power.¹⁶⁶ Allco still claimed that the RFPs encroach on authority reserved to FERC, but it is a subtle difference from the claims in *Allco I* and *Allco II*.

C. Allco IV: The Greatest Hits of Allco I, II, & III; or Practice Does Not Always Make Perfect

It cannot be said that Allco lacks persistence. On March 30, 2016, Allco filed the complaint that initiated this action, *Allco IV*.¹⁶⁷ In the *Allco IV* Complaint, the plaintiff asserted that (1) the 2013 RFP¹⁶⁸ and 2015 RFP would "[C]ompel and order the utility to enter into wholesale energy contracts"¹⁶⁹ and is preempted by the FPA; and (2) that the State's Renewable Portfolio Standard Program ("RPS Program") and Renewable Energy Credits ("RECs") placed an undue burden on interstate commerce and violated the dormant Commerce Clause.¹⁷⁰ The defendants again raised the defense that Allco did not have standing to bring the suit, but the court found this time that Allco did have standing to bring both claims as it could show an injury-in-fact and that redress of its injuries was possible if a favorable decision was rendered for the plaintiff.¹⁷¹

¹⁶³ *Allco Fin. Ltd. v. Klee*, No. 3:13CV1874 JBA, 2014 WL 7004024, at *2 (D. Conn. Dec. 10, 2014), *aff'd on other grounds*, 805 F.3d 89 (2d Cir. 2015), *as amended* (Dec. 1, 2015) ("*Allco I*").

¹⁶⁴ *Allco I*, No. 3:13CV1874 JBA, 2014 WL 7004024, at *3-6.

¹⁶⁵ *Allco Fin. Ltd. v. Klee*, No. 3:13CV1874 JBA, 2014 WL 7004024, (D. Conn. Dec. 10, 2014), *aff'd on other grounds*, 805 F.3d 89 (2d Cir. 2015), *as amended* (Dec. 1, 2015) ("*Allco II*"); *Allco Fin. Ltd. v. Klee*, No. 3:15-CV-608 (CSH), 2016 WL 1069043, (D. Conn. Mar. 17, 2016) ("*Allco III*"); *Allco IV*.

¹⁶⁶ *Allco IV*, 861 F.3d at 91.

¹⁶⁷ *Allco IV*, 861 F.3d at 92.

¹⁶⁸ On July 11, 2016, Allco notified the court that a winning bidder in the 2013 RFP was terminating its contract and that Allco's claims against the 2013 RFP were now moot, therefore it would proceed solely on its claims related to the 2015 RFP.

¹⁶⁹ *Allco IV*, 861 F.3d at 92 (internal quotations omitted).

¹⁷⁰ *Allco IV*, 861 F.3d at 92-93.

¹⁷¹ *Allco IV*, 861 F.3d at 95, 102.

D. Analysis of the Claims

There are two types of preemption¹⁷²; “field” preemption, where federal law has specifically allocated authority to the federal government¹⁷³, and the “conflict” preemption that occurs when, in the absence of explicit federal authority to regulate, federal and state laws are incompatible.¹⁷⁴ All of the Allco actions made claims of “field” preemption, asserting that the FPA grants FERC the authority to regulate prices for interstate wholesale purchases of electricity¹⁷⁵ and that the State does not have the authority to compel the sales “[U]nless it does so within the bounds of the limited exception defined by Section 210 of PURPA.”¹⁷⁶ Section 210 of PURPA seeks to encourage the development of efficient cogeneration and renewable generation facilities with a nameplate capacity of 80 megawatts or less.¹⁷⁷

Section 210 also authorizes FERC to implement a “must buy” provision for QFs based on the rebuttable presumption that QFs would not have equal access to the electrical markets. At the time that PURPA was passed, the utility business model in the country was one of vertical integration.¹⁷⁸ The utility owned everything from the generation facility to the wires connected to the customer’s houses and business¹⁷⁹ and it was posited that the utilities, without federal compulsion, would refuse to enter into contracts to purchase power from the QFs.¹⁸⁰ Allco’s claim of preemption under PURPA is that because the 2015 RFP may result in the State directing the utilities to enter into contracts with generation facilities that are less than 80 megawatts, the State is preempted by FERC’s authority over such contracts.

The court engages in statutory interpretation to evaluate Allco’s claim that the 2015 RFP will result in the State compelling utilities to sign contracts with generators.¹⁸¹ This is largely an application of logic to the language of the enacting statutes and the draft of the 2015 RFP. The language of the authorizing statutes is that the Commissioner of the Department of Energy and Environmental Protections (“DEEP”) “may direct” the utilities to “enter into” contracts.¹⁸² “May direct” is a discretionary term and not a compulsory one.

The court does not cite any authority that guides its statutory interpretation, but Connecticut does have a statute that guides its courts in these matters.¹⁸³ That law, and its interpretation by the courts¹⁸⁴, directs courts to view all language used by the

¹⁷² Note, *Preemption As Purposivism's Last Refuge*, 126 Harv. L. Rev. 1056, 1057–58 (2013).

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ F.E.R.C. v. Elec. Power Supply Ass’n, 136 S. Ct. 760, 766 (2016), *as revised* (Jan. 28, 2016).

¹⁷⁶ Allco IV, 861 F.3d at 97.

¹⁷⁷ 16 U.S.C. § 824a–3.

¹⁷⁸ *History of Electricity*, *supra* note 148.

¹⁷⁹ *Id.*

¹⁸⁰ Afton Energy, Inc. v. Idaho Power Co., 107 Idaho 781, 785, 693 P.2d 427, 431 (1984) (Court held that FERC had the authority to compel a utility to enter into a contract with a QF for the purchase of power).

¹⁸¹ Allco IV, 861 F.3d at 98–99.

¹⁸² 2013 Conn. Legis. Serv. P.A. 13-303 (S.B. 1138) (WEST); 2015 Conn. Legis. Serv. P.A. 15-107 (S.B. 1078) (WEST).

¹⁸³ Conn. Gen. Stat. Ann. § 1-2z (West).

¹⁸⁴ Kendall v. Comm’r of Correction, 162 Conn. App. 23, 31, 130 A.3d 268, 274 (2015).

legislature as intentional and having its plain meaning. Here, the legislature used the permissive term “may” rather than one that requires the Commission to act. The *Allco IV* court applied a similar principle and found that Allco’s claim that the 2015 RFP would result in the Commissioner of DEEP compelling the utilities to enter power purchase agreements (“PPAs”) to be insufficient to survive a motion to dismiss.¹⁸⁵

Allco also claims that the State’s RFP is preempted because it indirectly sets prices in the wholesale interstate energy markets.¹⁸⁶ Allco relies heavily on *Hughes v. Talen Energy Marketing, LLC*¹⁸⁷ (“*Hughes*”) and *PPL EnergyPlus, LLC v. Solomon*¹⁸⁸ (“*Solomon*”). *Hughes* was a landmark case in energy litigation which has been distinguished by *Allco IV*. In *Hughes*, Maryland was attempting to facilitate the construction of a generation facility by soliciting bids for its construction and operation and then requiring utilities to enter into 20-year contracts to purchase capacity, but conditioned those contracts on the requirement that the generator sell capacity to the utilities through an auction held by the Regional Transmission Operator (“RTO”) or Independent Service Operator (“ISO”).

The FPA grants FERC the authority to regulate interstate wholesale electricity prices.¹⁸⁹ It accomplishes this by reviewing contracts between utilities and suppliers for reasonableness or by holding auctions through the RTOs.¹⁹⁰ Because the Maryland scheme conditioned the contracts on the generator selling capacity through the auctions held by the RTO, which is under exclusive control by FERC, the court found the Maryland scheme to be an impermissible encroachment on FERC’s jurisdiction.¹⁹¹

In *Solomon*, New Jersey was also attempting to encourage the development of new power plants, and just like Maryland it was attempting to compel utilities to enter into contracts with the proposed facilities. Unlike the Maryland scheme, the New Jersey regulation guaranteed, in the contracts, the wholesale purchase price of electricity that the generators would receive in the capacity auctions. Again, the FPA grants FERC the exclusive authority to set wholesale prices.¹⁹² Despite the fact that New Jersey required that the contracts be submitted to FERC for review after negotiations, it was determined that the state set the wholesale purchase prices and were therefore preempted.¹⁹³

Connecticut’s regulatory scheme differs from *Hughes & Solomon* sufficiently enough that the court found Allco’s argument unconvincing. First, the State’s RFP does not require the parties to take part in the ISO-New England (“ISO-NE”) capacity auctions. In fact, the State very carefully avoids utilization of the wholesale

¹⁸⁵ *Allco IV*, 861 F.3d at 97.

¹⁸⁶ *Allco IV*, 861 F.3d at 98.

¹⁸⁷ *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 194 L. Ed. 2d 414 (2016).

¹⁸⁸ *PPL EnergyPlus, LLC v. Solomon*, 766 F.3d 241 (3d Cir. 2014).

¹⁸⁹ FPA, 16 U.S.C.A. § 824d.

¹⁹⁰ *Hughes*, 136 S. Ct. at 1290, 194 L. Ed. 2d 414.

¹⁹¹ *Hughes*, 136 S. Ct. at 1291-1292, 194 L. Ed. 2d 414.

¹⁹² FPA, 16 U.S.C.A. § 824d.

¹⁹³ *Solomon*, 766 F.3d at 254.

markets to implement the RFP. They are instead bilateral contracts that are negotiated by the utility and generators. FERC may review the contracts for reasonableness¹⁹⁴ but that is a discretionary power, not one that is reserved exclusively for FERC. Therefore, the court found that the 2015 RFP authorizing statute is not at odds with *Hughes*.¹⁹⁵ Because the statutes do not guarantee the prices received at the ISO-NE capacity auctions they are not at odds with *Solomon* either.¹⁹⁶

E. Dormant Commerce Clause

The dormant Commerce Clause has posed a significant threat to state energy policy, particularly state RPSs.¹⁹⁷ States had a tendency to craft RPS policy in a way that favored local, intrastate sources of energy over out-of-state sources.¹⁹⁸ This is a sensible move for politicians because it keeps money in state and concerns over air pollution have largely been local ones. Historically though, “greenwashing” a protectionist regulation or law is not enough for it to escape being struck down for violating the dormant Commerce Clause.¹⁹⁹

The analysis the Court engages in to determine if Connecticut has unreasonably discriminated against products from other states is, perhaps not surprisingly, similar to the analysis a court might undertake when examining a claim of exclusionary business practices in an antitrust suit. The court first compares the product to see if the product that is allegedly discriminated against is a reasonable substitute²⁰⁰ for the intrastate product. This helps to establish the scope of the market and whether the products actually compete in that market.²⁰¹ Finally, the court examines if the party alleged to be engaging in anticompetitive, exclusionary practices has a valid reason to do so, called a business justification in the antitrust context.²⁰²

Allco’s dormant Commerce Clause argument asserts that the State’s REC program and RFP unfairly favor local renewables over more distant ones.²⁰³ First the Court compared the RECs from the Georgia facility to those created under

¹⁹⁴ *Hughes*, 136 S. Ct. at 1290, 194 L. Ed. 2d 414.

¹⁹⁵ *Allco IV*, 861 F.3d at 100.

¹⁹⁶ *Id.*

¹⁹⁷ *Reiter*, *supra* note 136.

¹⁹⁸ *Id.* at 46.

¹⁹⁹ See *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994) (Court found that a Massachusetts milk pricing regulation was designed to protect the dairy industry in the state despite it being an environmental regulation on its face); see also *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (Court struck down a New Jersey statute intended to conserve resources and protect citizens by prohibiting the importation of solid waste from other states).

²⁰⁰ See *US v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 394-401 (1956) (court examined the cross elasticity of the flexible packaging material market to determine the scope of the market and the defendant’s power in that market).

²⁰¹ *Id.*

²⁰² See *Aspen Skiing Co. v. Aspen Highland Skiing Corp.*, 472 U.S. 585, 609-10 (1985) (court found that the defendant’s claims that it terminated participation in a joint marketing and efforts to dissuade visitors from patronizing a rival ski area because of concerns over the quality of that rival were not a valid business justification for engaging in an exclusionary practice).

²⁰³ *Allco IV*, 861 F.3d at 102.

Connecticut law.²⁰⁴ Connecticut defines its RECs to harmonize with the needs of the larger regional electricity system governed by two FERC sanctioned and regulated entities: the regional independent system operator, ISO-NE, and the New England Power Pool Generation Information System ("NEPOOL-GIS").²⁰⁵ NEPOOL-GIS is responsible for issuing and tracking renewable energy certificates for renewable energy generated in, or adjacent to, the ISO-NE control area²⁰⁶ and ISO-NE oversees system reliability and operates wholesale energy markets for the New England states.²⁰⁷

NEPOOL-GIS is the entity that determined that only RECs generated in the ISO-NE control territory or an adjacent territory are eligible RECs in that territory, not the state of Connecticut.²⁰⁸ Therefore, a REC generated in Georgia cannot be a REC in Connecticut, according to an organization whose rules have been sanctioned by the relevant federal regulator, FERC.²⁰⁹ The fact that Connecticut utilized the rules of ISO-NE and NEPOOL-GIS also negated Allco's claim that its New York facility was discriminated against because it would have been required to pay an additional transmission fee to sell its power into the ISO-NE system.²¹⁰

Finally, Allco's claim of discrimination against its Georgia facility is defeated by Connecticut's need to promote the generation of clean energy in the region. One purpose of promoting clean generation in or near Connecticut is the desire to displace generation facilities that emit more traditionally and regionally harmful pollutants.²¹¹ The Court relies heavily on *General Motors Corp. v. Tracy* ("*Tracy*") to guide its dormant Commerce Clause analysis and notes that the Court in *Tracy* made it clear that health and safety concerns are relevant factors to be weighed in such an analysis.²¹²

IX. CONCLUSION

Global warming is an existential threat to our world that cannot be ignored any longer and President Trump's decision to withdraw the United States from the Paris Agreement is a substantial blow to the international community's attempts to stem the tide of climate change. Although the world may have been disappointed by the President's decision, there are people in the United States who have decided that the issue is too important to sit out while the federal government does nothing. The challenge for these ambitious state governments is to navigate the byzantine system

²⁰⁴ *Id.* at 105-6.

²⁰⁵ *Id.*

²⁰⁶ See NEPOOL Generation Information System, <http://www.nepoolgis.com/>.

²⁰⁷ See ISO New England, What We Do, <https://www.iso-ne.com/about/what-we-do/>.

²⁰⁸ See *Allco Finance Ltd v. Klee*, 861 F.3d at 107.

²⁰⁹ *Id.*

²¹⁰ *Id.* at 107-08.

²¹¹ See Brief of Defendant-Appellee Robert Klee at 49, *Allco Finance Ltd. v. Klee*, 861 F.3d 82 (2d. Cir. 2017) (No. 16-2946 & No. 16-2949) (citing the State's non-attainment for status for ozone under the Clean Air Act and the need to reduce nitrogen oxide and particulate emissions and that fossil fuel generation is a primary source for those criteria pollutants).

²¹² See *Allco Fin. Ltd.*, 861 F.3d at 107 (citing *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 307 (1997)).

of energy regulation that has developed in this country, but there is guidance to be found in the state of Connecticut's energy policy. Knowing when to utilize the federal regulatory structures to protect its policy from dormant Commerce Clause challenges and when to carefully avoid dipping a toe into the waters prohibited to the States has allowed Connecticut to blaze a path for others to follow.

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