

# CHINA'S EPOCHAL CASE: A TALE OF TWO SHIPS

James A.R. Nafziger\*

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\* Thomas B. Stoel Professor of Law and Director of International Programs, Willamette University College of Law; Honorary Professor, East China University of Politics and Law.

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A case likely to go down as modern China's longest-ever is finally history. After more than 75 years since a cause of action arose and over 25 years since a concluding stage of court proceedings began, a judgment was finally and fully enforced against a foreign party. Even after the Supreme People's Court effectively ended the proceedings by ruling against a petition for a retrial following the judgment, the extraordinary case of *Zhong Wei Steamship Co. v. Mitsui O.S.K. Lines, Ltd.*<sup>1</sup> labored on for four more years until the judgment was satisfied in 2014. What began as simple lease contracts between two shipping companies during the 1930s would become ensnarled in a controversy that was complicated and delayed by war, disputes and deaths within a family, a controversial change of both corporate and individual domiciles from Shanghai to Hong Kong, litigation in both Japan and China, murky issues of public and private international law, and procedural snags.

The last long leg of a legal voyage through frustrated claims, petitions and litigation amid the shoals of technicalities began in 1986. In June of

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1. SUP. PEOPLE'S CT., Dec. 23, 2010 [hereinafter *Zhong Wei*], initially entitled *Zhong Wei Steamship Co. (Hong Kong) vs. Japan Line Co., Ltd.* when the concluding stage of court proceedings began in 1988. A trial of the case involved six hearings over a dozen years. *Zhong Wei Steamship Co. (Hong Kong) v. Mitsui O.S.K. Lines, Ltd.*, (1989) HHSFZ No. 25 (Shanghai Mar. Ct., Dec. 7, 2007) (Judgment). The Shanghai High People's Court, as the court of second instance, rejected an appeal of the judgment on August 6, 2010. The defendant then filed a petition for a retrial on August 26, 2010, but the Supreme People's Court's ruling in 2010 rejected this petition.

that year, Zhong Wei (earlier, Chung Wei), a Hong Kong shipping company owned by a Shanghai businessman, sought to file an action in the Shanghai Maritime Court against Japan Line Co., Ltd., one of several predecessors in interest of the ultimate defendant Mitsui. The court, then in its infancy, rather cautiously accepted the action for filing only on December 30, 1988 and docketed it on January 5, 1989. The plaintiffs<sup>2</sup> sought compensation for two lost ships that Zhong Wei had time-chartered in 1936 to a Japanese company, Daido.<sup>3</sup> The plaintiffs also sought compensation for the accrued rental charges (charter hires) and lost income. The claims were based on the apparent destruction of both ships during the Sino-Japanese War, one as the victim of a typhoon and the other as the victim of a submarine torpedo. Neither the charterer nor its consecutive successors in interest ever compensated the plaintiffs. After a protracted trial, the Shanghai Maritime Court rendered a judgment in favor of the plaintiffs on December 7, 2007.

Besides the likely record-setting longevity of both the court proceedings and the underlying dispute, the 2007 decision marked the first time that Chinese plaintiffs had won damages against a Japanese defendant for injuries arising out of events during World War II. It also appears to have been the largest judgment to date against a foreign party in a Chinese court.<sup>4</sup> The Shanghai High People's Court sustained the judgment on August 6, 2010, and the Supreme People's Court rejected the defendant's petition for a retrial on December 23, 2010. After the defendant had failed to satisfy the judgment, the Shanghai Maritime Court served it with an Enforcement Notice on December 28, 2011. Finally, on April 24, 2014 the defendant paid the judgment, but only after the Court had ordered the arrest of its vessel in a Chinese port five days earlier.<sup>5</sup>

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2. "Plaintiffs" rather than "plaintiff" will generally be used throughout this article even though, as will be apparent, the interests of the respective co-plaintiffs in successive proceedings were separable and not always aligned.

3. In 1964 the charterer of the two ships, Daido Kaiun Kabushiki Kaisha (The United Ocean Transport Co. Ltd.), a Japanese company headquartered in Kobe, Japan [hereinafter Daido], merged with Japan Line Co., Ltd., which then merged with Navix Line Ltd. (sometimes referred to as "Navix Maritime Co.") in June 1989 after Zhong Wei's case was accepted by the Shanghai Maritime Court. Mitsui, O.S.K. Lines, Ltd. purchased Navix in 1999. Each of the successive defendants consecutively assumed all of Daido's obligations and liability for lawsuits without raising any issues of privity.

4. See Kristine Kwok, *Court Orders Japanese Firm to Pay for Wartime Contract Dispute*, SOUTH CHINA MORNING POST, December 24, 2007, at 4.

5. See SUP. PEOPLE'S CT., III ANN. WORK REP. TO THE NAT'L PEOPLE'S CONG., March 12, 2015 (summary by Zhou Qiang, President of the Supreme People's Court, concerning the arrest in order to complete the enforcement procedure in *Zhong Wei*) (translation on file with the co-authors).

The concluding proceedings in the case involved significant legal issues related to time-charter contracts, maritime seizure and the law of prize, the laws of war, inheritance law, alternative dispute resolution, timeliness, and such civil and maritime procedural matters as the plaintiffs' standing, a forum-selection clause, extrinsic evidence, and enforcement of a judgment. Together with earlier litigation in Japan, these issues engaged both Chinese and Japanese law against the complicated backdrop of relations between the two countries. Recurring issues involving maritime delimitations in the East China Sea between China and Japan have added a thick layer to this backdrop.

This article will explore the epochal case of the two lost ships, beginning in Part I with provisions of their time charters, later communications between the parties to the charters, and claims by the Chinese ship owner against the Japanese charterer, Part II discusses the ship owner's futile legal action in Japan, extending over a decade and culminating in dismissal of his action for untimeliness. Part III focuses on concluding litigation of the case over a period of 26 years in the Shanghai Maritime Court as it came to involve successors in interest to both the ship owner and the charterer of the two ships. Part IV analyzes core legal issues in the case, ranging from the validity of the ships' capture and taking as prize under international maritime law to the merits of breach-of-contract and inheritance claims. Questions of procedure and private international law were also critical. Finally, Part V offers a conclusion with reflections on the significance of the case following enforcement of the Shanghai Maritime Court's judgment seven years later, in 2014. By then a fourth generation of the original ship owner had joined the third generation of the ship owner's family as judgment creditors.

## I. BACKGROUND

### A. The Time Charters

In 1930, CHEN Shuntong established a sole proprietorship, the Chung Wei Steamship Co. ("Chung Wei"),<sup>6</sup> in Shanghai. At the time, the company owned four ships, which Mr. Chen registered with the Shanghai Shipping Administration Bureau in 1931 under his own name as ship owner, and was regarded as the largest privately owned shipping company

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6. Chung Wei was the English translation of the plaintiff's company name before 1949 according to the then current Wade-Giles system of transliteration. After February 1958, when the State Council of the People's Republic of China (P.R.C.) adopted the Scheme of the Chinese Phonetic Alphabet (*pinyin*), the plaintiff's company name became "Zhong Wei," as it subsequently appears in official documents.

in China<sup>7</sup> In 1936, Chung Wei entered into two time-charter contracts<sup>8</sup> with Daido.<sup>9</sup> In the first contract, Chung Wei leased to Daido a 6,725-ton steamship, the *Shun Foong*, effective September 16, 1936. Chung Wei then entered into a second, similar time charter for lease of a 5,025-ton steamship, the *Hsin Tai Ping* (New Pacific), effective November 1, 1936. Each time charter was to last for twelve months, with a margin upon its expiration of one month or less for redelivery of the vessels to "China or Japan (Wakamatsu - Yokohama Range) at the charterers' option." The time charters provided as well for normal trading within, respectively, East Asian waters (*Hsin Tai Ping*) and Asian, African, American, Australian and European waters (*Shun Foong*). The charterer had an option, however, to send their ships to trade outside the prescribed limits so long as they paid for any additional insurance premiums. The parties to the charters agreed to arbitrate any pertinent disputes.<sup>10</sup> After execution of the two contracts, Chung Wei obtained hull insurance for the two vessels from two Japanese insurers in Tokyo, Mitsubishi Maritime Co., Ltd. and Prosperous Asia Maritime Insurance Co., Ltd.

Since Japan's seizure of Manchuria in 1931-32 and Inner Mongolia in 1933, serious tensions continued to damage relations between Japan and China. Apparently, though, the prospect of imminent war between the two countries did not deter Chung Wei from assuming a substantial risk in the interest of conducting his business as usual.

Within a year after the lease of his ships to Daido, however, the Marco Polo Bridge Incident<sup>11</sup> changed everything. It immediately sparked sustained armed conflict between Japan and China, known today as the

7. Yi Qi Yan Xu Wu Shi Ba Nian De Ma La Song Guang Si (A Marathon Case of 58 Years), RENMIN RIBAO (PEOPLE'S DAILY, overseas ed., Jan. 12, 1995, at 5.)

8. Time Charter Party, June 16, 1936; Time Charter Party, October 14, 1936 (copies on file with the co-authors).

9. In English: The United Ocean Transport Co. Ltd.

10. The arbitration clauses in the time charters provided for *ad hoc* arbitration in Shanghai. That, however, was not practicable at a critical time when the plaintiff in Zhong Wei alleged breaches of the time charters because of armed conflict between China and Japan. Later, the P.R.C. barred *ad hoc* arbitration. Even so, it is surprising that consecutive Japanese defendants never invoked the arbitration clause during the court proceedings.

11. Named after the famous Italian explorer of the thirteenth century, the Marco Polo Bridge near Beijing was the site of a major skirmish between Manchuria-based Japanese troops and Chinese troops on the night of July 7, 1937. The Japanese, who claimed to have been attacked, used the incident as a pretext for demands on the Chinese that led to the outbreak of the Sino-Japanese War. See, e.g., BARBARA TUCHMAN, *STILWELL AND THE AMERICAN EXPERIENCE IN CHINA, 1911-45*, at 208 (Bantam ed. 1971). Japanese forces, deliberately provoked by Chiang Kai-shek, then attacked China's financial center, Shanghai. On August 25, the Japanese navy declared a blockade of the Chinese coast against Chinese vessels, and Japan established provisional military governments in the conquered territory. See L.H. Woolsey, *Peaceful War in China*, 32 AM. J. INT'L. LAW 314, 317-18 (1938).

Sino-Japanese War that bled into World War II.<sup>12</sup> On August 13 Japanese forces attacked Shanghai and large-scale armed conflict broke out in Shanghai. Consequently, by August 16, 1937 Daido stopped performance on the contract and failed to return the ships to Chung Wei in Shanghai. On August 25 the Japanese navy blocked the Chinese coast, enveloping Shanghai. It was no longer business as usual.

### B. The 1940 Letter

According to the evidence presented by the plaintiffs during the proceedings more than a half-century later in the Shanghai Maritime Court, Chung Wei sent numerous inquiries to Daido requesting the return of his two ships, but he did not receive a formal response for three years. On September 4, 1940, however, Daido wrote Chung Wei that on August 22, 1937, just before its blockade of the Chinese coast, the Japanese navy had captured the two ships in Japanese waters, pursuant to which the Japanese government obtained title to them and leased the vessels back to Daido under new time charters.<sup>13</sup> In its letter, Daido claimed that it had been dutifully paying charter hire fees to the Japanese government for rental of the ships, but there is no evidence to support this claim. It appears to have been simply false information. In fact, by the time the letter was written, the *Hsin Tai Ping* had crashed against a reef during a typhoon in Japanese waters on October 21, 1938. Presumably, Daido would have ceased to pay charter fees after that date. Later, the *Shun Foong*, while transporting Japanese military materials, was sunk by an Allied torpedo from a submarine in Singapore waters on December 25, 1944. A standard war clause in the time charters provided only that Daido would pay for any war risk insurance that might be required and “[t]hat in the event of war between any Asiatic and European or any other Powers operating or likely to operate in the Eastern waters, owners shall have the option of cancelling the contract.” The charterers were not given the same option.

Over fifty years later, the false information in the letter from Daido would come back to haunt Daido’s successor in interest during the litigation before the Shanghai Maritime Court. In its letter Daido not only failed to reveal that the *Hsing Tai Ping* had sunk in Japanese waters in 1938, but that the Japanese insurer had tendered payment to it thereafter. Daido later claimed to have surrendered that payment to the Japanese

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12. See C. G. Fenwick, *War Without a Declaration*, 31 AM. J. INT’L. L. 694 (1937); RONALD E. DOLAN & ROBERT L. WORDEN, *JAPAN: A COUNTRY STUDY* 58 (1992).

13. Letter from Daido to Chung Wei, September 4, 1940 (copy on file with the co-authors).

Ministry of Finance. The company also claimed that it had continued to pay charter hires for the two vessels to the Japanese government.<sup>14</sup>

### C. Fruitless Claims after World War II

To summarize, Daido's September 1940 letter claimed that (1) the two vessels had been seized by the Japanese government; (2) the two vessels were subsequently leased by the Ministry of Communications through new time charters to Daido after the legal procedure necessary to formalize the seizures had been completed; (3) Daido continued to pay rent (charter hires) to the Japanese government for the two vessels; and (4) Daido suggested that Chung Wei assert any claim it might have directly to the "Japanese authority concerned."

Because the Sino-Japanese War, as it merged into World War II, did not officially end until September 3, 1945, no legal redress was available to Chung Wei until then. In December 1945 the Japanese Ministry of Communications, shortly after the Allied occupation of Japan began, recorded the two ships as "whereabouts unknown." In 1946 the Japanese government established a special Wartime Compensation Measure, but its benefits extended only to Japanese citizens. CHEN Shuntong, the owner

14. The full letter, which was typed in English, reads as follows:

Messrs. Chung Wei Steamship Co., Shanghai

Dear Sirs:

s.s. "Shun Foong"; s.s. "Hsintaiping"

We beg to acknowledge the receipt of your letter (written in Chinese) of 19<sup>th</sup> August, concerning the above two steamers and the contents of which are duly noted:

As we repeatedly told you through Mr. K. Yasuzawa, s.s. "Shun Foong" was seized by the Japanese Government at Osaka at 10 a.m. on the 22<sup>nd</sup> August 1937 and at the same time on the same date s.s. "Hsintaiping" was seized at Yawata. Consequently, the time-charter of these steamers was suspended from the time of the seizure as according to the terms of the contract.

Soon after the legal procedure of the seizure[s] [was] completed, the Ministry of Communication entrusted these two steamers to our Company in the form of [a] time charter and we began to operate s.s. "Shun Foong" from 5 p.m. on the 13<sup>th</sup> Oct. 1937 and s.s. "Hsintaiping" from 4 p.m. on the 16<sup>th</sup> Oct. 1937. Simultaneously, we paid charter hires to the Ministry from these delivery dates and are still continuing the payment.

We are quite aware of your difficult situation, but at [the] present moment the release of these steamers from the seizure is entirely beyond our power and we can only suggest to you to appeal to the Japanese Authority concerned.

We are, Dear Sirs,

Yours faithfully,

Daido Kaiun Kabushiki Kaisha

(The United Ocean Transport Co., Ltd.)

[affixed with the company's seal and authorized signatures]

of the two ships, therefore did not file a claim before a December 14, 1946 deadline. Only in 1947 did he apparently become aware that his ships had been wrecked, one in 1938 and the other in 1944. He then wrote General Douglas MacArthur, the Supreme Commander of the Allied Powers in occupied Japan. Relying on Daido's 1940 letter, Mr. Chen stated that the ships had been seized by the Japanese in 1937 rather than disclosing what he had learned about the disastrous fate of his ships. He also reported that he had petitioned the Chinese government of CHIANG Kai-shek to provide diplomatic protection by asserting Mr. Chen's claim to the Allied occupation authorities and that the Chinese government had agreed to do so, based on the 1940 letter.<sup>15</sup> Finally, he asked the occupation authorities to replace his vessels insofar as they could not be returned to him.

General MacArthur's office, having received pertinent documents from the Chinese government acting on Mr. Chen's behalf, replied to Mr. Chen that both vessels had, indeed, been "sunk during the recent hostilities" without indicating whether the cause had been natural, as in a typhoon, or of human origin, as a result of naval warfare. The reply letter disclaimed any capacity to replace the two vessels, advising Mr. Chen to seek guidance from the Chinese government. In the end, Mr. Chen did receive money for two other ships that Chung Wei owned that the Chinese government had requisitioned during the war. CHEN Shuntong and his heirs apparently used this money to pursue their claim related to *Hsin Tai Pin and Shun Foong*.

Prior to his death on November 14, 1949, CHEN Shuntong provided in his will for the appointment of his eldest son, CHEN Qiaqun, to take over the claim. Shortly thereafter, in October of 1949, the Chinese Civil War ended in the victory of MAO Zhedong's forces. When the Chinese Communist Party assumed power in Beijing, it rescinded all existing laws.<sup>16</sup> Later, all property of private enterprises was nationalized and no civil suits could be brought, not even those involving normal business transactions such as those conducted with Japan nationals.

It would not have been feasible for CHEN Qiaqun to assert a formal claim against either Daido or the Japanese government during the early 1950s while he resided in the fledgling P.R.C. which had no diplomatic relations or formal legal cooperation with Japan. In 1958, however, CHEN Qiaqun (the original owner's son) moved to Hong Kong, from which he

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15. Claim by Chen Shuntong, February 15, 1947 (copy on file with the co-authors).

16. See X FUNDAMENTAL LEGAL DOCUMENTS OF COMMUNIST CHINA (Albert P. Blaustein ed. 1962); see also DONG SHIZHONG, DANIAN ZHANG & MILTON R. LARSON, TRADE & INVESTMENT OPPORTUNITIES IN CHINA 2 (1992). From October 1949 to December 1956, the Chinese government nationalized private enterprise and assumed direct control over all foreign trade. Chung Wei was not nationalized because it had no assets at that time.

eventually filed his legal claim in Japan. He also registered the Chung Wei Steamship Co. in Hong Kong under its laws as a sole proprietorship, as his father CHEN Shuntong had done in Shanghai under Chinese law during the 1930s.

## II. LEGAL ACTION IN JAPAN

In 1959 CHEN Qiaqun wrote seven letters to Daido, claiming damages for the lost ships. Daido rejected all of these claims, citing the 1940 letter and suggesting that he deal directly with the Japanese government. CHEN Qiaqun accepted that course of action in 1961, formally claiming damages against the Japanese government on January 31, 1962, but he also maintained communications with Daido. In April 1962 he sent a final letter to Daido. In it, with assistance from several well-known Japanese lawyers, he requested Daido's cooperation in asserting his claim against the Japanese government by supplying all details regarding the fate of the ships, with faithful reference to Daido's 1940 letter to his father. Daido declined the request for cooperation, explaining that all of its staff members who had been involved in the matter were dead or retired and all the pertinent files had been destroyed in a fire. Meanwhile, from 1961 to 1962, in response to CHEN Qiaqun's claim, the Japanese government agencies, including the Ministry of Foreign Affairs, Ministry of Transportation and the Re-examination Commission on Seizure, had undertaken various investigations stemming from Daido's 1940 letter. The Ministry determined, however, that no evidence supported the claim and took no further action.

In 1964, CHEN Qiaqun, advised by his Japanese lawyers, decided to bring legal action against the Japanese government but first sought conciliation by the Tokyo Summary Court. After some thirty conciliation hearings, the conciliation failed in 1967<sup>17</sup> when the Japanese government rejected the plaintiff's claim altogether on the basis that any conjectured seizure of the two ships would have been an exercise of public power in wartime for which the government would have had no civil responsibility to compensate Mr. Chen. Although the Japanese government acknowledged that war had not yet been declared when the ships were

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17. JAPAN TIMES, April 28, 1967, at 3. Japan's obligation to pay compensation for damages arising out of the exercise of public power under its post-war constitution did not exist under the Meiji Constitution in effect at the time of the alleged governmental seizures. Amy Liu, *Battle Not Over for WWII Ship Owners*, H.K. STANDARD, March 4, 1995, at 1. The case was further complicated by the uncertain status of Chinese nationals living in Hong Kong. Unlike the Taiwanese, for example, Hong Kong residents were not deemed to have waived war-damage claims under the San Francisco Peace Treaty of 1951. Treaty of Peace with Japan, Sept. 8, 1951, U.S. TIAS 2490; 136 UNTS 45, 68 [hereinafter Peace Treaty].

allegedly seized, it claimed that the existence of a *de facto* state of war would have justified the seizures.

On April 25, 1970, CHEN Qiaqun responded to this setback by filing a formal claim against the Japanese government in the Tokyo District Court. In order to prove his affiliation with CHEN Shuntong as requested by the court, he obtained a special order from the High People's Court of Shanghai (similar to an affidavit) to prove that he was CHEN Shuntong's son. Having done so during a chaotic time at the peak of the China's Cultural Revolution, he fortunately was assisted by Premier ZHOU Enlai's good offices.

The Japanese government did not claim sovereign immunity from the suit because Japan had no applicable legal doctrine to that effect. Under its postwar constitution and State Compensation Law, all levels of government are subject to claims for damages based on the illegality of any action by government officials. The government also never sought to bring Daido into the case as a co-defendant. Instead, the Japanese government responded to CHEN Qiaqun's claim by asserting that there was no evidence of its seizure of the ships (contradicting Daido's 1940 letter) and that even if it had seized the ships, it would have been within its sovereign power to do so.<sup>18</sup> This argument would prove essential in the later Chinese proceedings by refuting Daido's defense based, as a matter of fact, on the alleged seizure of the ships by the Japanese government. In its decision of October 25, 1974, however, the Tokyo District Court did not rule explicitly on this argument, choosing instead to dismiss the plaintiff's case under Japan's statute of limitations, without specifying the applicable limitation provision.<sup>19</sup> The court also imposed costs on the plaintiffs. CHEN Qiaqun appealed this decision to the Tokyo High Court

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18. On June 5, 1962, the Japanese Review Commission on the Decisions of the Prize Courts informed the Foreign Ministry of Japan that it had no records in its files recording the condemnation of *Hsin Tai Ping* and *Shung Foong*. It was in its answers to Chen Qiaqun's pleadings in the Tokyo Summary Court and the Tokyo District Court in 1964 and 1970, respectively, (copies on file with co-authors) that the Japanese Ministry of Justice first denied that any act of seizure of Chung Wei's vessels had occurred. The Ministry then stated that, even if such a seizure could be proven, the government would not be properly subject to a legal challenge of the seizure under its interpretation of maritime law applicable in a time of armed conflict.

19. Decision on Claim No. 4055, Civil Department, Tokyo District Court, October 25, 1974 (Showa 49) (unofficial English translation on file with the co-authors). After Mr. Chen appealed but then withdrew his appeal to the Tokyo High Court, he also withdrew his still pending action before the Tokyo District Court on October 25, 1975, exactly one year after that court's judgment, pending appeal, against him. Japan's revised Code of Civil Procedure, effective in 1998, does not appear to materially differ, as to the issues in the instant case, from the so-called Old Code in effect during the *Zhong Wei* litigation. See Shozo Ota, *Reform of Civil Procedure in Japan*, 49 AMJ. COMP. L. 561 (2001).

but withdrew his action on March 28, 1975, apparently for lack of financial resources to pursue the matters and frustration with the reasonableness of the court.<sup>20</sup>

### III. LEGAL ACTION IN CHINA

#### A. The Plaintiffs' Action in the Shanghai Maritime Court

In 1986, after 24 years of fruitless effort to obtain compensation from the Japanese government,<sup>21</sup> CHEN Qiaqun, on behalf of Zhong Wei, returned to a consideration of pursuing his earlier claim directly against Daido, this time having in mind court proceedings in the P.R.C. He had prepared for this as early as 1984, the year in which the Shanghai Maritime Court was established. Until the 1980s, private citizens could not bring suit on such matters, but by 1984, with a modern legal system including a reestablished judiciary, beginning to take shape, CHEN Qiaqun contacted China Legal Service Center Inc. Ltd., the only law firm within the P.R.C. that was then licensed to practice law in Hong Kong. Arguably, CHEN Qiaqun was barred by some version of collateral estoppel and the principle of international comity from bringing the same claim against the Japanese

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20. Decision on Claim No. 2608, Tokyo High Court, March 28, 1975. *See also* Chen Qiaqun's pleading on appeal to the Tokyo High Court, November 11, 1974 (translated copy on file with co-authors). To Mr. Chen's dismay, the Tokyo High Court requested the parties to address only the issue of prescription (limitations). Regarding the withdrawal of the action at both the Tokyo District Court and High Court levels, *see* Letters to Susan Lewis-Somers, Willamette University College of Law, May 11, 1994 and May 24, 1994 (Tokyo District Court) (Tokyo High Court) (on file with the authors). The two letters are similar. The latter communication, for example, reads as follows:

The case, the Compensation for Damages (Claim #2608, Tokyo High Court 1974), was ended by withdrawal on March 28, 1975. The records of the case have been disposed of and therefore can't be sent.

The letter does not explicitly disclose that it was Chen Qiaqun who withdrew this case nor why it was withdrawn. From scattered informal sources, it appears that Chen Qiaqun ran out of funds to pursue an appeal. The case does not seem to have been reported in any legal gazette, the Japanese Annual of International Law, or in any other legal publication.

Chen Qiaqun claimed that he made several efforts to seek diplomatic support from the Chinese government after the Japanese court rendered its judgment. In December 1978, the Chinese ambassador to Japan instructed Chen Qiaqun to settle its claim through negotiation in accordance with the spirit of the Sino-Japanese Peace Treaty, which had been signed on October 23, 1978, but Chen Qiaqun apparently either failed or was unable to do so.

21. The formal effort seems to have been confined to the proceedings in Japan. It was reported, however, that Chen Qiaqun filed another action in Shanghai in 1966 (two years after seeking conciliation in Japan) that was either dismissed or withdrawn after the defendant's corporate merger. Amy Liu, *supra* note 17. But the reference to the date of the corporate merger is puzzling and, more fundamentally, there is no formal record of this action.

government that had failed a decade earlier, albeit in Japan. Also, CHEN Qiaqun could not bring its claim in Hong Kong since it was then still ruled by the United Kingdom, a party to the San Francisco Peace Treaty with Japan in 1951 that had purported to resolve all claims by it or its nationals against Japan on matters arising out of World War II.

In view of these constraints on bringing another action against the Japanese government or bringing an action against Daido in Hong Kong, CHEN Qiaqun decided instead to bring suit in the Shanghai Maritime Court<sup>22</sup> directly against Daido, the private company. By doing so, he would avoid any issue of sovereign immunity, under China's absolute theory, that the Japanese government might have asserted had it been sued there. Also, he substituted the Zhong Wei Steamship Company (Hong Kong) for either himself or his father as the lead plaintiff in the case. Meanwhile, a new shipping company, Navix Line Co., Ltd., had become the successor in interest to Daido.<sup>23</sup>

CHEN Qiaqun, in the name of Zhong Wei Steamship Co. (Hong Kong), brought his claim to the attention of the Shanghai Maritime Court on June 6, 1986. The action was formally filed on December 30, 1988 and docketed on January 5, 1989. Notice and papers were served on the new defendant and successor in interest, Navix, through diplomatic channels in the later half of 1989. Specifically, the plaintiffs initially filed a Statement of Claim in the amount of ¥ (Japanese) 5 billion, which was the equivalent of about \$ (U.S.) 50 million. After recalculation of its claim, CHEN Qiaqun sought an order requiring the defendant to pay compensation in an amount of about ¥ (Japanese) 11 billion, including: (1) charter hires and fees for possession and use of the two ships, totaling ¥ (Japanese) 1,616,987,200; (2) accrued interest of ¥ (Japanese) 3,638,221,200; (3) business losses of approximately ¥ (Japanese) 1 billion; (4) total loss of the two ships, totaling ¥ (Japanese) 4,524,032,000 Japanese; and (5) attorney fees. On June 20, 1996, the plaintiffs, having again recalculated the amounts according to a Public Appraisal Report, claimed nearly three

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22. The Shanghai Maritime Court was formally established as one of the so-called Special People's Courts in the reestablished Chinese judiciary system under the Organic Law of the People's Courts of the People's Republic of China. This law was adopted at the Second Session of the Fifth National People's Congress on July 1, 1979 and revised according to the Decision concerning the Revision of the Organic Law of the People's Courts of the People's Republic of China adopted at the Second Meeting of the Sixth National People's Congress on September 2, 1983.

23. See *supra* note 3. Daido had first merged with Japan Line Co. Ltd. in 1964, which then merged with Navix Line Ltd. [hereinafter Navix] in June 1989 after Zhong Wei's case was accepted by the Shanghai Maritime Court. Navix never argued that it lacked privity with the original party, Daido; instead, it apparently assumed all of Daido's obligations and liability for lawsuits.

times the revised amount, or ¥ (Japanese) 31,276,951,240, exclusive of attorney fees.

Navix appears not to have objected to either the Shanghai Maritime Court's jurisdiction over it or to the venue in Shanghai.<sup>24</sup> Instead, as the successor in interest to Daido, it based its initial defense on the following arguments: (1) the Chung Wei Steamship Company, the original time-chartering party, had gone out of business; (2) Zhong Wei, later joined as co-plaintiffs by CHEN Qiaqun's two sons after his death, was not an original party to the time charters at issue because it had been organized only later and separately under Hong Kong law; (3) the two ships had been captured by the Japanese government in 1937, thereby releasing Daido (and thus Navix) from any liability; (4) the claimed injuries to the plaintiffs

24. The Court reasoned as follows, according to the long-arm provisions in China's Civil Procedure Law:

To exercise jurisdiction over a foreign related civil case, the laws of the domicile court—The Civil Procedure Law of the People's Republic of China—and so on shall be applied. One side of the parties of the contract in this case are Chinese enterprise and Chinese citizen, the ownership registration place and the time-charter contracts signing place of the two ships, the delivery port of the two ships are all in Shanghai, therefore this Court obtains jurisdiction over this case because the contract signing place, performing place and the registration place of the contract's subject matter are in Shanghai.

Zhong Wei, (1989) HHSFZ No. 25 (Shanghai Mar. Ct., Dec. 7, 2007) (Judgment).

The underlying jurisdiction of a Chinese court over a foreign party, in the absence of an exercise of party autonomy under Article 244 of the Civil Procedure Law, is as follows:

*Article 243:* Where an action is instituted against a defendant without a domicile inside the territory of the People's Republic of China concerning a dispute over a contract or rights and interests in property, if the contract was executed or performed within the territory of the People's Republic of China, or the subject matter of the action is located within the territory of the People's Republic of China, or the defendant has distrainable property within the territory of the People's Republic of China, or the defendant maintains a representative office within the territory of the People's Republic of China, the action may come under the jurisdiction of the people's court of the place where the contract was executed, the place where the contract was performed, the place where the object of action is located, the place where the distrainable property is located, the place where the tort was committed or the place where the representative office is domiciled.

Civil Procedure Law art. 243. The P.R.C.'s Special Maritime Procedure Law (1999) also applied, but it appears to have been significant only in the enforcement proceedings that concluded the case. See *infra* text at note 31. Article 2 of that law explicitly provides that:

[w]hoever engages in maritime litigation within the territory of the People's Republic of China shall apply the Civil Procedure Law of the People's Republic of China and this law.

*Id.* The same law, does, however, confirm that "*the maritime court shall entertain the [sic] lawsuits filed in respect of . . . maritime contract disputes. . .*" *Id.* art. 4 (emphasis added).

lacked a factual basis; (5) the lawsuit was untimely under China's statute of limitations; (6) the plaintiffs had already lost its legal action, albeit against the Japanese government and only for untimeliness in a Japanese court; and (7) the plaintiffs had not fully paid the required court fees.

The plaintiffs organized a team of lawyers and legal consultants consisting of more than 50 well-known Chinese jurists, including REN Jisheng, President of the All-China Lawyer's Association, who led the group, and GAO Zongzhe, Vice President of the All-China Lawyer's Association. Mr. Gao prepared the initial pleadings and served as the chief trial lawyer during the first hearing before the Shanghai Maritime Court. The defendant also assembled a strong team of legal experts from China, Japan, the United States, the United Kingdom and Hong Kong.

### B. The Court Proceedings

On August 15, 1991, the Shanghai Maritime Court opened the first hearing. The 2½-year period of delay from the time the action was docketed is attributable to the court's lack of experience in handling such a complicated case prior to the P.R.C.'s adoption and promulgation of a comprehensive civil procedure law. Also, the Shanghai authorities feared that advancing the case would attract a flood of litigants.<sup>25</sup> It lasted just one day. The case was one of the first to be brought against a foreign party under the P.R.C.'s new Civil Procedure Law, which had been promulgated and came into effect on April 9, 1991. The president of the Court, GU Zhengpin, served as the chief judge, sitting with two other judges to preside over the hearings. Such a procedure is very rare in Chinese court history since most presidents of Chinese courts do not try cases in person. The counsel for the Japanese party challenged the standing of the plaintiffs, the applicable limitations period, and raised other factual and legal issues without any objection to the jurisdiction of the Shanghai Maritime Court. The Court heard, but did not rule on, the defendant's motion to dismiss the action on the basis that the plaintiffs lacked standing because of the status of Zhong Wei as a Hong Kong registered company that had not been a signing party to the original time-charter contracts.

In April 1992, after the first hearing in 1991, CHEN Qiaqun, the sole owner of Chung Wei Steamship Co. of Hong Kong, passed away, leaving a will he had made in Shanghai that appointed his two eldest sons, CHEN Zhen and CHEN Chun, as agents ad litem and heirs to continue the lawsuit. Two years later, after three years of dormancy, the case was revived in December 1994, this time supervised by the two sons of CHEN Qiaqun

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25. See Daniel Kwan, *War Damages Activists Face Clampdown*, SOUTH CHINA MORNING POST, Oct. 26, 1993, at 12.

and grandsons of the original ship owner, CHEN Shuntong. The dormancy occurred because CHEN Qiaqun was ill and then died in 1992, resulting in substantial uncertainty about the future course of the action. Special wording in his will allowed the sons to take over the case.

On January 10, 1995, the Shanghai Maritime Court opened a second hearing, which lasted two days. The court rejected the defendant's motion that had attacked the plaintiffs' standing. The Court opened a third hearing on May 15, 1995, lasting four days, and a fourth hearing on May 20, 1996, lasting nine days. The parties appeared to have discussed the possibility of mediating their dispute but could not agree on the terms of mediation or its legal effect on the status of the case itself. Subsequently, an intra-family inheritance dispute delayed the action.<sup>26</sup> Also, it was reported that the government in Beijing was less enthusiastic about the case. It had dropped its own wartime claims against Tokyo when the two countries normalized ties with each other in 1972. The government also did not favor China-based civil claims against Japanese parties although the normalization of relations between the two countries did not specifically preclude such claims.<sup>27</sup> For both familial and political reasons, then, seven years lapsed before the fifth and final hearing, lasting for three days, began on November 25, 2003.

The defendant Navix, as successor of Japan Lines, Ltd. and, before that, the charterer Daido, was acquired by Mitsui O.S.K. Lines, Ltd. in 1999. The new company, known as Mitsui O.S.K. Lines, Ltd., assumed Navix's rights and obligations, including those derived from Daido, pending the lawsuit in the Shanghai Maritime Court by joining the court proceedings as a defendant in 2003. In April 2003, the Shanghai Maritime Court, after a thorough examination, also accepted CHEN Zhen and CHEN Chun's applications to join the lawsuit as co-plaintiffs based on the wills of their late grandfather, CHEN Shuntong, and late father, CHEN Qiaqun. During the 12-year span of court hearings, both the legal complexity and emotional impact of the issues emerged full-blown.<sup>28</sup>

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26. In 1996 Chen Qiaqun's younger brother formally disputed the authenticity of the will together with that of their late grandfather Chen Shuntong. The Shanghai Intermediate People's Court ruled in his favor. (1996) Hu Gao Min Zhong Zi No. 136 (Shanghai Intern. People's Ct. 1996). In 1997, however, the High People's Court of Shanghai overruled this decision. (1996) Hu Gao Min Zhong Zi No. 135 (Shanghai Higher People's Ct. 1998). The two wills were later cited as evidence by the Shanghai Maritime Court in rendering its judgment.

27. SOUTH CHINA MORNING POST, Jan. 11, 1995, at 1.

28. See Irene So, *Top Names Back Ship Cash Claim*, SOUTH CHINA MORNING POST, May 8, 1995, at 1. At the resumed hearing on January 10, 1995, for example, the Court denied the defendant's 1991 motion, ruling that the plaintiff had standing, and requested further evidence from the parties on the issue of whether the Japanese navy had seized the two ships. When a disruptive dispute broke out in the courtroom, the single judge terminated a hearing. Ming Ye,

On December 7, 2007, four years after the final hearing, the Shanghai Maritime Court issued its judgment of first instance in favor of the two sons, but did not support Zhong Wei's claims although it did not rule explicitly on its standing in the case.<sup>29</sup> It ordered the defendant to compensate the plaintiffs for the charter hires (based on the periods of hire until the respective losses of the ships, as stipulated in the time charters), related business losses the loss of the two vessels and accrued interest, totaling ¥ (Japanese) 2,916,477,260.80 (approximately \$ (U.S.) 28 million according to the exchange rate at the time). The court did not, however, support the plaintiffs' request for inclusion of attorney fees in the judgment. The payment of litigation fees, totaling about \$ (U.S.) 1.9 million, was to be shared between the plaintiffs (91%) and the defendant (9%). It is worth noting that the usual "loser pays" principle in the civil code tradition did not seem to apply.

Both parties appealed the judgment in early 2008, but the Shanghai High People's Court that served as a court of second instance rejected the appeals and upheld the 2007 judgment on August 6, 2010. The defendant then petitioned the Supreme People's Court of China for a retrial on August 26, 2010. After accepting and reviewing the case, the Court, on December 23, 2010, rejected the petition, thereby sustaining the 2007 judgment.<sup>30</sup>

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co-author of this article, began serving as the leading trial lawyer for the plaintiffs after the second hearing of the case in 1995.

29. Zhong Wei Steamship Co. (Hong Kong) v. Mitsui O.S.K. Lines, Ltd., (1989) HHSFZ No. 25 (Shanghai Mar. Ct., Dec. 7, 2007) (Judgment) (English translation on file with the co-authors).

30. According to Article 147 of the Civil Procedure Law of the People's Republic of China (1991) [hereinafter Civil Procedure Law], a judgment of first instance made by a trial court is subject to appeal if a losing party does so in a timely fashion to the appellate court or the so-called court of second instance. The decision made by that becomes the final judgment, binding on both litigation parties.

Article 178 of the Civil Procedure Law, *id.*, provides that if a party to an action considers that there is error in a legally effective judgment or written order, it may apply to the people's court that originally tried the case or to a people's court at the next higher level for a retrial; however, execution of the judgment or order may not be suspended. Article 179 provides that the people's court must reject the application if it fails to meet any of the conditions specified as follows: (1) there is sufficient new evidence to set aside the original judgment or written order; (2) the main evidence on which the facts were ascertained in the original judgment or written order was insufficient; (3) there was definite error in the application of the law in the original judgment or written order; (4) there was violation by the people's court of the legal procedure which may have affected the correctness of the judgment or written order in the case; or (5) the judicial officers have committed embezzlement, accepted bribes, engaged in malpractices for personal benefits or otherwise perverted the law in adjudicating the case.

After that judgment took effect against Mitsui, it failed to satisfy it. The plaintiffs (now limited to the two sons of CHEN Qiaqun) therefore applied to the Shanghai Maritime Court for coercive enforcement of the judgment plus interest for delay in performance. The plaintiffs could not have expected the cooperation of the Japanese government to recognize or enforce the judgment insofar as the Japanese court's dismissal of the formal action brought against the Japanese government during the early 1970s had been based on a determination that CHEN Qiaqun's claim was time-barred. Even though Japan has no rule of collateral estoppel, its earlier determination would have precluded the Japanese government's recognition or enforcement of the Shanghai Maritime Court's judgment as a matter of public policy. On December 28, 2011, however, the Court served the defendant with an Enforcement Notice.<sup>31</sup> On April 19, 2014, after the defendant had still failed to make payment, the Court ordered the arrest of its ore carrier, "Baosteel Emotion," which was then berthed in the Majishan Port of Shengsi, in Zhejiang Province. Within five days, this action prompted Mitsui to pay a little over ¥ (Japanese) 3.7 billion, the equivalent, after substantial devaluation of the Japanese Yen over the years, of a little under \$ (U.S.) 36 million. The total amount equaled the original judgment of approximately \$ (U.S.) 28 million plus an assessment of double the accrued interest for delay in satisfaction of the judgment, court fees, and enforcement fees.<sup>32</sup>

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31. Thereafter, on March 13, 2012, Chen Chun, a co-plaintiff who had led the Chen's family's pursuit of their interest in the case, died in Shanghai, leaving a will that appointed his oldest son Chen Zhong Wei (whose name memorialized the company established by his great-grandfather, Chen Shuntong) as agent ad litem to continue the enforcement procedure. The torch of the epochal dispute thereby passed to a fourth generation of the Chen family to carry forward.

32. The exact bottom line was ¥ (Japanese) 3,720,648,758.8 or \$ (U.S.) 35,863,334 at the conversion rate on April 24, 2014. See Shanghai Maritime Court, Final Enforcement Statement Accounting Sheet (copy on file with the co-authors). The Civil Procedure Law provides as follows for the doubling of interest when a judgment debtor fails to perform on time:

*Article 232:* If a person subject to execution fails to perform his obligations to pay within the time limit specified in a judgment, ruling or other legal document, he shall pay twice the amount of interest on the debt for the period during which the performance is deferred. If a person subject to execution fails to perform any other obligations within the time limit specified in a judgment, ruling or other legal document, he shall pay a fine for deferred performance.

Civil Procedure Law, *supra* note 29. See also Josh Chen & Toko Sekiguchi, *Chinese Court Release Japanese Ship*, WALL ST. J., April 24, 2014, at 1; Kazuaki Nagata, *¥4 Billion Paid for Ship's Release*, JAPAN TIMES, April 24, 2014; but see Chris Buckley, *Wartime Claim Paid, China Releases a Japanese Vessel*, N.Y. TIMES, April 24, 2014, at A5 (noting a total payment, in line with most media accounts, of the approximately ¥ (Japanese) 2.9 billion in the 2007 judgment without the additional charges for double assessment of accrued interest, court fees and enforcement fees).

#### IV. THE LEGAL ISSUES

Chinese courts have come of age. As noted earlier, this was the first-ever case brought by a Chinese party in a Chinese court against a Japanese private company for alleged damages arising out of the Sino-Japanese War over three quarters of a century ago, thereby laying claim to being the longest-ever dispute in modern China from the time a cause of action arose until final disposition of the case. Even the 26 years between the filing of the Shanghai Maritime Court action in 1988 until its final disposition in 2014 likely sets a record for protracted court proceedings. It also proved to be one of the largest claims for civil damages against a foreign party to be heard in a Chinese court and the largest judgment against a foreign party.

China's traditional abhorrence of litigation<sup>33</sup> has unquestionably mellowed over the past three decades into a recognition of the practicality and efficacy of adjudication, at least as an impetus to a settlement, mediation or other informal resolution of an international dispute. Also, as China's bitter memories of Japanese atrocities during the Sino-Japanese war have faded somewhat, though clearly not disappeared, Chinese courts could be expected to address war-related issues more objectively than in the past. Of course, new tensions between the two countries, especially that related to East China Sea jurisdictional claims, cannot be ignored.

##### A. The Prize Issue: The Effects of the Naval Seizure of Chung Wei's Vessels

###### *1. Maritime Capture and Limitation under International Law*

The successive defendants in *Zhong Wei* argued that because the Japanese government had seized the vessels in 1937, they were relieved of any liability. As explained earlier, a Japanese court never addressed this issue but rather dismissed an action brought by *Zhong Wei* and the Chen family on the procedural basis of untimeliness. When, however, a Chinese court *did* address the issue of the seizures, it concluded that the Japanese government had merely detained but not seized the vessels, presumably under ice clauses in the original time charters (to be discussed later) and in the absence of any evidence to the contrary produced by the defendant. International comity was apparent, even against a backdrop of tensions between China and Japan. But what exactly is the international maritime

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33. "In death avoid hell, in life avoid the law courts," quoted in ALASDAIR CLAYRE, *HEART OF THE DRAGON* 184 (1984).

law applicable in a civil action such as that between Zhong Wei and Mitsui?

The outbreak of war historically conferred on a belligerent the right to seize and confiscate enemy merchant vessels anywhere other than in neutral territorial waters.<sup>34</sup> Warships may therefore take enemy merchant ships as prize. The Sixth Hague Convention of 1907,<sup>35</sup> however, set some important limitations on this right by protecting those enemy merchant vessels located in a belligerent port at the outbreak of war.<sup>36</sup> Thus, a merchant ship located in an enemy port at the outbreak of hostilities will be allowed to depart either at once or after a reasonable grace period. Alternatively, the vessel may be ordered to remain in port until hostilities have ended, when it must be released. On the other hand, even if a merchant vessel is unable, "owing to circumstances of *force majeure*," to leave the enemy port within the grace period, it is still immune from confiscation by a belligerent navy. The vessel can, indeed, only be detained.<sup>37</sup>

These provisions of the Hague Convention applied to several belligerents in the First World War.<sup>38</sup> During the period of the Sino-

34. See, e.g., the traditional pronouncement of this rule in C.J. COLOMBOS, *THE INTERNATIONAL LAW OF THE SEA* 548 (6th rev. ed., 1967).

35. 1907 Hague Convention VI Relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities, 205 C.T.S. 306 (1907) [hereinafter, the Convention.] China and Japan have both been parties to the Convention since the second decade of the last century. Japan signed it on October 18, 1907 and ratified it on December 13, 1911. China acceded to the Convention on May 10, 1917. See ADAM ROBERTS, *DOCUMENTS ON THE LAWS OF WAR* 75 (1982).

36. Article 1 of the Convention provides as follows:

When a merchant ship belonging to one of the belligerent Powers is at the commencement of hostilities in an enemy port, it is desirable that it should be allowed to depart freely, either immediately or after a reasonable number of days of grace, and to proceed, after being furnished with a pass, direct to its port of destination or any other port indicated.

The same rule should apply in the case of a ship which has left its last port of departure before the commencement of the war and entered a port belonging to the enemy while still ignorant that hostilities had broken out.

*Id.* art. 1.

37. Article 2 of the Convention provides as follows:

A merchant ship unable, owing to circumstances of *force majeure*, to leave the enemy port within the period contemplated in the above article, or which was not allowed to leave, cannot be confiscated. The belligerent may only *detain* it, without payment of compensation, but subject to the obligation of restoring it after the war, or requisition it on payment of compensation.

*Id.* art. 2 (emphasis added).

38. Of these, the following were parties to the Sixth Hague Convention: Great Britain, Germany, Russia, France, Japan, and Austro-Hungary. The following were not parties to the Convention: Bulgaria, Greece, Italy, Montenegro, Serbia, Turkey and the United States. The United States allowed no days of grace to either the German or Austrian vessels in American

Japanese War and World War II, the belligerents around the world generally adhered to the Convention's rules but conditioned their application on a principle of reciprocity.<sup>39</sup>

## 2. *Capture of the Two Ships*

Against this legal background, the plaintiffs argued that the information in Daido's 1940 notice letter to the ship owner CHEN Shuntong was materially false. In the letter, it will be recalled, Daido claimed that (1) the two vessels had been seized by the Japanese government on August 22, 1937; (2) the two vessels were subsequently leased by the Japanese Ministry of Communications through new time charters to Daido after the seizures had been formally legalized; (3) Daido thereafter paid charter hires for the two vessels to the Japanese government; and (4) Daido suggested to Chung Wei that it should deal directly with the Japanese government for any possible redress on its claim. Later, Daido also claimed that related insurance proceeds that it had received had been forfeited to the Japanese government.

As a formal notice from the charterer to the ship owner on the occurrence of an unforeseeable event, the 1940 letter would have exonerated the charterer from liability under the time charters if the facts set forth had been true. But the letter posed serious problems for the

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ports at the outbreak of the war in April 1917. Under the Settlement of the U.S. War Claims Act of 1928, however, the United States Congress arranged to pay fair compensation to the owners of German vessels taken by the United States Government under the 1917 Joint Resolution. Pronouncements by its officials and its course of conduct indicated that it was prepared to go even further than the terms of the Sixth Hague Convention to protect merchant shipping engaged in international commerce. Compensation was thus paid for the loss of all German merchant vessels seized by the United States. The same practice was adopted by the United States Government during and after the Second World War. See COLOMBOS, *supra* note 34 at 616, 619.

39. Article 18 of the German Prize Ordinance of 1929 stated forthrightly that "the provision of the Sixth Hague Convention relating to the treatment of enemy merchantmen at the outbreak of hostilities remain undisturbed." This rule was later made subject to reciprocity, however. Japan adopted the Japanese Rules of Naval War of October 6, 1914. These Rules granted two weeks of grace to the enemy merchant ships at the outbreak of hostilities on a condition of reciprocity. S.W.D. Rowson, *Prize Law During the Second World War*, 24 BR.YBK. INT'L L. 160, 165 (1947); see also COLOMBOS, *supra* note 34, at 620; G.H. HACKWORTH, VI DIGEST OF INTERNATIONAL LAW § 602; UNITED STATES NAVAL WAR COLLEGE, INTERNATIONAL LAW DOCUMENTS: REGULATION OF MARITIME WARFARE (1925).

It should be noted that the British Government had denounced the Sixth Convention in 1925, as had France in 1939, but a leading authority of that era notes that "[g]enerally speaking, there has been little change in the doctrines, developed during the First World War, as to the relationship between international law and the internal law of the state in the matter of prize. Thus, there being no change in the instructions contained in the Royal Commission to the British Prize Court. . . ." COLOMBOS, *supra* note 34 at 621, 623.

defendant. For one thing, it indicated that Daido still operated *Hsin Tai Pin* and *Shun Foong* as of September 4, 1940, albeit under new time charters issued to it by the Japanese government. Moreover, the letter alone could not formally prove that the two vessels had in fact been seized by the Japanese navy in 1937 although that was commonly known. Also, after the Japanese government's alleged legalization of the seizure, its entrustment of the two vessels to Daido through time charters and Daido's payment of the charter hires to the Japanese Ministry of Communications required specific proof. The evidence might have included, for example, the summons, notices and decisions of the Japanese Court of Prize, the contracts between Daido and the Japanese Ministry of Communications, and the receipts of payments for the charter hires from the Japanese authorities.

Daido, however, produced no such evidence, claiming that its pertinent files had been destroyed in the war. The plaintiffs argued that, even if that were so, the unavailability of the files could not have exempted Daido and its successors in interest from producing the required evidence because the crucial documents or at least copies of them should have been kept, and perhaps actually were kept, in the files of the relevant Japanese government agencies rather than only in Daido's own file storage system.

The plaintiffs also submitted writings of leading publicists to prove that under the laws of war, the claimed naval seizures and subsequent satisfaction of legal requirements in August 1937 would not have been valid under the Sixth Hague Convention's provision for immunity from confiscation of enemy merchant ships in a belligerent port at the outbreak of war. Procedural limitations on the right of seizure under both international law and domestic law also called into question the validity of the defense under the Convention.

Moreover, a controlling procedural rule is that every seizure must be adjudged. A valid title cannot arise simply from the military act of seizure: title passes only upon a judgment by a prize of court. It is a fundamental principle of the law of prize that in effecting a seizure, certain formalities must be fulfilled, among them the presentation of a *proces-verbal*. After a seizure, the vessels must be taken to a port, and a competent tribunal must determine the validity of the seizure. Hence, even if an enemy vessel has been destroyed following its seizure, a formal adjudication of the seizure is still required. There was no evidence in this case, however, that such a formality had been observed. Indeed, it was not until December 17, 1941, four years after the alleged seizures *Zhong Wei* (earlier, *Chung Wei*), that a competent Japanese prize court to effect the required formalities was established.

The same procedural limitations on the right of prize apply under international custom. Again, every prize must be adjudged.<sup>40</sup> Thus, a valid title cannot arise simply from a military act of seizure; instead, title passes only upon a judgment by a prize court, typically of the captor State.<sup>41</sup> Even if an enemy vessel has been destroyed following capture, adjudication is still required.<sup>42</sup> Thus, a prize court determines the validity of all maritime captures, and title to privately-owned vessels flying an enemy flag and their cargoes that had been seized as prize may pass to the captor only if so awarded by a prize court.

As has been noted, one of the major issues that the Shanghai Maritime Court addressed was whether Daido should have been liable for breach of the time-charter contracts because it had failed to pay charter hires and redeliver the vessels. The defendant argued that because the charters' purposes were frustrated by the Japanese seizure of the vessels, the plaintiffs' loss resulted from the Japanese navy's seizure of the vessels rather than any breach of contract by Daido.

Even had the Japanese Navy actually seized the two ships and subleased them to Daido without any adjudication of the prize, the title to them could not have passed to the Japanese government under international maritime law. On July 7, 1937, undeclared warfare between China and Japan had broken out, etched in history by the Marco Polo Bridge Incident.<sup>43</sup> Under Article 1 of the Sixth Hague Convention,<sup>44</sup> Chung Wei's vessels would have been entitled to a grace period to enable their departure from Japan, but they were kept in port, apparently by Daido. According to the *force majeure* provision in Article 2 of the Sixth Hague Convention,<sup>45</sup> they therefore should have been immune from confiscation—that is, anything more than temporary detention of the vessels—by the Japanese government. Moreover, the “prize” of these ships was never adjudicated, even after the establishment of a Japanese prize court on December 17, 1941<sup>46</sup> (interestingly, just after the Japanese attack on Pearl Harbor). The Japanese government's alleged releasing of the ships to Daido was therefore invalid, and the original time charters would have remained in effect. But this issue largely became moot insofar

40. 11 DIGEST OF INTERNATIONAL LAW 81-82 (Marjorie Whiteman ed. 1968).

41. Robert W. Tucker, *The Law of War and Neutrality at Sea*, in UNITED STATES NAVAL WAR COLLEGE, INTERNATIONAL LAW STUDIES, NO. 35, at 105 (1955); CHARLES E. ROUSSEAU, DROIT INTERNATIONAL PUBLIC 651 (1953).

42. Whiteman, *supra* note 40.

43. *See supra* note 11.

44. *Supra* note 35.

45. *Id.*

46. Whiteman, *supra* note 40, at 84.

as the Shanghai Maritime Court simply determined that rather than seizing the ships as prize, the Japanese Navy had detained them.

## B. The Breach-of-Contract Issue

Zhong Wei's claim against the defendant in the Shanghai Maritime Court was based in part on an interesting breach-of-contract theory. A so-called "safe port" or "ice" clause in both time charters signed by Chung Wei and Daido in 1936 reads in part:

That the ship shall not be ordered to any port where fever or pestilence is prevalent or any ports blockaded *or where hostilities are being carried on* or any ice-bound port . . . Should the ship be detained by any of the above cause [sic] such detention shall be for Charterers' account . . .<sup>47</sup>

Although it is unclear when exactly the armed conflict between China and Japan during the 1930s reached the status of all-out belligerency or international armed conflict under international law,<sup>48</sup> it is clear that it had reached that level of hostilities after the Marco Polo Bridge Incident on July 7, 1937, which is generally cited as the beginning date of the Sino-Japanese war that merged into World War II.<sup>49</sup> On August 13, 1937 Japan imposed a naval blockade of the Chinese coast. As a consequence, Daido could not order the *Hsin Tai Ping* and *Shun Foong* to Shanghai, the ships' home port and one of the two ports that the time charters stipulated for redelivery of the ships to the owners. The alternative choice of ports for redelivery was the "Wakamatsu-Yokohama Range" in Japan.<sup>50</sup> Instead, Daido ordered the two ships to the undesignated Japanese ports of Osaka and Yawata.<sup>51</sup> Zhong Wei argued that because a state of belligerency

47. Time Charter Party, *supra* note 8 (emphasis added). This kind of safe-port clause ensures that a vessel will be ordered only to a port where the vessel will not be exposed to forfeiture, penalty or other political sources of danger. See 2B BENEDICT ON ADMIRALTY § 5, 1-39 (7th ed. rev. 1995).

48. *E.g.*, the Allied Powers of Tokyo indicted the Japanese leaders for aggression in China beginning not in July 1937, but in September 1931. Count 18 of the indictment, *Trials of Japanese War Criminals*, at 52. See RICHARD H. MINEAR, *VICTORS' JUSTICE: THE TOKYO WAR CRIMINAL TRIAL*, Appendixes, Judgment of the International Military Tribunal for The Far East: Findings on Counts of the Indictment 193, 195 (1973).

49. C. G. Fenwick, *supra* note 12, at 694; DOLAN & WORDEN, *supra* note 12 (Japan effectively instigated an international armed conflict against China after the Marco Polo Bridge Incident on July 7, 1937). See *supra* note 11; IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 387 (1963).

50. Woolsey, *supra* note 11.

51. According to a statement by Japanese officials in the Ministry of Communications charged with the investigation of Chen Qiaqun's claim in 1961, "*Hsin Tai Ping*" and "*Shun Foong*" were the only two Chinese ships that entered into the Japanese navy's blockade in

existed between China and Japan, Daido had ordered the ships to ports “where hostilities are being carried on” in violation of the “safe port” or “ice” clause in the time charters. Although the charters had designed the “Wakamatsu-Yokohama Range” as an alternative port or ports for redelivery of the ships after expiration of the charters, the specific designation of a Japanese port or ports did not seem to matter insofar as Zhong Wei’s argument under the “safe port” or “ice” clause applied to *any* Japanese port or ports after the outbreak of hostilities between China and Japan. Zhong Wei argued that this breach of the “ice clause” in the charters led to the detention of the ships by the Japanese navy.

Each of the charters also included a war clause, as is almost invariably found in time charters. It provided (presciently) “[t]hat in the event of war between any Asiatic and European or any other Powers operating or likely to operate in the Eastern waters, owners shall have the option of cancelling the contract.” Chung Wei never did this, but it is uncertain whether its failure to do so would have relieved the defendant of liability under the then prevailing law. Instead, the plaintiffs broadly argued that insofar as the defendant had failed to *prove* that the claimed prize of the two ships ever took place on August 22, 1937<sup>52</sup> and Daido’s letter of 1940 had proven to be false,<sup>53</sup> the legal authority that Daido’s consecutive successors in interest presented to the court to justify Daido’s actions was irrelevant because it was based on an erroneous presumption that the Japanese government had validly seized, rather than temporarily detained the ships.

In its 2007 judgment, the Shanghai Maritime Court’s finding that the Japanese navy had detained, rather than seized, the two ships in August 1937 was based on its determination that the defendant had provided no evidence that the Japanese government had seized or captured the two vessels nor, secondarily, that the government had ever purported to transfer ownership registration of the two ships to Daido. To the contrary,

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Japanese ports soon after the Marco Polo Bridge Incident. See *supra* note 11 and text at *supra* note 43.

52. During the process of petitioning to the Japanese authorities and judiciaries, the Japanese lawyers for Chen Qiaqun failed to investigate or collect any direct evidence to disprove the contents of Daido’s letter of 1940. Moreover, various Japanese government agencies including the Ministry of Justice, Ministry of Transportation and Committee for Re-examination of Seizure, as well as the Japanese courts, never ruled that such alleged seizure, the completion of the formal legalization of the seizure, the entrustment of the two vessels to Daido through time charters by the Ministry of Communication of Japan and the continuation of payment of the charter hires to the Ministry of Communication by Daido ever took place.

53. *Id.* The plaintiffs argued that Daido’s false intent in its letter of 1940 was manifest when it asserted that “. . . we paid charter hires to the Ministry from these delivery dates and are still continuing the payment.” As certainly should have been clear, however, the “*Hsin Tai Ping*” had already been lost in a typhoon two years earlier while under Daido’s operation.

Daido had breached its obligation under the original time-charter contracts to keep the vessels within safe shipping areas. Instead, Daido had allowed the two ships to proceed along the Japanese coastline and be detained by the Japanese Navy in Osaka and Yawata. After that, Daido took unlimited possession of the two ships, knowing that the ship owner was the China-based CHEN Shuntong and that Daido's act constituted infringement of his interest in the two ships because it neither notified the details to the ship owner in time nor paid it the required contract (charter hire) fees. Thus, from 5:00 PM on October 16, 1937 until whenever the two ships were sunk, Daido had unlawful possession of the ships. It had simply breached the time-charter contracts. Daido therefore had had an obligation to restore the vessels to CHEN Shuntong, and if that was impossible, to pay compensation according to their property value. Since the two ships were actually lost, Daido had assumed a responsibility for the economic injury to the plaintiffs, and its obligations to compensate them accordingly extended to its successors in interest.

### C. The Plaintiffs' Standing to Sue Under the Original Charter

As noted earlier, the defendant challenged the plaintiffs' standing to pursue their claim under the two time-charter contracts of the 1930s. CHEN Qiaqun's initial Statement of Claim, which proved to be defective and needed to be amended, as will appear, addressed the issue of standing as follows:

"The Plaintiff, Zhong Wei Steamship Co., was previously legally registered according to the registration procedures in Shanghai, China, and was an existing Chinese legal person. In 1958, this company moved to Hong Kong, and was established by law and maintains its existence to the present. The vessels *Shun Foong* and *Hsin Tai Ping* were the independent property of the Plaintiff."

It will be recalled that during the concluding court proceedings, CHEN Qiaqun, the legal representative of Zhong Wei, died in April 1992, leaving a will that passed his rights in the already pending lawsuit to his sons Chen Zhun and CHEN Chun. The second son, CHEN Chun, registered a new sole proprietorship, also under the name Chung Wei Steamship Co., in Hong Kong in 1993.<sup>54</sup> Two years later the trial court approved the two sons' application to join the lawsuit as co-plaintiffs. With the court's permission, the plaintiffs amended their father's Statement of Claim by striking out the phrases "and was an existing

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54. Although the Wade-Giles translation of the company in Hong Kong is still "Chung Wei," the *pinyin* version, "Zhong Wei," continued to apply in the litigation.

Chinese legal person” and “[i]n 1958, this company moved to Hong Kong.”

The defendant argued that the plaintiff Zhong Wei Steamship Co. lacked standing to sue it for two reasons: first, the plaintiff was not a legal person under Hong Kong law, and its predecessor in interest had ceased to exist not later than 1949 when CHEN Shuntong, the original owner of Chung Wei, died. Accordingly, the defendant argued that the newly registered Chung Wei Steamship Co. (Hong Kong) could not rely on its status as a successor in interest to CHEN Shuntong’s time-charter contracts in order to assert the pre-1949 claim because CHEN Qiaqun’s will had not been probated in Hong Kong so as to validate his sons, CHEN Chun and CHEN Zhen as successors in interest to the rights of their father and therefore as beneficiaries entitled to assert the underlying claim in the name of Chung Wei (Hong Kong).

Before the plaintiffs amended their initial Statement of Claim, the defendant submitted evidence from Hong Kong lawyers to show that under Hong Kong law Chung Wei Steamship Co. was not a legal person and could not have “moved” there from Shanghai. It argued that the company was a Hong Kong sole proprietorship without recognizable legal status. Moreover, the company could not be recognized as a former Shanghai-registered entity because that entity had ceased to exist at the very latest in 1949, when the new communist government abolished the Nationalist Chinese company law that had provided the foundation for Chung Wei’s legal status. Also, the action should not go forward insofar as the sole proprietorship in Hong Kong, in whose name CHEN Qiaqun had launched the lawsuit, in effect had not survived his death in 1992.

Second, the defendant argued that because CHEN Qiaqun had died in Hong Kong and was domiciled there, his will could only be validated according to Hong Kong probate law. As the will had not been probated there, the court could not take judicial notice of it. The will therefore could not be assumed to be valid. Moreover, the court had no probate jurisdiction to itself resolve any pivotal issue of inheritance. Hence, the defendant argued that the court lacked jurisdiction on the issue of succession in interest by CHEN Qiaqun’s two sons to the assets and claims of the shipping company. Finally, it argued that, even if the court decided that CHEN Qiaqun had validly conveyed his rights in the lawsuit to his sons under P.R.C. law, this did not mean that they had succeeded to any right to represent both themselves and Zhong Wei. If, therefore, the sons could not represent Zhong Wei, any claim in its name was unsupportable.

In response, the plaintiffs agreed, first, that their predecessor in interest in the 1930s, Chung Wei Steamship Company, had been a sole proprietorship registered by CHEN Shuntong in Shanghai according to the

then Nationalist Chinese company & business law. They argued, however, that under the Civil Procedure Law of the P.R.C., a sole proprietorship could sue and be sued *either in the business name of the sole proprietorship or in the individual name of the owner of the sole proprietorship*. All four of CHEN Shuntong's ships, including the two in dispute<sup>55</sup>, were his personal properties and had been registered under his name as the ship owner according to the original title documents. Essentially, CHEN Shuntong had conducted his personal shipping business under the name Chung Wei Steamship Company, thereby assuming unlimited liability and exposing his personal assets to any liability, as was permissible and a common practice at that time. When CHEN Shuntong died in 1949, he left a will that appointed his oldest son, CHEN Qiaqun, to exercise rights over the two ships leased to Daido. As the owner of the sole proprietorship (Chung Wei), CHEN Shuntong had a right to dispose of his own assets including a right to claim compensation for the loss of the two ships that had been leased in his personal capacity to the Japanese party. His son, CHEN Qiaqun, then succeeded to that right.

The plaintiffs further argued that after the death of CHEN Qiaqun, his sons, CHEN Zhen and CHEN Chun, were entitled to exercise the right to claim the ships under, first, CHEN Shuntong's will, and, derivatively, his son CHEN Qiaqun's will. Regarding the effect to be given to CHEN Qiaqun's will, the plaintiffs argued that probate in Hong Kong was unnecessary; nor was Hong Kong probate law applicable *insofar as the will had been executed in Shanghai*. Thus, P.R.C. law, not the British law still applicable at that time in Hong Kong, applied so as to validate the will by a Shanghai-based court, and P.R.C. law would then unquestionably uphold the capacity of CHEN Qiaqun to convey all of his rights to his beneficiaries, CHEN Zhen and CHEN Chun.

The court so held, but only after agreeing with the defendant Mitsui, that upon the death of the original ship owner, CHEN Shuntong, his steamship company no longer existed, precisely because it had been his sole proprietorship rather than an incorporated entity. Indeed, the three Zhong (Chung) Wei Steamship Compan(ies), each established by a different generation of the Chen family, were neither identical nor valid successors in interest to each other. Each entity has a separate date and place of establishment, capital asset structure, capital subscription, and so on. Therefore, neither Zhong Wei's own claim nor any claim by the sons

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55. Shortly after the outbreak of the Sino-Japanese War, the two ships not at issue in this case were requisitioned by the Nationalist Chinese government and were sunk, respectively, in the internal ports of Zhenghai and Jiangying in order to block and slow down Japanese military action against and within China.

to the ships based on Zhong Wei's claim was supportable. Nevertheless, the court then held, first, that under P.R.C. law, it need not resolve any issues that would more properly be resolved in probate. That was because the sons' inheritance of the right to assert a claim to the ships was based on Shanghai-executed wills that required no further probate. Thus, the two sons, CHEN Zhen and CHEN Chun, *in their individual personal capacities*, could claim rights to claim the two ships at issue based on the Shanghai-executed will of CHEN Qiaqun, which itself was derived from the will of CHEN Shuntong. Although the name "Zhong Wei Steamship Co.," remained in the title of the case, only the two sons remained as parties in interest. Zhong Wei's own claim disappeared.

#### **D. The Timeliness of the Action**

As we have seen, the first stage of the extraordinarily protracted litigation in this case was in a Japanese court, which dismissed the action as time-barred. The same issue, this time under Chinese law, arose in the concluding proceedings before the Shanghai Maritime Court. The defendant argued that the action was again time-barred because 50 years had passed between the alleged breach of contract in 1937 and the filing of the action in 1988, far in excess of the limitations of both Japanese and Chinese law.

The plaintiff argued, on the other hand, that the action was timely according to the current Chinese law. It cited provisions from the General Principles of Civil Law of the P.R.C. and a Judicial Explanation of the Supreme Court of China: "Causes of action that have accrued more than 20 years before the effective date of the General Principles of the Civil Law of the P.R.C. should be filed by December 31, 1988." The plaintiff argued that, because the action was indeed filed the day before the deadline for such filings, it was timely.

##### *1. The Japanese Statute of Limitations*

Although the substance of Zhong Wei's claim in the Japanese proceedings appeared plausible, even against the Japanese government, procedural impediments were crippling. A first and ultimately fatal impediment was the timeliness of the action. It was not at all surprising that more than 35 years after the cause of action arose, the Tokyo District Court dismissed CHEN Qiaqun's case in 1974 for lack of timeliness. Japanese statutes of limitations are expressed as prescriptions that denote

a lapse of time by virtue of which a private right is either lost or acquired.<sup>56</sup> *Extinctive prescription* bars a person who has failed to exercise a right within 20 years from the date of acquiring title to the right.<sup>57</sup> *Acquisitive prescription*, on the other hand, enables a person who has *possessed* property for a specific period to acquire title to it after 20 years.<sup>58</sup> Clearly, the question in the case was one of *extinctive prescription*. That rule, however, is subject to tolling provisions for interruption<sup>59</sup> and suspension.<sup>60</sup> Litigation operates to interrupt prescription as soon as an action is filed<sup>61</sup>, regardless of whether the underlying complaint is actually served on the other party.<sup>62</sup> Japanese law also permits specified non-judicial demands to interrupt the period of prescription.<sup>63</sup>

Several events in *Zhong Wei* arguably constituted interruption or suspension of prescription according to Japanese law, such as the repeated demands by CHEN Shuntong and CHEN Qiaqun for compensation from Japanese parties, the Allied occupation in Japan, and the transition of the occupation authority to a competent Japanese government.<sup>64</sup> It would seem that the prescription period for bringing an action was suspended until the Treaty of Peace after World War II.<sup>65</sup> As a matter of international

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56. J. E. De Becker, I PRINCIPLES AND PRACTICE OF THE CIVIL CODE OF JAPAN 115 (1921) [hereinafter CIVIL CODE].

57. Also, there are numerous extinctive prescriptions of one to ten years that are not relevant in the instant case. *Id.* at 129.

58. *Id.* at 127-28. If possession was commenced in good faith, without fault, peacefully, openly and continuously, the possessor may acquire the right by only ten year's possession in the case of immovable property and immediately in the case of movables. See J. E. DE BECKER, I ANNOTATED CIVIL CODE OF JAPAN 160-162 (1909) [hereinafter, ANNOTATED CODE].

59. See CIVIL CODE, *supra* note 56, at 118-119; ANNOTATED CODE, *supra* note 58, at 150-58.

60. A "suspension of prescription" may occur as the result of an unavoidable cause. CIVIL CODE, *supra* note 56, at 125, 127; ANNOTATED CODE, *supra* note 58, at 157-160.

61. CIVIL CODE, *supra* note 56, at 119-120; ANNOTATED CODE, *supra* note 58, at 150-52.

62. De Becker, *supra* note 56, citing a decision of the Nagasaki Appeal Court of Feb. 18, 1911. In the case of a judicial demand, prescription recommences to run when the judgment has become final and conclusive. See CIVIL CODE, *supra* note 56, at 124; ANNOTATED CODE, *supra* note 58, at 156-157.

63. CIVIL CODE, *supra* note 56, at 119, 121; ANNOTATED CODE, *supra* note 58, at 150-151. Such exceptional demands must be proven, as by receipt of certified mail.

64. Interruptions involve acts of a certain person vis-à-vis another; they are not effective against third parties. Exceptionally, a demand against one of the debtors under a joint obligation interrupts the running of the period of prescription as against all the other debtors. See CIVIL CODE, *supra* note 56, at 123-24.

65. Treaty of Peace *supra* note 17. The P.R.C. has maintained, rather extravagantly, that a state of war continued between China and Japan until September 28, 1972, when a Sino-Japanese Joint Communiqué was signed. Paragraph I of the Joint Communiqué of the Government of Japan and the Government of the People's Republic of China provides as follows: "The abnormal state of affairs that has hitherto existed between Japan and the People's Republic of

custom, the equitable principle of laches cannot be imputed to persons unable to act.<sup>66</sup> Thus, the existence of a state of war between two countries normally suspends the running of statutes of limitation as between the citizens of such countries,<sup>67</sup> but it does not affect the continuity of obligations established prior to a state of war.<sup>68</sup> Article 17a of the Treaty of Peace with Japan implies this principle.<sup>69</sup> In accordance with these

China is terminated on the date on which this Joint Communiqué is issued." See, Joint Communiqué of the Government of Japan and the Government of the People's Republic of China of September 29, 1972, in 17 JAP. ANN. INT'L L. 81-83 (1973).

66. See, e.g., *Cayuga Indian Claim Case*, 3 ANN. DIG. PUB. INT'L L. 246 (Brit.-Am. Trib. [1910] (1926)).

67. See generally, *Annotation: War As Suspending Running of Limitations*, 137 A.L.R. 1454-1456 (1942); see also *Ogden v. Blackledge*, 2 Cranch 272 (1804); *Hanger v. Abbot*, 6 Wall 532 (1868); *Amy v. Watertown*, 130 U.S. 320 (1889); *Borovitz v. American Hard Ruber Co.*, 287 F. 368 (D.C. 1923); *First National Bank v. Anglo-Oesterreichische Bank*, 37 F.2d 564 (3d Cir. 1930). Article 300 of the Treaty of Versailles, for example, provided that:

All periods of prescription, or limitation of right of action, whether they began to run before or after the outbreak of war, shall be treated in the territory of the High Contracting Parties, so far as regards relations between enemies, as having been suspended for the duration of the war. They shall begin to run again at the earliest three months after the coming into force of the present treaty.

Treaty of Versailles (Treaty of Peace between the Allied and Associated Powers and Germany), 3 U.S.T. 3714, 225 C.T.S. 189, 16 AM. J. INT'L L. SUPP. 1 (1922). After World War II this principle was reiterated in the Peace Treaties, such as that between the United States and Italy. It provides that:

All periods of prescription or limitation of right of action or of the right to take conservatory measures in respect of relations affecting persons or property, involving United Nations nationals and Italian nationals who, by reason of the state of war, were unable to take judicial action or to comply with the formalities necessary to safeguard their rights, irrespective of whether these periods commenced before or after the outbreak of war, shall be regarded as having been suspended, for the duration of the war, in Italian territory on the one hand, and on the other hand in the territory of those United Nations which grant to Italy . . .

Peace Treaty, U.S.-Italy, § B, Annex XVI, Feb. 10, 1947, 61 Stat. 1245, 49 U.N.T.S. 3, 233-234.

68. It is recognized that the intervention of the state of war has not affected the obligation to pay pecuniary debts arising out of obligations and contracts which existed and rights which were acquired before the existence of a state of war, and which are due by the Government or nationals of Japan to the Government or nationals of one of the Allied Powers. The intervention of a state of war shall equally not be regarded as affecting the obligation to consider on their merits claims for loss or damage to property or for personal injury or death which arose before the existence of a state of war, and which may be presented or represented by the Government of one of the Allied Powers to the Government of Japan, or by the Government of Japan to any of the Governments of the Allied Powers.

Peace Treaty (U.S.-Italy), *supra* note 67.

69. Article 17(a) requires that upon the request of an Allied Power, Japan must review "in conformity with international law any decision or order of the Japanese Prize Courts involving ownership rights of nationals" of the Allied Power. Treaty of Peace, *supra* note 17. In the

provisions, Japan constituted a Review Commission on the Decisions of the Prize Courts, which is reported to have made decisions in two cases between 1952 and 1963, when it was dissolved.<sup>70</sup>

Article 17 of the Special Wartime Compensation Measure of Japan of 1946 established a deadline of December 14, 1946 for filing all claims for war-related reparations.<sup>71</sup> CHEN Qiaqun's claim in 1964 would thus seem to have been untimely. The 1946 instrument applied, however, only to Japanese citizens.<sup>72</sup> As to non-Japanese property, the Japanese Ministry of Foreign Affairs, in a publication entitled "Prize Adjudication," dated February 1949, stated:

Since the signature of the Surrender Instrument, Japan has executed and is now executing, in compliance with a series of directives of the Allied Headquarters, the restitution of Allied vessels in Japanese hands, inclusive of those which were formally confiscated by adjudication of Prize Courts.<sup>73</sup>

## 2. *The Chinese Statute of Limitations*

Today, Article 135 of the General Principles of Civil Law of the P.R.C. (Civil Law)<sup>74</sup> provides that the period of limitation for bringing a suit in the People's Court seeking protection of a civil right is two years, unless the law provides otherwise. Like the Japanese civil law, however,

Instrument of Surrender, September 2, 1945, Japan recognized that the "authority of the Emperor and the Japanese Government to rule the state shall be subject to the Supreme Commander for the Allied Powers." See Whiteman, *supra* note 40, at 121.

70. Mitsua Machara, *Review of Decisions of Japan's Wartime Prize Cases: The Santa Fe Case*, 8 JAP. ANN. INT'L L. 24 (1964). On American claims relating to certain small vessels condemned in prize, see Lionel M. Summers & Arnold Fralciigh, *The United States-Japanese Property Commission*, 56 AM. J. INT'L L. 407, 421 (1962).

71. Special Wartime Compensation Measure of Japan of 1946, art. 17.

72. *Id.* art. 1.

73. Whiteman, *supra* note 40, at 122. The Far Eastern Commission, Second Report by the Secretary General, July 10, 1947 - December 23, 1948, at 37-38 (1948) provided as follows:

Steps should be taken to restore to Allied countries ships of all types and sizes found in Japanese waters which are identified as having been registered in an Allied country at the time of seizure or sinking by the Japanese or their agents, or at the time of acquisition by the Japanese or their agents by fraud, force or duress. The fact that payment was made should be disregarded unless there is conclusive evidence that fraud, force or duress did not take place. Within the limits of feasibility ships found in Japanese waters whether seaworthy, sunk, or damaged, should, on the request of the claimant country, be refitted, or salvaged, repaired and refitted, as a matter of priority in Japanese yards, to permit their return in a condition substantially similar to that at the time they came into Japanese hands. The foregoing costs should be borne by the Japanese government.

74. General Principles of Civil Law of the People's Republic of China (1986), 34 AM. J. COMP. L. 715 (Whitmore Gray & Henry Ruiheng Zheng trans. 1986) [hereinafter Civil Law].

the Chinese civil law recognizes that the running of a period of limitations may be tolled.<sup>75</sup> Even if such relief from the running of the limitation statute seems to apply to the circumstances in *Zhong Wei's case*, however, it is unlikely that the tolling and other exceptional provisions were intended to be applied to interruptions outside of China, such as the court proceedings in Japan.<sup>76</sup>

Article 137 of the Civil Law establishes a 20-year maximum period of *repose* from the time an infringement of a right was known or might have been known. The same provision empowers the People's Court to extend the period of limitations in "special circumstances," but it is unclear what constitutes such special circumstances and what the maximum duration of such an extension is.<sup>77</sup>

As noted earlier, however, the Supreme People's Court advised that causes of action which had accrued more than 20 years before the effective date of the General Principles of the Civil Law of the P.R.C. (effective January 1, 1987), with no clear temporal baseline, should be filed by December 31, 1988. The Shanghai Maritime Court, following this Explanation by the Supreme People's Court, therefore concluded that the action was timely insofar as the Shanghai Maritime Court had allowed *Zhong Wei* to file its action the day before the prescribed deadline of December 31, 1988.

### E. The Forum-Selection Clause in the Original Time Charters

The forum-selection clauses in the original time charters also cast doubt on the proceedings in Shanghai insofar as those proceedings were before a court of law rather than an arbitral body. The clauses read as follows:

That any dispute arising under this charter shall be settled in Shanghai by arbitration, the Owners and Charterers appointing an Arbitrator each, and the two so chosen (both to be commercial men), if they do not agree, shall appoint an Umpire, the decision of whom shall be final. Should either party refuse or neglect to appoint an Arbitrator within 10 days of being

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75. *Id.* Article 140 provides that the period of limitations ceases if one party files a claim, demands performance or agrees to perform a duty. A new period of limitations (presumably two years) will start to run from the time when the previous period of limitations ceased. Article 139 provides that if, during the last six months before the period of limitation expires, a party is unable to bring his claim, as a result of *force majeure* or other obstacles, the running of the time prescribed in the statute of limitations is suspended. A new period of limitations begins to run (presumably two years) from the date when the cause of the suspension ceases.

76. *Id.*

77. *Id.*

required to do so by the other party, the Arbitrator appointed may make a final decision alone, and this decision shall be binding on both parties. For the purpose of enforcing any award, this agreement shall be made a Rule of Court.<sup>78</sup>

Chinese courts generally give effect to such clauses. Thus, Chung Wei ordinarily would have been bound to raise its claim in arbitration as soon as, having failed to receive rent, its cause of action arose. After August 1938, however, no viable arbitral tribunal or ad hoc arbitral arrangements protected by Chinese law remained in Japanese-occupied Shanghai until the end of the war, thereby denying Chung Wei recourse to the prescribed method of dispute resolution until the end of the war. To be sure, there were "commercial men" available to arbitrate disputes during the war, but under the circumstances of hostilities between the very two countries whose shipping interests were at stake, such arbitration unprotected by Chinese law would have carried little or no weight.

After the war arbitral facilities were reinstated. Also, private, *ad hoc* arbitration,<sup>79</sup> rooted in international custom,<sup>80</sup> was available in China between 1945 and 1949 during the final years of the Nationalist government of China.<sup>81</sup> Later, for example, an arbitration clause similar to that in the Chung Wei time charters appeared in a trade agreement between China and Finland<sup>82</sup> although such clauses do not appear in trade agreements between China and Japan.<sup>83</sup> Nor were such treaty provisions common.

78. Time Charter Party, *supra* note 8. The arbitration clause differs from the standard clause recognized by current Chinese law today. Under this standard clause, the parties must decide how many arbitrators will be involved, the method of their appointment, the place of arbitration, preferably the law to be applied, and any kind of rules they wish to see adopted by the arbitrators. The procedural rules of the arbitration must be determined by the arbitrators. See, e.g., RALPH H. FOLSOM & JOHN H. MINAN, LAW IN THE PEOPLE'S REPUBLIC OF CHINA, 124, 125, 126 (1989); see also JOHN SHIJIAN MO, ARBITRATION LAW IN CHINA, 22-25 (2001).

79. Martin Domke, THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION § 5.02, n. 18 (1968) ("These arbitrations [ad hoc arbitration], in contrast with institutional arbitration, may better be called 'private' arbitration . . .").

80. See, e.g., *Red Cross v. Atlantic Fruit Co.*, 264 U.S. 109, 122 n. 3 (1924).

81. See, e.g., *Commercial Arbitration in China*, 1 INT'L ARB. L. 165, 166 (1945).

82. In the Trade Agreement with Finland, June 5, 1953, it was provided that each party would be entitled to appoint one arbitrator, and the umpire would be chosen by agreement of the two arbitrators so appointed. Both the arbitrators and the umpire must be citizens of either China or Finland. See II COLLECTION OF TREATIES OF THE PEOPLE'S REPUBLIC OF CHINA 351-56 (1953). See also John B. McCobb, Jr., *Foreign Trade Arbitration in the People's Republic of China*, 5 N.Y.U.J. INT'L L. & POL. 205, 214 (1972).

83. In 1952 and 1953, the initial two trade agreements between China and Japan both provided for arbitration within the territorial boundaries of China regardless of which party was the defendant. The agreements did not provide for the composition of arbitration tribunals, however, nor for the method by which the arbitrators were to be selected. See Chinese-Japanese

In 1954 the China Council for the Promotion of International Trade (CCPIT) established two arbitration commissions, known today as the China International Economic and Trade Arbitration Commission (CIETAC) and the China Maritime Arbitration Commission (CMAC).<sup>84</sup> These two arbitration commissions, governed by their own rules, are of long standing as available means for conducting international arbitration in China.<sup>85</sup> Clearly, then, arbitration had become available as early as 1952 in the P.R.C. Moreover, the P.R.C.'s Civil Procedure Law, published on April 9, 1991, just a few months before the first hearing in the Chinese court proceedings of *Zhong Wei*, confirms the exclusivity of arbitral clauses. Article 257 of that law provides that any dispute arising from maritime matters which the parties agree in writing to refer to an arbitral commission may not be brought to a People's Court. Inexplicably, however, the defendant did not invoke the arbitration clause as a defense in the Shanghai litigation. That is especially surprising, given how new and untested the Shanghai Maritime Court was at that time.

#### F. Choice of Law

The parties agreed to apply P.R.C. law, including pertinent treaties and other international law as provided by the law, to resolve their dispute. In its 2007 judgment, the Shanghai Maritime Court accepted this exercise of party autonomy on the basis not only that the two ships had been registered in China, but also that the two time-charter contracts had been executed in China.<sup>86</sup>

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Trade Agreement, Dec. 31, 1952, art. 6, in II COLLECTION OF TREATIES OF THE PEOPLE'S REPUBLIC OF CHINA 367, 368 (1952-1953). In the third and fourth trade agreements with Japan, dated May 4, 1955 and March 5, 1958, respectively, the Chinese accepted the country of nationality of the defendant as the location of arbitration and agreed that if the arbitration was conducted in Japan, the rules of the Japan International Commercial Arbitration Association would prevail. On the other hand, if the arbitration was conducted in Beijing, the prevailing rules would be those of the Foreign Trade Arbitration Commission of the China Council for the Promotion of International Trade (later designated the China International Economic and Trade Arbitration Commission). See Chinese-Japanese Trade Agreement, May 4, 1955, art. 8, in IV COLLECTION OF TREATIES OF THE PEOPLE'S REPUBLIC OF CHINA 258, 259-60 (1955); Chinese-Japanese Trade Agreement, March 5, 1958, art. 8, in VII COLLECTION OF TREATIES OF THE PEOPLE'S REPUBLIC OF CHINA 197, 198-99 (1958).

84. See, e.g., Clement Shum, *Maritime Arbitration in the People's Republic of China*, LLOYD'S MAR. & COM. L. Q. 114 (1990) (with the approval of the State Council, the MAC was renamed as the China Maritime Arbitration Commission (CMAC) in 1988. The CCPIT adopted the CMAC Arbitration Rules, replacing the Provisional Rules of 1959. The Rules came into effect on January 1, 1989).

85. See James A.R. Nafziger & Ruan Jiafang, *Chinese Methods of Resolving International Trade, Investment, and Maritime Disputes*, 23 WILLAMETTE L. REV. 619, 626 (1987).

86. The Maritime Law of the People's Republic of China provides for choice of law as follows:

### G. Non-Recognition of Extrinsic Evidence

Generally, the Shanghai Maritime Court, confronted with somewhat of an evidentiary imbroglio, was quite open to the introduction of documentary evidence, even information that was challenged as hearsay. It did, however, scrutinize such information. It also ruled against the plaintiffs' submission of evidence about the extent of economic loss after a dispute about appropriate accounting methods had emerged. The court appeared to be especially skeptical, however, about the defendant's submission of certain extrinsic evidence.<sup>87</sup> In its 2007 opinion, the court ruled that affidavits and statements by a Hong Kong lawyer concerning the transferability of *Chung Wei* from Shanghai to Hong Kong under Hong Kong law were not admissible as evidence on behalf of Mitsui's defense although they could be used as "reasoning" in the case. In other words, the court was under no obligation to recognize extrinsic evidence of Hong Kong law. Another evidentiary issue arose, however, as a result of *Zhong Wei*'s filing of two other actions related to its claim against Mitsui.

Besides the main action discussed in this article, *Zhong Wei* filed the two additional actions also in the Shanghai Maritime Court. The first of these was a complaint against the Japanese government that *Zhong Wei* submitted to the Shanghai Maritime Court on December 21, 1988, ten days before the present action was accepted by the court. *Zhong Wei* promptly withdrew this complaint before the court accepted it, however. Then, on May 31, 1989, while the present action was proceeding, *Zhong Wei* filed an action against two private insurers, Japan New Asia Maritime Transportation Fire Insurance, Ltd. and the Japan Tokyo Sea Insurance Ltd. In this action *Zhong Wei* claimed insurance compensation for loss of the two ships. On March 12, 1993, however, *Zhong Wei* successfully moved to withdraw this action, just as it had done to terminate its action against the Japanese government.

Even though *Zhong Wei* had successfully withdrawn from the two additional actions, the defendant argued that the court in the present case should recognize evidentiary material as conclusive that *Zhong Wei* had presented in the two other actions, thereby estopping *Zhong Wei* from presenting new evidence against the defendant. The court rejected this

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Article 269: The parties to a contract can choose the applicable law for governing the contract, unless the law prescribes otherwise. If the parties to a contract do not choose the applicable law, the law of the country which has the closest connection with the contract shall be applied.

Article 270: The acquisition, transference and destruction of the ship's ownership shall apply the municipal law of the flag state.

87. What follows in this section is abstracted from the 2007 judgment. *Zhongwei*, 1989 HHSFZ No. 25 (Shanghai Maritime Ct., Dec. 7, 2007).

defense to the plaintiffs' presentation of further evidence against the defendant insofar as it determined that the other actions were neither *res judicata* nor even appropriate as sources of evidence in the present action.

### H. Compensation

The plaintiffs sought more than ¥ (Japanese) 31 billion in compensation from the defendant company, but they ultimately received only about 12% of that amount: approximately ¥ (Japanese) 3.7 billion. Even so, the release of the final payment to the plaintiffs was a major victory for them after so many years of effort and frustrating delays. Justice delayed had nearly been justice denied. If any issues of fairness remained, they related to the bottom line of compensation.

In the end, the Shanghai Maritime Court's release of funds to the plaintiffs was based on its 2007 judgment plus enforcement fees and double the accrued interest due to the defendant's seven-year delay in satisfying the judgment. The defendant benefited by its delay from a decline in the exchange value of the yen, as the base currency for compensation, during the period of nonpayment on the judgment. More fundamentally, the disparity between the plaintiffs' original claim and the its final compensation merits a few observations.

As an evidentiary matter, the Shanghai Maritime Court undertook an appraisal of the plaintiffs' claim in terms of the sufficiency of proof and acceptable accounting methods. Its appraisal was balanced but nevertheless controversial. On the one hand, in its 2007 judgment, the court concluded that the plaintiffs' valuation of the two lost ships was supportable despite the difficulty of determining their actual value, given the uncertainty about their condition when they were lost. The court also discounted the nonconformity of the plaintiffs' method of calculation with the prescribed post-war Japanese accounting standards. On the other hand, the court rejected the plaintiffs' method of calculating the charter-hire debt because of a lack of "grounds and rationality."<sup>88</sup> Further, the court rejected the plaintiffs' request for attorney fees. Also, the court assessed litigation fees between the parties overwhelmingly against the plaintiffs (91%). Moreover, the court's final ruling on compensation in 2014 was controversial regarding both the starting date for assessing the doubled interest against the defendant for its delay in satisfying the judgments and the base currency for calculating the interest. A final, very broad conclusion derived from this brief analysis of compensation in the case

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88. The plaintiffs initially claimed back payments for 45 years of charter hires, but each time charter provided for termination of payments "on the day of her loss, and if missing, from the date when last heard of."

against the background of political tensions between Japan and China is that they do not seem to have influenced the bottom line.

## V. CONCLUSION

It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity, it was the season of Light, it was the season of Darkness, it was the spring of hope, it was the winter of despair.<sup>89</sup>

China's tale of two ships, if not its *Jarndyce v. Jarndyce*,<sup>90</sup> is now history. In 2014, when the Shanghai Maritime Court successfully enforced a judgment against a Japanese defendant in *Zhong Wei Steamship Co. v. Mitsui O.S.K. Lines, Ltd*, more than 75 years had passed since the cause of action arose. Some 40 years had lapsed since a court in Tokyo had dismissed as untimely an identical claim against the Japanese government. It had also been 26 years since the Chinese court had accepted the filing of the plaintiffs' claim for the last, definitive proceedings. Quite likely, both that litigation and the underlying dispute set records for longevity in modern China. Unlike *Jarndyce*, however, the case did not simply melt away after the property at issue had been completely absorbed in costs. Instead, five days after the court had ordered the arrest of its vessel in the Majishan Port of Shengsi, the Japanese defendant, Mitsui, promptly satisfied the judgment. The underlying claim was one of the largest to date against a foreign party in a Chinese court, and the judgment of nearly ¥ (Japanese) 4 billion marked the first time that Chinese parties had won damages against a Japanese party for wartime losses.

The arrest of the Japanese vessel, pursuant to an Enforcement Notice in accordance with the P.R.C.'s Special Maritime Law<sup>91</sup> appears to have

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89. These famous opening lines from Charles Dickens' *A TALE OF TWO CITIES* (1859) nicely encapsulate the legal voyage of the *Zhong Wei Steamship Company*.

90. Charles Dickens' satirical novel, *BLEAK HOUSE* (1853), involves an almost endless proceeding, entitled *Jarndyce v. Jarndyce*, in the then reviled English Court of Chancery. As "the legion of bills in the suit have been transformed into mere bills of mortality," eventually "the suit lapses and melts away." Court costs and legal fees completely absorbed a substantial estate whose inheritance was at issue on the case.

91. See *supra* note 24. Article 22 of that law provides that "[n]o application for arrest of a ship may be filed except for the maritime claims as stipulated in Article 21 of this Law; there are exceptions, however, for executing judgments, arbitral awards or other legal documents. *Id.* (emphasis added). Article 23 provides that:

been the first time Chinese authorities had impounded foreign-owned property to enforce a war-related court judgment. It provoked a firestorm of indignation in Japan. On one level the vessel's arrest was viewed as a blatant political act reflecting historic tensions between the two countries that had been recently heightened by an ongoing, bitter dispute over the delimitation of the East China Sea.<sup>92</sup> Flare-ups of the same dispute had also immediately preceded both the judgment of the Shanghai Maritime Court seven years earlier and the final ruling in the case by the Supreme People's Court four years earlier.<sup>93</sup>

On another level of protest the arrest was claimed to violate the terms of a 1972 China-Japan Joint Communiqué<sup>94</sup> even though Mitsui, for good reason, never invoked it as a defense. Several sources in Japan feared that the arrest would "shake the foundation" of the Communiqué and alarm Japanese firms doing business in China, especially those engaged there since before the war; moreover, the Chief Cabinet Secretary of the Japanese government protested the arrest to the Chinese authorities.<sup>95</sup> Although China explicitly renounced its demand for war reparations from Japan in the Communiqué, this commitment clearly did not apply to judicial assistance in enforcing a commercial judgment in a case between two private parties. Nevertheless, the vessel's arrest prompted fears that it would lead to a flood of war-related reparations claims. One such claim had been filed in another Chinese court earlier in 2014 concerning forced labor during the war. The arrest also followed a string of lawsuits by former forced laborers of Chinese nationality demanding redress from Japanese corporations for which they worked during the Japanese occupation of China.<sup>96</sup> In the end, however, both the Chinese and Japanese governments appeared to view the arrest of the defendant Mitsui's vessel in this case as a strictly commercial matter.

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A maritime court may arrest other ships owned by the shipowner, bareboat charterer, time charterer or voyage charterer who is held responsible for a maritime claim, when the arrest is executed, with the exception of the claims related to ownership or possession of the ship.

92. For a study of this dispute, in search of a solution, see Michael C. Davis, *Can International Law Help Resolve the Conflicts Over Uninhabited Islands in the East China Sea?* 43 DENV. J. INT'L. L. & POL'Y 119 (2015).

93. See, respectively, SUSAN L. SHIRK, *CHINA: FRAGILE SUPER POWER* 147 (2007) and JAMES C. HSIUNG, *CHINA INTO ITS SECOND RISE: MYTHS, PUZZLES, PARADOXES, AND CHALLENGE TO THEORY* 282-83 (2012).

94. See *supra* note 65 (definitively terminating "[t]he abnormal state of affairs" between Japan and the P.R.C.).

95. NAGATA, *supra* note 32.

96. *Id.*

The underlying dispute concerned the loss of two ships that their Shanghai owner had leased in 1936 to a predecessor in interest of Mitsui. The core legal issues in the Shanghai Maritime Court engaged the international law of armed conflict, general maritime law, private international law, Chinese civil law and Chinese civil procedure. Ancillary questions about the standing of the co-plaintiffs and the inheritance rights of the original ship owner's heirs to assert a claim to the ship repeatedly contributed to the longevity of the litigation and led to the judicial unsupportability of the Chinese shipping company's claim, leaving only the heirs to benefit from the judgment.

The first hearing in the case, in 1991, took place just four months after the promulgation and effective date of the P.R.C's comprehensive Civil Procedure Law. The Shanghai Maritime Court was already well-established, however, having heard well over a thousand cases by 1991. Even so, *Zhong Wei* was no ordinary case. It was obviously complicated and venerable. It would require special care as well as guidance from the Supreme People's Court.

Understandably, then, the maritime judges were at first very cautious if not hesitant. They seemed to gain confidence and even aplomb, however, as court hearings continued for 16 years. In the end, their judicial opinion, with guidance from the Supreme People's Court, was well-crafted although the bottom line of compensation remained controversial. When the legal action nevertheless dragged on in fits and starts for another seven years, the court in effect declared in 2014 that enough was enough. All litigation must come to an end at some point in time. Although the defendant Mitsui had argued that the proceedings should continue because it had been seeking a settlement of the sort it had achieved in another similar case, the court, unmoved, had the confidence to bring the epochal case of *Zhong Wei* to an abrupt end. That occurred coincidentally in the very year when the Shanghai Maritime Court celebrated its thirtieth anniversary, a milestone in the Chinese tradition.

Amid the many technicalities and impediments along *Zhong Wei's* legal voyage of so many years through an "epoch of incredulity," a heartwarming outcome was the fundamental vindication of a claim by a single family, the Chens, for simple justice. After four generations and proceedings in two countries, the family finally recovered just compensation for the loss of their property. April 2014 provided, indeed,

a “spring of hope” for the Chens—and for users and observers of the Chinese judicial system.<sup>97</sup>

This was a complicated, protracted case. Perhaps the most obvious takeaway from it, then, is simply a reminder of how far China has departed from its traditional (but often caricatured) hostility to formal litigation.<sup>98</sup> Maritime and other courts have become mainstays of Chinese dispute resolution. More than 10 million lawsuits are filed each year in Chinese courts. In that regard, *Zhong Wei* was one of the first actions against a foreign party under the P.R.C.’s comprehensive Civil Procedure Law of 1991. The Shanghai Maritime Court readily assumed jurisdiction over the case under Chinese procedural law, even many years after a Tokyo court’s dismissal of the original ship owner’s action against the Japanese government under Japanese procedural law. And so the final proceedings beat on, a boat against the currents of traditional legal culture—as well as a forum-selection clause in the time charter that prescribed arbitration in Shanghai for resolving any disputes that might arise between the parties under the time charter.

It is surprising that Mitsui never raised the forum-selection (choice-of-arbitration) issue. After all, its defense was very much based on Chinese procedural law and private international law such as the justiciability of the action against it and the standing of the co-plaintiffs. These considerations, however, seemed to have overshadowed procedural issues that might have been raised directly under the time charters even though they did govern important substantive issues such as those related to the ice and war clauses in the charters. It was also surprising, concerning the circumstances of each ship’s demise, that Mitsui’s defense never turned to what arguably were supportive communications between the original ship owner and Allied officials in occupied Japan after World War II. Finally, Mitsui’s delay in complying with a very large judgment against it, even four years after all of its appeals had failed, led only to a substantial doubling of accrued interest on its judgment debt coupled with enforcement fees. To be sure, some evidence suggests that Mitsui still counted on an amicable settlement of the case in the East Asian cultural tradition. But four years is a long time to pin hopes on the prospect of such a settlement. Besides, the times have changed.

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97. In the words of Zhou Qiang, President of the Supreme People’s Court, the case was “widely watched at home and abroad” and its conclusion ensured “that the legitimate rights and interests of the parties concerned are protected.” ANN. WORK REP., *supra* note 5.

98. See, e.g., Albert H.Y. Chen, *China’s Long March Towards Rule of Law or China’s Turn Against Law?* 4 CHINESE J. COMP. L., NO. 1, at 1, 21 (2016)(noting that significant developments have occurred in China’s judicial system during the first decade and following years of this century).

During just the quarter century since the proceedings in *Zhong Wei* began in the Shanghai Maritime Court, China's legal culture, including its preferred mode for resolving disputes, shifted remarkably. Indeed, the modesty of Mitsui's pursuit of a settlement may itself have reflected an acknowledgment of, if not a resignation to, China's more litigious culture today. A concluding takeaway from the case may therefore be to confirm the need for careful and thorough advocacy in Chinese courts as well as prompt compliance with their civil judgments, at the risk of substantial penalties. Of course, this is just one case, but it is nevertheless instructive. With guidance from the Supreme People's Court, maritime and other courts have clearly been coming of age, as became evident, year by year, in the epochal case of *Zhong Wei*.

## VI. EPILOGUE

In retrospect, the commendable outcome of China's epochal case of *Zhong Wei* could be interpreted simply as a vindication of one family's persistent quest for justice. On the face of it, after far too long, a Chinese court dutifully did what was right on behalf of China-related interests. Even such a just outcome, however, required the court to order the arrest of a Japanese judgment debtor's vessel in a Chinese port in order to enforce the court's judgment. Justice is rarely simple.

### A. Implications for the Chinese Judiciary

The outcome of *Zhong Wei* has broader legal and political implications, however. Six months after the conclusion of the case, the Supreme People's Court gave notice that it would publicize *Zhong Wei* as one of its Classic Guiding Cases. In March 2015, ZHOU Qiang, President of the Court, chose to highlight the case in his annual report to the general assembly of the People's Congress, noting not only the equitable merit of the outcome, but also the international visibility of the case.<sup>99</sup>

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99. ANN. WORK REP., *supra* notes 5, 97. The full text of his remarks reads as follows:

最高人民法院院长周强关于最高人民法院工作的报告中有关中威船案执行

2015年3月12日上午9时，第十二届全国人民代表大会第三次会议在人民大会堂举行第三次全体会议，最高人民法院院长周强作关于最高人民法院工作的报告。在报告第三部分中周强院长提到：

“.....依法扣押日本商船三井株式会社货轮，顺利执行国内外广泛关注的中威执行案，保障了当事人合法权益。”

(On March 12, 2015, in Part III of a report delivered at the 12<sup>th</sup> National People's Congress in the third plenary meeting of the third session, Zhou Qiang, President of the Supreme People's Court of China, commented on the *Zhong Wei* case as follows: “False.The cargo carrier of Japan's Mitsui O.S.K. Lines, Ltd. was arrested according to the law in order to complete the

Despite *Zhong Wei's* prominence, it has not served to open the floodgates to claims in Chinese courts against Japanese entities, let alone the Japanese government, arising out of that country's treatment of Chinese nationals during World War II. The 1972 Joint Communiqué between China and Japan<sup>100</sup> clearly enjoins claims against the Japanese government itself<sup>101</sup> and explains why such claims inevitably have been unsuccessful, some on appeal of favorable decisions. Arguably, however, the judicial application of sovereign immunity is subject to an override of *jus cogens* with respect to violations of such first-order human rights as the use of lethal bacteria and indiscriminate bombing during the war.<sup>102</sup> In any event, *Zhong Wei* involved a claim against a private Japanese entity, not the Japanese government. Thus, the arrest of Mitsui's vessel to leverage enforcement of the plaintiff's claim did not violate or otherwise affect the Communiqué, let alone shake its foundation, as had been feared. To be sure, claims against Japanese entities for such practices as forced labor and coercion of "comfort women" during World War II are still pending. But such claims, which are normally barred in Japanese courts by the defense of sovereign immunity or statutes of limitations, have not noticeably increased in Chinese courts since the conclusion of *Zhong Wei*.

As noted earlier, one such claim had been filed shortly before the case concluded. The Beijing First Immediate People's Court proceeded to register that claim, which had been brought by thirty-seven Chinese laborers and their descendants against two Japanese companies. The court thereby became the first in China to establish jurisdiction over an action alleging World War II-related violations of human rights by Japanese entities. This focus on human rights, however narrowly it may be defined, is nevertheless an important development.<sup>103</sup> At the very least the claims, by seeking to determine violations authoritatively, can help draw attention to long-standing social issues, as well as to elaborate doctrine and potentially render moral and legal judgments.

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enforcement procedure of the *Zhong Wei* case, which has been widely watched at home and abroad, so that the legitimate rights and interests of the parties concerned are protected").

*Id.*

100. Joint Communiqué, *supra* note 65.

101. Paragraph five of the Communiqué provides as follows: "The Government of the People's Republic of China declares that in the interest of the friendship between the Chinese and the Japanese peoples, it renounces its demand for war reparation from Japan."

102. See Congyan Cai, *International Law in Chinese Courts During the Rise of China*, 110 AM. J. INT'L L. 269, 279 (2016), listing several actions that have asserted the *jus cogens* exception. The actions were filed in the Chongqing High People's Court and the Tangshan Intermediate People's Court between September 2012 and March 2014, just before the conclusion of *Zhong Wei*.

103. *Id.* at 279.

Unlike claims filed concurrently in Tangshan and Chongqing,<sup>104</sup> the Beijing action did not include the Japanese government as a co-defendant. The action and those of similar plaintiffs in other cases did, however, rely on the premise that paragraph five of the Joint Communiqué enjoins only war reparation claims against the Japanese government and not private entities. Japan contends, however, that the provision bars *all* claims, even against private parties.<sup>105</sup> Because of the repeatedly expressed disagreement between Chinese and Japanese authorities about the scope of paragraph five in the Joint Communiqué, the Supreme People's Court must give its consent for lower courts to proceed.<sup>106</sup> Foreign relations, after all, remain sensitive, even more than 70 years after the wartime causes of action arose.

The prominence that the Supreme People's Court has given to *Zhong Wei* suggests its confidence, up to a point, in the capacity of maritime and other lower courts to handle issues of potential sensitivity in foreign relations. More broadly, the determinative role in the case of general maritime law, public international law, and private international law confirms the observation that "Chinese courts apply international law regulating relations between individuals more frequently than any other category of international law... In other words, China's rise has produced a judicial policy that is open to the application of international law, but only when it poses little threat to executive authority."<sup>107</sup> To the extent that Chinese courts are gradually assuming competence to adjudge the scope or extent of such threats, *Zhong Wei* can be seen as a seminal case, even though it didn't implicate a foreign government, as well as simply the rectification of a family's unjustified loss of property.

Moreover, the bar by the Japanese judiciary to World War II-related claims underscores the indispensability of Chinese and Taiwanese courts to bring justice to bear on the lingering claims based on human rights to property, as they existed even during World War II, and freedom from slavery. However troubled the waters may still be in foreign affairs, the courts should therefore proceed on due course with such claims.

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104. *Id.* at 279, 281.

105. The conflicting interpretations involve the scope of the term "war reparations" in paragraph five of the Communiqué. See Communiqué, *supra* note 101. In 2007 the Supreme Court of Japan decided in two combined cases, that paragraph five's bar to mutual claims included those against private parties. See Masahiko Asada & Trevor Ryan, *Postwar Reparations Between Japan and China and the Waiver of Individual Claims: Japan's Supreme Court Judgments in the Nishimatsu Construction Case and the Second Chinese "Comfort Women" Case*, 19 *IT. Y. INT'L L.* 205 (2009).

106. Cai, *supra* note 102, at 282.

107. *Id.* at 286, 288.

## B. Maritime Relations

*Zhong Wei* in itself has nothing more to say about future maritime relations between China and Japan than an implied assurance that Chinese courts are prepared to resolve maritime relations disputes between private parties of each country. Even so, the case inevitably invites consideration of broader questions involving freedom and safety of maritime commerce in the East China Sea that separates Japan and China.<sup>108</sup> Persistent tensions between them are certainly not limited to maritime issues, of course, but significant issues within the East China Sea have severely roiled the diplomatic waters. In the eye of this storm are the Diaoyu (Senkaku, in Japanese) Islands that the United States controlled during its post-World War II occupation of Japan but ceded to Japan with the reversion of Okinawa in 1971. The islands are important because of their proximity to well-established shipping lanes and fishing grounds as well as their potential hydrocarbon resources. Moreover, the islands lie on the vanguard of the Chinese defense perimeter, which has been intensified in response to the apparent pivoting or rebalancing of United States defense towards East Asia.<sup>109</sup>

The tensions generated by issues related to the Diaoyu Islands and other aspects of the East China Sea have periodically led to dangerous incidents. In 2010 a Chinese fishing trawler rammed two Japanese Coast Guard vessels nearby and detained the captain. The resulting crisis quieted down but Japan's controversial pronouncement in 2012 of its purchase of the islands from a private party sparked a strong reaction in Beijing that led to its establishment of an East China Sea Air Defense Identification Zone (ADIZ). The Japanese Coast Guard went on 24/7 alert. Near-conflict ensued involving aircraft of both countries.<sup>110</sup> In August 2016, Japan protested the passage of Chinese-registered vessels close to the Diaoyu Islands twice.<sup>111</sup>

Open and safe sea lanes and fishing grounds in the East China Sea are vital to both Asia's growing economy and global maritime commerce. Clearly, important regional and global interests are threatened by the apparent lack of a stable *modus vivendi*, at the very least, in the East China Sea. More ambitiously but realistically, durable understandings, explicit procedures and agreed-upon mechanisms for dispute resolution are

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108. See Sheila A. Smith, *A Sino-Japanese Clash in the East China Sea*, Council on Foreign Relations Contingency Planning Memorandum No. 18, April 2013.

109. See, e.g., Yuwa Wei, *China and Its Neighbors: Exasperating Territorial Disputes*, 22 WILLAMETTE J. INT'L L. & DISP. RESOL. 105, 111 (2014).

110. Smith, *supra* note 108, at 2.

111. *ECONOMIST*, August 13, 2016, at 5.

urgently needed. Unfortunately, both regional confidence-building measures and reliable national commitments to maritime cooperation are meager. Although heightened tensions in the area do not necessarily betoken military conflict, as had doomed the two ships in *Zhong Wei*, they all too easily fuel political miscalculations and accidental incidents at sea. Worse yet, government-promoted nationalist activism and derivative actions of fishermen and other third parties can reinforce the tensions.

Although a discussion of institutions and techniques to minimize regional maritime tensions lies beyond the scope of this Epilogue, several possible initiatives might be noted: Taiwan's East China Sea Peace Initiative in August 12, 2012, in line with the United Nations Convention on the Law of the Sea (UNCLOS), offers a framework for "shelving disputes and working on joint development" in the East China Sea."<sup>112</sup> Other constructive initiatives might include standby status for Japan-China High-Level Consultations on Maritime Affairs, which first convened in 2012; bilateral agreement along the lines of the U.S.-China Military Maritime Consultative Agreement, including mechanisms for hotline communications and management; establishment of Incidents-at-Sea agreements; consultations within the established framework of trilateral summits among China, Japan and South Korea; ongoing consultation within the Regional Forum of the Association of Southeast Asian Nations (ASEAN); and a multilateral code of conduct in the East China Sea, modeled on the ASEAN declaration of a code of conduct to govern activities in the South China Sea.

Consideration of the ASEAN framework is a reminder of disputes and related developments in the South China Sea.<sup>113</sup> Taiwan is, of course, a strategic bridge between the two maritime areas. A controversial Award by the Permanent Court of Arbitration (PCA),<sup>114</sup> in a request initiated by

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112. See KUAN HSIUNG WANG, *PEACEFUL SETTLEMENT OF DISPUTES IN THE SOUTH CHINA SEA THROUGH FISHERIES COOPERATION AND MANAGEMENT* 36, Maryland Series in Contemporary Asian Studies, No. 222 (2015). According to the East China Sea Peace Initiative, provisional arrangements between maritime claimants in the area would commit them to: 1. refrain from taking any antagonistic actions; 2. shelve controversies and not abandon dialogue; 3. observe international law and resolve disputes through peaceful means; 4. seek consensus on a code of conduct in the East China Sea; and 5. establish a mechanism for cooperation in exploring and developing resources in the East China Sea.

113. See generally *THE SOUTH CHINA SEA AND THE LAW OF THE SEA* (S. Jayakumar, Tommy Koh & Robert Beckman eds. 2014) (focused on legal aspects of disputes in that maritime area).

114. In the Matter of the South China Sea Arbitration, PCA Case No. 2013-19, Award (Perm. Ct. Arb. 2016) [hereinafter] Award. On the tribunal's earlier confirmation of its jurisdiction, see *In Re Arbitration Between the Philippines and China, UN Convention on the Law of the Sea Annex VII Arbitral Tribunal, Jurisdiction and Admissibility*, Oct. 29, 2015. PCA Case No. 2013-19 (Perm. Ct. Arb. 2015). For a legal analysis of the jurisdictional decision, see

the Philippines against China, confirmed the applicability of UNCLOS, to which both states are parties, thereby rejecting any maritime claims based only on unilateral historical prescriptions. Within the UNCLOS framework, the arbitral tribunal carefully limited its competence with respect to land formations in the area to determinations of whether each formation is an island, a rock or submerged land at high tide within the UNCLOS glossary of definitions. The tribunal carefully avoided any consideration of either sovereignty over the maritime areas and land features within them or circumferential delimitation of the South China Sea. The Award also declared that China's law enforcement, land reclamation (dredging and construction), fishing and other maritime activities had breached the country's obligations under UNCLOS. Both Beijing<sup>115</sup> and Taipei<sup>116</sup> rejected the competence of the arbitral tribunal to make the Award as well as the Award itself. Beijing, which had chosen not to appear in the arbitration beyond its submission of written statements, declared that, because of both jurisdictional and substantive defects, the Award was "null and void, having no binding force."<sup>117</sup>

Of particular relevance to this Epilogue, however, was the tribunal's acknowledgement that "[t]he root of the dispute presented by the Philippines in this arbitration lies not in any intention on the part of China or the Philippines to infringe on the legal rights of others, but rather—as was apparent throughout these proceedings—in fundamentally different understandings of their respective rights under the [UNCLOS] Convention

John E. Noyes, *in* *Judicial Decisions*, 110 AM. J. INT'L. L. 102 (2016). For media commentary on the final Award, see Jane Perlez, *Panel Rejects China's Claims in Sea Dispute*, N.Y. Times, July 13, 2016, at A1.

115. See *ECONOMIST*, July 23, 2016, at 35; *ECONOMIST*, July 16, 2016, at 35 (with a concise chronology of selected incidents in the South China Sea ("Flash-points") between 1974 and 2016).

116. *ECONOMIST*, July 16, 2016, at 36. Former President Ma Ying-Jeou wrote as follows:

The ruling downgrades the legal status of Taiping [Itu Aba] from an island to merely a rock without exclusive economic zones or a continental shelf. Taiwan is not a party to the UN Convention on the Law of the Sea but has administered Taiping since 1946. Yet Taiwan was not invited to join the arbitration nor consulted during the process. This is a violation of the due process of law. Taiping's ample fresh water, agricultural produce and around 200 residents clearly meet the requirements of an island under the UN convention.

Moreover, Taiwan's claim on Taiping is far from "bizarre." It dates back to the 18<sup>th</sup> century and the Qing dynasty. Taiping lies 1,600 km from Taiwan, about an eighth of the distance between the British mainland and the Falklands, for which the Royal Navy fought rightly . . . against Argentina in 1982.

*ECONOMIST*, Aug. 27, 2016, at 11.

117. For a succinct summary of Beijing's response immediately after the Award, see Tuan N. Pham, *The South China Ruling: 1 month Later*, *DIPLOMAT*, Aug. 12, 2016.

in the waters of the South China Sea.”<sup>118</sup> The award concluded that the parties must avoid any further aggravation of their disputes and seek or resolve them peacefully.<sup>119</sup> Suggested initiatives for cooperation and collaborative development in the area of the East China Sea offer alternatives.<sup>120</sup> In this regard, separate joint statements by Beijing and ASEAN, following the latter’s joint communiqué after the Award, offered a limited assurance of future cooperation in implementing ASEAN’s code-of-conduct declaration pertaining to the South China Sea.<sup>121</sup>

Somewhat unexpectedly but encouragingly, Beijing and Manila eventually muted their war of words concerning their conflicting claims in the South China Sea. Their more conciliatory posture did not, however, appear to reflect any immediate softening of the Chinese opposition to the Award. Instead, the new posture was probably attributable to two other factors: First, the newly elected, mercurial government of President Rodrigo Duterte in Manila expressed an intent to strengthen its ties with Beijing while questioning the extent of its close alliance with the United States.<sup>122</sup> Second, and not surprisingly, Beijing, taking this appealing cue from President Duterte, relaxed its rampant quest for control of the maritime area, at least temporarily.

After President Duterte paid a state visit in Beijing, both governments expressed a willingness to enter into bilateral talks.<sup>123</sup> The two governments also agreed to establish a joint coast guard committee on maritime cooperation.<sup>124</sup> Of further importance to the Philippines, China appeared less committed to the immediate military development of the Scarborough (Huangyan) Shoal, an impressive land formation that surrounds a lagoon of nearly 60 square miles with rich fishing grounds. It is strategically situated just 150 miles from the Philippine coast and Subic Bay, home of a substantial United States defense establishment equipped

118. Award, *supra* note 114 ¶ 1198.

119. *Id.* ¶ 1200.

120. See, e.g., Wang, *supra* note 112 and the text following the footnote.

121. See Pham, *supra* note 117.

122. See, e.g., Jane Perlez, *Duterte Gets Closer to China. Neighbors Notice*, N.Y. TIMES, Oct. 25, 2016, at A8; *Sceptred hile*, ECONOMIST, Sept. 17, 2016, at 37, 38. By contrast, during his successful campaign for the presidency, Mr. Duterte promised to zoom off on a jet ski and personally plant the Philippine flag on features claimed by the Philippines. Ankit Panda, *Duterte: South China Talks with China 'Within the Year'*, DIPLOMAT, Aug. 24, 2016.

123. See Jane Perlez, *Presidents of Philippines and China Agree to Reopen Talks on a Disputed Sea*, N.Y. TIMES, Oct. 21, 2016, at A4. Pham, *supra* note 117. (noting that “Beijing has taken pains to signal that it remain[ed] open to bilateral negotiations with Manila,” showing restraint that “is likely paired with economic and diplomatic enticements designed to draw the Philippines closer to China”).

124. *Id.*

with fighter jets and naval vessels.<sup>125</sup> After Philippine President Duterte's state visit in Beijing, Chinese coastguard vessels withdrew from the area, and Philippine fishermen were once again allowed there.<sup>126</sup> Cooperation in fishing activity can itself enhance broader harmony in the South China Sea.<sup>127</sup> Both the loosening of Philippine-United States defense ties and Philippine acquiescence in Chinese military development of the Scarborough (Huangyan) Shoal remained big question marks, however.

This excursion into troubled waters beyond both the East China Sea geographically and *Zhong Wei* jurisprudentially, nevertheless is a reminder of the necessity of strengthening or otherwise developing procedures and institutions to maintain maritime harmony. In the East China Sea, the maritime theater where the curtains first arose in the protracted drama of *Zhong Wei*, the long-standing ambiguities of Chinese-Japanese relations continued to play out. Alarming, aerial displays of power continued after the PCA Award, but so did bilateral talks aimed at avoiding unintended conflict and at jointly developing gas resources in the area.

Insofar as disputes between private parties might lead to litigation, the epochal case of *Zhong Wei* instills confidence in the growing capacity of Chinese courts to properly apply general maritime law, public international law and private international law to resolve disputes involving shipping activities and incidents as well as other disputes at sea. These legal tools will be critical in rectifying long-standing grievances, even today, involving serious mistreatment of Chinese nationals during the World War II. Attending to these grievances as well as seeking greater regional cooperation and harmonization of interests related to the East China Sea are fundamentally related endeavors.

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125. See Jane Perlez, *Courting New President, China Slows Island-Building Off Philippine Coast*, N.Y. TIMES, Sept. 25, 2016, at 8 (summarizing a thaw in the frosty Philippine-Chinese relations, and also discussing the strategic importance of Scarborough (Huangyan) Shoal in enabling China to form a triangle of military power across the South China Sea, including the Paracel Islands to the west and the Spratley archipelago to the south).

126. See Richard C. Paddock, *Chinese Vessels Retreat from Disputed Fishing Zone*, N.Y. TIMES, Oct. 29, 2016, at A6.

127. See, e.g., Yao Huang & Pham Tran Vuong, *Fisheries Cooperation and Management Mechanisms in the South China Sea: Context, Limitations, and Prospects for the Future*, 4 CHINESE J. COMP. L., NO. 1, at 128 (2016).

## GLOSSARY

### I. Selected Abbreviated Terms:

Association of Southeast Asian Nations (ASEAN)

China Council for the Promotion of International Trade (CCPIT)

China International Economic and Trade Arbitration (CIETAC)  
Commission

Chinese Maritime Arbitration Commission (CMAC)

Consolidated Treaty Series (CTS)

East China Sea Air Defense Identification Zone (ADIZ)

Permanent Court of Arbitration (PCA)

Shanghai Maritime Court (HHSFZ)

Treaties and Other International Acts Series (TIAS)

United Nations Convention on the Law of the Sea (UNCLOS)

United Nations Treaty Series (UNTS)

### II. Names of Maritime Vessels and Cases

*Hsin Tai Ping* (New Pacific) 新太平

*Hu Gao Min Zhong Zi* 沪高民终字

*Shun Foong* 顺丰

*Zhong Wei* (Chung Wei) *Steamship Co. v. Mitsui O.S.K. Lines Ltd.*  
中威轮船公司与大同海运株式会社

**III. Personal Names**

CHEN Chun 陈春

CHEN Qiaqun 陈洽群

CHEN Shuntong 陈顺通

CHEN Zhen 陈震

CHEN Zhong Wei 陈中威

GAO Zongzhe 高宗哲

GU Zhengpin 古正平

REN Jisheng 任继圣

ZHOU Enlai 周恩来

ZHOU Qiang 周强