No.

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In The

Supreme Court of the United States

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LINDSAY R. COOPER, ET AL., *Petitioners*

v.

TOKYO ELECTRIC POWER COMPANY HOLDINGS, INC., ET AL., *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW:

Whether United States Military personnel, while deployed on U.S. Naval vessels undertaking a U.S. diplomatic humanitarian assistance mission, can rightfully rely on jurisdiction in a United States court when incurring harms by a private, foreign corporation for conduct occurring on foreign soil;

Whether a Statement of Interest from the United States should be afforded dispositive weight when considering dismissal on international comity grounds where Petitioners are U.S. Military Personnel harmed by a private Japanese corporation while onboard U.S. Naval vessels deployed on a U.S. initiated diplomatic and humanitarian relief mission to Japan;

Whether the lower courts had erroneously ascribed dispositive weight to their choice-of-law findings when analyzing and ultimately dismissing Petitioners' claims on the basis of international comity.

PARTIES TO THE PROCEEDING

Petitioner is Lindsay R. Cooper, et al., who, on behalf of fellow United States Military Service members harmed while undertaking a United States diplomatic humanitarian assistance mission to Fukushima, Japan, was the plaintiff-appellee in the Ninth Circuit Court of Appeals.

Respondents are Tokyo Electric Power Co. Holdings ("TEPCO") and General Electric Company.

STATEMENT OF RELATED PROCEEDINGS

United States District Court for the Southern District of California
Civil Action No: 12cv3032-JLS
Lindsay R. Cooper; et al., v. Tokyo Electric Power Inc.
Date of Order: June 11, 2015

United States Court of Appeals for the Ninth Circuit
No. 15-56424
Lindsay R. Cooper; et al., v. Tokyo Electric Power Inc.
Date of Judgment: August 17, 2017

United States District Court for the Southern District of California
Civil Action No: 12cv3032-JLS
Lindsay R. Cooper; et al., v. Tokyo Electric Power Company, Inc.; et al.
Date of Order: March 4, 2019

United States Court of Appeals for the Ninth Circuit
No.19-55295
Lindsay R. Cooper; et al., v. Tokyo Electric Power Company Holdings, Inc.; et al.
Date of Judgment: May 22, 2020

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PETITION FOR A WRIT OF CERTIORARI

Lindsay R. Cooper, on behalf of fellow United States Military Service members harmed while undertaking a United States diplomatic humanitarian assistance mission to Fukushima, Japan respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit pertaining to this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A) is reported at 960 F.3d 549. The order of the District court (App. B) is reported at 2019 U.S. Dist. LEXIS 34154 (S.D. Cal., Mar. 4, 2019).

JURISDICTION

The judgment of the court of appeals was entered on May 22, 2020. A petition for rehearing was denied on July 1, 2020 (App. C). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

INTRODUCTION

This case presents this Court with an opportunity to correct a long ignored and accepted incursion of the judicial branch into the domain of executive foreign policymaking through the legal thoroughfare of adjudicative international comity. While operating without a cohesive and consistent standard for deciding when it is proper for a court to abstain from adjudicating claims that it has rightful jurisdiction over, Federal courts have been left to their own whims and devices when making what is effectively an executive foreign policy decision under

the camouflage of international comity. Without guidance from this Court, each Federal Circuit has crafted their own standards for deciding whether a court should invoke voluntary forbearance by abstaining over claims, not on account of deficient jurisdictional grounds, but on what is effectively diplomatic grounds in order to "promote cooperation and reciprocity with foreign lands." This case will provide this Court with an opportunity to provide Federal Circuits with guidance as to how they can properly remain within the Judiciary's boundaries when asked to don the diplomatic cloak of deciding when it is proper to forego jurisdiction based upon such conspicuously executive considerations as "high international politics," foreign policy, diplomacy, and an "amicable working relationships between nations."

In articulating such a coherent and consistent standard for when it is proper for a court to abstain jurisdiction on comity grounds, this Court will also have the opportunity to clarify whether comity is properly invoked when a party to the litigation is in fact a representative of the United States government whose claims ripened upon undertaking governmental initiatives, i.e., should comity cease to be a consideration when the party requesting a United States forum is a representative of the United States government whose claims stem from carrying out United States diplomatic and foreign policies.

Similarly, given the fact that comity concerns itself with the law of sovereign nations and the diplomatic and foreign policy relations between them,

such a decision of whether to invoke comity is effectively an Executive function that the Judiciary is merely carrying forth and administering. As such, when the United States government invokes an opinion as to whether retaining jurisdiction will impact its diplomatic relations or foreign policy objectives with another sovereign nation, that opinion must be afforded significant weight in a court's decision of whether to abstain jurisdiction and dismiss on comity grounds. Such a proclamation that the Executive branch must be afforded significant, if not determinative weight in a comity decision does not currently exist which again, judiciously warrants this Court's intervention to provide clear and consistent standards whose necessity is more than paramount given that comity concerns sit squarely within the border land between the Executive and Judicial branches.

In short, this Petition offers an opportunity for this Court to provide necessary guidance to the Circuit and District courts as to what factors and their respective weights when contemplating comity abstention. Such proclamation would wholly rectify and redeem the most inequitable result that Petitioners, as United States Military personnel have faced by being stripped of their right to have their more than viable claims heard in a United States courtroom in order to redress the harms they incurred while carrying out the diplomatic and foreign policy initiatives of the United States government.

STATEMENT

Petitioners' claims stem from injuries they incurred on account of Tokyo Electric Power Co. Holdings, Inc's ("TEPCO") well documented and established negligence while operating the Fukushima Daiichi Nuclear Power Plant (FNPP) in Fukushima Japan that directly contributed to the meltdown of the FNPP's nuclear reactors and the subsequent emission of an enormously excessive amount of radioactivity. As United States Military servicemembers engaged in a United States humanitarian relief mission ordered at the behest of the U.S. Commander in Chief in response to a request from United States ally, Japan, Petitioners were stationed onboard U.S. Naval vessels as part of Operation Tomodashi when they were exposed to high levels of radioactivity resulting from TEPCO's negligent operation of the FNPP power plant and the subsequent meltdown of its reactors.

Upon Petitioners' return to the Navy's home port of San Diego, California, several Petitioners' developed physical symptoms commensurate with radioactive exposure that they attributed to exposure incurred during Operation Tomodashi. On December 21, 2012, a first wave of Petitioner Servicemembers filed suit in the Southern District Court of California. Thereafter, and with several amended complaints, the District Court permitted a now expanded Petitioner pool to proceed with their claims of Negligence and Strict Liability for Ultra-hazardous Activities by rejecting TEPCO's defense of supervening cause, Political Questions doctrine,

Forum Non Conveniens, and International comity. (App. E.). After the District court rejected TEPCO's Motion for Reconsideration, TEPCO appealed the court's denial of its motion to dismiss to the Ninth Circuit Court of Appeals.

The Ninth Circuit affirmed the District Court's denial of TEPCO's motion to dismiss by rejecting, among other of TEPCO's arguments, its defense of International comity. (App. D.). In rejecting dismissal based upon comity, the Ninth Circuit highlighted the Statement of Interest submitted by the United States wherein the U.S. Government asserted that it "ha[d] no specific foreign policy interest necessitating dismissal in this particular case."(App.D.,111a). Despite the Japanese government's assertion that permitting Petitioners' claims to proceed in the United States would threaten the viability of its post Fukushima compensation scheme and severely undermine its relief efforts, the Ninth Circuit properly interpreted the comity doctrine by ascribing the balance of weight in favor of the United States' opinion that retaining jurisdiction would not impact its diplomatic or foreign policy relations with Japan. As such, "voluntary forbearance" under comity was without cause.

Upon remand with the now added Defendant, General Electric, the District court addressed a renewed motion to dismiss wherein General Electric advanced a defense that a choice-of-law analysis would fall in favor of Japanese law which would then require that all liability be channeled towards

TEPCO and thereby discharge General Electric of any and all liability. The District court agreed finding that Japan's interest would be more impaired than California were its law not applied. (App. B.,_61a). The District court came to the same conclusion with respect to its choice-of-law analysis when considering Petitioners' claims against TEPCO.

The District court then proceeded to rely on its choice-of-law finding as the determinative factor for considering whether to abstain jurisdiction under international comity despite the express absence of such factor in Ninth Circuit precedent guiding a comity determination. The District court relied on "significant circumstances" that had accrued since it last decided to not dismiss on comity grounds prior to the appeal. The District court noted that among these changes were that the Japanese government had expressed its interest that United States jurisdiction of Petitioners' claims would have an impact on its domestic compensation scheme.

Although among the changed "significant circumstances" noted by the District court included a statement from the United States government which asserted that Petitioners' claims could proceed in a United States forum without upsetting its foreign or diplomatic policies with respect to Japan, the District court chose to subordinate the United States' opinions under that of those expressed by Japan and found that Japanese interests nevertheless prevailed.

Lastly, despite finding a "close call" between the Japanese and United States' interests, the District court imported its choice-of-law determination into

its comity analysis despite the absence of choice-of-law as factor among those expressly designated by the Ninth Circuit. Relying upon its choice-of-law decision as the determinative factor, the District court dismissed Petitioners' claims on comity grounds.

In addressing Petitioners' appeal, the Ninth Circuit, for the second time was charged with evaluating the efficacy of the District court's holding. Although after evaluating the first appeal, the Ninth Circuit uphold the District court's refusal to dismiss Petitioners' claims, it chose an about-face when revisiting Petitioners' claims for the second time. The Ninth Circuit followed suit with the District court and inopportunely erred in the same manner and on the same basis, i.e., failing to afford the just and proper weight to the United States' Statement of Interest which would have more than sufficiently moved the comity analysis in the direction of the United States,' as well as erroneously ascribing significant weight to a choice-of-law determination despite such consideration being absent from its own precedent that it relied upon when evaluating the appropriateness of a comity abstention. (App. A., 34a).

Thus, in affirming the District court's otherwise abuse of discretion in its misconstruance of the underlying rationale for invoking the 'highly exceptional' decision of abstaining jurisdiction on account of comity, the Ninth Circuit's decision perpetuates a misunderstanding of the appropriateness of exactly when the Judiciary

should stand in for the Executive branch and abstain its jurisdiction as a diplomatic gesture whose stated purpose is to "promote cooperation and reciprocity with foreign lands."

Had this Court previously addressed the errors that this Petition is now revealing and raising, the particular Circuit and District courts at bar, as well as those throughout the land would have had a more accurate and consistent understanding of when and under what conditions comity should be invoked. Additionally, courts would have been well apprised of the various weights to ascribe to not only the status of the particular plaintiffs invoking United States jurisdiction, but to the opinions of the United States Executive branch when that branch imparts an opinion as to whether foreign policy and diplomacy dictate that courts show judicial good will by deferring its jurisdiction to that of a foreign tribunal.

REASONS FOR GRANTING THE PETITION

A. As a Case of First Impression, the First Question Presented is one of Exceptional Importance as to Whether U.S. Military Servicemembers Undertaking a Diplomatic Mission Must be Afforded The Right to Prosecute their Claims in a United States Tribunal

Given Petitioners' status as United States military personnel who were harmed while on board U.S. Naval vessels deployed on a U.S. initiated humanitarian relief mission, Plaintiffs were rightfully endowed with the multiplicity of measures

the law provides other governmental representatives of both the United States and foreign nations while undertaking their duties on behalf of their countries.

In marshalling the following international, statutory and common law provisions whose very purpose is to protect government actors and representatives from having to defend or prosecute their actions and claims in a foreign tribunal, Petitioners posit that their status as U.S. military personnel who undertook a United States initiated relief mission overseas endowed them with the same protections and privileges as afforded other agents or representatives of the United States government. As with other governmental actors, Plaintiffs are unequivocally cloaked with 'immunity' such that jurisdiction over their claims would not occur in a foreign tribunal but could only rightfully be adjudicated in a United States courtroom.

Nevertheless, rather than recognizing Petitioners as fully endowed governmental representatives of the United States which should have otherwise rendered inapplicable a comity decision in favor of stripping them of United States jurisdiction, the courts below failed to acknowledge the full import of Plaintiffs' status and on account of such oversight, rendered Plaintiffs' claims non redressible in a United States court.

Although Plaintiffs' by no means construe themselves as United States 'diplomats' as that designation is defined by the Department of State, they do however consider that their designated status as U.S. military personnel officially assigned

to provide humanitarian relief to a foreign nation embody a parallel kind and quality of United States' representation that elicits and evokes the jurisdictional rights and protections that parallel those afforded diplomats and sovereigns. As such, the jurisdictional components of the following international and domestic laws should have equally informed and justified Petitioners' rightful reliance on securing a United States forum without any consideration as to comity or any other deference to the rights of a foreign country.

For example, on account of the Vienna Convention on Diplomatic Relations, ratified by the United States in 1972 and implemented by the the Diplomatic Relations Act ("DRA") of 1978, a district court must dismiss "any action or proceeding brought against an individual who is entitled to immunity" for lack of subject matter jurisdiction. 22 U.S.C. § 254d. Thus, on account of a nation's sovereignty, its diplomatic representatives are relieved from having to undergo legal proceedings in a foreign tribunal but can instead rely on the legal system of his or her home country for a fair and familiar legal proceeding.

Similar to diplomatic immunity, government sovereign immunity, as prescribed by the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1602-11, governs jurisdiction of suits brought against foreign states and their agents, while providing immunity from suit for foreign governments, including its "diplomatic, civil service, or military personnel." H.R. Rep. No. 94-1487, at 16

(1976), as reprinted in 1976 U.S.C.C.A.N. 6604, 6615(emphasis added); *Saudi Arabia v. Nelson*, 507 U.S. 349, 359-60, 123 L. Ed. 2d 47, 113 S. Ct. 1471(1993)(a state is immune from the jurisdiction of foreign courts as to its sovereign or public acts); *Askir v. Boutros-Ghali* , 933 F.Supp. 368, 371-372(S.D.N.Y. 1996)(military operations, even ones directed at ensuring the delivery of humanitarian relief are a distinctive province of sovereigns and governments).

Such designation that Military personnel who engage in "sovereign and public" acts are effectively the government itself and thereby afforded immunity from suit in a foreign forum is even more definitively recognized and sanctioned by this Court under the so-called public authority doctrine which was first designated by Chief Justice Marshall in Dow v. Johnson, 100 U.S. 158, 165, 25 L. Ed. 632(1879). In Dow, Chief Justice Marshall grounded a Military's exemption from criminal and civil jurisdiction in the territory of their mission on the rule and law of comity. The Supreme Court held that:

> "A foreign army or fleet, marching through, sailing over, or stationed in the territory of another State, with whom the foreign sovereign to whom they belong is in amity, are also, in like manner, exempt from the civil and criminal jurisdiction of the place."

Dow, 100 U.S. 165; *see also, Motherwell v. United States* 107 F. 437, 448(3d Cir. 1901)("it is undisputed that comity is operative in the case of an organized

regiment of a friendly foreign power while on our soil by permission of the Executive of the United States, and that proper discipline and obedience may be enforced by those in command without reference to our laws").

Thus, the doctrine that a foreign army is permitted to march through a friendly country, or to be stationed in it by authority of its sovereign or government, and thus is exempt from its civil and criminal jurisdiction has been firmly established for centuries and persists to this day. See*, Schooner Exchange v. McFaddon*, 7 Cranch 116, 145 (1812)(a grant of a free passage . . . implies a waiver of all jurisdiction over the troops, during their passage"); *Coleman v. Tennessee*, 97 US 509, 515(1878)("a sovereign cedes a portion of his territorial jurisdiction when he allows the troops of a foreign prince to pass through his dominions"); *Suhail Najim Abdullah Al Shimari v. CACI Int'l, Inc*. 679 F.3d 205, 227-228(4th Cir. 2012)(citing *Dow* explaining that military forces are not subject to the laws of the occupied territory); *United States v. Hamidullin* 888 F.3d 62, 75-76(4th Cir. 2018) (public authority defense looks to whether military maneuvers on foreign territory were sanctioned by the foreign government).

Here, to the extent that Petitioners were United States Military personnel carrying out a humanitarian relief mission ordered by the United States government upon the request of the Japanese government and thus a goodwill and diplomatic gesture among nations, Petitioners were firmly

imbued with vestiges of both 'diplomatic' as well as invitee status that more than justifiably triggered application of the public authority doctrine and diplomatic immunity privilege as they pertain to and determine jurisdictional designation. Such is the case despite the fact that Petitioners, as Military personnel and members of Operation Tomodashi had in fact never ventured off of United States territory as U.S. Naval vessels legally retain that designation while in international waters. See, 18 USCS § 7.

As the above analysis makes plain, on account of Petitioners' positionality as military personnel undertaking a diplomatic relief mission and harmed while onboard U.S. territory, there should never have been a question as to whether Petitioners' claims should be heard in a forum other than one in the United States. This should have been readily apparent where Petitioners' were unequivocally serving as 'diplomatic' agents of the United States thereby cloaking them with residual jurisdictional immunity. As if this was not sufficient in itself, the public authority doctrine ensured that jurisdiction in Japan was patently precluded on account of Japan's request for U.S. military assistance, i.e., 'the granting of free passage' that carried along with it a waiver of all jurisdiction over Petitioners as Military personnel. *Schooner Exchange*, 7 Cranch at 145.

In short, as the above authority is jurisprudentially founded upon considerations of comity and rightful law of nations, Petitioners' assertion that their claims should rightfully remain in the jurisdiction of the United States is

foundationally well supported and one that perhaps needn't have required a balancing under traditional adjudicatory comity analysis. Although the lower courts failed to fully perceive the full import of Petitioners particular status and the prevailing authority that fully warranted a jurisdictional determination in their favor, Petitioners' respectfully request this Court to remedy such oversight and provide Petitioners, as military and diplomatic agents of the United States, with the United States jurisdiction that they are unequivocally legally and equitably entitled to.

As the above analysis makes clear, given Petitioners' particular status, i.e., military personnel, and the particular context within which Petitioners' harms were incurred, i.e., while undertaking a diplomatic relief mission while onboard U.S. Naval vessels, the lower courts' dispository analysis under traditional adjudicatory comity was patently an abuse of discretion.

B. Given the Quasi Executive Function of Deferring Jurisdiction to a Foreign Tribunal in Order to Maintain Amicable Diplomatic Relations between Nations, it is Imperative that this Court Provide Consistent and Unified Standards throughout the Circuits for Making a Comity Determination

This is especially the case given that it is well established that comity is a "rule of 'practice, convenience, and expediency' rather than of law, and is a discretionary act of deference by a national court to decline to exercise jurisdiction in a case deemed

properly adjudicated in a foreign state. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 817 (1993); *Pravin Banker Assocs., Ltd. v. Banco Popular Del Peru*, 109 F.3d 850, 854 (2d Cir. 1997). Furthermore, the doctrine has never been well-defined, but has been well accepted as a means of "maintaining amicable working relationships between nations, a 'shorthand' for good neighbourliness, common courtesy and mutual respect between those who labour in adjoining judicial vineyards." *JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V.*, 412 F.3d 418, 423 (2d Cir. 2005); *Mujica v. AirScan Inc.* 771 F.3d 580, 603(9th Cir. 2014)(there is no well-defined test for when international comity obliges a court to dismiss an action in favor of another forum.)

Additionally, comity is not a rule expressly derived from international law, the Constitution, federal statutes, or equity, but it draws upon various doctrines and principles that, in turn, draw upon all of those sources. It thus shares certain considerations with international principles of sovereignty and territoriality; constitutional doctrines such as the political question doctrine; principles enacted into positive law such as the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602, 1611 (2006). As such, when deciding whether to exercise comity and dismiss an action on jurisdictional grounds, the courts are effectively exercising executive functions of diplomatic and foreign policy decision-making although the province of such clearly lies with the executive branch. See, *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363,

386, 120 S. Ct. 2288, 147 L. Ed. 2d 352 (2000) ("the 'nuances' of the 'foreign policy of the United States . . . are much more the province of the Executive Branch and Congress than of this Court.'"); *Abu Ali v. Ashcroft*, 350 F.Supp.2d 28, 61 (D.D.C. 2004)(acknowledged the considerable authority of the executive branch in diplomatic relations, and that such authority would "cabin the Court's inquiry" so as not to intrude on executive functions.) Thus, comity is a "rule of 'practice, convenience, and expediency' rather than of law" that courts have embraced "to promote cooperation and reciprocity with foreign lands," which again is primarily an executive function. *Pravin Banker Assocs.*, 109 F.3d at 854; see also, *Turner Entertainment Co. v. Degeto Film GmbH* 25 F.3d 1512, 1519, fn. 10(11th Cir. 1994)(comity defined as 'consideration of high international politics concerned with maintaining amicable and workable relationships between nations.')

All and all, given the quasi-executive function and result of a court's determination of whether to defer jurisdiction to a foreign tribunal, i.e., the court's weighing of interests between the United States and that of a foreign country, it is imperative that this Court provide more explicit oversight and guidance to the lower courts as to the particular factors and weights afforded for a comity determination. This is imperative as there is no consistently applied and well-accepted test for courts to rely on when determining whether to abstain jurisdiction on account of international comity. Rather, Circuit courts throughout the country have

devised their own individual set of factors in which to guide their circuit's decisions. See, *Philadelphia Gear Corp. v. Philadelphia Gear De Mexico, S.A.*, 44 F.3d 187, 191 (3d Cir. 1994)(whether granting comity would be contrary or prejudicial to the interest of the United States); *Mujica*, 771 F.3d at 603(the strength of the United States' interest in using a foreign forum, (2) the strength of the foreign governments' interests, and (3) the adequacy of the alternative forum); *Animal Sci. Prods. v. Hebei Welcome Pharm. Co. (In re Vitamin C Antitrust Litig.)* 837 F.3d 175, 184-185(2d Cir. 2016)(degree of conflict with foreign law, the availability of a remedy abroad, intent effect American interests). District courts of the Eighth Circuit and Fifth Circuit rely on factors from Section 403 of the Restatement (Third) of the Foreign Relations Law. *J.Y.C.C. v. Doe Run Res., Corp.* 403 F. Supp. 3d 737, 748(E.D.Mo. 2019);*Torres v. Southern Peru Copper Corp.* 965 F.Supp. 899, 908(S.D.Tex. 1996)

Given that courts are rendering jurisdictional decisions that straddle the fence between implicating the strictly executive function of diplomatic and foreign policy and a judicial function of determining jurisdiction, it respectfully behooves this Court to provide a uniform standard in order to ensure that courts are not straying into Executive function and rendering diplomatic and foreign policy decisions under the guise of carrying out judicial mandate. See, *JP Morgan Chase Bank, supra* 412 F.3d at 423 (comity described as having "borders are marked by fuzzy lines of politics, courtesy, and good faith.")

C. **The Weight Afforded an Executive Branches' Statement of Interest is an Exceptionally Important Question Given that the Essence of Invoking Comity is Founded upon Foreign Policy and Diplomatic Relations Which are Constitutionally Mandated Executive Functions.**

Given the fact that a comity determination is a quasi-Executive function, it is imperative that this Court affirm and underscore that a statement of interest submitted by the United States government be afforded substantial weight when a court is deciding whether to exercise its "discretionary act of deference" by declining to exercise jurisdiction on account of deciding that the claims before it are properly adjudicated in a foreign tribunal. As deferring jurisdiction is no small matter, the courts should effectively take direction from the Executive on matters of "diplomacy, good will and foreign policy." See, *Colorado River Water Conser. Dist. v. United States*, 424 U.S. 800, 817 (1976)(Federal courts have a 'virtually unflagging obligation' to exercise the jurisdiction conferred upon them.")

Thus, where the United States offers an opinion as to whether a proceeding should remain in a United States forum, such opinion should be provided substantial weight under a comity analysis given that the underlying function and purpose of comity is to "maintain amicable working relationships between nations," i.e., maintenance of diplomatic relations which is predominantly an executive function and one that the judiciary should rightfully defer.

Here, the District court and the Ninth Circuit failed to afford any deferential weight to the United States' Statement of Interest wherein the United States expressed its opinion that jurisdiction could remain in the United States District court without impacting its foreign and diplomatic relations with the Japanese Government. In fact, not only had the lower courts failed to ascribe the proper deferential weight to the United States' position, but that the District court flagrantly barely even mentioned the Government's position when it dismissed on grounds of comity.

In turn, the Ninth Circuit concurred with the District court by dismissing outright the idea that a government's statement of interest should receive deferential weight within a comity analysis. Considering that comity itself is a judicial determination of whether the United States should defer jurisdiction in order "to promote cooperation and reciprocity with foreign lands," and thus "inevitably implicates [the United States'] diplomatic relationship with that nation," it defies principles of judicial deference to Executive function for a court to diminish in importance an opinion on foreign relations and diplomacy that is communicated by the very branch whose constitutionally mandated to discharge that duty. See *In re Muir*, 254 U.S. 522, 532-33, 41 S. Ct. 185, 65 L. Ed. 383 (1921) ("The reasons underlying [deference to the Executive] are as applicable and cogent now as in the beginning, and are sufficiently indicated by observing that it makes for better international relations, conforms to diplomatic usage in other matters, accords to the

Executive Department the respect rightly due to it, and tends to promote harmony of action and uniformity of decision."); see also, *United States v. All Assets Held in Account Number XXXXXXXX*, 83 F. Supp. 3d. 360, 372, 314 F.R.D. 12 (D.D.C. 2015)(comity dismissal unwarranted where after weighing international policy and diplomatic interests, the Executive branch deemed that declining jurisdiction out of deference to the interest of a foreign nation was inappropriate.)1

Petitioners contention that an Executive branch's statement of interest specifically offered within the context of a comity must be afforded substantial weight is neither a novel nor outlandish proposition as courts throughout the Circuits have acknowledged such either with respect to a Government's affirmative expression of interest or its silence as to the impact of comity on its

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[1] Similar to the process of awarding sovereign immunity prior to the passage of the Foreign Sovereign Immunities Act in 1972 where the Executive branch by way of the State Department solely determined and dictated whether sovereign governments were entitled to immunity, Petitioners here advance that the same degree of judicial deference must be granted the Executive branch when it renders an opinion on the impact that retaining jurisdiction in the United States would have on its diplomatic and foreign relations with a foreign sovereign. *See, Samantar v. Yousuf*, 560 U. S. 305, 311-312, 130 S. Ct. 2278, 176 L. Ed. 2d 1047 (2010); *Republic of Mex. v. Hoffman*, 324 U.S. 30, 36, 65 S.Ct. 530, 89 L.Ed. 729 (1945)(it was "not for the courts to deny an immunity decision which our government has seen fit to allow").

diplomatic or foreign policy. In fact, this Court itself has acknowledged that deference is due to a statement offered by United States that expresses its opinion pertaining to a comity determination. See, *Republic of Austria v. Altmann*, 541 U.S. 677, 702, 124 S. Ct. 2240, 159 L. Ed. 2d 1 (2004)(if the State Department expresses a specific opinion on the implications of "exercising jurisdiction over particular petitioners in connection with their alleged conduct, that opinion might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy.")

Many court determinations of comity have relied upon statements of interest from the sovereigns involved as explicit expressions of interest that left no doubt as to how the court should rule. In *Mujica v. AirScan Inc., supra*, 771 F.3d at 603(9th Cir. 2014), both the U.S. Department of State and the Columbian government submitted statements which carried substantial weight in the court's ultimate determination that comity required deference to Columbian jurisdiction. The Court held:

> The United States, however, has spoken directly on the question of its interests in this case. The district court particularly credited the State Department's Supplemental SOI and concluded it was "strong evidence that the United States, in the interest of preserving its diplomatic relationship with Colombia, prefers that the

> instant case be handled exclusively by the Colombian justice system.

Mujica, 771 F.3d at 609.

Mujica was not alone in accentuating the overriding importance that a United States' expressed statement has in determining a courts' decision on comity. See, *Sarei v. Rio Tinto Plc* 221 F.Supp.2d 1116, 1205 (C.D.Cal. 2002)("based on the opinion expressed in the Statement of Interest, the court concludes that the United States' interests are aligned…with those of PNG,…that suggests it would be appropriate to refrain from exercising jurisdiction in this case"); *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1236 n. 12 (11th Cir. 2004)(statement of interest filed by U.S. Government under the Foundation Agreement is "entitled to deference"); *In re Nazi Era Cases Against German Defendants Litigation*, 129 F. Supp. 2d 370, 379-80 (D. N.J. 2001)(United States undertook to file Statements of Interest in the pending cases "'advising U.S. courts of its foreign policy interests . .); *Whiteman v. Dorotheum GmbH & Co KG* 431 F.3d 57, 73-74 (2d Cir. 2005) (U.S. statement of foreign policy interests preclude jurisdiction as the court cannot "undertake independent resolution without expressing lack of the respect due the Executive Branch")

Similarly, the absence of an expressed interest by a foreign state is strong indicia that the exercise of comity does not lie. See *Abad v. Bayer Corp.*, 563 F.3d 663, 668 (7th Cir. 2009)("[N]either [Argentina nor the United States] appears to have any interest in having the litigation tried in its courts rather

than in the courts of the other country; certainly no one in the government of either country has expressed to us a desire to have these lawsuits litigated in its courts."); *Gross v. German Found. Indus. Initiative*, 456 F.3d 363, 389-90(3d Cir. 2006) (declining to defer to U.S. government's preference where "the United States Executive has taken no position on the merits of this dispute, and has not promised dismissal or intervention.")

Here, the United States submitted a statement of interest expressing the strength and extent to which the United States held diplomatic and foreign relations with the Japanese Government and affirmed that adjudicatory comity was not required on account of Japan's Compensation scheme for compensating its citizens for the damages they incurred during the Fukushima earthquake. Consequently, it was this same Japanese Compensation scheme that the District court and thereafter, the Ninth Circuit relied upon in finding that comity was indeed required and directly resulted in the dismissal of Petitioners' claims. (App.B,77a). The United States additionally held that permitting its Military personnel to litigate their claims in a U.S. court did not upset the Convention on Supplementary Compensation for Nuclear Damage which was a Convention authored and sponsored by the United States and which Japan signed on at a date after Petitioners filed their claims. (App. F, 228a-231a). Thus, the United States affirmed that there was no public or foreign policy impediments to Petitioners' claims remaining in the United States. (App. F, 232a).

Nevertheless, in ultimately rejecting the United States position, the lower courts afforded insignificant weight to the United States statement of interest which, as argued above, patently disregarded the Executive branch's constitutionally mandated prerogative pertaining to diplomatic and foreign policy concerns. Such error was even more inexcusable and prejudicial given that Petitioners were actually undertaking those very Executive diplomatic and foreign policy initiatives, i.e., providing humanitarian relief to a long standing ally, when their claims arose.

As adjudicatory comity asks whether a court should abstain from exercising jurisdiction based upon considerations of "high international politics," foreign policy, diplomacy, and an "amicable working relationships between nations," the diminishment in importance and weight of an Executive opinion expressly undermines the deference required to be shown the Executive "on a particular question of foreign policy," *Republic of Austria*, 541 U.S. at 702, as well as towards a military operation ensuring the "delivery of humanitarian relief as a distinct province of sovereigns and governments." *Askir*, 933 F.Supp. at 372.

D. The Court of Appeals Decision was Incorrect by Relegating Determinative Weight to the District Court's Choice-of-Law Analysis in Arriving at a Comity Determination

While it is well established that adjudicative international comity is a fundamentally different application of law than that of the choice-of-law doctrine, the lower courts in this action erroneously failed to recognize such difference but rather conflated the two applications as one thereby holding that an international comity analysis is effectively synonymous with a choice of law analysis. Such an understanding is patently legally indefensible although one that the lower courts relied upon in dismissing Petitioners' claims on international comity grounds.

Such confusion is perhaps attributable to the overall 'murkiness' of the jurisprudence of international comity in general and its lack of a unified and coherent application standard that this Court can readily remedy were it to grant the instant Petition for Certiorari.

Nevertheless, as the following argument makes plain, the two doctrines are significantly distinguishable despite the lower courts' imposition of choice-of-law as the determinative factor within a Comity analysis. The lower courts' reliance on choice of law is particularly confounding when considering that choice of law is nowhere to be found and thus, glaringly absent as an applicable factor within Ninth Circuit precedent for determining whether adjudicative international comity is properly invoked.

Adjudicative international comity is a discretionary abstention doctrine where a jurisdictionally endowed federal court declines to exercise jurisdiction in a case after determining that

the case should properly be adjudicated in a foreign forum. *Hartford Fire Ins.*, 509 U.S. at 817. As a "rule of 'practice, convenience, and expediency' rather than of law," comity merely exists "to promote cooperation and reciprocity with foreign lands." *Pravin Banker Assocs.*, 109 F.3d at 854. While there is no well-defined test for when international comity obliges a court to dismiss an action in favor of a foreign forum, Petitioners' claims were analyzed and decided under the Ninth Circuit's test articulated within *Mujica*. The Ninth Circuit's test of whether a federal court should abstain adjudication and defer to a foreign forum consists of weighing (1) the strength of the United States' interests, (2) the strength of the foreign government's interests, and (3) the adequacy of the alternative forum. Id. In considering the United States' interests, courts weigh "(1) the location of the conduct in question, (2) the nationality of the parties, (3) the character of the conduct in question, (4) the foreign policy interests of the United States, and (5) any public policy interests." Id. at 604.

Alternatively, the choice-of-law doctrine is a procedural means by which a court selects one law among differing laws based primarily upon parties differing domiciles. See *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 307-08, 101 S. Ct. 633, 66 L. Ed. 2d 521 (1981) ("Implicit in this inquiry is the recognition, long accepted by this Court, that a set of facts giving rise to a lawsuit, or a particular issue within a lawsuit, may justify application of the law of more than one jurisdiction. As a result, the forum State may have to select one law from among the

laws of several jurisdictions having some contact with the controversy.") Unlike a comity analysis which deciphers which of two foreign sovereign's policies have the stronger interest and thus warrants adjudication in their home forum, the choice-of-law doctrine is one step removed where its purpose is to determine which body of law will be used to interpret the policies at play throughout the adjudication of the party's claims. *Pittston Co. v. Allianz Ins. Co.* 795 F.Supp. 678, 689-690. (D.N.J. 1992); see also, *In re GM LLC Ignition Switch Litig*. (S.D.N.Y. Aug. 3, 2017, No. 14-MD-2543 (JMF)) 2017 U.S.Dist.LEXIS 123740, at *379)(deference on account of comity is separate and apart from a choice of law determination). The Second Circuit underscored this distinct difference between international comity and choice-of-law when it held that "international comity, as it relates to this case, involves not the choice of law but rather the discretion of a national court to decline to exercise jurisdiction over a case before it when that case is pending in a foreign court with proper jurisdiction." *JP Morgan Chase Bank*, 412 F.3d at 424.

Despite expressing reliance on the *Mujica* factors which are explicitly designated as those particular factors to consider when deciding whether to invoke a comity abstention, here, both the District court and the Ninth Circuit chose to not only import choice of law as a comity factor despite its absence under *Mujica*, but ascribed it determinative weight that resulted in tipping the scales in favor of the District court deferring jurisdiction under comity despite its otherwise "unflagging obligation to exercise

jurisdiction conferred on [it]."*Colorado River Water Conser. Dist. v. United States*, 424 U.S. 800 (1976).

Here, both the District court and Ninth Circuit relied upon the unsupported assumption that a choice of law analysis was a 'prerequisite' to conducting an adjudicative comity analysis when such understanding was patently without mandate, either under *Mujica* or other Ninth Circuit precedent pertaining to adjudicative comity. Nevertheless, after conducting a choice of law analysis that resulted in a finding that Japanese law should apply and thus, the Japanese jurisdictional requirement that all claims against TEPCO were to be adjudicated in Japan, the lower courts simply imported that finding into its comity analysis concluding that such choice of law finding eclipsed the entirety of the stated *Mujica* factors thereby warranting the District court's "voluntary forebearance" and dismissal on comity grounds.

In other words, the lower courts relied upon the results of an analysis that was outside the contours of the explicit considerations required for a comity determination, i.e., the *Mujica* factors of (1) the strength of the United States' interests, (2) the strength of Japan's interests, and (3) the adequacy of a Japanese forum. Thus, glaringly absent in Mujica or other comity precedent is any reference to choice-of- law which as argued, is merely a procedural consideration that otherwise shouldn't have had a determinative influence over a court's decision of whether to exercise "voluntary forebearance" from asserting its rightful jurisdiction.

Thus, the lower courts erred by ascribing determinative weight to a result that was outside the factors designated by *Mujica* and/or other comity precedent. Such error was further compounded when considering that the District court erroneously failed to ascribe the proper weight to the United States' statement of interest which would have bolstered the strength of the United States' interest when evaluating *Mujica* factor number one, as well as the District court's failure to acknowledge the full import of Petitioners' status as representatives of the United States government undertaking a diplomatic humanitarian relief mission. This again should have significantly impacted the weight ascribed to the United States' interests. Having failed such and having ascribed impermissible weight to its choice of law determination when undertaking its comity analysis, the District court patently abused its discretion with the Ninth Circuit affirming such abuse.

CONCLUSION

As against these advantages, this case has no significant defects as a vehicle for addressing the questions presented. The Court should therefore grant this petition for a writ of certiorari.

Respectfully submitted.

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November 20, 2020

APPENDIX

TABLE OF APPENDICES

APPENDIX A

United States Court of Appeals
for the Ninth Circuit

LINDSAY COOPER, ET AL,

Plaintiff-Appellants,

v.

TOKYO ELECTRIC POWER COMPANY HOLDINGS, INC., AKA TEPCO; GENERAL ELECTRIC COMPANY; DOES, 1-200, inclusive,

Defendant-Appellees.

19-55295

Appeals from the United States District Court for the Southern District of California in 3:12-cv-03032-JLS-MSB, Judge Janis L. Sammartino.

Decided May 22, 2020

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* * *

Before: A. Wallace Tashima, Kim McLane Wardlaw, and Jay S. Bybee, Circuit Judges.

Opinion by Judge Bybee.

In the aftermath of a massive earthquake and tsunami in Japan, the Fukushima Daiichi Nuclear Power Plant (FNPP) was damaged. Hundreds of United States servicemembers, deployed to provide relief to the victims, allege that they were exposed to radiation from the FNPP. The plaintiffs, servicemembers and their families, brought suit in California for negligence and strict products liability against Tokyo Electric Power Company (TEPCO), the power plant's owner and operator, and General Electric Company (GE), the manufacturer of the plant's boiling water reactors.

This is the second time we have heard an appeal in this case. In 2017, we affirmed the district court's denial of TEPCO's motion to dismiss. *Cooper v. Tokyo Elec. Power Co.*, 860 F.3d 1193 (9th Cir. 2017) ("*Cooper III*"). On remand, GE and TEPCO both moved to dismiss. GE argued that Japanese law should apply to the case and that, under Japanese law, only the plant operator could be liable for injuries resulting from the power plant's failure. TEPCO argued for dismissal on international-comity grounds. The district court granted both motions to dismiss. We affirm

I. FACTS AND PROCEDURAL HISTORY

A. *The Act on Compensation for Nuclear Damage*

In the early 1960s, the Japanese National Diet enacted legislation "to establish a basic system pertaining to compensation for damages in the case where nuclear damage has occurred in connection

with the operation . . . of a nuclear reactor" and to "provid[e] protection for injured parties and contribut[e] to the sound development of nuclear reactor operations." Act on Compensation for Nuclear Damage, Act No. 147, ch. I, art. 1 (June 17, 1961) (Compensation Act). The Compensation Act encouraged participation in Japan's nuclear industry while ensuring compensation for any persons injured through operation of nuclear power plants. Articles 3 and 4 of Chapter II of the Compensation Act provide that the operator of a nuclear plant is strictly liable for any damage caused by the operation of the power plant but that "no other person shall be liable to compensate for damages." *Id.* at ch. II, arts. 3–4. This is referred to as the "channeling provision."

These provisions, along with others that provide for the creation of a national insurance pool and financial backing from the Japanese government to fund compensation, work to facilitate recovery for accident victims by eliminating the need to prove fault and ensuring recovery of damages. *Id.* at ch. III, arts. 6–9.

B. *The 2011 Earthquake*

On March 11, 2011, a 9.0-magnitude earthquake and massive tsunami struck Japan, causing enormous and widespread destruction.[1] Some 15,000 people died. The FNPP was

[1] We have taken the facts from plaintiffs' Third Amended Complaint. Additional details may be found in our prior opinion. *Cooper III*, 860 F.3d at 1197–98.

damaged by the earthquake and tsunami and released over 300 tons of contaminated water into the sea. In response to the disaster, the United States joined in a humanitarian relief effort known as "Operation Tomodachi." The day following the earthquake, the servicemember plaintiffs arrived off the coast of Fukushima on the *U.S.S. Ronald Reagan* and other vessels participating as part of the U.S. 7th Fleet's Reagan Strike Force.

Defendant TEPCO owns and operates the FNPP. After the FNPP meltdown, the Japanese government provided billions of dollars in financial support to TEPCO. It also developed a comprehensive scheme to deal with the thousands of claims resulting from the FNPP leak, giving claimants the option to submit a claim (1) directly to TEPCO, (2) to the newly established Nuclear Damage Claim Dispute Resolution Center, or (3) to a Japanese court. The plaintiffs, however, chose to sue in the Southern District of California. Subject matter jurisdiction was asserted under the district court's diversity jurisdiction. 28 U.S.C. § 1332(a)(2).

C. *Initial Complaints and the First Appeal*

The plaintiffs' second amended complaint (SAC) alleged that TEPCO was negligent in operating and maintaining the FNPP. Six months later, the plaintiffs moved to amend their complaint to name GE and three other manufacturer defendants, claiming they had only recently learned of their involvement. Shortly thereafter, the district court granted in part TEPCO's motion to dismiss the

SAC. It found that the plaintiffs' claims were not barred by the political-question doctrine, *forum non conveniens*, or the doctrine of international comity, but granted the motion in part because the plaintiffs failed to state claims for strict design-defect liability and intentional infliction of emotional distress. *Cooper v. Tokyo Elec. Power Co.*, 2014 WL 5465347 (S.D. Cal. Oct. 28, 2014) (*Cooper I*). The court granted leave to amend, including leave to name GE and the other manufacturers as defendants.

The plaintiffs then filed their third-amended complaint (TAC) against TEPCO, GE, and three other named defendants. The TAC asserts claims for negligence, strict liability for ultrahazardous activities, res ipsa loquitur, negligence per se, loss of consortium, and survival and wrongful death against all defendants. The TAC also raises strict-liability claims for manufacturing and design defects against GE and the other named manufacturers.

GE and TEPCO separately moved to dismiss. Meanwhile, TEPCO moved for reconsideration of the denial of its motion to dismiss the SAC. The district court granted the motion for reconsideration but again denied TEPCO's motion to dismiss the SAC. *Cooper v. Tokyo Elec. Power Co.*, 166 F. Supp. 3d 1103 (S.D. Cal. 2015) (*Cooper II*). The district court certified the issues for interlocutory appeal and denied the pending motions to dismiss as moot.

On appeal, we affirmed the denial of TEPCO's motion to dismiss the SAC. *Cooper III*, 860 F.3d at 1218. We held that none of the arguments raised in TEPCO's appeal warranted dismissal at that stage of the litigation, but allowed that "[f]urther developments . . . may require the district court to revisit some of the issues." *Id.* at 1197; *see also id.* at 1210 n.12.

D. *Proceedings on Remand*

After remand from *Cooper III*, and in light of a ruling in a parallel case filed by the same plaintiffs' counsel raising similar issues, the district court relieved the defendants of the requirement to respond to the TAC and allowed the plaintiffs to file a fourth-amended complaint. The plaintiffs informed the court they would not do so, leaving the TAC as the operative complaint in this case.

GE and TEPCO filed new motions to dismiss the TAC. GE argued that it could not be held liable because, under California's choice-of-law rules, Japan's Compensation Act applied and channeled all liability to TEPCO as the FNPP's operator.[2] TEPCO argued that the court lacked personal jurisdiction, and that, even if the court

[2] GE also argued that the TAC presented a political question, the claims were time-barred, the complaint should be dismissed under *forum non conveniens*, and the doctrine of international comity required dismissal. The district court did not reach these arguments.

had jurisdiction over it, the doctrine of international comity required dismissal.[3]

The district court granted both motions. As to GE, the district court first concluded that it had subject-matter jurisdiction over the suit. The court then, over the plaintiffs' objection, conducted a choice-of-law analysis. It determined that Japanese law governed with respect to third-party liability and, under that law, GE could not be held liable. As to TEPCO, the district court concluded that TEPCO had waived the personal-jurisdiction defense because it had not raised the issue in previous Rule 12 motions and there was no intervening change in the law that affected TEPCO's ability to raise the defense. But the district court ultimately dismissed the claims against TEPCO without prejudice on international-comity grounds.

II. ANALYSIS

The plaintiffs appealed the district court's ruling on both GE's and TEPCO's motions to dismiss. We begin with GE's motion to dismiss before discussing TEPCO's.

A. *GE*

The district court, after concluding under California's choice-of-law rules that Japanese law applied, dismissed all claims against GE with prejudice. Plaintiffs do not dispute that if Japan's

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[3] TEPCO also revived its *forum non conveniens* argument before the district court, but the district court did not reach it.

Compensation Act applies, their claims must be dismissed because TEPCO, as the operator, is exclusively liable under the channeling provision for any damages. Instead, they raise three challenges to the district court's choice-of-law ruling: first, that the channeling provision in the Compensation Act is procedural, not substantive, and therefore not subject to a choice-of-law analysis; second, that it was premature to decide choice-of-law questions at this stage of litigation; and, third, that the district court's analysis was wrong and California's strict products liability law should apply to the plaintiffs' claims against GE. We review choice-of-law questions de novo, but review underlying factual findings for clear error. *Daewoo Elecs. Am., Inc. v. Opta Corp.*, 875 F.3d 1241, 1246 (9th Cir. 2017). We apply California's choice-of-law rules to this claim. *See Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941).

1. Procedural Versus Substantive

A federal district court sitting in diversity jurisdiction, 28 U.S.C. § 1332, applies substantive state or foreign law. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). "The nub of the policy that underlies [*Erie*] is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away, should not lead to a substantially different result." *Guar. Tr. Co. of N.Y. v. York*, 326 U.S. 99, 109 (1945); *see Van Dusen v. Barrack*, 376 U.S. 612, 639 (1964) (a "change of courtrooms" should not lead to a change in the law applied to the

parties). Accordingly, a federal district court will apply its own rules of procedure, but state or foreign substantive law. *See, e.g.*, *Abogados v. AT&T, Inc.*, 223 F.3d 932, 935 (9th Cir. 2000).

Unfortunately, "[c]lassification of a law as 'substantive' or 'procedural' for *Erie* purposes is sometimes a challenging endeavor." *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427 (1996). "In determining whether a state law is substantive or procedural, we ask whether the law is outcome determinative," that is, whether not applying the law would significantly affect the result of the litigation. *Cuprite Mine Partners LLC v. Anderson*, 809 F.3d 548, 555 (9th Cir. 2015). We have explained that "[a] substantive rule is one that creates rights or obligations" while a procedural rule "defines a form and mode of enforcing the substantive right or obligation." *County of Orange v. U.S. District Court (In re County of Orange)*, 784 F.3d 520, 527 (9th Cir. 2015) (internal quotation marks omitted). Our inquiry is "guided by 'the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws.'" *Cuprite Mine*, 809 F.3d at 555 (quoting *Gasperini*, 518 U.S. at 428). It is important to the fair administration of law that "'the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court.'" *Gasperini*, 518 U.S. at 427 (quoting *Guar. Tr.*, 326 U.S. at 109). The same logic applies when a foreign, rather than state, forum is at issue.

The plaintiffs argue that the district court should not have conducted a choice-of-law analysis at all because the channeling provision in the Compensation Act is procedural and not substantive. According to the plaintiffs, the provision effectively "strips a court of jurisdiction" over claims against anyone other than an operator of a nuclear plant. But the plaintiffs do not explain how that is the case. While it is a well-established principle that jurisdictional rules are not substantive, *see McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 224 (1957), the plaintiffs make no meaningful argument about how the channeling provision is jurisdictional. The channeling provision makes no reference to jurisdiction or, indeed, to any court.[4] It simply provides that only the operator of a nuclear reactor will be liable for any damages caused by the operation of the facility. That is not a jurisdictional provision. *See Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 160–61 (2010).

The channeling provision is much more akin to state statutes that limit liability for certain injuries. If "[j]urisdiction is the power to declare law," *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1869), the channeling provision is the law itself, not an assignment of the power to declare it.

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[4] Under Japanese procedures put in place after the disaster, claims may be filed, but do not have to be filed, in a Japanese court. They may also be filed with TEPCO directly or with the Nuclear Damage Claim Dispute Resolution Center, created after the FNPP incident.

Importantly, California courts have routinely treated such liability-limiting provisions as substantive law and applied them under California's choice-of-law rules. *See*, *e.g.*, *Offshore Rental Co. v. Cont'l Oil Co.*, 583 P.2d 721, 729 (Cal. 1978) (applying Louisiana law foreclosing employer's cause of action for negligent injury to key employee); *Castro v. Budget Rent-A-Car Sys., Inc.*, 65 Cal. Rptr. 3d 430, 444 (Ct. App. 2007) (applying Alabama law precluding liability against vehicle owner for negligence of a permissive user).

Moreover, application of the channeling provision ends the case as to GE's liability, making the provision, as the plaintiffs concede, outcome-determinative. This weighs heavily in favor of finding that the provision is substantive rather than procedural. *See Gasperini*, 518 U.S. at 427–28. A liability-limiting statute with such outcome-determinative implications is substantive and subject to a choice-of-law analysis.

2. Propriety of Choice-of-Law Analysis at the Motion- to-Dismiss Stage

The plaintiffs next contend that the district court erred by conducting a choice-of-law analysis at this stage of the litigation. They argue that they needed additional time and discovery to fully develop the arguments and factual issues related to the choice-of-law analysis. The district court rejected this argument, finding that it was appropriate to analyze choice-of-law at this stage because the issue was fully briefed and discovery would not affect the analysis.

The plaintiffs argue that a choice-of-law determination "requires a level of factual development and detailed legal briefing that was not and is not present in" this case at this time. But the plaintiffs cite no principle to support the argument that a court cannot decide choice-of-law issues in a motion to dismiss. And although some district courts reserve ruling on the issue until later in the litigation, the district court here had all the argument and facts necessary to make its decision.

As to the contention that additional legal briefing was necessary, choice of law was one of the primary issues presented to the district court in the motion to dismiss. It was fully briefed by both parties, and the district court was able to engage in a complete analysis. This is unlike some of the cases the plaintiffs cited, in which the parties had provided little or no briefing when asking the district court to decide the choice-of-law question. *See, e.g.*, *Dean v. Colgate- Palmolive Co.*, 2015 WL 3999313, at *11 (C.D. Cal. June 17, 2015) (no analysis at all); *Czuchaj v. Conair Corp.*, 2014 WL 1664235, at *9 (S.D. Cal. Apr. 18, 2014) (one page); *Brazil v. Dole Food Co.*, 2013 WL 5312418, at *11 (N.D. Cal. Sept. 23, 2013) (no analysis at all).

We are also not persuaded that the district court needed a more expansive factual record to decide the choice-of-law issue. The plaintiffs first argue that the terms of the contract between GE and TEPCO, particularly its choice-of-law or venue

provisions, could influence the analysis. But those provisions have no bearing on tort claims filed by third parties, like the plaintiffs. *Sutter Home Winery, Inc. v. Vintage Selections, Ltd.*, 971 F.2d 401, 407 (9th Cir. 1992) ("Claims arising in tort are not ordinarily controlled by a contractual choice of law provision."); *see also Paracor Fin., Inc. v. Gen. Elec. Capital Corp.*, 96 F.3d 1151, 1165 (9th Cir. 1996) (finding third parties cannot be bound by a choice-of- law provision in a contract in which they had no interest). The plaintiffs also contend that discovery could shed light on information about the operational responsibilities of GE and TEPCO, as well as TEPCO's knowledge about the incoming U.S. naval ships. But the plaintiffs offer no explanation about why this information would be important to the analysis of whether California or Japan has a greater interest in the application of its substantive laws to the claims against GE. That information could be important to determining GE's ultimate liability, but it has no bearing on the choice-of-law analysis.

The district court did not err in proceeding with the full choice-of-law analysis.

3. Choice of Law

The final question is whether the district court erred when it decided that the laws of Japan, not California, govern plaintiffs' claims against GE. California courts decide choice-of-law questions by means of the "governmental interest" test, which proceeds in three steps. *Offshore Rental*, 583 P.2d at 723. First, the court must determine whether the

substantive laws of California and the foreign jurisdiction differ on the issue before it. *McGhee v. Arabian Am. Oil Co.*, 871 F.2d 1412, 1422 (9th Cir. 1989). Second, if the laws do differ, then the court must determine what interest, if any, the competing jurisdictions have in the application of their respective laws. *Id.* "If only one jurisdiction has a legitimate interest in the application of its rule of decision, there is a 'false conflict' and the law of the interested jurisdiction is applied." *Id.* But if more than one jurisdiction has a legitimate interest, "the court must move to the third stage of the analysis, which focuses on the 'comparative impairment' of the interested jurisdictions." *Id.* This third step requires the court to "identify and apply 'the law of the state whose interest would be the more impaired if its law were not applied.'" *Id.* (quoting *Offshore Rental*, 583 P.2d at 726).

a. The Laws Differ

The parties agree that the laws of California and Japan differ. Under Japanese law, the Compensation Act would apply and channel liability for nuclear damage exclusively to the licensed operator of the nuclear installation—here, TEPCO. If Japanese law applies, it requires dismissal of all claims against GE. Under California law, on the other hand, a manufacturer such as GE is strictly liable if its product is defectively manufactured, defectively designed, or distributed without adequate instructions or warnings. *See Hufft v. Horowitz*, 5 Cal. Rptr. 2d 377, 379 (Ct. App. 1992). If California law applies

and the plaintiffs prove that GE defectively manufactured or designed the reactor, GE would be strictly liable. *See id.*

b. Both Jurisdictions Have a Legitimate Interest

We must next determine what interest, if any, Japan and California have in the application of their respective laws to this case. *Offshore Rental*, 583 P.2d at 724–25. Only if each jurisdiction involved has a legitimate but conflicting interest in applying its own law will there be a "true conflict," requiring us to move on to step three of the analysis. *Id.* at 725–26. The plaintiffs agree that there is a true conflict, but contend that Japan's interests are not "strong." GE argues that there is no true conflict because, while Japan has substantial, legitimate interests in applying its laws, California's interests are "minimal at best." It asserts that the plaintiffs' claims directly implicate conduct that occurred in Japan and is subject to a Japanese liability-limiting statute, giving Japan strong legitimate interests in having its law applied. In contrast, GE contends that California's only interest is in ensuring compensation for California-resident victims, which would be equally served under Japanese law.

At this point in the analysis, our only consideration is whether each jurisdiction has legitimate interests in seeing its own law applied in this case and whether those interests conflict. Weighing the strength of California's interests

against Japan's occurs at the third step, which we need only reach if there is a true conflict.

(1) *Japan's Interests*. The parties generally agree that Japan has legitimate interests in having its law applied to this case. These interests are: (1) adjudicating claims arising from a natural disaster that occurred in Japan, (2) adjudicating claims arising from injuries that occurred in Japan, and (3)providing consistent allocation of liability for nuclear disasters under the Compensation Act. The final interest is of particular importance. As the California Supreme Court has stated:

> When a state adopts a rule of law limiting liability for commercial activity conducted within the state in order to provide what the state perceives is fair treatment to, and an appropriate incentive for, business enterprises, we believe that the state ordinarily has an interest in having that policy of limited liability applied to out-of-state companies that conduct business in the state, as well as to businesses incorporated or headquartered within the state.

McCann v. Foster Wheeler LLC, 225 P.3d 516, 530 (Cal. 2010). Here, Japan's Compensation Act limits liability for participants in its nuclear industry, in part as an incentive for businesses to participate. This is a "real and legitimate interest" in having Japanese law apply to the case. *Id.* at 531–32.

(2) *California's Interest.* California law holds manufacturers strictly liable for products defectively manufactured or designed. *Hufft*, 5 Cal. Rptr. 2d at 379. California courts have described the state's interest underlying this law:

> [It] is to [e]nsure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves. The other purposes, or public policies, behind the creation of the doctrine of strict products liability in tort as a theory of recovery are:
>
> (1) to provide a short cut to liability where negligence may be present but difficult to prove; (2) to provide an economic incentive for improved product safety; (3) to induce allocation of resources towards safer products; and (4) to spread the risk of loss among all who use the product.

Barrett v. Superior Court, 272 Cal. Rptr. 304, 309 (Ct. App. 1990) (internal quotation marks and citations omitted). These interests are certainly legitimate.

GE, however, contends that these interests are insignificant in this case, arguing that the plaintiffs "cannot manufacture a true conflict by invoking irrelevant policies and interests." It argues that policies underlying California's strict-products-liability law "are immaterial here because there are no 'products' at issue." But that is not the case. While it is true that the district court previously commented that "[t]he FNPP was evidently not a product 'placed on the market,'" *Cooper II*, 166 F. Supp. 3d at 1129, the claims against GE do not arise out of the FNPP as a single entity. GE manufactured particular parts of the Fukushima Daiichi facility—the reactors. The fact that reactors were not marketed broadly to consumers does not detract from the fact that they were designed and built for the FNPP. That is sufficient, in a proper case, to be subject to California's products liability rules. *See Rawlings v. D.M. Oliver, Inc.*, 159 Cal. Rptr. 119, 122 (Ct. App. 1979) (holding that the fact that a product was not mass produced has no effect on the manufacturer's responsibilities in manufacturing and selling products).

Although there are no California defendants in this case, there are plaintiffs who are California residents. And California has a legitimate interest in ensuring that its injured residents are compensated for injuries resulting from the design and manufacture of faulty products, as well as providing an easy way to prove liability. So, the interests served by California's strict-products-liability laws are also relevant.

We conclude, as did the district court, that there is a so- called "true conflict" here. California has an interest in holding manufacturers of defective products liable in tort to ensure compensation for its residents. Japan, on the other hand, has an interest in consistent application of its liability-limiting statute to businesses participating in its nuclear industry. We therefore move to the final step of the analysis.

c. Japan's Interests Would be More Impaired if Its Law Were Not Applied

Once a true conflict is identified, we must consider the "comparative impairment" step of the analysis, which "seeks to determine which state's interest would be more impaired if its policy were subordinated to the policy of the other state." *Offshore Rental*, 583 P.2d at 726. The conflict "should be resolved by applying the law of the state whose interest would be the more impaired if its law were not applied." *Id.* The purpose of this step is not for us to judge which law is "better" or "worthier" social policy; instead, we are "to decide—in light of the legal question at issue and the relevant state interests at stake—which jurisdiction should be allocated the predominating lawmaking power under the circumstances of the present case." *McCann*, 225 P.3d at 534.

California's courts have frequently applied foreign laws that serve to protect businesses by limiting liability, even when applying that law

precludes recovery by injured California residents. For example, in *Offshore Rental*, a California corporation brought a claim against a Louisiana company for the loss of services of a "key" employee who was injured on the defendant company's premises in Louisiana. 583 P.2d at 729. The California Supreme Court noted that Louisiana's interest in applying its own law to the case was "to protect negligent resident tort-feasors acting within Louisiana's borders from the financial hardships caused by the assessment of excessive legal liability or exaggerated claims resulting from the loss of services of a key employee." *Id.* at 725. California had made a different choice in legal policies: California had "an interest in protecting California employers from economic harm because of negligent injury to a key employee inflicted by a third party." *Id.* Weighing these competing interests, the court held that "[a]t the heart" of Louisiana's liability-limiting law was "the vital interest in promoting freedom of investment and enterprise *within Louisiana's borders*, among investors incorporated both in Louisiana and elsewhere." *Id.* at 728. Imposing liability in this situation, when Louisiana had decided not to, would therefore "strike at the essence of a compelling Louisiana law." *Id.* Particularly because the accident occurred in Louisiana, California's interest in compensation for injured California companies could not overcome Louisiana's greater interest in protecting businesses operating there. *Id.* at 728–

29. Applying Louisiana law and finding no cause of action, the court affirmed dismissal of the suit.

Similarly, in *McCann*, the California Supreme Court applied Oklahoma law that limited a defendant's liability even though it precluded recovery for a California plaintiff. 225 P.3d at 537. McCann was exposed to asbestos while working in an oil refinery in Oklahoma in the 1950s. Many years later he developed mesothelioma, and brought suit in his home state, California, against the manufacturer of a boiler installed in the refinery. The manufacturer was a resident of neither Oklahoma nor California, but of New York. Relying on *Offshore Rental*, the court applied Oklahoma's 10-year statute of repose to the plaintiff's claim instead of California's statute of limitations.[5] *Id.* The court noted that Oklahoma had an interest in promoting commercial activity within the state by limiting businesses' liability, while California had a general interest in ensuring compensation for its injured residents, and had a special interest in providing relief from "asbestos-related harm." *Id.* at 532. Nevertheless, the court concluded that applying California's statute of limitations would "significantly undermine Oklahoma's interest in establishing a reliable rule of law governing a business's potential liability for

[5] Under Oklahoma's statute of repose, the time for filing suit ran from the time the construction project was completed, whether McCann knew of his injury or not. Under California's statute of limitations, McCann had one year from the time he learned of his mesothelioma. *McCann*, 225 P.2d at 521 & n.2, 523, 529.

conduct undertaken in Oklahoma." *Id.* at 535. In contrast, failure to apply California law would have had a less significant impact on California's interest. *Id.* While it precluded the plaintiff's recovery, California courts take a "restrained view" of California's interest in recovery for its residents for injuries that occur in another jurisdiction. *Id.* at 535–36 (discussing *Offshore Rental*, 583 P.2d at 728, and *Castro*, 65 Cal. Rptr. 3d at 443–44). Given Oklahoma's strong interest in limiting liability for commercial activity within its borders, the California Supreme Court applied Oklahoma law and dismissed the McCann's claim. *Id.* at 537.

In light of this precedent, the district court correctly decided that Japanese law should apply to this case. Japan's interests here are similar to those at issue in *Offshore Rental*, *McCann*, and other cases in which California courts (and federal courts applying California's choice-of-law rules) have found that California's interest in compensation for injured residents failed to overcome a foreign jurisdiction's interest in limiting defendants' substantive liability for injuries occurring within its borders.[6] Japan's

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[6] *See Arno v. Club Med Inc.*, 22 F.3d 1464, 1469 (9th Cir. 1994) (applying French law to plaintiff's vicarious-liability claim because Guadeloupe's interest in "encouraging local industry . . . and reliably defining the duties and scope of liability of an employer doing business within its borders" would be more impaired than California's interest in "providing compensation to its residents" if its law was not applied); *Castro*, 65 Cal. Rptr. 3d at 443–44 (applying Alabama law because its interest in allocating liability would be more

interest here is in limiting liability for defendants engaged in the nuclear-power industry in Japan. Japan made a conscious decision to encourage nuclear power in Japan. It balanced "providing protection for injured parties" with "contributing to the sound development of nuclear reactor operations." Compensation Act, ch. I, art. 1. Under the Compensation Act, "the Nuclear Operator is liable to compensate for damages in connection with the Operation . . . of [the] Nuclear Reactor" and "no other persons shall be liable to compensate for damages other than the Nuclear Operator." *Id.* at ch. II, arts. 3–4. In comparing Japan's and California's interests, we cannot judge which policy embodies "the better or worthier rule," but instead must determine which jurisdiction's interest would be most "significantly impair[ed]" if its law were not applied. *McCann*, 225 P.3d at 534.

We have little difficulty concluding that failure to apply Japanese law in these circumstances would significantly impair Japan's interests. Japan's Compensation Act is directed specifically at accidents at a nuclear facility; California's products liability rules are general in nature and presumably cover everything from toasters to

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impaired by application of California's more permissive statute than would California's interest in compensation for injured residents if Alabama law was applied); *Tucci v. Club Mediterranee, S.A.*, 107 Cal. Rptr. 2d 401, 408–12 (Ct. App. 2001) (applying Dominican law in light of the Dominican Republic's superior interest in "assuring that businesses . . . face limited and predictable financial liability for work-related injuries").

airplanes. The release of radiation occurred at the FNPP on Japanese soil and the United States sent the *U.S.S. Ronald Reagan* to Japan in aid of the disaster.[7]

Even if application of the Compensation Act would bar any relief for these plaintiffs, we would still be required to apply Japanese law. *See McCann*, 225 P.3d at 537–38; *Offshore Rental*, 583 P.2d at 729. But application of Japanese law does not entirely foreclose recovery for the plaintiffs here. Japanese law allows for compensation for the plaintiffs' injuries—just not from GE. This makes application of Japanese law less intrusive on California's interests than in cases like *McCann* and *Offshore Rental*. For these reasons, Japanese law applies to the claims against GE. Because there is no dispute on appeal that application of Japanese law requires dismissal of all claims against GE, we affirm the dismissal of these claims with prejudice.[8]

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[7] Before the district court and in their opening brief, the plaintiffs argued that the injury here did not occur in Japan because it happened in international waters. In reply and at oral argument, the plaintiffs amended that argument and now claim that the injury occurred on "U.S. soil" because the sailors were injured on U.S. ships. This argument, presented for the first time in the reply, has been forfeited. *See Rizk v. Holder*, 629 F.3d 1083, 1091 n.3 (9th Cir. 2011).

[8] We therefore need not reach the alternative arguments in GE's brief.

B. *TEPCO*

We next address TEPCO's motion to dismiss. The district court also engaged in a choice-of-law analysis for the claims against TEPCO. After determining that Japanese law should apply, the court dismissed the claims against TEPCO on international-comity grounds. We begin by addressing the choice-of-law analysis. We then consider international comity.

1. Choice of Law

The plaintiffs raise the same challenges to this choice-of- law analysis as they did to the analysis of the claims against GE. For the reasons previously stated, the choice-of-law analysis is not premature or inappropriate at this stage. As to the merits of the choice-of-law analysis, the district court correctly found that Japanese law also applies to the plaintiffs' claims against TEPCO.

a. The Laws Differ

There is no disagreement that the laws of Japan and California differ in three ways with regard to the claims against TEPCO. First, under Japanese law, the Compensation Act is the exclusive means of redress, Saikô Saibansho [Sup. Ct.] May 14, 2009, 2066 HANREI JIHÔ [HANJI] 54,[9] but

[9] The cases cited here were explained in a detailed declaration from Yasuhei Taniguchi, a retired professor of law who has taught at several Japanese universities. In addition to an LL.B. from Kyoto University, Professor Taniguchi holds an LL.M. from the University of California at Berkeley and a J.S.D.

under California law, there is no such exclusive remedy. Second, the Compensation Act requires a "high probability" of causation, Saikô Saibansho [Sup. Ct.] Oct. 24, 1975, 29 Saikô Saibansho Minji Hanreishû [Minshû] 1417, 1419–20, while California negligence principles require the plaintiffs to show only that their injuries were "more likely than not" caused by radiation exposure. *Jones v. Ortho Pharm. Corp.*, 209 Cal. Rptr. 456, 460 (Ct. App. 1985). Finally, Japanese law has a broad definition of compensatory damages, including damages for proprietary and material losses, spiritual or mental suffering ("consolation money"), and income lost over a lifetime, but it does not recognize or allow for punitive damages, Saikô Saibansho [Sup. Ct.] July 11, 1997, 51(6) Saikô Saibansho Minji Hanreishû [Minshû] 2573, while California law does. Cal. Civ. Code § 3294.

b. Both Jurisdictions Have Legitimate Interests

The plaintiffs made no argument here or before the district court regarding the interests of either forum. We conclude that the same interests are implicated here as in the analysis of the claims against GE. California has an interest in ensuring compensation for its injured residents, while Japan has an interest in the consistent application of the Compensation Act to protect its nuclear industry. There is therefore a true conflict

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from Cornell University. His analysis was credited by the district court and is not disputed by the plaintiffs.

and we proceed to step three of the governmental-interest test.

c. Japan's Interests Would be More Impaired if Its Law Was Not Applied

The analysis at this step is also much the same as for the claims against GE. As noted *supra*, California courts have frequently applied foreign laws like the Compensation Act—which serve to limit liability for businesses—in these situations. Japan has an even greater interest in its law applying to the claims against TEPCO than it did with respect to GE. TEPCO is a Japanese corporation operating a nuclear reactor in Japan. It is not only subject to general principles of Japanese law but, as evidenced by the Compensation Act, to a series of special rules regarding its responsibility following a nuclear disaster, just as American nuclear plant operators are subject to special liability rules under the Price-Anderson Act. [10] Furthermore, following the disaster and consistent with the Compensation Act, the Japanese government has come forward to fund compensation for the victims of the FNPP meltdown. We were advised in TEPCO's brief and at oral argument that the Japanese government has allocated, to date, more than $76 billion to compensate victims, and that more than 21,000 victims have received some form of compensation.

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[10] *See* 42 U.S.C. § 2210. *See also Duke Power Co. v. Carolina Envtl. Study Grp.*, 438 U.S. 59, 63–67 (1978) (background on the Act).

Japan has a strong interest in the uniform application of the Compensation Act. Subjecting TEPCO to California's negligence rules would seriously undermine the comprehensive scheme in the Compensation Act and impair Japan's interests. In contrast, California has an interest in seeing the victims of a nuclear disaster compensated, but that interest would be equally served under Japanese law.[11] The Compensation Act operates to compensate those injured by nuclear accidents and the plaintiffs offered no showing that they cannot be adequately compensated for their injuries under Japanese law.[12]

Because Japan's interests would be more impaired if California's laws were applied than California's would if Japanese law were applied, we conclude that Japanese law applies to the claims against TEPCO and affirm the district court's holding on the choice-of-law issue. We now proceed to the question of whether, given that Japanese law must be applied in any proceedings in the Southern District of California, the

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[11] Of course, as discussed, the plaintiffs would not be able to recover punitive damages under Japanese law. But punitive damages are not intended to compensate for a plaintiff's losses, *see State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003), and TEPCO has stated that injured parties will be fully compensated for proven injuries.

[12] At oral argument, TEPCO agreed to waive any statute of limitations defense provided the plaintiffs filed their claims in Japan within a reasonable amount of time.

district court abused its discretion in dismissing the case on international-comity grounds.

2. International Comity

"International comity 'is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.'" *Mujica v. AirScan Inc.*, 771 F.3d 580, 597 (9th Cir. 2014) (quoting *In re Simon*, 153 F.3d 991, 998 (9th Cir. 1998)) (other citations omitted). It is "a doctrine of prudential abstention, one that 'counsels voluntary forbearance when a sovereign which has a legitimate claim to jurisdiction concludes that a second sovereign also has a legitimate claim to jurisdiction under principles of international law.'" *Id.* at 598 (quoting *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 8 (1st Cir. 1997)). International comity embodies the policy of "good neighbourliness, common courtesy and mutual respect between those who labour in adjoining judicial vineyards." *Id.*

There are two kinds of international comity: prescriptive comity (addressing "the extraterritorial reach of federal statutes") and adjudicative comity (a "discretionary act of deference by a national court to decline to exercise jurisdiction in a case properly adjudicated in a foreign state"). *Id.* at 598–99. This case deals only with adjudicative comity.

In deciding whether to apply the doctrine of adjudicative comity, the courts weigh "several factors, including [1] the strength of the United States' interest in using a foreign forum, [2] the strength of the foreign governments' interests, and [3] the adequacy of the alternative forum." *Id.* at 603 (quoting *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1238 (11th Cir. 2004)) (brackets in original)). In *Mujica*, we expounded on how to assess the United States' and the foreign government's interests in relying on a foreign forum:

> The (nonexclusive) factors we should consider when assessing [each country's] interests include (1) the location of the conduct in question, (2) the nationality of the parties, (3) the character of the conduct in question, (4) the foreign policy interests of the [countries], and (5) any public policy interests.

Id. at 604; *see also id.* at 607. These considerations need not be addressed mechanically.

We review the district court's international-comity determination for an abuse of discretion and reverse only if the district court applied an incorrect legal standard or if its "application of the correct legal standard was (1) 'illogical, (2) 'implausible,' or (3) without 'support in the inferences that may be drawn from the facts in the record.'" *Id.* at 589 (quoting *United States v. Hinkson*, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc)). The district court here "correctly laid out

[the] legal standard," so "the only question is whether the district court's decision . . . to dismiss Plaintiffs' claims was illogical, implausible, or unsupported by the record." *Cooper III*, 860 F.3d at 1205.

In our previous opinion, we concluded that the district court did not abuse its discretion when it decided against dismissing the claims against TEPCO on comity grounds. *Id.* at 1209. We recognized that this was a "difficult case" and that there were "strong reasons for dismissing the plaintiffs' claims in favor of a Japanese forum." *Id.* We noted that "further developments in the district court may counsel in favor" of dismissal, particularly once the district court determined which jurisdiction's law would apply. *Id.* at 1210 n.12. On remand, the district court reconsidered its comity analysis based on new developments, finding that these developments tilted the scales towards dismissal. The location of the conduct in question, nationality of the parties, nature of the conduct, and the public-policy interests remained the same. But after considering the statements from the Japanese and United States governments—which the district court did not have before it when it first ruled on the issue—the district court found that the foreign-policy interests now favored dismissal. [13] And because the choice- of-law

[13] The district court also left its previous decision on the adequacy-of- the-alternative-forum factor undisturbed, and the plaintiffs do not challenge this factor on appeal. They make passing reference to "the disparities between the American

analysis is relevant to comity decisions, the district court found that its conclusion that Japanese law applied also weighed in favor of dismissal on comity grounds. The plaintiffs contend that this was an abuse of discretion because "nothing has changed except for the court's willingness to revisit the issue of international comity and decide to punt this case to Japan."

First, the conclusion that Japanese law applies to the case does affect the comity analysis. *See Cooper III*, 860 F.3d at 1210 n.12 (citing *Mujica*, 771 F.3d at 602; *Ungaro- Benages*, 379 F.3d at 1240). It was not an abuse of discretion for the district court to take the applicability of Japanese law into consideration. If Japan's interest in the applicability of its laws to this case was strong enough to overcome California's interests in the choice-of-law analysis, it was not illogical or implausible for the district court to find that Japan had a similarly strong interest in being the place where the plaintiffs' claims are litigated. We can take notice of the fact that if the suit proceeds in the

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justice system and Japan's," but do so without citation to the record or law that supports the implication that Japan would be an inadequate forum. They claim that the defendants needed to present "clear and incontrovertible evidence" that Japan's courts would not "deprive Plaintiffs of due process and equal protection of law to which they are entitled," but our precedent imposes no such requirement. The plaintiffs raised similar unsubstantiated claims of bias in their previous appeal, but we found that there was "no doubt that Japan would provide an adequate alternative forum." *Cooper III*, 860 F.3d at 1209. The district court did not abuse its discretion by leaving its previous analysis of this factor in place.

Southern District of California, the district court will have to inform itself at every turn of the nuances of Japanese civil law. That would require understanding who bears the burden of proof, principles of causation, and what constitute compensable damages. Not only would the district court have to educate itself on the law, but it would need to understand how the Compensation Act has been administered in the thousands of cases resolved in Japan, lest the "change of courtrooms" mean a change in result. *Van Dusen*, 376 U.S. at 639.

The other "significant change" that the district court found affected its analysis was the amicus briefs filed in our court during the first appeal. Neither government had expressed its views on litigating in U.S. courts before *Cooper III*. After Japan filed an amicus brief in *Cooper III* expressing a strong interest in the case being litigated in Japan, we invited the United States Department of State to give its views on whether the litigation should proceed in the United States. We considered both amicus briefs and found that[14]

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[14] In *Cooper III*, TEPCO and GE (appearing as amicus) argued that dismissal on comity grounds would promote the Convention on Supplementary Compensation for Nuclear Damage ("CSC"). The United States argued that, in denying dismissal on comity grounds, the district court did not abuse its discretion. *See Cooper III*, 860 F.3d at 1199–1200. The CSC guarantees that its contracting parties will have exclusive jurisdiction over litigation arising out of a nuclear incident within their borders. Because Japan was not a contracting party to the CSC at the time of the FNPP disaster, the United

they expressed "important, competing policy interests" that required "difficult judgment calls" from the district court. *Cooper III*, 860 F.3d at 1209. On remand, the district court weighed the interests expressed in the governments' amicus briefs and decided that, in light of the Japanese government's strong objection to the case being litigated in the United States, the foreign-policy factor now weighed in favor of dismissal.

This was a significant change from the first time the district court engaged in the comity analysis, despite the plaintiffs' assertions to the contrary. The first time the district court considered the comity factors, neither Japan nor the United States had expressed an opinion to the district court about the appropriate venue for the litigation. It was not improper for the district court to reconsider its previous holding in light of those statements.

The plaintiffs suggest that the district court effectively "overruled the Ninth Circuit," by weighing the amicus briefs and coming to a different conclusion. But the district court did nothing of the kind. In *Cooper III*, we fairly invited the district court to revisit the comity analysis if and when circumstances changed. *Id.* at 1210 & n.12. And the statement from both governments about where the litigation should proceed was a

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States objected to the courts relying on this argument from TEPCO and GE. Otherwise, the United States argued that it had "no specific foreign policy interest necessitating dismissal in this particular case." *Id.* at 1208.

changed circumstance for the district court. The argument that the statements were not new because we had them before us in *Cooper III* misunderstands the scope of our review in that case. The question before us then was not whether we, with the benefit of the statements, would have dismissed the suit on comity grounds, but whether the district court had abused its discretion with the information that it had. We were careful in stating our standard of review in that case. *Cooper III*, 860 F.3d at 1205, 1209. Once the district court had the positions of the United States and Japanese governments before it, it was entirely proper for the district court to revisit the comity analysis.

In its amicus brief, Japan strongly objected to this case being litigated in the United States. Japan has committed a significant sum of money and resources to ensure fair and consistent compensation for accident victims. Japan pointed out that if injured parties could bring their claims anywhere in the world, foreign courts might apply different legal standards, resulting in different outcomes for similarly situated victims. *See id.* at 1207. This would seriously affect the integrity of the compensation system established by the Japanese government. And because the Japanese government is financing TEPCO's compensation payments, which are administered through Japanese courts, that risk is particularly troublesome. *See id.* at 1209 ("Japan has an undeniably strong interest in centralizing jurisdiction over FNPP-related claims."). If Japan

cannot exercise some control over the compensation process, it may be less willing to compensate FNPP victims who seek remedies outside of a Japanese forum. That may complicate the victims' ability to be compensated. *See Cooper III*, 860 F.3d at 1207 ("Judgments originating in American courts may well be inconsistent with the overall administration of Japan's compensation fund.")

When the district court revisited the comity factors, it noted TEPCO's argument that Japan's interests "have only grown stronger" since its brief was filed. With the benefit of this position, the district court found that the foreign policy factor weighed in favor of dismissal, despite the United States' "important, competing policy interest."

The plaintiffs contend that it was illogical for the district court not to consider the United States' amicus brief in its analysis and that the district court owed deference to the State Department's opinion about whether to exercise jurisdiction. But the district court acknowledged the United States' statement and its competing foreign-policy concerns in its order. And to the extent that the plaintiffs contend that the State Department's brief is an affirmative statement from the government that was entitled to special deference, the plaintiffs overstate their case. The plaintiffs point to no principle that requires district courts to defer to statements of interest from the United States. We will give "serious weight to" such statements, *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21

(2004), but "[a] statement of national interest alone. . . does not take the present litigation outside the competence of the judiciary," *Ungaro-Benages*, 379 F.3d at 1236.

Moreover, the United States issued a careful, cautious statement. The United States first "applaud[ed] the Government of Japan's impressive efforts to provide recovery for damages caused by the nuclear accident at the Fukushima- Daiichi power plant, including through the creation of an administrative compensation scheme that has paid over $58 billion in claims." It did express an interest in Japan not retroactively receiving exclusive jurisdiction over suits under the CSC, which Japan had not signed at the time of the FNPP incident. And, *for that reason*, the U.S. urged us not to overturn the district court's decision in *Cooper III*. *See Cooper III*, 860 F.3d at 1207–09. But outside of that, the United States said only that although "a district court could choose to dismiss a case based on international comity for a claim arising overseas[,] . . . [t]he United States has no specific firm policy interest necessitating dismissal in this particular case." The United States stopped well short of urging that California was the proper forum to exercise jurisdiction in this case. The United States thus voiced its concerns with the *reasons* for which the district court would grant dismissal on comity grounds, but expressed no objection that Japan be permitted to adjudicate these claims in its own courts.

The United States' measured response pales in comparison to Japan's unequivocal objection to the exercise of jurisdiction in U.S. courts. Recognizing Japan's interests under these circumstances was not illogical or implausible, particularly once the district court determined that Japanese law would apply to the claims.

We acknowledge that the case is complicated. It implicates strong, important policy interests in both countries. But comity is a "fluid doctrine" that can "change in the course of the litigation." *Cooper III*, 860 F.3d at 1210. We invited the district court to reevaluate its decision in appropriate circumstances. The district court did so, and carefully explained its reasons. Having decided that Japanese law applies to the case and considering Japan's strong interests in the case being litigated in Japan, the district court did not abuse its discretion when it dismissed the claims against TEPCO on international-comity grounds.[15]

III. CONCLUSION

We affirm the district court's granting of both GE's and TEPCO's motions to dismiss.

AFFIRMED.

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[15] In light our disposition, we do not reach TEPCO's personal- jurisdiction argument.

APPENDIX B

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF CALIFORNIA

LINDSAY COOPER, et al., *Plaintiff*, **v.** **TOKYO ELEC. POWER CO. HOLDINGS, et al.,** *Defendants*.	Case No.: 12cv3032-JLS (JLB) ORDER: (1) GRANTING GE'S MOTION TO DISMISS; AND (2) GRANTING TEPCO'S MOTION TO DISMISS

Presently before the Court is Defendant Tokyo Electric Power Company, Inc.'s ("TEPCO") Motion to Dismiss, ("TEPCO MTD," ECF No. 153), and Defendant General Electric's ("GE") Motion to Dismiss, ("GE MTD," ECF No. 152). Plaintiffs have filed a Response in Opposition to TEPCO's Motion, ("Opp'n to TEPCO MTD," ECF No. 155), and to GE's Motion, ("Opp'n to GE MTD," ECF No. 154). TEPCO filed a Reply, ("TEPCO Reply," ECF No. 157), as did GE, ("GE Reply," ECF No. 156). Having reviewed the parties' arguments and the law, the Court rules as follows.

BACKGROUND

On March 11, 2011, an earthquake struck Japan, giving rise to tsunami waves that struck

Japan's Fukushima-Daiichi Nuclear Power Plant ("FNPP"). Third Amended Complaint ("TAC") ¶¶ 112, 113, 119, 127, ECF No. 71. The plant's radioactive core melted down causing severe damage to the plant and releasing radiation as a result. *Id.* ¶ 182. Plaintiffs are members of the U.S. Navy crews of the U.S.S. RONALD REAGAN, crews of other vessels participating in the Reagan Strike Force, land-based service personnel, and/or their dependents. *Id.* ¶ 2. Plaintiffs were deployed to Japan as part of a mission known as "Operation Tomodachi." *Id.* Plaintiffs allege that the FNPP released radioisotopes and exposed them to injurious levels of ionizing radiation during the mission. *Id.* The release of radiation and subsequent injuries resulted from "negligently designed and maintained" Boiling Water Reactors at the FNPP. *Id.* ¶ 83.

Plaintiffs initiated this action against TEPCO, the owner and operator of the FNPP, on December 21, 2012. TEPCO moved to dismiss. The Court granted TEPCO's motion without prejudice. ECF No 46. Plaintiffs filed a Second Amended Complaint ("SAC"), which TEPCO moved to dismiss, and the Court granted in part and denied in part this motion, again permitting Plaintiffs to file an amended complaint. ECF No. 69. Plaintiffs filed their Third Amended Complaint ("TAC"), naming GE as an additional defendant, along with three other manufacturer defendants EBASCO,

Toshiba, and Hitachi.[1] ECF No. 71. TEPCO then moved for reconsideration of the Court's order regarding its second motion to dismiss. ECF No. 73. The Court amended its order and granted TEPCO's motion for certification of interlocutory appeal and stayed the case at the district court level. ECF No. 107. The Ninth Circuit affirmed the Court's denial of TEPCO's Motion to Dismiss Plaintiffs' SAC. *See* 860 F.3d 1193.

Plaintiffs' TAC asserts both individual and class action claims. *See generally* TAC. Their causes of action include negligence, strict products liability, strict liability for ultrahazardous activities, res ipsa loquitur, negligence per se, loss of consortium, and survival and wrongful death. *Id.* Plaintiffs make these claims against TEPCO as the owner and operator of the FNPP, *id.* ¶¶ 85, 96, and against GE as the designer of the Boiling Water Reactors within the FNPP. *Id.* ¶¶ 88, 141. Both GE and TEPCO have moved to dismiss this case against them. The Court addresses each Motion in turn.

GE'S MOTION TO DISMISS

In its Motion, GE argues that this Court lacks subject matter jurisdiction over this case. GE MTD at 19–21. Next, GE argues that this Court should conduct a choice-of-law analysis and apply Japan's Act on Compensation for Nuclear Damage, Act No. 147 of June 17, 1961 ("Compensation Act"), which

[1] Plaintiffs have voluntarily dismissed their claims against EBASCO, Toshiba, and Hitachi. ECF No. 139.

precludes GE from liability for nuclear events. GE MTD at 21–32.[2]

I. Subject Matter Jurisdiction

GE argues that this Court lacks subject matter jurisdiction because (1) Plaintiffs fail to satisfy diversity jurisdiction under 28 U.S.C. § 1332(a), and (2) Plaintiffs' attempt to invoke jurisdiction under the Class Action Fairness Act ("CAFA") fails to show that "class certification will ever be warranted." GE MTD at 19–20.

A. Diversity Jurisdiction Under Section 1332

The United States Supreme Court has "consistently interpreted § 1332 as requiring complete diversity: In a case with multiple plaintiffs and multiple defendants, the presence in the action of a single plaintiff from the same State as a single defendant deprives the district court of original diversity jurisdiction over the entire action." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546,

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[2] GE also argues that the Court should dismiss Plaintiffs claims under the doctrine of *forum non conveniens* or the political question doctrine. Further, GE argues that, if California law applies, Plaintiffs claims are time-barred and that Plaintiffs fail to state a claim against GE for several factual and legal deficiencies in the Complaint. Finally, GE argues that all claims against GE should be dismissed as a matter of international comity and that the Court lacks jurisdiction because the of Convention on Supplemental Compensation for Nuclear Damage. Because the Court agrees with GE that Japanese law applies, the Court does not reach these arguments.

553 (2005).

GE argues Plaintiffs fail to establish diversity jurisdiction because they fail to meet the section 1332 requirement of complete diversity of citizenship. GE MTD at 19. Plaintiffs do not oppose this contention. *See* generally Opp'n to GE MTD. In the TAC, Plaintiffs allege that GE is incorporated in New York and has its principle place of business in Connecticut. TAC ¶¶ 87–88. Plaintiffs state that Plaintiff Jedediah Irons is a citizen New York. *Id.* ¶ 81. Because both GE and Mr. Irons are citizens of New York, complete diversity is defeated and this court lack subject matter jurisdiction under section 1332.

B. Subject Matter Jurisdiction Under CAFA

The Class Action Fairness Act of 2005 provides "expanded original diversity jurisdiction for class actions." *United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union, AFL-CIO, CLC v. Shell Oil Co.*, 602 F.3d 1087, 1090–91 (9th Cir. 2010). Jurisdiction under CAFA requires the total number of members of the proposed plaintiff class be 100 or more persons and the primary defendants not be "States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief." 28 U.S.C. § 1332(d)(5); *see also Serrano v. 180 Connect, Inc.*, 478 F.3d 1018, 1020 (9th Cir. 2007). Once these threshold requirements are met, federal courts are vested with "original jurisdiction of any civil action in which the matter

in controversy exceeds . . . $5,000,000" and in which any member of the class is a citizen of a State different from any defendant. 28 U.S.C. § 1332(d)(2).

GE argues that this is not a class action, and thus "Plaintiffs cannot avail themselves of CAFA's minimal diversity provision." GE MTD at 19. GE points to statements by Plaintiffs' counsel that acknowledge that the case is "primarily a mass tort case," not a "class case." *Id.* (quoting Aug. 31, 2017 Status Conference Tr. at 59, ECF No. 145). Further, GE argues that the TAC reveals no basis to believe that class certification will ever be warranted. *Id.* at 7. Plaintiffs contend that their TAC satisfies all the CAFA requirements and that jurisdiction is appropriate. Opp'n to GE MTD at 11–12.

Here, there are 239 named Plaintiffs, and Plaintiffs allege no claims against any State or governmental entity. *See generally* TAC. The prayer for relief demands $1,000,000,000, meeting the amount in controversy requirement. *See* TAC Prayer. Further, Lindsay Cooper is a citizen of California, while GE is a citizen of New York (state of incorporation) and Connecticut (principle place of business), thus minimal jurisdiction is also satisfied. Accordingly, the TAC meets the CAFA jurisdictional requirements. *See* 28 U.S.C. § 1332(d)(11)(b).

Despite GE's contentions that there are insufficient allegations to certify the class alleged here, none of these alleged flaws are "so obviously

fatal as to make the plaintiff's attempt to maintain the suit as a class action frivolous." *See Cunningham Charter Corp. v. Learjet, Inc.*, 592 F.3d 805, 807 (7th Cir. 2010). Accordingly, the Court concludes that there is subject matter jurisdiction under CAFA.

II. Choice-of-Law

GE requests the Court perform a choice-of-law analysis as to the issue of GE's liability, arguing Japanese law applies and precludes GE from liability.[3] GE MTD at 21–32. Plaintiffs argue that the Court should defer making a choice-of-law analysis at this point, although California substantive law should apply to the case and GE is strictly liable.[4] Opp'n to GE MTD at 14–24.

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[3] In their briefs and at oral argument, Plaintiffs asserted that the Ninth Circuit has already expressed a position on GE's arguments regarding the choice-of-law issue. *See, e.g.*, Opp'n to GE MTD at 21. But, as the Ninth Circuit made clear, "the district court has yet to undergo a choice-of-law analysis" and it is yet to be determined "what body of law applies." *Cooper v. Tokyo Elec. Power Co.*, 860 F.3d 1193, 1215 (9th Cir. 2017). Further, the issue regarding the applicability of the Compensation Act was not before the Ninth Circuit.

[4] The Parties also reference American federal law in their choice-of-law arguments. Plaintiffs argue the Court could "potentially even cobbl[e] together the appropriate law from California, Japan, American federal law and other appropriate sources," Opp'n to GE MTD at 11, but ultimately take the position that, if the Court does consider choice of law, it should apply California law. *Id.* at 14. Based on the pleadings, the claims alleged, and the facts of the case, the Court will

In a diversity case, the district court must apply the choice-of-law rules of the state in which it sits. *See Klaxon Co. v. Stentor Elec. Mfg. Co.,* 313 U.S. 487, 496 (1941); *Ledesma v. Jack Stewart Produce, Inc.*, 816 F.2d 482, 484 (9th Cir. 1987). California applies a three-step "governmental interest" analysis to choice-of-law questions:

> First, the court examines the substantive law of each jurisdiction to determine whether the laws differ as applied to the relevant transaction. Second, if the laws do differ, the court must determine whether a "true conflict" exists in that each of the relevant jurisdictions has an interest in having its law applied. "If only one jurisdiction has a legitimate interest in the application of its rule of decision, there is a 'false conflict' and the law of the interested jurisdiction is applied." On the other hand, if more than one jurisdiction has a legitimate interest, "the court must move to the third stage of the analysis, which focuses on the 'comparative impairment' of the interested jurisdictions. At this stage, the court seeks to identify and apply the law of the state whose interest would be the more impaired if its law were not

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conduct its choice-of-law analysis as to the laws of California or Japan.

applied.

Abogados v. AT&T Inc., 223 F.3d 932, 934 (9th Cir. 2000) (internal citations omitted). Generally, the preference is to apply California law, rather than choose the foreign law as a rule of decision. *Strassberg v. New England Mut. Life Ins. Co.*, 575 F.2d 1262, 1264 (9th Cir. 1978). "[T]he party seeking to dislodge the law of the forum[] bears the burden of establishing that the foreign jurisdiction has an interest, cognizable under California conflict-of-law principles, in the application of its law to the dispute at hand." *McGhee v. Arabian Am. Oil Co.,* 871 F.2d 1412, 1424 (9th Cir. 1989).

A. Preliminary Choice-of-Law Issues

Before the Court conducts the choice-of-law analysis, it addresses Plaintiffs' preliminary arguments regarding the appropriateness of conducting the analysis at this point in the litigation.

Plaintiffs argue that the choice-of-law determination requires additional time and development to analyze fully, thus the Court should not decide the issue at the motion-to- dismiss stage. Opp'n to GE MTD at 21–24. The Court disagrees. "The question of whether a choice-of-law analysis can be properly conducted at the motion to dismiss stage depends on the individual case." *Czuchaj v. Conair Corp.*, No. 13-cv-1901 BEN (RBB), 2014 WL 1664235, at *9 (S.D. Cal. Apr. 18, 2014). As long as a court has sufficient

information to analyze the choice-of-law issue thoroughly, *see In re Graphics Processing Units Antitrust Litig.*, 527 F. Supp. 2d 1011, 1028 (N.D. Cal. 2007), and discovery will not likely affect the analysis, *see Frezza v. Google Inc.*, No. 5:12-cv-00237-RMW, 2013 WL 1736788, at *5–6 (N.D. Cal. Apr. 22, 2013), it is appropriate for the Court to undertake a choice-of-law analysis at the motion-to-dismiss stage. Here, GE and Plaintiffs fully briefed the issues, and discovery will not affect the analysis. Thus, the Court finds that there is adequate information to analyze the specific choice-of-law determination as to the issue of GE's liability.

Next, Plaintiffs argue that the Compensation Act's channeling provision is procedural, not substantive, and therefore not appropriate for the Court apply. Opp'n to GE MTD at 21–24. Whether or not the Court applies Japanese law or California law in the first place is a choice-of-law issue, and choice-of-law rules are considered "substantive." *Patton v. Cox*, 276 F.3d 493, 495 (9th Cir. 2002) (a federal court in a diversity case must apply the choice-of-law rules of the state in which it sits); *see also* O'Connell & Stevenson, *Rutter Group Practice Guide: Fed. Civil Procedure Before Trial*, Ch. 1-B (The Rutter Group 2017) (same). The law of California will therefore dictate which forums law will apply to this case.

As for the Compensation Act itself, the Court concludes that this issue is substantive. Plaintiffs have provided no authority to support their assertion that application of the Compensation

Act's channeling provision is procedural. Applying the Compensation Act would significantly affect the result of this litigation because whether or not the Compensation Act is applied determines the entire case as to GE's liability. This makes the Act a substantive one, and thus proper for the Court sitting in diversity to apply. *See Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427 (1996) (finding issue substantive if applying the foreign law, rather than the forum State's law, "significantly affect[s] the result of a litigation").

B. Choice-of-Law Analysis

1. Differences in the Forum Laws

The first factor in California's governmental interest test asks whether the laws of the two forums differ. The Parties and the Court all agree the laws absolutely conflict.

Under Japanese law, the Compensation Act applies. The Compensation Act channels liability for nuclear damage exclusively to the licensed operator of a nuclear installation. *See* Compensation Act, art. 3 & 4 (when a Nuclear Operator in the course of Operation of a Nuclear Reactor causes Nuclear Damage, "no other persons shall be liable to compensate for damages other than the Nuclear Operator"). The Parties agree that, if the Court were to apply this Act, it must dismiss all claims against GE.

In contrast, California law holds the manufacturer liable if a product is defective. Under California law, "[a] manufacturer is strictly

liable for injuries caused by a product that is (1) defectively manufactured, (2) defectively designed, or (3) distributed without adequate instructions or warnings of its potential for harm." *Hufft v. Horowitz*, 4 Cal. App. 4th 8, 13 (1992) (citing *Barker v. Lull Eng'g Co.*, 20 Cal. 3d 413, 428 (1978)). If Plaintiffs prove that GE defectively manufactured or designed the reactor, under California law, GE would be strictly liable for Plaintiffs' injuries.

2. "True Conflicts" Analysis

The second factor in California's governmental interest test requires the Court to evaluate each jurisdiction's interest in the application of its law to the issue at hand. The Court must examine the governmental policies underlying the California and Japanese laws, "'preparatory to assessing whether either or both states have an interest in applying their policy to the case.' Only if each of the states involved has a 'legitimate but conflicting interest in applying its own law' will [the court] be confronted with a 'true' conflicts case." *Offshore Rental Co. v. Cont'l Oil Co.*, 22 Cal. 3d 157, 163 (1985) (internal citations omitted). "When one of two states related to a case has a legitimate interest in the application of its law and policy and the other has none, there is no real problem; clearly the law of the interested state should be applied." *Hernandez v. Berger*, 102 Cal. App. 3d 795, 799 (1980) (internal citations omitted).

a. California's Interest

Plaintiffs allege GE's Boiling Water Reactors contained numerous design and manufacturing defects for which GE should be liable. TAC ¶ 83. As noted, California law holds manufacturers strictly liable for products defectively manufactured or designed. *Hufft*, 4 Cal. App. 4th at 13. The governmental interest underlying California's strict products liability law

> "is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves." . . . The other purposes, or public policies, behind the creation of the doctrine of strict products liability in tort as a theory of recovery are: "(1) to provide a 'short cut' to liability where negligence may be present but difficult to prove; (2) to provide an economic incentive for improved product safety; (3) to induce the reallocation of resources toward safer products; and (4) to spread the risk of loss among all who use the product."

Barrett v. Super. Ct., 222 Cal. App. 3d 1176, 1186 (1990) (internal citations omitted).

Plaintiffs argue California has a strong interest in applying its laws to this case because California seeks to protect U.S. servicemen and women stationed and serving the Naval and Marine

branches in the Southern District of California. Opp'n to GE MTD at 16–17 & 17 n.1. Plaintiffs also argue California has a strong public policy behind protecting those injured on account of defective products. *Id.* at 18. The primary purpose behind California's strict products liability law is to guarantee that the costs of injuries resulting from defective products are borne by manufacturers, not victims. *Id.* at 18–19 & 19 n.2. The Court agrees this interest is significant and, thus, California has an interest in ensuring compensation for the victims from California.

California has no interest, however, in ensuring compensation for plaintiffs who neither are California residents nor injured in California. *See Chen v. L.A. Truck Ctrs., LLC*, 7 Cal. App. 5th 757, 771 (2017) (citing *Hurtado v. Super. Ct.*, 11 Cal. 3d 574, 583 (1974)). Although California has an interest in ensuring compensation for the Plaintiffs residing in California, this interest does not extend to the other, non-resident Plaintiffs.

Other interests tied to California's strict products liability do apply to non-residents. Specifically, California has an interest in encouraging corporations to manufacture safe products regardless of whether these products will affect California residents. *See Hurtado*, 11 Cal. 3d at 583–584. California also has an interest in deterring defective nuclear power plants, both through the strict liability imposed in California for Defective products and the availability of punitive damages. These are significant interests that apply

whether or not Plaintiffs reside in California.

After weighing these factors, the Court finds that California has a strong interest in having its strict products liability law apply to this matter.

b. Japan's Interest

GE argues that Japan has a compelling interest in "applying its own law on allocation of liability to a nuclear power plant accident occurring in Japanese territory." GE MTD at 26–27. GE cites this Court's past Order, wherein it stated, "Japan has an interest in adjudicating claims arising from the March 11, 2011 earthquake and tsunami that devastated large swaths of the country as evidenced by Japan's large investment in responding to the disaster." GE MTD at 26 (citing ECF No. 69 at 28).

Japan also has an interest because it is the place of the wrong. The "place of the wrong" is the state where the last event necessary to make the actor liable occurred. *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 593 (9th Cir. 2012) (citing *Zinn v. Ex-Cell-O Corp.*, 148 Cal. App. 2d 56, 80 n.6 (1957)). Plaintiffs' injuries occurred off the coast of Japan as a result of the release of radioisotopes from the FNPP, TAC ¶ 84, and "the situs of the injury remains a relevant consideration" in choice-of-law issues. *Offshore Rental*, 22 Cal. 3d at 168. Finally, Japan has an interest in imposing liability based on and consistent with the Compensation Act.

"When a state adopts a rule of law

> limiting liability for commercial activity conducted within the state in order to provide what the state perceives is fair treatment to, and an appropriate incentive for, business enterprises, . . . the state ordinarily has an interest in having that policy of limited liability applied to out-of-state companies that conduct business in the state, as well as to businesses incorporated or headquartered within the state."

McCann, 48 Cal. 4th 68, 91 (2010); *see also McGhee*, 871 F.3d at 464 (holding Turkey has "a legitimate interest in limiting the liability of corporations that conduct business within its borders").

After considering these interests, the Court concludes that Japan also has a strong interest in resolving the issues surrounding the incident, which occurred in Japan. Having found that both Japan and California have an interest in having their own laws applied, a true conflict exists.

3. Comparative Impairment Analysis

Once the trial court "determines that the laws are materially different *and* that each state has an interest in having its own law applied, thus reflecting a true conflict, the court must take the final step and select the law of the state whose interests would be "more impaired' if its law were not applied." *Wash. Mut. Bank, FA*, 24 Cal. 4th

at 920. "In making this comparative impairment analysis, the trial court must determine 'the relative commitment of the respective states to the laws involved' and consider 'the history and current status of the states' laws,' and 'the function and purpose of those laws.'"[5] *Id.* (quoting *Offshore Rental*, 22 Cal. 3d at 167). "Accordingly, [the Court's] task is not to determine whether the [Japanese] rule or the California rule is the better or worthier rule, but rather to decide—in light of the legal question at issue and the relevant [] interests at stake—which jurisdiction should be allocated the predominating lawmaking power under the circumstances of the present case." *McCann*, 48 Cal. 4th at 97.

Plaintiffs argue California's interest would be significantly impaired if Japanese law were applied because GE's liability would go "unexamined" and GE would evade financial responsibility for its alleged misdeeds. Opp'n to GE MTD 19 n.2. According to Plaintiffs, without a finding of liability

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[5] Neither Party makes any arguments as to the "history and current status of the states' laws." *Offshore Rental*, 22 Cal. 3d at 167. In *Offshore Rental*, the court found California's law to be "unusual and outmoded" in contrast to Louisiana's "prevalent and progressive" law, a fact the court found weighed toward Louisiana having a stronger interest in applying its law. *Id.* There is nothing to indicate either California's law on product liability or Japan's Compensation Act are outmoded; indeed, both remain prevalent today. *See Chen*, 7 Cal. App. 5th 757 (applying California's strict liability law in 2017); Nasu Decl. 9 (noting the Act has been, and continues to be, applied to provide compensation to the victims of the 2011 incident at the Fukushima Plant).

as to GE, Plaintiffs' rights will not be vindicated, California's interest in ensuring victims are compensated would be frustrated, and California could be responsible for Plaintiffs' long-term medical bills. *Id.*; *see also Munguia v. Bekens Van Lines, LLC*, No. 1:11-cv-01134-LJO-SKO, 2012 WL 5198490, at *5 (E.D. Cal. Oct. 19, 2012) (concluding California has an interest that "its residents are compensated for their injuries and do not become dependent on the resources of California for necessary medical, disability, and unemployment benefits").

Predictably, GE disagrees. GE contends that the Compensation Act could fully compensate Plaintiffs for their injuries. GE MTD at 30. Under the Compensation Act, Plaintiffs with valid claims may recover against TEPCO—the operator liable for such injuries—which has already acknowledged its liability for any harm caused by the radiation and has already paid over $70 billion to compensate those affected by the incident. *Id.*

The Court finds no convincing support for Plaintiffs' assertion that Japanese law will leave them with "minimal and insufficient damages" requiring the U.S. Government or California to pick up the financial balance. And while Plaintiffs' contention that litigating in the Japanese forum will be exponentially more difficult than litigating in California may be true, Plaintiffs have shown no law or facts that indicate that the Japanese forum is closed to any of the named, or unnamed, Plaintiffs. As the California Supreme Court has held, "the

policy underlying a statute may [] be less 'comparatively pertinent' if the same policy may easily be satisfied by some means other than enforcement of the statute itself." *Offshore Rental*, 22 Cal. 3d at 166. Such is the case here. Because compensation for Plaintiffs' injuries is available in the Japanese forum, Plaintiffs have not demonstrated how, or to what extent, California's policy of compensating injured victims will be frustrated.

Plaintiffs also argue that California's interest in deterring tortfeasors would be greatly impaired. Opp'n to GE MTD 18–20. If Japanese law is applied, Plaintiffs concede that dismissal of their claims would follow. They argue that, if this occurs, no forum would be capable of holding GE responsible, thwarting California's interest in deterrence. *Id.* at 18.

Although deterrence is a legitimate interest, "California decisions have adopted a restrained view of the scope or reach of California law with regard to the imposition of liability for conduct that occurs in another jurisdiction and that would not subject the defendant to liability under the law of the other jurisdiction." *McCann*, 48 Cal. 4th at 99. For example, in *McCann*, the California Supreme Court applied California's choice-of-law analysis and determined that the application of Oklahoma law was more appropriate, despite the fact that Oklahoma's statute of limitations barred the plaintiff—a California resident exposed to asbestos in Oklahoma—while California's statute

of limitations did not. 48 Cal. 4th at 99. Although that decision meant the plaintiff could not recover at all from the defendant, the court held Oklahoma had a "predominate interest" in regulating conduct that occurred within its borders and an interest "in being able to assure individuals and commercial entities operating within its territory that applicable limitations on liability set forth in the jurisdiction's law will be available to those individuals and businesses in the event they are faced with litigation in the future." *Id.* at 97.

Likewise, in *Offshore Rental*, the California Supreme Court applied Louisiana law in a case involving a California corporation seeking to recover for loss of services of an employee injured in Louisiana. 22 Cal. 3d at 160. The court concluded that, "[b]y entering Louisiana, plaintiff exposed itself to the risks of the territory, and should not expect to subject defendant to a financial hazard that Louisiana law had not created." *Id.* at 169 (internal quotations and alterations omitted). Louisiana's "vital interest in promoting freedom of investment and enterprise *within Louisiana's borders*" prevailed over California's interest in compensating residents. *Id.* at 168 (emphasis in original).

The reasoning from both *McCann* and *Offshore Rental* is applicable to the present case and weighs in favor of Japan having the more impaired interest. Japan has an interest in ensuring the uniform applicability of the Compensation Act, which limits liability to companies operating in Japan in

the field of nuclear reactor operations. Japan instituted the Compensation Act to encourage businesses to participate in Japan's nuclear industry, and it has an interest in applying its law fairly to all businesses who participate. *See* Declaration of Kohei Nasu ("Nasu Decl."), ECF No. 152-22 at 9; *see also Meraz v. Ford Motor Co.*, No. CV 13-00260 PSG (VBKXx), 2014 WL 12558123, at *5 (C.D. Cal. June 13, 2014) (citing *McCann* to hold Georgia has an interest in limiting liability for commercial activity conducted within the state to provide fair treatment to, and an appropriate incentive for businesses to operate within the state). Furthermore, Plaintiffs boarded a vessel destined for Japan, thus exposing themselves to the "risks of the territory." Plaintiffs therefore cannot expect to subject GE to a "financial hazard" under California law because one of the ships carrying Plaintiffs that provided aid to Japan had a home port of San Diego. *Castro v. Budget Rent-A-Car Sys., Inc.*, 154 Cal. App. 4th 1162, 1180 (2007) (finding that because incident occurred within Alabama's borders, Alabama had a "presumptive interest in controlling the conduct of those persons who use its roadways, absent some other compelling interest to be served by applying California law").

In sum, after balancing the impairments and reviewing the relevant case law, the Court is persuaded that Japan's interests would be "more impaired" if its law was not applied to this matter. Accordingly, Japanese law applies to the issue of GE's liability.

C. Application of Japanese Law

Having determined that Japanese law applies, the Court must next determine the ramification of that finding. Article 3 of the Compensation Act provides that, when damage that is attributable to the operation of a nuclear reactor occurs, the Nuclear Operator is liable for all damages in connection with the operation of the nuclear reactor. Compensation Act, art. 3. Article 4 provides, in the case set forth in Article 3, "no other persons shall be liable to compensate for damages other than the Nuclear Operator." *Id.* art. 3 & 4. Justice Kohei Nasu, former Justice on the Japanese Supreme Court, explains that the Compensation Act "has adopted principles of . . . strict and unlimited liability of the Operator of a nuclear plant . . . [and] channeling of third party liability for Nuclear Damage exclusively to the Operator." Nasu Decl. at 9.

Only two questions remain about the applicability of the Compensation Act to this Case. The first is whether GE is an "Operator" within the meaning of the statute. Under Article 2 of the Compensation Act, there are a variety of definitions that may qualify an entity as a "Nuclear Operator." *See* Compensation Act art. 2 (listing eight possibilities). In his declaration, Justice Nasu states that, in his opinion, GE is not an Operator because it is not licensed as such in Japan. Nasu Decl. at 9. GE also points to a recent Tokyo High Court decision that found that the Compensation Act precluded a finding of liability against any entity

other than TEPCO. GE MTD at 24–25. The Court finds that GE does not fall within any of the Compensation Act's definitions for a Nuclear Operator, and thus GE "shall [not] be liable to compensate for damages." *See* Compensation Act art. 3.

The second question is whether the exception to the Compensation Act's channeling provision applies. Article 3 provides that the channeling provision does "not apply in the case where the damage was caused by an abnormally massive natural disaster." Compensation Act, art. 3. A massive 9.0 magnitude earthquake, giving rise to tsunami waves more than 40 feet high that struck and severely damaged the FNPP, releasing radiation as a result, caused the damage in this case. Although this exception would seem to apply, the Japanese government and courts have taken the position that it does not. GE MTD at 21–22; *see also* Declaration of David Weiner, Ex. B, ECF No. 152-4 at 6 (July 19, 2012 Tokyo District Court decision finding Article 3 exception does not apply). Moreover, as GE points out, even if the exception were to apply, liability would fall to the Japanese government under Article 17 of the Compensation Act, resulting in no liability for GE. GE MTD at 22 (citing Compensation Act art. 17). Based on the clear positions of the Japanese government and courts regarding the applicability of the exception, the Court agrees that the Article 3 exception does not apply.

The Court concludes, that under the

Compensation Act, all liability for the meltdown channels to the Nuclear Operator (TEPCO), GE is not an Operator under the Act, and that no exception applies. Thus, none of Plaintiffs' claims against GE can stand under the Compensation Act.

II. Conclusion

Based on the foregoing, the Court finds that subject matter jurisdiction is appropriate in this case under CAFA. Under California's choice-of-law governmental interest test, the Court finds that Japanese law applies to this case. Further, the Court interprets the Japanese Compensation Act to channel all liability from third parties to the Nuclear Operator. Because GE is not an Operator and no exception applies, the Compensation Act precludes all liability against GE. Thus, the Court **GRANTS** GE's Motion to Dismiss and **DISMISSES** all of Plaintiffs' claims against GE pursuant to the Compensation Act.

TEPCO'S MOTION TO DISMISS

In its Motion to Dismiss, TEPCO argues that it did not waive its personal jurisdiction defense, and therefore this Court should dismiss Plaintiffs' claims for lack of personal jurisdiction. TEPCO MTD at 12–28. TEPCO also argues that new developments, including the choice-of-law analysis this Court should undertake, weigh in favor of dismissing the claims under international comity. TEPCO MTD at 28–43.

I. Personal Jurisdiction

Under Rule 12(h)(1) of the Federal Rules of Civil Procedure, a defendant waives any personal jurisdiction objection if it omits it from a previous motion filed under Rule 12 or fails to raise the issue in its responsive pleading. Fed. R. Civ. P. 12(h)(1); *see also Glater v. Eli Lilly & Co.*, 712 F.2d 735, 738 (1983) ("It is clear under this rule that defendants wishing to raise [the personal jurisdiction] defense[ ] must do so in their first defensive move, be it a Rule 12 motion or a responsive pleading."). An exception to this rule exists when a defense or objection was unavailable at the time the defendant filed its earlier motion or responsive pleading. Fed. R. Civ. P. 12(g)(2).

TEPCO argues that under Ninth Circuit law prior to *Bristol-Myers Squib Co. v. Superior Court*, 137 S. Ct. 1773 (2017), TEPCO did not have 'available' to it the objection to personal jurisdiction that it now asserts under *Bristol-Myers* when it filed its prior motion to dismiss. TEPCO MTD at 19–23, 25–28.

In *Bristol-Myers*, a group of consumers brought tort claims against the defendant (a pharmaceutical company) in California state court, alleging injuries from the use of the defendant's drug. 137 S. Ct. at 1778. The 678 plaintiffs included 86 California residents and 592 non-California residents from other states. *Id.* Although the nonresident plaintiffs were not prescribed the drug in California, injured in California, or treated for their injuries in California, *id.*, and the drug was not manufactured, labeled, or packaged in

California, *id.* at 1778, the California Supreme Court found specific personal jurisdiction to exist. *Id.* at 1778–79. Employing a "sliding scale approach," the California Supreme Court held that, although the claims by the non-California-resident plaintiffs did not arise out of contacts in the state, Bristol Myers distribution contract with a California company co-defendant, as well as other non-claim-related forum contacts "permitted the exercise of specific jurisdiction based on a less direct connection between [Bristol Myers]'s forum activities and plaintiffs' claims than might otherwise be required." *Id.* at 1778–79. The United States Supreme Court reversed, finding "no support for this approach" in its personal jurisdiction jurisprudence. *Id.* at 1781. Instead, the Court employed a "straightforward application . . . of settled principles of personal jurisdiction," *id.* at 1783, in which specific jurisdiction over a claim can only be exercised if there is an "affiliation between the forum and the underlying controversy, principally, an activity or an occurrence that takes place in the forum State." *Id.* at 1781 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011).

The Court is not convinced that the *Bristol-Myers* opinion constituted a change in the law adequate to revive TEPCO's personal jurisdiction defense. TEPCO claims that its business relationship with GE would have been enough to assert personal jurisdiction over it under then-current Ninth Circuit precedent, which, according to TEPCO, applied the same "sliding scale"

approach the Supreme Court rejected. TEPCO MTD at 20 (citing *Yahoo! Inc. v. La Ligue Contre le Racisme et L'Antisemitisme*, 433 F. 3d 1199, 1210 (9th Cir. 2006) (en banc)). But in *Bristol-Myers*, the Supreme Court specifically noted that it has previously held that "'a defendant's relationship with a . . . third party, standing alone, is an insufficient basis for jurisdiction.'" *Bristol-Myers*, 137 S. Ct. at 1781 (quoting *Walden v. Fiore*, 571 U.S. 277, 286 (2014) (citing *Rush v. Savchuk*, 444 U.S. 320, 332 (1980) ("Naturally, the parties' relationships with each other may be significant in evaluating their ties to the forum. The requirements of *International Shoe,* however, must be met as to each defendant over whom a state court exercises jurisdiction")) (emphasis added). Indeed, the Supreme Court has long held that "[d]ue process requires that a defendant be haled into court in a forum State based on [its] own affiliation with the State, not based on the 'random, fortuitous, or attenuated' contacts [it] makes by interacting with other persons affiliated with the State." *Walden*, 571 U.S. at 286 (quoting *Burger King,* 471 U.S. at 475).

Moreover, a fair reading of *Yahoo!* does not support TEPCO's contention that raising a personal jurisdiction defense would have been futile prior to *Bristol-Myers*. In *Yahoo!*, the Ninth Circuit noted that, "[i]n a specific jurisdiction inquiry, we consider the extent of the defendant's contacts with the forum and the degree to which the plaintiff's suit is related to those contacts. A strong showing on one axis will permit a lesser

showing on the other." *Yahoo! Inc.*, 433 F.3d at 1210. In the context of that case, this unremarkable statement merely meant "[a] single forum state contact can support jurisdiction if 'the cause of action . . . arises out of that particular purposeful contact of the defendant with the forum state,'" *id.* (quoting *Lake v. Lake*, 817 F.2d 1416, 1421 (9th Cir. 1987), a holding not in disagreement with *Bristol-Myers*. The Court is unable to find a case stretching *Yahoo!* to find specific jurisdiction in a case factually similar to *Bristol-Myers*. Thus, nothing in *Yahoo!* convinces the Court that, had TEPCO raised a personal jurisdiction defense earlier in the litigation, the Court would have had no choice but to assert jurisdiction over TEPCO on the current facts.

Because TEPCO previously filed a motion to dismiss and failed to raise the personal jurisdiction defense there, *see* ECF No. 26, TEPCO waived its jurisdictional challenge and may not raise it here. *See Alvarez v. NBTY, Inc.*, 2017 WL 6059159, at *6-7 (S.D. Cal. Dec. 6, 2017) (finding defendants waived personal jurisdiction defense because *Bristol-Myers* did not change Ninth Circuit law); *see also Sloan v. General Motors LLC*, 287 F. Supp. 3d 840, 854 (N.D. Cal. 2018) (same).

II. Choice of Law

Like GE, TEPCO also requests that the Court perform a choice-of-law analysis, which it asserts will impact the international comity analysis. TEPCO MTD at 30–38. Plaintiffs argue that the choice of law analysis is not ripe for determination and that California law will apply.

Opp'n to TEPCO MTD at 36–37.

A. Preliminary Choice-of-Law Issues

As they did in their Opposition to GE's Motion, Plaintiffs argue that the choice-of- law analysis is not "ripe for determination" because the case requires additional time for development. *Id.* at 36. The Court already addressed—and rejected—this argument above. *See supra* GE Motion to Dismiss section II.A. The court will therefore conduct a choice- of-law analysis as it pertains to the claims against TEPCO.

B. Choice-of-Law Analysis

1. Differences in the Forum Laws

The first factor in California's governmental interest test asks whether the laws of the two forums differ. TEPCO argues that Japanese and California law differ in at least three significant ways. TEPCO MTD at 32–35. First, under Japanese law, the Compensation Act would be the exclusive means of redress and strict liability would apply for all aspects of the incident. *Id.* at 32 (citing Compensation Act, art. 3). Under California law, strict liability may also apply to an ultra-hazardous activity theory based on the operation and maintenance of the nuclear power plant. *Id.* at 34 n.14. But strict liability is not the only theory Plaintiffs may raise under California law; for the same construction and operation activities that constitute the hazardous activity, negligence principles may also be applied. *Id.* at 34.

Second, the Compensation Act requires any plaintiffs to establish a "high probability" of causation. *Id.* at 33. This standard of causation requires that "plaintiff[s] must show a likelihood of 70% or 80%." *Id.* (citing Apr. 25, 2018 Declaration of Yasuhei Taniguchi ("Taniguchi Decl.") ¶ 26, ECF No. 153-3). In contrast, California negligence principles require "[p]laintiffs to establish that their injuries were more likely than not caused by radiation exposure," which is a greater than 50% likelihood. *Id.* (citing *Jones v. Ortho Pharm. Corp.*, 163 Cal. App. 3d 396, 403 (1985)).

Third, TEPCO argues that the Compensation Act does not permit punitive damages. *Id.* at 33. According to TEPCO, damages under the Act are limited to compensatory damages and "do not permit an award of additional sums for the purpose of punishing the nuclear operator." *Id.* (citing Apr. 25, 2018 Taniguchi Decl. ¶¶ 3–21). California law, on the other hand, permits punitive damages for both strict liability and negligence claims. *Id.* at 35 (citing Cal. Civ. Code § 3294).

Plaintiffs do not contest that the Compensation Act conflicts with California law on these points. And while Plaintiffs "do not concede that the standards set forth by TEPCO are the proper standards under Japanese law for this case," they raise no alternative interpretations and no reasons why such an interpretation of Japanese law would be consistent with California law. Accordingly, the Court finds that the laws of Japan and California conflict.

2. "True Conflicts" Analysis:

The second factor in California's governmental interest test requires the Court to evaluate each jurisdiction's interest in the application of its law to this issue. In their Opposition to TEPCO's Motion, Plaintiffs make no specific arguments regarding the interests of either forum. *See generally* Opp'n to TEPCO MTD. In addressing whether there is a true conflict as it pertains to the claims against GE, the Court determined that both California and Japan have strong interests in applying their respective laws to this case. *See supra* GE Motion to Dismiss section II.B.(2). Nothing regarding the specific laws and facts at issue in the claims against TEPCO changes this analysis in any way. Thus, the Court finds a true conflict exists.

3. Comparative Impairment

The third and final step the court must take is to determine which forum's interests would be "more impaired" if its law were not applied. The Court's previous analysis of this step with regard to GE's liability is applicable here as well, and thus the Court concludes that Japan's interests would be "more impaired" if its law was not applied to this matter.

In fact, when compared to the claims against GE, Japan's interests in applying its laws in the case against TEPCO are even stronger. After the FNPP accident, the Japanese government established the Nuclear Damage Compensation

and Decommissioning Facilitation Fund ("NDF"), providing over $75 billion dollars to TEPCO to resolve claims arising from the accident. TEPCO MTD at 41 (citing Declaration of Norihito Yamazaki ("Yamazaki Decl.") ¶ 27, ECF No. 153-17). The Japanese government explained that if United States' law is applied, it could result in inconsistent adjudication of claims, which would be "highly corrosive to the integrity of the compensation system," not only for reasons of fairness to the claimants, but also the continued viability of funding of the NDF. *Id.* (citing Government of Japan Amicus Brief, at 3–4).

Because Japan has an overwhelmingly strong interest in applying its laws in this case, and because those interests would be more impaired than California's, the Court determines that Japanese law applies to the issue of TEPCO's liability.

III. International Comity

International comity is an abstention doctrine that permits federal courts to defer to the judgment of an alternative forum where the issues to be resolved are "entangled in international relations." *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1237 (11th Cir. 2004) (quoting *In re Maxwell Comm'n Corp.*, 93 F.3d 1036, 1047 (2d Cir. 1996)). Courts must evaluate several factors, including "the strength of the United States' interest in using a foreign forum, the strength of the foreign governments' interests, and the adequacy of the alternative forum." *Id.* at 1238

(citing cases).

In assessing the interests of the respective countries, courts should consider five nonexclusive factors: (1) the location of the conduct in question, (2) the nationality of the parties, (3) the character of the conduct in question, (4) foreign policy interests, and (5) any public policy interests. *Mujica v. AirScan Inc.*, 771 F.3d 580, 604, 607 (9th Cir. 2014). Also relevant to the analysis is which country's law applies and whether those laws conflict. *Id.* at 602–03. With respect to the third element—adequacy of the foreign forum—the focus should be on procedural fairness in the forum and whether the opponent has presented specific evidence of significant inadequacy. *Id.* at 607–08.

Previously, the Court held that, although "both the U.S. and Japan have an interest in having this suit heard within their forum[,] . . . [the] reasons for maintaining jurisdiction of this case [were] more compelling." ECF No. 107 at 46. Consequently, the Court "decline[d] to exercise its discretion in dismissing this case under the doctrine of international comity." *Id.* In affirming that decision, the Ninth Circuit noted in *Cooper* that "further developments in the district court may counsel in favor of dismissing Plaintiff's lawsuit in favor of a Japanese forum" 860 F.3d at 1201 n.12.

TEPCO argues that since the Ninth Circuit's decision, "several significant factors have tilted the balance sharply in favor of a Japanese court." TEPCO MTD at 29. Specifically, TEPCO argues that the outcome of the choice of law

analysis, the Japanese Government's objection to the suit, and several recent findings by this Court in the *Bartel* cases should sway this Court to dismiss Plaintiffs' claims on international comity grounds. *Id.* at 30–43.

A. Changes Since Ninth Circuit Decision: Choice-of-Law

Following a choice-of-law analysis, the country's law that applies is relevant to the international comity analysis. *Ungaro-Benages*, 379 F.3d at 1240; *see also Mujica*, 771 F.3d at 602 ("At least in cases considering adjudicatory comity, we will consider whether there is a conflict between American and foreign law as one factor in . . . the application of comity.").

Plaintiffs argue that if the Court determines that Japanese law applies, that fact should not weigh in favor of dismissal. They argue that while some issues will likely turn on Japanese law, the entire case will likely be decided under a mixed-law framework. Opp'n to TEPCO MTD 38–39. According to Plaintiffs, that puts this Court in as good of a position as the Japanese court to rule on the case. Moreover, Plaintiffs assert that, even if Japanese law applies to all the major issues, this Court is "fully capable" of applying that law in this case. *Id.*

The Court appreciates this vote of confidence, but these arguments have very little weight in the comity analysis. And even if they did, it is undercut by Plaintiffs' own briefing. While

Plaintiffs state that applying Japanese law will be straightforward, they already disagree that the standards TEPCO set forth in its Motion concerning Japanese law are the correct standards. *Id.* at 27 n.10. Given this disagreement, this Court would be forced to decide what the correct standards under Japanese law are without the benefit of "any familiarity with the substantive principles and nuances of Japanese law" that will "inevitably arise during the course of this complex litigation." TEPCO MTD at 39. The Court agrees that "[i]t would be preferable to allow a Japanese court to articulate and apply the pertinent principles of Japanese law in the uniform and authoritative manner that only the courts of Japan can do." *Id.*

Based on the Ninth Circuits' guidance regarding the now-completed choice-of-law analysis and the preference to have Japanese courts articulate and apply important and pertinent principles of Japanese law themselves, the Court finds that this factor weighs in favor of dismissing the case.

B. Significant Changes Since Ninth Circuit Decision: Japanese Government's Objection to this Suit

Prior to the Ninth Circuit appeal in these proceedings, neither the Japanese government nor the United States government expressed an interest in the location of this litigation. This Court cited that fact as a reason for maintaining jurisdiction, and the Ninth Circuit subsequently noted that, "when a country in question expresses no

preference [to the location of the litigation], the district court can take that fact into consideration." *Cooper*, 860 F.3d at 1206. When "a foreign county[] request[s] that the United States court dismiss a pending lawsuit in favor of a foreign forum[, it] is a significant consideration weighing in favor of dismissal." *Id.* (citing *Jota v. Texaco, Inc.*, 157 F.3d 153, 160 (2nd Cir. 1998)).

During the appeal in the Ninth Circuit, the Japanese government submitted an *amicus* brief stating its strong objection to continuing this suit in the United States and expressing its belief that the suit should be dismissed in favor of the Japanese forum. *Id.* Following the submission of Japan's *amicus* brief, the Ninth Circuit solicited the views of the U.S. State Department, which submitted an *amicus* brief in support of this Court maintaining jurisdiction. *Id.* at 1207. The Ninth Circuit thoroughly discussed each country's relevant policy interests. *Id.* at 1206–09. It found that "Japan has an undeniably strong interest in centralizing jurisdiction over FNPP-related claims," and that "the United States believes that maintaining jurisdiction over this case will help promote the [Convention on Supplementary Compensation for Nuclear Damage], an interest that encompasses all future claims arising from nuclear incidents around the globe."[6] *Id.* at 1209.

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[6] In its amicus brief, the United States also noted that, "certainly, [the district court] could choose to dismiss [this] case based on international comity." TEPCO MTD at 40

The Ninth Circuit concluded that these "important, competing policy interests" create a "difficult judgment call" for this Court. *Id.*

TEPCO argues that, since filing the *amicus* brief in March 2016, Japan's interests have only grown stronger. The Japanese government has now paid more than $76 billion to resolve more than 17,000 claims and approximately 160 court proceedings through TEPCO's "Nuclear Damage Claim Dispute Resolution Center."[7] TEPCO MTD at 41. The sheer number of parties compensated through the Japanese system, TEPCO argues, increases Japan's interest in ensuring there is consistency in how plaintiffs are treated to guarantee there are ample funds to maintain the system. *Id.* at 41–42.

Weighing these interests, the Court concludes that the United States and Japan both have important, competing policy interest here. Because the Japanese government has now made its position known and Defendants have made strong showings for why Japan's foreign and public policy interests would be harmed, however, the Court finds that this factor now weighs slightly in favor of dismissal.

(quoting U.S. Government's *amicus curiae* brief in the Ninth Circuit 16–17).

[7] More than 440 court proceedings have been filed, while 160 have been adjudicated or settled. TEPCO MTD 41.

C. Significant Changes Since Ninth Circuit Decision: Other Developments

TEPCO raises two other developments in support of its argument. First, TEPCO points to this Court's decision in *Bartel I*, in which the Court found TEPCO's activities in California ended five years before the incident and many years before the litigation. This, TEPCO argues, is a change from the Court's finding that TEPCO "is a large corporation with a significant physical presence in the United States and is registered as a foreign corporation in California." ECF No. 107 at 41. The Court does not agree that this fact changes its previous analysis. When assessing the nationality of the parties, this Court focused on the Plaintiffs' U.S. citizenship, not just TEPCO's ties to California. Additionally, TEPCO does not refute its significant ties to the United States in general, which still weighs against dismissal.

Second, TEPCO argues that the nature of the conduct now weighs in favor of dismissal. Because Japanese law applies, the case is no longer a "civil tort case regarding a Japanese company's negligence and personal injury to U.S. plaintiffs," as this Court previously found. *Id.* at 42. Instead, this is a strict liability tort under Japanese law. TEPCO MTD at 43. This is true, but it does not change the Court's previous finding that this factor is neutral. A Japanese tort is still not a criminal case or violation of international moral norms that would weigh in favor of dismissal. Therefore, the Court finds this also does not move the scale in

favor of dismissal.

IV. Conclusion

As the Ninth Circuit previously made clear, this is a "close case" with competing interests pointing in both directions. After further developments, and with the benefit of the Ninth Circuit's guidance, the Court has now reweighed its prior ruling on international comity. The location of the conduct in question, as well as the nationality of the parties, continues to weigh against dismissal; the nature of the conduct and public policy interests remains neutral. Now, however, after considering the Japanese and United States governments' views, the Court finds that the foreign and public policy interests weigh toward dismissal. And having conducted a choice-of-law analysis and having determined that Japanese law applies, this factor also weighs in favor of dismissal.

On balance, the Court concludes that the factors now weigh in favor of dismissal. Accordingly, the Court **GRANTS** TEPCO's Motion to Dismiss and **DISMISSES WITHOUT PREJUDICE** Plaintiffs' case against TEPCO under international comity.

CONCLUSION

Based on the foregoing, the Court (1) **GRANTS** GE's Motion to Dismiss (ECF No. 152) and **DISMISSES** Plaintiffs' TAC as to the claims against GE; and (2) **GRANTS** TEPCO's Motion to Dismiss (ECF No. 153) and **DISMISSES** Plaintiffs' TAC **WITHOUT PREJUDICE** as to the

claims against TEPCO. The Court dismisses the complaint against TEPCO without prejudice so that Plaintiffs may file their claims in the proper forum.

IT IS SO ORDERED

Dated: March 4, 2019

Janis L. Sammartino
Hon. Janis L. Sammartino
United States District Judge

APPENDIX C

United States Court of Appeals
for the Ninth Circuit

LINDSAY COOPER, ET AL,

Plaintiff-Appellants,

v.

TOKYO ELECTRIC POWER COMPANY HOLDINGS, INC., AKA TEPCO; GENERAL ELECTRIC COMPANY; DOES, 1-200, inclusive,

Defendant-Appellees.

19-55295

Appeals from the United States District Court for the Southern District of California in 3:12-cv-03032-JLS-MSB, Judge Janis L. Sammartino.

ON PETITION FOR REHEARING EN BANC

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* * *

Before: A. Wallace Tashima, Kim McLane Wardlaw, and Jay S. Bybee, Circuit Judges.

ORDER

The panel has voted to deny the appellants' petition for rehearing. Judge Wardlaw voted to deny the petition for rehearing en banc. Judges Tashima and Bybee recommended denying the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether the rehear the matter en banc. Fed. R. App. P. 35.

The appellants' petition for rehearing and petition for rehearing en banc, filed, June 8, 2020, are DENIED.

APPENDIX D
United States Court of Appeals
for the Ninth Circuit

LINDSAY COOPER, ET AL,

Plaintiff- Appellees,

v.

TOKYO ELEC. POWER CO. HOLDINGS, ET AL,

Defendant- Appellant,

SOLICITOR GENERAL OF THE UNITED STATES OF AMERICA,
Real Party in Interest

15-56424

Appeals from the United States District Court for the Southern District of California in 3:12-cv-03032-JLS-MSB, Judge Janis L. Sammartino.

June 22, 2017

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* * *

Before: A. Wallace Tashima, Kim McLane Wardlaw, and Jay S. Bybee, Circuit Judges.

Opinion by Judge Bybee.

BYBEE, Circuit Judge:

On March 11, 2011, a 9.0 earthquake and a massive tsunami struck Japan's northeastern coast. The United States participated in a relief effort known as Operation Tomodachi (Japanese for "friend"). The plaintiffs in this putative class action lawsuit are members of the U.S. Navy who allege that they were exposed to radiation when deployed near the Fukushima Daiichi Nuclear Power Plant ("FNPP") as part of Operation Tomodachi. The earthquake and tsunami damaged the FNPP, causing radiation leaks. Plaintiffs sued Defendant Tokyo Electric Power Company, Inc. ("TEPCO"), the owner and operator of the FNPP, in the Southern District of California for negligence and other causes of action. TEPCO moved to dismiss the case on the grounds of international comity, *forum non conveniens*, the political question doctrine, and the firefighter's rule. The district court denied the motion on all grounds, but certified its order denying TEPCO's motion to dismiss for immediate appeal under 28 U.S.C. § 1292(b). We agreed to take the interlocutory appeal. At this interlocutory stage in the proceedings, we affirm the district court's denial of TEPCO's motion to dismiss on all grounds. Further developments, however, may require the district court to revisit some of the issues that TEPCO raised in its motion to dismiss.

I. FACTS AND PROCEDURAL HISTORY

A. *The FNPP Meltdown*

The March 2011 earthquake and resulting tsunami were nothing short of devastating.[1] Over 15,000 deaths were reported, and there was immense damage to the region's infrastructure. Cleanup efforts continue to this day, over six years later. One of the most alarming consequences of the catastrophe was the damage to the FNPP. The incident has been described as the worst nuclear accident since Chernobyl. The FNPP consisted of six boiling water reactors. At the time of the earthquake, only units one through three were in operation. The earthquake triggered an automatic shutdown of the three operating units. Water from the tsunami, however, disabled generators necessary to cool the reactors, causing the three units to melt down and leak radiation. Plaintiffs allege that the first meltdown occurred five hours after the earthquake and that units one through three exploded that same day. They further allege that over 300 tons of contaminated water from the FNPP began seeping into the sea after the meltdown.

On the afternoon of March 12, the day following the earthquake, Plaintiffs arrived off the coasts of Fukushima Prefecture aboard the aircraft carrier U.S.S. Ronald Reagan and other vessels to provide humanitarian aid. Plaintiffs allege that TEPCO promulgated false information regarding the

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[1] We take the facts from Plaintiffs' complaint and, for our purposes, we assume them to be true.

extent of the damage to the FNPP, misleading the public, Japanese officials, and the U.S. military. They allege that TEPCO's management publicly announced that there was no danger to those participating in Operation Tomodachi, despite knowing that there was a risk of radiation exposure. Plaintiffs claim that they and U.S. military officials were unaware of the extent of the radiation leak and that they would not have been deployed as close to the FNPP had TEPCO been forthcoming about the damage. They further allege that the U.S. military would not ordinarily discover such radiation absent sufficient warning.

On March 14, two days after their arrival, Plaintiffs allege that their vessels were repositioned further away from the FNPP after U.S. officials onboard the U.S.S. Ronald Reagan detected nuclear contamination in the air and on an aircraft operating near the FNPP. "Sensitive instruments" aboard the U.S.S. Ronald Reagan discovered measurable levels of radioactivity on seventeen aircrew members returning from relief missions.

In the months following the earthquake, Japan commissioned the Fukushima Nuclear Accident Independent Investigation Commission (the "Commission") to investigate the incident. The Commission determined that the meltdown was foreseeable in light of the known tsunami risks in the region and that TEPCO and the relevant regulatory bodies failed to take adequate precautions to prevent the incident. Though the earthquake and tsunami were natural disasters, the

Commission characterized the FNPP meltdown as a "manmade" disaster. In 2013, TEPCO also allegedly admitted that it could have avoided the meltdown.

In an effort to compensate victims of the FNPP meltdown, the Japanese government developed a comprehensive scheme to deal with the millions of claims resulting from the FNPP leak, giving claimants the option to submit a claim directly to TEPCO, to the newly established Nuclear Damage Claim Dispute Resolution Center, or to a Japanese court. These avenues for relief are available to all victims, regardless of nationality. Over $58 billion has been paid out to victims of the disaster. Brief of Amicus Curiae the Government of Japan 1–2, ECF No. 23. The Japanese government has provided immense financial support to TEPCO to keep TEPCO solvent. Although Plaintiffs could have pursued their claims against TEPCO in Japan, they chose to sue in the United States.

B. *District Court Proceedings*

Each Plaintiff in the present suit alleges that he or she was exposed to radiation during Operation Tomodachi. Plaintiffs request a judgment compelling TEPCO to establish a billion- dollar fund to cover continuing medical monitoring costs. They also request damages, including lost wages, non-economic damages, and punitive damages.

In Plaintiffs' First Amended Complaint ("FAC"), they alleged that TEPCO and the Japanese government conspired to keep the extent of the

radiation leak secret. They further alleged that "the U.S. Navy was lulled into a false sense of security," which led it to deploy Plaintiffs "without doing the kinds of research and testing that would have verified" the extent of the nuclear meltdown. The district court found that adjudicating this claim would require impermissible scrutiny of discretionary military judgments and would also require the court to evaluate communications between the U.S. and Japanese governments regarding the FNPP. Accordingly, the district court dismissed the FAC under the political question doctrine but granted Plaintiffs leave to amend. *Cooper v. Tokyo Elec. Power Co., Inc.* (*Cooper I*), 990 F. Supp. 2d 1035, 1039–42 (S.D. Cal. 2013).

In the Second Amended Complaint ("SAC"), Plaintiffs removed their conspiracy allegations and relied instead on allegations that TEPCO was negligent in operating the FNPP and in reporting the extent of the radiation leak. TEPCO filed a motion to dismiss, arguing that the SAC still presented a political question because determining whether TEPCO's conduct was the proximate cause of Plaintiffs' injuries would require the court to evaluate the Navy's decision to deploy troops near the FNPP. TEPCO also argued that, given Japan's extensive efforts to compensate FNPP victims, the SAC should be dismissed under the doctrines of international comity or *forum non conveniens.* TEPCO further contended that the so-called firefighter's rule, which bars first responders from suing those who cause the emergency to which they respond, barred Plaintiffs' claims.

The district court denied TEPCO's motion to dismiss.[2] Shortly thereafter, TEPCO filed a motion for reconsideration in light of our opinion in *Mujica v. AirScan, Inc.*, 771 F.3d 580 (9th Cir. 2014), which provided additional guidance to district courts on how to determine whether to dismiss a case on international comity grounds. The district court granted TEPCO's motion for reconsideration, but again denied TEPCO's motion to dismiss. *Cooper v. Tokyo Elec. Power Co., Inc.* (*Cooper II*), 166 F. Supp. 3d 1103 (S.D. Cal. 2015). The district court concluded that the SAC's restyling of Plaintiffs' claims no longer implicated any political questions because it focused on TEPCO's negligence rather than the military's decision to deploy troops. *Id.* at 1117–24. The district court also rejected TEPCO's alternative theories for dismissal. *Id.* at 1126–28, 1130–40. Per TEPCO's request, the district court certified the issues for immediate appeal under 28 U.S.C. § 1292(b). *Id.* at 1141–43.

C. *Appellate Proceedings*

On appeal, TEPCO urges us to reverse the district court's determinations regarding international comity, forum non conveniens, the political question doctrine, and the firefighter's rule. The government of Japan, which had expressed no

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[2] The SAC contained ten causes of action, including claims for negligence, strict liability, nuisance, and intentional infliction of emotional distress. The district court granted TEPCO's motion to dismiss with respect to Plaintiffs' claims of design defect and intentional infliction of emotional distress but let the remaining eight causes of action proceed.

views on the location of this litigation to the district court, also filed an amicus brief urging us to reverse the district court's decision and order the district court to dismiss Plaintiffs' claims so that Plaintiffs can pursue their claims in Japan. In its brief, the Japanese government expresses concern that foreign lawsuits such as Plaintiffs' could threaten the viability of Japan's continuing efforts to ensure that all FNPP victims receive fair compensation.

In light of Japan's brief, we solicited the United States Department of State's views on whether this litigation should proceed in the United States. In response, the United States filed an amicus brief arguing that the district court did not err in allowing Plaintiffs' claims to proceed for the time being. Specifically, the United States opines that allowing Plaintiffs' lawsuit to continue in the United States is consistent with U.S. efforts to promote the Convention on Supplementary Compensation for Nuclear Damage ("CSC").

The parties each filed supplemental briefs in response to the United States' position. General Electric Co. ("GE") [3] also filed an amicus brief responding to the United States' argument that maintaining jurisdiction will help promote the CSC. Both TEPCO and GE argue that, although it did not enter into force until after Plaintiffs' litigation was already pending, the CSC strips all U.S. courts

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[3] GE is a defendant in the district court but not a party to this appeal. Plaintiffs claim that GE is liable for defectively designing the FNPP's reactors.

of jurisdiction over claims arising out of the FNPP incident. If correct, TEPCO and GE's argument undermines the United States' position that maintaining jurisdiction in the United States will help promote the CSC and provides an independent basis for dismissing Plaintiffs claims.

II. ANALYSIS

We begin by addressing whether the CSC strips U.S. courts of jurisdiction over Plaintiffs' claims.[4] We then address TEPCO's arguments regarding international comity, *forum non conveniens*, the political question doctrine, and the firefighter's rule.

A. *Jurisdiction Under the CSC*

The CSC is an attempt to create "a worldwide liability regime" for dealing with nuclear accidents. Convention on Supplementary Compensation for Nuclear Damage, Preamble, *opened for signature* Sept. 29, 1997, S. Treaty Doc. No. 107-21 (2002) [hereinafter CSC]. One of the main goals of such a regime is to control the nuclear energy industry's liability exposure, thus ensuring the continuing viability of the industry, while at the same time ensuring compensation for victims of nuclear accidents. Prior to the CSC, there were two major

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[4] GE raised this argument in the district court, but the district court has yet to rule on it. Because TEPCO and GE's argument questions our jurisdiction, we may consider it in the first instance on appeal. *See Allstate Ins. Co. v. Hughes*, 358 F.3d 1089, 1093 (9th Cir. 2004) ("The court has a continuing obligation to assess its own subject-matter jurisdiction . . . .").

conventions addressing liability for nuclear accidents: the Paris Convention on Third Party Liability in the Field of Nuclear Energy of July 1960 and the Vienna Convention on Civil Liability for Nuclear Damage of May 1963. Both of these conventions included a number of provisions aimed at compensating victims of nuclear accidents while keeping the nuclear energy industry viable, such as imposing strict liability on operators of nuclear installations, requiring those operators to maintain insurance in certain amounts, permitting countries to cap the liability of nuclear installation operators, requiring countries to fund compensation for nuclear damage should private insurance be inadequate, and centralizing jurisdiction over claims arising out of nuclear incidents in the country where the nuclear incident occurred. Vienna Convention on Civil Liability for Nuclear Damage arts. II, V, VII, XI, May 21, 1963, 1063 U.N.T.S. 266; Paris Convention on Third Party Liability in the Field of Nuclear Energy arts. 6–7, 10, 13, 15, July 29, 1960, 956 U.N.T.S. 251. The United States was not a party to either of these conventions, but enacted similar measures in the Price-Anderson Nuclear Industries Indemnity Act of 1957. *See* 42 U.S.C. § 2210.

To join the CSC, a country must be a party to the Vienna or Paris Conventions or have laws (such as the Price- Anderson Act) that meet the requirements set forth in the CSC's annex. The CSC builds upon these prior conventions and national laws by creating an international supplementary compensation fund for victims of

nuclear incidents. Under the CSC, contracting countries are required to ensure the availability of a certain amount of funds to compensate victims of a nuclear incident that occurs within their territories. CSC art. III. Beyond that amount, the contracting countries will contribute to a supplemental compensation fund. *Id.* Like the Paris and Vienna Conventions, the CSC also provides that "jurisdiction over actions concerning nuclear damage from a nuclear incident shall lie only with the courts of the Contracting Party within which the nuclear incident occurs." *Id.* art. XIII(1).

The CSC was set to enter into force ninety days after "the date on which at least 5 States with a minimum of 400,000 units of installed nuclear capacity" ratified it. CSC art. XX(1). The CSC opened for signature on September 29, 1997, at which time the United States signed it. See Int'l Atomic Energy Agency, Status Report on the Convention on Supplementary Compensation for Nuclear Damage (2016). The United States ratified the CSC in May 2008, id., but it was not until Japan signed and ratified the CSC on January 15, 2015, almost four years after the FNPP incident, that there were enough parties to put the CSC into effect. Ninety days later on April 15, 2015, the CSC entered into force, almost two-and-a-half years after Plaintiffs first filed this suit. Id.

TEPCO and GE do not argue that the entirety of the CSC applies to the FNPP incident. Rather, they acknowledge the general principle that "[u]nless a different intention appears from the treaty or is

otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party." Vienna Convention on the Law of Treaties art. 28, May 23, 1969, 1155 U.N.T.S. 331.[5] Based on this principle, TEPCO and GE accept that the CSC's supplemental fund is unavailable for nuclear incidents occurring before the CSC's entry into force, including the FNPP incident. Appellant's Opening Brief 28, ECF No. 14; Appellant's Supplementary Brief 10, ECF No. 98; Brief of Amicus Curiae GE 11, ECF No. 96. TEPCO and GE maintain, however, that Article XIII's mandate that "jurisdiction over actions concerning nuclear damage from a nuclear incident shall lie only with the courts of the Contracting Party within which the nuclear incident occurs" applies to cases pending before the CSC entered into force.

This is so, TEPCO and GE argue, because jurisdictional provisions are not subject to limits on retroactive application. In support of this contention, TEPCO and GE cite a long list of cases explaining that jurisdictional provisions do not retroactively alter substantive rights, but only alter where plaintiffs can go to obtain prospective relief.

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[5] Although the United States is not a party to the Vienna Convention on the Law of Treaties, it acknowledges the non-retroactivity principle as an element of customary international law. United States' Brief 13 n.5, ECF No. 81; *see Mora v. New York*, 524 F.3d 183, 196 n.19 (2d Cir. 2008) ("The Department of State considers the Vienna Convention on the Law of Treaties an authoritative guide to current treaty law and practice.").

Accordingly, TEPCO and GE argue that jurisdiction-stripping provisions such as the one at issue here presumptively apply to pending cases. *See*, *e.g.*, *Landgraf v. USI Film Prods.*, 511 U.S. 244, 274 (1994) ("We have regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed. . . . Application of a new jurisdictional rule usually 'takes away no substantive right but simply changes the tribunal that is to hear the case.'" (citation omitted)); *Bruner v. United States*, 343 U.S. 112, 116–17 (1952) ("This rule—that, when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law—has been adhered to consistently by this Court."); *Duldulao v. INS*, 90 F.3d 396, 399 (9th Cir. 1996) ("The Supreme Court has long held that 'when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall within the law.'" (citation omitted)). TEPCO and GE also argue that the same principle applies to jurisdictional provisions in treaties. *See*, *e.g.*, *Third Report on the Law of Treaties*, [1964] 2 Y.B. Int'l L. Comm'n 11, U.N. Doc. A/CN.4/167 (suggesting that certain jurisdictional provisions in treaties apply to any "dispute which *exists* between the parties after the coming into force of the treaty" regardless of whether "the dispute concerns events which took place prior to that date."). In short, because the courts of Japan are undisputedly open to Plaintiffs, and because Article XIII makes no reservation as to

pending cases, TEPCO and GE argue that the CSC strips us of jurisdiction over Plaintiffs' claims.

We find this argument plausible, but ultimately unpersuasive. Although jurisdictional provisions can and often do apply to cases already pending when those provisions go into effect, it is not true that we always apply new jurisdictional provisions to pending cases. Rather, we look at the jurisdiction-stripping provision in the context of the statute or treaty at issue, applying normal canons of construction, to determine if the provision should apply to pending cases. Hamdan v. Rumsfeld, 548 U.S. 557, 577 (2006) ("[Not] all jurisdiction-stripping provisions—or even all such provisions that truly lack retroactive effect—must apply to cases pending at the time of their enactment. '[N]ormal rules of construction,' including a contextual reading of the statutory language, may dictate otherwise." (second alteration in original) (citation omitted)); Lindh v. Murphy, 521 U.S. 320, 326 (1997) ("In determining whether a statute's terms would produce a retroactive effect, however, and in determining a statute's temporal reach generally, our normal rules of construction apply."); see also Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 180 (1982) ("The clear import of treaty language controls unless 'application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories.'" (citation omitted)).

Applying normal rules of construction to Article XIII, we do not believe that it strips U.S. courts of

jurisdiction over claims arising out of nuclear incidents that occurred prior to the CSC's entry into force.[6] Two things bring us to this conclusion. First, starting with Article XIII's text, we find it informative that the CSC gives exclusive jurisdiction to "the courts of the Contracting Party within which the nuclear incident *occurs*." CSC art. XIII(1) (emphasis added). The use of the present tense suggests that the provision applies to future nuclear incidents and does not include past incidents. One would expect the drafters to have used the past tense had they intended to alter jurisdiction over claims arising out of nuclear incidents that occurred before the CSC's entry into force. Other paragraphs within Article XIII also use the present tense, similarly indicating that Article XIII refers only to claims arising out of future nuclear incidents. *See id.*

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[6] For purposes of this analysis, we will assume that Article XIII is self-executing. *See Medellin v. Texas*, 552 U.S. 491, 505–06 (2008) (explaining that a treaty "ordinarily 'depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it,'" but that some treaties "contain[] stipulations which are self- executing, that is, . . . they have the force and effect of a legislative enactment" (citation omitted)); Letter of Submittal for the Convention on Supplementary Compensation for Nuclear Damage at XV, August 7, 2001, S. Treaty Doc. No. 107-21 ("As with similar jurisdictional provisions in earlier treaties submitted to the Senate for advice and consent to ratification, it is anticipated that the provisions of Article XIII would be applied without the need for further implementing legislation."). Because we conclude that, in any event, Article XIII does not apply to claims arising out of the FNPP incident, we need not decide this issue.

art. XIII(2) ("Where a nuclear incident *occurs* within the area of the exclusive economic zone of a Contracting Party[,] . . . jurisdiction over actions concerning nuclear damage from that nuclear incident shall, for the purposes of this Convention, lie only with the courts of that Party." (emphasis added)); *id.* art. XIII(3) ("Where a nuclear incident *does not occur* within the territory of any Contracting Party[,] . . . jurisdiction over actions concerning nuclear damage from the nuclear incident shall lie only with the courts of the Installation State." (emphasis added)).[7]

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[7] TEPCO and GE counter that versions of the CSC in other languages, which are equally authentic, *see* CSC art. XXVII, use different verb tenses. The Spanish text, for example, uses the phrase "haya ocurrido." "Haya" is the present subjunctive form of the Spanish verb "haber," which in English means "to have." As TEPCO and GE note, the phrase "haya ocurrido" means "has occurred." In other words, the Spanish text grants jurisdiction to the courts of the country where the nuclear incident "has occurred," not where it "occurs." TEPCO and GE suggest that this difference precludes us from giving much weight to the English text's use of the present tense.

We think that TEPCO and GE's reliance on the Spanish text is misplaced. The Spanish text's use of the phrase "haya ocurrido"—a subjunctive form that conveys a mood of indeterminancy that has no direct English counterpart—does not necessarily suggest that the CSC's jurisdictional provision encompasses pre-existing nuclear incidents. Even if the CSC used the past tense and limited jurisdiction to "the courts of the Contracting Party within which the nuclear incident *occurred*," that would not answer the question at issue here. In that case, the use of the past tense only shows the temporal relationship between the nuclear accident and the lawsuit, the former obviously preceding the latter. But this wording leaves open

Second, the CSC's overall framework also supports our conclusion that Article XIII does not apply to claims arising out of nuclear incidents that precede the CSC's entry into force because we view the promise of exclusive jurisdiction as a *quid pro quo* for establishing a compensation fund. To accept TEPCO and GE's argument that the CSC's jurisdictional provision applies to the current case, we would have to view Article XIII as a stand-alone provision, independent of the CSC's remaining provisions, to centralize jurisdiction over nuclear damage claims in a single country. We cannot fairly construe the CSC in this manner. Article XIII is but one component of the compensation scheme created in the CSC. The CSC's title—The Convention on *Supplementary Compensation* for Nuclear Damage—suggests what the remainder of the document makes clear: the CSC is, first and foremost, concerned with creating an international backstop for funding claims by victims of nuclear incidents. The "Purpose and Application" section reinforces that "[t]he purpose of this Convention is to supplement the system of compensation provided pursuant to" the Vienna and Paris Conventions and national laws such as the Price-Anderson Act. CSC art. II(1). To carry out its goal, the CSC creates what the CSC itself refers to as a "system," *id.* art.

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the question whether the nuclear accident had to occur after the CSC's entry into force for the provision to apply. Even if other languages make the answer to that question ambiguous, our second point above compels our conclusion that the CSC only applies to nuclear incidents occurring after the CSC's entry into force.

II(2), or a "worldwide liability regime," *id.*, Preamble. Nothing in the CSC suggests that one component of that system, such as the jurisdictional provision at issue here, would apply when the entire system does not. The jurisdictional provision is not independent of the compensation scheme, but is part of the mechanism for effectuating that scheme.

Other provisions of the CSC confirm our reading that Article XIII is not an independent agreement to centralize litigation from a nuclear accident in a single country, but a mechanism for administering the supplemental compensation fund. A country whose courts have jurisdiction under Article XIII obtains certain rights and responsibilities. Specifically, "the Contracting party whose courts have jurisdiction shall inform the other Contracting Parties of a nuclear incident as soon as it appears that" domestic funds may be insufficient to compensate victims. Id. art. VI. Once domestic funds are exhausted, "the Contracting Party whose courts have jurisdiction shall request the other Contracting Parties to make available" the supplemental compensation fund, and "the Contracting Party whose courts have jurisdiction" has "exclusive competence to disburse such funds." Id. art. VII(1); see also id. art. X(1) ("The system of disbursement by which the [supplemental funds] are to be made available and the system of apportionment thereof shall be that of the Contracting Party whose courts have jurisdiction."). "The Contracting party whose courts have jurisdiction" may also exercise certain rights of recourse under the CSC. Id. art. IX(3). Article XIII is more than just an agreement to

centralize jurisdiction in one country; it is integral to the CSC's overall "system" for implementing the supplemental fund.

Our interpretation of Article XIII also finds support in a letter from Secretary of State Colin Powell submitting the CSC to President George W. Bush. That letter provides an article-by-article explanation of the CSC. It explains that the CSC "requires that all claims resulting from a covered nuclear incident be adjudicated in a single forum." Letter of Submittal for the Convention on Supplementary Compensation for Nuclear Damage at VII, Aug. 7, 2001, S. Treaty Doc. No. 107-21 [hereinafter Letter of Submittal] (emphasis added). It further provides that "after the United States deposits its instrument of ratification to the CSC, the effect of Article XIII will be to remove jurisdiction from all U.S. Federal and State courts over cases concerning nuclear damage from a nuclear incident covered by the CSC except to the extent provided in the CSC." Id. at XV (emphasis added); see also id. at XIV ("Article XIII determines which Party's courts shall have jurisdiction over claims brought under the CSC . . . ." (emphasis added)). In our view, the phrases "covered nuclear incident" and "nuclear incident covered by the CSC" most logically refer to nuclear incidents subject to all of the CSC's terms, and in particular to nuclear incidents that are eligible for the supplemental compensation fund. Thus, the United States' view at the time of ratification appears to be that Article XIII applies only to nuclear incidents occurring after the CSC's entry into force. That is also the view that

the United States expresses in its amicus brief. We owe deference to this view.[8] Sumitomo Shoji Am., Inc., 457 U.S. at 184–85 ("Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight.").

The CSC's text, structure, and ratification history dictate that Article XIII's jurisdiction-stripping provision applies only to claims arising out of nuclear incidents occurring after the CSC's entry into force. We conclude, therefore, that the CSC does not strip us of jurisdiction over Plaintiffs' claims.

B. *International Comity*

TEPCO next contends that the district court erred by not dismissing Plaintiffs' claims on comity grounds. We review the district court's international comity determination for an abuse of discretion and will reverse only if the district court applies an incorrect legal standard or if its "application of the correct legal standard was (1) 'illogical,' (2) 'implausible,' or (3) without 'support in inferences that may be drawn from the facts in the record.'"

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[8] We also note that Japan filed an amicus brief in this appeal urging the court to dismiss Plaintiffs' claims, but did not cite the CSC as a basis for that request. The amicus brief was filed in February 2016, almost one year after the CSC's entry into force. Presumably, had Japan felt entitled to exclusive jurisdiction over Plaintiffs' claims pursuant to the CSC, it would have said so. "When the parties to a treaty both agree as to the meaning of a treaty provision, and that interpretation follows from the clear treaty language, we must, absent extraordinarily strong contrary evidence, defer to that interpretation." *Sumitomo Shoji Am., Inc.*, 457 U.S. at 185.

Mujica v. AirScan Inc., 771 F.3d 580, 589 (9th Cir. 2014) (quoting *United States v. Hinkson*, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc)).

"International comity 'is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.'" Id. at 597 (quoting In re Simon, 153 F.3d 991, 998 (9th Cir. 1998)). There are two kinds of international comity: prescriptive comity (addressing the "extraterritorial reach of federal statutes") and adjudicative comity (a "discretionary act of deference by a national court to decline to exercise jurisdiction in a case properly adjudicated in a foreign state"). Id. at 598–99. This case concerns the latter.

District courts deciding whether to dismiss a case on comity grounds are to weigh (1) "the strength of the United States' interest in using a foreign forum," (2) "the strength of the foreign governments' interests," and (3) "the adequacy of the alternative forum." Id. at 603 (quoting *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1238 (11th Cir. 2004)). Here, the district court correctly laid out this legal standard, and the only question is whether the district court's decision not to dismiss Plaintiffs' claims was illogical, implausible, or unsupported by the record. Although this is a close case with competing policy interests, we hold that the district court did not abuse its discretion in deciding to

maintain jurisdiction. For our convenience, we will discuss together the interests of the United States and Japan. We then consider the adequacy of a Japanese forum.

1. U.S. and Japanese interests

In *Mujica*, we expounded on how to assess the United States' and foreign governments' interests:

> The (nonexclusive) factors we should consider when assessing [each country's] interests include (1) the location of the conduct in question, (2) the nationality of the parties, (3) the character of the conduct in question, (4) the foreign policy interests of the [countries], and (5) any public policy interests.

Id. at 604, 607. The district court determined that because the FNPP incident occurred in Japan, Japan has a strong interest in this litigation. On the other hand, the district court reasoned that Plaintiffs are U.S. servicemembers, suggesting that the United States also has an interest in this litigation. In balancing the first two factors, the district court concluded that the parties' ties to the United States outweighed the fact that the allegedly negligent conduct occurred Japan. We agree with the district court that, at least with respect to the first two factors, there are competing interests. Under these facts, we find these considerations not particularly helpful in determining whether to dismiss Plaintiffs' claims.

With respect to the character of the conduct in question, the district court determined that the factor was neutral. The court found that Japan had an interest in regulating its nuclear utilities and compensating those injured by the FNPP incident, but that the United States also had an "interest in the safe operation of nuclear power plants around the world, especially when they endanger U.S. citizens." *Cooper II*, 166 F. Supp. 3d at 1138. The district court also rejected TEPCO's argument that the foreign policy interests of Japan and the United States favored a Japanese forum. TEPCO argued that the CSC's jurisdiction-channeling provision, even if not applicable of its own force, reflected a policy judgment of centralizing claims arising out of nuclear incidents in the courts of the country where the nuclear incident occurred. The district court gave little weight to the CSC because it saw no evidence that maintaining jurisdiction would create friction between the United States and Japan[9] and

[9] TEPCO suggests that the district court misstated the law by requiring a showing that maintaining jurisdiction would create diplomatic friction between the United States and Japan. We do not view the district court's opinion to suggest that actual diplomatic friction is a prerequisite for dismissing a case on international comity grounds. *See Cooper II*, 166 F. Supp. 3d at 1139 (noting the lack of evidence that maintaining jurisdiction would harm U.S.-Japanese relations as one consideration). Although not a prerequisite for international comity, whether maintaining jurisdiction would harm the United States' relationship with a foreign country is certainly a relevant consideration. *See Mujica*, 771 F.3d at 609 (considering the United States' interest in preserving its diplomatic relationship with Colombia).

because the CSC's supplemental fund is unavailable to Plaintiffs. Finally, the district court found that there were public policy considerations cutting both in favor of and against dismissing the case.

One of the reasons the district court cited for maintaining jurisdiction was that neither Japan nor the United States had expressed an interest in the location of this litigation. Indeed, a foreign country's request that a United States court dismiss a pending lawsuit in favor of a foreign forum is a significant consideration weighing in favor of dismissal. See Jota v. Texaco, Inc., 157 F.3d 153, 160 (2d Cir. 1998) ("[I]nherent in the concept of comity is the desirability of having the courts of one nation accord deference to the official position of a foreign state, at least when that position is expressed on matters concerning actions of the foreign state taken within or with respect to its own territory."). By contrast, when the country in question expresses no preference, the district court can take that fact into consideration. See Abad v. Bayer Corp., 563 F.3d 663, 668 (7th Cir. 2009) (finding it relevant that neither the United States nor Argentina took a position on where litigation should proceed).

Although Japan took no position in the district court,[10] Japan has not remained silent on appeal. The government of Japan submitted an amicus brief

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[10] The record reflects that the Japanese government informed the State Department of its objection to U.S. jurisdiction while litigation was pending in the district court, but did not express its views to the district court.

urging us to reverse the district court. In its amicus brief, Japan presents a compelling case that FNPP-related claims brought outside of Japan threaten the viability of Japan's FNPP compensation scheme. In dealing with claims arising out of the FNPP incident, Japan has developed a set of universal guidelines applicable to all claims brought in Japan. If Plaintiffs' lawsuit and others like it are permitted to proceed in foreign countries, those courts might apply different legal standards, which could result in different outcomes for similarly situated victims. That risk is especially troublesome to Japan because the Japanese government finances TEPCO's compensation payments, which are being administered through Japanese courts. As Japan explained in its amicus brief, "The irony of the situation is that this U.S. lawsuit against TEPCO is possible only because the Government of Japan, as part of its compensation system, ensured TEPCO's solvency, including by providing ongoing funds for damage payments." Brief of Amicus Curiae the Government of Japan 3–4. Judgments originating in American courts may well be inconsistent with the overall administration of Japan's compensation fund. In light of Japan's justifiable insistence that we direct Plaintiffs to Japanese courts, we might well have either reversed the district court's decision to maintain jurisdiction or remanded to the district court for further consideration.

Because we became aware of Japan's position by way of an amicus brief on appeal, concerns of fairness and thoroughness led us to seek the State Department's views. We asked for a Statement of

Interest. In lieu of a Statement of Interest, the United States submitted an amicus brief in support of affirming the district court's order. In its brief, the United States expressed that it "has no clear independent interest in Japan's compensation scheme beyond [its] general support for Japan's efforts to address the aftermath of Fukushima." United States' Brief 12, ECF No. 81. That alone would not be enough for us to conclude that the comity doctrine does not apply to this case. But the United States also makes a much more important point about U.S. interests: allowing the suit to continue in California is consistent with U.S. interests in promoting the CSC.

The United States has a strong interest in promoting the CSC's widespread acceptance. As explained above, the CSC was designed as a global liability regime for handling claims arising out of nuclear incidents, and its effectiveness naturally depends on global, or at least widespread, adherence.[11] The CSC creates an international compensation fund to supplant domestic funding for

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[11] Unlike the Paris and Vienna Conventions, the CSC is designed to attract even countries that do not generate nuclear power. Letter of Submittal at VIII. Specifically, the CSC requires that fifty percent of the supplemental compensation fund be used to compensate damage occurring outside of the installation state, including damage occurring in a non- nuclear power generating country. CSC art. XI(1)(b). This incentive for non-nuclear power generating countries was designed to create "for the first time the potential for a nuclear liability convention that will apply globally." Letter of Submittal at VIII.

victims of nuclear incidents. CSC arts. III, IV. The CSC cannot provide the robust supplemental compensation fund it was intended to provide if only a few countries contribute to the fund. The CSC also grants contracting parties exclusive jurisdiction over actions concerning nuclear incidents that occur within their borders. CSC art. XIII. But this grant of exclusive jurisdiction has little value if it binds only a few countries. In short, the CSC cannot be the global liability system it was intended to be without widespread adherence, particularly from developed nations. *See* Letter of Transmittal for the Convention on Supplementary Compensation for Nuclear Damage at IV, Nov. 15, 2002, S. Treaty Doc. No. 107-21 ("[U]nder existing nuclear liability conventions many potential victims outside the United States generally have no assurance that they will be adequately or promptly compensated in the event they are harmed by a civil nuclear incident, especially if that incident occurs outside their borders or damages their environment. The Convention, *once widely accepted*, will provide that assurance." (emphasis added)); *see also* Letter of Submittal at VIII–IX ("[T]he CSC can strengthen U.S. efforts to improve nuclear safety, because, *once widely accepted*, the CSC will eliminate ongoing concerns on the part of U.S. suppliers of nuclear safety equipment and technology that they would be exposed to damage claims by victims of a possible future accident at a facility where they have provided assistance." (emphasis added)).

Thus, the United States, as a party to the CSC, has a strong interest in encouraging other

countries, especially those with large nuclear industries such as Japan, to join the CSC. As we have discussed, one of the perquisites of joining the CSC is the guarantee of exclusive jurisdiction over nuclear incidents vis-à-vis other contracting parties. *See supra* Section II.A. If a country knew it could receive the benefit of the exclusive jurisdiction provision by becoming a party to the CSC after a nuclear incident has occurred within its borders (as Japan did here), or even avoid foreign jurisdiction altogether by virtue of international comity, there would be less incentive to join the CSC before a nuclear incident occurs. As the State Department advised us in its brief:

> The exclusive jurisdiction provision forms part of a bargain in exchange for robust, more certain and less vexatious (*e.g.*, the application of strict liability without need to establish fault) compensation for victims of a potential incident. United States policy does not call for advancing one element of this system in isolation from the other elements of the Convention's system.
>
> For these two inextricably interrelated interests to be fully realized, it is essential that the Convention be as widely adhered to internationally as possible. Thus, broad international adherence to the

> Convention is the ultimate U.S. policy goal.

United States' Brief 6–7. Accordingly, "[t]he United States has no specific foreign policy interest necessitating dismissal in this particular case." *Id.* at 17. We understand the position of the United States to be that, faced with the reality that there is no guarantee of exclusive jurisdiction outside of the CSC, more countries will accede to the CSC, thus fostering the global liability regime the CSC was designed to create. Indirectly, this suit makes the case—and Japan has become the poster child—for why recalcitrant countries should join the CSC.

In its supplemental brief in response to the United States' brief, TEPCO argues that the United States has misapprehended its own foreign policy interests. In support of this rather bold assertion, TEPCO repeats its argument made in the district court that the CSC merely codified the longstanding U.S. policy of centralizing jurisdiction over claims from nuclear accidents in a single forum. TEPCO points to State Department testimony before the Senate that, even before the CSC, the State Department "would expect that if a nuclear incident occurs overseas[,] U.S. courts would assert jurisdiction over a claim only if they concluded that no adequate remedy exists in the court of the country where the accident occurred." *Treaties: Hearing Before the S. Comm. on Foreign Relations*, S. Hearing No. 109-324, 109th Cong. 27 (2005) (statement of Warren Stern, Senior Coordinator for Nuclear Safety, Department of State). This may

well have been the United States' position prior to the CSC's ratification. In hopes that other countries would do the same, the United States may have preferred that U.S. courts not exercise jurisdiction over claims arising out of foreign nuclear incidents. But that policy appears to have changed. Now that the United States has ratified the CSC, the State Department takes the position that it would prefer to keep exclusive jurisdiction as a bargaining chip to encourage other nations to join the CSC. We owe this view deference. *See Mujica*, 771 F.3d at 610 ("[S]hould the State Department choose to express its opinion on the implications of exercising jurisdiction over *particular* petitioners in connection with *their* alleged conduct, that opinion might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy." (citation omitted)); *id.* at 607 ("[C]ourts will not extend comity to foreign proceedings when doing so would be contrary to the policies . . . of the United States." (second alteration in original) (citation omitted)).

In light of these important, competing policy interests, we conclude that the district court did not abuse its discretion in weighing U.S. and Japanese interests. Although Japan has an undeniably strong interest in centralizing jurisdiction over FNPP-related claims, the United States believes that maintaining jurisdiction over this case will help promote the CSC, an interest that encompasses all future claims arising from nuclear incidents around the globe. Competing policy interests such as these require our district court judges to make difficult

judgment calls, judgment calls committed to their sound discretion. We recognize that the district court did not have the benefit of the views of Japan and the United States. We might, in this case, have remanded to the district court to review its judgment on this question in light of the briefs filed by the two governments. We are not sure why neither government decided to weigh in when the district court was considering this question. Nevertheless, the district court had before it the facts that underlie the positions taken by Japan and the United States, and we cannot say that the district court abused its discretion.

2. Adequacy of the alternative forum

Like the district court, we have no doubt that Japan would provide an adequate alternative forum. TEPCO is certainly subject to suit in Japanese courts, and the doors of those courts are undisputedly open to Plaintiffs. *See Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1178 (9th Cir. 2006) ("Generally, an alternative forum is available where the defendant is amenable to service of process and the forum provides 'some remedy' for the wrong at issue." (citation omitted)). We have held that district courts have not abused their discretion in holding that Japanese courts are an adequate alternative forum, despite their procedural differences with U.S. courts. *See*, *e.g.*, *Lockman Found. v. Evangelical All. Mission*, 930 F.2d 764, 768–69, 769 n.3 (9th Cir. 1991). Plaintiffs provide no evidence that Japanese courts would be inadequate aside from unsubstantiated fears of bias

against foreign claimants. The district court did not abuse its discretion in finding that Japan would provide an adequate alternative forum for resolving Plaintiffs' claims.

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This is a difficult case that required the district court to weigh a number of complex policy considerations. Though there are strong reasons for dismissing Plaintiffs' claims in favor of a Japanese forum, the district court did not abuse its discretion in maintaining jurisdiction. Comity is not a doctrine tied to our subject matter jurisdiction. As we have explained:

> Comity is not a rule expressly derived from international law, the Constitution, federal statutes, or equity, but it draws upon various doctrines and principles that, in turn, draw upon all of those sources. It thus shares certain considerations with international principles of sovereignty and territoriality; constitutional doctrines such as the political question doctrine; principles enacted into positive law such as the Foreign Sovereign Immunities Act of 1976; and judicial doctrines such as *forum non conveniens* and prudential exhaustion.

Mujica, 771 F.3d at 598 (citation omitted). Accordingly, it is a "a doctrine of prudential

abstention." *Id.* Because comity is not a jurisdictional decision, comity is not measured as of the outset of the litigation; it is a more fluid doctrine, one that may change in the course of the litigation.[12] Should either the facts or the interests of the governments change—particularly the interests of the United States[13]—the district court would be free to revisit this question.

C. Forum Non Conveniens

The doctrine of *forum non conveniens* allows a court to dismiss a case properly before it when litigation would be more convenient in a foreign

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[12] We note that further developments in the district court may counsel in favor of dismissing Plaintiffs' lawsuit in favor of a Japanese forum. For example, the district court has yet to determine whether U.S. or Japanese law will govern Plaintiffs' claims. Which country's law applies is relevant to the international comity analysis. *See Ungaro-Benages*, 379 F.3d at 1240 (affirming a district court's decision to dismiss a case when the relevant conduct occurred in Germany and the case involved issues of German law); *cf. Mujica*, 771 F.3d at 602 ("At least in cases considering adjudicatory comity, we will consider whether there is a conflict between American and foreign law as one factor in . . . the application of comity.")

[13] Although the United States does not oppose Plaintiffs' litigation, its brief states that it has no foreign policy interest that requires dismissal "at this time." United States' Brief 3. The United States may change its position if the circumstances so merit. *See Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 756–57 (9th Cir. 2011) (en banc) (noting that the State Department initially opposed U.S. jurisdiction over claims touching on foreign relations with Papua New Guinea, but later withdrew its opposition in light of changed country conditions), *vacated on other grounds*, 133 S. Ct. 1995 (2013) (mem.).

forum. *Lueck v. Sundstrand Corp.*, 236 F.3d 1137, 1142 (9th Cir. 2001); *see also Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255–56 (1981). "To prevail on a motion to dismiss based upon *forum non conveniens*, a defendant bears the burden of demonstrating an adequate alternative forum, and that the balance of private and public interest factors favors dismissal." *Carijano v. Occidental Petroleum Corp.*, 643 F.3d 1216, 1224 (9th Cir. 2011). We review the district court's decision to grant or deny a motion to dismiss on *forum non conveniens* grounds for an abuse of discretion. *Id.* Here, the district court did not abuse its discretion in declining to dismiss this case.

1. Adequacy of the alternative forum

The analysis used in evaluating the adequacy of an alternative forum is the same under the doctrine of *forum non conveniens* as it is under the doctrine of international comity. *Mujica*, 771 F.3d at 612 n.25. As we stated in our international comity analysis, Japan provides an adequate alternative forum for resolving Plaintiffs' claims. *See supra* Section II.B.2.

2. Private and public interest factors

To some extent, analysis of the private and public interests factors also overlaps with the analysis under international comity. *See Mujica*, 771 F.3d at 598 (explaining the relationship between international comity and *forum non conveniens*). However, the *forum non conveniens* analysis introduces a presumption that litigation is convenient in the plaintiff's chosen forum when a

domestic plaintiff sues at home. *Carijano*, 643 F.3d at 1227. Defendants have the "heavy burden of showing that the [plaintiff's choice of] forum results in 'oppressiveness and vexation . . . out of all proportion' to the plaintiff's convenience." *Id.* (second alteration in original) (quoting *Piper*, 454 U.S. at 241).

In this case, Plaintiffs are U.S. citizens, and their decision to sue in the United States must be respected. The district court properly took Plaintiffs' choice of their home forum into consideration and did not abuse its discretion in finding that other private and public considerations did not outweigh Plaintiffs' interest in suing at home.

> The private interest factors are
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> (1) the residence of the parties and the witnesses; (2) the forum's convenience to the litigants; (3) access to physical evidence and other sources of proof; (4) whether unwilling witnesses can be compelled to testify; (5) the cost of bringing witnesses to trial; (6) the enforceability of the judgment; and (7) all other practical problems that make trial of a case easy, expeditious and inexpensive.*Id.* at 1229 (citation omitted).

The district court reasonably balanced these private interest factors. The district court noted that while most of TEPCO's witnesses reside in Japan, all Plaintiffs reside in the United States. Cooper II, 166

F. Supp. 3d at 1132–33. It further found that it would be more difficult for Plaintiffs to travel to Japan given their alleged medical conditions. Id. at 1133. The district court agreed with TEPCO that most of the relevant documents and physical proof remained in Japan, and also that litigating in the United States would make it more difficult to obtain testimony from non-party witnesses located in Japan, but did not believe that these considerations outweighed Plaintiffs' interest in suing at home. Id. at 1133–35. In sum, "[b]ecause of the nature of international litigation, each side would incur expenses related to traveling and procuring witnesses in either forum." Id. at 1135 (emphasis added). This was a reasonable determination.

The public interest factors relevant to a forum non conveniens analysis include "(1) the local interest in the lawsuit, (2) the court's familiarity with the governing law, (3) the burden on local courts and juries, (4) congestion in the court, and (5) the costs of resolving a dispute unrelated to a particular forum." Carijano, 643 F.3d at 1232 (citation omitted). The district court also reasonably weighed the public interest factors and concluded that they were neutral. It balanced Japan's interest in centralizing litigation in Japan with the United States' interest in compensating its military servicemembers. Cooper II, 166 F. Supp. 3d at 1132–36. It noted that this litigation would be burdensome to either country's courts. Id. at 1136. This determination was neither illogical, implausible, nor unsupported by the record.

Of course, the policy considerations addressed in the international comity discussion may also be relevant here. But as we explained above, these policy considerations did not require the district court to dismiss this case on international comity grounds. Nor do they require dismissal under *forum non conveniens*. We therefore affirm the district court's decision not to dismiss Plaintiffs' claims under the *forum non conveniens* doctrine.

D. *The Political Question Doctrine*

TEPCO next contends that the political question doctrine bars Plaintiffs' suit. It argues that the Navy's decision to deploy Plaintiffs near the FNPP was a superseding cause of Plaintiffs' injuries, and that Plaintiffs, accordingly, cannot prove their claims without asking the court to review nonjusticiable military decisions. The district court found that TEPCO's superseding causation defense did not render this case nonjusticiable. *Cooper II*, 166 F. Supp. 3d at 1119–24. We review de novo the district court's determination that the political question doctrine does not bar Plaintiffs' case. *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 979 (9th Cir. 2007).

1. The political question doctrine framework

"The nonjusticiability of a political question is primarily a function of the separation of powers." *Baker v. Carr*, 369 U.S. 186, 210 (1962). "The conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative—'the political'—departments of the

government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918). The Court has cautioned, however, that "it is 'error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.'" *Corrie*, 503 F.3d at 982 (quoting *Baker*, 369 U.S. at 211). Rather, courts look to a series of factors to determine whether a case presents a nonjusticiable political question. As *Baker* explains:

> Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

369 U.S. at 217.

Typically, deciding whether a case presents a nonjusticiable political question requires the court simply to look at the complaint and apply the Baker factors to decide whether there are any nonjusticiable issues. Sometimes, however, and as is the case here, no political questions are apparent from the complaint's face. Plaintiffs' allegations that TEPCO, an entity unaffiliated with the United States government, was negligent in operating the FNPP do not, on their face, trigger any of the six Baker factors. But even when the face of a complaint does not ask the court to review a political question, issues "that are textually committed to the executive sometimes lie just beneath the surface of the case." Harris v. Kellogg Brown & Root Servs., Inc., 724 F.3d 458, 465 (3d Cir. 2013). Such may be the case when, as here, the defendant argues that the U.S. military is responsible for all or part of a plaintiff's injuries. See id. Because "the political question doctrine is jurisdictional in nature," we must evaluate these potential defenses and facts beyond those pleaded in the complaint to determine whether the case is justiciable. See Corrie, 503 F.3d at 979; see also Harris, 724 F.3d at 466 ("[T]o avoid infringing on other branches' prerogatives in war-time defense-contractor cases, courts must apply a particularly discriminating inquiry into the facts and legal theories making up the plaintiff's claims as well as the defendant's defenses."); Taylor v. Kellogg Brown & Root Servs., Inc., 658 F.3d 402, 409 (4th Cir. 2011) ("[W]e are obliged to carefully . . . 'look beyond the complaint, and consider how [the

plaintiff] might prove his claim and how [the defendant] would defend.'" (citation, emphasis, and alterations omitted)); Carmichael v. Kellogg, Brown & Root Servs., Inc., 572 F.3d 1271, 1285 (11th Cir. 2009) (finding the political question doctrine applicable where "any defense mounted by [defendants] would undoubtedly cite the military's orders as the reason" for defendants' actions); Lane v. Halliburton, 529 F.3d 548, 565 (5th Cir. 2008) ("We must look beyond the complaint, considering how the Plaintiffs might prove their claims and how [the defendant] would defend.").

Thus, analyzing TEPCO's contention that the political question doctrine bars Plaintiffs' claims requires a two-part analysis. First, we must determine whether resolving this case will require the court to evaluate a military decision. Doing so requires us to consider what Plaintiffs must prove to establish their claim, keeping in mind any defenses that TEPCO will raise. If step one reveals that determining TEPCO's liability will require the court to evaluate a military decision, step two requires us to decide whether that military decision is of a kind that is unreviewable under the political question doctrine. See Harris, 724 F.3d at 466 ("[A] determination must first be made whether the case actually requires evaluation of military decisions. If so, those military decisions must be of the type that are unreviewable because they are textually committed to the executive."); Lane, 529 F.3d at 560 ("First, [the defendant] must demonstrate that the claims against it will require reexamination of a decision by the military. Then, it must demonstrate

that the military decision at issue . . . is insulated from judicial review." (second alteration in original) (citation omitted)).

Although we have never expressly adopted this two-part test, it is consistent with our precedent. For example, in Corrie, the plaintiffs were family members of individuals who were killed or injured when the Israeli Defense Forces demolished homes in the Palestinian Territories using bulldozers manufactured by a U.S. defense contractor. 503 F.3d at 977. The plaintiffs sued the defense contractor, arguing that it knew the bulldozers would be used to demolish homes in violation of international law. Id. Though the complaint standing alone did not appear to raise a political question, it turned out that the United States paid for each of the bulldozers sold to the Israeli Defense Forces pursuant to a congressionally enacted program giving the executive discretion to finance aid to foreign militaries. *Id.* at 978. We concluded that resolving the plaintiffs' claims would require us to evaluate the United States' decision to provide military aid because it was "difficult to see how we could impose liability on [the defense contractor] without at least implicitly deciding the propriety of the United States' decision to pay for the bulldozers which allegedly killed the plaintiffs' family members." *Id.* at 982. Having determined that evaluating the plaintiffs' claims would require us implicitly to evaluate the United States' decision to pay for the bulldozers, we concluded that the decision "to grant military or other aid to a foreign nation is a political decision inherently entangled with the conduct of

foreign relations." *Id.* at 983. In light of our conclusion that we could not "intrude into our government's decision to grant military assistance to Israel, even indirectly," we affirmed the district court's dismissal of the plaintiffs' claims under the political question doctrine. *Id.* at 983–84.

Because determining whether a case raises a political question requires a "discriminating inquiry into the precise facts and posture of the particular case," Baker, 369 U.S. at 217, it is not always possible to tell at the pleading stage whether a political question will be inextricable from the case, see Lane, 529 F.3d at 554. For example, in Lane, a defense contractor recruited the plaintiffs to drive trucks in Iraq. Id. While in Iraq, Iraqi insurgents attacked the plaintiffs' convoys resulting in deaths and injuries to the plaintiffs. Id. at 555. The plaintiffs argued that the contractor fraudulently induced them into employment by falsely representing that their work in Iraq would be entirely safe. Id. They also asserted that the defense contractor was negligent in carrying out the convoy. Id. The defense contractor argued that the case presented a nonjusticiable political question, and the district court agreed and dismissed the case. Id. at 555–56.

On appeal, the Fifth Circuit reversed. The court stressed that in order to dismiss a case on political question grounds, "a court must satisfy itself that [a] political question will certainly and inextricably present itself." Id. at 565. Though acknowledging the potential for a political question to arise in the case,

the court was not satisfied that addressing a political question would be inevitable. The plaintiffs' fraud theory, for example, might have succeeded if the plaintiffs could establish that the defense contractor guaranteed the plaintiffs' safety while knowing that the plaintiffs were at a greater risk of harm than they were led to believe. Id. at 567. The court also permitted the plaintiffs' negligence claims to proceed, while noting that those claims "move precariously close to implicating the political question doctrine, and further factual development very well may demonstrate that the claims are barred." Id. But given the lack of clarity at the pleading stage regarding what duties the defense contractor owed toward the plaintiffs while in Iraq, it was not certain that a political question was inextricable from the case. Id. Accordingly, the court remanded to the district court for further factual development. Id. at 568; see also Carmichael, 572 F.3d at 1279 (noting that factual developments during discovery aided the district court in determining whether a political question existed); McMahon v. Presidential Airways, Inc., 502 F.3d 1331, 1361 (11th Cir. 2007) (rejecting a defendant's arguments that the political question doctrine barred the plaintiffs' claims because it was not clear from the pleadings that a political question existed).

Another consideration that may make it difficult to determine in the early stages of litigation whether a nonjusticiable political question exists is a lack of clarity as to which state's or country's law applies. *See Harris*, 724 F.3d at 474. Deciding whether a political question is inextricable from a

case necessarily requires us to know what the plaintiff must prove in order to succeed. Although there is often similarity between the tort regimes of different jurisdictions, the elements of a particular tort and the host of defenses available to the defendant can vary in significant ways. *See id.* (contrasting the tort laws of Pennsylvania, Tennessee, and Texas). This leaves open the possibility that a political question may arise under the laws of one jurisdiction but not under the laws of another. For example, in *Harris*, the Third Circuit concluded that a political question would arise under Tennessee or Texas law because their proportional liability systems would require the court to apportion fault among all possible tortfeasors, including the military. *Id.* Doing so would require the court to determine whether a particular military decision was reasonable, which raised a political question. In contrast, under Pennsylvania's joint-and-several liability system, it would be possible to impose liability on the defense contractor without needing to apportion any fault to the military or otherwise review its decisions. *Id.* Thus, at least where the potentially applicable bodies of law differ, the district court must either decide what law applies or conclude that a political question would arise under any potentially applicable body of law before it can dismiss a case as nonjusticiable.

2. Analysis

At this stage in the litigation, we find ourselves unable to undertake the "discriminating inquiry" necessary to determine if this case presents a

political question. Baker, 369 U.S. at 217. The parties have agreed, and we assume for present purposes, that the political question doctrine prevents us from evaluating the wisdom of the Navy's decision to deploy troops near the FNPP. See Corrie, 503 F.3d at 983 ("Whether to grant military or other aid to a foreign nation is a political decision inherently entangled with the conduct of foreign relations."); see also Gilligan v. Morgan, 413 U.S. 1, 10 (1973) ("The complex[,] subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments . . . ."); id. ("It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches . . . . Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence."); Johnson v. Eisentrager, 339 U.S. 763, 789 (1950) ("Certainly it is not the function of the Judiciary to entertain private litigation—even by a citizen—which challenges the legality, the wisdom, or the propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region."). In other words, step two is not in dispute. The dispute is whether Plaintiffs' claims or TEPCO's superseding causation defense would actually require the court to review the wisdom of the Navy's decisions during Operation Tomodachi.

Several considerations make it difficult for us to tell at this stage in the proceedings whether the district court would actually need to review the Navy's decisions. First, the district court has yet to

undergo a choice-of-law analysis, and the parties have briefed the issue assuming California law applies. Without knowing what body of law applies—whether it is California law, Japanese law, federal common law, or something else—we cannot know what Plaintiffs must demonstrate in order to prove their claims or what defenses are available to TEPCO. We cannot, therefore, decide with certainty that a political question is inextricable from the case. See Harris, 724 F.3d at 474–75.[14]

Even assuming California law applies, we are unable to conclude at this juncture that TEPCO's superseding causation defense injects a political question into this case. "California has adopted sections 442–453 of the Restatement of Torts, which define when an intervening act constitutes a superseding cause." *USAir Inc. v. U.S. Dep't of Navy*, 14 F.3d 1410, 1413 (9th Cir. 1994). Section 442 of the Restatement lays out several considerations used to determine whether an intervening force is a superseding cause.

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[14] TEPCO suggests that there are no material differences between the potentially applicable bodies of law, making the choice-of-law analysis irrelevant. In support of this argument, TEPCO cites to only a few pages of the record providing a brief summary of how Japanese tort law addresses causation. Aside from that, the parties have not briefed the choice of law issue. TEPCO may well be correct that the political question doctrine will bar review irrespective of the choice of law, but we will defer consideration of the matter until after the parties fully brief the issue in the district court and the district court makes a determination in the first instance.

Restatement (Second) of Torts § 442 (Am. Law Inst. 1965). The parties primarily discuss two such considerations. First, determining whether the Navy's actions were a superseding cause of Plaintiffs' injuries will require the district court to determine whether the Navy's actions were foreseeable as a result of TEPCO's negligence. As we have explained our understanding of California law,

> [a] superseding cause must be something more than a subsequent act in a chain of causation; it must be an act that was not reasonably foreseeable at the time of the defendant's negligent conduct. Moreover, even if the intervening act is negligent, it is not a superseding cause if the first actor should have known that a third person might so act.

USAir Inc., 14 F.3d at 1413 (citations omitted). Even when a third party acts negligently, it may not relieve the defendant of its own negligence where the defendant could have anticipated the acts of the third party. Rather, in that circumstance there is "concurrent or contributory causation, where both wrongful acts were necessary conditions of the harm. That there was more than one proximate or legal cause of the accident is important only for the district court's apportionment of damages." *Id.* at 1414 (citations omitted).

The district court ruled that it was foreseeable that Plaintiffs and other foreign responders would be in the area to provide aid in the wake of the earthquake and tsunami. Cooper II, 166 F. Supp. 3d at 1121. TEPCO argues, and we agree, that the proper inquiry is not whether it was foreseeable that Plaintiffs would be in the area, but whether TEPCO, in anticipation of its alleged negligence, could have foreseen the Navy's actions in response. Only if TEPCO could not have foreseen the Navy's actions and the Navy's actions caused the Plaintiffs' injuries would the Navy's conduct break the chain of proximate causation. But deciding whether a particular military action was "reasonably foreseeable" is not the same as requiring an evaluation of whether that action was itself reasonable. We cannot begin to resolve these questions at this stage in the litigation because there are basic factual disputes regarding the Navy's operations during Operation Tomodachi. [15] We

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[15] TEPCO makes much of Plaintiffs' allegations that the U.S.S. Ronald Reagan was initially positioned "two miles off the coast," while the Navy had been warned to stay at least "50 miles outside of the radius . . . of the [FNPP]." Appellant's Opening Brief 7. The SAC alleges, however, that the U.S.S. Ronald Reagan was situated so as to provide relief in the city of Sendai, which is located over fifty miles north of the FNPP. Thus, it is possible that the U.S.S. Ronald Reagan was at once two miles off the coast and fifty miles away from the FNPP. Although other portions of the SAC suggest that the U.S.S. Ronald Reagan was closer to the FNPP, where the U.S.S. Ronald Reagan was situated is unclear from the record before us, and further factual development is necessary to resolve this issue.

agree with the district court that it may "hear evidence with respect to where certain ships were located and what protective measures were taken" without running afoul of the political question doctrine. Cooper II, 166 F. Supp. 3d at 1123; see Harris, 724 F.3d at 473 ("[T]he submission of evidence related to strategic military decisions that are necessary background facts for resolving a case . . . is not sufficient to conclude that a case involves an issue textually committed to the executive.").

Second, TEPCO relies on § 452(2) of the Restatement (Second) of Torts, which provides: "Where, because of lapse of time or otherwise, the duty to prevent harm to another threatened by the actor's negligent conduct is found to have shifted from the actor to a third person, the failure of the third person to prevent such harm is a superseding cause." This provision

> covers the exceptional cases in which, because the duty, and hence the entire responsibility for the situation, has been shifted to a third person, the original actor is relieved of liability for the result which follows from the operation of his own negligence. The shifted responsibility means in effect that the duty, or obligation, of the original actor in the matter has terminated, and has been replaced by that of the third person.

Restatement (Second) of Torts § 452 cmt. d. Even assuming TEPCO is correct that the duty to protect Plaintiffs shifted from TEPCO to the Navy,[16] it is not clear that determining whether the duty shifted would raise a political question. A determination that someone other than TEPCO bore the responsibility for Plaintiffs' safety might simply absolve TEPCO of liability to Plaintiffs. The district court may not have to then decide whether the Navy fulfilled its duty to Plaintiffs.

The political question doctrine does not currently require dismissal. As the facts develop, it may become apparent that resolving TEPCO's superseding causation defense would require the district court to evaluate the wisdom of the Navy's decisions during Operation Tomodachi. But at this point, that is not clear. Further district court proceedings will help flesh out the contours of

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[16] The applicability of § 452(2) may hinge on facts that are not clear from the record before us. The comments to § 452 note that "[i]t is apparently impossible to state any comprehensive rule as to when" the responsibility to prevent harm passes to a third person, but they list various factors that play into the determination. Restatement (Second) of Torts § 452 cmt. f (stating that such factors include "the degree of danger and the magnitude of the risk of harm, the character and position of the third person who is to take the responsibility, his knowledge of the danger and the likelihood that he will or will not exercise proper care, his relation to the plaintiff or to the defendant, the lapse of time, and perhaps other considerations"). As the district court noted, the Navy's "knowledge of the danger" is unclear at this point, as is exactly how much time passed between the meltdown and the Plaintiffs' arrival. *Cooper II*, 166 F. Supp. 3d at 1122.

whatever law the district court finds applicable. TEPCO is free to raise the political question doctrine again if and when further developments demonstrate that a political question is inextricable from the case.

E. *Firefighter's Rule*

Finally, TEPCO argues that the firefighter's rule bars Plaintiffs' claims. The firefighter's rule originated at common law and "precluded firefighters from suing those whose negligence caused or contributed to a fire that, in turn, caused the firefighter's injury or death." *Vasquez v. N. Cty. Transit Dist.*, 292 F.3d 1049, 1054 (9th Cir. 2002). Despite its name, the firefighter's rule extends to more than just firefighters. *See id.* at 1054–55. It is an open question under California law, however, whether the firefighter's rule applies to military servicemembers. The district court declined to extend the firefighter's rule beyond domestic first responders. *Cooper II*, 166 F. Supp. 3d at 1127. As with the political question doctrine, the parties have briefed this issue assuming California law will apply. We decline the invitation to rule on this issue of California law, one that may well require us to certify a question to the California Supreme Court, before the district court has determined what law applies. It is unclear whether Japanese law has a doctrine similar to the firefighter's rule, and the choice of law determination may therefore obviate the need to decide whether California would extend this common law doctrine to military servicemembers. Accordingly, we provide no opinion as to whether

the firefighter's rule applies to military servicemembers and, if so, whether it bars Plaintiffs' claims.

III. CONCLUSION

We affirm the district court's denial of TEPCO's motion to dismiss. As the case develops more fully, however, the district court may reconsider dismissal as a matter of comity or under the political question doctrine or state law.

AFFIRMED.

APPENDIX E

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF CALIFORNIA

LINDSAY COOPER, ET AL, *Plaintiff* **v.** **TOKYO ELEC. POWER CO. HOLDINGS, ET AL,** *Defendant.*	Case No.: 12cv3032-JLS (JLB) AMENDED ORDER AFTER RECONSIDERATION: (1) GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS, (2) DENYING DEFENDANT'S MOTION TO DISMISS UNDER *FORUM NON CONVENIENS* AND INTERNATIONAL COMITY, AND (3) GRANTING MOTION FOR CERTIFICATION OF INTERLOCUTORY APPEAL

Presently before the Court is Defendant Tokyo Electric Power Company, Inc.'s ("TEPCO") Motion for Reconsideration or, Alternatively, for Certification of Interlocutory Appeal Under 28 U.S.C.

§1292(b). (Mot. Reconsideration, ECF No. 73.) TEPCO asks the Court to reconsider its prior Order granting in part and denying in part TEPCO's Motion to Dismiss Second Amended Complaint for Lack of Subject Matter Jurisdiction and Failure to State a Claim or, in the Alternative, to Dismiss under the Doctrines of *Forum Non Conveniens* and International Comity. (*See* SAC Order, ECF No. 69 (granting in part and denying in part TEPCO's Mot. to Dismiss, ECF No. 55.))

Having carefully considered the Parties' arguments and the law, the Court (1) **GRANTS** TEPCO's Motion for Reconsideration, (2) **MAINTAINS** its prior rulings, and (3) **CERTIFIES** this case for interlocutory appeal. This Order **AMENDS** and **SUPERSEDES** the Court's prior Order docketed as ECF No. 69.

FACTUAL AND PROCEDURAL BACKGROUND

This Order incorporates by reference the factual and procedural background set forth in the Court's Nov. 26, 2013 Order dismissing Plaintiffs' First Amended Complaint ("FAC") without prejudice. (FAC Order, Nov. 26, 2013, ECF No. 46.) This section presents a brief summary of the most relevant facts in order to provide context for the issues discussed below.

Plaintiffs are members of the U.S. military who allege that they were injured by radiation exposure when they were deployed near the Fukushima-Daichi Nuclear Power Plant ("FNPP") in Japan in the aftermath of the disastrous earthquake and

tsunami that struck that country on March 11, 2011. On December 21, 2012 Plaintiffs initiated this action against TEPCO, which owns and operates the FNPP, and subsequently filed the FAC on June 4, 2013.

1. First Amended Complaint

Plaintiffs' FAC alleged that TEPCO "conspired and acted in concert with the Japanese Government . . . to create an illusory impression that the extent of the radiation that had leaked from the site of the FNPP was at levels that would not pose a threat" to human health and safety, and that TEPCO "failed to alert public officials, including the U.S. Navy, the Plaintiffs, and the general public, to the danger of coming too close to the FNPP." (See FAC ¶¶ 70, 109, ECF No. 21.)

On November 26, 2013, the Court granted TEPCO's motion to dismiss the FAC, concluding that subject matter jurisdiction was lacking because Plaintiffs' claims were non-justiciable under the political question doctrine. (FAC Order 9, Nov. 26, 2013, ECF No. 46.) The Court determined that adjudicating Plaintiffs' claims would require impermissible scrutiny of the U.S. military's discretionary judgments regarding deployment of personnel and would also require evaluation of the Japanese Government's communications with the U.S. Government regarding the FNPP. (*Id.* at 7–9.) The Court dismissed Plaintiffs' claims with leave to amend and declined to address TEPCO's arguments for dismissal on the merits or its

arguments urging dismissal on the basis of *forum non conveniens* and international comity.

2. Second Amended Complaint

On February 5, 2014, Plaintiffs filed the Second Amended Complaint ("SAC"), omitting claims grounded in TEPCO's purported fraud and misrepresentation, and instead relying on allegations that TEPCO was negligent in the siting, design, construction, and operation of the FNPP. Plaintiffs maintain, inter alia, that TEPCO failed to adhere to basic safety requirements in designing and operating the FNPP, failed to take adequate measures to prevent and minimize nuclear accidents, and failed to develop a suitable evacuation plan in case of emergency. (SAC ¶ 109, ECF No. 50.) Plaintiffs further allege that TEPCO ignored warnings that the FNPP was at risk of significant damage from a tsunami, failed to make necessary repairs to the plant's cooling system, and failed to carry out timely inspections of other critical equipment. (Id. at ¶¶ 114, 118–19.) Plaintiffs contended that because they no longer relied on TEPCO's affirmative representations and fraud, the Court was not required to analyze any decision made by the Executive Branch of the U.S. Government, thereby avoiding the justiciability issue.

TEPCO moved to dismiss once again, arguing that Plaintiffs' revised claims did not remedy the deficiencies previously identified by the Court. (Mot. to Dismiss 1, ECF No. 55.) TEPCO filed the operative Motion to Dismiss Second Amended

Complaint for Lack of Subject Matter Jurisdiction and Failure to State a Claim or, in the Alternative, to Dismiss under the Doctrines of Forum Non Conveniens and International Comity. (Mot. to Dismiss, ECF No. 55.) In addition, Plaintiff filed a Response in Opposition (Plaintiff's Resp. in Opp'n, ECF No. 59.) and TEPCO filed a Reply in Support (Reply ISO Mot. to Dismiss, ECF No. 62.) of the Motion to Dismiss.

According to TEPCO, the new theory of liability elaborated in Plaintiffs' SAC remained inadequate because it still relied on an account of causation of injury that implicated the deployment decisions of the U.S. Navy and high-level communications between the Japanese and U.S. Governments, thereby raising the same issues of justiciability that warranted dismissal of the original pleading. (Id.) In addition, TEPCO emphasized that Plaintiffs' claims failed on the merits and that this suit should be dismissed on the grounds of forum non conveniens and international comity to allow for litigation to proceed in Japan. (Id. at 4–6.)

Additionally Plaintiffs filed a Motion to Amend Second Amended Complaint to Add Doe Defendants and Doe Plaintiffs. (Mot. to File Am. Compl., ECF No. 65.) The Court considered TEPCO's Response in Opposition, (TEPCO's Resp. in Opp'n, ECF No. 67.), and Plaintiffs' Reply in Support (Reply ISO Mot. to File Am. Compl., ECF No. 68.) of the Motion to Amend.

After oral argument the Court took both matters under submission and on October 28,

2014, the Court issued its Order granting in part and denying in part TEPCO's motion. (Order, ECF No. 69.) The Court granted TEPCO's motion to dismiss Plaintiff's strict liability and design defect claims as well as Plaintiff's claims on behalf of Doe plaintiffs. (*Id.*) The Court denied TEPCO's motion to dismiss for lack of subject matter jurisdiction. (*Id.*) In so deciding, the Court reasoned that Plaintiffs' amended theory of causation did not implicate any of the *Baker* factors and that the military judgment in this instance is not the kind that warranted application of the political question doctrine. (*Id.* at 9.) Further, the Court found that Plaintiff adequately alleged proximate causation as against TEPCO. (*Id.* at 12.) The Court determined that the Firefighter's Rule was not a bar to recovery because it does not apply to independent acts of misconduct which were not the cause of a plaintiff's presence at the scene. (*Id.* at 13.) Lastly, the Court denied TEPCO's motions to dismiss under the doctrines of *forum non conveniens* and international comity. (*Id.*)

3. Motion for Reconsideration, or Alternatively, for Certification

Subsequently, TEPCO filed a Motion for Reconsideration or, Alternatively, for Certification of Interlocutory Appeal Under 28 U.S.C. §1292(b). (Mot. Reconsideration, ECF No. 73.) Plaintiff filed a Response in Opposition to (Opp'n Reconsideration, ECF No. 84) and TEPCO filed a Reply in Support of (Reply Reconsideration, ECF No. 90) the Motion. TEPCO premises its Motion for Reconsideration on

the grounds of (1) an intervening change in controlling law in International Comity analysis and (2) clear error with respect to the Court's Causation and Firefighter's Rule analysis. (Mot. Reconsideration 1–3, ECF No. 73-1.)

TEPCO requests that if the Court does not reconsider its Order and dismiss the case, then the Court should certify the Order (or an Amended Order) for interlocutory appeal. The Court heard oral argument regarding the motion on March12, 2015.

I. RECONSIDERATION

1. Legal Standard

In the Southern District of California, a party may apply for reconsideration "[w]henever any motion or any application or petition for any order or other relief has been made to any judge and has been refused in whole or in part." Civ. L. R. 7.1(i)(1). The moving party must provide an affidavit setting forth, inter alia, new or different facts which previously did not exist. Id.

Generally, reconsideration of a prior order is "appropriate if the district court (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law." *Sch. Dist. No. 1J v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993) (citation omitted). Reconsideration is an "extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." *Kona Enters., Inc. v. Estate of*

Bishop, 229 F.3d 877, 890 (9th Cir. 2000) (citation omitted). Ultimately, whether to grant or deny a motion for reconsideration is in the sound discretion of the district court. *Navajo Nation v. Norris*, 331 F.3d 1041, 1046 (9th Cir. 2003) (citing *Kona Enters.*, 229 F.3d at 883). A party may not raise new arguments or present new evidence if it could have reasonably raised them earlier. *Kona Enters.*, 229 F.3d at 890 (citing *389 Orange St. Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999)).

2. Analysis

TEPCO premises its Motion for Reconsideration on the grounds of (1) an intervening change in controlling law and (2) clear error. (Mot. Reconsideration 1–3, ECF No. 73-1.) The Court addresses each basis in turn.

A. **Intervening Change in Controlling Law**

TEPCO alleges that an intervening change in controlling law justifies its Motion for Reconsideration. (Id. at 9.) Specifically, TEPCO argues that the Ninth Circuit's decision in Mujica v. AirScan, Inc., 771 F.3d 580 (9th Cir. 2014)—handed down two weeks after this Court's Order—substantially alters the legal standard governing international comity. (Id.) In its Order denying dismissal based on international comity, the Court relied on the three-part Ungaro-Benages test, analyzing: (1) the strength of the U.S.'s interests in using a foreign forum, (2) the strength of the foreign government's interests, (3) and the adequacy of the

foreign forum. Ungaro-Benages v. Dresdner Bank AG, 379 F.3d 1227, 1232 (11th Cir. 2004).

TEPCO argues that reconsideration is warranted in light of the Ninth Circuit's substantial revision and elaboration of the factors to be considered in evaluating the first two elements of the Ungaro-Benages framework. 1 (Mot. Reconsideration 10, ECF No. 73-1.) TEPCO notes that while the court in Mujica endorsed Ungaro-Benages' framework as a useful starting point, it held that the framework lacked substantive standards for assessing its three factors and did not provide sufficient guidance to district courts. (Id. at 5.) The Mujica court articulated a five-factor test that may be applied in assessing the interests of the respective countries2 and TEPCO contends that the Court should consider this guidance now. (Id.) With respect to both the U.S. and foreign country's interests, the Ninth Circuit held that courts should consider the nonexclusive factors including:

> (1) the location of the conduct in question, (2) the nationality of the

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[1] With respect to the third element—adequacy of the foreign forum—the *Mujica* court held that the focus should be on procedural fairness in the forum and whether the opponent has presented specific evidence of significant inadequacy. *Id.* at 607–08. TEPCO states that *Mujica* did not change the standards governing the adequacy of the foreign forum, and in any case, the Court found Japan to be an adequate alternative forum.

[2] The *Mujica* court held that the "proper analysis of foreign interests essentially mirrors the consideration of U.S. interests." 771 F.3d at 607.

> parties, (3) the character of the conduct in question, (4) the foreign policy interests of the United States, and (5) any public policy interests.

Mujica, 771 F.3d at 604, 607. Under a renewed analysis using *Mujica*'s five factors, TEPCO contends that the case should be dismissed. Plaintiff responds that although *Mujica* clarified how a district court should evaluate a comity claim, it left unchanged the primary factors a court should use in deciding the claim. (Opp'n 8, ECF No. 84.)

The Court **AGREES** with TEPCO that *Mujica*'s holding is relevant in this case, and a renewed analysis in light of the opinion is warranted. Accordingly, the Court **AMENDS** its Order below to incorporate the *Mujica* factors. (*See infra* pp. 39–49.)

B. Clear Error

TEPCO contends that reconsideration is warranted due to clear error in the Court's Order regarding its (1) superseding cause analysis and (2) application of the Firefighter's Rule. (Mot. for Reconsideration 17, ECF No. 73-1.)

The Court **AGREES** with TEPCO that in light of its allegations of clear error, a renewed analysis of the Order is warranted. Accordingly, the Court **AMENDS** its Order to incorporate the Parties' supplemental arguments and to clarify its ruling. (*See infra* pp. 8–24.)

C. Conclusion

Accordingly, the Court **AMENDS** the following sections, taking into account the parties subsequent briefing on reconsideration: Subject Matter Jurisdiction, Proximate Causation, Firefighter's Rule, and International Comity.

II. TEPCO'S MOTION TO DISMISS PLAINTIFFS' SAC FOR LACK OF SUBJECT MATTER JURISDICTION AND FAILURE TO STATE A CLAIM OR, IN THE ALTERNATIVE, TO DISMISS UNDER THE DOCTRINES OF FORUM NON CONVENIENS AND INTERNATIONAL COMITY

SUBJECT MATTER JURISDICTION

TEPCO moves to dismiss Plaintiffs' SAC for lack of subject matter jurisdiction, arguing that the SAC raises nonjusticiable political questions.

1. Legal Standard

A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) challenges a court's subject matter jurisdiction. Federal district courts are courts of limited jurisdiction that "may not grant relief absent a constitutional or valid statutory grant of jurisdiction" and are "presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears." *A–Z Int'l v. Phillips*, 323 F.3d 1141, 1145 (9th Cir. 2003) (internal quotations omitted).

"[D]isputes involving political questions lie outside of the Article III jurisdiction of federal courts." *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 980 (9th Cir. 2007).

The political question doctrine forecloses judicial review of controversies which revolve around policy choices constitutionally committed to Congress or the Executive branch. *Japan Whaling Ass'n v. Am. Cetacean Soc.*, 478 U.S. 221, 230 (1986). Like other doctrines of justiciability, such as standing, mootness, and ripeness, the political question doctrine is grounded in respect for the Constitution's separation of powers. *See Baker v. Carr*, 369 U.S. 186, 210 (1962) ("The nonjusticiability of a political question is primarily a function of the separation of powers."). A case should be dismissed on political question grounds if one of the following characteristics is present:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; [2] a lack of judicially discoverable and manageable standards for resolving it; [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id.

Determining whether a case involves a nonjusticiable political question requires a "discriminating inquiry into the precise facts and posture of the particular case." *Id.* at 217. Courts must analyze "the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in light of its nature and posture in the specific case, and of the possible consequences of judicial action." *Id.* at 211–12. While many cases involving foreign relations or the military invoke the political question doctrine, "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Id.* at 211. Courts must determine, in light of the Baker factors, "whether the military judgment is the kind that warrants application of the political question doctrine." *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1358 (11th Cir. 2007). The court "must analyze [a plaintiff's] claim as it would be tried, to determine whether a political question will emerge." *Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 572 F.3d 1271, 1281 (11th Cir. 2009) (citing *Occidental of Umm al Qaywayn, Inc. v. A. Certain Cargo of Petroleum*, 577 F.2d 1196 (5th Cir. 1978)).

2. Analysis

TEPCO argues that the first, second, third, and fourth Baker factors are implicated in

Plaintiffs' theory of causation, and that the Court, therefore, lacks subject matter jurisdiction over this case. (Mot. to Dismiss 16–17, ECF No. 55.)

Plaintiffs maintain that they have "redirected the focus of their claims" away from TEPCO's alleged misrepresentations and fraud, and toward TEPCO's negligent acts and omissions prior to, and during, the nuclear accident at the FNPP. (Plaintiffs' Resp. in Opp'n 6, ECF No. 59.) According to Plaintiffs, because the SAC no longer rests on the theory that TEPCO's misrepresentations influenced military judgments regarding deployment of personnel and assets, the Court need not "stand in judgment over any decision made by the Executive Branch of the U.S. Government." (Id. at 1.) Plaintiffs contend that their action as amended is now merely one for "ordinary negligence," which can be resolved through the application of "traditional tort standards" that do not raise political questions. (Id. at 10.) In particular, the SAC seeks to impose liability for TEPCO's "intentional and negligent oversight in construction, design, regulatory compliance, maintenance, training, emergency readiness, emergency responses, and decision making during the emergency." (Id. at 11–12.)

TEPCO rejects this characterization of the SAC. Despite Plaintiffs' efforts to re- style their pleading by dropping their cause of action for fraud, TEPCO contends that Plaintiffs are nonetheless required to "plead and prove that the chain of causation [of injury] was not broken by the U.S. Navy's independent decisionmaking about where to locate

the vessels and what protective measures to take." (Reply ISO Mot. to Dismiss 3, ECF No. 62.) Because the Navy's contribution to causation remains in issue, TEPCO argues that the Court cannot adjudicate Plaintiffs' negligence claims without implicating several of the Baker factors. TEPCO asserts that Plaintiffs continue to rely on concealment by TEPCO and the Japanese government.

After reevaluating the "chain of causation" in this case, the Court agrees with Plaintiffs that the SAC as amended no longer requires the Court to evaluate the discretionary actions of the U.S. military or communications between the Japanese and U.S. Governments. In reaching this decision the Court must make a "discriminating inquiry into the precise facts and posture" of this case.

A. Factual Causation

Causation in fact is one necessary element in causation analysis. See USAir, Inc. v. U.S. Dept. of Navy, 14 F.3d 1410, 1413 (9th Cir. 1994) (citing Maupin v. Widling, 192 Cal.App.3d 568, 237 Cal.Rptr. 521, 524 (Cal. Ct. App. 1987)).

As alleged, TEPCO's negligence was a factual cause of Plaintiff's injuries. Plaintiffs allege that TEPCO failed to adhere to basic safety requirements in designing and operating the FNPP, failed to take adequate measures to prevent and minimize nuclear accidents, failed to develop a suitable evacuation plan in case of emergency, failed to make necessary repairs to the plant's

cooling system, failed to carry out timely inspections of critical equipment, and ignored warnings that the FNPP was at risk of significant damage from a tsunami. (SAC ¶¶ 109, 114, 118–19, ECF No. 50.) These negligent acts, in conjunction with the earthquake and tsunami, led to the FNPP's ultimate failure which caused Plaintiffs and many other people within the FNPP's vicinity to fall ill.

The Navy's decision to deploy personnel and assets in support of Operation Tomodachi is also a factual cause of Plaintiff's injuries. Accepted as true, the SAC states that the Navy transported Plaintiffs into the vicinity of the FNPP in response to the earthquake and tsunami in order to provide humanitarian relief to Japan. Aside from transporting Plaintiffs into the area, the executive branch had no role in the chain of causation for Plaintiffs' injuries as alleged in the SAC.

B. Proximate Causation

TEPCO contends that the U.S. military's contribution to causation should limit its liability in this case. If the U.S. military's actions were a superseding cause that cut off TEPCO's liability, TEPCO's allegedly negligent acts or omissions were not a proximate cause of Plaintiffs' injuries. *See USAir*, 14 F.3d at 1413.

(i) Legal Standard

The doctrine of proximate causation limits liability. 6 Witkin, Summary 10th (2005) Torts, Cause in Fact and Proximate Cause s. 1186, p. 553 (2012). In certain situations where the defendant's conduct is an actual cause of plaintiff's harm, the defendant will nevertheless be absolved where there is an independent intervening act that was not reasonably foreseeable. *Id.*; *Farr v. NC Mach. Co.*, 186 F. 3d 1165, 1169 (9th Cir. 1999) ("the doctrine of superseding intervening cause is at bottom an expression of the requirement of foreseeability" (citing Robert E. Keeton, Legal Cause In the Law of Torts 38–41 (1963)); *See Akins v. Sonoma Cnty.*, 67 Cal. 2d 185, 199 (1967) (Whether defendant is liable "revolves around a determination of whether the later cause of independent origin . . . was foreseeable by the defendant or, if not foreseeable, whether it caused injury of a type which was foreseeable"). A superseding cause must be something more than a subsequent act in a chain of causation:

> It must be an act that was not reasonably foreseeable at the time of the defendant's negligent conduct. Moreover, even if the intervening act is negligent, it is not a superseding cause if the first actor should have known that a third person might so act.

USAir, 14 F.3d at 1413 (citing Restatement (Second) of Torts § 447(a)); *Earp v. Nobmann,* 122 Cal.App.3d 270, 175 Cal.Rptr. 767, 780 (Cal. Ct. App. 1981).

California has adopted sections 442 through 453 of the Restatement (Second) of Torts. *USAir*, 14 F.3d at 1413. These sections discuss whether an intervening force should be considered a "superseding cause" thereby limiting an actor's liability for harm which his antecedent negligence was a substantial factor in bringing about. Restatement (Second) of Torts §§ 440–53 (1965). Relevant considerations include:

> (a) the fact that its intervention brings about harm different in kind from that which would otherwise have resulted from the actor's negligence; (b) the fact that its operation or the consequences thereof appear after the event to be extraordinary rather than normal in view of the circumstances existing at the time of its operation; (c) the fact that the intervening force is operating independently of any situation created by the actor's negligence, or, on the other hand, is or is not a normal result of such a situation; (d) the fact that the operation of the intervening force is due to a third person's act or to his failure to act; (e) the fact that the intervening force is due to an act of a third person which is wrongful toward the other and as such subjects the third person to liability to him; (f) the degree of culpability of a wrongful act

> of a third person which sets the intervening force in motion.

Usually, "the failure of a third person to act to prevent harm to another threatened by the actor's negligent conduct is not a superseding cause of such harm." *Id.* § 452(1). However, section 452(2) covers the exceptional case where the entire responsibility for a situation has been shifted to a third party:

> Where, because of lapse of time or otherwise, the duty to prevent harm to another threatened by the actor's negligent conduct is found to have shifted from the actor to a third person, the failure of the third person to prevent such harm is a superseding cause.

Where a third person has the opportunity to take affirmative action to avert the threatened harm, various factors should be considered, including: "the degree of danger and the magnitude of the risk of harm, the character and position of the third person who is to take responsibility, his knowledge of the danger and the likelihood that he will or will not exercise proper care, his relation to the plaintiff or to the defendant, the lapse of time, and perhaps other considerations." Restatement (Second) of Torts § 452(2) cmt. f.

(ii) Analysis

TEPCO argues that the Navy's independent decision to send the U.S.S. Reagan to Japan was a superseding cause of Plaintiffs' harm, which limited TEPCO's liability by breaking the chain of proximate causation. To determine whether the Navy's decision was a superseding cause, TEPCO argues that the Court will be required to evaluate the discretionary decisions of military commanders, which would invoke a political question and deprive the Court of subject matter jurisdiction.

As a threshold matter, the Court notes that superseding cause is usually a factual issue that would be determined by a jury. See Benefiel v. Exxon Corp., 959 F.2d 805, 808 (9th Cir. 1992). However in the instant case, TEPCO argues that where the military's discretionary decision making is a step in the chain of causation of injury, the inquiry into whether the Navy's decision could be a superseding cause would necessarily raise a nonjusticiable political question, thus depriving the Court of jurisdiction. Although TEPCO argues that under these circumstances the inquiry itself raises a non-justiciable political question, the Court must look at the nature and extent of the military's involvement and decide whether it is the type of case where a political question is necessarily implicated. *See McMahon*, 502 F.3d 1331 (11th Cir. 2007) (not all cases involving the military are necessarily foreclosed by the political question doctrine).

(a) Foreseeability

At the outset, TEPCO argues that "it was not foreseeable that the most sophisticated military in the world [would] place its servicemembers 'two miles' from the FNPP and do so after Unit 1 had already exploded and the risk of radiation was well-known." (Mot. Reconsideration 18, n.5, ECF No. 73-1(citing NY Times articles which came out the day of and the day after the tsunami when Plaintiffs allegedly arrived off the coast of Japan).)

On the other hand, Plaintiffs argue that TEPCO was aware of the risks of engaging in an ultra-hazardous activity, aware of the applicable safety standards, aware of the potential for an earthquake, aware that in the past, the U.S. and other allies had provided humanitarian aid in the aftermath of earthquakes and other emergencies, and that harm to foreign relief workers in the vicinity was foreseeable. (Opp'n Reconsideration 24–25, ECF No. 84.) Plaintiffs argue that TEPCO's unstated assertion is that the Navy was negligent in entering the radioactive zone. (Id. at 26.) However, Plaintiffs allege that upon discovering the increasing radioactivity, the Military Command ordered its fleet further out to sea. (Id.) Plaintiffs contend that it is unreasonable to believe that Military Command would knowingly place itself and its crewmembers in a zone of life-threatening radioactivity. (Id.)

At this early stage in the proceedings, TEPCO does not persuade the Court that the U.S. military's decision-making could constitute a superseding cause of Plaintiffs' injuries. It is foreseeable that as

a result of an improperly designed and maintained nuclear plant, people present in the vicinity would be adversely affected by radiation. Likewise, the Navy's presence in this scenario was foreseeable. In the aftermath of a natural disaster, it is foreseeable that foreign military and aid-workers would be among those in the vicinity. It would be improper to shift the entire responsibility from TEPCO to the Navy where the Navy's actions were a foreseeable consequence of the very negligence alleged against TEPCO. "In line with the fundamental rule of foreseeability, the courts have largely abandoned the effort to construct a rule of law that exculpates the first actor merely because a second actor has discovered the danger and could avoid it." Dan B. Dobbs, Paul T. Hayden and Ellen M. Bublick, The Law of Torts 213 (2d ed.).

Even if TEPCO claims that the Navy was somehow negligent, "it is not a superseding cause if the first actor should have known that a third person might so act" or if the action of the third party was not highly extraordinary given the circumstances. *USAir*, 14 F.3d at 1413; Restatement (Second) of Torts § 447. The SAC alleges that the Navy's actions were reasonable. Plaintiffs contend that once the U.S.S. Reagan detected unsafe levels of radiation, the ship withdrew from the area. Further, TEPCO presents no facts showing the U.S. military's precautions were inadequate or unreasonable. TEPCO only points out that the Navy is a sophisticated entity with the independent capability of knowing the risks incident to a natural disaster. (Mot. to

Dismiss 25, ECF No. 55.) As discussed above, the Navy's actions were foreseeable, they appear to be reasonable in light of Plaintiffs' SAC, and they do not overwhelm and supplant TEPCO's negligence.

(b) Third Party's Failure to Prevent Harm

In addition, although TEPCO did not initially rely on the Restatement, in its Motion for Reconsideration TEPCO states that its "superseding cause argument is embodied by section 452(2)": Third Person's Failure to Prevent Harm. (Id. at 20.) TEPCO argues that the factors as outlined in the Restatement's comment show that the Navy's decision to send servicemembers into this dangerous situation may act as a superseding cause and litigation of this case will therefore require an inquiry into the Navy's decision making. (Id. at 22.) First, TEPCO states that the Navy's character and position enabled it to take responsibility to prevent Plaintiffs from radiation. (Id.) Second, TEPCO argues, it is unlikely that the Navy would not exercise proper care. (Id.) Third, the Navy has complete control over servicemembers and a duty to care for and protect them. (Id.) Fourth, TEPCO contends that the lapse of time makes it clear that the Navy had actual knowledge of the danger of radiation. (Id.)

The Court is not persuaded by TEPCO's "third party failure to prevent harm" argument. Analysis of the relevant factors does not establish that the Navy's actions constituted a supervening cause and that duty shifted from TEPCO to the Navy. First, the degree of danger and the magnitude of the risk

of harm were great because TEPCO was conducting the ultra-hazardous activity of running a nuclear power plant. In addition, the Navy's knowledge of the danger is unclear at this stage in this litigation. Although there appears to have been general knowledge of the potential nuclear leak, the extent of the leak and the magnitude of danger were likely unknown, especially given the close time frame between the disaster and the Navy's arrival. Even assuming the Navy knew of the existence of the leak, it is likely that the Navy exercised proper care over the servicemembers. Next, although the Navy was in the position to take responsibility for the care of the servicemembers, it is not mutually exclusive that the Navy acted reasonably and that harm also resulted. In addition, the Navy had no relationship with TEPCO. Lastly, there was only a short lapse of time between the disaster and the Navy's arrival, within one day, and this was amidst an ongoing humanitarian disaster.

(c) *Baker* Factors

Moreover, in light of the specific factual posture of this case, as discussed above, the Court does not find any Baker factors or separation of powers concerns to be implicated. While deployment decisions regarding military personnel operating in a disaster zone are essentially professional military judgments, and therefore could implicate a political question, here no military judgments need be reviewed. The crux of the case is not whether the decision to deploy or the actions taken during the deployment were reasonable. The Navy's choices

only incidentally come into play as a potential affirmative defense to Plaintiffs' theory of negligence, and as discussed above, that theory is likely not viable.

The first Baker factor "is primarily concerned with direct challenges to actions taken by a coordinate branch of the federal government. *Lane v. Haliburton*, 529 F.3d 548, 560 (5th Cir. 2008). Here, Plaintiffs are not challenging the executive decision to offer aid to Japan or questioning U.S. foreign relations decisions. Next, in resolving this case, the Court will rely on well-established tort standards for judging a private corporation's negligence, and thus the second *Baker* factor is not implicated.

Plaintiffs ask the court to judge TEPCO's policies and actions, not those of the military or Executive Branch, and accordingly, the third Baker factor is not implicated. To recover, Plaintiffs do not need this Court to evaluate the Executive's longstanding policy of deploying military to assist with humanitarian aid. All parties accept that the Executive acted within its discretionary authority to deploy the U.S.S. Reagan to support the humanitarian mission in Japan. (See RT 29, ECF No. 99.) TEPCO's "intended defense has not been shown as legitimately implicating this broad, policy-based decision." See Lane, 529 F.3d at 563.

And unlike the other cases presented before the court where the circumstances were thoroughly pervaded by military judgments and decisions, here, the allegedly negligent conduct is easily separated from the actions of the U.S. Navy both temporally

and factually. Cf. Carmichael, 572 F.3d at 1282–83 (suit against military contractor related to driver's negligence in an Iraqi convoy accident nonjusticiable because convoy controlled by U.S. military); Corrie, 503 F.3d at 980 (Palestine nationals suing private corporation for selling bulldozers to Israel where bulldozers approved and paid for by U.S.); Taylor v. Kellogg Brown & Root Servs., Inc., 658 F.3d 402 (4th Cir. 2011) (political question barred negligence claim against military contractor working in combat zone when unauthorized military personnel interfered with repair of electrical box). TEPCO is not a military contractor or otherwise under the control or direction of the United States.

Were the actions of TEPCO and the military so intertwined that to question TEPCO's decisions would necessarily question the Navy's decisions, any contribution to causation could very well raise a nonjusticiable political question. However, it is unclear from TEPCO's briefing and oral argument how resolving this case would question or impose upon the discretionary decisions of the executive branch. (See RT 22-38, ECF No. 99.) TEPCO thinks that in hearing this case, the Court would have to question how the mission was conducted. However, at this point, the Court thinks it could hear evidence with respect to where certain ships were located and what protective measures were taken without passing judgment on the executive's decisions. Therefore, the fourth Baker factor is not implicated. Accordingly, because the Court finds that Plaintiffs' amended theory of causation does

not implicate any of the Baker factors, the Court need not delve into the discretionary decisions of the executive branch, and the military judgment in this instance does not warrant application of the political question doctrine.

The Court notes that Plaintiffs substantively changed their theory of the case in the SAC in order to alleviate the Court's justiciability concerns. Plaintiffs' FAC relied on the Japanese Government and TEPCO's deception regarding the condition of the FNPP. Plaintiffs' alleged a chain of causation involving TEPCO's communications with the Navy and the Navy's reliance on those misrepresentations. This necessarily included the issue of whether the Navy justifiably relied on TEPCO's misrepresentations and whether the Navy made an informed decision in deploying personnel near the FNPP. See Corrie, 503. F.3d at 983 ("Whether to grant military or other aid to a foreign nation is a political decision inherently entangled with the conduct of foreign relations."). Accordingly, the Court dismissed the FAC as nonjusticiable.

However, the SAC omits these allegations. The SAC no longer alleges that had it not been for TEPCO's distribution of false information regarding radiation levels at the FNPP, military commanders would have adopted a different course of action. Similarly, the SAC no longer alleges that "but for TEPCO's allegedly wrongful conduct, the military would not have deployed personnel near the FNPP or would have taken additional measures to protect service members from radiation exposure." (Order 7,

Nov. 26, 2013, ECF No. 46.) Moreover, Plaintiffs no longer specifically allege that the Japanese Government was TEPCO's 'co-conspirator' in providing misleading information to the Navy, (Mot. to Dismiss 18, ECF No. 55.), and, the Court therefore need not examine the Japanese Government's disclosures to the U.S. military. (*See* Reply in Supp. 7–9, ECF No. 62.)

The "residual factual allegations asserting (1) TEPCO's affirmative misrepresentations that the conditions at the reactor complex were within safe limits, and (2) that the radioactive release was far more dangerous than TEPCO communicated, are **not** the basis of Plaintiff's claims in the SAC." (Resp. in Opp'n 11, ECF No. 59.) TEPCO argues throughout its motion to dismiss that these statements continue to support its political question defense. However, these allegations, "although included in the SAC," are not the basis for Plaintiffs current claims as is evident from the briefing and oral argument. TEPCO's motion to dismiss for lack of subject matter jurisdiction is therefore **DENIED**.

FAILURE TO STATE A CLAIM

1. Legal Standard

Federal Rule of Civil Procedure 12(b)(6) permits a party to raise by motion the defense that the complaint "fail[s] to state a claim upon which relief can be granted." The Court evaluates whether a complaint states a cognizable legal theory and sufficient facts in light of Federal Rule of Civil

Procedure 8(a), which requires a "short and plain statement of the claim showing that the pleader is entitled to relief." Although Rule 8 "does not require 'detailed factual allegations,' . . . it [does] demand[] more than an unadorned, the-defendant-unlawfully-harmed-me accusation." Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)). In other words, "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555 (citing Papasan v. Allain, 478 U.S. 265, 286 (1986)). "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" Iqbal, 129 S. Ct. at 1949 (citing Twombly, 550 U.S. at 557).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Id. (quoting Twombly, 550 U.S. at 570); see also Fed. R. Civ. P. 12(b)(6). A claim is facially plausible when the facts pled "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. (citing Twombly, 550 U.S. at 556). That is not to say that the claim must be probable, but there must be "more than a sheer possibility that a defendant has acted unlawfully." Id. Facts "'merely consistent with' a defendant's liability" fall short of a plausible entitlement to relief. Id. (quoting Twombly, 550 U.S. at 557). Further, the Court need not accept as true "legal conclusions" contained in the complaint. Id.

This review requires context-specific analysis involving the Court's "judicial experience and common sense." Id. at 1950 (citation omitted). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" Id. Moreover, "[f]or a complaint to be dismissed because the allegations give rise to an affirmative defense[,] the defense clearly must appear on the face of the pleading." McCalden v. Ca. Library Ass'n, 955 F.2d 1214, 1219 (9th Cir. 1990) (internal quotation marks omitted).

Where a motion to dismiss is granted, "leave to amend should be granted 'unless the court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency.'" DeSoto v. Yellow Freight *Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992) (quoting *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986)). In other words, where leave to amend would be futile, the Court may deny leave to amend. *See Desoto*, 957 F.2d at 658; *Schreiber*, 806 F.2d at 1401.

2. Analysis

TEPCO moves to dismiss each of Plaintiffs' asserted causes of action for failure to state a claim for which relief could be granted. The Court considers each of TEPCO's arguments in turn.

A. Proximate Causation

TEPCO contends that Plaintiffs fail to satisfy the crucial element of proximate causation, such that all nine of their claims must be dismissed because there is no plausible connection between TEPCO's allegedly wrongful conduct and Plaintiffs' injuries. TEPCO relies on the same argument discussed above regarding the U.S. military's role in causation and its unlikely reliance on TEPCO's representations. (Mot. to Dismiss 21, ECF No. 55.) As discussed above, the Court finds that Plaintiffs have sufficiently pled proximate causation. As alleged, Plaintiff's harms were directly caused by TEPCO's negligence and Plaintiffs no longer contend that the military based its decision to deploy on TEPCO's representations.

Additionally, the Court finds TEPCO's reliance on the Ninth Circuit's decision in Galen v. Cnty. of L.A., 477 F.3d 652 (9th Cir. 2007), and the First Circuit's decision in Jacob v. Curt, 898 F.2d 838 (1st Cir. 1990), to be misplaced. TEPCO contends that "when the decisionmaking of a government body is an essential step in the chain of causation of injury, a plaintiff's burden to plead and prove proximate causation requires a showing that the government's decisionmaking was not the result of its own independent judgment." (Mot. to Dismiss 21, ECF No. 55.)

In both cases, plaintiffs sued individuals who had made statements leading to a later independent government decision. In Galen, the court identified that California law vests judicial officers with "the exclusive authority to enhance or reduce bail." 477

F.3d at 663. Therefore, a deputy's recommendation with respect to setting bail could not subject that deputy to liability for the judicial officer's decision. Id. In Jacob, the court held that a researcher could not be found liable for a foreign government's decision to close a health clinic because of the researcher's prior article criticizing the clinic. 898 F.2d at 839. In Galen and Jacob, due to the nature of the successive independent decisions, the government officials who made the subsequent decisions were the exclusive proximate cause of plaintiffs' harm. In both cases, the courts held that the independent government decisions were superseding causes that broke the chain of causation.

The situation before the Court is factually and legally distinguishable from these two cases. As alleged, TEPCO's negligence was unrelated to the Navy's decision to offer aid to Japan. As discussed previously, the Navy's decision to offer aid to Japan and to transport servicemembers into the area as part of that mission did not supplant TEPCO's allegedly negligent behavior. The Court finds that the SAC sufficiently alleges that TEPCO's negligence was a proximate cause of Plaintiffs' injuries. Accordingly, the Court DENIES TEPCO's motion to dismiss on this basis.

B. Firefighter's Rule

TEPCO contends that Plaintiffs' recovery is barred under the "firefighter's rule," because as professional rescuers, they cannot recover for injuries caused by a hazard incident to the situation

to which they responded. (Mot. to Dismiss 22, ECF No. 55.) TEPCO maintains that Plaintiffs, as members of the U.S. Armed Forces participating in Operation Tomodachi, were acting as professional rescuers and are therefore covered by the "firefighter's rule." (Id. at 23 (citing Maltman v. Sauer, 530 P.2d 254, 257–58 (Wash. 1975).)

TEPCO argues that the same event which drew the Navy also caused, in combination with another's tortious conduct, a further consequence that harmed the responders. (Mot. Reconsideration 24, ECF No. 73-1.) TEPCO argues that this factual situation is evident in several cases and that the Firefighter's Rule consistently bars liability. TEPCO contends that the case that most squarely addresses this fact pattern is White v. Edmond, 971 F.2d 681 (11th Cir. 1992), in which the plaintiff firefighter responded to a fire and then, as a direct result of the fire, the allegedly negligently designed shock absorbers on a Volvo in the garage exploded and injured the firefighter. Id. at 682–83. The Court held that the Fireman's Rule barred suit against the manufacturer because the "possibility of an unexpected explosion" was within the range of "anticipated risks of firefighting." Id. at 689.

TEPCO points to a distinction within the cases where a defect manifests itself coincident with rather than because of the event. (Id. at 25–26.) For example, in Stapper v. GMI Holdings, Inc., 73 Cal. App. 4th 787 (1999), the plaintiff firefighter was injured when, during the course of a house fire, the defendant's allegedly defectively designed garage

door opener malfunctioned and plaintiff was trapped in the garage. Id. at 790. The Court noted that, because the plaintiff alleged that the door malfunction was not caused by the fire, plaintiff's claim was not barred by the firefighter's rule. Id. at 793 n.2; see also Lipson v. Superior Court, 31 Cal. 3d 362 (1982) (explaining firefighter's rule would not apply to a gasoline tank explosion which occurred independently of an electrical fire which was responsible for a fireman's presence at the house) and Rowland v. Shell Oil Co., 179 Cal. App. 3d 399 (1986) (where truck driver failed to properly handle his vehicle and it tipped over, leading in turn to a "chemical spill" from the vehicle, the court held that the negligence that triggered the accident was not independent of the resulting spill, and therefore the firefighter's ultrahazardous-liability claim for injuries incurred while responding to the spill were barred by the firefighter's rule).

Here, TEPCO argues, the negligence was not independent of the tsunami/earthquake, but a shared underlying cause of Plaintiffs' injuries. (Mot. Reconsideration 26, ECF No. 73-1.) Further, TEPCO argues that the Navy knew of the risk of radiation, so it was reasonable to anticipate the harm and therefore it was a risk inherent in responding to the natural disaster. (Id. at 26–27.) Accordingly, because Plaintiffs' injuries were due to a shared underlying cause created by defendant and the condition that brought the rescuer to the scene, the Firefighter's Rule should be a bar to liability. (Id. at 27.) However, Plaintiffs contend that the firefighter's rule does not apply to them because a

nuclear meltdown is not a risk inherent in offering humanitarian assistance. See Solgaard v.Guy F. Atkinson Co., 6 Cal.3d 361, 369 (1971). Further, the firefighter's rule does not bar recovery for independent acts of misconduct which were not the cause of the plaintiff's presence on the scene. Donahue v. S.F. Hous. Auth., 16 Cal.App.4th 658, 663 (1993).

Although TEPCO draws on similarities between certain cases and the current situation, the Court agrees with Plaintiffs that the SAC is not barred by the firefighter's rule. First, there is no authority extending the application of the Firefighter's Rule outside of the context of domestic first responders such as firefighters or police officers.34 The Court will not extend the Firefighter's Rule to this type of circumstance absent authority to do so. Second, the cases on which TEPCO relies are distinguishable based on the scope of the scene and the associated scope of risk. In contrast to providing humanitarian aid to a country after a natural disaster, when a firefighter or police officer responds to a fire or a car accident, the geographic area is limited and the anticipated risks are

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[4] TEPCO cites to *Maltman v. Sauer*, to support the proposition that "Army servicemembers responding to accidents" are barred by the Firefighter's Rule. 530 P.2d 254, 257–58 (Wash. 1975). The Court finds this broad statement to be misleading. In *Maltman*, an army helicopter was dispatched to a car accident scene in Washington state as part of the Military Assistance to Safety and Traffic rescue program. (*Id.* at 256.) Subsequently the helicopter crashed en route to the accident. (*Id.*)

confined to that fixed situation. In light of the facts of this case, the Court finds that radiation exposure due to a private corporation's negligence was not a risk inherent in the Navy's mission of providing humanitarian assistance, including: supplying food, water, and emergency shelter. Accordingly, the Court **DENIES** TEPCO's motion to dismiss Plaintiffs' claims on this basis.

C. TEPCO's Duty of Care with Respect to Plaintiffs' Claims of Negligence, Negligence Per Se, Res Ipsa Loquitur, Failure to Warn, and Nuisance

TEPCO argues that Plaintiffs' claims for negligence, failure to warn, and nuisance must be dismissed because TEPCO owed no duty of care to Plaintiffs. TEPCO relies on two arguments in support of it's contention. First, there was no need to warn the U.S. military about potential radiation because "it would be inappropriate, as a matter of substantive tort law, for the court to recognize an innovative judge-made duty of foreign sovereigns and foreign entities to provide disclosures to other sovereigns in the context of a large-scale humanitarian crisis." (Mot. to Dismiss 25, ECF No. 55). Second, TEPCO contends that it had no duty to warn a sophisticated entity such as the Navy regarding known risks of operating in a disaster zone especially as the U.S.S. Reagan had nuclear detection capabilities. (*Id.*) Both of these arguments appear to be only related to TEPCO's duty to warn the U.S. military in the context of negligence. TEPCO does not address any independent duty

owed to Plaintiffs as individuals in the area. (Reply ISO Mot. to Dismiss 14, ECF No. 6.) Further, TEPCO does not address the merits of Plaintiffs' Strict Products Liability Failure to Warn or Nuisance claims.[5]

Plaintiffs respond by arguing that TEPCO owed an absolute duty to all persons within the vicinity of the FNPP. (Plaintiff's Resp. in Opp'n 18, ECF No. 59.) As discussed above, the SAC alleges a chain of causation independent from the decisions made by the Navy. Thus, TEPCO owed Plaintiffs the same duty of care it owed to those in the vicinity of the FNPP in reasonably operating the FNPP. TEPCO's two arguments have no bearing on whether it owed a duty to the individual servicemembers. In light of the Court's decision regarding causation and the Parties' arguments, the Court **DENIES** TEPCO's motion to dismiss Plaintiffs' claims on this basis.

D. Actual and Justifiable Reliance

TEPCO moves to dismiss Plaintiffs' negligence claim arguing that the claim is based in large part on negligent misrepresentation and argues that Plaintiff did not demonstrate actual and justifiable reliance. (Mot. To Dismiss 26, ECF No. 55.) Plaintiffs contend that this issue is irrelevant because they are not asserting a negligent misrepresentation claim. (Plaintiff's Resp. in Opp.

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[5] The Court has serious concerns that Plaintiffs claims for Strict Liability Failure to Warn and Nuisance cannot stand as a matter of law.

24, ECF No. 59.) Because Plaintiffs are pursuing no such claim, the Court **DENIES** as moot TEPCO's motion to dismiss Plaintiffs' negligence claim on this basis.

E. Strict Liability for Design Defect

A strict liability for design defect claim has four elements: (1) the product is placed on the market, (2) there is knowledge that it will be used without inspection for defect, (3) the product is defective, and (4) the defect causes injury. Nelson v. Sup. Ct., 50 Cal. Rptr. 3d 684, 688 (Cal. Ct. App. 2006).

TEPCO moves to dismiss Plaintiffs' strict liability design defect claim, arguing that Plaintiffs fail to allege facts supporting the claim that the FNPP is a product "placed on the market." (Mot. to Dismiss 28, ECF No. 55.) Because the FNPP is a nuclear power facility that was owned by TEPCO at all times and was never transferred to a different "user," TEPCO argues that Plaintiffs' design defect claim must fail. (Id. at 28–29.) Plaintiffs argue that Defendants placed the electricity from the FNPP on the market which was stored and manufactured in the FNPP and that this should lead to strict liability for design defect. (Plaintiff's Resp. in Opp'n 31, ECF No. 59.)

Plaintiff's design defect claim lacks merit. Plaintiffs may not ignore elements of the design defect cause of action simply because it would make sense to apply liability in light of the potential for injury to the public. Plaintiffs do not persuasively explain how a design defect claim is viable in light

of these facts. The product, electricity, was not defectively designed and did not cause Plaintiff's injuries. The FNPP was evidently not a product "placed on the market." The alleged defects in storage and design do not support a defective design claim. Accordingly, the Court **GRANTS** TEPCO's motion to dismiss Plaintiffs' design defect claim **WITH PREJUDICE** because Plaintiffs can not cure the defects in this claim by alleging additional facts consistent with their pleading.

F. Intentional Infliction of Emotional Distress ("IIED")

A claim for IIED requires (1) extreme and outrageous conduct by the defendant with the intention of causing emotional distress, (2) the plaintiff's suffering severe emotional distress, and (3) actual and proximate causation of the emotional distress. Potter v. Firestone Tire & Rubber Co., 863 P.2d 795, 819 (Cal. 1993). Thus, "it is not enough that the conduct be intentional and outrageous. It must be conduct directed at the Plaintiff." Id. This distinguishes IIED from negligent infliction of emotional distress. Id. at 820.

TEPCO contends that Plaintiffs' claim for IIED fails for two reasons: (1) the federal statutory scheme for compensating victims of nuclear incidents, known as the Price-Anderson Act, prohibits claims for emotional distress in the absence of physical injury, suggesting that common law liability should not provide recovery in such cases either; and, (2) Plaintiffs do not allege facts establishing that TEPCO engaged in "extreme and

outrageous conduct" or that any such conduct was "directed at" Plaintiffs, two necessary elements of the IIED cause of action. (Mot. to Dismiss 29–30, ECF No. 55). Plaintiffs maintain that the Price-Anderson Act does not apply to foreign producers of nuclear power. (Resp. in Opp'n 24–25, ECF No. 59). Plaintiffs also contend that TEPCO's degree of negligence rises to the level of extreme and outrageous. (*Id.* at 25.) Plaintiffs make no effort to respond to TEPCO's argument that no conduct was "directed at" Plaintiffs, a prerequisite for imposing liability for IIED.

Plaintiffs' IIED claim lacks merit. Plaintiffs attempt to cast TEPCO's alleged negligence as extreme and outrageous conduct. However, negligence is insufficient to state a claim for IIED. Plaintiff must establish intentional conduct or reckless disregard. *Potter*, 863 P.2d 795 at 819. Plaintiffs also fail to allege facts sufficient to establish that TEPCO engaged in any conduct specifically "directed at" them. Because IIED imposes liability for ambiguous injuries that are easily feigned, Plaintiffs may not recover in the absence of facts indicating that the defendant's conduct specifically targeted them and sought to cause them harm. There is no plausible way to claim that TEPCO engaged in any conduct directed at the U.S. servicemembers. Much of the alleged negligence occurred years before the Plaintiffs were deployed and they never had any contact with TEPCO other than suffering from the radiation.

Accordingly, the Court **GRANTS** TEPCO's motion to dismiss Plaintiffs' IIED claim **WITH PREJUDICE**.

G. Strict Liability for Ultrahazardous Activities

TEPCO also moves to dismiss Plaintiffs' claim for strict liability for injuries resulting from an inherently dangerous activity. TEPCO makes a similar argument as with the IIED claim that the Price-Anderson Act prohibits strict liability claims for releases of radiation below federal limits, and suggests that common law liability should not provide recovery absent pleading that their exposure to radiation exceeded federal limits. (Mot. to Dismiss 32–33, ECF No. 55.) Second, TEPCO argues that the Convention on Supplementary Compensation for Nuclear Damage ("CSCND") specifies that all claims concerning nuclear accidents should be resolved in the country where the accident occurred. (Id. at 33–34.) TEPCO apparently concedes that operation of a nuclear power facility is an inherently dangerous or "ultrahazardous" activity. (Reply ISO Mot. to Dismiss 18 n. 7, ECF No. 62 (TEPCO's Motion assumed arguendo that the operation of a nuclear power plant qualifies as an ultrahazardous activity).) Plaintiffs again argue that the Price-Anderson Act does not apply to a foreign nuclear operator and that the CSCND is not yet in force and has not been ratified by Japan. (Plaintiff's Resp. in Opp. 24–25, 29–30, ECF No. 59.) Also, Plaintiffs argue that TEPCO's activities meet the criteria of abnormally dangerous. (Id. at 27–29.)

The Court finds TEPCO's arguments unpersuasive. TEPCO offers no legal support for applying the Price-Anderson Act by analogy to a foreign corporation and the Court declines to do so. Also, the Court will not dismiss a claim that is sufficiently pled because of the pending CSCND. Accordingly, the Court **DENIES** TEPCO's motion to dismiss the strict liability for ultra-hazardous activity claim.

H. Loss of Consortium

TEPCO moves to dismiss Plaintiffs' loss of consortium claim arguing that since Plaintiffs' tort claims fail there is no valid loss of consortium cause of action. (Mot. to Dismiss 34, ECF No. 55.) Plaintiffs clarify that a tort claim and a spouse's loss of consortium claim are separate claims. (Plaintiff's Resp. in Opp'n 31–32, ECF No. 59.) Because the Court finds that Plaintiffs have stated a claim for which relief may be granted for several tort claims, the loss of consortium claim survives.

MOTION TO DISMISS CLAIMS ON BEHALF OF DOE PLAINTIFFS

Finally, TEPCO moves to dismiss the claims purportedly brought by Plaintiffs on behalf of "John & Jane Does 1-70,000." (Mot. to Dismiss 34, ECF No. 55.) TEPCO argues that this is an impermissible attempt by Plaintiffs' counsel to bring claims on behalf of "placeholder plaintiffs" so as to buy time while they try to drum up 70,000 future clients. (*Id.* at 34–35.) Additionally, TEPCO states that this designation is inappropriate in the context of a

class action because absent class members are not formal parties which could be designated as Doe parties. (Reply ISO Mot. to Dismiss 18–19, ECF No. 62.) Plaintiffs insist that they are seeking to certify a class action and that Defendant's motion to dismiss the John and Jane Does is premature. (Plaintiff's Resp. in Opp'n 32–33, ECF No. 59.)

The continued use of "placeholder plaintiffs" is likely unjustified and inappropriate at this point as Plaintiffs have had over two years to name additional parties. Absent class members are not formal parties which can be designated as pseudonymous Doe plaintiffs. Accordingly, the Court **GRANTS** TEPCO's motion to dismiss the claims on behalf of the "DOE" plaintiffs.

FORUM NON CONVENIENS

1. Legal Standard

"A federal court has discretion to decline to exercise jurisdiction in a case where litigation in a foreign forum would be more convenient for the parties." *Lueck v. Sundstrand Corp.*, 236 F.3d 1137, 1142 (9th Cir. 2001) (citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 504 (1947)). "The doctrine of *forum non conveniens* is a drastic exercise of the court's 'inherent power' because, unlike a mere transfer of venue, it results in the dismissal of a plaintiff's case." *Carijano v. Occidental Petroleum Corp.*, 643 F.3d 1216, 1224 (9th Cir. 2011). TEPCO bears the burden of proving the Plaintiffs' choice of forum results in "'oppressiveness and vexation . . . out of all proportion'" to Plaintiffs'

convenience. *Id.* at 1227 (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 (1981). Where the plaintiff is a U.S. citizen, a court should afford more deference to the plaintiff's choice of a U.S. forum and should assume the forum is convenient. *Id.* "While a U.S. citizen has no absolute right to sue in a U.S. court, great deference is due plaintiffs because a showing of convenience by a party who has sued in his home forum will usually outweigh the inconvenience the defendant may have shown." *Contact Lumber Co. v. P.T. Moges Shipping Co.*, 918 F.2d 1446, 1449 (9th Cir. 1990).

To dismiss on the ground of forum non conveniens, a court must examine: "(1) whether an adequate alternative forum exists, and (2) whether the balance of private and public interest factors favors dismissal." Id. (citations omitted). An adequate alternative forum is available to the plaintiff when (1) the defendant is amenable to service of process in the foreign forum and (2) the foreign forum provides the plaintiff with a satisfactory remedy. Id. at 1225. Only where the remedy provided is "clearly unsatisfactory" is this second requirement not met. Id. (citing Lueck, 236 F.3d at 1144.).

Courts must consider the following private interest factors: "(1) the residence of the parties and witnesses; (2) the forum's convenience to the litigants; (3) access to the physical evidence and other sources of proof; (4) whether unwilling witnesses can be compelled to testify; (5) the cost of bringing witnesses to trial; (6) the enforceability of the judgment; and (7)

all other practical issues that make trial of a case easy, expeditious, and inexpensive." *Id.* at 1229. Courts also must consider the following public interest factors: (1) local interest of the lawsuit; (2) the court's familiarity with governing law; (3) the burden on local courts and juries; (4) congestion in the court; and, (5) the costs of resolving a dispute unrelated to this forum. *Id.* at 1232.

2. Analysis

TEPCO moves to dismiss on the basis of forum non conveniens, arguing that this case should be heard in a Japanese court. TEPCO provides documentation in support of its request, detailing the customs and practices of the Japanese legal system and examining the factors that would complicate trial of this action in a U.S. court.

A. Adequate Alternative Forum

To begin with, TEPCO maintains that Japan's court system is an adequate alternative forum because TEPCO is unquestionably subject to jurisdiction and amenable to process in Japan, and because Plaintiffs would be able to recover for their injuries under Japanese tort law, assuming their claims are meritorious.[6] According to TEPCO, "[t]he Japanese judicial system is held in high regard and has consistently been found to be adequate for

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[6] TEPCO emphasizes that Plaintiffs could also file a special statutory cause of action that provides for recovery from a nuclear operator for injuries resulting from a nuclear incident.

forum non conveniens purposes." (Mot. to Dismiss. 38, ECF No. 55.)

Plaintiffs deny that Japan is an adequate alternative forum, arguing that they "will be denied a fair and impartial proceeding, due to the highly sensitive and politicized circumstances surrounding TEPCO." (Plaintiff's Resp. in Opp'n 36, ECF No. 59). Additionally, Plaintiffs contend that they will be unable to receive a fair trial because of the lack of discovery and jury trials available to Plaintiffs in Japan. (Id.) Plaintiffs rely on the declaration of two Japanese attorneys and discuss a Japanese case rejecting an appeal to evacuate school children suffering from radiation illness. (Id. at 34–35.)

The Court agrees with TEPCO that Japan is an adequate alternative forum. There is no doubt that TEPCO is amenable to service in Japan. Further, Japanese courts are well-respected and independent of government control and Plaintiffs provide no evidence to the contrary. Courts in this Circuit have not previously rendered Japan an inadequate forum, despite the country's more limited discovery system and lack of jury trials. *Lockman Found v. Evangelical Alliance Mission*, 930 F.2d 764, 768 (9th Cir. 1991); *Philippine Packing Corp. v. Maritime Co. of Philippines*, 519 F.2d 811, 812 (9th Cir. 1975) (per curiam); *Creager v. Yoshimoto*, No. 05-1985, 2006 WL 680555, at *2 (N.D. Cal. Mar. 14, 2006). Further, Plaintiffs' concerns about the secrecy law are unpersuasive in light of the Japanese Government's statements indicating it would be inapplicable to a case like this. (Reply ISO Mot. to Dismiss 20, ECF

No. 62 ("the Japanese government has specifically stated that the [privacy] Act does not apply to . . . information concerning nuclear power plant accidents.").) Because the Court finds that Japan is an adequate alternative forum, the Court must next balance various private and public factors and dismiss the case if the Japanese forum would be more convenient for the Parties.

B. Balancing of Private Interests

TEPCO argues that the relevant private interest factors all indicate that Japan is the appropriate forum for this action. Plaintiffs disagree. The Court considers each private interest factor in turn.

(i) Residence of the Parties and Witnesses

TEPCO argues that Japan is where the overwhelming majority of the witnesses reside. (Mot. to Dismiss. 40, ECF No. 55.) TEPCO maintains that Japan is the more convenient forum for the litigants because all current and former TEPCO officers and employees that they expect to testify are located in Japan, as are nearly all of the Japanese Government officials and private citizens that were involved in the response to the FNPP meltdown. (*Id.*) TEPCO emphasizes that, not only will it be difficult or impossible to produce many non-party witnesses for trial, but it will also be extremely challenging to obtain even pre-trial deposition testimony from them in light of Japan's restrictions on taking depositions for use in foreign litigation. Further, TEPCO argues that although Plaintiffs are all located in the U.S., Plaintiffs'

testimony is unnecessary at the liability stage, such that there is no need for them to travel to the forum at this time. If it eventually becomes necessary for Plaintiffs to provide testimony regarding their injuries, TEPCO indicates that Japanese courts have established procedures for procuring testimony from parties located overseas who cannot travel to Japan.

Plaintiffs insist that this factor favors a U.S. forum. Plaintiffs argue that all of the service members named as plaintiffs in this action are located in the U.S. and that TEPCO even has a Washington, D.C. office. (Plaintiff's Resp. in Opp'n 37, ECF No. 59). Plaintiffs downplay the inconvenience of seeking deposition or trial testimony from witnesses residing in Japan, arguing that these procedural obstacles will primarily affect Plaintiffs, not TEPCO.

The presence of numerous non-party witnesses in Japan weighs in favor of dismissal. The difficulty of accessing these witnesses will affect both parties and, in any case, the principal consideration is the convenience of the witnesses. Plaintiffs' residence in the U.S. and distance from Japan favors retaining the case. However, plaintiff's testimony will likely play a minimal role in the initial, critical stages of the proceeding and would be more important during the damages portion of trial. Overall, the Court finds that this factor is neutral. Plaintiffs all reside in the U.S. and TEPCO's witness mostly reside in Japan. Each side has established that it would be inconvenient for them to

conduct proceedings in the opposite country. However, the Court dos not find it this factor to clearly weigh in favor of one side or the other.

(ii) Forum's Convenience to the Litigants

TEPCO does not separately address this factor in its motion to dismiss. Plaintiffs maintain that their choice of forum is entitled to substantial deference. (Plaintiff's Resp. in Opp'n 39, ECF No. 59). Plaintiffs argue that it would be "simply impossible" for them to pursue their cases in Japan. (Id. at 40.) They attach numerous declarations to their opposition detailing their "radiation related injuries," which they claim would prevent them from traveling to Japan at all. (Id. at 40–44.) On the other hand, Plaintiffs argue, TEPCO has a long history of doing business in the U.S. and would not be inconvenienced by litigating in a U.S. forum.

This factor strongly favors retaining jurisdiction in this forum. Plaintiffs would be comparatively disadvantaged if they were required to file suit in Japan and likely would not proceed with their claims. The comparative hardship for Plaintiffs is much greater than it would be for TEPCO given the alleged medical conditions and ability to travel. On the other hand, TEPCO could necessarily defend itself in this forum, albeit at a significant cost.

(iii) Access to the Physical Evidence and Other Sources of Proof

TEPCO contends that the critical documents that will be needed in this suit are nearly all located in Japan. (Mot. to Dismiss. 44, ECF No. 55.)

Although TEPCO concedes that the U.S. Navy may have some important documents, TEPCO argues that the Navy is unlikely to disclose those documents in either forum. (*Id.* at 45.) Additionally, TEPCO argues that information from the Japanese government may be necessary to adjudicate Plaintiffs' claims and that the Japanese government may refuse to disclose this information or make witnesses available in a U.S. court. (*Id.* at 46–47.) TEPCO contends that with respect to documents outside of TEPCO's possession and located in Japan, a U.S. forum could not obtain them, even by letters rogatory, since Japanese judges have no authority to compel document production for foreign litigation.

Plaintiffs insist that the key inquiry is which forum will facilitate access to documents, rather than where the documents themselves are located. (Plaintiff's Resp. in Opp'n 45, ECF No. 59). Plaintiffs argue that TEPCO will be required to produce documents in its possession and control if this suit proceeds in this Court, such that access to documents does not favor a Japanese forum. (*Id.*) This is especially true given the prevalence of electronic documents and current technology. (*Id.* at 45–46.) Moreover, Plaintiffs claim that there is no evidence indicating that TEPCO will have difficulty obtaining documents held by the Japanese Government or by other non-parties. (*Id.* at 46.) And, "Plaintiffs have no intention to compel documents from the Japanese government." (*Id.*) Plaintiffs maintain that TEPCO cannot meet its high burden of proving that the current forum is

inadequate by relying on mere speculation. The Court finds that this factor is neutral. While this suit arises from a nuclear incident at the FNPP and most of the operative facts took place in Japan, many of the obstacles TEPCO identifies would be present no matter where the litigation takes place. It is true that because TEPCO is subject to personal jurisdiction in the Southern District, it would be required to turn over all of the documents in its possession. These documents would undoubtedly be the most important source of information in this litigation and would be available in the District Court. Although the majority of the relevant documents and physical proof remain in Japan, TEPCO has not satisfied its burden of proving that litigation in California would be oppressive or vexing.

(iv) Whether Unwilling Witnesses Can Be Compelled to Testify

TEPCO argues that U.S. courts have no ability to compel testimony from unwilling non-party witnesses located in Japan, such as Japanese Government officials, former TEPCO officers, and other potential witnesses. TEPCO's argument is that many witnesses, which might be willing to testify in a Japanese court, would not do so in a U.S. court. Further, what little could be done by way of letters rogatory would be burdensome and expensive compared to the summary procedures available in Japan. According to TEPCO, this means that critical witnesses will be unavailable in the U.S. forum, indicating that a Japanese forum is highly

preferable to a fair and unbiased determination of this action. Plaintiffs argue that there is nothing to suggest that Japanese Government officials or former TEPCO directors and employees would be unwilling to testify or to cooperate with this litigation.

The Court agrees with TEPCO that the difficulties in obtaining testimony from non-party witnesses located in Japan, and outside of TEPCO's control, weigh in favor of a Japanese forum. Plaintiffs err in continuing to argue that these challenges are not relevant to TEPCO's ability to present a defense. As these witnesses can be conveniently accessed in a Japanese forum, but can be accessed only with difficulty, if at all, in this Court, this factor favors dismissal.

(v) The Cost of Bringing Witnesses to Trial

TEPCO contends that the presence of witnesses and evidence in Japan would make a trial in this Court very costly, requiring significant travel expenses for TEPCO employees to attend trial and for TEPCO's U.S. counsel to conduct depositions of non- party witnesses at the U.S. Embassy in Japan. Accordingly, TEPCO argues that this factor favors dismissal.

Plaintiffs maintain, on the other hand, that they would incur several hundred thousand dollars in travel expenses in order to try this case in Japan. Plaintiffs claim that they would have to fly all 80 individual named plaintiffs, at least 40 treating physicians, and many expert damages witnesses to

Japan, far outweighing any expenses that TEPCO might incur to fly a few officers or employees to the U.S. (Plaintiffs' Resp. in Opp'n 48, ECF No. 59). Travel to Japan would take a "physical and psychological toll" on Plaintiffs, as well as a financial one, whereas Plaintiffs claim that TEPCO is a "multi-billion dollar company" that can easily afford the costs of defending itself in this forum. (Id.)

Because of the nature of international litigation, each side would incur expenses related to traveling and procuring witnesses in either forum. Although Plaintiffs might incur additional expenses to retain counsel in Japan, it is not at all clear that they would be required to travel to Japan to testify if it is inconvenient for them to do so, especially in the initial stages of litigation. (see Supp. Decl. of Prof. Yasuhei Taniguchi ¶¶ 6, 13–17, ECF No. 43-1) (detailing procedures for procuring testimony from willing witnesses overseas who cannot travel to Japan). However, any willing witnesses in Japan would almost certainly have to travel to the U.S. for trial or provide pre-trial depositions through the expensive and cumbersome process specified by Japanese law. However, the Japanese deposition process is feasible and is not a bar for litigating in the District Court. It is also unlikely that Plaintiffs would be required to procure the number of witnesses and experts they detail in their Opposition. Therefore, the Court finds this factor to weigh only slightly in favor of dismissing the case.

(vi) Enforceability of the Judgment

TEPCO is headquartered in Tokyo, Japan and also has significant assets in the U.S. Accordingly, any judgment rendered against TEPCO either in Japan or in the U.S. would be enforceable. This factor is therefore neutral.

(vii) Other Practical Problems

TEPCO argues that translation costs would be high if this case is tried in the U.S., as most of the witnesses associated with TEPCO or with the Japanese Government would have to testify in Japanese and most of the relevant documents will also be in Japanese. (Mot. to Dismiss. 51, ECF No. 55.) Plaintiffs respond that translation to English would be necessary in a Japanese forum in order to "apprise and include" Plaintiffs, and that testimony from U.S. military witnesses would also have to be translated into Japanese. (Plaintiffs' Resp. in Opp'n 50, ECF No. 59). Plaintiffs insist that translation costs are "an expected cost of litigating in a global world." (*Id.*) This factor is neutral. The available documents and testimony pertaining to liability are all likely to be in Japanese, while Plaintiffs will have English-language materials and witnesses as well. The translation costs may be higher in this forum, however the Court does not find this to be a decisive factor in light of the necessary costs of translation in either forum.

C. Balancing of Public Interests

TEPCO contends that the relevant public interest factors also favor dismissal. The Court considers each in turn.

(i) Local Interest in the Lawsuit

TEPCO argues that Japan has the strongest interest in this dispute because the Japanese Government has enacted several measures to provide compensation to those harmed by the FNPP incident. (Mot. to Dismiss. 52–53, ECF No. 55.) Moreover, TEPCO observes that the Japanese Government, through its instrumentality, the Nuclear Damage Liability Facilitation Fund, is now TEPCO's principal shareholder and has committed billions of dollars in aid to TEPCO to ensure that it is able to pay out compensation to those affected by the FNPP incident. (Id. at 53–54.) TEPCO emphasizes that the Japanese Government has been "heavily involved in the overall response to the earthquake, the tsunami, and the FNPP accident," such that no interest in this forum can "compare to the singular importance of the FNPP accident to Japan and its Government." (Id. at 54–55.)

Plaintiffs maintain that the U.S. has a strong interest in seeing that its service members are compensated for their injuries. (Plaintiffs' Resp. in Opp'n 52, ECF No. 59). In particular, because many of the Plaintiffs reside in the Southern District, this Court in particular has a strong interest in providing resolution for them. Plaintiffs point to the myriad institutions dedicated to caring for military veterans as evidence that the U.S. is interested in ensuring that "those who have served . . . receive

benefits for [their] service." (Id.) Plaintiffs deny that Japan's efforts to centralize compensation for victims of the tsunami support dismissal because the allegations of negligence distinguish Plaintiffs from other Japanese citizens who were merely harmed by a natural catastrophe. (Id.)

Japan has an interest in adjudicating claims arising from the March 11, 2011 earthquake and tsunami that devastated large swaths of the country as evidenced by Japan's large investment in responding to the disaster. The U.S. also has a strong interest in seeing that members of the Armed Forces are compensated for their service. Especially as it is the V.A. system and the U.S. taxpayers who will ultimately pay for the injuries to Plaintiffs. The Court thinks that both countries have a strong interest in this litigation. This factor slightly favors retaining jurisdiction because of the strong interest in providing compensation for servicemembers and the ultimate costs of medical treatment lying with U.S. taxpayers.

(ii) Court's Familiarity with the Governing Law

The parties do not address this factor. Although TEPCO does not concede the applicability of California law, TEPCO does not suggest at any point that Japanese law would govern the dispute if the Court retained jurisdiction. In all likelihood, the Court would be applying some version of U.S. law, be it maritime law, federal common law, or California state law. Accordingly, this factor weighs against dismissal.

(iii) Remaining Public Interest Factors: Burden on Local Courts and Juries, Congestion in the Court, Costs of Resolving a Dispute

The parties hardly touch upon the remaining public interest factors, suggesting that these issues need not substantially affect the Court's inquiry. Although litigating this case in this forum would add to an already busy docket and would require time and resources to be dedicated to the matter, these factors alone do not justify dismissal. Moreover, litigating in Japan would impose significant costs on the Japanese judicial system. Accordingly, these factors are neutral.

D. Summary and Conclusion

In sum, although Japan is an adequate alternative forum, the balance of the private and public interest factors suggests that it would be more convenient for the parties to litigate in a U.S. court. Accordingly, the Court **DENIES** TEPCO's motion to dismiss on this basis.

INTERNATIONAL COMITY

Lastly, TEPCO argues that the doctrine of international comity warrants dismissal of this action in favor of a Japanese forum.

1. Legal Standard

International comity is an abstention doctrine that permits federal courts to defer to the judgment of an alternative forum where the issues to be resolved are "entangled in international relations."

Ungaro-Benages v. Dresdner Bank AG, 379 F.3d 1227, 1237 (11th Cir. 2004) (quoting *In re Maxwell Comm'n Corp.*, 93 F.3d 1036, 1047 (2d Cir. 1996)). Adjudicatory comity can be viewed as a "discretionary act of deference by a national court to decline to exercise jurisdiction in a case properly adjudicated in a foreign state." *Mujica v. AirScan, Inc.*, 771 F.3d 580, 599 (9th Cir. 2014). Courts consider whether to dismiss or stay the action based on "the strength of the United States' interest in using a foreign forum, the strength of the foreign governments' interests, and the adequacy of the alternative forum." *Id.* at 603 (citing *Ungaro- Banages*, 379 F.3d at 1238).

In assessing the interests of the respective countries, courts should consider five nonexclusive factors:

> (1) the location of the conduct in question, (2) the nationality of the parties, (3) the character of the conduct in question, (4) foreign policy interests, and (5) any public policy interests.

Id. at 604, 607. With respect to the third element—adequacy of the foreign forum—the focus should be on procedural fairness in the forum and whether the opponent has presented specific evidence of significant inadequacy. *Id.* at 607–08.

2. Analysis

TEPCO contends that the interests of the U.S., Japan, and the international community support consolidating Plaintiffs' claims in Japan in light of the Japanese Government's comprehensive scheme for providing relief to individuals harmed by the FNPP incident.

A. United States and Japanese Interests

(i) Location of the Conduct in Question and Nationality of the Parties

Courts have "afforded far less weight, for comity purposes, to U.S. or state interests when the activity at issue occurred abroad." Id. at 605 (citing cases involving foreign plaintiffs). The court must consider "whether any of the Parties are United States citizens or nationals, and also whether they are citizens of the relevant state." Id. This factor, together with the location of the conduct, determines the overall strength of the connection to the U.S. and the justification for adjudicating the matter in U.S. courts. Id. at 605–06. The Court affords the most weight to these factors.

Although TEPCO's allegedly negligent actions took place in Japan, the Court finds that the overall strength of the connection to the U.S. weighs heavily in favor of maintaining the case in the Southern District.

The Plaintiffs, as U.S. citizens, have an undeniably strong connection to the U.S. As U.S. citizens and servicemembers, Plaintiffs argue that they expect and should receive full protection and care under the laws of the United States. (Opp'n

Reconsideration 14, ECF No. 84.) Plaintiffs are United States citizens who allege that they were harmed by TEPCO, and accordingly, the U.S. has an interest in maintaining the suit in this country and providing a forum for Plaintiffs to seek relief. See Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473 (1985).

While TEPCO is correct that each country has an interest in adjudicating the case based on the citizenship of the Parties, 7 TEPCO is a large corporation with a significant physical presence in the United States and is registered as a foreign corporation in California. Whereas, Plaintiffs are individuals who have no connection to Japan, many suffering from alleged illnesses that might prohibit international travel. It would be far more reasonable for TEPCO to litigate in the U.S. than for Plaintiffs to litigate in Japan. In light of the Parties' connections to the U.S. and the global nature of the harm, the Court finds a strong justification for retaining the case in the Southern District. Furthermore, California also has a strong interest in adjudicating Plaintiffs' claims as many of the Plaintiffs are California residents.

(ii) Character of Conduct in Question

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7 TEPCO argues that this factor is neutral because TEPCO is a Japanese corporation and Plaintiffs are U.S. citizens. (Mot. Reconsideration 12, ECF No. 73-1.)

In evaluating the nature of the conduct in question, the court should ask whether the conduct is "civil or criminal; whether it sounds in tort, contract, or property; and whether the conduct is a regulatory violation or is a violation of international norms against torture, war crimes, or slavery." *Mujica*, 771 F.3d at 606. These "inquiries may inform our judgment of the importance of the issue" to the United States, California, or Japan, because "[t]he closer the connection between the conduct and the core prerogatives of the sovereign, the stronger that sovereign's interest." *Id.*

TEPCO argues that the alleged conduct is not a human rights violation nor aimed at harming American commerce. (Mot. Reconsideration 13, ECF No. 73-1.) Further, TEPCO contends that the negligence and strict liability claims do not implicate the core prerogatives of the U.S., rather the nature of the claims implicate Japan's "prerogative to regulate its domestic utilities and power plants." (Id.) TEPCO argues that Japan has shown its prerogative by addressing the situation at the FNPP and establishing a centralized system for prompt resolution of damage claims. (Id.) In contrast, Plaintiffs argue that although the meltdown had a catastrophic impact on Japan, the impact of TEPCO's negligence did not remain in Japan. (Opp'n Reconsideration 15, ECF No. 84.) Plaintiffs argue that the U.S. has a strong interest in regulating the safety of nuclear power facilities domestically and internationally, and that the U.S. is also the largest governmental provider of humanitarian aid in the world. (Id. at 16.)

This is a civil tort case regarding a Japanese company's negligence and personal injury to U.S. Plaintiffs. The Court agrees with TEPCO that Japan has an interest in regulating its nuclear utilities, compensating those injured by one of its domestic corporations, and that the effects of the FNPP meltdown were more significant in Japan where the majority of damage occurred. However, the U.S. also has an interest in the safe operation of nuclear power plants around the world, especially when they endanger U.S. citizens. This factor is not particularly helpful to the Court's analysis and, on balance, is fairly neutral.

(iii) Foreign Policy Interests

The Court should also take cognizance of both the U.S. and Japanese foreign policy interests. Mujica, 771 F.3d at 606. A Court "must respect the Constitution's commitment of the foreign affairs authority to the political branches." Id. U.S. interests weigh against hearing cases that would be harmful to U.S. foreign policy. Id.

TEPCO argues that the U.S.'s ratification of the Convention on Supplementary Compensation for Nuclear Damage (the "CSCND" or "Convention") reflects a long- expressed policy that "all claims arising from a nuclear incident are handled in a comprehensive and coordinated fashion by centralizing all such claims in the courts of the country where the nuclear incident occurred." (Mot. to Dismiss 57–58, ECF No. 55.) The CSCND, which was ratified by the U.S. in 2006, provides that "jurisdiction over actions concerning nuclear

damage from a nuclear incident shall lie only with the courts of the Contracting Party within which the nuclear incident occurs." (Id. at 58.) According to TEPCO, both the CSCND and the comments of Executive officials regarding the Convention make clear that the U.S. has an interest in seeing that claims for damages from a nuclear incident are consolidated in the country where the incident occurred, even if that means that U.S citizens are diverted to a foreign court system. (Id. at 58–59.) TEPCO also contends that just recently, the Japanese Diet approved the CSCND. (Mot. Reconsideration 14, ECF No. 73-1.) Accordingly, because the "exclusive territoriality principle" is now an official element of U.S.-Japanese foreign relations policy, TEPCO argues that the Court must defer to that policy judgment. (Id.) TEPCO concedes that the CSCND itself may not require dismissal, but argues that it reflects a policy judgment independent of the treaty. (Reply Reconsideration 7, ECF No. 90.)

Although TEPCO points to the CSCND as evidence of U.S. foreign policy interest in support of declining jurisdiction, the Court gives it minimal weight. First, TEPCO does not provide any evidence that the Court's jurisdiction of this lawsuit would in any way harm U.S.-Japanese foreign relations. (RT 16–17, ECF No. 99.) In response to the Court's inquiry during oral argument, TEPCO discussed that a global regime for resolving nuclear civil litigation would have many benefits for the U.S., including: facilitating efforts by U.S. agencies to use nuclear suppliers overseas, allowing nuclear

suppliers to compete for the growing market in other countries, increasing jobs in the U.S., helping the balance of payments, helping the U.S. nuclear infrastructure, allowing U.S. nuclear suppliers to be leaders in technology, and providing incentives for students to go into nuclear technology. (*Id.* at 16.) In order to achieve these goals under the CSCND, TEPCO stated that courts where the incident occurred must have exclusive jurisdiction. (*Id.* at 16–17; Collins Decl. 26, ECF No. 90-3.)

Although TEPCO explains the policy goals behind the CSCND and notes the importance of "respect for the courts of another nation," the Court is not persuaded that hearing this case would be harmful to U.S. foreign policy. This is especially so because the CSCND has not yet been ratified. (RT 15, ECF No. 99.) Further, the Court gives less weight to this policy of limiting liability because the supplemental remedy written into the treaty is not yet available to these Plaintiffs. (See Collins Decl. 30, ECF No. 90-3 (Under the CSCND, "there will be substantial compensation, and . . . rules that allow victims to get compensation quickly and without litigating questions like fault or negligence").)

TEPCO contends that if the Court harbors doubts about whether the strength of the U.S. interests favor dismissal, it would be appropriate to solicit the views of the U.S. Department of State. (Mot. Reconsideration 17, ECF No. 73-1 (citing *Mujica*, 771 F.3d at 610, 612.).) The Court notes that neither the Japanese nor the U.S. government has expressed interest in the location of this litigation.

See Mujica, 771 F.3d at 611. At this time, in its discretion, the Court will not solicit the views of the U.S. government because it would cause unnecessary delay and TEPCO's arguments provide adequate information on the issue.

(iv) Public Policy Interests

Lastly, the Court may also weigh U.S., California, and Japanese public policy interests. Mujica, 771 F.3d at 607. Courts will respect differences in foreign practices so long as the variances do not violate strongly held state or federal public policy. Id. TEPCO claims that allowing this lawsuit to be heard in a U.S. court is inconsistent with Japanese public policy interests. (Mot. Reconsideration 15, ECF No. 73-1.) Further, TEPCO states that if the Court does consider the countries' respective financial interests, Japan has a stronger financial interest because a majority of TEPCO's shares are now owned by the Nuclear Damage Liability and Decommissioning Facilitation Corporation ("NDF"), which is an agency or instrumentality of the Japanese government. (Mot. Reconsideration 16, ECF No. 73-1.) The Japanese government has funded, through the issuance of bonds to the NDF, $37.8 billion in aid to compensate for nuclear damage. (Id.)

Plaintiffs contend that without relief, Plaintiffs, the U.S., and U.S. taxpayers would ultimately bear the burden of paying for Plaintiffs' care. Plaintiffs also argue that TEPCO has not been forthcoming about the FNPP meltdown, such that dismissal in deference to Japan's interests would be improper.

Further, Plaintiffs argue that the U.S. has a strong public policy in favor of nuclear safety. (Opp'n Reconsideration 20, ECF No. 84.) Plaintiffs note that in furtherance of this policy, the U.S., both domestically and internationally, has signed and ratified a number of conventions. (Id.) Plaintiff states that these conventions set out protocols and standards; however there is neither regulatory oversight nor means of enforcement. (Id.) Next, Plaintiff contends that it has long been public policy to award punitive damages as a means of deterring private corporations from recklessly endangering the public. (Id. at 21.) Plaintiffs argue that in light of the international concerns and the U.S.'s dedication to providing humanitarian assistance, public policy favors retaining the case. (Id.) Lastly, to the extent that jurisdiction is appropriate; Plaintiffs should be permitted to bring their claims in the forum of their choice.

On balance, the Court finds that both countries have public policy interests in litigating the case and that neither side makes especially compelling arguments with respect to this factor. Accordingly, the Court finds that the public policy interests of the U.S. and Japan are neutral and do not weigh in favor of dismissal.

B. Adequacy of the Japanese Forum

The standards for evaluating the adequacy of a forum are the same under the international comity doctrine as they are under *forum non conveniens* analysis. *See Jota v. Texaco Co.*, 157 F.3d 153, 160 (2d Cir. 1998). Neither party adds any argument

regarding this factor. As discussed above, the Court finds Japan to be an adequate alternative forum.

C. Summary and Conclusion

Accordingly, the Court finds that both the U.S. and Japan have an interest in having this suit heard within their forum. TEPCO has pointed to several reasons supporting dismissal of the present claims; and the Court concedes that some of TEPCO's arguments are persuasive. However, the reasons for maintaining jurisdiction of this case are more compelling, namely the Parties strong connection with this forum. The Court finds that the United States has a strong interest in hearing this case and declines to exercise its discretion in dismissing this case under the doctrine of international comity.

III. PLAINTIFFS' MOTION TO AMEND

Plaintiffs seek leave to amend the SAC to add four Doe Defendants: General Electric, EBASCO, Toshiba, and Hitachi. Plaintiffs also wish to add additional servicemember plaintiffs. Plaintiffs assert that they only recently "discovered the nature and extent of conduct of the Doe Defendants giving rise to liability and causation of Plaintiffs' harms, damages, injuries and losses." (Mot. to File Am. Compl. 3, ECF No. 65.) Plaintiffs allege that each of the four Doe Defendants was responsible in part for the design, procurement, maintenance, management, or servicing of the FNPP. (*Id.*)

1. Legal Standard

Leave to amend should be freely given "when justice so requires." Fed. R. Civ. P. 15(a)(2). But while the rule should be interpreted extremely liberally, leave should not be granted automatically. *Jackson v. Bank of Haw.*, 902 F.2d 1385, 1387 (9th Cir. 1990). The opposing party bears the burden of demonstrating why denial is necessary. A trial court may deny a motion for leave to amend based on various factors, including bad faith, undue delay, prejudice to the opposing party, futility of amendment, and whether the party has previously amended. *Foman v. Davis*, 371 U.S. 178 (1962).

2. Analysis

TEPCO argues that the Court should deny Plaintiffs' Motion to Amend SAC as futile because of the previously discussed justiciability issue. However, as the Court finds that the SAC is not barred by the political question doctrine, this argument is not persuasive. TEPCO does not address the other *Foman* factors. The burden fell on TEPCO to demonstrate that leave to amend would be inappropriate. Because TEPCO failed to meet that burden and did not establish the presence of any of the five *Foman* factors, the Court finds no reason to deny leave to amend. However, the Court does not accept as filed the third amended complaint, attached as Exhibit A. Rather, Plaintiffs shall amend in light of the Court's rulings in this Order.

IV. CERTIFICATION FOR INTERLOCUTORY

APPEAL

TEPCO also requests that if the Court does not reconsider its Order and dismiss the case, then the Court should certify the Order (or an Amended Order) for interlocutory appeal.

1. Legal Standard

Pursuant to 28 U.S.C. § 1292(b):

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order.

The Ninth Circuit cautions that district courts should only certify an interlocutory appeal in "rare circumstances" because "[s]ection 1292(b) is a departure from the normal rule that only final judgments are appealable, and therefore must be construed narrowly." *James v. Price Stern Sloan, Inc.*, 283 F.3d 1064, 1067 n.6 (9th Cir. 2002). Thus, certification pursuant to section 1292(b) is

appropriate "only in exceptional situations." *In re Cement Antitrust Litig.*, 673 F.2d 1020, 1026 (9th Cir. 1982) (citing *U.S. Rubber Co. v. Wright*, 359 F.2d 784, 785 (9th Cir. 1966) (per curiam); *Milbert v. Bison Labs.*, 260 F.2d 431, 433–35 (3d Cir. 1958)). The party seeking the interlocutory appeal bears the burden of establishing that the requirements for certification are met. *Couch v. Telescope Inc.*, 611 F.3d 629, 633 (9th Cir. 2010).

2. Analysis

A. **Controlling Question of Law**

"To meet the requirement that the proposed interlocutory appeal raises a controlling question of law, the moving party must show 'that resolution of the issue on appeal could materially affect the outcome of litigation in the district court.'" Hawaii ex rel. Louie v. JP Morgan Chase & Co., 921 F. Supp. 2d 1059, 1065 (D. Haw. 2013) (quoting In re Cement Antitrust Litig., 673 F.2d at 1026). "Controlling questions of law include 'determination[s] of who are necessary and proper parties, whether a court to which a cause has been transferred has jurisdiction, or whether state or federal law should be applied.'" Id.

The Court FINDS a controlling question of law exists here. If the Ninth Circuit were to find that TEPCO's causation analysis does not invoke a political question—as this Court decided in its October 28, 2014 Order—then this Court would maintain jurisdiction. If, however, the Ninth Circuit were to hold that the Court lacks subject

matter jurisdiction, this Court could no longer hear the case as against TEPCO. Further, if the Ninth Circuit were to find the Firefighter's Rule was an absolute bar to TEPCO's liability, the case would be terminated as against TEPCO. Accordingly, the Ninth Circuit's resolution of this issue "could materially affect the outcome of [this] litigation" because it would affect whether the Court has jurisdiction. Thus, a controlling question of law is at issue.

B. Substantial Ground for Difference of Opinion

There is a "substantial ground for difference of opinion" if "there is a genuine dispute over the question of law that is the subject of the appeal." In re Cement Antitrust Litig., 673 F.2d at 1026. Such a dispute exists, for example, if the circuits are in disagreement and the court of appeals in which the district court sits has not decided the issue, the issue involves complicated questions of foreign law, or the issue is a novel and difficult one of first impression. Couch, 611 F.3d at 633. "However, just because a court is the first to rule on a particular question or just because counsel contends that one precedent rather than another is controlling does not mean" that sufficient grounds exist. Id.

TEPCO argues that there are substantial grounds for a difference of opinion as to application of the political question doctrine and the firefighter's rule. (Mot. Reconsideration 24, ECF No. 73-1.) TEPCO points out that the Court found these issues to be close and difficult based on the tentative

ruling which was altered in the ultimate Order. (*Id.)* Plaintiffs, on the other hand, argue that the issues do not elicit a substantial ground for difference of opinion. (Opp'n Reconsideration 30, ECF No. 84.)

The Court **FINDS** that there is a substantial ground for difference of opinion on this question due to the novelty and complexity of the issue.

C. Materially Advances the Ultimate Termination of the Litigation

Certification "materially advances the ultimate termination of the litigation" when "allowing an interlocutory appeal would avoid protracted and expensive litigation," saving both the court and the parties "unnecessary trouble and expense." In re Cement Antitrust Litig., 673 F.2d at 1026; Hawaii ex rel. Louie, 921 F. Supp at 1067 (quoting United States v. Adam Bros. Farming, Inc., 369 F. Supp. 2d 1180, 1182 (C.D. Cal. 2004)).

Given the potential burdens of litigating the transnational and novel claims presented in this extraordinarily large and complex litigation, TEPCO argues that the Court should seek guidance from the Ninth Circuit now as to threshold legal issues which could end the case. (Mot. Reconsideration 28, ECF No. 73-1.) Plaintiff, on the other hand, argues that an interlocutory appeal would delay the litigation and unduly impact Plaintiffs who are dying and battling cancers and other illnesses allegedly caused by TEPCO's negligence. (Opp'n Reconsideration 30, ECF No. 84.)

The Court FINDS that resolution of this issue would materially advance the ultimate termination of this litigation. If the lawsuit proceeded and then TEPCO successfully appealed this Court's determination regarding the lack of subject matter jurisdiction or the firefighter's rule, much time and expense would be wasted by all of the parties, Plaintiffs included.

D. Conclusion

For the reasons stated above, the Court **GRANTS** TEPCO's Motion for Certification of Interlocutory Appeal. The Court has concerns as to the wording of the issues proposed by TEPCO in its Motion. Therefore the Parties shall take this Amended Order into account and confer and file a joint statement of the issues to be certified on appeal on or before June 26, 2015.

CONCLUSION

1. The Court **GRANTS** TEPCO's Motion for Reconsideration.

2. The Court **GRANTS** TEPCO's motion to dismiss Plaintiffs' strict liability for design defect and IIED claims **WITH PREJUDICE**. Additionally, the Court **GRANTS** TEPCO's motion to dismiss the SAC's claims on behalf of "Doe" plaintiffs. Plaintiffs' other claims survive.

3. The Court **DENIES** TEPCO's Motion to Dismiss under the doctrines of *forum non conveniens* and international comity.

4. The Court does not disturb its prior Order **GRANTING** Plaintiffs Motion to Amend their SAC. Plaintiffs timely filed an amended pleading.

5. The Court **GRANTS** TEPCO's Motion for Certification of Interlocutory Appeal. The Court has concerns as to the wording of the issues proposed by TEPCO in its Motion. Therefore the Parties shall take this Amended Order into account and confer and file a joint statement of the issues to be certified on appeal on or before June 26, 2015.

IT IS SO ORDERED.

DATED: June 11, 2015

Janis L. Sammartino
Honorable Janis L. Sammartino
United States District Judge

APPENDIX F

No. 15-56424

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LINDSAY R. COOPER, et al.,

Plaintiffs-Appellees,

v.

TOKYO ELECTRIC POWER COMPANY, INC.,

Defendant-Appellant.

On Appeal from the United States
District Court for the Southern
District of California

BRIEF FOR THE UNITED STATES IN SUPPORT
OF NEITHER PARTY AND IN SUPPORT OF
AFFIRMANCE OF THE ORDER BELOW

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INTRODUCTION AND INTERESTS OF THE UNITED STATES AS *AMICUS CURIAE*

The United States respectfully submits this amicus brief in response to the Court's order of September 26, 2016. In declining to dismiss this litigation, the district court weighed the interests of U.S. military servicemembers in litigating their claims in a U.S. court against the interests of the private defendant and the Government of Japan in having disputes arising out of the nuclear accident at the Fukushima-Daiichi power plant adjudicated in a Japanese forum. This case thus touches upon strong U.S. interests, both because of our Nation's enduring relationship with Japan, a longstanding and essential ally, and because plaintiffs in this action are members of the U.S. military allegedly harmed while deployed on a humanitarian mission, and their family members.

The humanitarian mission at issue in this case, Operation Tomodachi, evinces the strong ties between this country and the country of Japan. Japan is an essential strategic, political, and economic ally and partner of the United States.

The United States applauds the Government of Japan's impressive efforts to provide recovery for damages caused by the nuclear accident at the Fukushima- Daiichi power plant, including through the creation of an administrative compensation scheme that has paid over $58 billion in claims. The United States also applauds Japan's decision to become a party to the Convention on Supplementary

Compensation for Nuclear Damage (Convention), pursuant to which jurisdiction over litigation regarding future nuclear incidents causing nuclear damage in Japan would be exclusive to a Japanese forum.

Nevertheless, as explained further in the Argument section of this brief, the United States does not believe that the district court abused its discretion in declining to dismiss this case under the doctrines of international comity and *forum non conveniens*. In its comity analysis, the district court correctly stated this Circuit's law. The district court weighed the interests of the private defendant and the Government of Japan in having these cases resolved in a Japanese forum, as well as the interests of the U.S. plaintiffs in having their claims heard in a U.S. court. Although the United States recognizes Japan's desire to have these cases decided in a uniform manner, Japan's remedial scheme is not exclusive on its own terms; the United States did not play a role in developing the remedial scheme; and plaintiffs are U.S. citizens rather than Japanese nationals. These differences distinguish this case from cases in which courts have held that international comity requires dismissal of claims brought in a U.S. forum. Nor does the Convention on Supplementary Compensation for Nuclear Damage reflect a policy that the State in which a nuclear incident occurred must be the exclusive forum for adjudicating claims of civil liability when the Convention does not apply to the incident. While the United States strongly values its relationship with Japan, it does not have

a foreign policy interest in the specific subject matter of this litigation that requires dismissal at this time.

For similar reasons, the United States does not believe that the district court abused its discretion in declining to dismiss the claims on *forum non conveniens* grounds. The district court ruled that the interests of U.S. citizens in litigating in a home forum outweighed the interests supporting adjudication of this dispute in a Japanese forum. This was not an abuse of discretion.

The Court's order also invited the United States to address the political question doctrine and the "firefighter's rule." In the view of the United States, however, it is premature for the United States (and this Court) to address the potential application of those doctrines to the claims in this case. Their applicability depends on the law that governs the claims and defenses in this action, but no choice-of-law analysis has yet been conducted by the district court. The United States notes that, to the extent ruling on a plaintiff's claims would require a judicial inquiry into the reasonableness of military commanders' decisions regarding deployment of U.S. troops, which involves balancing risks of a deployment decision against the benefits of mission objectives, those claims would be nonjusticiable under the political question doctrine. However, judicial restraint and constitutional avoidance principles counsel in favor of conducting a choice-of-law analysis prior to deciding whether plaintiffs' claims against the private defendant are justiciable,

or addressing a novel question of first impression under state law.

STATEMENT

A. Japan is one of the United States' most important economic partners and strategic allies. It hosts approximately 50,000 U.S. servicemembers at bases in Japan under bilateral arrangements, including the 1960 Treaty of Mutual Cooperation and Security. In the context of complex security threats to both countries, the strength of the U.S.–Japan alliance is central to U.S. foreign policy objectives in the Asia-Pacific region. Our two countries also share essential values, including a commitment to democracy and the rule of law. Operation Tomodachi, involving humanitarian support by U.S. troops in the midst of a dire emergency, was a tangible example of the strength and the benefits of the U.S.– Japan alliance.

B. Japan is also a valuable economic partner to the United States, and represents the United States' fourth-largest export market and its fourth-largest source of imports. In 2014, our two-way goods and services trade exceeded $279 billion. The United States is the largest foreign investor in Japan, accounting for 29% of Japan's total inbound stock of foreign direct investment, and Japan consistently provides a large volume of foreign direct investment to the United States. Japan was the largest source of foreign direct investment in the United States in 2013 and 2014, and the second largest in 2015. Japanese firms employ an estimated 839,000 personnel in the United States,

and U.S. companies employ an additional 600,000 people whose jobs are directly tied to exports to Japan. The United States and Japan also cooperate broadly on nuclear energy issues, encompassing both close commercial ties among our companies and bilateral government-to-government engagement. On issues relating to Fukushima, for example, the U.S. Department of Energy leads an interagency Bilateral Commission on Civil Nuclear Cooperation. Both the United States and Japan are parties to the Convention on Supplementary Compensation for Nuclear Damage, a multilateral treaty regime designed to address compensation for nuclear damage from nuclear incidents.

C. The United States took a leading role in the creation of the Convention on Supplementary Compensation for Nuclear Damage, in order to establish a global framework for providing for compensation for nuclear damage from nuclear incidents.

The Convention operates to ensure an effective recovery mechanism for victims of nuclear damage from nuclear incidents, while simultaneously protecting U.S. suppliers of nuclear technology from potentially unlimited liability arising from their activities in foreign markets. *See* S. Exec. Rep. No. 109-15, at 2, 8 (2006). The Convention channels liability to the operator of a nuclear facility in the State Party where the incident occurred. *See id.* at 2; Int'l Atomic Energy Agency, Convention on Supplementary Compensation for Nuclear Damage, IAEA Doc. INFCIRC/567, art.

XIII (July 22, 1998). The Convention also helps ensure the availability of prompt and adequate compensation for victims, including U.S. nationals who might be affected by an incident outside the United States. *See* S. Exec. Rep. No. 109-15, at 2. The Convention accomplishes these goals by (1) providing for strict liability for nuclear accidents, *see* Convention art. II(1)(a), (b); *id.* annex, art. 3; (2) requiring a State Party in whose territory an incident takes place to provide at least a minimum amount of funds to compensate victims without regard for their nationality, domicile, or residence, *id.* art. III(1), (2); and (3) making a multilateral supplemental compensation fund available where damage exceeds that amount, to be funded by the States Parties to the Convention, *id.* arts. III(1)(b), IV.

These provisions work together to create an interlocking "system." Convention art. II(2). For U.S. interests in the Convention to be fulfilled, the regime established by the treaty must be viewed in its entirety. The exclusive jurisdiction provision forms part of a bargain in exchange for robust, more certain and less vexatious (*e.g.*, the application of strict liability without need to establish fault) compensation for victims of a potential incident. United States policy does not call for advancing one element of this system in isolation from the other elements of the Convention's system.

For these two inextricably interrelated interests to be fully realized, it is essential that the

Convention be as widely adhered to internationally as possible. Thus, broad international adherence to the Convention is the ultimate U.S. policy goal. *See* S. Treaty Doc. No. 107-21, at III-IV (2002). The United States led the effort to negotiate the Convention and has been the leading proponent of the treaty regime. *Treaties: Hearing Before the S. Comm. on Foreign Relations*, 109th Cong. 20-22, 26 (2005) (2005 Hearing). From the perspective of the United States, the Convention is preferable to other international treaty regimes aimed at addressing nuclear incidents, which would require sweeping changes to U.S. tort law. *See* S. Exec. Rep. No. 109-15, at 2.

The Convention was ratified by Japan in January 2015, and entered into force in April 2015.[1] Because the Convention was not in force at the time of events underlying plaintiff's claims, those events are not covered under the Convention.

D. In March 2011, a devastating earthquake and tsunami struck Japan. In keeping with the strong ties between the United States and Japan, U.S. troops provided immediate humanitarian aid to victims of this natural disaster. Plaintiffs are members of the U.S. military who assert that they were deployed in the vicinity of Fukushima to provide humanitarian aid to the victims of the earthquake and tsunami, and their families.

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[1] *See* https://www.iaea.org/Publications/Documents/Conventions/supcomp_ status.pdf.

ER 804, 816 (Second Am. Comp.).

The earthquake and tsunami ultimately led to the meltdown of three reactors at the Fukushima-Daiichi nuclear power plant, which was operated by the private defendant. Plaintiffs allege that they were exposed to radiation during the humanitarian operation and, as a result, are at risk for various radiation-related illnesses. *See, e.g*, ER 804, 845-46 (Second Am. Compl.).

Plaintiffs filed this tort suit against the Tokyo Electric Power Company, Inc. (TEPCO) and other defendants in the United States District Court for the Southern District of California. TEPCO moved to dismiss plaintiffs' second amended complaint on the basis of international comity, *forum non conveniens*, the political question doctrine, and a doctrine of California law known as the "firefighter's rule." The district court denied the motion to dismiss, and this Court accepted TEPCO's interlocutory appeal.

Following oral argument, this Court called for the views of the United States on the issues in this appeal. Specifically, this Court requested the views of the United States on the application of the doctrine of international comity, *forum non conveniens*, the political question doctrine, and the "firefighter's rule."

ARGUMENT

I. The district court did not abuse its discretion in declining to dismiss this case on the basis of international comity.

A. Comity is "the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws." *Hilton v. Guyot*, 159 U.S. 113, 164 (1895). One strand of comity is "adjudicatory comity," pursuant to which a U.S. court "'as a discretionary act of deference'" declines to exercise jurisdiction over a case on the basis that it is more properly decided in a foreign forum. *Mujica v. AirScan Inc.*, 771 F.3d 580, 599 (9th Cir. 2014), *cert. denied* 136 S. Ct. 690 (2015) (quoting *In re Maxwell Commc'n Corp. ex rel. Homan*, 93 F.3d 1036, 1047 (2d Cir. 1996)).

Under governing Ninth Circuit law, a court addressing adjudicatory comity weighs "several factors, including [1] the strength of the United States' interest in using a foreign forum, [2] the strength of the foreign governments' interests, and [3] the adequacy of the alternative forum." *Mujica*, 771 F.3d at 603 (brackets in original). This Court has set out the following nonexclusive list of factors relevant to ascertaining U.S. and foreign interests: "(1) the location of the conduct in question, (2) the nationality of the parties, (3) the character of the conduct in question, (4) the foreign policy interests of the United States, and (5) any public policy interests." *Id.* at 604; *see also id.* at 607 (indicating

that "[t]he proper analysis of foreign interests essentially mirrors the consideration of U.S. interests"). The Executive Branch's view of its interests is also entitled to "serious weight" and due deference. *Id.* at 610. This Court reviews the district court's decision for abuse of discretion. *Id.* at 589.[2]

In the view of the United States, the district court did not abuse its discretion in declining to dismiss this case under this test. The district court accurately identified *Mujica* as a recent statement of the governing law in this circuit and applied the relevant factors to the facts of this case. As the district court acknowledged, TEPCO is a Japanese corporation and its actions took place in Japan. Japan therefore has an interest in this litigation. Plaintiffs are U.S. citizens, however, who have

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[2] In describing the abuse of discretion standard for review of the denial of dismissal on international comity grounds, *Mujica* states that the district court's application of the correct legal rule must be upheld unless the application is "illogical," "implausible," or "without 'support in inferences that may be drawn from the facts in the record.'" 771 F.3d at 589. The United States respectfully suggests that this articulation of the abuse of discretion standard, which was derived from cases reviewing a district court's factual findings under a clearly erroneous standard, *see United States v. Hinkson*, 585 F.3d 1247, 1259, 1262 (9th Cir. 2009) (en banc), sets too high a bar for overturning a district court's resolution of the mixed questions of law and fact underlying a comity determination. However, in this case, the district court did not abuse its discretion under either articulation of the standard.

chosen to litigate this case in a U.S. forum. This factor weighs against dismissal.

B. The foreign policy and public policy interests here do not require a holding that the district court abused its discretion. As described above, Japan is an important ally and a valuable partner. In addition, the United States applauds Japan's efforts to provide adequate and timely compensation for claims following Fukushima, as detailed in Japan's amicus brief filed with this Court. Japan Br. 2-3. Japan has informed the Court that 2.4 million claims have been resolved under its scheme and that it has paid approximately $58 billion in compensation.[3] Japan Br. 2. These factors, however, are not a sufficient basis to conclude that the district court abused its discretion here.

Japan's remedial scheme differs in critical ways from remedial schemes as to which U.S. courts have applied principles of adjudicatory comity. Most significantly, while the United States acknowledges Japan's concerns that adjudication of claims outside its compensation scheme might undermine that scheme, Japan does not assert that the scheme is exclusive on its own terms. There is no provision of Japanese law foreclosing lawsuits arising out of the

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[3] To the government's knowledge, this compensation has been for economic damages, and Japan has not yet had the opportunity to decide a claim for personal injuries arising from radiation exposure under this scheme. However, this is apparently due to the economic nature of the harms suffered, not to the inability of the compensation scheme to address an injury claim if one were brought.

Fukushima disaster to which a U.S. court is asked to give force and effect. *Cf. Bi v. Union Carbide Chems. & Plastics Co.*, 984 F.2d 582, 585-86 (2d Cir. 1993) (dismissing suit brought by Indian mass tort victims for lack of standing where Indian law gave the Indian government the exclusive right to represent victims of the disaster and the Indian government had agreed to a global settlement). Additionally, the United States was not involved in the creation of Japan's compensation system and is not party to any bilateral or multilateral agreement recognizing or seeking recognition for Japan's compensation system as an exclusive remedy. *Cf. Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1231, 1239 (11th Cir. 2004) (dismissing on comity grounds where "the United States agreed to encourage its courts and state governments to respect the Foundation as the exclusive forum for claims from the National Socialist era" and "consistently supported the Foundation as the exclusive forum").

The United States has no clear independent interest in Japan's compensation scheme beyond our general support for Japan's efforts to address the aftermath of Fukushima. Under these circumstances, the district court could have reasonably determined that the interest in providing U.S. service members a U.S. forum for their claims was not outweighed by the interest in having the Japanese system address all claims arising out of the Fukushima nuclear accident.

C. The Convention on Supplementary Compensation for Nuclear Damage does not evince a

public policy of the United States or Japan that would render the district court's comity ruling an abuse of discretion. On the contrary, the district court's decision in this case is consistent with U.S. interests in promoting the Convention.

The Convention entered into force after the Fukushima nuclear accident, so it does not apply to this case on its own terms.[4] As a general rule, "[u]nless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party." Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 339, art. 28 (May 23, 1969);[5] *Ehrlich v. Am. Airlines, Inc.*, 360 F.3d 366, 373 (2d Cir. 2004) ("Ordinarily, a particular treaty does not govern conduct that took place before the treaty entered into force."). Some commentators have suggested that jurisdictional provisions may sometimes be interpreted as applying to disputes that arose before the entry into force of the treaty on the theory that, "by using the word 'disputes' without any qualification, the parties are

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[4] The district court correctly concluded that the Convention does not apply to this case, although its holding seems to have been based at least in part on the erroneous understanding that the Convention was not in force at the time of its order, rather than at the time of the incident. ER 47.

[5] While the United States is not a party to the Vienna Convention on the Law of Treaties, it recognizes Article 28 as reflective of customary international law.

to be understood as accepting jurisdiction with respect to all disputes existing after the entry into force of the agreement." *Draft Articles on the Law of Treaties, with commentaries*, Yearbook of the Int'l Law Comm'n, 1966, Vol. II, at 212. However, under this theory, "when a jurisdictional clause is attached to the substantive clauses of a treaty as a means of securing their due application, the non-retroactivity principle may operate to limit *ratione temporis* the application of the jurisdictional clause." *Id.*

Rather than using the general term "disputes," the Convention's jurisdictional channeling is limited to "actions concerning nuclear damage from a nuclear incident" and provides that jurisdiction "shall lie only with the courts of the Contracting Party within which the nuclear incident occurs." Convention art. XIII(1). So even under this theory, the Convention's jurisdictional provisions would not be interpreted to apply retroactively. Both "nuclear damage" and "nuclear incident" are defined terms under the Convention, brought into existence only upon the Convention's entry into force. Additionally, the verb "occurs" is in the present tense, not the past tense as would be expected if the treaty applied retroactively. *Id.*

Moreover, retroactive application would significantly undermine the liability regime established by the Convention. For U.S. interests in the Convention to be fulfilled, it is essential that the treaty regime be widely adhered to internationally. The Convention creates a compensation regime whereby, if an incident occurs for which the baseline

compensation is not sufficient, States Parties must pay into a supplementary compensation fund. *See* Convention art. III, IV. If a State were allowed to receive the benefit of the exclusive jurisdiction provisions and perhaps even access to the supplementary compensation fund by becoming a party to the treaty after a nuclear incident has taken place in its territory, there would be no need for any State to join the Convention prior to such an incident occurring. States would likely wait to join the Convention to avoid having to pay into the fund for an incident in the territory of another State Party. Additionally, if States Parties to the treaty were required to contribute to a supplementary compensation fund for incidents that predate the Convention's entry into force, the cost would be a significant disincentive to nations considering ratification.

As indicated above, the policies underlying the Convention do not require dismissal in a case to which the Convention does not apply. The Convention regime promotes U.S. interests both in providing prompt and adequate compensation to victims of nuclear incidents and in simultaneously protecting U.S. nuclear suppliers from potentially unlimited liability arising from their activities in foreign markets. *See* S. Exec. Rep. No. 109-15, at 2, 8. The treaty provisions work together to create an interlocking "system." Convention art. II(2). The regime must be viewed in its entirety, with the exclusive jurisdiction provision forming part of a bargain in exchange for robust and more likely compensation for victims of a potential incident.

Holding that international comity requires dismissal of suits brought in the United States by U.S. citizens for injuries from nuclear incidents abroad would effectively provide for exclusive jurisdiction without the other components of the treaty. United States policy does not call for advancing one element of this system in isolation of the other.

In arguing that U.S. policy requires dismissal, TEPCO mistakenly relies on testimony by the State Department's then-Senior Coordinator for Nuclear Safety, Warren Stern, during 2005 Senate hearings on the Convention. In response to a question from the Chairman of the Senate Foreign Relations Committee regarding whether joining the Convention would "in effect limit the right of U.S. persons to bring suit against entities or companies in the United States courts or against U.S. companies for accidents overseas," Mr. Stern responded in the affirmative, but also noted: "As a practical matter, in today's legal framework, where there is no [Convention], we would expect that if a nuclear incident occurs overseas U.S. courts would assert jurisdiction over a claim only if they concluded that no adequate remedy exists in the court of the country where the accident occurred." 2005 Hearing at 27. This was a factual, predictive statement ("as a practical matter"), not an expression of U.S. policy. Certainly, a district court could choose to dismiss a case based on international comity for a claim arising overseas. But it is not required to do so, and, as explained above, limiting this existing flexibility to hear claims outside the courts of the country where the accident occurred was one of the functions

of the treaty. Mr. Stern made this clear in his testimony, explaining that "[o]nce the United States and the state whose nationals are involved are both Parties to the [Convention], liability exposure will be channeled to the operator in the 'installation state,' thus substantially limiting the nuclear liability risk of United States suppliers." *Id.* at 19.

Plaintiffs in this case are U.S. servicemembers who have chosen to file claims in U.S. court. The United States has no specific foreign policy interest necessitating dismissal in this particular case. Under these circumstances, while this Court should give due regard to Japan's brief, the United States does not believe the district court abused its discretion in refraining from denying these plaintiffs access to U.S. courts in favor of a Japanese forum.

II. The district court did not abuse its discretion in declining to dismiss this case on the basis of *forum non conveniens*.

Under the doctrine of *forum non conveniens*, a "district court has discretion to decline to exercise jurisdiction in a case where litigation in a foreign forum would be more convenient for the parties." *Lueck v. Sundstrand Corp.*, 236 F.3d 1137, 1142 (9th Cir. 2001). Courts consider the following private interest factors: "(1) the residence of the parties and the witnesses; (2) the forum's convenience to the litigants; (3) access to physical evidence and other sources of proof; (4) whether unwilling witnesses can be compelled to testify; (5) the cost of bringing witnesses to trial; (6) the enforceability of the judgment; and (7) all other

practical problems that make trial of a case easy, expeditious and inexpensive." *Id.* at 1145. The relevant public interest factors are "(1) local interest of lawsuit; (2) the court's familiarity with governing law; (3) burden on local courts and juries; (4) congestion in the court; and (5) the costs of resolving a dispute unrelated to this forum." *Id.* at 1147. This Court has explained that "[w]hen a domestic plaintiff initiates litigation in its home forum, it is presumptively convenient." *Carijano v. Occidental Petroleum Corp.*, 643 F.3d 1216, 1227 (9th Cir. 2011).

The party moving for dismissal has the burden of demonstrating that dismissal is warranted. *Creative Tech., Ltd. v. Aztech Sys. Pte., Ltd.*, 61 F.3d 696, 699 (9th Cir. 1995). The district court's decision is reviewed for abuse of discretion. *Lueck*, 236 F.3d at 1143.

Although "[t]he presence of American plaintiffs . . . is not in and of itself sufficient to bar a district court from dismissing a case on the ground of *forum non conveniens*," "a showing of convenience by a party who has sued in his home forum will usually outweigh the inconvenience the defendant may have shown." *Contact Lumber Co. v. P.T. Moges Shipping Co.*, 918 F.2d 1446, 1449 (9th Cir. 1990). This Court has upheld district court decisions dismissing cases on the basis of *forum non conveniens* that were brought by U.S. citizens against foreign defendants regarding conduct that occurred abroad. *See, e.g., Loya v. Starwood Hotels & Resorts Worldwide, Inc.*, 583 F.3d 656,

665–66 (9th Cir. 2009); *Gutierrez v. Advanced Med. Optics, Inc.*, 640 F.3d 1025, 1028, 1032 (9th Cir. 2011). However, a defendant seeking to reverse the denial of a motion to dismiss on this basis faces a "doubly difficult task," given the standard of review on appeal. *See Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1177 (9th Cir. 2006).

The district court did not abuse its discretion here. As the district court explained, relevant evidence is likely present in both countries, and both parties would incur additional costs and be inconvenienced by litigating in the other country. ER 35-40. The district court recognized Japan's interest in adjudicating the lawsuit, ER 41, and the United States sees no basis for concluding that the district court abused its discretion in determining that the balance of factors nevertheless weighed against dismissal.

TEPCO asserts that a plaintiff's choice of its home forum is irrelevant where a plaintiff would not be required to travel in person to litigate the case abroad. Reply Br. 16. This is incorrect. Plaintiffs may prefer to testify in person, even if this is not legally required, and may wish to do so in front of a tribunal that will hear their testimony in untranslated form. In any event, litigating in plaintiffs' home forum may be more convenient for many reasons, of which travel is only one. The many costs and hurdles inherent in litigating in a foreign legal system are relevant to the *forum non conveniens* analysis. *See Lueck*, 236 F.3d at 1145 (instructing courts to consider "practical problems

that make trial of a case easy, expeditious and inexpensive"). TEPCO erroneously relies on cases addressing whether use of an alternative forum is unreasonable or inadequate, not merely inconvenient. *See, e.g., Argueta v. Banco Mexicano, S.A.*, 87 F.3d 320, 325 (9th Cir. 1996) (addressing enforceability of forum selection clauses in contracts, which are presumed to be valid unless unreasonable under the circumstances); *Mujica*, 771 F.3d at 614 (holding that noncitizen plaintiffs had not made the required "powerful showing" that the alternative forum is "clearly unsatisfactory" for purposes of comity).

As the United States discusses in greater detail below, the district court did err in simply assuming that U.S. law would apply to this suit, without conducting a choice-of-law analysis. ER 42. However, this error does not require reversal of the *forum non conveniens* ruling. While this Court has stated that a choice-of-law analysis must precede a decision on *forum non conveniens*, it did so in the context of cases in which a potentially applicable rule of law mandated venue in U.S. courts. *See Creative Tech.*, 61 F.3d at 700. The United States is not aware of any such statute that could apply in this case. Where no such venue provision is at issue, "the applicability of United States law to the various causes of action 'should ordinarily not be given conclusive or even substantive weight.'"

Lueck, 236 F.3d at 1148 (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 247 (1981)).[6]

III. This Court should refrain from addressing the political question doctrine at this preliminary stage without the benefit of a choice- of-law analysis.

The Court also invited the United States to express its views on the application of the political question doctrine to the claims in this case. The United States notes that, to the extent ruling on a plaintiff's claims would require a judicial inquiry into the reasonableness of military commanders' decisions regarding deployment of U.S. troops, which involves balancing the risks of a deployment decision against the benefits of mission objectives, those claims would be nonjusticiable under the political question doctrine. "The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments." *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973). Decisions regarding where to locate troops in dangerous and unfolding situations, involving a weighing of the risk to troops against mission objectives, are exactly the type of "complex, subtle, and professional decisions within the military's professional judgment and beyond courts' competence." *Harris v. Kellogg Brown & Root*

[6] Indeed, should this case be decided under Japanese law, the application of Japan's strict-liability regime may reduce the need for evidence located in Japan regarding the maintenance of the power plant.

Servs., Inc., 724 F.3d 458, 478 (3d Cir. 2013); *see also Wu Tien Li-Shou v. United States*, 777 F.3d 175, 180- 81 (4th Cir. 2015); *Saldana v. Occidental Petroleum Corp.*, 774 F.3d 544, 553 (9th Cir. 2014); *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 843-44 (D.C. Cir. 2010) (en banc); *Aktepe v. United States*, 105 F.3d 1400, 1404 (11th Cir. 1997).

At this early stage of the litigation, however, it is premature to decide whether the political question doctrine applies prior to conducting a choice-of-law analysis. The United States accordingly takes no position now on the doctrine's application to the claims in this case.[7]

This Court has explained that, "[a]lthough the political question doctrine often lurks in the shadows of cases involving foreign relations," such cases are often resolved on other legal grounds. *Alperin v. Vatican Bank*, 410 F.3d 532, 538 (9th Cir. 2005). "[I]t is a well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case." *Northwest Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 205 (2009) (quoting *Escambia Cty. v. McMillan*, 466 U.S. 48, 51 (1984) (per

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[7] Depending on how these proceedings develop, the government may express further views on the applicability of the political question doctrine to the claims in this case.

curiam)). Although this Court treats the political question doctrine as a jurisdictional bar, *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 979 (9th Cir. 2007), it can wait for the issues in the litigation to be developed prior to dismissing on that basis, *New York v. United States*, 505 U.S. 144, 185 (1992); *Wong v. Ilchert*, 998 F.2d 661, 662-63 (9th Cir. 1993).

In order to assess the political question argument in this case, the Court must understand the elements of the cause of action and relevant defenses under the applicable law. TEPCO asserts that it has a defense based on the U.S. military's supposed recklessness in exposing its troops to radiation, which TEPCO argues is a superseding cause absolving it of liability. TEPCO makes this argument under California law. However, the parties have not yet briefed choice of law and the district court did not address it. Given that the relevant conduct that gave rise to plaintiffs' claims occurred in Japan, there is at least a possibility that Japanese law will apply to this case. *See Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1005 (9th Cir. 2001) (explaining standard for choice of law determinations for cases filed in California). At a minimum, the district court would have to consider the potential bodies of law that apply, whether California's or Japan's; to determine whether there is a true conflict between those two bodies of law; to resolve any conflict by considering each state's interests in having its law applied; and, finally, to "apply the law of the state whose interest would be more impaired if its law were not applied." *Id.*

Without knowing whether California law will apply or whether a superseding-cause defense exists under Japanese law, it is premature to decide whether this case is nonjusticiable under the political question doctrine. Even if the superseding-cause defense were applicable, as the district court explained, at this early stage of the litigation it is far from clear whether the court would actually be called upon to evaluate the wisdom of military decision making. It is also unclear at this stage whether a need to review military decisions to adjudicate any superseding-cause defense would require dismissal, or whether the military's decisions simply could not qualify as a superseding cause. *See Harris*, 724 F.3d at 469 n.9. To the extent that the superseding-cause defense under governing law requires that the intervening actions be unforeseeable, the court may determine that it was foreseeable that rescue workers, including the U.S. military, would respond to this disaster even if some risk were involved.[8] *See, e.g., USAir Inc. v.*

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[8] Determining whether there was an unforeseeable intervening action could also require a court to resolve an apparent dispute regarding the distance of the U.S.S. *Ronald Reagan*, the vessel on which the troops were deployed, from the Fukushima plant. Plaintiffs assert that at some point the U.S.S. *Ronald Reagan* was positioned just two miles from the Fukushima plant. ER 357 (Third Am. Compl.); ER 833 (Second Am. Compl.). Significantly, however, the Department of Defense, in conjunction with the National Council on Radiation Protection and Measurements, conducted an official investigation into the Fukushima disaster and the deployment to support Operation Tomodachi and determined that the vessel was never closer than 100 miles to the site of the

U.S. Dep't of Navy, 14 F.3d 1410, 1413 (9th Cir. 1994) ("A superseding cause must be something more than a subsequent act in a chain of causation; it must be an act that was not reasonably foreseeable at the time of the defendant's negligent conduct.") (applying California tort law).

IV. The Court should not reach the "firefighter's rule" absent a choice-of-law analysis.

For reasons similar to those expressed in the prior section, in the view of the United States it is premature to determine whether this case should be dismissed based on the firefighter's doctrine. The firefighter's rule is a doctrine under California tort law. *See, e.g., Lipson v. Superior Court*, 644 P.2d 822, 826-27 (Cal. 1982). Without knowing the applicable body of law that governs this dispute, there is no way to determine whether a California state-law defense would be even potentially available. The United States urges the Court not to rule on the scope of the firefighter's rule before the choice-of-law analysis is completed, particularly as doing so could require an expansion of the doctrine and could have unforeseen repercussions for U.S. troops.

CONCLUSION

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nuclear plant. *See* Dep't of Def., Final Report to the Congressional Defense Committees in Response to the Joint Explanatory Statement Accompanying the Department of Defense Appropriations Act, 2014, page 90, "Radiation Exposure," at B-1 (June 19, 2014), www.health.mil/Reference-Center/Reports/2014/06/19/Radiation-Exposure- Report.

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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