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FOREWORD: The Role of International Courts in Protecting Environmental Commons

Christina Voigt*

This issue of the *University of Hawai'i Law Review* inquires about the roles of international courts when dealing with certain environmental issues for the "greater good" or the benefit of all—that can be all states, "all humankind," or the planet as a whole. These are, for example, issues concerning areas that lie outside states' national jurisdiction and which cannot be appropriated and subjected to sovereign claims, such as the High Seas or endangered migratory species like certain whales. Environmental commons can also be understood as those interests that are of common concern, such as halting the decline in global biological diversity, protecting the remaining rainforests on this planet that are the "lungs of the earth," or preventing dangerous climate change.

The main questions this issue seeks to address are: What role *do* international courts play? Which role *can* they play? Which role *should* they play? These questions are posed for a world that is characterized by over-use and over-exploitation of natural resources; habitat fragmentation and destruction of ecological systems by the massive pollution of the seas, the soils and the air; and where multilateral environmental regimes don't seem to be effective. Whether the reason lies within its rules or in the absence of effective implementation is up for interpretation.

Not all news is bad: the ozone hole seems to be healing due to the successes of the Vienna Convention and the Montreal Protocol. But a recent WWF report warns us that 60% of animal species have been wiped out in the last 50 years.[1] 60%—more than half of the web of life. The IPCC, in the clearest formulation ever used in any of its reports, tells us that we have a 10-year time window to address climate change and that we need to cut the emission of greenhouse gases down to net zero within the next 3 decades if we want to avoid a global collapse of all systems, be they economic, ecological, or social.[2] This situation made Jane Goodall, the world famous primatologist,

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[1] Ed Yong, *Wait, Have We Really Wiped Out 60 Percent of Animals?*, THE ATLANTIC (Oct. 31, 2018), https://www.theatlantic.com/science/archive/2018/10/have-we-really-killed-60-percent-animals-1970/574549/.

[2] *See generally* Intergovernmental Panel on Climate Change [IPCC], SPECIAL REPORT: GLOBAL WARMING OF 1.5°C (2018), https://www.ipcc.ch/sr15/.

wonder in disbelief: How come the most intellectual created to ever walk Earth is destroying its only home?[3]

What role do courts play in this situation? In this issue, the authors focus on international courts because we are looking at questions which at their root have collective action problems and causes and effects that are disbursed globally. These are the problems which the international community has to solve collectively by applying its governance tools, such as international law and international courts. This must, however, by no means diminish the need for strong national laws and strong national courts.

International courts appear to be adequately positioned to address such interests, being independent and international institutions in the public global order. They function as authoritative interpreters of international law and act as agents for the development of international law. They are usually permanent, which allows them to act as global law makers that weave together a system of norms[4] and moreover, are uniquely situated to take interests that go beyond the self-interest of states into account. It has been claimed that international adjudicators, if properly insulated from partisan pressures or biases, are institutionally inclined and relatively well-positioned to promote wider interests or community interests and can act as "trustees of humanity."[5]

International courts can fulfill crucial roles by stating what the law is; and can overcome collective action failures when states fail to reach agreements. They can curb power and stabilize expectations by being consistent and treating like cases alike and by respecting the rule of law.

With regard to environmental commons, and the respective common interest in their protection, there are, however, a number of challenges.

First of all, as we all know, there is *no* international environmental court. This means that cases which concern environmental commons and interests have to be brought (if at all possible) to courts which either have *general* jurisdiction, competence, and expertise—like the International Court of Justice—or which have *special* jurisdiction, like the World Trade Organization Dispute Settlement System or Human Rights Courts, which deal with the norms that aim at liberalization of international trade or human rights, respectively. Environmental norms therefore have to "somehow" fit into the applicable normative framework, either by the use of exception

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[3] Jane Goodall, *'The Most Intellectual Creature to Ever Walk Earth is Destroying its Only Home'*, THE GUARDIAN (Nov. 3, 2018), https://www.theguardian.com/environment/2018/nov/03/the-most-intellectual-creature-to-ever-walk-earth-is-destroying-its-only-home.

[4] Eyal Benvenisti, *Community Interests in International Adjudication*, *in* COMMUNITY INTERESTS ACROSS INTERNATIONAL LAW 70 (Eyal Benvenisti & Georg Nolte eds., 2018).

[5] *Id.*

clauses or broader and dynamic interpretation. This, in itself, raises a number of interesting legal questions.

Second, environmental cases usually are only "environmental" for one side of the dispute. For the other side, questions of right to development, permanent sovereignty over natural resources, access and benefit sharing, food security, poverty eradication or other objectives take center-stage. How do courts square the circle when different objectives collide? Which role can, and should, sustainable development play in this context; a concept which seeks the integration of environmental, economic and social "priorities" within the ecological boundaries of the planet. In other words, international courts are often faced with trade-offs and challenges to withstand political and/or ideological pressures in one direction or another. Only in rare cases do underlying treaty and customary law provide for the protection of truly "collective interests," such as in the protection of "global common goods." In many cases, they have manifested and codified the trade-offs just mentioned.

Third, the challenges lie as much in the substantive law applied by courts as in their procedures. Even if a case is brought to an international court, significant procedural challenges arise with respect to standing, legal interest, and burdens of proof. Moreover, the bilateral nature of many dispute settlement mechanisms may not suit well the collective nature of common interest claims. What role do *erga omnes* rules play in this picture? How are non-injured states treated and what roles do intervening states play? Also, how can non-state actors be meaningfully involved? Are amicus curiae briefs the end of the line – or are there other ways of engagement?

The articles in this issue circle around the following questions: (1) what are environmental commons; (2) how does international law account for legal interests in such commons; and (3) how do international courts deal with them?

In his article, *Lorenzo's Answer*, Associate Justice Michael Wilson of the Hawaii Supreme Court argues strongly for the rule of law to prevent global warming of 1.5°C above pre-industrial levels. He describes a pragmatic approach being employed by the "Final Stand"—a global movement grounded in legislation and litigation to protect future generations from catastrophic global climate catastrophe within a rapidly closing time window.

Professor Daniel Bodansky in his article, *Adjudication v. Negotiation in Protecting Environmental Commons*, looks at the future prospect of adjudicating environmental protection through courts. He contrasts the respective merits of litigation and negotiation as methods of addressing environmental commons problems and provides his view of whether or not the "rule of negotiators" should be replaced by a "rule of judges?"

Professor Lakshman Guruswamy in *The Use of Courts to Protect the Environmental Commons* first provides a comprehensive analysis of the term "environmental commons." He then goes on to provide an overview of the legal requirements, challenges and possibilities of judicial protection of environmental commons through international arbitration, in particular with respect to primary rules of international law and secondary rules of state responsibility. He concludes by reviewing the promise of judicial protection and the principal weaknesses.

Professor David Forman argues for greater attention to indigenous ecological knowledge in international and national legislation and litigation. In his article, *Applying Indigenous Ecological Knowledge for the Protection of the Environmental Commons: Case Studies from Hawaii for the Benefit of "Island Earth,"* he shows that the integration of indigenous ecological knowledge can shape more effective responses to the climate crisis and other pressing environmental challenges and lead, among other things, to deeper harmonization between the law of human rights and the law of environmental protection.

Professor Margaret Young in her contribution, *International Adjudication and the Commons*, invites first to a reflection about the scale and nature of environmental commons under international law. She then goes on to investigate how the international courts can mediate the immediate need for dispute settlement between states with the broader interests of a global community. In doing so, she considers how international cases across three different international tribunals—the International Court of Justice, the International Tribunal for the Law of the Sea, and the World Trade Organization Appellate Body—are framing "the commons." By bringing attention to these cases, she seeks to demonstrate a certain preparedness and capacity of international courts to engage in the ideals and ideas of the commons. In the context of the selected cases, professor Young brings attention to the social, cultural and economic conditions that have been at play in international litigation over commons-type scenarios, and reflects upon whether the tribunals were well-equipped to deal with them.

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The articles in this issue are all carried forward by the same investigative spirit into the capacity of the rule of law in adjudication to protect the environment for the common good. This issue of the *University of Hawai'i Law Review* seeks to explore whether international courts are ready, able, willing and prepared to step in to strike a sustainable balance between sovereign self-interest and the aim of collectively protecting environmental common goods. We hope that it stimulates interest and discussion – and invites to reflection, further research and legal development.

This issue is based on the Pluricourts and *University of Hawai'i Law Review*'s Symposium that took place on November 8, 2018. I would like to express my sincere thanks to the William S. Richardson School of Law at the University of Hawai'i at Mānoa, represented by Associate Dean and Professor, Denise Antolini, and the Environmental Law Program and its Director, Professor David Forman, for hosting the event, for showing a strong interest in the subject matter, and for making their precious time available.

A special thanks to the *University of Hawai'i Law Review* for co-organizing the Symposium and the Law Review's team, especially Jacob Kamstra and Matthew Kollinger, as well as Casey Miyashiro, for their tireless help and support in making this event happen.

Many thanks go to Julie Suenaga, Miranda Steed, and Gro Kvigne for their help and support, especially with the intricate logistics, planning, and administration.

And last but not least, many thanks go to the Student Law Association for their support of the event and to Pluricourts—the Center of Excellence for the study of the legitimate roles of the judiciary in the global order—at the University of Oslo, Faculty of Law, for generously supporting this event. The background for this topic is a research pillar at Pluricourts which deals with international courts and tribunals and global public goods. Pluricourts, in general, inquires into questions of legitimacy with regard to the practice of international courts.

The event was also co-organized by the IUCN World Commission on Environmental Law (WCEL) – represented by its Deputy Chair, Professor Denise Antolini and its chair Justice Antonio Benjamin, Brazil, as well the WCEL Specialist Group on Climate Change.

Lorenzo's Answer

By: Associate Justice Michael D. Wilson*

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I. INTRODUCTION

"What can I do?" Lorenzo, a first-year law student, posed this question to a room full of academics at the University of Hawai'i Law Review Symposium on the Role of International Courts in Protecting Environmental Commons on November 9, 2018. He sought guidance as a young-adult law student facing the existential threat posed by climate change. A pregnant silence followed. Lorenzo is a member of the "Final Stand." A group of individuals comprised of youth, and people yet unborn, that will suffer the deleterious consequences of unfettered greenhouse gas emissions.

This article seeks to answer his question. It describes a pragmatic approach being employed by the Final Stand through the rule of law to prevent global warming of 1.5°C above pre-industrial levels.[1] It applies key scientific findings on climate change that define the limited solution horizon—the remaining time in which to implement solutions. Finally, this article identifies current strategies undertaken by the Final Stand grounded in litigation and legislation.

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* Michael D. Wilson is an Associate Justice of the Supreme Court of Hawai'i. He thanks Lucy Brown and Miranda Steed for their assistance with this article.

[1] The Paris Agreement, entered into by 185 state parties, limits the increase in global average temperature to 1.5°C above pre-industrial levels in an effort to "significantly reduce the risks and impacts of climate change[.]" Paris Agreement art. 2, Apr. 22, 2016–April 21, 2017, T.I.A.S. No. 16-1104, FCCC/CP/2015/L.9/Rev.1; Status of the Paris Agreement, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&lang=_en&clang=_en (last visited Mar. 24, 2019) (listing the status of signature, ratification, acceptance, approval, or accession of the state parties to the Paris Agreement).

II. THE SCIENCE OF CLIMATE CHANGE AND ITS LIMITED SOLUTION HORIZON

Human activities[2] unequivocally cause emissions that significantly increase the atmospheric concentrations of greenhouse gases such as carbon dioxide (CO_2), methane (CH_4), and nitrous oxide (N_2O).[3] Greenhouse gases trap radiation emitted by the sun in the Earth's atmosphere—radiation that would otherwise be reflected back into space.[4] Trapped radiation results in additional warming of Earth's surface.[5] Essentially, humans are adding greenhouse gases "to the atmosphere at a rate far greater than [they] are removed by natural processes, creating a long-lived reservoir of gas in the atmosphere and oceans that is driving the climate to a warmer and warmer state."[6]

The 2018 Special Report of the Intergovernmental Panel on Climate Change ("IPCC")[7] on Global Warming of 1.5°C (SR1.5) reports that Earth's

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[2] Human activities that create greenhouse gas emissions include, for example, burning fossil fuels to produce electricity and fuel vehicles, cutting down forests to clear land for agriculture or development, and large-scale livestock production. *See* Intergovernmental Panel on Climate Change [IPCC], *Climate Change 2013: The Physical Science Basis*, AR5 (Sept. 2013) https://www.ipcc.ch/site/assets/uploads/2017/09/WG1AR5_Chapter01_FINAL.pdf [hereinafter 2013 IPCC Report] (providing an overview of the conclusions drawn from previous IPCC assessment reports).

[3] *Id.* at 124; *see also* U.S. NATIONAL RESEARCH COUNCIL, ADVANCING THE SCIENCE OF CLIMATE CHANGE 21–22 (2010) ("Some scientific conclusions or theories have been so thoroughly examined and tested, and supported by so many independent observations and results, that their likelihood of subsequently being found to be wrong is vanishingly small. Such conclusions and theories are then regarded as settled facts. This is the case for the conclusions that the Earth system is warming and that much of this warming is very likely due to human activities.").

[4] JOSEPH ROMM, CLIMATE CHANGE: WHAT EVERYONE NEEDS TO KNOW 1 (2016).

[5] 2013 IPCC Report, *supra* note 2, at 124.

[6] 2 ALEXA JAY, DAVID REIDMILLER, CHRISTOPHER AVERY, DANIEL BARRIE, BENJAMIN DEANGELO, APURVA DAVE, MATTHEW DZAUGIS, MICHAEL KOLIAN, KRISTIN LEWIS, KATIE REEVES & DARRELL WINNER, *Chapter 1 in* FOURTH NATIONAL CLIMATE ASSESSMENT: IMPACTS, RISKS, AND ADAPTATION IN THE UNITED STATES 36, 40 (David Reidmiller et al. eds., 2018) (concluding that "[t]he warming trend observed over the past century can only be explained by the effects that human activities, especially emissions of greenhouse gases, have had on the climate").

[7] The IPCC was established by the World Meteorological Organization and United Nations Environment Programme in 1988. IPCC, IPCC FACTSHEET: WHAT IS THE IPCC? 1 (2013), https://www.ipcc.ch/site/assets/uploads/2018/02/FS_what_ipcc.pdf. The IPCC provides policymakers and governments "with regular assessments of the scientific basis of climate change, its impacts and future risks, and options for adaptation and mitigation." *Id.* IPCC reports are written by hundreds of expert scientists, and reviewed by thousands more, to ensure "the full range of views in the scientific community." *Id.*

surface today is approximately 1°C warmer than pre-industrial levels.[8] Although 1°C may sound trivial, it is monumental compared to the relatively constant temperatures enjoyed by Earth for the past several centuries.[9] The rate of warming in the last fifty years alone is unique compared to the last 1,300 years on Earth.[10] Human activity has caused a new geological era, the Anthropocene, in which "rates of human-driven change far exceed the rates of change driven by geophysical or biosphere forces that have altered the Earth System trajectory in the past[.]"[11] The Anthropocene era is thus defined by human-caused alterations to Earth's natural systems. In the Anthropocene era, climate change affects Earth by, *inter alia*, sea level rise, ocean acidification,[12] "changes in the likelihood of the occurrence or strength of extreme weather and climate events[,]"[13] and rapid ice melt.[14]

The IPCC predicts that, if warming continues at its current rate, "[g]lobal warming is *likely* to reach 1.5°C between 2030 and 2052[.]"[15] A world 1.5°C warmer than pre-industrial levels will be different than the one we know today. Global mean sea level rise will likely reach 0.26 to 0.77 meters (0.85 to 2.5 feet) by 2100, exposing small islands and low-lying coastal areas to flooding, increased saltwater intrusion in freshwater aquifers, and damage to infrastructure.[16] Warming waters are expected to cause a 70% to 90% decline in coral reefs.[17] The impact on biodiversity and species extinction will be extreme: scientists have warned that we are entering the sixth mass extinction "in Earth's 4.5 billion years of history."[18] The irreversible and

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[8] Intergovernmental Panel on Climate Change [IPCC], *Special Report: Global Warming of 1.5°C*, IPCC Doc. SR15, at 51 (2018) [hereinafter 2018 IPCC Report.] "Pre-industrial" refers to the period between 1850 and 1900 A.D. *Id.*

[9] 2013 IPCC Report, *supra* note 2, at 126.

[10] *Id.* at 124.

[11] 2018 IPCC Report, *supra* note 8, at 54.

[12] 2013 IPCC Report, *supra* note 2, at 136. Ocean acidification refers to a decrease in ocean pH as a result of the ocean's uptake of CO_2. *Id.* According to the most recent IPCC report, "[t]he ocean has absorbed about 30% of the anthropogenic carbon dioxide, resulting in ocean acidification and changes to carbonate chemistry that are unprecedented for at least the last 65 million years[.]" 2018 IPCC Report , *supra* note 8, at 178.

[13] 2013 IPCC Report, *supra* note 2, at 134. Examples of extreme weather events include floods, drought, and heat waves that are "rare at a particular place and/or time of year." *Id.*

[14] *Id.* at 134, 136.

[15] 2018 IPCC Report, *supra* note 8, at 6.

[16] *Id.* at 9–10.

[17] *Id.* at 10.

[18] Gerardo Ceballos, Paul R. Ehrlich, Anthony D. Barnosky, Andrés García, Robert M. Pringle & Todd M. Palmer, *Accelerated Modern Human-Induced Species Losses: Entering the Sixth Mass Extinction*, SCI. ADVANCES, June 19, 2015, at 1, 3 ("[W]e can confidently conclude that modern extinction rates are exceptionally high, that they are increasing, and that they suggest a mass extinction under way—the sixth of its kind in Earth's 4.5 billion years of

catastrophic loss of ice sheets in Antarctica and Greenland could be triggered, resulting in additional multi-meter sea level rise.[19] These environmental processes, among many others, create climate-related risks to human "health, livelihoods, food security, water supply, human security, and economic growth[.]"[20] Vulnerable and disadvantaged communities, indigenous peoples, and agricultural and coastal communities will be disproportionately impacted[21] and hundreds of millions of people will be displaced.[22] The unprecedented effects of human-caused greenhouse gas emissions on Earth will become increasingly apparent within the next 100 years.

Notwithstanding the environmental and humanitarian crises that await a world with an average temperature 1.5°C above the pre-industrial average, *global warming will surpass 1.5°C within this century at current emissions rates*.[23] Thus, climate change has a limited solution horizon—the remaining time in which we have to implement solutions to prevent 1.5°C of warming.[24] The United Kingdom Foreign Secretary's Special Representative for Climate Change and former Chief Scientific Advisor,[25] Sir David King, urges that solutions must be implemented within the next ten years, with the goal of reducing global greenhouse gas emissions to net-zero by 2050.[26] Dr. Charles

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history.").

[19] 2018 IPCC Report, *supra* note 8, at 9.

[20] *Id.* at 11.

[21] *Id.*

[22] David King, Centre for Climate Repair at Cambridge: A Concept Note 1, 2 [hereinafter King, A Concept Note] (on file with author); *see also* David King, Address at the Eco Forum Global Annual Conference (July 8, 2018) (urging that one of the greatest risks of climate change is environmental migration and warning that low-lying areas like Kolkata and Bangladesh, with a cumulative total of 110 million residents, will become "unlivable") [hereinafter King, Address at the Eco Forum Global Annual Conference].

[23] 2018 IPCC Report, *supra* note 8, at 6 ("Global warming is *likely* to reach 1.5°C between 2030 and 2052 if it continues to increase at the current rate.") (emphasis in original); *see also* Xiaoxin Wang, Dabang Jiang & Xianmei Lang, *Climate Change of 4°C Global Warming above Pre-Industrial Levels*, 35 ADVANCES ATMOSPHERIC SCI. 757, 760 (2018) (warning that "if greenhouse gas emissions continue to rise with no mitigation, many of the models suggest a 4°C global warming being reached in the 21st century"); Chip Fletcher, Lecture at the University of Hawai'i at Mānoa (Feb. 26, 2019) [hereinafter Fletcher, Lecture] (describing predictions that, on the current path of emissions, Earth will reach 3°C to 4°C of warming by 2100).

[24] Humans have long argued about issues such as slavery, women's rights, nuclear warfare, abortion, and genetic engineering. Over time, society has developed strategies to address some of these issues, often through the help of courts. The limited solution horizon intrinsic to climate change differentiates it from all other challenges humanity has faced as there is little time left to argue—we must act quickly and decisively.

[25] *Featured Speaker: Sir David King*, WORLD BANK LIVE, https://live.worldbank.org/experts/sir-david-king (last visited Mar. 18, 2019).

[26] King, A Concept Note, *supra* note 22, at 1; *see also* King, Address at the Eco Forum

"Chip" Fletcher, renowned scientist and Associate Dean for Academic Affairs for the Department of Earth Sciences at the School of Ocean and Earth Science Technology at the University of Hawai'i at Mānoa,[27] contends that global greenhouse gas emissions must be reduced by 50% every decade starting *now*.[28] The world's largest insurance companies are already partnering with the United Nations to develop a strategy to protect the impending "uninsurable" world.[29] To protect future generations from the uninsurable world, many are taking action to reduce greenhouse gas emissions at a pace sufficient to prevent global ecological, economic, and humanitarian catastrophe.

Climate change's limited solution horizon invariably impacts the time in which the rule of law may be used to reduce greenhouse gas emissions. New South Wales Supreme Court Justice Francois Kunc suggests that the rule of law itself may be at stake.[30] He opines that "[a]t its worst, inadequately mitigated climate change could undo our social order and the rule of law itself. Some commentators have proposed that only a 'war footing' will be an adequate response."[31] Accordingly, the rule of law is a tool in jeopardy of being lost to future generations unless carbon neutrality is achieved before the solution horizon is reached. The remainder of this article will discuss how members of the Final Stand are presently applying the rule of law to achieve survival by averting 1.5°C of global warming.

Global Annual Conference, *supra* note 22, (calling on all nations to reduce global greenhouse gas emissions to net zero by 2045); 2018 IPCC Report, *supra* note 8, at 7 ("Reaching and sustaining net zero global anthropogenic CO2 emissions and declining net non-CO2 radiative forcing would halt anthropogenic global warming on multi-decadal time scales (*high confidence*).").

[27] *Chip Fletcher*, UNIV. OF HAW. AT MĀNOA SCH. OF OCEAN AND EARTH SCI. AND TECH., https://www.soest.hawaii.edu/soestwp/about/directory/chip-h-fletcher/ (last visited Mar. 18, 2019).

[28] Fletcher, Lecture, *supra* note 23; *see also* Chip Fletcher, *Speeding Toward Irrevocable Climate Chaos*, CIVIL BEAT (Mar. 14, 2014), https://www.civilbeat.org/2019/03/speeding-toward-irrevocable-climate-chaos/.

[29] Charlie Wood, *IAG says climate change could make world 'uninsurable': Financial Review*, REINSURANCE NEWS (Nov. 16, 2018), https://www.reinsurancene.ws/iag-says-climate-change-could-make-world-uninsurable-financial-review/.

[30] Francois Kunc, *As Our Ancient Ancestors Knew, Climate Change Can Pose a Threat to the Rule of Law*, 31 AUSTL. FIN. REV. 1, 2 (2018).

[31] *Id.* at 2.

III. LITIGATION: DOMESTIC AND INTERNATIONAL PERSPECTIVES

A. Juliana v. United States—"This is no ordinary lawsuit."[32]

To the Final Stand, developing effective strategies to hold governments and carbon emitters accountable is crucial to mitigating the climate crisis. While the rule of law still exists, litigation will be an important strategy. In 2015,[33] a group of young environmentalists between the ages of eight and nineteen filed a civil rights action against the United States, President Barack Obama, and several executive agencies (collectively "U.S. government").[34] The plaintiffs alleged that the U.S. government has "known for more than fifty years that the carbon dioxide ('CO_2') produced by burning fossil fuels was destabilizing the climate system in a way that would 'significantly endanger plaintiffs, with the damage persisting for millennia.'"[35] Accordingly, they asserted, the willful actions of the U.S. government to encourage and enable greenhouse gas emissions to exponentially rise "violate [the plaintiffs'] substantive due process rights to life, liberty, and property" and breach public trust obligations owed to present and future generations.[36] The case is currently before the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") and calendared for oral argument on June 4, 2019, in Portland, Oregon.[37]

Juliana is distinguished by an active and unusual procedural history that continues to unfold with attention from the United States Supreme Court.[38] The case was filed in the United States District Court for the District of Oregon ("Oregon District Court").[39] The U.S. government, together with intervenor-defendant fossil fuel and manufacturing associations,[40] filed motions to dismiss the complaint.[41] In a groundbreaking opinion, Judge Ann

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[32] Juliana v. United States (*Juliana I*), 217 F. Supp. 3d 1224, 1234 (D. Or. 2016).

[33] Juliana v. United States (*Juliana II*), No. 6:15-cv-01517-AA, 2018 WL 6303774, at *1 (D. Or. Nov. 21, 2018).

[34] *Juliana I*, 217 F. Supp. 3d at 1233.

[35] *Id.* at 1233 (quoting Plaintiff's First Amended Complaint ¶ 1).

[36] *Id.*

[37] Order, Juliana v. United States, No. 18-36082 (9th Cir. Feb. 4, 2019); *Calendar for The Pioneer Courthouse, Portland Or., June 3–7, 2019*, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, https://www.ca9.uscourts.gov/calendar/view.php?hearing=June%20-%20The%20Pioneer%20Courthouse,%20Portland%20Oregon&dates=3-7&year=2019 (last visited Apr. 20, 2019).

[38] Due to the overwhelming procedural history of the case, only key actions will be discussed in this article.

[39] *Juliana I*, 217 F. Supp. 3d at 1233.

[40] The intervenors-defendants included the National Association of Manufacturers, the American Fuel & Petrochemical Manufacturers, and the American Petroleum Institute. *Id.*

[41] *Id.*

Aiken denied the motions and ordered the trial to move forward.[42] In 2017, the U.S. government filed a petition for writ of mandamus in the Ninth Circuit alleging that discovery obligations arising from the case would be so "burdensome" on the federal government as to "threaten the separation of powers."[43] The Ninth Circuit denied mandamus relief, holding that the issues raised by the U.S. government would be "better addressed through the ordinary course of litigation."[44]

Shortly before trial was set to begin in 2018, the U.S. government filed a petition for writ of mandamus in the United States Supreme Court.[45] It sought to stay proceedings in the Oregon District Court pending disposition of the mandamus petition.[46] In a 7–2 decision, the Supreme Court denied the request for a stay and the petition—without prejudice.[47] The Court held that the petition was premature because adequate relief was still available in the Ninth Circuit.[48] The order notes that "Justice Thomas and Justice Gorsuch would grant the application [for a stay]."[49]

On November 5, 2018, the U.S. government again filed a petition for writ of mandamus in the Ninth Circuit.[50] This time, the Ninth Circuit stayed the trial pending the resolution of the mandamus petition[51] and requested that the Oregon District Court reconsider granting an interlocutory appeal.[52] In response, the Oregon District Court certified the case for interlocutory appeal, though it "[did] not make this decision lightly."[53] In a 2–1 decision,

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[42] *Id.* at 1262–63 ("Federal courts too often have been cautious and overly deferential in the arena of environmental law, and the world has suffered for it."). The U.S. government filed a motion to certify the Oregon District Court's November 10, 2016 opinion and order denying the motions to dismiss for immediate appeal to the Ninth Circuit, but the motion was denied. Juliana v. United States (*Juliana III*), No. 6:15-cv-0517-TC, 2017 WL 2483705, at *1–*2 (D. Or. June 8, 2017).

[43] *In re* United States, 884 F.3d 830, 833 (9th Cir. 2018).

[44] *Id.* at 834.

[45] *In re* United States, 139 S. Ct. 452, 452 (2018).

[46] *Id.*

[47] *Id.* at 453.

[48] *Id.*

[49] *Id.*

[50] Juliana v. United States (*Juliana II*), No. 6:15-cv-01517-AA, 2018 WL 6303774, at *1 (D. Or. Nov. 21, 2018).

[51] *In re* United States, No. 18-73014 (9th Cir. Nov. 8, 2018). The writ of mandamus was ultimately denied. Order at 6, *In re* United States, No. 18-73014 (9th Cir. Dec. 26, 2018).

[52] Order at 2, *In re* United States, No. 18-73014 (9th Cir. Nov. 8, 2018). The Oregon District Court had previously denied the U.S. government's motion to certify the case for interlocutory appeal. Juliana v. United States (*Juliana III*), No. 6:15-cv-0517-TC, 2017 WL 2483705, at *2 (D. Or. June 8, 2017).

[53] *Juliana II*, 2018 WL 6303774, at *3.

the Ninth Circuit granted the interlocutory appeal.[54] The case is currently stayed pending oral argument and a decision by the Ninth Circuit.[55] As of March 2019, fifteen amicus briefs were filed in support of the plaintiffs,[56] including a brief by Zero Hour with over 30,000 youth signatures.[57]

Juliana is not the first case in the United States to address climate change, and it will not be the last.[58] In a March 19, 2019 memorandum opinion, the United States District Court for the District of Columbia held that the United States Bureau of Land Management ("BLM") violated the National Environmental Policy Act ("NEPA")[59] when it "failed to take a hard look at the climate change impacts of oil and gas drilling" in its Environmental Assessments ("EA") and Findings of No Significant Impact ("FONSI").[60] Importantly, the court noted that "[g]iven the national, cumulative nature of climate change, considering each individual drilling project in a vacuum deprives the agency and the public of the context necessary to evaluate oil and gas drilling on federal land before irretrievably committing to that drilling."[61] Also in the realm of climate change litigation, a large commercial

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[54] Order at 3, Juliana v. United States, No. 18-80176 (9th Cir. Dec. 26, 2018). Judge Friedland dissented, noting that the Oregon District Court expressed that the criteria for certifying the interlocutory appeal was not actually satisfied in this case. *Id.* at 4 (Friedland, J., dissenting). Judge Friedland emphasized that allowing the appeal "effectively rewards the Government for its repeated efforts to bypass normal litigation procedures by seeking mandamus relief in our court and the Supreme Court. If anything has wasted judicial resources in this case, it was those efforts." *Id.* at 6 n.1.

[55] *Juliana II*, 2018 WL 6303774, at *3.

[56] Press Release, Our Children's Trust, Zero Hour Launches Nationwide Campaign in Support of *Juliana v. United States* Youth Plaintiffs (Feb. 19, 2019) (on file with author).

[57] Brief of Amicus Curiae Zero Hour on Behalf of Approximately 32,340 Children and Young People in Support of Plaintiffs-Appellees at 5, Juliana v. United States (No. 18-36082) (Mar. 1, 2019).

[58] *See, e.g.*, Massachusetts v. EPA, 549 U.S. 497, 521, 534 (2007) (determining the petitioners had standing to challenge the Environmental Protection Agency's "steadfast refusal to regulate greenhouse gas emissions" and holding that the Environmental Protection Agency's failure to explain "its refusal to decide whether greenhouse gases cause or contribute to climate change[]" was "'arbitrary, capricious, . . . or otherwise not in accordance with law'").

[59] NEPA is the cornerstone of the country's environmental review system. Its purpose is "[t]o declare a national policy which will encourage productive and enjoyable harmony between man [and woman] and [their] environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man [and woman]; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality." National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (Supp. 2017).

[60] WildEarth Guardians v. Zinke, No.: 16-1724 (RC), 2019 WL 1273181, at *26, *28 (D.D.C. Mar. 19, 2019).

[61] *Id.* at *26 (citation omitted).

fishing trade group recently filed suit in the Superior Court of the State of California against thirty fossil fuel companies for causing carbon levels to rise, thereby increasing ocean acidification and decreasing catch stocks.[62]

B. International Jurisprudence

The litigation strategy employed in *Juliana* reaches beyond U.S. borders; it is a global phenomenon. In the historic case *Urgenda v. Netherlands*, a citizens' organization sued the government of the Netherlands, arguing that the state's efforts to reduce greenhouse gas emissions were inadequate "to protect the citizens of the Netherlands against the real and imminent threats of climate change."[63] The petitioners sought an order requiring "the State . . . to achieve a reduction so that the cumulative volume of the greenhouse gas emissions will have been reduced by 40%, or at least by 25%, by end-2020, relative to 1990."[64] The Hague District Court ordered the state to reduce greenhouse gas emissions by "at least 25% as of end-2020 relative to 1990[.]"[65] The Hague Court of Appeal affirmed the judgment, holding that the state's underwhelming effort to reduce greenhouse gas emissions contravened its obligations under the European Convention on Human Rights to ensure its citizens' rights to life and right to respect for private and family life.[66] *Urgenda* is the first case in which authentic targets to reduce greenhouse gas emissions have been *ordered* upon a government by a court.

Another seminal case, *Asghar Leghari v. Federation of Pakistan*, was decided in Pakistan in 2015.[67] The petitioner, a farmer, challenged the government's failure to implement the National Climate Change Policy and the Framework for Implementation of Climate Change Policy (2014-2030).[68]

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[62] Complaint at 1–6, Pac. Coast Fed'n of Fisherman's Ass'ns v. Chevron Corp., No. CGC-18-571285 (Cal Super. Ct. Nov. 14, 2018).

[63] Hof Haag 9 oktober 2018 C/09/456689/ HA ZA 13-1396 m.nt. (Urgenda/Netherlands) ¶¶ 3.8, 46. The official translation of *Urgenda* is not yet available in English. The information and quotations in the foregoing discussion of the case are derived from the unofficial version available on the website of the Netherlands judiciary. *State Must Achieve Higher Reduction In Greenhouse Gas Emissions In Short Term*, DE RECHTSPRAAK, https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Gerechtshoven/Gerechtshof-Den-Haag/Nieuws/Paginas/State-must-achieve-higher-reduction-in-greenhouse-gas-emissions-in-short-term.aspx (last visited Mar. 28, 2019).

[64] *Urgenda*, C/09/456689/ HA ZA 13-1396, at ¶ 3.8.

[65] *Id.* at ¶ 3.9.

[66] *Id.* at ¶¶ 29, 76.

[67] Asghar Leghari v. Fed'n of Pakistan, W.P. No. 25501/2015 1 (2015) ("Climate [c]hange is a defining challenge of our time. . . . On a legal and constitutional plane this is clarion call for the protection of fundamental rights of the citizens of Pakistan, in particular, the vulnerable and weak segments of the society who are unable to approach this Court.").

[68] *Id.* at 2–3.

The petitioner alleged that the government's failure to take action on climate change offended the petitioner's fundamental right to life, including the right to a healthy and clean environment, and human dignity.[69] Agreeing with the petitioner, the Lahore High Court recognized the need to evolve jurisprudence in such a way as to respond to the threat to fundamental rights posed by climate change:

> Fundamental rights, like the right to life (Article 9) which includes the right to a healthy and clean environment and right to human dignity (Article 14) read with constitutional principles of democracy, equality, social, economic and political justice include within their ambit and commitment, the international environmental principles of sustainable development, precautionary principle, environmental impact assessment, inter and intra-generational equity and public trust doctrine. Environment and its protection has taken a center stage in the scheme of our constitutional rights. It appears that we have to move on. The existing environmental jurisprudence has to be fashioned to meet the needs of something more urgent and overpowering i.e., *Climate Change.*[70]

The court found that the government had done "no substantial work . . . to implement the Framework" and thus instituted a Climate Change Commission to identify and enforce actions to reduce the risks and impacts of climate change.[71]

In November 2018, a group of individuals aged 35 and under filed a lawsuit against the Canadian government for its inaction on climate change.[72] The suit alleges that the government's failure to adopt an ambitious greenhouse gas reduction target deprives an entire generation of individuals of "their right to life and security of the person . . . their right to equality, and . . . their right to an environment in which biodiversity is preserved."[73] And in February 2019, Chief Judge Brian Preston of the Land and Environment Court of New South Wales issued an opinion denying a coal mining permit, in part, on the basis of climate change.[74] Chief Judge Preston explained that the coal mine was simply being sought at the "wrong time" in history "when what is now urgently needed, in order to meet generally agreed climate targets, is a rapid and deep decrease in GHG emissions."[75] Although

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[69] *Id.* at 2–3, 10.

[70] *Id.* at 10–11 (emphasis in original).

[71] *Id.* at 11.

[72] *Quebec's Youth are Suing the Government of Canada for Inaction on Climate Change*, ENVIRONNEMENT JEUNESSE, http://enjeu.qc.ca/justice-eng/ (last visited Mar. 25, 2019).

[73] *Id.*

[74] *Gloucester Res. Ltd. v Minister for Planning* [2019] NWSLEC 7, ¶ 699 (Austl.).

[75] *Id.*

Judge Ann Aiken befittingly described *Juliana* as "no ordinary lawsuit,"[76] climate change litigation may indeed soon be "ordinary."

IV. LEGISLATION: AN AUTHENTIC PLAN TO ACHIEVE CARBON NEUTRALITY

Legislation mandating carbon limits is another emerging method being developed by the Final Stand to protect itself from the effects of 1.5°C global warming. Law students at India's O.P. Jindal Global University are developing a law mandating a 50% reduction in greenhouse gas emissions every decade to achieve net zero emissions by 2050.[77] If pursued on a global scale, efforts like those being undertaken by the Final Stand in India could effectively limit warming to between 1.5°C and 2°C above pre-industrial levels.[78] India is one of the world's largest emitters of greenhouse gases and stands to be one of the first countries to experience social and political collapse from the present trajectory of emissions.[79] "Earth's Law" represents a simple legislative mandate—grounded in the constitutional right to a habitable planet—to save India's future generations.[80] Specific implementing regulatory tools supporting such a carbon law could include eliminating fossil fuel subsidies, incentivizing the renewable energy industry, implementing and enforcing carbon budgets, and encouraging society-wide behavioral changes.[81] A carbon law impacts the "Carbon Majors"—the entities responsible for producing the vast majority of greenhouse gas

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[76] Juliana v. United States, 217 F. Supp. 3d 1224, 1234 (D. Or. 2016).

[77] Videotape: The Final Stand (Vaibhavi Dwivedi & Akruti Chandrayya 2019) (on file with author). Scientists project that a 50% reduction in greenhouse gases every decade is necessary to achieve carbon neutrality in the requisite time to avoid climate catastrophe. *See, e.g.*, Johan Rockström, Owen Gaffney, Joeri Rogelj, Malte Meinshausen, Nebojsa Nakicenovic & Hans Joachim Schellnhuber, *A Roadmap for Rapid Decarbonization*, 355 SCI. 1269, 1269 (2017) ("[W]e propose framing the decarbonization challenge in terms of a global decadal roadmap based on a simple heuristic—a 'carbon law'—of halving gross anthropogenic carbon-dioxide (CO_2) emissions every decade."); Chip Fletcher, Lecture at the University of Hawai'i at Mānoa (Feb. 26, 2019); *see also* Chip Fletcher, *Speeding Toward Irrevocable Climate Chaos*, CIVIL BEAT (Mar. 14, 2019) https://www.civilbeat.org/2019/03/speeding-toward-irrevocable-climate-chaos/. Of course, a carbon law would be in conjunction with, *inter alia*, efforts to remove existing carbon from the atmosphere and refreezing polar regions. King, A Concept Note, *supra* note 22, at 1.

[78] *See* Rockström et al., *supra* note 79, at 1269.

[79] Videotape: The Final Stand (Vaibhavi Dwivedi & Akruti Chandrayya 2019) (on file with author).

[80] *Id.*

[81] Rockström et al., *supra* note 79, at 1270 (stating that fossil fuel subsidies total between $500 and $600 billion annually).

emissions.[82] But it also paves the way for the Carbon Majors to facilitate the transition to a green economy.

V. CONCLUSION

Science tells us that the window of time to protect future generations from global climate catastrophe is closing. The opportunity to use the rule of law to facilitate the global transition to a green economy to prevent the earth from heating 1.5°C above pre-industrial levels is limited. For the Final Stand, *survival* is thus a driving force to utilize the rule of law through litigation and legislation in time to prevent global warming of 1.5°C.

On March 15, 2019, sixteen-year-old Greta Thunberg rallied over 1.4 million youth to strike against inaction on climate change.[83] Greta acts to overcome a perceived failure of political and industry leadership to protect her generation. She teaches that thwarting the existential threat posed by climate change will require unprecedented participation by young people. Use of the rule of law by future generations in court and through legislation is thus underway. This is the answer to Lorenzo's question being supplied by his generation of law students and their allies: resort to the rule of law for protection from climate change.

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[82] PAUL GRIFFIN, THE CARBON MAJORS DATABASE: CDP CARBON MAJORS REPORT 2017 5 (2017) (reporting that 100 fossil fuel producers are responsible for 923 billion tons of CO_2 emissions, or 52% of the global greenhouse gases emitted since the industrial revolution).

[83] Damian Carrington, *School Climate Strikes: 1.4 Million People Took Part, Say Campaigners*, THE GUARDIAN (Mar. 19, 2019), https://www.theguardian.com/environment/2019/mar/19/school-climate-strikes-more-than-1-million-took-part-say-campaigners-greta-thunberg.

Adjudication vs. Negotiation in Protecting Environmental Commons

Daniel Bodansky*

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I. INTRODUCTION

In its list, *Top 10 Developments in International Law in 2018*, Oxford University Press ranked "[p]rotecting the environment through the courts" Number 1.[1] The ranking is presumably based more on future potential than past achievement since, to date, the actual impact of international environmental adjudication has been rather modest. In support of the listing, the OUP blog cites only the International Court of Justice's (I.C.J.) latest opinion in *Costa Rica v. Nicaragua*, concerning damage to a wetland in Costa Rica,[2] the Inter-American Court of Human Rights' advisory opinion on the right to a healthy environment,[3] and domestic cases in Colombia[4] and the

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[1] Merel Alstein, *Top Ten Developments in International Law in 2018*, OUPBLOG (Dec. 31, 2018), https://blog.oup.com/2018/12/top-ten-developments-international-law-2018.

[2] Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.), Judgment, (Feb. 2, 2018), https://www.icj-cij.org/files/case-related/150/150-20180202-JUD-01-00-EN.pdf.

[3] The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights), Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (ser. A) No. 23 (Nov. 15, 2017).

[4] Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala de Casación Civil abril 5,

Netherlands.[5] Nevertheless, if these cases are a harbinger of things to come, they represent the beginnings of a fundamental shift in the process by which international environmental law develops.

In its relatively brief history, international environmental law has emerged primarily through treaty-making—through what I have called elsewhere the "rule of negotiators."[6] Adjudication, in contrast, represents the "rule of judges," and, by extension, the "rule of law," to the extent that judges decide cases in a manner faithful to the law.

This brief essay contrasts adjudication and negotiation as methods of addressing environmental commons problems. Part II begins by considering what is an environmental commons. Part III then examines the various roles of courts. Part IV reviews how international environmental law has developed, primarily through treaty-making. Parts V and VI identify reasons to be cautious about relying on courts to protect environmental commons and about analogizing from domestic to international courts. Parts VII and VIII analyze the potential roles of contentious cases and advisory opinions, respectively, in protecting environmental commons. Part IX concludes by comparing the relative merits of adjudication versus negotiation.

II. WHAT IS AN ENVIRONMENTAL COMMONS?

As I will use the term, "environmental commons" come in two varieties. First, they include so-called common-pool resources—that is, resources that are not excludable and hence can be used by all.[7] Resources in areas beyond national jurisdiction, such as the high seas or outer space, are one type of common-pool resource, the atmosphere is another. In the case of the high seas, users cannot legally be excluded by individual states because they lack jurisdiction (except over their nationals). In the case of the atmosphere, states have jurisdiction to regulate users in their airspace; but to the extent the atmosphere is an interconnected whole that cannot be subdivided physically, individual states cannot effectively regulate use, since they cannot exclude activities in other states that affect them. In both cases, the inability to

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2018, M.P: Luis Armando Tolosa Villabona, STC4360-2018 (Colom.).

[5] Hof Den Haag, 24 juni 2015, AB 2015, 336 m.nt. Ch. W. Backes (Stichting Urgenda/De Staat Der Nederlanden) (Neth.).

[6] Daniel Bodansky, *The Role of the International Court of Justice in Addressing Climate Change: Some Preliminary Reflections*, 49 ARIZ. ST. L.J. 689 (2017). This essay draws from my earlier article.

[7] Elinor Ostrom, *The Challenge of Common-Pool Resources*, 50 ENV'T: SCI. AND POL'Y FOR SUSTAINABLE DEV. 8 (2008).

exclude or regulate use leads to what Garrett Hardin famously called the "tragedy of the commons."[8]

Second, environmental commons include global public goods, which provide benefits to the entire international community and which all states therefore have an interest in protecting.[9] Biodiversity is one such example. In many cases, global public goods are found within a particular state and could be protected by the territorial state both legally and physically, in contrast to common-pool resources. But because the benefits of global public goods largely go to the international community as a whole, rather than to the states in which they are located, states often lack sufficient incentive to produce or protect them.

Two features unite open pool resources and global public goods, each with implications for litigation. First, both are of common rather than simply individual concern, so many if not all states have standing to protect them.[10] Second, both raise collective action problems. As a result, although any state has standing to sue, few may wish to incur the material and diplomatic costs of doing so, since most of the benefits of successful litigation go to the international community rather than the state bringing suit.

III. WHAT ROLE MIGHT COURTS PLAY IN PROTECTING ENVIRONMENTAL COMMONS?

What are the potential functions of international courts with respect to environmental commons?[11] First, courts can peacefully resolve disputes—for example, disputes regarding high seas fishing quotas, levels of greenhouse gas emissions, or protection of a sensitive wetland. Providing states with a way to resolve their differences peacefully, rather than through force, has traditionally been seen as the core judicial function internationally.

Second, in resolving disputes, courts can be a means of providing retributive justice. They can right past wrongs—for example, by awarding compensation for transboundary harms, as the I.C.J. did in *Costa Rica v.*

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[8] Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243 (1968).

[9] SCOTT BARRETT, WHY COOPERATE? THE INCENTIVE TO SUPPLY GLOBAL PUBLIC GOODS 1–2 (2007).

[10] *See infra* notes 41–42 and accompanying text.

[11] For a discussion of this question, see generally José E. Alvarez, *What Are International Judges For? The Main Functions of International Adjudication*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 158, 176 (Cesare P.R. Romano et al. eds., 2014).

Nicaragua,[12] or, at least in principle, for loss and damage due to climate change in suits brought by specially affected states.[13]

Third, courts can be forward as well as backward-looking. They can seek to guide future conduct, either in a specific case through a judicial order, or more broadly through the specification of general rules of conduct. Although, in theory, international judicial decisions do not establish precedents, they are often best known not for the particular disputes they resolve, but for the legal rules they articulate. In doing so, courts contribute to the development of international environmental law.[14]

Fourth, judicial decisions can influence longer-term changes in values and consciousness. As Philippe Sands has noted, "international courts and tribunals are one among many actors that occupy the large space in which global public consciousness is formed."[15]

In practice, these functions often overlap. In deciding a case, a court can simultaneously resolve a dispute, right past wrongs, guide future conduct, and contribute to both legal and normative development. The *Trail Smelter* decision, for example, resolved the dispute between the United States and Canada, awarded the United States compensation for past injuries, established a pollution control regime, and contributed to the development of international environmental law through its articulation of the duty to prevent significant transboundary pollution.[16]

But, of the four functions of courts, the first—that is, deciding cases—is usually seen as primary and the others ancillary. In resolving disputes, courts must sometimes legislate, but they should do so "only interstitially," as Oliver Wendell Holmes once put it.[17] They may interpret ambiguities in the law and fill in gaps, but they should not make new law out of whole cloth. That is the job of representative political bodies, answerable to the people,

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[12] Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.), Judgment, at 2 (Feb. 2, 2018), https://www.icj-cij.org/files/case-related/150/150-20180202-JUD-01-00-EN.pdf.

[13] Int'l Law Comm'n, Rep. on the Work of Its Fifty-Third Session, Draft Articles on Responsibility of States for Internationally Wrongful Acts, art. 42(b)(i), U.N. Doc. A/56/10, at 117 (2001), *reprinted in* [2001] 2 Y.B. Int'l L. Comm'n 26, 29, U.N. Doc. A/56/10 [hereinafter I.L.C. Draft Articles].

[14] TIM STEPHENS, INTERNATIONAL COURTS AND ENVIRONMENTAL PROTECTION 2–10 (2009).

[15] Philippe Sands, *Climate Change and the Rule of Law: Adjudicating the Future in International Law*, 28 J. ENVTL. L. 19, 26 (2016).

[16] Trail Smelter (U.S. v. Can.), 3 R.I.A.A. 1905 (Arb. Trib. 1941).

[17] S. Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting) ("I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions.").

not judges. The role of judges, by contrast, is to take the law that the legislature has enacted and apply it to particular cases. Their role is complementary to that of legislatures, not competitive.

IV. NEGOTIATION VERSUS ADJUDICATION IN THE DEVELOPMENT OF INTERNATIONAL ENVIRONMENTAL LAW

In reality, the relationship of legislatures and courts has never been that simple. But, on the whole, the development of environmental law has reflected the philosophy that policy should be determined through politics rather than adjudication—domestically, through the enactment of legislation like the National Environmental Policy Act, the Clean Air and Water Acts, and the Endangered Species Act; and internationally, through the negotiation of multilateral environmental agreements (MEAs). True, international environmental law was, in some sense, launched by the *Trail Smelter* decision in the 1930s, which first articulated the duty to prevent transboundary harm, a duty considered by many the "cornerstone" of international environmental law.[18] But *Trail Smelter* was an anomaly; until recently, it was not only the seminal international environmental case, but virtually the only one. By contrast, MEAs have been negotiated addressing most international environmental issues, including climate change, stratospheric ozone depletion, pollution of the marine environment, persistent organic pollutants, trade and disposal of hazardous substances, and loss of biodiversity.[19]

Most observers accepted the primacy of politics over adjudication in environmental policymaking so long as it seemed to be making progress in protecting the environment. And, until recently, that was the case. Since the emergence of environmental law in the 1960s, domestic environmental legislation has done much to clean up the air and water and control hazardous substances in countries around the world. And negotiated international agreements, though less effective, have had a number of prominent successes, most notably in protecting the stratospheric ozone layer.

Nevertheless, despite the huge growth in the number of MEAs, many environmental commons continue to decline. For example, greenhouse gas emissions have continued to increase over the last quarter century, despite the adoption of three MEAs on climate change: the U.N. Framework

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[18] Günther Handl, *Transboundary Impact, in* OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 531, 548 (Daniel Bodansky, Jutta Brunnée & Ellen Hey eds., 2008).

[19] *See* Ronald B. Mitchell, *IEADB Agreement List*, U. OF OR.: INT'L ENVTL AGREEMENTS (IEA) DATABASE PROJECT, https://iea.uoregon.edu/base-agreement-list (last visited Feb. 19, 2019).

Convention on Climate Change,[20] the Kyoto Protocol,[21] and the Paris Agreement.[22] Even assuming full implementation of the Paris Agreement, greenhouse gas emissions will still be well above the trajectories needed to limit climate change to 2 or 1.5 degrees centigrade, the agreed upon international goal.[23] Similarly, despite the adoption of a variety of wildlife agreements, the so-called Living Planet Index continues to decline, particularly in tropical regions.[24]

The increased interest in litigation is the product of these perceived failures of domestic and international politics. Examples of the new approach include *Urgenda*, in which a Dutch court ordered the government of the Netherlands to increase the stringency of its climate change mitigation goal,[25] and the pending case of *Juliana v. United States,* in which a group of youths are arguing that the U.S. federal government's failure to address climate change violates their substantive due process rights and the government's public trust obligations.[26] In cases such as these, litigation is being undertaken as a substitute for legislation—a means of requiring stronger policies than political processes have delivered—rather than a complement.

At the international level, addressing environmental commons problems through adjudication rather than negotiation would represent a paradigm shift—a shift from the rule of negotiators to the rule of judges, if not law.[27] Consider the U.N. climate change regime:

> In the [climate change] negotiations, states have sought to ensure that their emission [reduction] contributions are nationally determined and are not subject to multilateral review. But an international tribunal could engage in external review, assessing the adequacy of mitigation efforts in light of states' obligation to prevent transboundary harm and their obligations to future generations. In the negotiations, norms of general international law play relatively little role. But, in adjudication, they would be front and center. In

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[20] United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107 [hereinafter UNFCCC].

[21] Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, 2303 U.N.T.S. 162.

[22] Paris Agreement, Dec. 12, 2015, 55 I.L.M 740 (2016).

[23] UNITED NATIONS ENVIRONMENT PROGRAMME, EMISSIONS GAP REPORT 2018 xiv (2018).

[24] WORLD WILDLIFE FUND, LIVING PLANET REPORT 2016: RISK AND RESILIENCE IN A NEW ERA 12 (2016).

[25] Hof Den Haag, 24 juni 2015, AB 2015, 336 m.nt. Ch. W. Backes (Stichting Urgenda/De Staat Der Nederlanden) (Neth.).

[26] Juliana v. United States, 217 F. Supp. 3d 1224 (D. Or. 2016), *appeal docketed*, 18-36082 (9th Cir. Jan. 2, 2019).

[27] For a more extensive discussion of this paradigm shift, see Bodansky, *supra* note 6, at 695–99.

the negotiations, little is ever settled definitively. A judicial opinion, in contrast, would have an existence independent of the will of the parties and would not be subject to endless renegotiation.[28]

V. THREE CAUTIONS

Would a paradigm shift from politics to adjudication be a good thing? In thinking about this question, three initial cautions:

First, one must be careful about the reasons to favor courts over political processes such as legislation and negotiation. One possible reason is result-oriented: courts are more likely to reach the "right" result—i.e., results that are more protective of environmental commons. This rationale might be true in some places at some points in time, but it is highly contingent. Courts can be conservative as well as progressive institutions. Some may be "pro-environment," but others not, and even courts that are "pro-environment" now may become less protective in the future. Advocates of a greater role for international courts sometimes give the impression that they view judicial decision-making as an unalloyed good, because they believe it will lead to stronger protection of environmental commons. But this is not necessarily true. It is well to remember that, in the United States, the Supreme Court helped desegregate the South, but it also held back the New Deal for many years. And more recently, it has blocked campaign finance reform and struck down state and local limits on handguns.[29] Internationally, dispute resolution in the World Trade Organization has had mixed results for the environment. And although the Appellate Body's *Shrimp-Turtle* decision is usually seen as heralding a more environmentally-friendly approach, it simply upheld environmental protections adopted nationally, rather than providing any additional protection for environmental commons.[30]

The better reason to favor judicial decision-making over politics is process-oriented: courts are better at making certain kinds of decisions than political institutions because of their institutional features—for example, because they are insulated to some degree from political pressures, or because they have to listen to both sides of the argument and give reasons for their decisions.[31] Arguments for a greater judicial role in protecting the

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[28] *Id.* at 698–99.

[29] *See, e.g.*, Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010) (striking down provisions of Bipartisan Campaign Reform Act); District of Columbia v. Heller, 554 U.S. 570 (2008) (striking down Washington D.C. law on handgun possession).

[30] Appellate Body Report, *United States—Import Prohibitions of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/AB/R (adopted Oct. 12, 1998).

[31] These kind of comparative institutional competence arguments are characteristic of the so-called legal process approach. *See generally* Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393

environment should focus on these kinds of arguments about the comparative institutional competence of courts versus negotiations, rather than assume that judges are likely to reach "better" results.

Second, enforcement is not the strong suit of international courts, so even favorable decisions may not yield significant improvements in state behavior. Consider, for example, the International Court of Justice. The U.N. Security Council is the institution tasked with enforcing the court's judgments. But even if it were otherwise inclined to enforce an I.C.J. judgment, it cannot do so against any of the permanent five members of the Council, each of which has veto power.[32] As a result, major powers like the United States and China can ignore decisions of the I.C.J., at least in the first instance, and the same is true of other international tribunals. The United States flouted the I.C.J. judgment in the *Nicaragua* and *Avena* cases,[33] Russia did so with respect to an ITLOS ruling in the *Arctic Sunrise* case,[34] and China rejected an arbitral award under the U.N. Convention on the Law of the Sea in the *South China Sea* case.[35] This is not to say that these decisions were unimportant and did not have longer-term impacts. For example, some observers credit the I.C.J. judgment in the *Nicaragua* case with the subsequent Congressional decision to cut off American assistance to the contras in Nicaragua. But to the extent these cases had influence, their influence was indirect and circuitous. By contrast, negotiated agreements, although also largely reliant on self-implementation, are more likely to influence state behavior in protecting environmental commons, both because negotiating, adopting, and accepting an agreement is a process of committing, and because negotiated agreements generally have an element of reciprocity, so other states are more likely to react to under-performance of an international agreement than to non-compliance with a judicial decision.[36]

Third, whether international adjudication is, on balance, positive or negative depends, in part, on whether it is likely to complement or impede

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(1996).

[32] U.N. Charter art. 27, ¶ 3 (decisions of the Security Council on non-procedural matters require affirmative vote of nine members including the concurring votes of the permanent members).

[33] Avena and Other Mexican Nationals (Mex. v. U.S.), Judgment, 2004 I.C.J. Rep. 12 (Mar. 31); Military and Paramilitary in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14 (June 27).

[34] Arctic Sunrise (Neth. v. Russ.), Case No. 22, Order of Nov. 22, 2013, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/published/C22_Order_221113.pdf.

[35] The South China Sea Arbitration (Phil. v. China), PCA Case No. 2013-19, Award (Perm. Ct. Arb. 2016).

[36] I develop these arguments further in Bodansky, *supra* note 6, at 706.

other international processes currently underway addressing the same problem, including negotiations. As in a domestic context, litigation can provide a prod to negotiate;[37] but it can also undercut negotiations by leading parties to focus on their rights rather than their interests. Climate change provides an illustration. Advocates of climate litigation are rightly skeptical of the Paris Agreement: the nationally determined contributions put forward by parties are plainly inadequate in their ambition, and whether the Agreement's "ambition mechanism" will lead to more ambitious contributions over time remains unproven.[38] Nevertheless, in my view, it is premature to give up on the Paris Agreement. The initial round of nationally determined contributions, though inadequate, are still a significant improvement over business as usual.[39] And the Paris Agreement still commands widespread political support, which could translate into stronger commitments in the future. Proponents of judicial decision-making should tread warily to ensure that climate change litigation does not undercut the delicate compromises embodied in the Paris Agreement, or cause parties to retrench in an effort to limit their legal exposure.

VI. HOW INTERNATIONAL COURTS ARE DIFFERENT

One final caution: beware of domestic analogies. International courts differ from domestic courts in important ways. And these differences have important implications for their potential role in protecting environmental commons.

First, international courts generally lack compulsory jurisdiction. If I walk across the road and get run over, I can bring a lawsuit against the driver without his or her consent. But if the Maldives is submerged by sea-level rise as a result of climate change, it cannot sue other states for their contributions to climate change unless the other states consent.[40]

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[37] *Cf.* Benjamin Ewing & Douglas A. Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm,* 121 YALE L.J. 350 (2011) (courts can prod political branches to take action to confront an issue).

[38] The Paris Agreement's so-called "ambition mechanism" includes the five-year cycle of "global stocktakes" under Article 14 and Parties' new or updated nationally determined contributions under Article 4.9, which are to be informed by the stocktakes. *See Chloe Revill, The Paris Agreement Ambition Mechanism*, E3G (May 16, 2016), https://www.e3g.org/library/the-paris-agreement-ambition-mechanism.

[39] *See* Climate Interactive, *Climate Scorecard: UN Climate Pledge Analysis*, https://www.climateinteractive.org/programs/scoreboard/ (estimating that parties' nationally determined contributions will reduce temperature increase in 2100 from 4.2 to 3.3° C).

[40] In general, states can consent to jurisdiction in three ways. First, they can consent generally to a court's jurisdiction. An example is the "optional clause" of the I.C.J. statute, pursuant to which a state may declare that it accepts as compulsory the I.C.J.'s jurisdiction in

Second, a plaintiff arguably need not show standing internationally if the obligation that has been breached is "owed to the international community as a whole," as is true of many, if not all, environmental commons cases.[41] In such cases, although only states that are "specially affected" may seek money damages, any state may bring suit to halt the wrongful act. For example, in the *Japanese Whaling* case, Australia challenged Japan's scientific whaling program in the I.C.J. even though it was not specifically harmed by Japan's activities.[42]

Third, international courts can give advisory opinions, in contrast to national courts in countries such as the United States, which may interpret the law only in the context of specific cases or controversies. The International Tribunal for the Law of the Sea, for example, can render advisory opinions pursuant to related legal agreements that authorize such

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all disputes concerning a question of international law. Statute of the International Court of Justice art. 36(2). Second, they can consent to a treaty that confers jurisdiction on a court to decide disputes. For example, by becoming a party to the U.N. Convention on the Law of the Sea, a state consents to the dispute settlement system established in Part XV of UNCLOS. United Nations Convention on the Law of the Sea arts. 279–285, Dec. 10, 1982, 1833 U.N.T.S. 397. The same is true of membership in the World Trade Organization, which provides for compulsory jurisdiction in its Dispute Settlement Understanding. Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 3, Apr. 15, 1994, 1869 U.N.T.S. 401. Third, a state can agree to refer a dispute to a court by special agreement, or *compromis*, with the other state involved. Hugh Thirlway, *Compromis*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERANTIONAL LAW (2006), http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e19.

[41] I.L.C. Draft Articles, *supra* note 13, at art. 48(1)(b). This rule on standing is of relatively recent origin. In 1966, the I.C.J. held in the *South-West Africa* case that an "'*actio popularis*,' or right resident in any member of a community to take legal action in vindication of a public interest . . . is not known to international law as it stands at present[.]" South West Africa, (Eth. v. S. Afr.; Liber. v. S. Afr.), Judgment, 1966 I.C.J. 6, ¶ 88 (July 18). By 2001, legal developments in the intervening thirty-five years led the International Law Commission, in its Draft Articles on State Responsibility, to implicitly reject the *South West Africa* decision by providing that "any state" may "invoke the responsibility" of a state for breaching "an obligation owed to the international community as a whole." Although the Draft Articles do not define "invoke the responsibility," the I.L.C.'s commentary makes clear that "invocation should be understood as taking measures of a relatively formal character, for example, the . . . presentation of a claim against another State or the commencement of proceedings before an international court or tribunal." I.L.C. Draft Articles, *supra* note 13, at art. 42, commentary, ¶ 2.

[42] Whaling in the Antarctic (*Japanese Whaling*) (Austl. v. Japan), Judgment, 2014 I.C.J. 226 (Mar. 31). Apparently, Japan did not raise the standing issue, so the I.C.J. decision did not specifically address it. *See* Priya Urs, *Are States Injured by Whaling in the Antarctic?*, OPINIOJURIS (Aug. 14, 2014), http://opiniojuris.org/2014/08/14/guest-post-states-injured-whaling-antarctic/.

opinions.[43] Similarly, the I.C.J. can give advisory opinions at the request of the U.N. General Assembly, the Security Council, or any U.N. specialized agency on legal questions within the scope of the specialized agency's authority.[44]

Finally, there is no international political question doctrine. U.S. courts have held that a variety of issues are political questions that need to be decided by the political branches rather than the courts.[45] But the I.C.J. does not recognize any similar limitation on its authority. Take, for example, cases concerning the use of military force, such as the U.S. missile strikes in Syria in 2018 or the U.S. invasion of Iraq in 2003. U.S. courts almost certainly would decline to decide whether these actions were legal. But the I.C.J. has decided a number of cases involving the use of force, including the *Nicaragua* case in 1985 and the *Oil Platforms* case in 2003.[46] In the 1990s, the U.N. General Assembly requested an advisory opinion from the I.C.J. about the legality of using nuclear weapons, a question that U.S. courts would be unlikely to answer. The I.C.J., in contrast, went ahead and rendered an advisory opinion, finding that the issue involved was legal rather than political.[47]

VII. CONTENTIOUS CASES

Most international environmental cases to date have been bilateral disputes, brought by one state for damage caused by another state. The first (and for many years only) such case was *Trail Smelter*, which involved a claim by the United States against Canada in the 1930s for damage to farmers in Washington state caused by pollution from a smelter across the border in British Columbia.[48] More recently, Argentina brought a case against

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[43] Rules of the International Tribunal for the Law of the Sea, art. 138(1), ITLOS/8 (1997); *see* Ki-Jun You, *Advisory Opinions of the International Tribunal for the Law of the Sea: Article 138 of the Rules of the Tribunal, Revisited*, 39 OCEAN DEV. & INT'L L. 360 (2008).

[44] U.N. Charter art. 96 (authorizing the General Assembly and Security Council to request an advisory opinion from the I.C.J. on "any legal question" and authorizing other organs of the U.N. and specialized agencies to request advisory opinions on "legal questions arising within the scope of their activities"); Statute of the International Court of Justice art. 65 (authorizing the I.C.J. to give advisory opinions).

[45] Baker v. Carr, 369 U.S. 186, 210–11 (1962).

[46] Military and Paramilitary in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14 (June 27); Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. 161 (Nov. 6).

[47] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 13 (July 8) ("The fact that this question . . . has political aspects, as, in the nature of things, is the case with so many questions which arise in international life, does not suffice to deprive it of its character as a 'legal question[.]'").

[48] Trail Smelter (U.S. v. Can.), 3 R.I.A.A. 1905 (Arb. Trib. 1941).

Uruguay for transboundary pollution from a pulp mill located in Uruguay.[49] And a few years ago, the I.C.J. decided a case brought by Costa Rica for environmental damage caused by Nicaragua to a wetland in Costa Rica.[50]

By contrast, few contentious cases have been litigated internationally relating to the protection of an environmental commons, and most of these have been WTO cases concerning the permissibility of national environmental measures. The principal non-WTO case is the I.C.J. case brought by Australia against Japan about whether Japan's "scientific" whaling program is, in fact, for "purposes of scientific research" and hence permissible under the International Convention for the Regulation of Whaling.[51]

The prevalence of bilateral disputes about transboundary pollution over more general disputes about environmental commons is not surprising. Bilateral disputes are comparatively straightforward. One state is injured by another, and the injured state has an incentive to sue the polluter, since it will get all of the benefits if it wins, in the form of less pollution, money damages, or both. In contrast, cases about environmental commons tend to be more difficult because there is no willing plaintiff or readily identifiable defendant. Although any state has legal standing to bring a case to stop acts that breach an obligation owed to the international community as a whole,[52] no state may have a sufficient individual interest to do so, if the negative effects are widely shared among the international community, as is often true of harms to environmental commons. For example, the loss of a particular species or the destruction of a World Heritage site may not harm any individual state enough to make costly litigation worthwhile. On the other side of the equation, for problems such as climate change, to which all states contribute, identifying a defendant to sue and allocating responsibility may be difficult.

As a result, contentious cases to protect environmental commons are most likely in situations that parallel transboundary litigation—that is, when an individual state or small group of states is specially threatened and thus has an incentive to undertake costly litigation and when a small, identifiable number of states are responsible for the harm.[53] In the context of a regional

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[49] Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J. 60 (Apr. 20).

[50] Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.), Judgment, 2015 I.C.J. 665 (Dec. 16).

[51] Whaling in the Antarctic (*Japanese Whaling*) (Austl. v. Japan), Judgment, 2014 I.C.J. 226 (Mar. 31).

[52] *See id.*

[53] *Cf.* Cesare P.R. Romano, *International Dispute Settlement*, *in* OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW, *supra* note 18, at 1036, 1042 (explaining that traditional international dispute settlement works mostly in cases where an environmental

fisheries, for example, if one state engages in overfishing, the harms to the other participants in the fishery may be sufficiently serious to justify litigation.[54]

Even when a state is interested in bringing a contentious case and can identify a defendant to sue, it must also find a court with jurisdiction. In the *Japanese Whaling* case, both Australia and Japan had accepted the compulsory jurisdiction of the I.C.J. under the optional clause, so jurisdiction was not an issue.[55] But the majority of states do not accept the compulsory jurisdiction of the I.C.J., including the two largest emitters of greenhouse gases, the United States and China.[56] As a result, the I.C.J. could, at best, address only a small fraction of a problem such as climate change. The U.N. Convention on the Law of the Sea (UNCLOS) establishes a compulsory dispute settlement system that applies to a larger group of countries,[57] but it too lacks jurisdiction over the United States, which is not a party to UNCLOS, and its subject-matter jurisdiction is limited to ocean issues.

Finally, even if a willing plaintiff were able to find a court with jurisdiction over an identifiable defendant, contentious litigation would likely be of limited utility in changing state behavior. In the *Japanese Whaling* case, for example, Australia's victory in the I.C.J. was short-lived. In response to the I.C.J.'s decision that Japan's whaling program did not constitute legitimate scientific research, Japan simply modified its program and resumed whaling the following year.[58] Then, in December 2018, Japan announced that it was

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dispute is essentially localized, in contrast to being widespread or global).

[54] The Bering Fur Seal Arbitration of 1893 provides an illustration. Although it involved protecting fur seals on the high seas, it was essentially a bilateral dispute between the United Kingdom and the United States, the two main countries engaged in sealing in the area. Fur Seal Arb. (U.S. v. U.K.) 28 R.I.A.A. 263 (Trib. of Arb. 1893). A more recent example is the 2018 challenge by Ecuador to the fisheries allocation it received under the South Pacific Regional Fisheries Management Organization, which was decided by an independent panel convened pursuant to the 2009 Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean. *See* James Harrison, *Significant International Environmental Law Cases: 2017–2018*, 30 J. ENVTL. L. 527, 536–37 (2018).

[55] *Whaling in the Antarctic*, 2014 I.C.J. at 242.

[56] As of February 2019, seventy-three states accepted the compulsory jurisdiction of the I.C.J. *Declarations Recognizing the Jurisdiction of the Court as Compulsory*, INT'L COURT OF JUSTICE, https://www.icj-cij.org/en/declarations (last visited Feb. 22, 2019). In addition to Japan and Australia, these include Germany, India, and the United Kingdom. *Id.*

[57] United Nations Convention on the Law of the Sea art. 297, Dec. 10, 1982, 1833 U.N.T.S. 397. Several contentious cases involving environmental commons issues have been decided under UNCLOS, including most recently the South China Sea Arbitration (Phil. v. China), P.C.A. Case No. 2013-19, Award of July 12, 2016 (Perm. Ct. Arb. 2016), which found that China had breached its environmental obligations under UNCLOS.

[58] *See* Adam Vaughan, *Japan to Face Criticism at International Summit for Flouting Whaling Ruling*, THE GUARDIAN (Oct. 20, 2016. 2:00 AM), https://www.theguardian.com

withdrawing from the International Whaling Convention altogether.[59] Thus, the most celebrated example thus far of an environmental commons case may ultimately result in fewer rather than more restraints on Japanese whaling.

States' general wariness of contentious litigation to protect environmental commons is reflected in their practice under multilateral environmental agreements.[60] More than half of all MEAs contain dispute resolution provisions, and many include adjudication as an option.[61] But these provisions generally require the mutual consent of the disputants and have rarely been invoked.[62] Instead, the preferred approach to compliance in MEAs has been *sui generis* mechanisms that are more political than legal in nature.[63] In contrast to adjudication, these mechanisms are non-adversarial and forward-looking. Rather than determining legal liability for past action, they seek to determine why a state is having trouble complying and then to assist the state to come back into compliance. Although they do not preclude contentious litigation, they illustrate what a departure such litigation would represent from the prevailing modes of multilateral environmental cooperation.

VIII. ADVISORY OPINIONS

Given the limited ability to enforce international judgments in contentious cases, advisory opinions are a potentially attractive alternative. Advisory opinions do not raise the difficult issues of jurisdiction and causation faced

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/environment/2016/oct/20/japan-to-face-criticism-at-international-summit-for-flouting-whaling-ban-iwc.

[59] *Statement on Government of Japan Withdrawal from the IWC*, INT'L WHALING COMM'N., (Jan. 14, 2019), https://iwc.int/statement-on-government-of-japan-withdrawal-from-t.

[60] This wariness is nothing new. As long ago as 1975, Richard Bilder noted that "governments have tended to avoid judicial and liability-based methods of dealing with [international environmental] questions." Richard B. Bilder, *The Settlement of Disputes in the Field of International Law of the Environment,* 144 RECUEIL DES COURS 139, 155 (1975).

[61] Romano, *supra* note 53, at 1040.

[62] The MOX plant arbitration between Ireland and the United Kingdom under the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention) is apparently the only example of dispute settlement under an MEA. The MOX Plant Case (Ir. v. U.K.), Final Award, 23 R.I.A.A. 59 (Perm. Ct. Arb. 2003). In contrast to many MEAs, the OSPAR Convention permits compulsory arbitration at the request of any party. Convention for the Protection of the Marine Environment of the North-East Atlantic, *opened for signature* Sept. 22, 1992, art. 32, 2354 U.N.T.S. 67 (entered into force Mar. 25, 1998).

[63] *See generally* Jan Klabbers, *Compliance Procedures*, *in* OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW, *supra* note 18, at 995.

by contentious cases. They can simply be requested by the U.N. General Assembly or a specialized agency with respect to a legal question within its competence.[64]

In comparison with contentious cases, advisory opinions do not serve a dispute resolution function. They cannot order compensation or cessation of the wrongful act. But they can serve many of the other functions of contentious cases:

- They can contribute to the normative development of international environmental law, by clarifying and elaborating the law.
- They can express public values, and thereby seek to influence public opinion and political will over the longer term.
- Finally, they can help influence domestic politics.

Role of Litigation	Contentious	Advisory
Dispute resolution	✔	
• Induce states to cease wrongful act	Any state can initiate Likely ineffective	
• Compensate victims	Only specially affected state can initiate Must show causation	
Normative development: clarify/ elaborate the law	✔	✔
Politics by other means	✔	✔
• Express public values	✔	✔

[64] *See supra* note 44.

• Influence domestic politics	✔	✔

IX. COMPARING NEGOTIATION WITH ADJUDICATION

Let me close by returning to the question, negotiation or litigation?[65] As noted earlier, legislation is often seen as preferable to adjudication in the domestic context because of legislatures' democratic legitimacy and their ability to address policy issues in a comprehensive fashion. Issues such as climate change or protection of biodiversity involve huge policy questions that, most agree, should be addressed politically by representative bodies, not by courts.

But this argument for preferring politics to adjudication has less force internationally. There is no multilateral legislature at the international level that could set international climate change policy democratically. And democracy at the national level does not have any special claim to legitimacy with respect to decisions that affect other states, which are not represented in the polluting state's democratic politics. The people of a country have a right to decide how to make the complicated value trade-offs involved in climate policy, to the extent their decisions affect only themselves. But they have no democratic authority to make decisions that affect others.

The alternative to adjudication internationally is not democratic decision-making by a legislature, but rather negotiation by consensus, a mode of decision-making that allows a small number of states to block agreement and preserve the status quo at the expense of those damaged by climate change—a result that few would call fair.

Negotiation is also not necessarily superior to litigation in terms of the criterion of efficiency. If we believe the Coase theorem, then bargaining should reach an efficient outcome in the absence of transaction costs.[66] But given the extremely high transaction costs involved in multilateral environmental negotiations and the difficulties of getting everyone to contribute, MEAs should not be expected to produce an efficient outcome and, in fact, they do not.

The real argument for negotiation over litigation is effectiveness—negotiated outcomes are more likely to influence state behavior. I am sympathetic to this view and, for this reason, believe that when there is a

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[65] This section draws on Bodansky, *supra* note 6, at 701–03.

[66] Ronald H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1, 18 (1960).

viable negotiating process, litigation should be undertaken cautiously to avoid undercutting the prospects for a negotiated outcome.

But, although international litigation is unlikely to compel states to significantly change their behavior, it could help shine a spotlight on environmental commons issues, raise consciousness, and put pressure on states to do more. Given the slow progress in international negotiations to protect environmental commons, this could be attractive as an additional strategy.

The Use of Courts to Protect the Environmental Commons

By
Lakshman Guruswamy, Ph.D.

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I. INTRODUCTION

This Article will begin by defining the environmental commons. There is no canonical definition of the environmental commons but based on etymological use, and jurisprudential lineage, this Article will offer a functional definition of environmental commons. The environmental commons consists of bio-physical phenomena like air, water, land, sea, atmosphere, and ecosystems which support life on earth. This Article will then provide examples of environmental commons that could benefit from judicial protection.

Part III of this Article deals with the legal architecture of judicial protection of the environmental commons which consists of primary rules of law and secondary rules of state responsibility. This is followed by examining how judicial intervention has been used to protect the oceanic commons. The

analysis uses the lens of three cases involving the environmental commons including the *Nuclear Test Cases* [1] and the *South China Sea Arbitration*.[2]

Part IV of this Article addresses numerous challenges confronting judicial protection of the environmental commons. The Article concludes by reviewing the promise of judicial protection and the principal weaknesses in international adjudication. The promise offered by primary rules of law pertaining to the oceanic commons is countered by secondary rules of state responsibility dealing with attribution, and the enforcement of judgments. Part V of this Article makes limited suggestions for overcoming some of these weaknesses.

II. DEFINING THE ENVIRONMENTAL COMMONS

We are dealing with the conjunction of two terms: "environment" and "commons." Etymologically, "environment" is derived from the French words *environ or environner* which means around, roundabout, to surround, to encompass.[3] In turn, *environ* is derived from the Old French *virer or viron* which means a circle, around, the country around, or circuit.[4] Even this blushing etymological encounter with the word environment suggests that it relates in some way to the totality, and everything that encompasses each and every human and human society. Moreover, it is possible to infer an interaction or symbiosis between humans and the environment. The environment is a living identity, not an inert phenomenon, that responds to human activity that might affect it.[5]

The idea of the commons traces its legal lineage to the Roman Law concept of *res communis*, succinctly codified in the Institutes of Justinian.[6] According to the Institutes some "things" are defined by the law of nature as common to mankind. They include "the air, running water, the sea, and consequently the shores of the sea."[7] But to many unfamiliar with Justinian, the term "commons" is perceived as originating from the traditional English legal term for common land (commons) popularized as a shared resource by

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[1] Nuclear Tests (Austl. v. Fr.), Judgment, 1974 I.C.J. Rep. 253 (Dec. 20); Nuclear Tests (N.Z. v. Fr.), Judgment, 1974 I.C.J. Rep. 457 (Dec. 20).

[2] *See In re* South China Sea Arbitration (Phil. v. China), PCA Case No. 2013-19, Award (Perm. Ct. Arb. 2016).

[3] LAKSHMAN D. GURUSWAMY ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND WORLD ORDER 221 (1994); ENVIRONMENTAL ENCYCLOPEDIA 467 (Marci Bortman et al. eds., 3d ed. 2003).

[4] ENVIRONMENTAL ENCYCLOPEDIA, *supra* note 3.

[5] Gerald L. Young, *Environment: Term and Concept in the Social Sciences*, 25 SOC. SCI. INF. 83, 83–84 (1986).

[6] J. INST. 2.1.1.

[7] *Id.*

Garrett Hardin in his famous 1968 article, *The Tragedy of the Commons*.[8] As Frank van Laerhoven and Elinor Ostrom have observed: "Prior to the publication of Hardin's article on the tragedy of the commons (1968), titles containing the words 'the commons,' 'common pool resources,' or 'common property' were very rare in the academic literature."[9]

It is possible to weave the meanings of environment with commons, to arrive at a functional definition that does not encompass the intellectual or cultural environment. Accordingly, the environmental commons could be defined as consisting of bio-physical phenomena like air, water, land, sea, atmosphere, and ecosystems which support life on earth.

A. Examples of the Environmental Commons

Using the suggested functional definition of environmental commons, it is possible to offer examples of environmental commons that could benefit from judicial protection. Here are the most prominent among them:

1. The atmosphere which mediates climate and life on earth is a leading example of an environmental commons. If the accumulation of greenhouse gases like carbon dioxide in the atmosphere is leading to apocalyptic changes, then the atmosphere is an environmental commons calling for remedial management or regulation.

2. Population growth leading to overpopulation. This was one of the primary concerns of Hardin, and remains a problem of the commons.[10]

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[8] Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243 (1968).

[9] Frank van Laerhoven & Elinor Ostrom, *Traditions and Trends in the Study of the Commons*, 1 INT'L J. COMMONS 3, 5 (2007).

[10] Hardin, writing in 1968, cited Thomas Malthus, *An Essay on the Principle of Population* (1798), in which Malthus discussed the problem of food production and population growth. Malthus argued that people reproduce faster than food can be produced, and inevitably a population will run out of food if it continues to grow at a steady rate. According to Hardin, if population continues to grow at the present alarming rates, the earth's resources, which are finite, will quickly be exhausted, and become unable to support the earth's population. However, Malthus and Hardin, underestimated the role of technology, and the world has not run out of food. In fact, the world produces more than enough food to feed the total world population today. The real problem is one of distribution. The surplus food produced in rich developed countries is not distributed to the poor needy countries. The result is that the world faces three interwoven and intractable issues. First, the reality of poverty and famine especially in poor less developed countries across the globe. Second, increasing population in these countries which Unfortunately, are unable to properly feed, house or clothe their increasing population. Third, the absence of a treaty ordering re-distribution of food, embodying primary rules of the kind described below, which could be upheld through compulsory adjudication. In the absence of a treaty and compulsory adjudication, there is

3. Air pollution caused by chemicals other than carbon dioxide. These can consist of toxic heavy metals like mercury or cadmium, or harmful ubiquitous pollutants like nitrogen oxides or sulfur dioxides, that can harm human health, damage ecosystems, and interfere with amenities.

4. Water pollution and exhaustion of ground water by over irrigation is another example of the possible tragedy of the commons.

5. Oceanic pollution remains a concern and the damage to the oceans could lead to another tragedy of the commons.

6. The destruction of rain forests, coral reefs, and mangrove swamps that contain the highest remaining concentrations of biological diversity in the form of fauna and or flora, can irrevocably damage the ecology of life that supports human societies. This may take the form of:

    a. Logging of rain forests and slash and burn methods of forest clearance;

    b. Destruction of coral reefs by chemical pollution, dynamiting for fish, and industrial harvesting of coral reefs of the kind referred to in the *South China Sea Arbitration* discussed below; and

    c. "Reclaiming" of the ocean by harvesting for coral and other biota for the purpose of building on rock and other formations in the sea, of the kind referred to in the *South China Sea Arbitration*. This is different from the development of coastal areas covered by mangrove swamps for purposes of coastal zone development, that leads to the disappearance of such swamps.

7. Overfishing can destroy fish stocks that provide up to 20% of the world's protein.[11]

III. JUDICIAL PROTECTION OF THE ENVIRONMENTAL COMMONS

There are three pre-conditions for judicial intervention to protect the environmental commons. The first consists of primary rules of obligation creating or protecting the environmental commons. The second consists of the existence of secondary rules of state responsibility, that govern the breach of these primary rules. The third consists of a regime of compulsory adjudication over disputes pertaining to the breach of the relevant environmental obligations.[12]

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little or nothing that courts can do to address overpopulation.

[11] FOOD & AGRIC. ORG. OF THE UN, THE STATE OF WORLD FISHERIES AND AQUACULTURE 2 (2018), *available at* http://www.fao.org/3/i9540en/I9540EN.pdf.

[12] JAMES CRAWFORD, STATE RESPONSIBILITY 1–110 (2013).

Primary rules establishing or creating an environmental commons may be formulated or generated by a treaty or customary law. The violation of these primary rules amount to international wrongs that give rise to the secondary rules of state responsibility. However, the existence of primary rules cannot invoke judicial protection, unless a treaty mandates compulsory adjudication of disputes concerning the violation of these primary rules, or where parties agree to judicial settlement. Consequently, judicial protection can only be invoked where the wrongs caused by the alleged breach of these primary rules are subject to adjudication by a court or tribunal.

If these three factors are present, courts could offer judicial protection of the environmental commons in any of the seven areas described above. I will deal with the protection of the oceanic commons through the United Nations Convention on the Law of the Sea ("UNCLOS")[13] because this treaty satisfies the three conditions of primary rules of obligation, secondary rules of state responsibility,[14] and a regime of compulsory judicial settlement. My analysis will employ the lens of three important cases.

A. Oceanic Environmental Commons

According to the United Nations:

> Oceans cover three quarters of the Earth's surface, contain 97 percent of the Earth's water, and represent 99 percent of the living space on the planet by volume. Over three billion people depend on marine and coastal biodiversity for their livelihoods.
>
> . . .
>
> Oceans serve as the world's largest source of protein, with more than 3 billion people depending on the oceans as their primary source of protein[.]. Marine fisheries directly or indirectly employ over 200 million people.
>
> . . .

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[13] United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS]. The convention concluded in 1982 and came into force in 1994. U.N., DIV. FOR OCEAN AFFAIRS & LAW OF THE SEA, THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA (A HISTORICAL PERSPECTIVE) (1998), *available at* https://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm.

[14] Int'l Law Comm'n, Rep. to the General Assembly, Draft Articles on Responsibility of States for Internationally Wrongful Acts U.N. Doc. A/56/10 (2001), reprinted in [2001] 2 Y.B. Int'l L. Comm'n 26, U.N. Doc. A/CN.4/SER.A/2001/Add.1 [hereinafter *Draft Articles on State Responsibility*].

> Coastal waters are deteriorating due to pollution and eutrophication. Without concerted efforts, coastal eutrophication is expected to increase in 20 percent of large marine ecosystems by 2050.[15]

The primary legal instrument governing the oceans is UNCLOS.[16] Politically, the global importance of oceans was recognized by Sustainable Development Goal 14 that deals with the conservation and sustainable use of the oceans.[17]

B. Cases Invoking the Environmental Commons

1. Nuclear Test Cases

The *Nuclear Test Cases* were instituted and decided prior to UNCLOS, or the *Draft Articles on State Responsibility*.[18] In these cases both Australia and New Zealand brought separate, but similar, actions against France in the International Court of Justice ("ICJ"), complaining of France's imminent atmospheric tests on the Moruroa Atoll in the South Pacific.[19] From 1967 to 1972 France had conducted atmospheric tests within its own territory, and appeared about to begin another series of tests in 1973.[20] Both Australia and New Zealand made similar arguments as to why French nuclear testing violated international law. One claim or cause of action was based on the violation of national sovereignty. Australia argued that:

> The deposit of radio-active fall-out on the territory of Australia and its dispersion in Australia's airspace without Australia's consent:
>
> > (*a*) violates Australian sovereignty over its territory; [and]
> >
> > (*b*) impairs Australia's independent right to determine what acts shall take place within its territory and in particular whether Australia and its people shall be exposed to radiation from artificial sources[.][21]

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[15] Sustainable Development Goals, *Goal 14: Conserve and Sustainably Use the Oceans, Seas and Marine Resources*, U.N., https://www.un.org/sustainabledevelopment/oceans/ (last visited Mar. 13, 2019). *See also* MINDY SELMAN ET AL., WORLD RES. INST., EUTROPHICATION AND HYPOXIA IN COASTAL AREAS: A GLOBAL ASSESSMENT OF THE STATE OF KNOWLEDGE (2008), *available at* https://www.wri.org/publication/eutrophication-and-hypoxia-coastal-areas.

[16] CRAWFORD, *supra* note 12; UNCLOS, *supra* note 13.

[17] *Goal 14*, *supra* note 15.

[18] Nuclear Tests (Austl. v. Fr.), Judgment, 1974 I.C.J. Rep. 253 (Dec. 20); Nuclear Tests (N.Z. v. Fr.), Judgment, 1974 I.C.J. Rep. 457 (Dec. 20).

[19] Austl. V. Fr., 1974 I.C.J., ¶¶16–18; N.Z. v. Fr., 1974 I.C.J., ¶16–19.

[20] N.Z. v. Fr., 1974 I.C.J., ¶ 17.

[21] Nuclear Tests (Austl. v. Fr.), Request for the Indication of Interim Measures of

The second cause of action is more relevant to our discussion because it concerned the protection of the collective interests of the international community, and what we may call the environmental commons. New Zealand articulated this argument very clearly by claiming that France's action violated "the rights of all members of the international community, including New Zealand, that no nuclear tests that give rise to radio-active fall-out be conducted"[22] and also violated "the rights of all members of the international community, including New Zealand, to the preservation from unjustified artificial radio-active contamination of the terrestrial, maritime and aerial environment and, in particular, of the environment of the region in which the tests are conducted[.]"[23]

It is to be noted that both New Zealand and Australia effectively took the position that the high seas were *res communis*, and that every state had an interest in protecting the freedom of the seas even in the absence of a material interest or injury in fact.[24] In so doing they anticipated the concept of the high seas as the common heritage of mankind as subsequently expressed in Article 136 and explicated further by Articles 137 to 148 of UNCLOS.[25] Furthermore, the two claims of Australia and New Zealand relating to state responsibility could now be justified under Articles 42 and 48 of the *Draft Articles of State Responsibility*. Article 42 of the *Draft Articles of State Responsibility* deals with injury in fact,[26] while Article 48 addresses the environmental commons.[27] A plain reading of Article 48 makes this abundantly clear. According to Article 48:

> Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:
>
> (*a*) the obligation breached is owed to a group of States including that State, and is established for the protection of a **collective interest of the group**; or
>
> (*b*) the obligation breached is **owed to the international community as a whole**.[28]

Protection, Order, 1973 I.C.J. Rep. 99, ¶ 22 (June 22).

[22] Nuclear Tests (N.Z. v. Fr.), Judgment, 1974 I.C.J. Rep. 494, ¶ 36 (Dec, 20) (joint dissenting opinion by Onyeama, J., Dillard, J., Jiménez de Aréchaga, J., and Sir Humphrey Waldock, J.).

[23] *Id.*

[24] *See id.* ¶ 7.

[25] UNCLOS, *supra* note 13, at arts. 136 to 148.

[26] *Draft Articles on Responsibility*, *supra* note 14, at art. 42.

[27] *Id.* at art. 48.

[28] *Id.* (emphasis added).

The two petitioners requested interim measures, and the ICJ granted these requests in 1973, stating that "no action of any kind [should be] taken which might aggravate or extend the dispute . . . and, in particular, the French Government should avoid nuclear tests causing the deposit of radio-active fall-out"[29] on the respective territories of Australia and New Zealand.[30] While the ICJ did not base its interim measures on the second cause of action relating to the international community, they found that the petitioners had established a prima facie case. It is reasonable to not dismember the "case" but to treat it as the whole case which includes the second cause of action. Moreover, the Joint Dissenting Opinion clearly stated that the court should be open to consider actions brought to enforce the kind of *obligations erga omnes* referred to in the *Barcelona Traction case*.[31] Unfortunately, France ignored the decision and actually conducted two more nuclear tests.[32] The actions of France flew in the face of Article 59 of the ICJ's governing statute that clearly states that any decision rendered by the ICJ is binding on the parties to the case.[33] However, the ICJ appeared incapable of doing anything about this flagrant violation of its decision.

2. South China Sea Arbitration

A recent decision of the Permanent Court of Arbitration ("PCA") perhaps offers the best doctrinal example of judicial protection of the environmental commons.[34] The PCA's jurisdiction is derived from UNCLOS—all State parties to UNCLOS agree to compulsory dispute settlement procedures under Part XV, Section 2 of the treaty.[35] The arbitration revolved around whether China's claim to sovereignty over much of the South China Sea based on its nine-dash-line around the great wall of sand was compatible with

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[29] Nuclear Tests (Austl. v. Fr.), Request for the Indication of Interim Measures of Protection, Order, 1973 I.C.J. Rep. 99, 106 (June 22).

[30] Nuclear Tests (N.Z. v. Fr.), Request for the Indication of Interim Measures of Protection, 1973 I.C.J. Rep. 49, ¶¶ 46–47 (May 14).

[31] Austl. v. Fr., 1974 I.C.J., ¶103 (joint dissenting opinion by Onyeama, J., Dillard, J., Jiménez de Aréchaga, J., and Sir Humphrey Waldock, J.) (citing Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Judgment, 1970 I.C.J. Rep. 13, 32 (Feb. 5)).

[32] LAKSHMAN D. GURUSWAMY & MARIAH ZEBROWSKI LEACH, INTERNATIONAL ENVIRONMENTAL LAW 674 (5th ed. 2017) [hereinafter INTERNATIONAL ENVIRONMENTAL LAW].

[33] Statute of the International Court of Justice, art. 59.

[34] *See In re* South China Sea Arbitration (Phil. v. China), PCA Case No. 2013-19, Award (Perm. Ct. Arb. 2016).

[35] UNCLOS, *supra* note 13, at Part XV, § 2.

UNCLOS.[36] China objected to the PCA's jurisdiction on the basis that it had submitted a declaration at the time it ratified UNCLOS, exempting disputes over sea boundaries and land territory from compulsory arbitration.[37] On this ground, China did not participate in the arbitration.

The PCA held first, that they were not dealing with boundary delimitation, and that the claims presented by the Philippines did not concern sea boundary delimitation and were not, therefore, subject to the exception to the dispute settlement provisions of UNCLOS.[38] The PCA also emphasized that the Philippines had not asked it to delimit any boundary.[39] China's non-participation did not deprive it of jurisdiction under Annex VII, Article 9 of UNCLOS.[40] It then went on to decide the case on the merits, and in doing so further decided that any historic rights China previously had in the South China Sea, insofar as they were incompatible with the Exclusive Economic Zones ("EEZ") of other states, were relinquished when China ratified UNCLOS.[41] Therefore, Chinese navigation and fishing in the South China Sea were simply exercises of high seas freedoms rather than of any historic rights.[42] The PCA further explained that the underlying rationale of UNCLOS was to give resources in EEZs to coastal states.[43] Correspondingly, states with only a presence on small features would not have the same entitlements as coastal States.[44]

The most important aspect of the case, relating to this discussion on judicial protection of the global commons, is worth noting. This aspect of the case concerned the PCA's holding that China's land reclamation and construction of artificial islands in the Spratly Islands, and its failure to prevent Chinese fishermen from harvesting endangered sea life, constituted a breach of its obligations under Articles 192 and 194(5) of UNCLOS to

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[36] Phil. v. China, PCA Case No. 2013-19, ¶7; *see also China Building 'Great Wall of Sand' in South China Sea*, BBC (Apr. 1, 2015), https://www.bbc.com/news/world-asia-32126840.

[37] Phil. v. China, PCA Case No. 2013-19, ¶¶ 6, 13. China ratified UNCLOS on June 7, 1996. When doing so, it declared in writing, as it was permitted to do under Article 298 of UNCLOS that it did not accept the compulsory judicial jurisdiction under Section 2 relating to boundary delimitation and disputes concerning military activities. UNCLOS, *supra* note 13, at art. 298.

[38] Phil. v. China, PCA Case No. 2013-19, ¶ 155.

[39] *Id.* ¶ 28.

[40] *Id.* ¶ 12.

[41] *Id.* ¶¶ 252, 261–63.

[42] *Id.* ¶ 270.

[43] *Id.* ¶ 519.

[44] *Id.* ¶¶ 517–19.

preserve and protect the marine environment.[45] The Philippines had argued that the obligation to protect and preserve the marine environment is not dependent on deciding which Party, if any, has sovereignty or sovereign rights or jurisdiction over Scarborough Shoal or Second Thomas Shoal or Mischief Reef.[46] What controlled instead, was the duty placed on China to control the harmful fishing practices, the land creation, and the construction activities which threaten the marine environment at those locations and elsewhere in the South China Sea.[47]

The unanimous decision of the PCA on this question is categorical and unequivocal. It held that the obligations in Part XII, dealing with the protection and preservation of the marine environment, applies "to all States with respect to the marine environment in all maritime areas, both inside the national jurisdiction of States and beyond it. Accordingly, questions of sovereignty are irrelevant to the application of Part XII of [UNCLOS]."[48] The applicability of these duties "have no bearing upon, and are not in any way dependent upon, which State is sovereign over features in the South China Sea."[49] In effect they are obligations owed to the international community as a whole. It further wrote:

> This "general obligation" extends both to "protection" of the marine environment from future damage and "preservation" in the sense of maintaining or improving its present condition.
>
> . . .
>
> The content of the general obligation in Article 192 is further detailed in the subsequent provisions of Part XII, including Article 194, as well as by reference to specific obligations set out in other international agreements, as envisaged in Article 237 of the Convention.[50]

According to the PCA, "Articles 192 and 194 set forth obligations not only in relation to activities directly taken by States and their organs, but also in relation to ensuring activities within their jurisdiction and control do not harm the marine environment."[51] It then examined Article 194(2), which states: "States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment . . . ."[52] It relied on the

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[45] *Id.* ¶ 992.
[46] *Id.* ¶ 892
[47] *Id.*
[48] *Id.* ¶ 940.
[49] *Id.*
[50] *Id.* ¶¶ 941–42.
[51] *Id.* ¶ 944.
[52] UNCLOS, *supra* note 13, at art. 194, ¶ 2.

Fisheries Advisory Opinion of the International Tribunal for the Law of the Sea, which had drawn on decisions of the ICJ in *Pulp Mills on the River Uruguay* and the Seabed Disputes Chamber advisory opinion, to conclude "that the obligation to 'ensure' is an obligation of conduct."[53] It imposes an obligation on "a flag State to ensure its fishing vessels not be involved in activities which will undermine a flag State's responsibilities under [UNCLOS] in respect of the conservation of living resources and the obligation to protect and preserve the marine environment."[54]

The PCA then dealt with the argument that China had destroyed fragile and critical ecosystems prohibited by Article 194(5) of UNCLOS that protects and preserves rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life.[55] It concluded that there was:

> [N]o doubt from the scientific evidence before it that the marine environments where the allegedly harmful activities took place in the present dispute constitute "rare or fragile ecosystems." They are also the habitats of "depleted, threatened or endangered species," including the giant clam, the hawksbill turtle and certain species of coral and fish.[56]

China's actions had, therefore, violated Article 194(5).

Furthermore, the PCA held that China also violated a cluster of other obligations. One set of those obligations are found in Article 197 read with Article 123.[57] These Articles deal with cooperation, especially in dealing with enclosed and semi enclosed seas like to South China Seas.[58] They "require[] States to cooperate on a global or regional basis, 'directly or through competent international organizations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with [UNCLOS], for the protection and preservation of the marine environment[.]'"[59] China had not done so.

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[53] Phil. v. China, PCA Case No. 2013-19, ¶ 944 (citing Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Case No. 21, Advisory Opinion of Apr. 2, 2015, ITLOS Rep. 2015, ¶¶ 118–36; Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J. Rep. 14 (Apr. 20); Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Case No. 17, Advisory Opinion of Feb. 1, 2011, ITLOS Rep. 2011).

[54] *Id.*

[55] *Id.*¶ 945.

[56] *Id.*

[57] *Id.* ¶ 946; UNCLOS, *supra* note 13, at art. 123, 197.

[58] Phil. v. China, PCA Case No. 2013-19, ¶ 946.

[59] *Id.* (quoting UNCLOS, *supra* note 13, at art. 197).

Other obligations allegedly violated by China include those found in Articles 204, 205, and 206.[60] Article 204 requires states to "endeavour [sic], as far as practicable, directly or through the competent international organizations, to observe, measure, evaluate and analyse [sic], by recognized scientific methods, the risks or effects of pollution on the marine environment."[61] It also requires states to "keep under surveillance the effects of any activities which they permit or in which they engage in order to determine whether these activities are likely to pollute the marine environment."[62] Article 205 requires states to publish reports of the results from such monitoring to the competent international organizations, which should make them available to all states.[63] Finally, Article 206 relates to environmental impact assessments.[64]

What is evident from *South China Sea Arbitration* is that the obligations contained in Part XII of UNCLOS satisfied the three preconditions for invoking state responsibility. First, it created primary rules protecting and preserving the marine environment as an international commons, that are owed to the international community as a whole. Second, these rules could give rise to state responsibility under Article 48 of the *Draft Articles on State Responsibility*. Third, UNCLOS required compulsory judicial settlement of alleged violations of its provisions. As we have noted this is found in Part XV of UNCLOS.[65]

In the result, *South China Sea Arbitration* is perhaps the best example of how international courts have sought to protect the global commons. However, *South China Sea Arbitration* further illustrates the problem encountered in the *Nuclear Test cases*, namely the inability of international courts to enforce or implement their order in the face of resistance or rejection by the offending state.

3. Seabed Disputes Chamber of The International Tribunal for The Law Of The Sea, Responsibilities And Obligations Of States Sponsoring Persons and Entities with Respect To Activities In The Area, Advisory Opinion of February 1, 2011

The Seabed Disputes Chamber (the "Chamber") is a separate judicial body within the International Tribunal for the Law of the Sea ("ITLOS"). It is entrusted, through its advisory and contentious jurisdiction, with the

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[60] *See id.* ¶¶ 947–48.

[61] UNCLOS, *supra* note 13, at art. 204.

[62] *Id.* at art. 204.

[63] *Id.* at art. 205.

[64] *Id.* at art. 206.

[65] *See id.* at Part XV.

exclusive function of interpreting Part XI of UNCLOS dealing with the Area, and the relevant annexes and regulations that are the legal basis for the organization and management of activities in the Area. The Chamber's advisory opinion, Responsibilities and Obligations of States Sponsoring Persons and Entities With Respect to Activities in the Area, concerned the duties of various parties engaged in deep sea bed mining.[66] The Chamber characterized the nature of the environmental obligations relating to compensation, writing:

> Each State Party may also be entitled to claim compensation in light of the *erga omnes* character of the obligations relating to preservation of the environment of the high seas and in the Area. In support of this view, reference may be made to article 48 of the ILC Articles on State Responsibility[.][67]

The reference to obligations *erga omnes*, and Article 48 of the *Draft Articles on State Responsibility*, relating to obligations owed to the international community should be situated within the characterization of the Area as the common heritage of mankind by Article 136 of UNCLOS. When these provisions are read in conjunction, the contextualized area and environmental commons can invoke judicial supervision.

IV. PROBLEMS CONFRONTING JUDICIAL PROTECTION OF THE ENVIRONMENTAL COMMONS UNDER RULES OF STATE RESPONSIBILITY.

While states may invoke court intervention to protect the environmental commons, based on the *Draft Articles on State Responsibility*, they face a number of legal and practical difficulties. These challenges traverse the geopolitics of international relations, the nature of the international adjudication, the actors causing harm to the environmental commons, the existence and ambit of primary rules of obligation, the doctrine of state responsibility, and the implementation of a court order.

First, the geopolitics of international relations and the international adjudication. International law functions within a complex vortex of a global community consisting of 193 sovereign independent states.[68] International law, is a body of law created by these states to promote interaction and govern

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[66] Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Case No. 17, Advisory Opinion of Feb. 1, 2011, ITLOS Rep. 2011.

[67] Responsibilities and Obligations of States, *supra* note 66, ¶ 189 (quoting *Draft Articles on State Responsibility*, *supra* note 14, at art. 48).

[68] For a list of the 193 states that make up the United Nations, see *Member States*, U.N., http://www.un.org/en/member-states/ (last visited Mar. 14, 2019).

problems that arise between themselves.[69] International environmental law ("IEL"), a branch of international law, is situated and expressed primarily in treaties, which consist of written agreements between two or more states creating or re-stating legal rights and duties. Where states that have agreed to and incorporated primary rules protecting the global commons in treaties, it is open to them to seek the protection of these environmental commons.

It is a related geopolitical fact, however, that states aspire to have friendly relations with other states, and comity does not favor adversarial litigation.[70] The foreign offices and chancelleries across the world, much prefer to settle their differences by diplomatic means and not resort to litigation. Litigation is expensive, distracting, time consuming, and may attenuate goodwill among nations. Furthermore, where they decide to litigate, states usually do so to vindicate their individual self-interest, not promote community objectives. Accordingly, litigation is not ordinarily pursued in the absence of self-promoting or self-serving circumstances. This may constrain judicial protection because it may be difficult to find a champion of the environmental commons, that undertakes costly litigation, based on altruism not self-interest.

A second difficulty concerns the actors. International law is an interstate system that only binds states. Consequently, non-state actors like multinational corporations, non-governmental organizations ("NGOs"), or private parties, do not directly fall under the jurisdiction of courts set up by treaties that protect the global commons. Quite often, those most concerned about damage to the commons are private persons or non-governmental environmental organizations, not states. They claim to act as watchdogs over the environment. These environmental watchdogs cannot directly bring an action in an international tribunal based on the violation of a treaty. Instead, NGOs will need to convince their national governments to espouse the cause of the environmental commons and institute a case against the offending state.

The *Trail Smelter case*, a well-known public international law case dealing with transboundary pollution, is illustrative of how state responsibility works.[71] In *Trail Smelter*, sulfur dioxide fumes from a Canadian smelter were causing damage in the state of Washington.[72] Farmers who suffered

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[69] In this Article, "international law" refers to public international law created by states, and not to transnational laws involving non-state players like corporations or non-governmental organizations.

[70] *See generally* Joel R. Paul, *Comity in International Law*, 32 HARV. INT'L L. J. 1 (1991) (using comity, an elusive and canonically undefined concept, as one expressing goodwill and respect towards other nations).

[71] Trail Smelter Arbitration (U.S. v. Can.), 3 R.I.A.A. 1905 (1938).

[72] *Id.* at 1907, 1912, 1917.

damage were prevented from bringing an action in U.S. courts because they would have encountered jurisdictional difficulties. The first of these jurisdictional problems arose from the fact that the company owning the smelters had its place of business and was registered in Canada.[73] A second jurisdictional problem arose from the *locus delicti*, or the fact that the act that initiated the damage, and therefore the tort, occurred in Canada.

Even if the plaintiffs had been able to overcome this difficulty and persuade a U.S. court to assume jurisdiction on the basis that the harm inflicted or damage suffered was in the U.S., they still faced other difficulties. Another problem was the proper law to be applied by the court. Should it be Canadian or U.S. law? If the applicable law were Canadian, to what extent did Canadian law permit recovery of damages in cases where the harm suffered was in a jurisdiction different from that in which it originated? The doctrine of *forum non conveniens*, or the appropriate forum for an action, raised another question. Were the U.S. courts an appropriate forum for deciding a case such as this?

These were among the reasons for the U.S. to espouse and advocate the claims of the Washington farmers and negotiate a treaty with Canada: Convention for Settlement of Difficulties Arising from Operations of Smelter at Trail, B.C. (1935) ("Convention for Settlement").[74] In this treaty, Canada accepted state responsibility for provable damage caused by the Trail smelter.[75] An arbitral tribunal was created under that treaty to find a solution that was just to all parties.[76] The arbitral tribunal concluded that the Dominion of Canada was responsible in international law for the conduct of the Trail Smelter, apart from the undertakings in the Convention for Settlement. It held, therefore, that it was the duty of the Government of the Dominion of Canada to ensure that its conduct conform with the obligation of the Dominion under international law, not to allow its territory to be used in a manner that caused transboundary damage to another state.[77] *Trail Smelter* demonstrates the working of an inter-state or international system of law. The injured Washington farmers obtained relief only because they persuaded their state, the United States, to espouse and advocate their claims against Canada, the state where the Trail Smelter was located. Moreover, they able to appear before the tribunal, and seek damages, only because the treaty allowed them to do so.

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[73] *Id.* at 1918.

[74] Convention for Settlement of Difficulties Arising from Operations of Smelter at Trail, B.C., U.S.-Can., Apr. 15, 1935, 3 R.I.A.A. 1907.

[75] *Id.* at art. 1.

[76] *Id.* at art. 2.

[77] *See Trail Smelter*, 3 R.I.A.A. at 1934–37.

The third and fourth impediments deal with those created by primary rules of obligation, and secondary rules of state responsibility. When one nation brings another to court, it relies on state responsibility, a form of international tort law. The International Law Commission ("ILC"), codified the law dealing with state responsibility in 1955. The first of their three volumes of work, the *Draft Articles on State Responsibility* was finalized in 2001,[78] and "it laid the conceptual foundations and provided an authoritative re-statement of state responsibility."[79] The authority of the *Draft Articles on State Responsibility* was confirmed by the ICJ in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*.[80] The ICJ found that Articles 4 and 8 of the *Draft Articles on State Responsibility* were a codification of customary international law.[81]

The foundational principle of state responsibility, as of tort law, is the concept of an internationally "wrongful" act.[82] A state commits an internationally wrongful act when it violates or acts in breach of an existing international obligation, found in treaty or customary law. As such, an act's classification as "wrongful" depends not on its being morally unacceptable *per se*, but instead on the wrongfulness of breaching international law. In theory, all obligations, whether general or specific, contained in treaties as well as in customary law, have the potential to give rise to state responsibility. According to the *Draft Articles on State Responsibility*, "[e]very internationally wrongful act of a State entails the international responsibility of that State"[83] and "[t]here is an internationally wrongful act of a State when conduct consisting of an action or omission: (*a*) is attributable to the State under international law; and (*b*) constitutes a breach of an international obligation of the State."[84]

What this entails is that there must be pre-existing primary rules of law establishing that it is wrong to damage the environmental commons, and next there is a need to attribute the conduct damaging the environment to a state.

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[78] *See generally Draft Articles on State Responsibility*, *supra* note 14. "This final draft was submitted to the U.N. General Assembly, which commended it on numerous occasions, and decided in 2007 to consider the question of a convention on the basis of the [Draft] Articles[.]" Lakshman Guruswamy, *State Responsibility in Promoting Environmental Corporate Accountability*, 21 FORDHAM ENVTL. L. REV. 209, 211 n.5 (2010). This has not happened yet.

[79] Guruswamy, *supra* note 78, at 211.

[80] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro) (*Bosnian Genocide*), Merits, 2007 I.C.J. 43 (Feb. 26).

[81] *Id.* at 283–84, 287.

[82] *See generally* Guruswamy, *supra* note 78, at 210–12.

[83] *Draft Articles on State Responsibility*, *supra* note 14, at art. 1.

[84] *Id.* at art. 2.

Attribution may present problems. Entities responsible for damaging the global commons by pollution or resource extraction almost invariably are non-state entities. They include multinational corporations or private actors as distinct from states themselves or agencies belonging to the state. Take the hypothetical case of a private corporation, registered in state A causing damage to the oceanic environmental commons, shared by states A, B, and C, by harvesting deep sea bed nodules.[85] The actions of such NGOs must be attributable to a state under the *Draft Articles on State Responsibility*. As a private corporation, their conduct is not that of an organ of the state under Article 4, or conduct of persons or entities exercising elements of governmental authority under Article 5.

It is arguable, however, that their actions are directed and controlled, and therefore attributable to the state under Article 8:

> Proving attribution under Article 8 is very difficult because it involves proving a direct agency relationship. It must also be shown that the state gave specific directions, or exercised explicit control over a corporation's actions. In their commentaries to the [*Draft Articles on State Responsibility*], the ILC concluded that, as a general rule, the conduct of private persons and corporations is not attributable to the State under public international law. In dealing with Article 8, the ILC considered the example of a State-owned and controlled enterprise. They concluded that prima facie the conduct of even such an enterprise is not attributable to the State. Given the opinion of the ILC, it is going to be substantially more difficult to attribute the conduct of a private corporation to a state. In sum, this means that the actions of a private corporation can only be attributed to a state under Article 8 in very exceptional circumstances. Such circumstances should demonstrate explicit control and direction exercised by the State over the impugned actions of [a corporation].[86]

The ICJ confirmed this strict interpretation of Article 8 in the *Bosnia case*:

> In that case, Serbia and Montenegro alleged that the former Yugoslavia (now Bosnia and Hertzgovania) was responsible for committing genocide. The [ICJ] discussed the question of whether, although not organs of Serbia in general, the perpetrators were acting under Serbian "direction and control" "in carrying out the conduct" under Article 8. The decision of the ICJ followed the reasoning

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[85] Polymetallic nodules, also called manganese nodules, are rock concretions on the sea bottom formed of concentric layers of iron and manganese hydroxides around a core. As nodules can be found in vast quantities, and contain valuable metals, deposits have been identified as having economic interest. *See generally* JOHN MERO, THE MINERAL RESOURCES OF THE SEA (1965).

[86] *See* Guruswamy, *supra* note 78, at 213–14.

> and "effective control" test it used in the earlier case of *Military and Paramilitary Activities*.[87]

Applying the "effective control" test from the *Nicaragua case* in the *Bosnia case*, the ICJ concluded that:

> [T]he state will be responsible for non-state actors to the extent that "they acted in accordance with that state's instructions or under its effective control." This responsibility requires direction or control by Serbia over specific, identifiable events of the genocide. General control over the direction of operations is inadequate; there must have been specific control over the international wrongful act. The [ICJ] explained that, "it must however be shown that this 'effective control' was exercised, or that the State's instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations."[88]

In *South China Sea Arbitration*, we have seen how the PCA held China responsible for violations of various provisions of UNCLOS dealing with the pollution and protection of the marine environment. The question of attribution was not specifically addressed in this case apparently because China did not contest that their island-building and fishing projects in the South China Sea were attributable to China. Moreover, China's statements do not identify other actors responsible for the island-building or fishing projects.[89] In the course of the dispute, as the order of PCA points out, China issued several statements affirming the Chinese government's purpose for building artificial islands.[90] A spokesperson for China's Ministry of Foreign Affairs stated that China is, in fact, building artificial islands in the Spratly Islands area to "meet various civilian demands and better perform China's international obligations and responsibilities[.]"[91] Furthermore, Chinese spokespersons claimed that the Chinese government has taken into account ecological preservation and fishery management in conducting its construction project.[92] The Chinese government also claimed to have enacted ecological measures pursuant to its international obligations. In the result, it may have emerged that attribution was conceded by China, and that the PCA did not need to address this aspect of state responsibility.

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[87] Guruswamy, *supra* note 78, at 213–14 (citing *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 110 (June 27)).

[88] *Id.* at 214–15.

[89] *In re* South China Sea Arbitration (Phil. v. China), PCA Case No. 2013-19, Award, ¶ 920 (Perm. Ct. Arb. 2016).

[90] *Id.* ¶¶ 919–20.

[91] *Id.* ¶ 919.

[92] *Id.* ¶¶ 917, 920.

It is surprising, however, that attribution, which is an essential and indispensable element of the rules of state responsibility, was not specifically raised, analyzed or addressed by the PCA. It was incumbent on the PCA to do so even if they considered that Articles 193 and 194 of UNCLOS embodied obligations of conduct that obviated the need for attribution. It was necessary for the PCA to have articulated why their interpretation of those articles dispensed with the need for attribution. The clear need to address attribution was further underlined by the fact that China neither accepted nor participated in the proceedings, and was not represented at the hearings.[93] In these circumstances the PCA acknowledged that the situation of a non-participating party imposes a special responsibility on it.[94] Referring to Article 9 of Annex 7 of UNCLOS, the PCA stressed the importance, before making its award, to satisfy itself "not only that it has jurisdiction over the dispute but also that the claim is well founded in fact and law."[95]

Given this self-admonition it behooved the PCA to have raised the crucial issue of attribution, even if the facts overwhelmingly proved that the illegal actions were attributable to China, rendering them *res ipsa loquitur*,[96] or that China had conceded attribution, or that the primary rules did not require attribution. Whatever the PCA's basis for dispensing with attribution, the PCA should have referenced the facts and articulated its reasons for so doing. The absence of any treatment of attribution creates a lacuna in the award. As we have seen, attribution must be shown before state responsibility can be proved, and the *South China Sea Arbitration* cannot be interpreted as dispensing with attribution. Moreover, the seeming admission made by China in *South China Sea Arbitration* may not be forthcoming in other cases involving the environmental commons, and attribution will continue to present challenges when dealing with the actions of non-state actors.

Fifth, causation could be another obstacle. Typically, more than one state may be responsible for causing damage to the environmental commons by way of pollution or extraction of natural resources. Consider the example of damage to coral reefs within an environmental commons, caused by pollution

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[93] *Id.* ¶¶ 6, 12–13.

[94] *Id.* ¶ 12.

[95] *Id.*

[96] *Res ipsa loquitor* means "the thing speaks for itself." *Res Ipsa Loquitor*, BLACK'S LAW DICTIONARY (9th ed. 2009).

from numerous nations discharging pesticides,[97] dioxins,[98] and various petrochemicals.[99] Because of the nature of the substances involved, the harm caused to coral reefs due to exposure, typically are not discovered until long after the exposure occurred. It becomes very difficult to demonstrate which state or states are responsible for the resulting damage.

Typically, hazardous waste disposal by states involves many participants, who have been categorized as generators, transporters, and disposal site operators.[100] To complicate the identification issue further, the substances disposed of in the environmental commons may have come from several different generators in different countries, analogous to a waste dump site in the United States.[101] Records by generators, transporters and site owners are

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[97] Most pesticides are produced by the petrochemical industry, but their importance as a source of pollution arising from individual and agricultural use calls for separate treatment. There are many different types of pesticide products in use, including: insecticides (insects), herbicides (plants), fungicides (molds and mildew), rodenticides (rats and mice), acaricides (mites and ticks), bactericides (bacteria), avicides (birds), and nematicides (roundworms). According to the most recent Environmental Protection Agency ("EPA") report, nearly 6 billion pounds of pesticides were used worldwide in 2011 and 2012. DONALD ATWOOD & CLAIRE PAISLEY-JONES, EPA, PESTICIDES INDUSTRY SALES AND USAGE: 2008–2012 MARKET ESTIMATES 9 (2017), *available at* https://www.epa.gov/sites/production/files/2017-01/documents/pesticides-industry-sales-usage-2016_0.pdf.

[98] Dioxin can refer to any of a number of chlorinated hydrocarbon compounds that are produced as toxic side products in a range of industrial processes. *See generally Dioxins and Their Effects on Human Health*, WORLD HEALTH ORG. (Oct. 4, 2016), https://www.who.int/news-room/fact-sheets/detail/dioxins-and-their-effects-on-human-health. These compounds are highly carcinogenic, persist for long periods in the environment, and can accumulate up the food chain. *Id.*

[99] We use and find petrochemicals in goods as varied as food, medicine, cosmetics, lumber, household appliances, fuels, plastics, papers, and innumerable other manufactured products. Petrochemicals are divided into two groups: organic and inorganic. Organic compounds are based on carbon atoms usually in combination with hydrogen, and the better known include ethylene, methylene chloride, formaldehyde, benzene, dichlorodiphenyltrichloroethane (DDT), and polychlorinated biphenyls (PCBs). Inorganic compounds are not based on carbon, and examples of such substances include sulfuric acid, aluminum, and chromium. Petrochemical products enter the environment in a number of ways. The principal among these are intentional use as in the case of pesticides, incidental and operational releases of liquid discharges and gaseous emissions during their manufacturing process, accidental spills, and waste disposal. INTERNATIONAL ENVIRONMENTAL LAW, *supra* note 32, at 361.

[100] *See* Note, *Strict Liability for Generators, Transporters, and Disposers of Hazardous Wastes*, 64 MINN. L. REV. 949, 950 n.5 (1980) (noting that "[i]n many cases, the party responsible for the improper disposal either cannot be identified or is insolvent"); *see generally* Stephen M. Soble, *Proposal for the Administrative Compensation of Victims of Toxic Substance Pollution: A Model Act*, 14 HARV. J. ON LEGIS. 683 (1977).

[101] William R. Ginsberg & Lois Weiss, *Common Law Liability for Toxic Torts: A Phantom Remedy*, 9 HOFSTRA L. REV. 859, 896–97(1981).

rarely kept.[102] Consequently, it may not be possible to isolate a culpable state or states responsible for the damage to the coral reefs.[103]

Moreover, ascertaining the particular substance that caused the injury is very difficult and often impossible for a number of reasons. First, substances that escaped into the air or water may have combined with other substances forming a new compound.[104] Second, a substance may manifest itself in different ways depending upon the characteristics of the ecosystem it damages. Third, the latency period between exposure and injury may also vary with each individual.[105] As a result, identifying any responsible state party, much less identifying all responsible parties, can be a daunting task.

A final challenge confronting judicial intervention to protect the environmental commons relates to enforcement of the judicial order. As we have seen from the *Nuclear Test cases* and *South China Sea Arbitration,* the orders of the ICJ and the PCA were not enforced. The absence of an executive agency or machinery for enforcement of the orders and decisions of international tribunal raises important questions as to the utility and/or effectiveness of adjudication to protect the global commons.

V. CONCLUSIONS

The *South China Sea Arbitration* offers the strongest evidence of how primary rules of law such as those found in Part XII of UNCLOS can be used to protect environmental commons.[106] Part VII of the *South China Sea Arbitration*, dealing with environmental damage in the South China sea, is worthy of, and deserves, much greater consideration than the scant attention given to it by scholars and publicists. The PCA held that the rules contained in Articles 193, 194 and other provisions of UNCLOS establish primary rules protecting the environmental commons that gives rise to secondary rules of state responsibility.[107] Admittedly, the award was flawed to the extent that attribution was not articulated or explicitly addressed, but that deficiency is severable from the rest of the award. It is clear that the rest of the award holding that some of the primary rules embodied in Part XII of UNCLOS protected the global commons, regardless of state jurisdiction, is of singular importance.

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[102] *Id.* at 891 n.131.

[103] *Id.* at 897.

[104] *See* Ginsburg & Weiss, *supra* note 101, at 922; Soble, *supra* note 100, at 686, 699.

[105] *See* Ginsburg & Weiss, *supra* note 101, at 920–23; Soble, *supra* note 100, at 686.

[106] *See generally In re* South China Sea Arbitration (Phil. v. China), PCA Case No. 2013-19, Award, ¶¶ 906–11 (Perm. Ct. Arb. 2016).

[107] *See id.* ¶ 940.

With regard to the secondary rules of state responsibility, the *South China Sea Arbitration* did not consider attribution. This is an omission even though China appeared to concede attribution by admitting it specifically directed the fishing and building operations in issue. Where, as in most cases, attribution is not conceded, it remains to be proved, and as we have noted, may present formidable difficulties. Environmental harm to the commons, in the great majority of cases, is caused by corporations or private entities not organs of the state. Article 8 of the *Draft Rules of State Responsibility*, as applied and interpreted by the case law, has been narrowly construed and appears to preclude attribution to private corporations. Given that the ILC commentaries on Article 8 affirmed the narrow scope of the article,[108] the ILC should revisit this subject and rewrite Article 8 or expand the meaning of it in their commentaries to include the actions of private corporations.

The inability to enforce international judicial decisions remains a fundamental problem and will require collective measures by the entire community of nations. Based on the materials offered in this article, it may be contended that the difficulty only arises in enforcing judicial remedies against powerful countries as distinguished from smaller less developed countries. In the cases cited, France in the *Nuclear Test cases* and China in the *South China Sea Arbitration* repudiated judicial decisions that they were legally obligated to accept and implement. This ought not to be the case, and justice irrefutably requires rich and powerful nations to comply with the law. The primary difficulty in enforcing international judicial decisions is that there is no agency empowered to do so. It becomes necessary, therefore, to search for ways of inducing compliance.

It may be possible to vest the UN Security Council ("SC") with powers to enforce judicial decisions but this is impracticable for at least two reasons. First, it will require amendments to the UN Charter and this does not appear politically feasible. Second, even if the UN Charter were amended, allowing it to take measures to enforce international decisions under selected globally accepted treaties including UNCLOS, any decision to enforce the judgments in the *Nuclear Test cases* and *South China Sea Arbitration* would have been vetoed, because both France and China are permanent members of the SC, and along with the other members (the United Kingdom, United States, and Russia) can exercise veto power in the SC.

A more feasible and practical measure might take the form of a UN General Assembly Resolution demanding that the order in the *South China Sea Arbitration* be accepted and complied with by China. This will bring public pressure on China. While shaming China in the UN may not persuade it to honor the Philippines decision, the naming, shaming, and embarrassment

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[108] *See Draft Articles on State Responsibility*, *supra* note 14.

triggered by GA Resolutions may deter other nations from following the same path. The obvious state to propose such a GA Resolution is the United States. Unfortunately, the United States is not a party to UNCLOS, and did not participate in the *South China Sea Arbitration*. It will lack credibility in moving for the enforcement of awards under UNCLOS. It is past time that the United States ratified UNCLOS.[109]

[109] On June 14, 2012, the U.S. Senate Committee on Foreign Relations held a "24 Star" hearing that featured six four-star generals and admirals representing every branch of the U.S. Armed Forces. *See* Press Release, U.S. Senate Comm. on Foreign Relations, "24 Star" Military Witnesses Voice Strong Support for Law of the Sea Treaty (June 14, 2012), *available at* https://www.foreign.senate.gov/press/chair/release/24-star-military-witnesses-voice-strong-support-for-law-of-the-sea-treaty. All of the witnesses—which included the Vice Chairman of the Joint Chiefs of Staff, the Chief of Naval Operations, the Commandant of the Coast Guard, and Commander of the U.S. Pacific Command—testified in favor of ratifying UNCLOS. *Id.*

Applying Indigenous Ecological Knowledge for the Protection of Environmental Commons: Case Studies from Hawai'i for the Benefit of "Island Earth"

David M. Forman*

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Indigenous ecological knowledge ("IEK")[1] deserves far greater international recognition than it currently enjoys. The evolution of such

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recognition, nonetheless, represents a significant measure of progress toward multi-pronged outcomes such as:

(i) more effective responses to the climate crisis and other pressing environmental challenges;[2]

(ii) deeper harmonization between the law of human rights and the law of environmental protection;[3] and

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this article were graciously provided by ELP colleagues, Professor Richard Wallsgrove and Associate Dean Denise Antolini. In addition to the stellar work of the editorial team at the University of Hawai'i Law Review, Brazilian law student Lorenzo Lima provided helpful assistance in response to a variety of issues that emerged while attempting to finalize this article.

[1] I choose to use the term "Indigenous Ecological Knowledge" in this Article while cognizant of foundational scholarship that instead uses the term "traditional ecological knowledge" as well as alternative references to "indigenous environmental knowledge." *Compare* FIKRET BERKES, SACRED ECOLOGY: TRADITIONAL ECOLOGICAL KNOWLEDGE AND RESOURCE MANAGEMENT (1999), *with* INDIGENOUS ENVIRONMENTAL KNOWLEDGE AND ITS TRANSFORMATIONS: CRITICAL ANTHROPOLOGICAL PERSPECTIVES (Roy Ellen et al. eds., 2000); *see also infra* note 20 (discussing a resolution adopted by the Members Assembly at the 2016 World Conservation Congress, International Union for the Conservation of Nature, which references the traditional knowledge of indigenous people and local communities).

[2] Maxine Burkett, *Indigenous Environmental Knowledge and Climate Change Adaptation*, *in* CLIMATE CHANGE AND INDIGENOUS PEOPLES: THE SEARCH FOR LEGAL REMEDIES 118 (Randall S. Abate & Elizabeth Ann Kronk eds., 2013) (arguing that "[t]he foundational worldview that forms the specific management tools prescribed in [indigenous environmental knowledge] are more relevant to the complex and ever-changing natural system that we have so deeply disturbed").

[3] D. Kapua'ala Sproat, *An Indigenous People's Right to Environmental Self-Determination: Native Hawaiians and the Struggle Against Climate Change Devastation*, 35 STAN. ENVT'L L.J. 157, 197 (2016) (proposing an "analytical framework for the development of remedial measures to redress the consequences of colonization, including climate change . . . to guide, and possibly compel, local decision-makers to proactively combat climate change" by "infusing international human rights norms into local laws and embracing restorative justice to realize the indigenous right to environmental self-determination"); Susan K. Serrano, *A Reparative Justice Approach to Assessing Ancestral Classifications Aimed at Colonization's Harms*, 27 WM. & MARY BILL RTS. J. 501, 523 (2018) ("For Indigenous inhabitants of the territories, in particular, the preservation of their deep connections to land (and where applicable, the return of land), the reclaiming of knowledge systems, language, and life ways, and the regeneration of self-government, are also central to their self-determination."); Rebecca Tsosie, *Climate Change and Indigenous Peoples: Comparative Models of Sovereignty*, *in* CLIMATE CHANGE AND INDIGENOUS PEOPLES, *supra* note 2, at 79–80 ("With respect to the issue of climate change, the domestic sovereignty framework is inadequate to address the challenges confronting indigenous communities because tribal jurisdiction is largely circumscribed by boundaries of reservation and membership. International human rights law offers a more comprehensive framework of analysis for the principle of indigenous self-determination, as it governs the relationship of indigenous peoples

(iii) nearer realization of the principle of indigenous self-determination.[4]

It was no surprise, then, that questions arose about how international law implements—and should implement—indigenous ecological knowledge, when participants in the 2018 Pluricourts and *University of Hawai'i Law Review* Symposium considered "The Role of International Courts in Protecting Environmental Commons."

During the symposium welcoming dinner, several participants mentioned the carbon offset programs that they selected in order to mitigate greenhouse gas emissions resulting from their respective journeys to our isolated archipelago in the middle of the Pacific Ocean. I could not help but think of the historic Mālama Honua Worldwide Voyage that took place from 2013 to 2018.[5] Two Native Hawaiian sailing canoes called Hōkūle'a[6] and

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with their traditional lands and resources, and places responsibility on the nation-states to account for the impact of their policies upon indigenous peoples.").

[4] Sproat, *supra* note 3, at 197; *cf.* John H. Knox (Special Rapporteur on Human Rights and the Environment), *Rep. of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, at 3–4, U.N. Doc. A/HRC/31/52 (Feb. 1, 2016) ("In the past eight years, the relationship between climate change and human rights has received increasing attention from the Human Rights Council, mandate holders, Governments and international bodies, including the Conference of the Parties to the United Nations Framework Convention on Climate Change. An important milestone was the Male' Declaration on the Human Dimension of Global Climate Change, adopted by representatives of small island developing States in November 2007. The Male' Declaration was the first intergovernmental statement explicitly recognizing that climate change has 'clear and immediate implications for the full enjoyment of human rights', including the rights to life, to an adequate standard of living and to the highest attainable standard of health. The Declaration requested the Human Rights Council to convene a debate on human rights and climate change, the Office of the United Nations High Commissioner for Human Rights (OHCHR) to study the effects of climate change on the full enjoyment of human rights, and the Conference of the Parties to seek the cooperation of OHCHR and the Council in assessing the human rights implications of climate change.").

[5] *The Mālama Honua Worldwide Voyage Continues Into 2018*, POLYNESIAN VOYAGING SOC'Y, http://www.hokulea.com/worldwide-voyage/ (last visited Feb. 14, 2019).

[6] Hōkūle'a, or "Star of Gladness" is the Hawaiian name for Arcturus, which is a zenith star of Hawai'i; traditional wayfinders memorized the zenith stars of different islands as well as the time distances between them. *Hōkūle'a*, POLYNESIAN VOYAGING SOC'Y, http://www.hokulea.com/vessels/hokulea/ (last visited Feb. 14, 2019); *The Canoe is the People: Indigenous Navigation in the Pacific*, UNITED NAT'L EDUC., SCI. & CULTURAL ORG., http://www.canoeisthepeople.org/navigating/zenith_star.php (last visited Feb. 14, 2019). Hōkūle'a was "the first deep-sea Polynesian voyaging canoe to be built in more than 600 years, reviving the art and science of celestial navigation and deep-ocean voyaging." Nainoa Thompson, *Traditional Knowledge for Today's Obstacles*, IUCN (July 21, 2016), https://2016congress.iucn.org/news/20160721/article/traditional-knowledge-todays-obstacles.html ("Hōkūle'a and her crew have been crossing the ocean for over 40 years in the wake of our ancestors, committed to showing the world that old knowledge can be made new again, and that traditional ecological understanding holds the key to solving some of Earth's

Hikianalia[7] circumnavigated the globe using traditional sailing techniques, while "engaging local communities and practicing how to live sustainably."[8] As the Polynesian Voyaging Society explains:

> *Mālama Honua*, means "to care for our Earth." Living on an island chain teaches us that our natural world is a gift with limits and that we must carefully steward this gift if we are to survive together. As we work to protect cultural and environmental resources for our children's future, our Pacific voyaging traditions teach us to venture beyond the horizon to connect and learn with others. The Worldwide Voyage is a means by which we now engage all of *Island Earth*—bridging traditional and new technologies to live sustainably, while sharing, learning, creating global relationships, and discovering the wonders of this precious place we all call home.[9]

Global relationships nurtured over the years by symposium organizer Dr. Christina Voigt, Distinguished Scholar in Residence with the ELP, allowed

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greatest problems."). According to the Polynesian Voyaging Society:

> On March 8, 1975, a performance-accurate deep sea voyaging canoe built in the tradition of ancient Hawaiian *wa'a kaulua* (double-hulled voyaging canoe), was launched from the sacred shores of Hakipu'u-Kualoa, in Kaneohe Bay on the island of O'ahu. . . . This launching was one of many events that marked a generation of renewal for Hawai'i's indigenous people. Along with the renewal of voyaging and navigation traditions came a renewal of Hawaiian language, dance, chant, and many other expressions of Hawaiian culture. The renewal represented a new-found respect and appreciation for Hawaiian culture, by all of Hawai'i's people. For the Hawaiian people, it has meant that they once again have begun to feel proud of who they are, and where they come from.

Hōkūle'a, supra.

[7] Hikianalia launched for sea trials on September 15, 2012. *Hikianalia*, POLYNESIAN VOYAGING SOC'Y, http://www.hokulea.com/vessels/hikianalia/ (last visited Feb. 14, 2019) ("Hikianalia is the Hawaiian name for the star known as Spica, which rises together with Hōkūle'a (Arcturus) in Hawai'i. They are sister stars because they break the horizon together at the latitude of the Hawaiian [I]slands. While Hikianalia had her own sail plan for part of the Worldwide Voyage, she and Hōkūle'a began and concluded their respective voyages side-by-side. Hikianalia combines the latest ecological technology with the heritage of the voyaging tradition. Each of our hulls contains an electric motor powered by onboard photovoltaic panels that convert sunlight to electric propulsive energy. With a zero carbon footprint, her design supports the '*Mālama Honua*' intent of the Worldwide Voyage.").

[8] *Mālama Honua Worldwide Voyage*, *supra* note 5.

[9] *Mālama Honua Worldwide Voyage*, *supra* note 5 (emphasis added) (scroll down to "The Mālama Honua Worldwide Voyage") (explaining that the "sail plan include[s] more than 150 ports, 23 countries and territories, and [8] of UNESCO's Marine World Heritage sites" to "connect with more than 100,000 people . . . across the South Pacific, Tasman Sea, Indian Ocean, Atlantic Ocean, and the Caribbean Sea, including Samoa, Aotearoa (New Zealand), Australia, Indonesia, Mauritius, South Africa, Brazil, U.S. Virgin Islands, Cuba, the East Coast of the United States, Canada, Panama, and the Galapagos Islands").

fortunate symposium participants to connect and learn about different approaches for protecting environmental commons. Whether intentionally or subconsciously, stewards from around the world were brought together consistent with Pacific voyaging traditions: "It wasn't about navigation. It wasn't about building a canoe. It wasn't about the stars. *It was about bringing people together.*"[10]

This Article begins in Part I by using two examples to describe evolving international recognition of IEK as a valuable tool for protecting environmental commons using the principle of intergenerational equity. Part II then provides some global context for an intergenerational equity framework that has been increasingly embraced by environmental constitutionalism around the world, and to which international (and domestic) courts should look for support concerning worldwide efforts that aim to protect environmental commons. Many of these constitutional provisions are rooted in IEK, including the public trust and environmental rights provisions of the Hawai'i Constitution. In Part III, the voices of indigenous practitioners and other members of local communities in Hawai'i illustrate three contemporary applications of IEK, which have already operationalized the intergenerational equity framework in the jurisdiction that hosted this symposium: (A) community-based subsistence fishery areas; (B) the *'Aha Moku* (District Council) system; and (C) a decision by

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[10] Sam Low, *Sacred Forests: The Story of the Logs for the Hulls of Hawai'iloa*, HAWAIIAN VOYAGING TRADITIONS (emphasis added), http://archive.hokulea.com/ike/kalai_waa/low_sacred_forests.html (last visited Mar. 14, 2019); *id.* (describing a 200-year-old story of a 108-foot Native Hawaiian canoe built of pine, "a gift from the gods" that apparently drifted all the way from the Pacific Northwest; then, describing the reluctance to accept the gift of the spruce trees until after a soul-healing day planting *koa* seedlings with accompanying cultural protocol and recognition of cultural renewal). According to one tradition, Hawai'iloa was the first discoverer of Hawai'i. *The Building of Hawai'iloa*, HAWAIIAN VOYAGING TRADITIONS, https://archive.hokulea.com/ike/kalai_waa/hawaiiloa.html (last visited Mar. 14, 2019); *see also* Dennis Kawarahada, *Hawai'iloa's Northwest-Alaska Journey / May–July 1995*, HAWAIIAN VOYAGING TRADITIONS, http://archive.hokulea.com/holokai/1995/hawaiiloa_alaska.html (last visited Mar. 14, 2019) (referencing the canoe's first voyage to Tahiti and the Marquesas and back to Hawai'i, then from British Columbia up the Alaskan coast). During the IUCN's 2016 World Conservation Congress, Polynesian Voyaging Society President Nainoa Thompson shared the following story about Hawai'iloa, "the first modern canoe of its time created as much as possible from native materials" except that there were "only two living *Koa* trees in Hawai'i large enough for her hulls." World Conservation Congress, National Host Committee, *Hawaiian Culture: Caring for People and Place*, IUCN, https://2016congress.iucn.org/hawaii/about-the-host/hawaiian-culture/index.html (last visited June 22, 2019). Instead, a respected elder from an Alaskan native tribe (who joined other activists as a teenager in successfully suing the United States and obtaining a land claims settlement that returned millions of acres to Alaskan natives) facilitated a gift of two large spruce trees, explaining that it was "like giving you our children" in order to carry the Native Hawaiian culture. Low, *supra*.

Kamehameha Schools to modify its land management policies by incorporating cultural values associated with beneficiaries' familial relationship with the land, instead of focusing solely on maximizing economic return on trust assets. Part IV elaborates on the sub-national context for environmental constitutionalism in Hawai'i, exploring the cultural and legal foundations of the intergenerational equity framework as applied through constitutional provisions adopting the public trust doctrine, protecting environmental rights, as well as reaffirming traditional and customary Native Hawaiian rights. Drawing inspiration from an ongoing renaissance that continues to be fueled by local communities in the Hawaiian Islands, this article concludes by suggesting that the role of international courts in protecting environmental commons will be greatly enhanced by recognizing the foundational role that IEK plays in the exercise of sub-national constitutionalism, whether in Hawai'i or elsewhere around the globe.

I. EVOLVING INTERNATIONAL RECOGNITION OF INDIGENOUS ECOLOGICAL KNOWLEDGE AS A VALUABLE TOOL FOR PROTECTING ENVIRONMENTAL COMMONS THROUGH THE PRINCIPLE OF INTERGENERATIONAL EQUITY.

The principle of intergenerational equity plays a foundational role in deploying IEK to improve environmental laws and policies, as Professor Maxine Burkett explains using examples that include the Iroquois' "Seventh Generation" intergenerational planning principle, and Hawai'i's public trust doctrine (with roots in Native Hawaiian custom and tradition).[11] International recognition of the value of IEK for protecting environmental

[11] Burkett, *supra* note 2, at 105–12, 115–18 ("Neither the [UNFCCC] nor the Kyoto Protocol mentioned indigenous communities, despite their clearly vulnerable status."); *see also* Joaggquisho (Oren Lyons), *Scanno*, 28 PACE ENVTL. L. REV. 334, 335 (2010). Joaggquisho (Oren Lyons), "Chief and Faithkeeper of the Turtle Clan of the Onondaga Nation, Haudensaunee (Iroquois Confederacy, or the Six Nations, the world's oldest continuously functioning democratic government)" was honored for his extraordinary work on behalf of Indigenous Peoples in the United Nations during the symposium, *On the Prospects for the United Nations Declaration on the Rights of Indigenous Peoples*. Lyons, *supra*, at 334. Chief Lyons quoted the mandate of the Onondaga Council of Chiefs, the Haudenosaunee Council of Chiefs, as shared with Chief Lyons by one of his predecessors: "[M]ake your decisions on behalf of the seventh generation coming . . . protect them, so that they may enjoy what you enjoy today." *Id.* at 335; Nicholas A. Robinson, *Evolutionary Roots Nurturing Equity Across Generations*, *in* TAKING LEGAL ACTIONS ON BEHALF OF FUTURE GENERATIONS: NEW PATHS (Emilie Gaillard & David M. Forman eds., forthcoming Nov. 2019) [hereinafter GAILLARD & FORMAN].

commons is a relatively recent and evolving phenomenon, however. Professor Burkett notes that the 1992 U.N. Framework Convention on Climate Change ("UNFCCC") and subsequent 1997 Kyoto Protocol each failed to mention indigenous communities.[12] When the UNFCCC parties initially sought to enable "systematic channels of communication" between stakeholders and the agreement's secretariat and parties, it recognized only two stakeholder constituencies—representing business and industry non-governmental organizations ("NGOs") on the one hand, and environmental NGOs on the other hand.[13] This changed in 2001, when indigenous peoples' organizations became the third recognized constituency.[14] In 2007, the *Fourth Assessment Report of the Intergovernmental Panel on Climate Change* placed "greater emphasis on the value of indigenous input, a sentiment affirmed in 2010 . . . [as follows]: 'indigenous or traditional knowledge may prove useful for understanding the potential of certain adaptation strategies that are cost-effective, participatory, and sustainable[.]'"[15] In 2015, the parties incorporated this concept in the Paris Agreement, comprising a global acknowledgement that climate change adaptation "should be based on and guided by the best available science and, as appropriate, traditional knowledge, knowledge of indigenous peoples and local knowledge systems."[16]

A similar evolution took place within the International Union for the Conservation of Nature ("IUCN") over the course of the last three meetings of the World Conservation Congress ("WCC"). At the fourth WCC in Barcelona, Spain (2008), the IUCN Members' Assembly endorsed the Declaration on the Rights of Indigenous People—which the United Nations ("U.N.") General Assembly adopted barely one year earlier on September 13, 2007.[17] The IUCN resolution emphasized "that the foundations for

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[12] Burkett, *supra* note 2, at 98 n.7.

[13] *See* UNFCC, CONSTITUENCIES AND YOU (May 2014), *available at* https://unfccc.int/files/parties_and_observers/ngo/application/pdf/constituencies_and_you.pdf. Additional constituencies were subsequently admitted, representing perspectives from trade union NGOs, women, and youth. *See id.*

[14] *See Admitted NGOs*, UNFCC, https://unfccc.int/process-and-meetings/parties-non-party-stakeholders/non-party-stakeholders/admitted-ngos (last visited Jan. 25, 2016)

[15] Burkett, *supra* note 2, at 98 n.7 (citing COMM. TO REVIEW THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE ASSESSMENTS: REVIEW OF THE PROCESSES AND PROCEDURES OF THE IPCC 33 (Oct. 2010), *available at* https://www.ipcc.ch/site/assets/uploads/2019/03/IAC-Report.pdf).

[16] Framework Convention on Climate Change, *Report of the Conference of the Parties on its Twenty-First Session, held in Paris from 30 November to 13 December 2015*, art. 7, ¶ 5, FCCC/CP/2015/10/Add.1 (Jan. 26, 2019).

[17] WCC Res. 4.052, Implementing the United Nations *Declaration on the Rights of Indigenous Peoples* (Oct. 2008) ("Sharing the Republic of Bolivia's concerns that 'at the day of adoption of the Declaration, the Planet was clearly wounded' and while 'it did not solve the

sustainable development require intra-generational and intergenerational equity" and called for the deployment of internal IUCN "mechanisms to address and redress the effects of historic and current injustices against indigenous peoples in the name of conservation of nature and natural resources[.]"[18] During the fifth WCC in Jeju, Republic of Korea (September 2012), the IUCN Members' Assembly requested that its governing entities and representatives "develop a policy for ensuring that the principles of the U.N. *Declaration on the Rights of Indigenous Peoples* are observed throughout the work of the Union" and "establish a taskforce to examine the application of the *Declaration* to every aspect of the IUCN Programme (including Commission mandates), policies and practices and to make recommendations that guarantee its implementation in the *IUCN Programme 2013–2016*, especially with respect to the Programme's focus on 'rights-based' nature conservation."[19] Most recently, at the sixth WCC in Honolulu, Hawai'i (September 2016; theme: "Planet at a Crossroads"), the IUCN Members' Assembly voted to create a new category of membership for indigenous peoples' organizations ("IPOs")—allowing IPOs to join 217 state and government agencies, more than 1,000 NGOs, and networks of more than 16,000 experts in 185 countries.[20] According to then IUCN Director General Inger Anderson:

> [This] decision to create a specific place for indigenous peoples in the decision-making process of [the] IUCN marks a major step towards achieving the equitable and sustainable use of natural resources . . . . Indigenous peoples are key stewards of the world's biodiversity. By giving them this crucial

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problems, nor ease the tensions between people,' it was a step forward in allowing indigenous peoples to 'participate in global processes for the betterment of all societies.'"). Thirty-three years earlier, at its twelfth General Assembly meeting in Kinshasa, Zaire (September 1975), the IUCN recommended that "governments maintain and encourage traditional methods of living and customs which enable communities, both rural and urban, to live in harmony with their environment[.]" IUCN G.A. Res. 12/5, Protection of Traditional Ways of Life (Sept. 1975); *see also* IUCN G.A. Res. 15/7, The Role of the Traditional Life Styles and Local People in Conservation and Development (Oct. 1981) ("[T]raditional conservation systems have much to recommend them, not because of sentimental nostalgia, but because they are based on common sense, are cost-effective and fit in with the needs of many local communities[.]").

[18] WCC Res. 4.052, *supra* note 17. *Cf.* Sproat, *supra* note 3, at 197; Serrano, *supra* note 3, at 523; Tsosie, *supra* note 3, at 79-80.

[19] WCC Res. 097-EN, Implementation of the United Nations *Declaration on the Rights of Indigenous Peoples* (2012).

[20] Press Release, IUCN, WCC, IUCN Congress Boosts Support for Indigenous Peoples' Rights (Sept. 10, 2016), *available at* https://www.iucn.org/news/secretariat/201609/iucn-congress-boosts-support-indigenous-peoples%E2%80%99-rights.

> opportunity to be heard on the international stage, we have made our Union stronger, more inclusive[,] and more democratic.[21]

Elements of the intergenerational equity legal framework discussed in Part II below were implicitly recognized by "Nature-Culture Journey" participants at the sixth WCC; this particular subset of Congress participants issued a statement of commitments, which expressly incorporates the concept introduced at the beginning of this Article; namely, "Mālama Honua—to care for our island Earth."[22] The Nature-Culture Journey participants' statement:

> Recall[s] the potential afforded by existing international treaties such as the UNESCO World Heritage Convention, which explicitly brings together nature and culture, as well as culture and biodiversity related conventions, declarations and other international documents that set global standards;
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> . . .
>
> Recognize[s] the profound contribution that natural and cultural heritage make toward the achievement of the UN Sustainable Development Goals, the Paris Agreement, the Sendai Framework, and Habitat III's New Urban Agenda, and the fundamental need to better link nature and culture to achieve that potential; [and]
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> . . .
>
> Call[s] upon governments, local authorities and practitioners to implement joint approaches that advance synergies among Conventions, legal frameworks and international instruments for safeguarding cultural and biological diversity[.][23]

In addition, Polynesian Voyaging Society President and Master Navigator, Nainoa Thompson, discussed the Mālama Honua Worldwide Voyage during a high-level session on *Actions for a Sustainable Ocean* moderated by Dr. Sylvia A. Earle.[24]

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[21] *Id. See also* Mike Gaworecki, *IUCN to Create New Category of Membership for Indigenous Peoples' Organizations*, MONGABAY NEWS (Sept. 13, 2016), https://news.mongabay.com/2016/09/iucn-to-create-new-category-of-membership-for-indigenous-peoples-organizations.

[22] IUCN, MĀLAMA HONUA – TO CARE FOR OUR ISLAND EARTH (2016), *available at* https://www.iucn.org/sites/dev/files/malama-honua-en.pdf.

[23] *Id.* at 1–2.

[24] Tim Jones (Chief Rapporteur to the Hawai'i Congress), WCC, *Proceedings of the Members' Assembly*, 26–27 (2016), *available at* https://portals.iucn.org/library/sites/library/files/documents/WCC-6th-004.pdf; Risa Oram, *Master Navigator Nainoa Thompson*, YOUTUBE (Sept. 4, 2016), https://youtu.be/f__teb05OaA; IUCN, International Union for Conservation of Nature, *Oceans, The Driver of Life*, YOUTUBE (July 4, 2017), https://youtu.be/9U5COonhpYY.

The IUCN Members' Assembly subsequently affirmed the role of indigenous cultures in global conservation efforts generally,[25] and expressed specific support for a concrete example of community-based natural resource management in the State of Hawai'i.[26] This particular example along with other *boots-on-the-ground* illustrations of collaborative natural resource management in the Hawaiian Islands, may be of particular interest to international audiences. Before describing a few of these initiatives in greater detail, Part II presents an emerging legal framework rooted in intergenerational equity that can and should be deployed (by both international *and* domestic courts) to implement IEK for the protection of environmental commons.

II. THE INTERGENERATIONAL EQUITY LEGAL FRAMEWORK FOR DEPLOYING INDIGENOUS ECOLOGICAL KNOWLEDGE TO PROTECT ENVIRONMENTAL COMMONS.

The principle of intergenerational equity has woven itself into international law commencing with the 1972 Stockholm Declaration on the Environment, and through the subsequent adoption of major treaties, along with general principles of law recognized by civilized nations, and judicial opinions.[27] Among other sources, Professor Edith Brown Weiss highlights the eloquent dissenting opinion by International Court of Justice ("ICJ") Judge Christopher Weeramantry, who famously described the normative

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[25] IUCN, IUCN RESOLUTIONS, RECOMMENDATIONS AND OTHER DECISIONS 179 (Sept. 2016), *available at* https://portals.iucn.org/library/sites/library/files/documents/IUCN-WCC-6th-005.pdf (reprinting WCC Res. 075-EN, including but not limited to: "NOTING that while the world seeks innovative approaches to sustainable development, indigenous peoples and local communities can provide examples of sustainability to serve as global models, including by means of their traditional knowledge" and "ACKNOWLEDGING that the integration of indigenous peoples' and local communities' approaches and knowledge systems with other conservation efforts is essential to achieve sustainable development").

[26] *Id.* at 158–59 (reprinting WCC Res. 065-EN, including but not limited to: "NOTING that decentralized management enables local people to address unique social, political, and ecological problems and find solutions ideal to their situation" and "RECOGNISING [sic] the contemporary importance of indigenous Hawaiian principles such as *kuleana* (the indivisibility of rights and responsibilities) and *aloha 'āina* (the love of the land which feeds) to the well-being of Hawai'i and the world").

[27] *See, e.g.*, EDITH BROWN WEISS, IN FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY, AND INTERGENERATIONAL EQUITY (1989); *see also* Edith Brown Weiss, *Intergenerational Equity as a Change of Paradigm*, *in* GAILLARD & FORMAN, *supra* note 11 (citing Professor Brown Weiss's own book published in 1989).

framework for evaluating legal challenges that involve the interests of future generations[28] as follows:

> It is to be noted in this context that the rights of future generations have passed the stage when they were merely an embryonic right struggling for recognition. They have woven themselves into international law through major treaties, through juristic opinion and through general principles of law recognized by civilized nations.
>
> Among treaties may be mentioned, the 1979 London Ocean Dumping Convention, the 1973 Convention on International Trade in Endangered Species, and the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage. All of these expressly incorporate the principle of protecting the natural environment for future generations, and elevate the concept to the level of binding State obligation.
>
> Juristic opinion is now abundant, with several major treatises appearing upon the subject and with such concepts as intergenerational equity and the common heritage of mankind being academically well established. Moreover, there is a growing awareness of the ways in which a multiplicity of traditional legal systems across the globe protect the environment for future generations. To these must be added a series of major international declarations commencing with the 1972 Stockholm Declaration on the Human Environment.
>
> When incontrovertible scientific evidence speaks of pollution of the environment on a scale that spans hundreds of generations, this Court would fail in its trust if it did not take serious note of the ways in which the distant future is protected by present law. The ideals of the United Nations Charter do not limit themselves to the present, for they look forward to the promotion of social progress and better standards of life, and they fix their vision, not only on the present, but on "succeeding generations[.]"[] This one factor of

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[28] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, 429, at 455–56 (July 8) [hereinafter Weeramantry Dissent] (dissenting opinion by Weeramantry, J.). More recent opinions issued in 2010 and 2014 by another ICJ Judge, Antônio A. Cançado Trindade, likewise acknowledged these generally recognized principles of international law. *See* Whaling in the Antarctic (Austl. v. Japan: N.Z. intervening), Judgment, 2014 I.C.J. Rep. 226, 348, ¶¶ 7, 10–12, 41–47 (Mar. 31) (separate opinion by Cançado Trindade, J.); Pulp Mills (Arg. v. Uru.), Judgment, 2010 I.C.J. Rep. 135, 138, ¶¶ 5–6, 215, 220 (Apr. 20) (separate opinion by Cançado Trindade, J.) (recognizing "the principle of prevention and the *precautionary principle*, added to the long-term temporal dimension underlying *inter-generational equity*, and the temporal dimension underlying the principle of sustainable development" as general principles of law recognized by civilized nations under Article 38(1)(c), Statute of the International Court of Justice). *See also* Arg. v. Uru., 2010 I.C.J. at 157–59, ¶¶ 54–61 (discussing the prevention principle); *id.* at 159–70, ¶¶ 62–93 (discussing the precautionary principle); *id.* at 170–71, ¶¶ 93–96 (discussing the prevention and precautionary principles together); *id.* at 177–84, ¶¶ 114–31 (discussing the principle of intergenerational equity).

> impairment of the environment over such a seemingly infinite time span would by itself be sufficient to call into operation the protective principles of international law which the Court, as the pre-eminent authority empowered to state them must necessarily apply.[29]

The connection between intergenerational equity and IEK is implicit in Professor Brown Weiss' acknowledgement that notions of intergenerational solidarity and future needs are deeply rooted in diverse cultural and religious traditions; more specifically, traditions that expressly recognize rights held in relationship to our ancestors that must also be protected for our descendants.[30] In fact, the year after his dissent in the *Nuclear Weapons Advisory Opinion*, Judge Weeramantry joined the majority in the *Pulp Mills (Argentina v. Uruguay)* case.[31] He wrote separately to highlight

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[29] Weeramantry Dissent, *supra* note 28, at 455. *See also* Gabčíkovo-Nagymoros Project (Hung./Slovk.), Judgment, 1997 I.C.J. Rep. 7, 41, ¶ 53, 68, ¶ 112 (Sept. 25) (recalling the "great significance" the Court attached "to respect for the environment, not only for States but also for the whole of mankind" in its earlier *Nuclear Weapons Advisory Opinion*); Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. at 241–42, ¶ 29 ("[T]he environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including *generations unborn*." (Emphasis added)). In *Gabčíkovo-Nagymoros Project*, the ICJ wrote:

> The Court is mindful that, in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage.
>
> Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind—for present and *future generations*—of pursuit of such interventions at an unconsidered and unabated pace, *new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight*, not only when States contemplate new activities but also when continuing with activities begun in the past. *This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.*

1997 I.C.J. at 78, ¶ 140 (emphasis added). *See* Gabčíkovo-Nagymoros Project (Hung./Slovk.), Separate Opinion of Vice-President Weeramantry, 1997 I.C.J. Rep. 88, 110 (Sept. 25) [hereinafter Separate Opinion of Weeramantry] ("[T]he principle of trusteeship of earth resources, the principle of intergenerational rights, and the principle that development and environmental conservation must go hand in hand.").

[30] WEISS, *supra* note 27.

[31] Arg. v. Uru., 2010 I.C.J. at 88. Citing Judge Weeramantry's opinion for the proposition that protection of the environment is a *sine qua non* for human rights, the Honorable Dr. Emmanuel Ugirashebuja, Judge President of the East African Court of Justice, and 2019 International Jurist-in-Residence at the William S. Richardson School of Law, discussed two

intergenerational concern for the environment, discussing examples "from nearly every traditional system, ranging from Australasia and the Pacific Islands, through Amerindian and African cultures to those of ancient Europe."[32] Among other sources Judge Weeramantry identified: Native American and American Indian attitudes;[33] a "Pacific Islander" who

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relevant cases touching upon some of the topics addressed in this Article. Emmanuel Ugirashebuja, Judges, Environment and Indigenous People: Role of Judiciary in Creating a Safe and Just Place for Humanity, Presentation at the William S. Richardson School of Law for Maoli Thursday (Mar. 7, 2019). *See* African Commission on Human and Peoples' Rights v. Republic of Kenya, No. 006/2012, Judgment, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 109 (May 26, 2017) ("The most salient feature of most indigenous populations is their strong attachment with nature, particularly, land and the natural environment. Their survival in a particular way depends on unhindered access to and use of their traditional land and the natural resources thereon. In this regard, the Ogieks, as a hunter-gatherer community, have for centuries depended on the Mau Forest for their residence and as a source of their livelihood."); *id.* ¶ 130 (concluding that the Kenyan government "has not provided any evidence to the effect that the Ogieks' continued presence in the area is the main cause for the depletion of natural environment in the area" instead "the main causes of the environmental degradation are encroachments upon the land by other groups and government excisions for settlements and ill-advised logging concessions"); Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR)/Nigeria, Communication 155/96, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], 9 (Oct. 27, 2001), *available at* http://www.achpr.org/files/sessions/30th /comunications/155.96/achpr30_155_96_eng.pdf (holding that the Federal Republic of Nigeria violated the African Charter; accordingly, the commission appealed to the government to "ensure protection of the environment, health and livelihood of the People of Ogoniland" by, *inter alia*, "[e]nsuring that appropriate environmental and social impact assessments are prepared for any future oil development and that the safe operation of any further oil development is guaranteed through effective and independent oversight bodies for the petroleum industry; and [p]roviding information on health and environmental risks and meaningful access to regulatory and decision-making bodies to communities likely to be affected by oil operations").

[32] Separate Opinion of Weeramantry, *supra* note 29, at 107–09 & nn.67–70, 75. *See also id.* at 104 n.53 (describing the sacred duty held by each generation of Tanzania's Sonjo tribe to keep their irrigation system in good repair). Judge Weeramantary concluded this part of his analysis by pointing out that modern researchers have shown that some unwritten, traditional legal systems in Africa are "in some respects even more sophisticated and finely tuned than [their written cousins]" in other parts of the world. *Id.* at 109 n.75 (citing MAX GLUCKMAN, AFRICAN TRADITIONAL LAW IN HISTORICAL PERSPECTIVE (1974); MAX GLUCKMAN, THE IDEAS IN BAROTSE JURISPRUDENCE (2d ed. 1972); MAX GLUCKMAN, THE JUDICIAL PROCESS AMONG THE BUROTSE (1955); ARNOLD L. EPSTEIN, JURIDICAL TECHNIQUES AND THE JUDICIAL PROCESS: A STUDY IN AFRICAN CUSTOMARY LAW (1954)).

[33] *Id.* at 107 n.67 (citing INTERNATIONAL ENVIRONMENTAL LAW AND WORLD ORDER 298–99 (Lakshman D. Guruswamy et al. eds., 1994); J. Baird Callicott, *Traditional American Indian and Western European Attitudes Toward Nature: An Overview*, 4 ENVTL. ETHICS 293 (1982); Armstrong Wiggins, *Indian Rights and the Environment*, 18 YALE J. INT'L L. 345 (1993); J. DONALD HUGHES, AMERICAN INDIAN ECOLOGY (1983)).

"point[ed] out that land was treated in his Society with respect and with due regard for the rights of future generations" while giving evidence before the first Land Commission in the British Solomons (1919–1924);[34] Aboriginal Australians;[35] ancient India;[36] and Islamic law.[37] He then observed that "[m]odern environmental law needs to take note of the experience of the past in pursuing this 'congruence of fit' between development and environmental imperatives."[38]

In the nearly quarter century that has passed since Justice Weeramantry pointed out a "growing awareness" about the principle of intergenerational equity,[39] international recognition concerning the value of IEK for the protection of environmental commons has ripened significantly. As a result, today:

> Environmental constitutionalism enjoys global ubiquity. About half of the world's constitutions guarantee a substantive right to a clean or quality or healthy environment explicitly or implicitly, and about half of those also guarantee procedural rights to information, participation or access to justice in environmental matters. Nearly seventy constitutions specify that individuals have responsibilities or duties to protect the environment [e.g., Benin, Chechnya, and India] . . . while others define the environment . . . as a public trust or in terms of sustainable development.[40]

Sub-national environmental constitutionalism has also "gained a foothold throughout the globe—including in Austria, Argentina, Brazil, Ethiopia, Germany, India, Iraq, Netherlands, and the Philippines, in addition to the

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[34] *Id.* at 104 n.68 (citing PETER G. SACK, LAND BETWEEN TWO LAWS: EARLY EUROPEAN LAND ACQUISITIONS IN NEW GUINEA 33 (1993)).

[35] *Id.* at 104 n.69 (citing ELIZABETH MOULTON EGGLESTON, FEAR, FAVOUR OR AFFECTION: ABORIGINES AND THE CRIMINAL LAW IN VICTORIA, SOUTH AUSTRALIA AND WESTERN AUSTRALIA (1976)).

[36] *Id.* at 108 n.70 (citing NAGENDRA SINGH, HUMAN RIGHTS AND THE FUTURE OF MANKIND 93 (1981)).

[37] *Id.* at 108 (explaining that under "Islamic law, all land . . . is only held in trust, with all the connotations that follow of due care, wise management, and custody for *future generations*. The first principle of modern environmental law—the principle of trusteeship of earth resources—is thus categorically formulated in this system" (emphasis added)).

[38] *Id.* at 109. Weeramantry noted that many traditional societies carried out "sustainable irrigation agriculture over thousands of years," while "modern irrigation systems rarely last more than a few decades," and suggested that this success was "due to the achievement of a 'congruence of fit' between [traditional societies'] methods and 'the nature of land, water and climate.'" *Id.* (citing EDWARD GOLDSMITH & NICHOLAS HILDYARD, THE SOCIAL AND ENVIRONMENTAL EFFECTS OF LARGE DAMS (1985)).

[39] Weeramantry Dissent, *supra* note 28, at 455.

[40] James R. May, *Subnational Environmental Constitutionalism*, 38 PACE L. REV. 121, 122–23 & nn.8–9 (2017) [hereinafter *Subnational Environmental Constitutionalism*].

United States."[41] Hawai'i is one of just five U.S. states—in addition to Illinois, Massachusetts, Montana, and Pennsylvania—whose constitutions provide a substantive right to a quality environment.[42]

By comparison, all twenty-seven Brazilian states and the Federal District promote environmental protection—e.g., "guaranteeing substantive and procedural rights and imposing duties and responsibilities that apply to all for the benefit of present and *future generations*."[43] Indeed, "most Brazilian states express environmental rights in terms of duties and responsibilities that are owed by all for the benefit of present and *future generations*."[44] Governmental means for implementing substantive environmental rights are

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[41] *Id.* at 132 (citing Joseph Marko, *Federalism, Sub-national Constitutionalism, and the Protection of Minorities*, RUTGERS U. CTR. FOR ST. CONST. STUD. (2015), http://statecon.camden.rutgers.edu/sites/statecon/files/subpapers/marko.pdf). In addition to Brazil and the United States, Professor May adds that state constitutions within Germany also include "substantive and procedural environmental rights, environmental duties, and sustainable development, for present and future generations, often with much more specificity and enforceability than provided in national constitutions." *Id.* at 123–24 (citing JAMES R. MAY & ERIN DALY, GLOBAL ENVIRONMENTAL CONSTITUTIONALISM 236–54 (2016); James R. May & William Romanowicz, *Environmental Rights in State Constitutions*, *in* PRINCIPLES OF CONSTITUTIONAL ENVIRONMENTAL LAW 305, 306–07 (James R. May ed., 2011). *See also Subnational Environmental Constitutionalism*, *supra* note 40, at 132 n.24 (observing that the 2006 federalism reform in Germany gave the *Bundesländer* (states) "the right to deviate from federal law in the areas of nature conservation, landscape planning, and water and flood water management"). Regarding relevant judicial decisions from Argentina, see Juan Ignacio Pereyra, *The Recognition of Rights for Future Generations in Argentinian Lawsuits: Review and Prospects*, *in* GAILLARD & FORMAN, *supra* note 11.

[42] *Subnational Environmental Constitutionalism*, *supra* note 40, at 137 (citing HAW. CONST. art. XI, § 9; ILL. CONST. art. XI, § 2; MASS. CONST. art. XCVII; MONT. CONST. art. II, § 3; PA. CONST. art. I, § 27). The Hawai'i, Illinois, and Montana Constitutions specifically recognize "future generations" while the Pennsylvania Constitution addresses "generations yet to come" and the Massachusetts Constitution does not include any comparable reference. Pennsylvania's provision "has been recommended for consideration in other national constitutions." John C. Dernbach, *Taking the Pennsylvania Constitution Seriously When It Protects the Environment: Part I – An Interpretive Framework for Article I, Section 27*, 103 DICK. L. REV. 694, 698 (1999) (quoting Elizabeth F. Brown, Comment, *In Defense of Environmental Rights in East European Countries*, 1993 U. CHI. L. SCH. ROUNDTABLE 191, 215 (1993), for the suggestion that "East European countries adopt constitutional provisions similar to Pennsylvania's"); *see also Subnational Environmental Constitutionalism*, *supra* note 40, at 125 (citing Brown, *supra*, at 191–92, to support his contention that "experience in U.S. states with environmental constitutionalism could provide Eastern Europeans with models for making such environmental provisions self-executing and enforceable").

[43] *Subnational Environmental Constitutionalism*, *supra* note 40, at 133 nn.33 & 39 (emphasis added) (citing MAY & DALY, *supra* note 41, at 221–22, 225–26) (summarizing the "typical" Mato Grosso Constitution and quoting the Maranhão Constitution).

[44] *Id.* at 134 & nn.42–43 (emphasis added) (citing MAY & DALY, *supra* note 41, at 225–26) (quoting the Constitutions of Espírito Santo, Mato Grosso, Acre, and Amapá as examples).

further dictated in constitutional provisions for the Brazilian states of Amazonas, Bahia, Espírito Santo, Goiás, Maranhão, Mato Grosso do Sul, Minas Gerais, Paraíba, Paraná, Piauí, Rio de Janeiro, Rio Grande do Sul, Rio Grande do Norte, Santa Catarina, Sergipe, and Tocantins, as well as the Federal District.[45] In Argentina, the duty to protect future generations has been incorporated through constitutional reforms in Buenos Aires, Córdoba, Chubut, Mendoza, and Santiage de Estero.[46]

In some cases, sub-national constitutions "reflect local environmental concerns that [may] be ignored or underserved by the national constitution, even when those concerns may address global challenges"—e.g., climate change and sustainable development, which are addressed by the Dutch provinces of Zeeland, North Holland, Friesland, and Groningen.[47] Likewise, "[a] recent study reports that many cities in the Philippines, including Puerto Princessa, Naga, Quezon, and Makati Cities have adopted local constitutional action plans to address various environmental concerns, including climate

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[45] *Id.* at 128.

[46] Pereyra, *supra* note 41 (citing the provincial constitutional measures as follows: Buenos Aires, articles 26 and 28; Córdoba, article 68; Chubut, article 109; Mendoza, article 1; and, Santiage de Estero, article 35). The Argentine Constitution was amended in 1994 to include a duty to provide a "right to a healthy and balanced environment fit for human development in order that productive activities shall meet present needs without endangering those of future generations; and shall have the duty to preserve it." *Id.* (citing Art. 41, CONST. NAC. (Arg.)).

[47] *Subnational Environmental Constitutionalism*, *supra* note 40, at 126 & n.17 (citing MAY & DALY, *supra* note 41, at 211). The atmospheric trust litigation in the United States and elsewhere is beyond the scope of this article. *See, e.g.*, Elizabeth Brown et al., *Securing the Legal Right to a Healthy Atmosphere and Stable Climate for the Benefit of All Present and Future Generations*, *in* GAILLARD & FORMAN, *supra* note 11 (discussing the case, *Juliana v. United States*, trial in the United States District Court for the District of Oregon currently stayed pending the outcome of an interlocutory appeal before the United States Court of Appeals for the Ninth Circuit); Nathalie J. Chalifour & Jessica Earle, *Feeling the Heat: Climate Litigation Under the Canadian Charter's Right to Life, Liberty, and Security of the Person*, 42 VT. L. REV. 689, 693 & n.15 (2018) (mentioning *Leghari v. Pakistan*, a case which "held the government accountable for failing to implement its climate commitments, and ordered the government to take steps to reduce [greenhouse gas] emissions and help communities adapt to climate change" and urging similar litigation in Canada); Josephine van Zeben, *Establishing a Governmental Duty of Care for Climate Mitigation: Will* Urgenda *Turn the Tide?*, 4 TEL 339 (2015) (discussing *Urgenda Foundation v. Netherlands*, a case now pending before the Hague Court of Appeal). *Compare* Rick Reibstein, *Can Our Children Trust Us with Their Future?*, AM. BAR ASS'N: TYL (Jan. 16, 2018), https://www.americanbar.org/groups/young_lawyers/publications/tyl/topics/environmental-law/can-our-children-trust-us-their-future.html, *with* James Huffman, *Another Take on* Juliana, AM. BAR ASS'N: TYL, https://www.americanbar.org/groups/young_lawyers/publications/tyl/topics/environmental-law/another-take-on-juliana/ (responding to Rick Reibstein's Article "Can Our Children Trust Us with Their Future").

change."[48] Alternatively, unsuccessful "efforts to advance environmental constitutionalism at the federal and provincial level in Canada contributed to the enactment of provincial legislation recognizing substantive environmental rights in the Northwest Territories, Nanavut, Ontario, Quebec, and the Yukon."[49]

> Super-subnational environmental constitutionalism by municipal and other local governmental entities is also trending upward, particularly in subnational governmental entities that operate under constitutional mandates to promote environmental interests . . . [that] can be even more protective and expansive than what is typically found at the subnational and national levels, such as, for instance, those American cities whose charters protect rights of nature, including Pittsburgh, Pennsylvania.[50]

Occasionally, subnational experiences with constitutional environmental rights provisions may even normalize environmental constitutionalism and goad activity at the national level, as demonstrated by the Province of Córdoba in Argentina.[51]

The success of global efforts to instantiate environmental rights for the benefit of present and future generations will depend at least in part, of course, upon judicial enforcement of environmental constitutionalism. In

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[48] *Subnational Environmental Constitutionalism*, *supra* note 40, at 138 (citing ATENEO SCH. OF GOV'T, STUDY ON CARBON GOVERNANCE AT SUBNATIONAL LEVEL IN THE PHILIPPINES (2011)); *see also id.* at 149–50 & n.142 (characterizing the Pennsylvania Supreme Court's 2013 plurality opinion in Robinson Twp. v. Pennsylvania, 83 A.3d 901 (Pa. 2013), as "[e]choing sentiments from the majority opinion in" Minors Oposa v. Sec'y of the Dep't of Env't & Nat. Res., G.R. No. 101083 (S.C. July 30, 1993) (Phil.), *translated in* 33 I.L.M. 173); Erin Daly & James R. May, Robinson Township v. Pennsylvania*: A Model for Environmental Constitutionalism*, 21 WIDENER L. REV. 151 (2015). This is notwithstanding the "murky" nature of Pennsylvania law with respect to public trust obligations, as discussed *infra* note 109 & accompanying text.

[49] *Subnational Environmental Constitutionalism*, supra note 40, at 131 & n.27 (citing DAVID R. BOYD, THE RIGHT TO A HEALTHY ENVIRONMENT: REVITALIZING CANADA'S CONSTITUTION 61–66 (2012)). Canadian jurisprudence may also be of interest to sovereignty activists in Hawai'i. For example, Professor Jeremy Webber posits an "agonistic constitutionalism" that brackets the question of sovereignty in a way that suspends its final determination—and which "may turn out to be a more common feature of constitutional orders than we have ever suspected." Jeremy Webber, *We Are Still in the Age of Encounter: Section 35 and a Canada beyond Sovereignty*, *in* FROM RECOGNITION TO RECONCILIATION 63–64 (Patrick Macklem & Douglas Sanderson eds., 2016) (citing JAMES TULLY, STRANGE MULTIPLICITY: CONSTITUTIONALISM IN AN AGE OF DIVERSITY (1995); Jean Leclair, *Le Fédéralisme Comme Refus des Monismes Nationalistes (Federalism as Rejection of Nationalist Monisms)*, *in* LA DYNAMIQUE CONFIANCE/MÉFIANCE DANS LES DEMOCRACIES MULTINATIONALES 209 (Dimitrios Karmis & François Rocher eds., 2012)).

[50] *Subnational Environmental Constitutionalism*, *supra* note 40, at 138.

[51] *Id.* at 132 & n.30 (citing ANTONIO MARIA HERNANDEZ, SUB-NATIONAL CONSTITUTIONAL LAW IN ARGENTINA 24 (2011)).

this regard, the recent establishment of a Global Judicial Institute for the Environment ("GJIE")[52] is a welcome development, as is the prospect of a Global Pact for the Environment,[53] along with efforts to promote an International Covenant on the Human Right to the Environment,[54] in addition to a proposed Universal Declaration on the Rights and Duties of Humankind.[55] While these distinct initiatives move forward on their respective paths, it is vitally important to acknowledge important efforts by indigenous peoples and local communities to implement environmental constitutionalism—particularly here in Hawai'i, which served as the host site for this Symposium *On the Role of International Courts in Protecting Environmental Commons*. Accordingly, Part III below discusses three case studies from Hawai'i.

III. EXAMPLES OF THE INTERGENERATIONAL EQUITY FRAMEWORK HAVE ALREADY BEEN DEPLOYED IN HAWAI'I.

Contemporary applications of IEK in Hawai'i have already operationalized the intergenerational equity framework outlined above in Part II.[56] This part provides three brief case studies involving: (1)

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[52] *See, e.g.*, World Comm'n on Envtl. Law, *Global Judicial Institute on the Environment*, IUCN, https://www.iucn.org/commissions/world-commission-environmental-law/our-work/global-judicial-institute-environment (discussing the establishment of GJIE and the first meeting of its Interim Governing Committee in Brasilia on March 17–18, 2018) (last visited Apr. 10, 2019).

[53] *See, e.g.*, World Comm'n on Envtl. Law, *Global Pact for the Environment*, IUCN, https://www.iucn.org/commissions/world-commission-environmental-law/our-work/global-pact-environment (noting the adoption of a resolution by the U.N. General Assembly that sets in motion a process to discuss and potentially reach agreement on an international instrument) (last visited Apr. 10, 2019). *See also* G.A. Res. 72/277, Towards a Global Pact for the Environment (May 10, 2018).

[54] *See, e.g.*, Michel Prieur, *Draft International Covenant on the Human Right to the Environment*, *in* GAILLARD & FORMAN, *supra* note 11.

[55] *See, e.g.*, Corinne Lepage & Emilie Gaillard, *Towards the Recognition of Rights and Duties of Humankind*, *in* GAILLARD & FORMAN, *supra* note 11 (citing E. Morin, *Le chemin de l'espérance* [*The Path of Hope*], S. Hessel & E. Morin (eds.), éditions Fayard, 2011, Chap. 1 *in* C. Lepage & Equipe de Redaction, "Declaration Universelle des Droits deL'Humanite: Rapport à l'attention de Monsieur Le Président de La République" [Universal Declaration of the Rights & Duties of Humankind: A Report to Monsieur the President of the Republic], 25 Sep. 2015, p. 10, *available at* http://droitshumanite.fr/the-declaration/?lang=en) (following the hybrid citation format created by Gaillard & Forman for their interdisciplinary, cross-cultural publication).

[56] Note, however, that the United States Court of Appeals for the Ninth Circuit refused to certify questions to the Hawai'i Supreme Court involving the potential application of article XI, section 1 in the context of industry challenges to ordinances adopted by "political

community-based subsistence fishery areas; (2) the *'Aha Moku* (District Council) system; and (3) the land management policy at Kamehameha Schools.

A. Case study #1: Community-based subsistence fishing areas.

Fishery management in Hawai'i is shifting from concentration within a centralized state agency, back to communities—with practitioners who are stepping forward to exercise their *kuleana* (right and responsibility) to ensure that resources are available for future generations.[57] The state Department of Land and Natural Resources ("DLNR") is now legally authorized to designate community-based subsistence fishing areas ("CBSFA").[58] In 2005, Miloli'i on Hawai'i Island became the first CBSFA designated by statute—although proposed administrative rules are still awaiting action by the governor of Hawai'i.[59] The following year, a second CBSFA was designated in Hā'ena on the northeastern coast of Kaua'i[60]—unlike the

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subdivisions"—*viz.*, the counties of Maui, Kaua'i and Hawai'i—while ignoring relevant Hawai'i precedent applying that very constitutional provision to both Maui, *see* Kelly v. 1250 Oceanside Partners, 111 Hawai'i 205, 140 P.3d 985 (2006), and Kaua'i, *see* Kauai Springs, Inc. v. Planning Comm'n of Cty. of Kaua'i (*Kauai Springs*), 133 Hawai'i 141, 324 P.3d 951 (2014), then invalidating the county ordinance under the implied state preemption doctrine relying in part on decisions that were either issued prior to the 1978 constitutional amendments, or that did not involve analogous constitutional provisions. *See* David M. Forman, *Marooned in the Doldrums While Ignoring Indigenous Environmental Knowledge: Attempting to Regulate Pesticide Use in Hawai'i*, *in* GAILLARD & FORMAN, *supra* note 11; Atay v. Cty. of Maui, 842 F.3d 688, 705–10 (9th Cir. 2016); Syngenta Seeds, Inc. v. Cty. of Kauai, 842 F.3d 669, 676–81 (9th Cir. 2016); Haw. Papaya Indus. Ass'n v. Cty. of Haw., 666 Fed. App'x 631, 633–34 (9th Cir. 2016).

[57] This development arguably represents a measure of restorative justice, *see* Sproat, *supra* note 3, at 197, which constitutes a step forward in addressing long-standing issue of "environmental justice" in Hawai'i. *Id.* at 159 ("native peoples' claims to land, water, and other resources are most appropriately framed not simply as 'environmental' issues, but, more aptly, as 'environmental justice' issues. When an indigenous group and the local legal regime interact around environmental justice, the tenor and even outcome of those interactions potentially turn upon the extent to which *restorative justice* underpins local laws. This becomes crucial.").

[58] HAW. REV. STAT. § 188-22.6 (2007 & Supp. 2017) (authorizing DLNR to adopt administrative rules "for the purpose of reaffirming and protecting fishing practices customarily and traditionally exercised for purposes of [N]ative Hawaiian subsistence, culture, and religion").

[59] *Id.* § 188-22.7 (designating the Miloli'i CBSFA on Hawai'i Island).

[60] *Id.* § 188-22.9 (designating the Hā'ena CBSFA on the island of Kaua'i). Recently announced as one of three 2019 Equator Prize winners from the United States to be honored in a high-level award ceremony in New York on September 24, 2019 (along with another CBSFA-related non-profit organization from Mo'omomi, Moloka'i), the Hā'ena based non-profit Hui Maka'āinana o Makana is a "native Hawaiian grassroots initiative [that] has woven

previously-designated Miloli'i CBSFA, administrative regulations governing the Hā'ena CBSFA were approved by the governor in 2015 and enacted into law.[61] Residents elaborated on the benefits and responsibilities inherent in such initiatives as follows:

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together traditional, place-based knowledge and policy advocacy to sustainably manage their near-shore fisheries, resulting in the official designation of the first community co-managed fishery in the state of Hawai'i." United Nations Development Programme, Equator Initiative, *Announcing the Equator Prize 2019 Winners*, https://www.equatorinitiative.org/2019/06/02/ep-2019-meet-the-winners/ (identifying a total of three winners from the United States, including two CBSFA-related initiatives in Hā'ena and Moloka'i); *see also* Alden Alayvilla, *Hui Maka'ainana o Makana Educates, Cultivates, Inspires*, GARDEN ISLAND, Dec. 4, 2016, https://www.thegardenisland.com/2016/12/04/hawaii-news/hui-makaainana-o-makana-educates-cultivates-inspires/ (describing Hui Maka'āinana o Makana as "a nonprofit that aims to restore Hawaiian values and stewardship practices in Hā'ena[,]" and quoting an explanation by the organization's then President that, "[w]e're here to protect our natural resources in the ocean, so we can bring it back to *future generations*") (emphasis added). The success of the Hā'ena CBSFA was underscored in the aftermath of a major storm that devastated the area and cut off tourism for more than a year, but apparently gave dwindling fish stocks desperately needed time to recover. *See, e.g.*, Brittany Lyte, *Kauai's Newly Reopened Park is a Case Study in Controlling Tourism*, CIVIL BEAT, June 19, 2019, https://www.civilbeat.org/2019/06/kauis-newly-reopened-park-is-a-case-study-in-controlling-tourism/?fbclid=IwAR3VPaVKBOXhPmv2a7NteqGP-oUrB9ibOqO-xvvogTpwkTjkq5CU1XUMc-A (noting that tourism in Hā'ena "came to a halt in April 2018 when a record-setting storm dumped 49.7 inches of rain in 24 hours" that "damaged hundreds of homes, unleashed dozens of landslides, destroyed the park's infrastructure and ravaged the road that is this region's lifeline" and "bar[red] entry to all but construction workers and those who live in the neighborhoods for 14 months"; adding that the closure also resulted in things residents "hadn't seen since the 1950s: empty beaches and roads, *undisturbed waters teeming with fish and a resurgence of community spirit* . . . [a] popular sentiment among born-and-raised locals is that the flood was *a divine declaration from Mother Nature that she had had enough*; "[e]ven the fish started looking up and recognizing that there was room now for them to come back and swim") (emphasis added); Allison Schaefers, *Kauai Officials Promise to Manage Tourism Concerns by Teaching Visitors About the Aloha Pledge*, HONOLULU STAR-ADVERTISER, June 20, 2019, https://www.staradvertiser.com/2019/06/20/hawaii-news/kauais-tourism-concerns-are-being-addressed/?HSA=7b6395b9808410fb5e7454ae04fda450246bdf59 (discussing a community protest that briefly shut down access into Hā'ena a day after it reopened so community members could distribute an "Aloha Pledge" – a grassroots initiative described as "an opportunity for residents and visitors to assume *joint responsibility* for Kauai's well-being" by asking "visitors to promise they will obey rules, follow laws, and respect local residents and the environment" – and telling visitors to "respect local road rules, use non-reef harming sunscreen and avoid walking on the fragile coral"; the protest followed the state's decision to reopen access to Hā'ena the previous day and impose a 900 person limit, compared with the unrestricted pre-storm daily average of 3,000 – which had the unintended consequence of pushing "visitors without permits to other parts of the community — leaving rubbish on the pristine shores and walking on the region's delicate reefs" and "[s]peeding motorists, who killed two pet dogs in the community") (emphasis added).

[61] After a lengthy process including "nearly ten years of planning and negotiation, over

We gotta get back to the konohiki[62] *system, and maybe the konohiki is gonna be the community.*

– David Sproat, Kalihiwai, 2015

You gotta believe in it and you gotta live it. If we're gonna make these rules then we gotta live it.

– Chipper Wichman, Hā 'ena, 2011

This isn't about extra agencies being needed or extra enforcement; all we need is the ability to do what we know how to do, in a place [the families of Hā'ena] know best.

– Maka'ala Ka'aumoana, Hanalei, 2014

. . . .

I limit myself because I see what it was like before. There were plenty fish! Not like today, you strain your eyes looking. Big like this tent, the pile of moi, and some bigger, the ulua behind, riding the wave, silver all in the wave.

– Tommy Hashimoto, elder [indeed "oldest"] Hā'ena fisherman, 2009[.][63]

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seventy meetings, fifteen rule drafts, three public hearings, and multiple studies undertaken to document visitor impacts, user groups, fishery health and the importance of locally caught fish within and beyond the Hā'ena community," the administrative rules for the Hā'ena CBSFA were finally adopted in 2015. Jade M.S. Delevaux et al., *Linking Land and Sea through Collaborative Research to Inform Contemporary Applications of Traditional Resource Management in Hawai'i*, 10 SUSTAINABILITY 3147 (2018), *available at* https://www.researchgate.net/publication/327443779_Linking_Land_and_Sea_through_Collaborative_Research_to_Inform_Contemporary_applications_of_Traditional_Resource_Management_in_Hawai'i ("This was the first time in the state of Hawai'i that local-level fisheries management rules, based on indigenous Hawaiian practices, were recognized.").

[62] *Konohiki* means "Headman of an *ahupua'a* land division under the chief; land or fishing rights under the control of the *konohiki*; such rights are sometimes called *konohiki* rights; *Lit.*, invites ability." MEHANA BLAICH VAUGHAN, KAIĀULU: GATHERING TIDES 223 (2018). *Kaiāulu* means "[c]ommunity, neighborhood, village[.]" *Id.* at 222; MARY KAWENA PUKUI & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY 115 (rev. ed. 1986); PUKUI & ELBERT, *supra* (providing that another definition of *Kaiāulu* is the "[n]ame of a pleasant, gentle trade-wind breeze, famous in song [albeit on a different island] at Wai'anae, O'ahu").

[63] VAUGHAN, *supra* note 62, at 138–39. Vaughan elaborates upon the quoted excerpts above based on interviews with, and more informal stories shared by, community members:

> Historically in Hawai'i, the people of an *ahupua'a* [land division] served as *kia'i*, guardians or caretakers of local resources, from fishponds to streams, mountain forests to coral reefs. Though *konohiki* shifted, *maka'āinana* families [literally, "people that attend the land"] stayed in and watched over the *ahupua'a* of their ancestors across generations. Under the territorial and, later, state governments, decision-making about natural resources shifted from local *konohiki* and *maka'āinana* families to centralized state agencies. . . . As they carry *kuleana* [rights and responsibilities] into governance,

At least nineteen other communities in Hawai'i are now pursuing co-management of local fisheries.[64] These communities are embarking upon their respective journeys as a kind of cultural imperative,[65] with full knowledge of the associated demands and challenges involved.

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the families of Hā'ena are strengthening their community and state policy.

Id. at 138. The term *ahupua'a* is defined as a "[l]and division usually extending from the uplands to the sea, so called because the boundary was marked by a heap (*ahu*) of stones surmounted by an image of a pig (*pua'a*), or where a pig could be offered as tax to the chief[.]" *Id.* at 221. The term *maka'āinana* is defined as "[p]eople in general; citizen, commoner, subject; *Lit.*, people that attend the land[.]" *Id.* at 224. The term *kuleana* is defined, in part, as "[r]ight, privilege, concern, responsibility . . . jurisdiction, authority . . . reason, cause, function, justification[.]" *Id.* at 223. The *moi* and *ulua* mentioned by Uncle Tom Hashimoto are defined, respectively as "[t]hreadfish (*Polydactus sexfilis*)" and "[c]ertain species of Carangidae (crevalle, jack, or pompano), the most common is the giant trevally (*Caranx ignobilis*), an important game fish and food item[.]" *Id.* at 224 & 226; *see also id.* at 132 (describing "Uncle Tom Hashimoto, Hā'ena's oldest fishermen," as an highly respected elder in the community who "shared some of the place-names for fishing holes taught to him by his father").

[64] Delevaux et al., *supra* note 61. Another "nearly ten years of planning and negotiation and over 350 community meetings and multiple studies undertaken to document fishing impacts and coral reef health[,]" preceded the adoption of a ten-year fishing rest period known as "Try Wait" in Ka'ūpūlehu on Hawai'i Island, commencing in 2015. *Id.* (defining the local Pidgin language phrase to mean "Let's wait a moment"). Draft administrative rules for a CBSFA at Mo'omomi on the island of Moloka'i are awaiting the Governor's approval to commence public hearings. E-mail from Shaelene K. Kamaka'ala, Acting CBSFA Coordinator, to author (Sep. 17, 2018, 10:25 HST) (on file with author). *See, e.g.*, *Na Loea: The Masters, Mac Poepoe: Malama Moomomi*, 'Ōiwi TV (Apr. 24, 2014), https://oiwi.tv/oiwitv/na-loea-malama-moomomi/ (exploring the "wealth of knowledge and expertise accumulated . . . growing up in the rigor and lifestyle of a Hawaiian family that has been [hunting,] fishing and maintaining the sustainability of these waters for generations"; adding that Uncle Mac Poepoe is "one of a dying breed . . . of skilled fishermen who approach their practice with a passion not just for the sport of it but to hone and perpetuate their skill and expertise in managing Hawai'i's ocean ecosystems, which is critical to the sustainability of Hawai'i and its people"); *id.* (quoting Kanohowailuku Helm, one of Uncle Mac's students, who explained that one of the lessons he learned is that a fishing expert's legacy and kuleana—or right and responsibility—goes beyond providing for himself, his family, and the present community but, more importantly, "to look at providing for *generations that are unborn*" (emphasis added)).

[65] *See, e.g.*, Sproat, *supra* note 3, at 160 ("[R]estorative justice is imperative because it links environmental justice for native peoples to principles of self-determination. As a fundamental expression of restorative justice, self-determination is essential to this task to begin to heal the harms flowing from colonization. It is critical, in this context and others, because indigenous peoples are seeking to remedy cultural destruction, land dispossession, the loss of self-governance, and more.").

> *I wish I had a secretary, so I don't have to be here at these meetings. I could be down the beach, watching, that's my TV.*
>
> – Uncle Mac Poepoe, Mo'omomi, Moloka'i, community leader and pioneer of community-based fisheries management, 2016[.][66]

> *It's not about pointing fingers. It's something that we learned from way back when we were small: mālama what you get, take care what you get, take what you need and that's it, think about tomorrow, think about the future. Simple. So remember every one of you in this room get something to do with this.*
>
> – Keli'i Alapa'i, 2016[.][67]

CBSFAs are also inspiring innovative solutions to resource management issues that plague centralized models. For example, collaborative research involving scientists and local communities is incorporating dynamic interactions between people and nature rather than expert-driven, narrowly focused scientific research.[68] These collaborations have demonstrated that "different environmental conditions make place-based solutions essential,

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[66] VAUGHAN, *supra* note 62, at 144 (observing, in a section entitled "Monopolizing Community Time Away from 'Āina [land; lit., that which feeds,]" that "[f]ishermen carrying *kuleana* [rights and responsibilities] into governance found themselves starting email accounts, learning to use social media, tracking legislation, traveling off island, and spending long weeks in meetings."); *id.* at 142 ("[T]he choice to partner with state government agencies to restore local-level fisheries governance held challenges for the Hā'ena community. While some community leaders felt collaboration with state agencies was necessary to protect area resources and enhance local governance, others were more cautious. Key challenges included concerns regarding legitimacy of government regulation, risk of undermining informal community efforts, monopoly of community time, and bureaucratic delays."). *See also* United Nations Development Programme, *supra* note 60 (identifying Uncle Mac's "Hui Mālama o Mo'omomi, a native Hawaiian grassroots initiative on the island of Molokai, [which] uses traditional ecological management practices such as the art of kilo and pono fishing to sustainably manage their nearshore fisheries in the face of climate change *for generations to come*" as one of two 2019 Equator Prize winners from Hawai'i) (emphasis added); *id.* (acknowledging Hāena based non-profit Hui Maka'āinana o Makana as the other 2019 Equator Prize winner from Hawai'i).

[67] VAUGHAN, *supra* note 62, at 159 (emphasis added).

[68] Delevaux et al., *supra* note 61, at 7 & 14 (observing that such collaboration "offers a flexible, transferable, data-driven, place-based model that is spatially explicit and relies on increasingly available free remote sensing imagery and bathymetry data"). To illustrate the narrow focus that often describes scientific research relative to indigenous ecological knowledge, Professor Akutagawa quotes Uncle Mac as saying: "I work with a lot of scientists. They come around for the 'kodak moments.' Me . . . I'm here every day." Malia Akutagawa, Return of the Konohiki: Exercising Kuleana in Natural Resource Management, Presentation to the William S. Richardson School of Law Faculty (Dec. 4, 2014). In other words, more narrowly focused scientific research is often based on mere snapshots in time, as compared with lifetimes of empirical observation (or *kilo*) by *Kanaka 'Ōiwi* practitioners whose database is rooted in oral histories passed down from generation to generation.

because one-size-fits-all kinds of management ignore issues of place and scale."[69] Thus, departures from centralized models of governance can be seen as *essential* to ecological-social resilience.[70]

B. Case study #2: Incorporation of the 'Aha Moku system into statewide natural resource management processes.

Another illustration of the intergenerational equity framework at work in Hawai'i is the *'Aha Moku* (District Council), a traditional Native Hawaiian system of localized natural resource use and management.[71] The name *'Aha Moku* derives from one of the strongest natural fibers on earth, *olonā*—i.e., *Touchardia latifolia* (from the *Urticaceae* family, but without stinging hairs). As explained by the late, revered *Kumu Hula* (Hula Master)[72] John

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[69] Delevaux et al., *supra* note 61, at 15 (citations omitted); *id.* (adding that "local-scale and place-based solutions are particularly important in Hawai'i, where locally sourced food is socially and culturally important and food systems are vulnerable to coastal development and climate change impacts"). Not coincidentally, "traditionally managed community fisheries in Hawai'i have exhibited equal or higher biomass than even no-take marine protected areas." *Id.* at 2 (citations omitted).

[70] *See, e.g.*, *id.* at 2 (observing that a resurgence of interest among academics, policy makers, and communities in reviving the traditional Hawaiian biocultural resource management system is now taking place, after "nearly two centuries of decline"). Beyond Hawai'i, analogous examples of "social-ecological system approaches to natural resources management" include Indonesia, the Solomon Islands, Yap, and Fiji, in addition to the Pacific Northwest, Asia, Africa, and Oceania. *Id.* at 14.

[71] This discussion is based on a presentation delivered by the author on April 16, 2018, at the 7th International Conference on Environmental Future. An abstract for that presentation is available at http://manoa.hawaii.edu/7ICEF/wp-content/uploads/2018/04/7th-ICEF-Abstract-Booklet-4.2.2018.docx.pdf. A summary of the conference is available at https://foundationforec.org/wp-content/uploads/2018/06/7ICEF-Summary-Output.pdf. The author's presentation was entitled, *'Aha Moku Councils: Collaborative Natural Resources Management Guided by the Application of Indigenous Knowledge*, with thanks to my colleague Malia Akutagawa for graciously sharing her deep knowledge of this issue. *See, e.g.*, Malia K. H. Akutagawa, *The 'Aha Moku Rules of Practice and Procedure: Weaving 'Ōiwi Governance and Expertise in Mālama 'Āina* (2017) (unpublished manuscript) (on file with author). Professor Akutagawa is the "*po'o* (head) of the 'Aha Kiole o Moloka'i (the *'aha moku* island council on Moloka'i)" and "drafter of the Final Rules of Practice and Procedure for the 'Aha Moku Advisory Committee [AMAC]" under the DLNR. *See* 'Aha Moku Advisory Committee Rules §§ 1-1 to 4-1 (Oct. 2016) [hereinafter AMAC Rules], *available at* http://www.ahamoku.org/wp-content/uploads/2016/12/FINAL.AMAC_.Admin_.Rules_.effective.102016.pdf.

[72] *Cf.* PUKUI & ELBERT, *supra* note 59, at 182 (defining "hula teacher"). *See generally*, DOROTHY B. BARRERE ET AL., HULA: HISTORICAL PERSPECTIVES (1980). Ka'imikaua received the "*mo'okuauhau* (genealogy) of his *Kumu* [Ka-wahine-kapu-hele-i-ka-po-kane, or 'Sacred Woman Traveling on the Night of Kane'] and her *Kumu* dating back to 900 A.D. to the first

Ka'imikaua, *'aha* means council, but is also symbolized by *olonā* fibers that are woven into a cord with each strand, or *aho*, representing an expert who sits on the council;[73] all the collective strands of expertise are woven together in order to serve the people and to help to preserve the lands as well as other things that help sustain life for the community—i.e., a collaborative natural resource management process that represents *lōkahi* (meaning the balance between people, land and *akua* [i.e., gods]), which results in *pono*, or spiritual balance, that enables the land and people to flourish without starvation.[74]

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keeper of this knowledge." *John Ka'imikaua*, MOLOKA'I KA HULA PIKO, www.kahulapiko.com/john-kaimikaua.html (last visited June 22, 2019). "At the age of 14, he learned the history, chants and dances of Moloka'i from . . . Kawahinikapuheleikapokane" and "viewed the hula as a vehicle to educate and enlighten all people about our ancestors through the early traditions of Hawaiian chant and dance." Ka'oi Ka'imikaua, *John Ka'imikau*, MOLOKAI DISPATCH (May 16, 2007), https://themolokaidispatch.com/john-kaimikaua/ (during the month prior to the anniversary of his death, Kaimikaua's wife wrote that her late husband "was relentless in promoting the Hawaiian way of life, its principles and values").

[73] *See, e.g.*, AMAC Rules § 2-2(a) ("They were experts in fisheries management, hydrology and water distribution, astronomy and navigation, architecture, farming, healing arts, etc. . . . These experts utilized their knowledge to *kia'i 'āina*, or care for the natural resources and produced food in abundance—not just for the people of that time, but for all successive generations.").

[74] Hui Mālama o Mo'omomi, *John Kaimikaua – Aha Moku*, VIMEO, https://vimeo.com/29767407 (explaining that the term *ki'ole* refers to fish hatchlings that shroud the south shores of Moloka'i between October and January, as a metaphor for the dense populations of people that lived on Moloka'i when the ancient *'aha* councils were operating as intended on all four *moku* or districts on Moloka'i). After the first 300 years under the *'aha* councils, the population expanded so dramatically that the practitioners from all islands gathered again on Moloka'i and devised a plan to divide each *moku* into smaller parcels called *ahupua'a* with their own *'aha* councils of practitioners living in each *ahupua'a*; these smaller councils would make decisions about producing food or making changes to the land for the benefit of the people, except when a wider pool of expert practitioners was required because the decision would affect other (or even all) *ahupua'a* within the *moku*. *See, e.g.*, Nalani Minton & Na Maka O Ka 'Āina, *A Mau A Mau (To Continue Forever): Cultural and Spiritual Traditions of Molokai* (2000) [hereinafter *A Mau a Mau*] (quoting Ka'imikaua, who added that this natural and cultural resource management system spread to the other Hawaiian Islands and continued for another 700 years before the arrival of the *ali'i*, or chiefs, at the end of the ninth century—the *'ike*, or knowledge, of the experts was passed down through generations, based on learning by doing).

> After the passing of the first seven generations under the 'aha councils, peace was established. By the sixteenth generation, there was no more manufacture of weapons and no knowledge of war amongst the people. The leadership of the *'aha* councils was so proficient in providing for the people's needs. Everyone had enough food, materials for housing, and clothing. There were no rich, no poor. Because of the *'aha* councils, the people were able to progress and expand their farming and fishing abilities and excel spiritually. About three-hundred years after the formation of the 'aha councils, the lands became abundant and the population of the islands increased.

> [T]his system of localized use and management optimizes the well-being of the ecosystem and that of its users. By way of contrast, Hawaiians often assert that management of resources under the Euro-American paradigm involves formal centralized control of resources and habitats and thus less sensitivity to local biophysical dynamics, less appreciation for the needs and interests of the indigenous human populations, and less capacity for enforcing rules and regulations at the local level. . . . Traditional resource management is often said to be relatively more adaptable to real-time conditions and situations in specific places, places which in sociocultural and biophysical terms can vary significant[ly] within and across the islands. . . . In contrast, institutionalized statewide rules are far less flexible and adaptive to localized conditions which can vary from ahupua'a to ahupua'a [land divisions within districts], moku to moku [regional districts], and island to island.[75]

In 2012, the state formally authorized the 'Aha Moku Advisory Committee ("AMAC") to advise DLNR on, *inter alia*: "[i]ntegrating indigenous resource management practices with western management practices in each *moku* [district]"; "[f]ostering the understanding and practical use of [N]ative Hawaiian resource knowledge, methodology, expertise"; "[s]ustaining the

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AMAC Rules § 2-2(d) (quoting Ka'imikaua); *see also A Mau a Mau*, *supra* (noting that the great productivity on land and sea was due to ingenuity and an intimate understanding of the resources). For example, the first offshore *loko i'a*, fishpond, was built on Molokai at Puko'o—which translates as complete organization/cooperation—by many thousands of people, standing in seven human chains, passing long stones one by one from the mountains to the shore. *A Mau a Mau*, *supra* (adding that the technology was transferred to O'ahu, Maui, and Hawai'i by bringing the same expert who supervised construction of the first seven fishponds on Moloka'i; he then supervised construction of the first fishponds on those islands). After six centuries, there were hundreds of fishponds on Moloka'i, ranging from ten to five hundred acres in size (including fifty-eight main fishponds), and providing more fish than needed by the island's people. *Id.* According to Professor Akutagawa, Ka'imikaua taught her the following phrase used by Moloka'i *kūpuna* (elders) to describe the abundance of fish in their fishponds: "Aia nā kai po'olo'olo'uo Moloka'i" ("There are the turbulent waters of Moloka'i")—meaning the fish were so numerous in these ponds that they created turbulent seas even while the waters outside of the fishpond were calm. Malia Akutagawa, *Molokai's "Turbulent Seas,"* SUST'ĀINABLE MOLOKAI (Mar. 24, 2011), http://www.sustainablemolokai.org/aia-na-kai-pooloolou-o-molokai-molokais-turbulent-seas-abundant-ponds-churning-with-fish/.

[75] HO'OHANOHANO I NĀ KŪPUNA 15–16 (2010), *available at* http://ahamoku.org/wp-content/uploads/2011/09/Hoohanohano-Puwalu-Series-Summary.pdf. *Id.* at 15 (noting that "modern science and contemporary management approaches often do not address whole systems and relationships of the human and biological components that compromise the whole" while traditional systems "tend to be holistic in nature" and "healthy ecosystems are highly valued"). One of the Puwalu convenors, Kamehameha Schools, makes for an interesting case study itself. *See infra* notes 94–99.

State's marine, land, cultural, agricultural, and natural resources"; and "[f]ostering protection and conservation of the State's natural resources."[76]

Four years later, the AMAC promulgated administrative rules.[77] Notwithstanding the AMAC's placement with the DLNR for administrative purposes and its express authority to "advise the chairperson of the board of land and natural resources[,]"[78] multiple provisions of the AMAC rules contemplate the provision of advice to other state, county and even federal agencies, as well as the state legislature.[79] Among other things, the AMAC

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[76] HAW. REV. STAT. § 171-4.5(d) (Supp. 2017).

[77] *See generally* AMAC Rules, *supra* note 71; S. Con. Res. 55, 28th Leg. (Haw. 2015), *available at* https://www.capitol.hawaii.gov/session2015/bills/SCR55_SD1_.htm (authorizing the AMAC to "engage stakeholders for the purpose of developing and adopting rules for its operation and administration" then "report its proposed administrative rules to the Legislature" before the 2016 legislative session).

[78] § 171-4.5(a).

[79] *See, e.g.*, AMAC Rules § 1-2(g) ("[AMAC] shall proactively . . . collaborate with *state, county, and federal agencies, and the state legislature* on how to affirmatively protect and preserve Native Hawaiian rights, traditional and customary practices, and natural and cultural resources that are protected as part of the public trust. Namely, the [AMAC] shall provide guidance to *agencies and the state legislature* for practical and customized application of statutory and constitutional protections of Native Hawaiian rights and the public trust, and judicial cases respecting the same." (Emphasis added)). "Agency" includes "*any federal, state or county agency* that the [DLNR] advises." *Id.* § 1-3 (emphasis added). "Collaborative governance" means "a governing arrangement where *one or more public agencies* . . . directly engage non-state stakeholders, such as the [AMAC] and island *'aha moku* councils, in a collective decision-making process that is *formal, consensus-oriented,* and *deliberative* and that aims to make or implement public policy or manage public programs or assets" implying "two-way communication and influence between *agencies* and stakeholders." *Id.* (emphasis added). *See also id.* § 1-12(i) (authorizing the AMAC executive director to "only offer testimony in public hearings before agencies and the legislature related to specific findings, policies, and recommendations that have been formally approved by the [AMAC] at its meetings"); *id.* § 1-12(j) (providing that in response to inquiries from DLNR, *other agencies, and the legislature* on island-specific issues, the AMAC "executive director shall only consult with and seek a response from the respective Island *Po'o* [representative either appointed by the governor, or appointed locally to serve on an island *'aha moku* council] for which the matter corresponds to"; mandating that the executive director "defer to the Island *Po'o* on next steps and recommended action"; and, prohibiting the executive director from acting "independently and without consent and authority from the Island *Po'o* on matters affecting the respective *Po'o's ahuupa'a* [land divisions], *moku* [districts], and *mokupuni* [island] issues and concerns" (emphasis added)); *id.* § 2-1(c) (stating the purpose of the *'aha moku* system to include "serving in an advisory function . . . that enhances the capacity of [DLNR], its divisions, and *other agencies* to *mālama 'āina* and implement their statutory obligations to affirmatively protect the public trust, traditional and customary rights and practices of Native Hawaiians, and the natural and cultural resources that Hawai'i's Indigenous people depend on for subsistence, cultural, and religious purposes" (emphasis added)); *id.* § 2-3(a)(2) (citing Ka Pa'akai O Ka 'Āina v. Land Use Comm'n, 94 Hawai'i 31, 7 P.3d 1068 (2000)) ("Under this framework, *state and county agencies*, when reviewing land use applications, must

must "liberally apply the 'precautionary principle' when advising agencies [including state agencies beyond DLNR, as well as county and federal agencies][80] regarding development or use of lands under the public trust."[81] In addition, the AMAC and the respective island *'aha moku* councils "shall serve as vehicles for free prior and informed consent" pursuant to articles 18, 19, and 32(a) of the U.N. Declaration on the Rights of Indigenous Peoples (as formally adopted by the United States under the administration of President Barack Obama).[82] More specifically, AMAC members are required to incorporate the methodology employed by their ancestors in assessing natural and cultural resource management issues:

(1) Accountability to and protection of eight resource realms[.][83]

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independently assess: (A) The identity and scope of valued cultural and historical or natural resources in the petition area including the extent to which traditional and customary Native Hawaiian Rights are exercised in the petition area[;] (B) The extent to which those resources including traditional and customary Native rights will be affected or impaired by the proposed action; and (C) The feasible action, if any, to be taken to reasonably protect Native Hawaiian rights if they are found to exist." (Emphasis added)); *id.* § 2-3(b) (requiring the AMAC to "liberally apply the 'precautionary principle' when advising *agencies* regarding development or use of lands under the public trust" (emphasis added)); *id.* § 2-5(a) (requiring representatives in island *'aha moku* councils to "relay their concerns about site-specific natural and cultural resources issues to their respective island *Po'o* [representative appointed by the governor] serving on the *'aha moku* advisory committee" so that "the [AMAC] and those participating in the *'aha moku* system . . . [will] be effective in advising *agencies*, the [DLNR], its divisions, and the board" (emphasis added)).

[80] *See supra* note 79 (quoting AMAC Rules § 1-2(g)). *See also supra* note 28 (citing discussion of the precautionary principle in Judge Cançado-Trindade's separate opinions for the ICJ's 2010 *Whaling in the Antarctic* and 2014 *Pulp Mills* decisions).

[81] AMAC Rules § 2-3(b).

[82] *Id.* § 2-3(c)(1) to (3).

[83] The description of these eight resource realms demonstrates how much attention to detail *Kanaka 'Ōiwi* paid concerning their natural environment: "Moana-Nui-Ākea – the farthest out to sea or along the ocean's horizon one could perceive from atop the highest vantage point in one's area." *Id.* § 2-2I(1)(i). "Kahakai Pepeiao – where the high tide begins to where the *lepo* [soil] starts. This is typically the splash zone where crab, *limu* [seaweed], and *'opihi* [limpets] may be located; sea cliffs; or a gentle shoreline dotted with a coastal strand of vegetation; sands where turtles and seabirds nest; extensive sand dune environs; and the like." *Id.* § 2-2(e)(1)(ii). "Ma Uka – from the point where the *lepo* [soil] starts to the top of the mountain." *Id.* § 2-2(e)(1)(iii). "Nā Muliwai – all the sources of fresh water, ground or artesian water, rivers, streams, springs, including coastal springs that create brackish-water and contribute to healthy and productive estuarine environments." *Id.* § 2-2(e)(1)(iv). "Ka Lewalani – everything above the land, the air, the sky, the clouds, the birds, the rainbows, etc." *Id.* § 2-2(e)(1)(v). "Kanaka Hōnua – the natural resources important to sustain people. However, care for these resources are based on their intrinsic value. Management is based on providing for the benefit of the resources themselves, rather than from the perspective of how

(2) Consider and weigh issues, problems, and potential solutions in terms of their impact, both beneficial and adverse, to the eight resource realms described above.

(3) Adopt measures and implement solutions that[:]

(i) Are determined to be non-harmful and/or beneficial to each of the resource realms;

(ii) Honor the ancestral past and wisdom of the *kūpuna*;

(iii) Address the needs of the present;

(iv) And establish abundance and sustainability for future generations.[84]

The AMAC Rules further identify three houses of knowledge representing the categorization and organization of the natural world[85]—which are "contained in orature, including *oli* [chants], *mele* [song], *mo'olelo* [song], *hula* [dance], other Native cultural expressions, oral histories, and *kama'āina* testimony;[86] archival literature; and expressed in the living culture and

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these resources serve people." *Id.* § 2-2(e)(1)(vi). "Papahelōlona – knowledge and intellect that is a valuable resource to be respected, maintained, and managed properly. This is the knowledge of *kahuna* (priests and experts), *konohiki*, astronomers, healers, and other carriers of *'ike*." *Id.* § 2-2(e)(1)(vii). "Ke 'Ihi'ihi – elements that maintain the sanctity or sacredness of certain places." *Id.* § 2-2(e)(1)(viii).

[84] *Id.* § 2-2(e).

[85] Known collectively as Papakū Makawalu, the three houses of knowledge are Papahulilani, Papahulihonua, and Papahānaumoku. *Id.* § 2-2(f). Papahulilani is "the space from above one's head to where the stars sit. It includes the sun, the moon, stars, planets, winds, clouds, and the measurement of the vertical and horizontal spaces of the atmosphere. It is also a class of experts who are spiritually, physically, and intellectually attuned to the space above and its relationship to the earth." *Id.* § 1-3. Papahulihonua is "both the earth and ocean. It is the ongoing study of the natural development, transformation and evolution of the earth and ocean. It is also a class of experts who are spiritually, physically, and intellectually attuned to earth and its relationship to the space above and the life forms on it." *Id.* Papahānaumoku is "the embryonic state of all life forces and their transition to death. It is the birthing cycle of all flora and fauna, including humans. It is the process of investigating, questioning, analyzing and reflecting upon all things that give birth, regenerate, and procreate. It is also a class of experts who are spiritually, physically and intellectually attuned to things born and the habitat that provides their nourishment, shelter, and growth." *Id.* The latter house of knowledge may sound familiar to persons already aware of one of the largest marine conservation areas in the world (an area larger than all of the United States' national parks combined). PAPAHĀNAUMOKUĀKEA MARINE NATIONAL MONUMENT, https://www.papahanaumokuakea.gov/ (explaining that the name commemorates the union of two Hawaiian ancestors—Papahānaumoku and Wākea—who gave rise to the Hawaiian Archipelago, the taro plant, and the Hawaiian people) (last visited Apr. 23, 2019).

[86] This legal term of art refers to "testimony from a Native Hawaiian person who is familiar from childhood with a particular locality. Testimony from *kama'āina* is recognized

traditional practices of Native Hawaiians for the protection of cultural and natural resources"[87]—and which must be protected, respected, maintained, managed, and prevented from being appropriated during the process.

When "determining and maintaining the ecological health of *nā ahupua'a* [land divisions within districts] and protecting the natural and cultural resources within *nā ahupua'a*," the AMAC and island *'aha moku* councils are required to use "indigenous tools of assessment and *ahupua'a* design principles adopted by the ancient *kūpuna* [elders/ancestors] which include *mālama*[88] of the [five] biocultural zones."[89] The AMAC Rules specifically recognize that the descriptions of these five biocultural zones are not necessarily universally applicable, and that each Hawaiian island may have fewer or greater biocultural zones, and/or may have named and categorized them differently.[90] In addition, the AMAC Rules recognize that there were appropriate biota, ecologies, and uses for various landscape and oceanscape

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as the appropriate method to determine the nature of Hawaiian traditional and customary practices in general, and also specifically in describing the customs exercised in a given area." *Id.* § 1-3 (citing *In re* Ashford, 50 Haw. 314, 440 P.2d 76 (1968)). *Ashford* recognized that "it has long been the rule, based on necessity, to allow reputation evidence by *kamaaina* witnesses in land disputes." 50 Haw. at 316, 440 P.2d at 77 (citing *In re* Boundaries of Pulehunui, 4 Haw. 239 (1879); Kanaina v. Long, 3 Haw. 332 (1872)). Further, "[t]he rule also has a historical basis unique to Hawaiian land law . . . [as] the custom of the ancient Hawaiians to name each division of land and the boundaries of each division were known to the people living thereon or in the neighborhood[,]" especially persons who "were specially taught and made repositories of this knowledge[]" across generations. *Id.* at 316, 440 P.2d at 77–78.

[87] AMAC Rules § 2-2(f)(2).

[88] "*Mālama 'Āina*' means to care for and/or responsibly manage the land, ocean, natural and cultural resources, and ecosystems with the understanding that humans are also part of the natural environment and active participants in its care." AMAC Rules § 1-3.

[89] *Id.* § 2-2(g). The five biocultural zones (referred to collectively in traditional terms as *nā wao*) are, respectively: (1) *Wao Akua*, the "sacred, montane cloud forest, core watershed, native plant community that is non-augmented and an area that was traditionally *kapu* (human access usually forbidden and prohibited)"; (2) *Wao Kele*, the "saturated forest just below the clouds, the upland rainforest where human access is difficult and rare, and an area that is minimally augmented"; (3) *Wao Nahele*, the "remote forest, highly inconvenient for human access; a primarily native plant community; minimally augmented; and utilizing by early Hawaiians as a bird-catching zone"; (4) *Wao Lā'au*, "a zone of maximized biodiversity comprised of a highly augmented lowland forest due to integrated agroforestry of food and fuel trees, hardwood trees, construction supplies, medicine and dyes, and lei-making materials"; and (5) *Wao Kānaka*, "where the early Hawaiians chiefly settled. These were the *kula* lands, the sloping terrain between the forest and the shore that were highly valued and most accessible to the people. These were the areas where families constructed their *hale* [homes], cultivated the land, conducted aquaculture, and engaged in recreation. For coastal *ahupua'a* [land divisions within districts], *Wao Kānaka* also extended into the sea to include fishponds and fisheries." *Id.* §§ 1-3, 2-2(g)(1) to (5).

[90] *Id.* § 2-3(h) & Attachment A.

features that were also named and categorized by the *kūpuna* (ancestors, elders).[91] Accordingly, the *'aha moku* advisory committee has positioned itself as "a global leader in the integration of Indigenous resource management models into modern legal and regulatory structures" consistent with the principles recognized by IUCN barely more than a month earlier,[92] such that "Act 288 and the [AMAC] represent one of the first codifications of this developing international policy."[93]

While some may find the breathtaking scope contemplated under the AMAC Rules invigorating, these administrative rules may be disconcerting from other perspectives. For those in the latter category, it may be helpful to consider one final case study for the purposes of this article.

C. Case study #3: Kamehameha Schools reconfigures its land management policies to embrace cultural and environmental values.

An indigenous institution with a massive endowment has stepped back from its previous focus on maximum economic return on assets, in favor of an approach that now recognizes the cultural importance of land as part of the Native Hawaiian *'ohana* (or family). Kamehameha Schools is a charitable trust for the educational benefit of Hawaiian children established by the great-granddaughter and last recognized descendant of Kamehameha I's royal line, which managed a whopping $9 billion dollar endowment as of 2012.[94] After having "lost its way"[95] in the 1990s and getting forced to reform by its beneficiaries, the new leadership at Kamehameha Schools began (and, today, continues) to consider "what it means to be a permanent indigenous organization in the modern world" after belatedly recognizing

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[91] *Id.* § 2-3(i) & Attachment B.

[92] *See supra* notes 20–21 & 25–26 (IUCN Press Release and resolution affirming the role of indigenous peoples in global conservation efforts).

[93] AMAC Rules § 2-3(d).

[94] Avis Kuuipoleialoha Poai & Susan K. Serrano, *Ali'i Trusts: Native Hawaiian Charitable Trusts, in* NATIVE HAWAIIAN LAW: A TREATISE 1172–73 (Melody Kapilialoha MacKenzie et al. eds., 2015) [hereinafter NATIVE HAWAIIAN LAW TREATISE] (providing a historical overview of the Bishop Estate, Bishop's will, and the establishment of the Kamehameha Schools charitable trust); *see also* David M. Forman, *The Hawaiian Usage Exception to the Common Law: An Inoculation Against the Effects of Western Influence*, 30 U. HAW. L. REV. 319, 350 (2008); Susan K. Serrano et al., *Restorative Justice for Hawaii's First People: Selected Amicus Briefs in* Doe v. Kamehameha Schools, 14 ASIAN AM. L.J. 205, 223 (2007); Peter Vitousek & Kamanamaikalani Beamer, *Traditional Ecological Values, Knowledge, and Practices in Twenty-First Century Hawai'i, in* LINKING ECOLOGY AND ETHICS FOR A CHANGING WORLD 66 (Ricardo Rozzi et al. eds., 2013).

[95] Vitousek & Beamer, *supra* note 94.

that the trust's "actions should be governed by the perspective of having a familial relationship with the land, and its life" instead of focusing solely on maximizing economic return on assets.[96] The trust realized that it could:

> [U]se its lands to support education directly, without first monetizing it. Students can learn ecology, soils, and agriculture on the land; they can learn to appreciate it. They can learn how Hawaiian culture once managed land, before the arrival of Europeans and others; they can learn how land can be managed under modern "best practices"; they can learn to find ways to navigate managing land from an indigenous perspective in the modern world. Similarly, land assets can support environmental values—watersheds can provide clean water for drinking or for agriculture, or to support native stream biota or to feed beautiful waterfalls. Land can support cultural values, sustaining significant gathering, artistic, or agricultural practices; land can also support the livelihood and well-being of Hawaiian communities.[97]

As a result, Kamehameha Schools "has explicitly traded off [monetary] economic benefits for other values, sometimes to the chagrin of other Hawai'i businesses that are driven by [more direct] economics."[98] Briefly, the trust "is actively and explicitly managing its assets on the basis of [a five-value framework consisting] of educational, environmental, community, and cultural values as well as economic values."[99]

Each of the contemporary applications of IEK described above are made possible, at least in part, by 1978 amendments to the Hawai'i Constitution

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[96] *Id.* at 66–67 ("Any actions on the land should account for the reciprocity of human-land interactions; the land feeds people, people have a responsibility to take care of the land.").

[97] *Id.* at 67–68 (citations omitted) (citing Neil J. Hannahs, *Indigenizing Management of Kamehameha Schools' Land Legacy*, *in* 2 I ULU I KA 'ĀINA: THE HAWAI'INUIĀKEA MONOGRAPH (2014); since November 2016, the article has also been available at Hawaii Scholarship Online).

[98] *Id.* at 68 (adding that the trust's land managers "are fully aware that while there may be immediate economic gains to be had by (for example) filling in marine estuaries to build marinas or ocean-front gated communities, the adverse *intergenerational* impacts on *'āina*, community, culture, ecology, as well as the estuary's potential for education often outweigh the nearly guaranteed lucrative economic profits" (emphasis added)); *see also id.* at 68–70 (describing the 'Āina Ulu program that "links resource management and place-based education with community capacity building . . . to create a seamless flow between stewardship and education"; including one example involving a fishpond that was slated for marina development but "is now producing fish that feed people; it has also been a vehicle for the rejuvenation of the traditional knowledge underlying fishpond management, and the traditional practices through which people interacted with this innovative aquacultural system").

[99] *Id.* at 70 (noting that "other indigenous organizations ([e.g.,] the Ngai Tahu Tribe from Te Waipounamu, Aotearoa (the South Island of New Zealand)) have been quick to adapt and then adopt the approach").

that are rooted in traditional Native Hawaiian cultural values as discussed in Part IV below. Even community members who do not have the luxury of a $9 billion dollar purse, and who may therefore lack the ability to forego opportunities for monetary gain, are continuously confronted with serious challenges to their cultural relationship with the land—evoking sentiments like those quoted below, which proponents of other projects (as well as judges evaluating environmental justice claims) should not callously dismiss:

> *It's a place people go to, but to see it as its living being, you go there, you clean it, you take care of it, protect it from people that will do it harm. Like you would anybody, any little sister, little brother, older person. So that, that's what I think it means to really care for and see a place as family. That you would lay your life down for that place.*
>
> – Kamealoha Forrest, 2016[.][100]
>
> *It's the coming together and saying, "Hey we want our culture to live." It's obviously not how it was two hundred years ago, it's not how it was one hundred years ago, but we're going to figure out how to operate within this system to make sure that our culture survives today. We can still eat from the land and the ocean and mālama 'āina so that our families are healthy. And so that's the role, it is the embodiment of the community's voice that is attempting to be resilient in the face of change.*
>
> – Kawika Winter, 2011[.][101]

The core Native Hawaiian cultural value of *mālama 'āina* referenced in the quote above is at the root of the concept introduced at the beginning of this Article—"Mālama Honua (to care for the Earth)"—and is described more fully below in Part IV.

IV. THE CULTURAL AND LEGAL FOUNDATIONS OF THE INTERGENERATIONAL EQUITY FRAMEWORK IN HAWAI'I.

Ka Wā Ma Mua, Ka Wā Ma Hope.[102]

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[100] VAUGHAN, *supra* note 62, at 119.

[101] *Id.* at 162. *See also* Nina Wu, *Hirono, Schatz Introduce Act Preventing U.S. Withdrawal From Paris Accord,* HONOLULU STAR-ADVERTISER, June 6, 2019, https://www.staradvertiser.com/2019/06/06/breaking-news/hirono-schatz-introduce-act-preventing-u-s-withdrawal-from-paris-accord/ (quoting Senator Mazie Hirono regarding introduction of the International Climate Accountability Act: "[i]n Hawaii we understand why it is important to *malama, or take care of, our land, ocean, and air* – our way of life depends on it") (emphasis added).

[102] In 1993, I applied this *'ōlelo no'eau* (Hawaiian proverb) in a similar context for a capstone paper submitted in satisfaction of the requirements for a Graduate Ocean Policy Certificate from the School of Oceans and Earth Sciences and Technology, University of Hawai'i at Mānoa; regrettably, that paper is no longer available. "It is as if the Hawaiian

Island Earth would be well-served by recognizing IEK acquired by the people who lived here on these islands sustainably for more than a millennium, on the most isolated land mass in the world. It is also important to understanding the consequences that have followed as a result of marginalizing the ancestors of those who hold this valuable information.[103] According to Native Hawaiian cultural traditions:

> The Kumulipo, the Hawaiian genealogical and cosmological chant, articulates and reveals the connection between sky and earth, earth and ocean, ocean and land, land and *Kānaka Maoli*, and *Kānaka Maoli* and *akua* (gods), and it describes the way in which this connection establishes the interrelationship of all things in an everlasting continuum.
>
> It is the Kumulipo, and specifically the genealogy of Papa and Wākea, that inherently connects *Kānaka Maoli* to the *'āina* (land). According to this genealogy, the union of Papa, earth-mother, and Wākea, sky-father, resulted in the creation of most of the principal Hawaiian Islands. Their union also produced a daughter, Ho'ohōkūkalani [star-of-heaven], whose subsequent joining with Wākea resulted in the birth of Hāloanaka [quivering long stalk]. Hāloanaka, a stillborn offspring, was buried in the ground and subsequently became the first *kalo* (taro) plant, the staple food of the Hawaiian diet. A second offspring, Hāloa, eventually became the progenitor of the Native Hawaiian people. This relationship establishes the spiritual and genealogical connection of *Kānaka Maoli* to *'āina*: Hāloanaka, or *kalo*, as the elder sibling,

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stands firmly in the present, with his back to the future, and his eyes fixed upon the past, seeking historical answers for present-day dilemmas." *See, e.g.*, Lena Lei Ching, Ka Wā Ma Mua, Ka Wā Ma Hope 1 (May 2003) (unpublished M.A. thesis, University of Hawai'i), *available at* https://scholarspace.manoa.hawaii.edu/bitstream/10125/6916/2/uhm_mfa_438_r.pdf (citing LILIKALĀ KAME'ELEIHIWA, NATIVE LAND AND FOREIGN DESIRES: PEHEA LĀ E PONO AI? 22 (1992)). "Hawaiian navigators oriented themselves without instruments by using a system based upon knowing where they came from and by having faith in the words of their ancestors." *Id.* "We Hawaiians view the world looking to that time that came before us because it is rich in knowledge." *Id.* However,

> [I]t makes little sense to talk about going back to traditional knowledge, values, and practices at the time of European colonization. Traditional knowledge is neither timeless nor immutable; Hawaiian knowledge and practices would have evolved from 1778 (European arrival) to the present had Europeans not arrived, as they had evolved continuously up to 1778. Moreover, contact with the world is now a fact of Hawaiian society—and that contact has been actively absorbed into and influenced Hawaiian knowledge, values, and practices. (Of course some values and practices have been imposed on Hawaiian society as a result of imperialism. Still, Hawaiian culture has evolved in contact with the world, would have evolved had it not contacted the world, and is no less "traditional" for its changes.)

Vitousek & Beamer, *supra* note 94, at 65.

[103] Sproat, *supra* note 3, at 197; Serrano, *supra* note 3, at 523; Tsosie, *supra* note 3, at 79-80.

> and the Native Hawaiian people as the younger sibling. Out of this familial relationship arises the concept of *mālama 'āina*, caring for and serving the land, an essential pattern of Hawaiian life. It is the duty of *Kānaka Maoli*, as the younger sibling, to care for and serve the *'āina*, which in turn provides food and shelter. This *reciprocal relationship* helps to create and preserve *pono*—balance and harmony in the universe.[104]

Moreover, the act of burying *iwi kūpuna* (Native Hawaiian ancestral remains)[105] "is to transfer *mana* (divine power or life force) to growing plants that in turn nourish *Kanaka Maoli*" and further acknowledges "the spiritual sustenance that *kūpuna* offer to succeeding generations[,]" thus reinforcing the *reciprocal relationship* representative of a "fundamental *kuleana* (responsibility) [that] perpetuates harmony between the *'āina* and generations past and present."[106]

Decimation of the Native Hawaiian population following the introduction of western disease, loss of political sovereignty, diversion of native streams to support plantation agriculture (sugar and pineapple), along with the more-recent shift to a military- and tourism-based economy, dramatically altered the balance and harmony (*pono*)[107] reflected by deeply held *Kānaka 'Ōiwi* cultural values.

> [T]he health and well-being of the Native Hawaiian people is intrinsically tied to their deep feelings and attachment to the land . . . the long-range economic and social changes in Hawaii over the nineteenth and early twentieth centuries have been devastating to the population and to the health and well-being of the Hawaiian people . . . the Native Hawaiian people are determined to preserve, develop and transmit to future generations their ancestral territory, and their cultural identity in accordance with their own spiritual and traditional beliefs, customs, practices, language, and social institutions[.][108]

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[104] Melody Kapilialoha MacKenzie, *Religious Freedom*, *in* NATIVE HAWAIIAN LAW TREATISE, *supra* note 94, at 860–61 & nn.13, 16–19 (emphasis added) (citations omitted) (citing THE KUMULIPO: A HAWAIIAN CREATION CHANT 7, 55–57 (Martha Warren Beckwith trans., 1972); KAME'ELEIHIWA, *supra* note 102, at 23–25); *see also* Natasha L.N. Baldauf, *Iwi Kūpuna: Native Hawaiian Burial Rights*, *in* NATIVE HAWAIIAN LAW TREATISE, *supra* note 94, at 912 (citing THE KUMULIPO, *supra*, at 125) (defining Hāloanaka, "quivering long stalk," and Ho'ohōkūkalani, "star-of-heaven").

[105] Baldauf, *supra* note 104, at 911.

[106] *Id.* at 912 & nn.16–19 (citing Kūnani Nihipali, *Stone by Stone, Bone by Bone: Rebuilding the Hawaiian Nation in the Illusion of Reality*, 34 ARIZ. ST. L.J. 27, 36–37 (2002)).

[107] *See, e.g.*, Sproat, *supra* note 3, at 169 ("Since the documented arrival of foreigners beginning in about 1778, traditional Maoli society has changed completely. The decimation of Native Hawaiians by disease, imposition of industrial agriculture, and illegal overthrow of the Hawaiian Kingdom by the United States military inflicted significant cultural harms, many of which remain unaddressed today.").

[108] S.J. Res. 19, 103d Cong. (1993).

As sugar plantations began to lose their dominant economic role (following the islands' admission to the United States in 1959 as the fiftieth state in the union), the people of Hawai'i seized an opportunity to more proactively manage their natural resources for the benefit of the larger community rather than for the profit of a handful of private interests.[109] Hawai'i's voters simultaneously reaffirmed traditional and customary Native Hawaiian rights as a background principle of state property law,[110] and made Hawai'i one of only four states in the union whose fundamental governing documents consider the interests of future generations.[111]

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[109] D. Kapua'ala Sproat, *Where Justice Flows Like Water: The Moon Court's Role in Illuminating Hawai'i Water Law*, 33 U. HAW. L. REV. 537, 547 & nn.75–77 (2011); *see also* Melody Kapilialoha MacKenzie & Aviam Soifer, *Introduction* to KA LAMA KŪ O KA NO'EAU: THE STANDING TORCH OF WISDOM vi–vii (2009).

[110] HAW. CONST. art. XII, § 7; *see, e.g.*, Public Access Shoreline Haw. v. Haw. Cty. Planning Comm'n (*PASH/Kohanaiki*), 79 Hawai'i 425, 437–51, 903 P.2d 1246, 1258–72 (1995) (discussing the obligation to preserve and protect cultural and historic resources in accordance with article XII, section 7); *PASH/Kohanaiki*, 79 Hawai'i at 451–52, 903 P.2d at 1272–73 (rejecting a resort developer's judicial and regulatory takings claims based on preexisting principles of state property law). I have added "Kohanaiki" to the short form case citation out of respect for the native Hawaiian sense of place, recognizing that the environmental association represented native Hawaiian practitioners from that part of the island.

[111] A fifth state constitution that includes an environmental rights provision, in Massachusetts, does not include any reference to future generations. MASS. CONST. art. XCVII ("The people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment; and the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources is hereby declared to be a public purpose."). As compared with express references to "future generations" in the Hawai'i, Illinois, and Montana Constitutions, the Pennsylvania Constitution instead reference "generations yet to come." *Compare* PA. CONST. art. I, § 27 ("The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including *generations yet to come*. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people." (Emphasis added)), *with* HAW. CONST. art. XI, § 1, *infra* text accompanying note 113; ILL. CONST. art. XI, § 1 ("The public policy of the State and the duty of each person is to provide and maintain a healthful environment for the benefit of this and *future generations*. The General Assembly shall provide by law for the implementation and enforcement of this public policy." (Emphasis added)); MONT. CONST. art. IX, § 1(1) ("The state and each person shall maintain and improve a clean and healthful environment in Montana for present and *future generations*." (Emphasis added))

A. Under Hawai'i's Constitution, public natural resources are held in trust and must be conserved and protected for the benefit of present and future generations.

The people of Hawai'i made the intergenerational equity framework part of their primary governing document, embedded within the same constitutional provision that adopts the public trust doctrine with respect to all public natural resources. Among just four states in the Union that provide similar constitutional protections for future generations, Hawai'i is the *only* state where these rights are clearly self-executing.[112] The Hawai'i Constitution provides that:

> For the benefit of present and *future generations*, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the *self-sufficiency* of the State.
>
> All public natural resources are held in trust by the State for the benefit of the people.[113]

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[112] *See infra* notes 113–16 and accompanying text.

[113] HAW. CONST. art. XI, § 1 (emphasis added); *see also id.* art. IX, § 8 (giving the state "power to promote and maintain a healthful environment, including the prevention of any excessive demands upon the environment and the State's resources"). Previously, the Hawai'i Constitution merely directed the state legislature to "promote the conservation, development and utilization of agricultural . . . and other natural resources." *Id.* art. X, § 1 (1968).

By comparison, the situation appears to be a bit murky in Montana[114] and Pennsylvania.[115] Likewise, the Illinois courts do not yet appear to have

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[114] *Compare* MONT. CONST. art. II, § 3 ("All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment . . . . In enjoying theses rights, all persons recognize corresponding responsibilities."), *with id.* art. IX, §§ 1(2), (3) ("[(2)] The legislature shall provide for the administration and enforcement of this duty. [(3)] The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources."). In *Mont. Envtl. Info Ctr. v. Dep't of Envtl. Quality*, 988 P.2d 1236 (Mont. 1999), the court held that a right to a clean and healthful environment is a fundamental right, *id.* at 1246, and "did not look to additional legislation to enforce the right" so it "can be said to be self-executing." Anil S. Karia, *A Right to A Clean and Healthy Environment: A Proposed Amendment to Oregon's Constitution*, 14 U. BALT. J. ENVTL. L. 37, 52–53 (2006). *But see* Barton H. Thompson, *Constitutionalizing The Environment: the History and Future of Montana's Environmental Provisions*, 64 MONT. L. REV. 157, 169 & n.50 (2003) (noting that the Montana Supreme Court skipped the threshold question of self-execution and proceeded directly to standing; adding that "Professor John Horwich justifiably has criticized the Montana Supreme Court's opinion in MEIC for this and other failings"); John L. Horwich, MEIC v. DEQ*: An Inadequate Effort to Address the Meaning of Montana's Constitutional Environmental Provisions*, 62 MONT. L. REV. 269, 284–88 (2001) (criticizing the Montana Supreme Court for not explicitly discussing self-execution); *id.* at 298 & n.101 (observing that the case was subsequently resolved on remand without further reliance on the Montana Supreme Court opinion). *Accord* Brian P. Wilson, Comment, *State Constitutional Environmental Rights and Judicial Activism: Is the Big Sky Falling?*, 53 EMORY L.J. 627, 631–32 (2004) ("[T]hough it did not explicitly say so, the court determined in effect that the right to a clean and healthful environment was self-executing.")

[115] *Compare* Payne v. Kassab, 312 A.2d 86, 94 (Pa. Commw. Ct. 1973) (establishing a three-prong test for determining constitutionality of action), *aff'd*, 361 A.2d 263, 272 (Pa. 1976) (declining to "explore the difficult terrain of whether the amendment is or is not 'self-executing'" but, nevertheless, holding that article I, section 27 is at least *partially* self-executing to the extent that it "declares and creates a public trust of public natural resources for the benefit of all the people" because "[n]o implementing legislation is needed to enunciate these broad purposes and establish these relationships"), *with* Commonwealth v. Nat'l Gettysburg Battlefield Tower, Inc., 302 A.2d 886 (Pa. Commw. Ct. 1973), *aff'd*, 311 A.2d 588, 594–95 (Pa. 1973) (affirming, in a fractured 2-1-2-2 decision, the denial of an action to enjoin construction; holding that "before the environmental protection amendment can be made effective, supplemental legislation will be required to define the values which the amendment seeks to protect and to establish procedures by which the use of private property can be fairly regulated to protect those values"). *See* Margaret J. Fried & Monique J. Van Damme, *Environmental Protection in a Constitutional Setting*, 68 TEMP. L. REV. 1369, 1394 (1995) (observing that "only two justices actually held [in the controlling opinion] that the Amendment was not self-executing" in *Gettysburg Tower*, "while four of the seven (including two dissenters) asserted that it was" self-executing); *id.* at 1394–97 (discussing the Pennsylvania Commonwealth Court's subsequent application of the three-prong test in *Payne*, including the first prong requiring "compliance with all applicable statutes and regulations relevant to the protection of the commonwealth's public natural resources"; and, concluding that even when the first two prongs have been met, the courts have never applied the third

addressed the question whether that state's constitutional provision is self-executing.[116]

Since its adoption, the Hawai'i Constitution has expressly provided that its provisions "shall be self-executing to the fullest extent that their respective natures permit."[117] Accordingly, the Hawai'i Supreme Court concluded in

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prong—instead deferring to agency policy decisions regarding "the scope and intensity of the commonwealth's interest in protecting environmental values"). *But See* Robinson Twp v. Pennsylvania, 83 A.3d 901, 967 (Pa. 2013) ("[W]e conclude that the non-textual Article I, Section 27 test established in *Payne* and its progeny is *inappropriate* to determine matters outside the narrowest category of cases, *i.e.*, those cases in which a challenge is premised simply upon an alleged failure to comply with statutory standards enacted to advance Section 27 interests." (Emphasis added)). Interestingly, a Pennsylvania law provides that "no ordinance or regulation of any political subdivision or home rule municipality may prohibit or in any way attempt to regulate any matter relating to the registration, labeling, sale, storage, transportation, distribution, notification of use or use of *seeds* if any of these ordinances, laws or regulations are in conflict with this chapter." 3 PA. STAT. AND CONS. STAT. ANN. § 7120(b) (West, 2018) (emphasis added). *Compare* Forman, *supra* note 56 (criticizing the Ninth Circuit's *implied* state preemption analysis on state constitutional grounds involving three county ordinances attempting to regulate the genetically engineered seed industry in Hawai'i).

[116] ILL. CONST. art XI, § 2 ("Each person has the right to a healthful environment. Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation as the General Assembly may provide by law."). *See, e.g.*, Karia, *supra* note 114, at 54 ("The provisions in Illinois' and Massachusetts' Constitutions are the weakest and most problematic of all because they require further legislative action for the enforcement of the enumerated rights."); Jose L. Fernandez, *State Constitutions, Environmental Rights Provisions, and the Doctrine of Self-Execution: A Political Question?*, 17 HARV. ENVTL. L. REV. 333, 364 (1993) (concluding that the language above "clearly expresses the drafters' intent that the Illinois legislature enact enabling legislation"). *But see id.* at 352–55 (citing Gherna v. State, 146 P. 494 (Ariz. 1915), for the proposition that similar language was "permissive, merely inviting the legislature to 'provid[e] a more specific and convenient' enforcement procedure"; "although a constitutional provision may call for legislative action, it may still be found self-executing if the rule it contains is otherwise complete and the court detects a clear intent that the provision be self-executing"). Note also the Hawai'i Supreme Court's conclusion that article XI, section 9 of the Hawai'i Constitution is self-executing, despite the presence of similar language: "subject to reasonable limitations and regulations as provided by law." *See infra* text accompanying notes 127–28 (citing Cty. of Haw. v. Ala Loop Homeowners (*Ala Loop*), 123 Hawai'i 391, 411–13, 235 P.3d 1103, 1123–25 (2010)); *infra* text accompanying notes 130-32 (citing *Ala Loop*, 123 Hawai'i at 414 nn.32 & 33, 235 P.3d 1126 nn.32 & 33); *infra* text accompanying note 142–43 (citing *In re* Application of Maui Electric Co. (*Maui Electric*), 141 Hawai'i 249, 261–62 & 264 n.28, 408 P.3d 1, 13–14 & 16 n.28 (2017)).

[117] HAW. CONST. art XVI, § 16; *see also In re* Water Use Permit Applications (*Waiāhole I*), 94 Hawai'i 97, 132 n.30, 9 P.3d 409, 444 n.30 (2000) (citing HAW. CONST. art XVI, § 16, in the context of discussing the state's obligation under article XI, section 7, "to protect, control and regulate the use of Hawaii's water resources for the benefit of its people"); *id.* at 193, 9 P.3d at 505 (citing 2 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at 863 (1980) (statement of Delegate Waihee), *available at* http://lrbhawaii.org/conconcon78/conconjrnl78v2.pdf) ("What the [amendment] attempts to do is to, first of all, create

Waiāhole I, that article XI, section 1 "adopt[s] the public trust doctrine as a fundamental principle of constitutional law in Hawai'i."[118] The *Waiāhole I* court noted that this fundamental duty to protect the public trust may only be surrendered "in rare cases when the abandonment of that right is consistent with the purposes of the trust."[119]

In *Waiāhole I*, the court explained further that the public trust "requires planning and decision making from a global, long-term perspective," which means that "the state may compromise public rights in the resource pursuant only to a decision made with a level of openness, diligence, and foresight commensurate with the high priority these rights command under the laws of our state."[120] In addition to requiring transparency and public participation,

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a fiduciary duty to on the part of the State to regulate and control the water. The second thing that it does is establish a coordinating agency to regulate all water."). The court observed further that neither legislation adopted pursuant to article XI, section 7, nor its implementing agency can "override the public trust doctrine or render it superfluous." *Waiāhole I*, 94 Hawai'i at 133, 9 P.3d at 445 (holding that the State Water Code "does not supplant the protections of the public trust doctrine").

[118] *Waiāhole I*, 94 Hawai'i at 132, 9 P.3d at 444. *Accord In re* Contested Case Hearing on Water Use Permit Application Filed by Kukui (Molokai), Inc. (*Kukui (Molokai), Inc.*), 116 Hawai'i 481, 490, 174 P.3d 320, 329 (2007) (observing that this fundamental principle is now "well established"). It is relevant to note here that Professor Sproat was one of the attorneys at Earthjustice who litigated the *Waiāhole I* case before she became a law professor, and continues to do important work as Of Counsel at Earthjustice in addition to providing live-client representation as Director of our Law School's Environmental Law Clinic.

[119] *Waiāhole I*, 94 Hawai'i at 138, 9 P.3d at 450 (quoting Nat'l Audubon Soc'y v. Superior Ct. of Alpine Cty., 658 P.2d 709, 723–24 (Cal. 1983) (en banc)). *See also* Envtl. Law Found. v. State Water Res. Control Bd., 237 Cal. Rptr. 3d 393, 409 (Cal. Ct. App. 2018) (responding to the question whether the fiduciary duties imposed by the public trust doctrine survived enactment of the 2014 Sustainable Groundwater Management Act ("SGMA"), by concluding that "enactment of SGMA does not . . . occupy the field, replace or fulfill public trust duties").

[120] *Waiāhole I*, 94 Hawai'i at 143, 9 P.3d at 455. *Accord Kukui (Molokai), Inc.*, 116 Hawai'i at 490, 174 P.3d at 329. *But see* Kilakila 'O Haleakala v. Bd. of Land & Nat. Res., 138 Hawai'i 383, 409–10, 382 P.3d 195, 221–22 (2016) (McKenna, J., concurring) (dismissing allegations of improper ex parte communications based on the presence of the Attorney General and Senator Daniel K. Inouye's chief of staff, as lawyers aware of prohibitions prohibiting such communications except with regard to procedural matters, then noting "it is preferable and indeed advisable that procedural questions be raised and responded to in writing, so that questions do not linger whether improper communications took place"); *id.* at 412, 419–20 & nn.8–9, 382 P.3d at 223, 231–32 & nn.8–9 (Pollack, J., dissenting) ("the record is inadequate for this court to conclude that external political pressure was not made an ingredient in the BLNR Chair's decisionmaking process"; listing communications involving Senator Inouye's chief of staff, the governor's chief of staff, the University of Hawai'i Institute for Astronomy, and others; noting inconsistencies in BLNR's explanations about the contents of ex parte communications purportedly involving only procedural matters); *id.* at 426–62, 382 P.3d at 238–74 (Wilson, J., dissenting) (opining that the CDU permit should be vacated

the Hawai'i Supreme Court observed that "the lack of full scientific certainty does not extinguish the presumption in favor of public trust purposes or vitiate the [government's] affirmative duty to protect such purposes wherever feasible."[121] Accordingly, "the absence of firm scientific proof should not tie the [government's] hands in adopting reasonable measures designed to further the public interest."[122] Thus, the Hawai'i Supreme Court applied the public trust doctrine in order to incorporate the precautionary principle alongside the intergenerational equity framework under Hawai'i law:

> As the public trust arises out of a constitutional mandate, the duty and authority of the state and its subdivisions to weigh competing public and private uses on a case-by-case basis is *independent of statutory duties and authorities created by the legislature.* "The public trust doctrine at all times forms the outer boundaries of permissible government action." . . . "The public trust has never been understood to safeguard rights of exclusive use for private commercial gain." The very meaning of the public trust is to recognize separate and enduring public rights in trust resources *superior* to any private interest . . . [such that] a "higher level of scrutiny" is [] employed when considering proposals for private commercial use.
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> When an agency is confronted with its duty to perform as a public trustee under the public trust doctrine, it *must preserve the rights of present and future generations* . . . [and] take the initiative in considering, protecting, and advancing public rights in the resource at every stage of the planning and decision-making process. . . . The agency must apply a *presumption in favor of . . . resource protection.*
>
> The agency is duty-bound to *place the burden on the applicant* to justify the proposed [] use in light of the trust purposes. . . . If there is a reasonable allegation of harm . . . then *the applicant must demonstrate* that there is *no harm in fact* or that any potential harm does not preclude [approval of the proposed use]. . . . "[I]n other words, the absence of evidence . . . is insufficient."
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> When an agency or other deciding body considers an application for permits under circumstances that requires [sic] the deciding body to perform as

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and the matter remanded to BLNR for another contested case hearing with instructions to produce ex parte communications and allow Kilakila O Haleakala to seek appropriate remedies in that proceeding).

[121] *Waiāhole I*, 94 Hawai'i at 155, 9 P.3d at 467. *Accord Kukui (Molokai), Inc.*, 116 Hawai'i at 499, 174 P.3d at 338 (recognizing the "predicament when inconclusive allegations raise a specter of harm that cannot be dispatched by readily available evidence" but explaining that "to the extent that harm to a public trust purpose . . . is alleged, the permit applicant must demonstrate that there is, in fact, no harm, or that any potential harm does not rise to a level that would preclude a finding that the requested use is nevertheless reasonable-beneficial" under the State Water Code).

[122] *Waiāhole I*, 94 Hawai'i at 155, 9 P.3d at 467.

> a public trustee to protect a public trust resource, the agency or other deciding body must make findings sufficient to enable an appellate court to track the steps that the agency took in reaching its decision . . . [and] "clarity in the agency's decision is all the more essential . . . where the agency performs as a public trustee and is duty bound to demonstrate that it has properly exercised the discretion vested in it by the constitution and the statute."
>
> Under the foregoing principles and purposes of the public trust, it is manifest that a government body is precluded from allowing an applicant's proposed use to impact the public trust in the absence of an *affirmative showing* that the use does not conflict with those principles and purposes. . . . [A] lack of information from the applicant is exactly the reason the agency is empowered to deny a proposed use of a public trust resource.[123]

Other constitutional provisions are also relevant to this analysis, including the right to a clean and healthful environment.

B. Under Hawai'i's Constitution, each person also has an enforceable right to a clean and healthful environment.

Like the public trust provision of the Hawai'i Constitution, its so-called "environmental rights" provision codified as article XI, section 9, is also self-executing[124]:

> Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person

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[123] *Kauai Springs*, 133 Hawai'i at 172–74, 324 P.3d 951, 982–84 (emphasis added) (citations omitted) (citing *Kukui (Molokai), Inc.*, 116 Hawai'i at 490, 499, 509, 174 P.3d at 329, 338, 348; *In re* Wai'ola O Moloka'i, Inc., 103 Hawai'i 401, 442, 83 P.3d 664 (2004); *Waiāhole I*, 94 Hawai'i at 132, 138, 141–43, 154, 9 P.3d at 444, 450, 453–55, 466); *see also Kauai Springs*, 133 Hawai'i at 181–82, 324 P.3d at 991–92 (Recktenwald, C.J., concurring and dissenting) (observing that it "is *beyond dispute* that public trust doctrine imposes on the State *and its political subdivisions* a serious and significant duty to protect the natural water resources of the State" under the plain language of article XI, section 1 of the Hawai'i Constitution (emphasis added)). Chief Justice Recktenwald and Justice Nakayama disagreed only to the extent that the majority's approach in *Kauai Springs* requires "each agency that considers a permit application . . . to ensure compliance with every other agency's potentially applicable regulatory requirements [including those that involve third parties not under the control of the applicant] without reference to whether doing so furthers the purposes of the public trust." *Id.* at 183, 324 P.3d at 993.

[124] Mary Ellen Cusack, *Judicial Interpretation of State Constitutional Rights to a Healthful Environment*, 20 B.C. ENVTL. AFF. L. REV. 173, 182 & n.67 (1993) (stating that article XI, section 9 of the Hawai'i Constitution is self-executing because it "refer[s] to individuals' right to enforce compliance without any further legislation"). *See supra* notes 112–23, and *infra* notes 125–46.

> may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulations as provided by law.[125]

In *Ala Loop*, the Hawai'i Supreme Court held that the "plain language of article XI, [section] 9 suggests . . . the right of enforcement described in the provision is self-executing."[126] Explaining that "the right exists and can be exercised even in the absence of" reasonable limitations and regulations provided by law,[127] the court confirmed its plain language interpretation on multiple grounds.

First, the final clause of article XI, section 9 ("subject to reasonable limitations and regulations provided by law"), "simply refer[s] to an existing body of statutory and other law on a particular subject" including a reasonable statute of limitations that might otherwise have been rendered unconstitutional in the absence of said clause.[128] Second, the judiciary has the ability to implement the right to seek enforcement "through appropriate legal proceedings" without legislative action because "[u]nlike the establishment of a new right to grand jury counsel [under article I, section 11] . . . establishing a right to enforce environmental rights does not raise practical issues of implementation."[129] Third, the framers intended to

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[125] HAW. CONST. art. XI, § 9.

[126] 123 Hawai'i 391, 413, 235 P.3d 1103, 1125 (2010).

[127] *Id.* at 413, 235 P.3d at 1125.

[128] *Id.* at 412–13, 235 P.3d at 1124–25 (analogizing the 180-day statute of limitation for challenging the failure to prepare an environmental impact statement under HRS section 343-7(a) (Supp. 1975), to the existing law of collective bargaining as discussed in United Public Workers, AFSCME, Local 646 v. Yogi, 101 Hawai'i 46, 62 P.3d 189 (2002)); *see also Yogi*, 101 Hawai'i at 51–53, 62 P.3d at 194–96 (interpreting the limiting language "collective bargaining as provided by law" in article XIII, section 2, "as simply referring to an existing body of statutory and other law on a particular subject," *Ala Loop*, 123 Hawai'i at 412, 235 P.3d at 1123, *without* intending to give the legislature absolute discretion to define the scope of collective bargaining, because that term *already had a well-recognized meaning, usage, and application* under both federal and state laws when the constitutional amendment was adopted in 1968—including the "ability to engage in negotiations concerning core subjects such as wages, hours, and other conditions of employment"); *Ala Loop*, 123 Hawai'i at 411–12, 235 P.3d at 1123–24 (citing *Yogi*, 101 Hawai'i at 51–53, 62 P.3d at 194–96). Interestingly, the Hawai'i legislature expressly provided that its law with respect to collective bargaining in public employment "shall take precedence over all conflicting statutes concerning this subject matter and shall preempt all contrary local ordinances, executive orders, or rules adopted by the State, a county, or any department or agency thereof, including the departments of human resources development or of personnel services or the civil service commission. HAW. REV. STAT. § 89-19 (2007) (noting initial enactment in 1970). In other words, the Hawai'i legislature knew how to preempt all contrary local ordinances—but did not do so in enacting the statutes relied upon by the Ninth Circuit to support its implied state preemption holdings in *Syngenta Seeds*, *Atay*, and *Hawaii Papaya*. *See, e.g.*, Forman, *supra* note 56.

[129] *Ala Loop*, 123 Hawai'i at 413, 235 P.3d at 1125 (distinguishing "administrative details

remove standing to sue barriers without adding new duties merely as a complement to (without replacing or limiting) existing government enforcement authority, believing that "the safeguards of reasonable limitations and regulations as provided by law should serve to prevent abuses of the right to a clean and healthful environment."[130] Instead of requiring implementing legislation, the framers provided that "individuals may directly sue private and public violators"[131] subject to reasonable limits like statutes of limitation, without suggesting that such limits must be in place before such actions can be brought.[132] Fourth, based on the state legislature's subsequent decision not to enact legislation implementing "the environmental rights amendment (Article XI, Section 9)" because it "is self-executing [and] self-implementing, and that no legislation is necessary at this time to implement its provisions."[133] The legislature further recognized that the constitutional provision gave "the public standing to use the courts to enforce laws intended

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such as the compensation of the counsel [and who gets to serve as counsel, that] needed to be addressed by the legislature" before effectuating the new right to grand jury counsel under Hawai'i Constitution article I, section 11). *See also id.* at 411, 235 P.3d at 1123 (citing State v. Rodrigues, 63 Haw. 412, 415, 629 P.2d 1111, 1114 (1981), for the conclusion that "reference to the appointment, term and compensation of the independent counsel 'as provided by law' reflected the framers intent that 'subsequent legislation was required to implement the amendment,' since at the time the amendment was adopted, 'there were no other constitutional provisions or statutes to which the phrase could refer'"); *id.* at 412, 235 P.3d at 1124 (citing Save Sunset Beach Coal. v. City & Cty. of Honolulu, 102 Hawai'i 465, 474–76, 78 P.3d 1, 10–12 (2003), for the conclusion that the provisions of article XI, section 3 relating to agricultural lands were not self-executing when read as a whole).

[130] *Id.* at 414, 235 P.3d at 1126 (quoting 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at 689–90 (1980)).

[131] *Id.* at 414 & n.32, 235 P.3d at 1126 & n.32 (quoting a Legislative Reference Bureau study for the conclusion that "[t]here are a number of advantages to the inclusion of a constitutional provision, in contrast to a statute, granting the right to sue").

[132] *Id.* at 414 & n.33, 235 P.3d at 1126 & n.33 (quoting 1 PROCEEDINGS, *supra* note 124, at 690) (noting that "the legislature *may* reasonably limit and regulate this private enforcement right by, *for example*, prescribing . . . a reasonable statute of limitations" for actions under HRS chapter 205 involving the State Land Use Commission, otherwise the generally applicable two-year statute of limitation for recovery of compensation for damage or injury to persons or property under HRS section 657-13 "can be applied to such claims consistent with article XI, section 9" (emphasis added)); *id.* at 414 n.34, 235 P.3d at 1126 n.34 (highlighting the framers' intent that adopting article XI, section 9 "*has* removed the standing to sue barriers" and "*provide*[*d*] that individuals may directly sue private and public actors").

[133] *Id.* at 414–15, 235 P.3d at 1126–27 (quoting H. SPEC. COMM. REP. NO. 22, 10th Leg., Reg. Sess. (Haw. 1980), *printed in* 1980 H. JOURNAL at 1248; *see also id.* at 415, 235 P.3d at 1127 (noting "that the experience to date in Hawai'i with the provision, as well as that in other states (such as Illinois) with similar provisions, did not justify" concerns raised by the private sector that "the broad, liberalized standing-to-sue provision in the subject amendment will encourage a flood of lawsuits").

to protect the environment" when "it specifically included [Hawai'i Revised Statutes ("HRS")] chapter 205 among the list of provisions for which attorneys' fees could be recovered in a suit by one private party against another for an injunction against development undertaken without permits or approvals" under HRS section 607-25.[134] Finally, scholars widely support the conclusion that article XI, section 9 is self-executing.[135]

The Hawai'i Supreme Court recently reaffirmed the self-executing nature of article XI, section 9 in *Maui Electric*.[136] The electric utility company sought approval from the state Public Utilities Commission ("PUC") of a proposed power purchase agreement with Hawaiian Commercial & Sugar Company ("HC&S"), which produced electricity by burning internal bagasse at its Pu'unene sugar mill, along with other fuels including coal and petroleum.[137] The Sierra Club attempted to intervene or otherwise participate

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[134] *Id.* at 415, 235 P.3d at 1127 (citing 1986 Haw. Sess. Laws Act 80, § 607, at 104–05; H. STAND. COMM. REP. NO. 766-86, 13th Leg., Reg. Sess. (Haw. 1986), *printed in* 1986 H. JOURNAL, at 1373; S. STAND. COMM. REP. NO. 450-86, 13th Leg., Reg. Sess. (Haw. 1986) in 1986 S. JOURNAL, at 976). *Accord* Kahana Sunset Owners Ass'n v. Maui Cty. Council, 86 Hawai'i 132, 133–35, 948 P.2d 122, 123–25 (1997) (concluding that an award of attorneys' fees to a private defendant under HRS section 605-27 was not warranted because the plaintiffs' arguments were not frivolous, after explaining that "the legislature intended that individuals and organizations would help the state's enforcement of laws and ordinances controlling development by acting as private attorney generals and suing developers who did not comply with the proper development laws"); *see also Ala Loop*, 123 Hawai'i at 416, 235 P.3d at 1128 (citing HRS § 605-27).

[135] *Ala Loop*, 123 Hawai'i at 416, 235 P.3d at 1128 (citing Susan Morath Horner, *Embryo, Not Fossil: Breathing Life into the Public Trust in Wildlife*, 35 LAND & WATER L. REV. 23, 65 (2000); Janelle P. Eurick, *The Constitutional Right to a Healthy Environment: Enforcing Environmental Protection Through State and Federal Constitutions*, 11 INT'L LEGAL PERSP. 185, 208 (2001); Carole L. Gallagher, *The Movement to Create an Environmental Bill of Rights: From Earth Day, 1970 to the Present*, 9 FORDHAM ENVTL. L. REV. 107, 139 (1997); David Kimo Frankel, *Enforcement of Environmental Laws in Hawaii*, 16 U. HAW. L. REV. 85, 135 (1994)).

[136] 141 Hawai'i 249, 261 & n.21, 408 P.3d 1, 13 & n.21 (2017) (noting the distinction between substantive and procedural components of article XI, section 9—*viz.*, the right to a clean and healthful environment on the one hand, and the private right of enforcement of the right to a clean and healthful environment, on the other hand).

[137] *Id.* at 253 & n.4, 408 P.3d at 5 & n.4; *see also id.* at 254 & n.7, 408 P.3d at 6 & n.7 (noting that HC&S entered into a consent decree with the state Department of Health in 2016, agreeing to pay a $600,000 fine, relinquish certain equipment, related hardware, and supplies, in addition to maintaining air quality monitoring equipment at local schools). HC&S installed the state's first oil-fired power plant at the Pu'unene mill in 1907, but ended production in December 2016 as the last plantation in Hawai'i. Lee Imada, *HC&S Closure Will Pull Plug on Power Deal*, MAUI NEWS (Nov. 29, 2016), http://www.mauinews.com/news/local-news/2016/11/hcs-closure-will-pull-plug-on-power-deal/ ("In early January [2016], HC&S' parent company, Alexander & Baldwin, announced the closure of Hawaii's last sugar plantation at the end of this year.").

in the PUC proceeding, asserting potential adverse impacts to its members' health, aesthetic, and recreational interests as well as an organizational interest in reducing Hawai'i's dependence on imported fossil fuels and advancing a clean energy grid.[138] The PUC denied the Sierra Club's motion as well as its request for reconsideration, without addressing the organization's assertion of a due process right to participate in the hearing based on its constitutionally-protected environmental rights.[139] After the Hawai'i Intermediate Court of Appeals dismissed the Sierra Club's appeal, the Hawai'i Supreme Court granted certiorari.[140]

Drawing an analogy to Native Hawaiian water rights, the state's highest court observed that the Sierra Club's asserted "property" interest for constitutional due process purposes is defined by the substantive right to a clean and healthful environment under article XI, section 9.[141] The court then concluded that this particular substantive right is self-executing, defined by existing law relating to environmental quality and "thus[,] a property interest protected by due process."[142] Rejecting the dissenting justices' attempt to distinguish the Native Hawaiian water rights discussed in *'Īao* as statutory creations, the *Maui Electric* court stressed that the State Water Code (HRS chapter 174C) was *not intended to abridge rights already in existence*—e.g., traditional and customary rights reaffirmed in article XII, section 7[143]—even assuming, arguendo, that it would be constitutionally permissible to do so in reliance on the penultimate phrase "subject to the right of the State to regulate such rights." Because the PUC was "statutorily required to consider the

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[138] 141 Hawai'i at 254 & nn.5–7, 408 P.3d at 6 & nn.5–7 (quoting applicable PUC rules and affidavits submitted by two of the organization's members).

[139] *Id.* at 255–56, 408 P.3d at 7–8.

[140] *Id.* at 256, 408 P.3d at 8.

[141] *Id.* at 260–61, 408 P.3d at 12–13 (citing *In re* 'Īao Ground Water Mgmt. Area High-Level Source Water Use Permit Applications (*'Īao*), 128 Hawai'i 228, 241–44, 287 P.3d 129, 142–45 (2012)).

[142] *Id.* at 261, 408 P.3d at 13 (citing Ala Loop, 123 Hawai'i 391, 417, 235 P.3d 1103, 1127 (2010), along with the duties and operation of the PUC in regulating public utilities under HRS chapter 269). *See also id.* at 261–62, 408 P.3d at 13–14 (citing the PUC's now mandatory obligation under HRS section 269-6(b) to "consider the need to reduce the State's reliance on fossil fuels through energy efficiency and increased renewable energy generation" and "explicitly consider" the effect of the State's reliance on fossil fuels on the level of "greenhouse gas emissions"); *id.* at 262, 408 P.3d at 14 (citing HRS section 269-27.2, which authorizes the PUC to reduce the State's dependence on fossil fuels by utilizing renewable energy sources).

[143] *Id.* at 264 & n.28, 408 P.3d at 16 & n.28 (explaining that HRS sections 269-6(b) and 269-27.2 merely define the contours of the rights guaranteed by article XI, section 9 "subject to reasonable limitations and regulation as provided by law," which represent protectable property interests for the purposes of constitutional due process).

hidden and long-term costs of the continued reliance on energy produced at the Pu'unene Plant, including the potential for increased air pollution as a result of greenhouse gas emissions[,][144] its analysis necessarily would have included "implied consideration of potential risks to health . . . affecting Sierra Club's members' right to a clean and healthful environment [under article XI, section 1] as defined by HRS [c]hapter 269."[145] Therefore, the PUC was obligated to provide the Sierra Club an opportunity to be heard at a meaningful time and in a meaningful manner.[146]

The Hawai'i Supreme Court has recognized a similar substantive due process right under article XII, section 7 of the Hawai'i Constitution, as discussed in subsection IV.C. below.

C. *Reaffirmation of Native Hawaiian traditional and customary rights under the Hawai'i Constitution.*

The link between culture and the environment in Hawai'i has, perhaps, been made most clear through efforts to implement the constitutional reaffirmation of traditional and customary Native Hawaiian rights.[147]

> The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by *ahupua'a* tenants who are descendants of [N]ative Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.[148]

A little more than two years before its *Maui Electric* decision recognized a substantive due process right to intervene in a contested case hearing, the

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[144] *Id.* at 265, 408 P.3d at 17.

[145] *Id.* at 266, 408 P.3d at 18.

[146] *Id.* at 266, 269–71, 408 P.3d at 18, 21–23. *Accord In re Hawaiian Elec. Light Co.*, No. SCOT-17-0000630, 2019 WL 2065921 (Haw. May 10, 2019) (vacating PUC decision approving power purchase agreement that involved construction and operation of a biomass-fueled energy production facility, because the agency violated Life of the Land's property interest in a clean and healthful environment when it failed to consider reduction of greenhouse gas emissions as required under HRS §269-6(b)).

[147] *See generally*, David M. Forman & Susan K. Serrano, *Traditional and Customary Access and Gathering Rights*, *in* NATIVE HAWAIIAN LAW TREATISE, *supra* note 94, at 779–822; *see also* Forman & Serrano, *supra*, at 784–86 (citing, *inter alia*, *PASH/Kohanaiki*, 79 Hawai'i 425, 445–47, 903 P.2d 1246, 1266–68 (1995), regarding preservation of Native Hawaiian customs and traditions consistent with then-applicable constitutional mandates during the period when private property rights were developed in these islands); Forman & Serrano, *supra*, at 796 nn.147–48 (citing *PASH/Kohanaiki*, 79 Hawai'i at 437 n.21, 903 P.2d at 1258 n.21, which traced the "Hawaiian usage" statute now codified at HRS section 1-1, back to the 1847 law creating an independent Judiciary for the Kingdom of Hawaii).

[148] HAW. CONST. art. XII, § 7.

Hawai'i Supreme Court issued the first of two decisions involving a proposed Thirty Meter Telescope ("TMT") on Mauna Kea (also known as Mauna a Wākea, or Wākea's mountain),[149] located at the top of the state's largest island, Hawai'i (known also as the "Big Island"). In *Mauna Kea Anaina Hou v. Board of Land and Natural Resources (Mauna Kea I)*,[150] the court held for the first time that article XII, section 7 and constitutional due process obligated the agency to allow Native Hawaiian practitioners to participate as intervenors in an administrative hearing involving whether a conservation area district use ("CDU") permit should be granted that would authorize construction of the proposed telescope.[151] The court vacated the CDU permit and remanded the matter back to the agency for further proceedings, because a decision by the State of Hawai'i Board of Land and Natural Resources ("BLNR") to grant the permit subject to a later hearing on the practitioners' petition to intervene put "the cart before the horse[.]"[152]

The agency appointed a new hearing officer who admitted multiple intervenors into the proceeding on the still-pending CDU application, and the board eventually agreed (by a vote of 5-2) to adopt the hearing officer's recommended decision and order granting the permit.[153] *Mauna Kea II* relied on the plain language of article XI, section 1, to hold that conservation district lands held by the State (including the summit area of Mauna Kea) are held in trust, which requires "a balancing between the requirements of conservation and protection of public natural resources, on the one hand, and the development and utilization of these resources on the other [hand] in a manner consistent with their conservation."[154] The court acknowledged its previous decision in *Waiāhole I* upholding "the exercise of Native Hawaiian

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[149] *See* Melody Kapilialoha MacKenzie, *Historical Background*, *in* NATIVE HAWAIIAN LAW TREATISE, *supra* note 94, at 6 (discussing the cultural importance of Wākea, as the sky-father); Melody Kapilialoha MacKenzie and Wayne Chung Tanaka, *Papahānamokuākea: The Northwestern Hawaiian Islands*, *in* NATIVE HAWAIIAN LAW TREATISE, *supra* note 94, at 699 (same); MacKenzie, *Religious Freedom*, *supra* note 104, at 860 (same); Baldauf, *supra* note 104, at 912 (same).

[150] 136 Hawai'i 376, 363 P.3d 224 (2015).

[151] *Id.* at 390, 363 P.3d at 238. In an earlier CDU permit proceeding involving a proposed telescope at the top of Haleakalā, Maui, only concurring Justices Acoba and Pollack acknowledged that such a substantive due process right existed under article XII, section 7. Kilakila 'O Haleakala v. Bd. of Land & Nat. Res., 131 Hawai'i 193, 206, 317 P.3d 27, 40 (2013) (Acoba, J., concurring).

[152] *Mauna Kea I*, 136 Hawai'i at 381, 363 P.3d at 229.

[153] *In re* Conservation Dist. Use Application HA-3568 (*Mauna Kea II*), 143 Hawai'i 379, 387, 431 P.3d 752, 760 (2018).

[154] *Id.* at 400, 431 P.3d at 773; *see also id.* at 401, 431 P.3d at 774 (noting the presumption in favor of public access, use and enjoyment under *Waiāhole I*, 94 Hawai'i 97, 142, 9 P.3d 409, 454 (2000)).

traditional and customary rights as a public trust purpose."[155] However, the court concluded that the BLNR met its obligation as a trustee because "there was no actual evidence of use of the TMT Observatory site and Access Way area by Native Hawaiian practitioners"[156] and, in any event, Native Hawaiians would be included among those enriched by resulting scientific discoveries along with a community benefits package.[157] In reaching this conclusion, the court dropped a footnote observing that it would "not wholesale adopt our precedent setting out public trust principles as applied to the state water resources trust [under *Waiāhole I*] and its progeny. Rather the dimensions of this trust remain to be further demarcated."[158]

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[155] *Id.* at 402, 431 P.3d at 775 (citing *Waiāhole I*, 94 Hawaii at 137, 9 P.3d at 449). *See also Kukui (Molokai), Inc.*, 116 Hawai'i at 507–09, 174 P.3d at 468.

[156] *Mauna Kea II*, 143 Hawai'i at 402, 431 P.3d at 775. Petitioners-Appellants Mauna Kea Anaina Hou and Kealoha Pisciotta, Clarence Kukauakahi Ching, Flores-Case 'Ohana, Deborah J. Ward, Paul K. Neves, and KAHEA: The Hawaiian Environmental Alliance filed a Motion for Reconsideration, which the Court granted in part by deleting footnote 15 from the original version of its decision (issued October 30, 2018), and substantially modifying a second footnote. Order Granting in Part and Denying in Part Motion for Reconsideration, Mauna Kea II, 143 Hawai'i 379, 431 P.3d 752 (2018) (No. SCOT-17-0000777), *available at* https://www.courts.state.hi.us/wp-content/uploads/2018/11/SCOT-17-0000777reconpg.pdf. These issues deserve careful further inquiry; however, such matters lie outside the scope of this particular article.

[157] *Mauna Kea II*, 143 Hawai'i at 402, 431 P.3d at 775. Whether or not the court's conclusion adequately considered the principle of indigenous self-determination also deserves careful analysis by scholars, practitioners, and others. *See, e.g.*, Timothy Hurley, *Thirty Meter Telescope Construction Will Proceed on Mauna Kea, Gov. Ige Says*, HONOLULU STAR-ADVERTISER, June 20, 2019, https://www.staradvertiser.com/2019/06/20/breaking-news/gov-ige-says-state-has-issued-a-notice-to-proceed-for-construction-of-thirty-meter-telescope-on-mauna-kea/ (reporting that the "highly controversial" project "has been given the green light to proceed with construction . . . sometime this summer"; adding that the announcement followed "an early morning operation by state law enforcement officers to remove . . . two Native Hawaiian altars located in the mountain's northern plateau, the planned site of the telescope[,] . . . including ceremonial platforms for placing flowers, sacred water and other offerings during prayer" utilizing "about 20 state vehicles . . . on the eve of solstice ceremonies" while blocking the road to the summit and refusing to allow Hawaiians to go pray at the summit); *id.* (adding that "[t]elescope parts have been built in California and partner countries while construction on Mauna Kea was halted"); *id.* (quoting a native Hawaiian activist as saying "It's a sad day in Hawaii [sic]. . . . If they're going to move forward on this project, then we are going to have conflict up on the Mauna. There's no question about it"); *see also supra* note 100 ("what I think it means to really care for and see a place as family . . . [is] you would lay your life down for that place").

[158] *Id.* at 401 n.24, 431 P.3d at 774 n.24 (citations omitted). On the day of this Pluricourts/UH Law Review symposium, Justice Michael Wilson filed a stinging dissent (later amended on November 30, 2018), which accused the BLNR of applying the newly-coined "degradation principle" to conclude that "the cumulative negative impacts from development of prior telescopes caused a substantial adverse impact; therefore, TMT could not be the cause of a substantial adverse impact." Amended Dissenting Opinion by Wilson, J., Mauna Kea II,

According to retired Hawai'i Supreme Court Associate Justice Simeon R. Acoba, Jr.:

> Over the last two decades, the Hawai'i Constitution's mandate for protection of natural resources and water resources, aligned with the right to a clean and healthy environment, has been of increasing social importance and has resulted in judicial oversight of public and private actions involving the environment that is likely to continue into the future.[159]

Justice Acoba concludes his article by noting both the court's "leading role among other jurisdictions" as well as the prospects for the development of public trust and environmental rights to provide "pathways for the future of the judicial system and the state."[160]

A similarly pathbreaking decision currently on appeal before the Hawai'i Supreme Court holds that the state's public trust duties include the obligation to *mālama 'āina*, or care for the land.[161] This case again involved the BLNR, which authorized United States military training exercises (including live ammunition and explosive ordinance) on public trust lands in an area of the Big Island called Pōhakuloa, provided that the Army "make every reasonable effort to . . . remove or deactivate all live or blank ammunition upon completion of a training exercise or prior to entry by the said public, whichever is sooner[,]" and to "remove or bury all trash, garbage or other waste materials[.]"[162] Two Native Hawaiian practitioners filed a declaratory

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143 Hawai'i 379, 431 P.3d 752 (2018) (No. SCOT-17-0000777), *available at* https://www.courts.state.hi.us/wp-content/uploads/2018/11/SCOT-17-0000777disam.pdf.

[159] Simeon R. Acoba, Jr., *Four Major Hawai'i Judicial Developments in the Last 50 Years*, 23 HAWAII B.J. 11 (2019).

[160] *Id.*

[161] Findings of Fact, Conclusions of Law and Order, Ching v. Case, No. 14-1-1085-04 GWBC (Haw. 1st Cir. Apr. 3, 2018) [Ching v. Case Order], *available at* https://www.slideshare.net/civilbeat/dlnr-nhlc-pohakuloa-ruling. The Hawai'i Supreme Court held oral argument in the case on May 16, 2019. Hawaii State Judiciary, Oral Argument Before the Hawaii Supreme Court-No. SCAP-18-0000432, *available at* https://www.courts.state.hi.us/courts/oral_arguments/archive/oral-argument-before-the-hawaii-supreme-court-no-scap-18-0000432 (scroll down and click on the link "Listen to the entire audio recording in mp3 format"). Two earlier attempts by practitioners unsuccessfully sought to establish a traditional and customary Native Hawaiian right to *mālama 'āina* in the context of defending against criminal trespass charges. *See* State v. Pratt, 127 Hawai'i 206, 277 P.3d 300 (2012); State v. Hanapi, 89 Hawai'i 177, 970 P.2d 485 (1998).

[162] Ching v. Case Order, *supra* note 161, at 6–7. During May 16, 2019 oral arguments before the Hawai'i Supreme Court, counsel for the practitioners argued that BLNR had ample reason to doubt assurances provided by the military about its purported clean-up efforts based on past experiences on the island of Kaho'olawe, as well as Lualualei and Makua on the island of O'ahu. *See, e.g.*, Hawai'i State Judiciary, Oral argument before the [Hawai'i] Supreme Court, https://www.courts.state.hi.us/courts/oral_arguments/archive/oral-argument-before-

judgment action over the state agency's failure to adequately care for trust resources at the expense of future generations.[163] Professor D. Kapua'ala Sproat observes that Judge Chang's ruling:

> [D]istinguished the State's *duty* to *mālama 'āina* the subject lands from the Plaintiffs' *ability* to *mālama 'āina* the lands as cultural practitioners—for whom the *'āina* is of "crucial importance" as the foundation of cultural and spiritual identity, as well as part of their *'ohana*, "central" to their existence, and reflecting their *kuleana* as stewards of the land.[164]

As Professor Sproat explains further:

> This duty to *mālama* is also firmly grounded in Native Hawaiian custom and tradition, which is an important background principle of property law in Hawai'i [since elevated to the status of independent constitutional mandates]. *Kanaka Maoli* scholar and professor Dr. Lilikalā Kame'eleihiwa describes the *kuleana* to *mālama* as the first lesson of Wākea. This reference to the Kumulipo, the great chant of cosmos that ties *Maoli* to the creation of life in Hawai'i, describes Native Hawaiians' inherent responsibility to respect and care for our elder sibling, the *kalo* plant, and in turn, all natural and cultural resources. By recognizing and upholding this cultural duty to *mālama*, Judge Chang illuminated the vital role of *Kānaka Maoli* custom and traditions as both a core value and a foundation for our current legal regime, especially in the context of the ceded lands and public trusts.[165]

Nevertheless, "on the ground in our communities, local decisionmakers have regularly turned a blind eye to their *kuleana*—as they did in Pōhakuloa—leaving enforcement to citizen groups and, eventually, the courts."[166]

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the-hawaii-supreme-court-no-scap-18-0000432 (scroll down and click on "Listen to the entire audio recording in mp3 format") (last accessed June 22, 2019).

[163] D. Kapua'ala Sproat, *The First Lesson of Wākea:* Ching v. Case *and the Duty to Mālama 'Āina*, KA HULI AO CTR. FOR EXCELLENCE IN NATIVE HAWAIIAN L. (Sept. 18, 2018), http://blog.hawaii.edu/kahuliao/ka-moae/fall-2018/directors-column/. Note, once again, the reference to Wākea, the sky-father. *See supra* notes 85, 104 & 149.

[164] *The First Lesson of Wākea*, *supra* note 163 (citing Ching v. Case Order, *supra* note 161, at 24–26).

[165] *Id.* Professor Sproat's understanding of these issues represents significantly more than an academic interest. She and her father David Sproat (*see supra* note 59 and accompanying text) are descendants of the *konohiki* who served Kalihiwai, where Professor Sproat's parents raised her and still live; in addition, Professor frequently returns to Kalihiwai with her children to facilitate the passing on of this ancestral knowledge to the next generation.

[166] *Id.*

V. CONCLUSION.

Increasing recognition of the value inherent in IEK—which often includes deeply held beliefs about the need for intergenerational equity—provides a promising vehicle for protecting environmental commons. By enforcing intergenerational rights, domestic courts are building upon the strong foundation that already exists for applying the intergenerational equity framework as a general principle of international law, in order to better protect environmental commons around the world. This Article shares three case studies from the Hawaiian Islands to illustrate just a few of the diverse ways that the intergenerational equity framework has already operationalized IEK in this jurisdiction. The cultural and legal foundations that support these initiatives share characteristics with distant relatives throughout the world, which make up a web of environmental constitutionalism at national, sub-national, and super-subnational levels that can only strengthen the intergenerational equity framework.

Like the Maori tribe in New Zealand that adopted its modified version of Kamehameha School's five-value framework for evaluating proposed projects based on considerations beyond economic values,[167] or the Canadian provinces that enacted legislation recognizing environmental rights following the failure of efforts to advance environmental constitutionalism at the federal level,[168] sub-national entities can help advance global efforts to instantiate environmental rights for the benefit of present and future generations. Their success will depend at least in part, of course, upon judicial enforcement of environmental constitutionalism. The recently established Global Judicial Institute for the Environment,[169] as well as the prospect of a Global Pact for the Environment[170] and efforts to promote a Draft International Covenant on the Human Right to the Environment,[171] along with a proposed Universal Declaration on the Rights and Duties of Humankind,[172] are all welcome developments that could help pave the way for more explicit recognition of the important role that indigenous peoples can and should play in decision-making processes involving environmental commons.

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[167] *See supra* note 99 and accompanying text.

[168] *See supra* note 49 and accompanying text (citing BOYD, *supra* note 49).

[169] *See supra* note 52 and accompanying text.

[170] *See supra* note 53 and accompanying text.

[171] *See, e.g.*, Prieur, *supra* note 54.

[172] *See supra* note 55 and accompanying text.

This Symposium *On the Role of International Courts in Protecting Environmental Commons* brought people together[173] in a manner that brings to light important lessons from the historic Mālama Honua Worldwide Voyage, along with efforts to construct the first modern canoe made as much as possible from native materials.[174] Byron Mallott (one of the Native Alaskans who assisted with the project) wrote to Polynesian Voyaging President Nainoa Thompson: "In your canoe you carry all of us who share your vision and aspiration for a people to live and prosper with their future firmly built on the knowledge of their heritage and tradition."[175] Similar thanks are owed to Dr. Christina Voigt for having the vision to bring together an amazing group of scholars, so that we could all embark upon a desperately needed journey. This journey must continue to expand across "Island Earth" and invite additional voices to lend us their wisdom, so that we can pass along this canoe to future generations better able to live sustainably together as fellow stewards of our planet.

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[173] *See supra* note 10 and accompanying text (quoting Low, *supra* note 10).

[174] *See supra* notes 6–10 and accompanying text.

[175] Low, *supra* note 10. Byron Mallott is the former CEO of Sealaska Corporation, a Native institution whose core Native values "represent the rich heritage of the Tinglit, Haida and Tsimshian people." *Who We Are*, SEALASKA, https://www.sealaska.com/who-we-are (last visited Apr. 24, 2019).

International Adjudication and the Commons

Margaret A. Young*

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I. INTRODUCTION

The historic idea of the commons has animated a broad range of scholars within and across many disciplines, while providing a powerful suggestion of a shared enterprise and a productive past in international law.[1] Popularized by biologist Garrett Hardin's metaphor of an open pasture doomed to overgrazing by free-riding cattle herders, the commons was depicted as holding a remorseless logic towards the over-exploitation of any space or place that was not privatized or centrally planned.[2] This "tragedy" was refuted by empirical examples of small-scale fisheries, forests, and irrigation offered by Elinor Ostrom.[3] She showed the institutional frameworks that

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[1] *See* Case Concerning the Gabčikovo-Nagymaros Project (Hungary/Slovakia), Judgment, 1997 I.C.J. Rep. 7, 88, 110 (Sept. 25) (Separate Opinion of Vice-President Weeramantry) (noting that '[n]atural resources are not individually, but collectively, owned, and a principle of their use is that they should be used for the maximum service of people; *see also* United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 (entrenching the 'common heritage of mankind' concept).

[2] *See generally* Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243 (1968).

[3] *See generally* ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF

existed to support endurable common pool resources, which included rule enforcement and the appropriators' access to sanctions.[4] Ostrom's empirical engagements were with natural resources used collectively by certain groupings, never across state boundaries,[5] thus, although she emphasized governance through rules and enforcement, the translation of her work to international law is not a ready one.

The central question of this Article—what, if anything, does international adjudication have to do with the commons?—brings the concept of sharing and use of ownerless or commonly-held places or things to the context of dispute settlement between countries. As will already be clear, posing this question requires more than a few intellectual leaps. First, it draws attention to the scope and definition of the commons, which in pre-industrialization times comprised a manageable circle of users of a shared pasture or lake, but which then extended to air and flowing streams so as to include an unknowable circle of those affected.[6] Recent times have confirmed that action in one place can not only trigger harm in another place, but it can also be difficult to predict and have global, long-lasting consequences. Whether the concept of the commons can withstand not only a massive extension of scale, but more fundamentally a change of identity of the user (from human to nation-state), is an important question for international lawyers,[7] especially given the commons-crushing enterprise at the origins of international law.[8]

A second leap required to arrive at this Article's central question relates to the character and function of relevant dispute settlement bodies. This moves the focus of analysis from the decentralized and bounded community-based institutions that provide for rule enforcement within a commons, including through the imposition of graduated sanctions that Elinor Ostrom identified as necessary to secure endurability,[9] into a set of international courts and tribunals that are variously limited in both jurisdiction and remedies. How the international judicial function can mediate the immediate need for dispute settlement between states with the broader interests of a global community

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INSTITUTIONS FOR COLLECTIVE ACTION (Cambridge Univ. Press 1990).

[4] *Id.* at 100-101.

[5] *See id.* 26.

[6] JOACHIM RADKAU, NATURE AND POWER: A GLOBAL HISTORY OF THE ENVIRONMENT, 205 (Thomas Dunlap trans., 2008).

[7] *See* PHILIP ALLOTT, EUNOMIA: NEW ORDER FOR A NEW WORLD 309 (2d ed. 2001) (explaining the detriment to the notion of international community caused by the legal powers of states).

[8] Olivier De Schutter, *From Eroding to Enabling the Commons: The Dual Movement in International Law*, *in* THE COMMONS AND A NEW GLOBAL GOVERNANCE 231 (Samuel Cogolati & Jan Wouters eds., 2018); *see also* ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW 13–31 (2004).

[9] OSTROM, *supra* note 3, at 90.

remains an ongoing quest within the discipline.[10] Indeed, treaty regimes are generally regarded as the primary venues for "collective concern" law making in international law, where norms are agreed under negotiation rather than identified through adjudication.[11] A third leap – or perhaps sidestep – relates to the property arrangements underpinning resources within a commons. The central question of this Article may seem to downplay the preoccupation of many about such arrangements—because the adjudication of disputes between states may be wholly separate or at least agnostic about the public or private models of ownership that operate within the borders of the litigating parties—but makes much more central the issue of production and consumption within globalized trade. Analogizing the organic, decentralized practices of small-scale endeavors to the artificial, state-led institutions that comprise public international law serves as a demanding intellectual exercise but also as a reminder not only of the limitations of metaphors, but also of disciplinary foundations.

This Article does not aspire to provide a new definition of the commons that suits the fraught fundamentals of sovereignty and consent in international law. Rather, it endorses the view that warns against confusing "commons" and "global commons," with the former used to emphasize self-government by small groups that actively manage collective resources, and the latter describing areas of open access that are often unmanaged.[12] Indeed, on whether an issue arises "in the commons," Oran Young observed that "the appropriate framing of problems involving human-environment interactions can and often will be at least as much a function of prevailing sociopolitical conditions as it is a matter of the characteristics of the biophysical systems involved."[13] Thus, while some spaces and places may be suggestive of open access areas, and the high seas, atmosphere, and polar regions are generally

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[10] James Crawford, *Responsibility, Fraternity, and Sustainability in International Law*, 52 CAN. YEARB. INT. LAW 1–34 (2015); G.I. Hernandez, *A Reluctant Guardian: The International Court of Justice and the Concept of "International Community"*, 83 BRIT. Y.B. INT'L L. 13–60 (2013); James Crawford, *Responsibility to the International Community as a Whole*, 8 IND. J. GLOBAL LEGAL STUD. 303 (2001).

[11] Jutta Brunnée, *Common Areas, Common Heritage, and Common Concern, in* THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 550, 572 (Daniel Bodansky et al. eds. 2008).

[12] Samuel Cogolati & Jan Wouters, *Introduction: Democratic, Institutional and Legal Implications of the Commons for Global Governance*, *in* THE COMMONS AND A NEW GLOBAL GOVERNANCE 1, 7 (Samuel Cogolati & Jan Wouters eds., 2018); *see* Vito De Lucia, *The Concept of Commons and Marine Genetic Resources in Areas Beyond National Jurisdiction*, 5 MAR. SAFETY & SECURITY L.J. 1, 7–8 (2018).

[13] Oran Young, *Land Use, Environmental Change, and Sustainable Development: The Role of Institutional Diagnostics*, 5 INT'L J. COMMONS 66, 76 (2011).

accepted "global commons"[14] one must be aware of the contexts of these labels as well as their effects. This is particularly so with the blurring of local, transboundary or global issues through trade measures that respond to problems faced by the natural environment in territories outside the importing state.[15]

Instead of grasping for a concept of the commons to suit public international law, this Article makes clearer the intellectual leaps that are required through an engagement with international disputes. It determines whether commons-type scenarios can be discerned in existing case-law of international courts and tribunals, and examines how the commons was advanced or negated. To do this, the Article chooses cases from three different international tribunals—the International Court of Justice ("ICJ"), the International Tribunal for the Law of the Sea ("ITLOS"), and the World Trade Organization Appellate Body ("WTO")—in order to seek a cross-cutting overview of contemporary international judicial bodies. It takes a contentious or advisory proceeding from each of these three bodies that, by virtue of its subject matter, can be framed according to the accepted characteristics endorsed in literature on the commons. Although ideas from economic theory such as common pool resources and global public goods are dominant in these framings, this Article also draws from associated literature on the commons, from political science, anthropology, law, and behavioral science. In its analysis of international disputes, this Article acknowledges that although different disciplinary offerings are disparate in aims and methods,[16] their interest in issues of endurability and sustainability often converges.

In selecting the cases for study, this Article does not depend on the framing offered by the litigants or the courts themselves, as the language of "the commons" is almost invisible in the case-law.[17] Instead, it selects

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[14] *E.g.*, XUE HANQIN, TRANSBOUNDARY DAMAGE IN INTERNATIONAL LAW 6 (2003).

[15] Margaret A. Young, *Trade Measures to Address Environmental Concerns in Faraway Places: Jurisdictional Issues*, 23 REV. EUR. COMP. & INT'L ENVTL. L. 302, 310 (2014).

[16] *See generally* Surabhi Ranganathan, *Global Commons*, 27 EUR. J. INT'L L. 693 (2016) (discussing the need to be upfront about the disciplinary biases with which one approaches commons scenarios).

[17] For a rare exception, see Case Concerning the Gabčíkovo-Nagymoros Project (Hung./Slovk.), Separate Opinion of Vice-President Weeramantry, 1997 I.C.J. Rep. 88, 110 (Sept. 25). In a Separate Opinion, Judge Weeramantry calls for international law to:

> [T]ake account of the perspectives and principles of traditional systems . . . with reference to specific principles, concepts, and aspirational standards.
>
> . . .
>
> Land is to be respected as having a vitality of its own and being integrally linked to the welfare of the community. When it is used by humans, every opportunity should be afforded to it to replenish itself.

characteristics of common pool resources, such as whether they are prone to rival or excludable uses and the related concept of global public goods, to demonstrate how international courts have adjudicated on the goods or places that may be said to belong to the commons. By bringing attention to these cases, this Article points to the capacity of international courts to engage in the ideals and ideas of the commons, which may develop in ways that refute the prescriptions for tragedy that have been apparent in the literature.

Part II of this Article thus outlines five different cases from international courts and tribunals, beginning with a tabular summary of these international cases as categorized according to economic theories relating to the commons. It explains how international adjudicators have made orders relating to the exploitation by states of southern bluefin tuna and deep seabed minerals, and argues that the subject of these disputes may be characterized as common pool resources.[18] It also shows how whales, sea turtles, and freedom from the threat of nuclear weapons have led to inter-state judicial settlement of what may be described as global public goods.[19] While these five cases constitute a very limited set of fact scenarios, the way in which they may be framed offers a series of provocations for notions of community interest in international law. Procedural aspects of the disputes are then analyzed in Part III. Institutional features such as rules on jurisdiction and standing differ across the selected tribunals and can either constrain or facilitate the ability of them to adjudicate. Part IV considers some of the substantive principles

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. . .

Natural resources are not individually, but collectively, owned, and a principle of their use is that they should be used for the maximum service of people.

Id. at 110. A separate point, which is outside the scope of this Article, relates to the languages used to evoke the language of the commons. *See* Vijaya Nagarajan, *On the Multiple Languages of the Commons*, 21 WORLDVIEWS GLOBAL RELIGIONS, CULTURE & ECOLOGY (2017).

[18] *See generally* Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Request for Advisory Opinion Submitted to the Seabed Disputes Chamber), Case No. 17, Advisory Opinion of Feb. 1, 2011, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/17_adv_op_010211_en.pdf [hereinafter *Deep Seabed Mining* Advisory Opinion]; Southern Bluefin Tuna Cases (N.Z. v. Japan; Austl. v. Japan), Case Nos. 3 and 4, Order of Aug. 27, 1999, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_3_4/published/C34-O-27_aug_99.pdf.

[19] *See generally* Whaling in the Antarctic (Austl. v. Japan: N.Z. intervening), Judgment, 2014 I.C.J. Rep. 226 (Mar. 31), https://www.icj-cij.org/files/case-related/148/148-20140331-JUD-01-00-EN.pdf; Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226 (July 8); Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996 I.C.J. Rep. 66 (July 8); Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *Import Prohibition of Certain Shrimp*].

evoked in the cases, including the precautionary principle, duties of due diligence, and principles of inter-generational equity. Though limited in scope, this discussion helps situate the constitutive role played by the courts. In the context of the selected cases, the Article thus brings to the fore the social, cultural, and economic conditions that have been at play in international litigation over commons-type scenarios, and reflects upon whether the tribunals were well-equipped to deal with them.

II. FRAMING OF "THE COMMONS" IN SELECTED CASES

International adjudication has resolved conflicts or provided opinions on the sharing and utilization of resources by states at least since the United States and the United Kingdom agreed to an arbitration over fur seals in the Bering Sea in 1893.[20] This Article focusses, however, on three courts and tribunals established in the post-war era: the ICJ,[21] ITLOS and the WTO.[22] The disputes selected for analysis in this Article involve southern bluefin tuna, sea turtle bycatch, deep seabed mining, whales, and the public good of living without the threat of nuclear weapons.[23] While arbitration continues to provide a forum for similar disputes (including under UNCLOS), these more ad hoc arrangements are outside the Article's scope..

Whether the selected cases involve the concept of the commons is admittedly open to debate. Instead of arguing this point by establishing and relying upon a universalized concept of the commons, this Article endorses the view that the concept in international law contains "terminological

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[20] Award between the United States and the United Kingdom Relating to the Rights of Jurisdiction of United States in the Bering's Sea and the Preservation of Fur Seals (U.S. v. U.K), XXVIII R.I.A.A. 263 (Perm. Ct. Arb. 1893). Russia, which has transferred fisheries rights after the handover of Alaska, was not a party.

[21] The ICJ, also known as the World Court, was founded after World War II to replace the Permanent Court of International Justice. *History*, INTERNATIONAL COURT OF JUSTICE, https://www.icj-cij.org/en/history (last visited May 21, 2019).

[22] *The Tribunal*, INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA, https://www.itlos.org/en/the-tribunal/ (last visited May 21, 2019); *Appellate Body*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm (last visited May 21, 2019).

[23] *See supra* notes 19–20. The aim is to concentrate on these cases, rather than canvas the wide range of international disputes involving natural resources. *See, e.g.*, Case Concerning the Gabčikovo-Nagymaros Project (Hung./Slovk.), Judgment, 1997 I.C.J. Rep. 7 (Sept. 25); Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J. Rep. 14 (Apr. 20); Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicar.), Judgment, 2018 I.C.J. Rep. 665 (Dec. 16); Construction of a Road in Costa Rica along the San Juan River (Nicar. v. Costa Rica), Judgment, 2015 I.C.J. Rep. 665 (Dec. 16); South China Sea Arbitration Award (Phil. v. China), 2013–19 (Perm. Ct. Arb. 2016). Some of the norms and principles that emerge from such jurisprudence are noted throughout the Article.

ambiguities and semantic slippages[.]"[24] The idea of the commons arguably depends upon a small scale and specific historic context and is open to interpretation based on its subject and objects. If Hardin's focus had shifted from the common pasture to the herders' arrangements for private property in their cattle, a wholly different prescription may have emerged.[25] In addition, the accompanying arrangements for private property should be recognized as themselves contingent upon and subject to the law; it is not inevitable, for example, that private property will be adjudicated as solely serving private ownership.[26]

As mentioned above, rather than seeking to defend a universalized conception of the commons, this Article considers scenarios that have characteristics that are ascribed to the commons in the relevant literature. Central to this is the concept of "common pool resources." Although Elinor Ostrom called her book *Governing the Commons,* it was really common pool resources that were her focus, which has been influential in the legal discourse.[27] An associated characterization, "global public goods," is another economic concept that is increasingly taken up in international law.[28] These concepts are described in this Part by reference to characteristics of the selected international disputes. Although at a more abstract level, international adjudication itself might constitute a global public good, or a mechanism which produces such goods,[29] this Article provides a framing for a limited number of cases, as summarized in Table 1.

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[24] *See* De Lucia, *supra* note 12, at 3.

[25] *See* David Harvey, *The Future of the Commons*, 109 RADICAL HIST. REV. 101, 104 (2011).

[26] For a recent account, see generally Ben France-Hudson, *Surprisingly Social: Private Property and Environmental Management*, 29 J. ENVTL. L. 101 (2017).

[27] *See* Carol M. Rose, *Ostrom and the Lawyers: The Impact of Governing the Commons on the American Legal Academy*, 5 INT'L J. COMMONS 28, 29 (2011); Nicholas A. Robinson, *The Charter of the Forest: Evolving Human Rights in Nature*, PACE L. FAC. PUBLICATIONS 1, 4–5 (2017), https://digitalcommons.pace.edu/lawfaculty/1075/.

[28] J. Samuel Barkin & Yuliya Rashchupkina, *Public Goods, Common Pool Resources, and International Law*, 111 AM. J. INT'L L. 376, 376 (2017). *See generally* Fabrizio Cafaggi & David D. Caron, *Global Public Goods Amidst a Plurality of Legal Orders: A Symposium*, 23 EUR. J. INT'L L. 643 (2012); Daniel Bodansky, *What's in a Concept? Global Public Goods, International Law, and Legitimacy*, 23 EUR. J. INT'L L. 651 (2012).

[29] Joshua Paine, *International Adjudication as a Global Public Good?*, 29 EUR. J. INT'L L. 1223–49 (2018).

	ICJ		ITLOS		WTO	
	Contentious case	Advisory Opinion	Contentious case	Advisory Opinion	Contentious case (Appellate Body)	(no advisory jurisdiction)
Short title	*Whaling* (2014)[30]	*Nuclear Weapons (UNGA Request)* (1996)	*Southern Bluefin Tuna (Prov measures)* (1999)[31]	*The Area* (2011)[32]	*U.S.-Shrimp* (1998)[33]	-
Characterization according to economic theory	Global public good / common pool resource (whale)	Global public good (freedom from threat of nuclear weapons)	Common pool resource (southern bluefin tuna)	Common pool resource (deep seabed minerals)	Global public good (sea turtles threatened as bycatch by shrimp harvesting)	

Table 1: Selected international cases and the characteristics of the goods according to economic theory

A. Common Pool Resources

Economic analysis develops from the questions of whether the use of a good diminishes its availability for others, and whether such use can be excluded. Common pool resources are assessed as rival in consumption (i.e., use of the good will reduce the ability of another party to use it) and non-excludable (i.e., others cannot be excluded from the use of the good).[34] A common pool resource differs from a "public good" because though both are non-excludable, the public good is non-rival in consumption (i.e., its consumption by one individual does not reduce its availability for other individuals).[35] Bodansky points to high seas fisheries as an example of a

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[30] *See generally* Whaling in the Antarctic (Austl. v. Japan: N.Z. intervening), Judgment, 2014 I.C.J. Rep. 226 (Mar. 31).

[31] Southern Bluefin Tuna Cases (N.Z. v. Japan; Austl. v. Japan), Case Nos. 3 and 4, Order of Aug. 27, 1999, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_3_4/published/C34-O-27_aug_99.pdf.

[32] *Deep Seabed Mining* Advisory Opinion, *supra* note 18.

[33] *Import Prohibition of Certain Shrimp*, *supra* note 19.

[34] *See generally* Inge Kaul, Donald Blondin & Neva Nahtigal, *Review Article: Understanding Global Public Goods: Where We Are and Where to Next, in* GLOBAL PUBLIC GOODS (Inge Kaul ed., 2016).

[35] *Id.*

common pool resource, and national defense as a public good.[36] Inversely, the "club good" is non-rivalrous but may be excludable (Bodansky invokes cable television signals as an example),[37] while a private good is both rivalrous and excludable.

The southern bluefin tuna, which has been the subject of much litigation between states, conforms to the accepted definition of a common pool resource. Located in an open access environment of the high seas and therefore non-excludable, the southern bluefin tuna was at risk of over-exploitation by rival fishers from Japan, Australia and New Zealand in 1999.[38] ITLOS was called upon to grant provisional measures in a dispute between these countries, which required interpretation of provisions in the United Nations Convention on the Law of the Sea ("UNCLOS") relating to the high seas and highly migratory species.[39] After the granting of provisional measures, an ad hoc tribunal subsequently found it did not have jurisdiction to hear the dispute on account of a highly controversial interpretation of UNCLOS.[40]

Australia and New Zealand's case rested on Japan's alleged over-fishing of southern bluefin tuna, where quotas established by the three states according to the relevant fisheries agreement[41] were being exceeded.[42] This scenario signals an important differentiating feature in literature on the commons, namely, what is done with the shared resource. Some would assert that the historic notion of the commons depended on the production of goods for use, rather than production for exchange.[43] By contrast, the common pool resource of the southern bluefin tuna has long been commodified and traded by states.[44] The high seas fisheries organizations overseeing fishing from

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[36] Bodansky, *supra* note 28, 652–53.

[37] *Id.* at 653.

[38] Leah Sturtz, *Southern Bluefin Tuna Case: Australia and New Zealand v. Japan*, 28 ECOLOGY L.Q. 455, 458–59, 468–70 (2001) (discussing the facts and surrounding context for the dispute).

[39] *Id.* at 459; *see* Southern Bluefin Tuna Cases (N.Z. v. Japan; Austl. v. Japan), Case Nos. 3 and 4, Order of Aug. 27, 1999, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_3_4/published/C34-O-27_aug_99.pdf.

[40] Southern Bluefin Tuna (Austl. & N.Z. v. Japan), Award on Jurisdiction and Admissibility, 23 R.I.A.A. 1, ¶ 65 (Arb. Trib. 2000).

[41] Convention for the Conservation of Southern Bluefin Tuna, Austl.-Japan-N.Z., May 10, 1993, 1819 U.N.T.S. 360 [hereinafter CCSBT].

[42] *Souther Bluefin Tuna*, 23 R.I.A.A. at ¶¶ 21–34.

[43] Ugo Mattei, *The Ecology of International Law: Towards an International Legal System in Tune with Nature and Community?*, *in* THE COMMONS AND A NEW GLOBAL GOVERNANCE 212 (2018).

[44] For separate examples, see STEFANO B. LONGO, REBECCA CLAUSEN & BRETT CLARK, THE TRAGEDY OF THE COMMODITY: OCEANS, FISHERIES, AND AQUACULTURE 63–105 (2015) (discussing the commodification and over-fishing of bluefin tuna in the Mediterranean).

multiple states, such as the Commission for the Conservation of Southern Bluefin Tuna established by Australia, New Zealand, and Japan, are at times criticized as forums for extracting profit under a metric of "maximum sustainable yield," especially at the expense of outsiders.[45] Whether such rationalist appropriation for exchange leads to endurability in environmental terms is open to question, due to both the susceptibility of collapse of the fish population (which in itself prompted the litigation) and the interests of other fishers and other states (but also of other species and of the ecosystem itself). To digress from the case for a moment, it can be noted that high seas fisheries organizations are undergoing an evolution in their approaches, with newer governing principles emphasizing the ecosystem rather than management of specific species,[46] and with rights of participation of newer entrants proving to be hotly sought.[47] Moreover, human rights principles are beginning to emerge as central to the management of fisheries resources. The use of quotas, for example, gave way to models of collective rights within some fisheries communities.[48] The United Nations Special Rapporteur for the Right to Food reported to the General Assembly in 2012 that "[o]nly by linking fisheries management to the broader improvement of the economic and social rights of fishers, in a multisectoral approach that acknowledges how fishing fits into the broader social and economic fabric, can progress be made towards robust and sustainable solutions."[49] While further comments on the ITLOS case are provided below, these observations point to a tension between the concept of common pool resources and the need for the southern bluefin tuna to continue to exist within an ecosystem.

Another example of international litigation over purported common-pool resources can be found in the area of the deep seabed (the "Area")[50] that is

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[45] For a brief introduction to Regional Fisheries Management Organizations (RFMOs), see MARGARET A. YOUNG, TRADING FISH, SAVING FISH: THE INTERACTION BETWEEN REGIMES IN INTERNATIONAL LAW 34–46 (Cambridge University Press, 2011).

[46] *See* Adriana Fabra & Virginia Gascón, *The Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR) and the Ecosystem Approach*, 23 INT'L J. MARINE AND COASTAL L. 567, 571 (2008) (discussing that the ecosystem approach to high seas fishery management "incorporates ecosystem considerations into the regulation of fishing activities, in recognition that traditional single-species management approaches have failed in meeting ecological, social and economic objectives.").

[47] *See* Erik J. Molenaar, *Participation in Regional Fisheries Management Organizations*, *in* STRENGTHENING INTERNATIONAL FISHERIES LAW IN AN ERA OF CHANGING OCEANS 103 (Richard Caddell & Erik J. Molenaar eds., 2019).

[48] De Schutter, *supra* note 8, at 251–52.

[49] Olivier De Schutter (Special Rapporteur on the Right to Food), *The Right to Food*, ¶ 59, U.N. Doc. A/67/268 (Aug. 8, 2012).

[50] UNCLOS coined the term the "Area" to describe "the sea-bed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction[.]" U.N. Convention on the Law of the Sea, art. 1, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force

located beyond the limits of national jurisdiction.[51] The Area is non-excludable but the minerals that it contains could be depleted by largescale mining. The Area could be characterized as a "common pool resource" but has been conceived legally with the somewhat different notion of "common heritage of mankind."[52] The emphasis on underlying distributional and cultural concepts as well as "use" resonates with conceptions of the commons outside the economics literature. For example, drawing on the history of the enclosures in medieval England, Peter Linebaugh emphasizes that the notion of the "commons" combines both resources *and* people.[53] The commons is thus not a thing, but a relationship, and the resultant activities can be expressed through the verb commoning.[54] Given the aspirations of developing countries that were part of UNCLOS's negotiations,[55] a verb of "global commoning" could have started to enter the lexicon, though in the deep seabed context, it undoubtably would have depended on access to technology and resources. Instead, as has been explored in detail, the subsequent implementing agreement transformed the issue into a far more instrumentalist one.[56] Perhaps unsurprisingly, no notion of "global commoning" can be deduced from the International Tribunal for the Law of the Sea in its advisory opinion.[57] Before discussing that case in further detail, it is useful to consider how common pool resources have been reconceived in ways more akin to "global public goods."

B. Global Public Goods

Whales might be seen to be a common pool resource if one still viewed them as items for consumption. The 1946 Convention agreed to "make possible the orderly development of the whaling industry."[58] But at least by

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Nov. 16, 1994) [hereinafter *UNCLOS*].

[51] *See generally Deep Seabed Mining* Advisory Opinion, *supra* note 18.

[52] *See UNCLOS*, *supra* note 50, art. 136 ("The Area and its resources are the common heritage of mankind.").

[53] *See* PETER LINEBAUGH, THE MAGNA CARTA MANIFESTO: LIBERTIES AND COMMONS FOR ALL 103 (2008).

[54] *See id.* ("The allure of commoning arises from the mutualism of shared resources. Everything is used, nothing is wasted. Reciprocity, sense of self, willingness to argue, long memory, collective celebration, and mutual aid are traits of the commoner.").

[55] For a history of such negotiations, see Ranganathan, *supra* note 18, at 711–14. *See also* SURABHI RANGANATHAN, STRATEGICALLY CREATED TREATY CONFLICTS AND THE POLITICS OF INTERNATIONAL LAW (Cambridge University Press 2014).

[56] *See generally* Martti Koskenniemi & Marja Lehto, *The Privilege of Universality: International Law, Economic Ideology and Seabed Resources*, 65 NORDIC J. INT'L L. 533 (1996).

[57] *See Deep Seabed Mining* Advisory Opinion, *supra* note 18; *but see infra*, note 172.

[58] International Convention for the Regulation of Whaling, pmbl., Dec. 2, 1946, 161

1982, when the moratorium on commercial whaling was agreed by states, the intrinsic value of whales as an iconic species may be said to have gained ascendancy. The value of whales held by societies continues to be expressed by states under the auspices of the International Whaling Commission through resolutions, for example, restricting the use of lethal methods for purposes of scientific research.[59] This value is not diminished by the abstract enjoyment of increasing numbers of people, nor can it be excluded; therefore whales may be placed in the category of global public goods.[60] Such a conception is facilitated by other developments in public international law, including the establishment of the "international community as a whole" as a recipient of legal obligations.[61] Whether whales could be defined according to these notions was a question that came before the International Court of Justice in 2014.[62] As is described further in the next Part, the Court was asked to consider possible violations of the International Convention for the Regulation of Whaling (hereinafter the "Whaling Convention") by Japan in its killing of whales ostensibly for scientific purposes.[63]

Sea turtles might once have been a common pool resource for some, but again, the species can now be considered as a global public good given the recognition of its value for biodiversity (and the fact that it is exploitable to extinction) evidenced by instruments such as the Convention on the International Trade in Endangered Species ("CITES").[64] Science plays a key role in this conception, especially in determining the characteristic of rival consumption, because we largely understand the diminishing of a resource through observation and experiment with the physical and natural world. The

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U.N.T.S. 74.

[59] *See* Whaling in the Antarctic (Austl. v. Japan: N.Z. intervening), Judgment, 2014 I.C.J. Rep. 226, ¶ 35 (Mar. 31), https://www.icj-cij.org/files/case-related/148/148-20140331-JUD-01-00-EN.pdf (discussing the resolutions).

[60] *See, e.g.*, André Nollkaemper, *International Adjudication of Global Public Goods: The Intersection of Substance and Procedure*, 23 EUR. J. INT'L L. 769 (2012).

[61] Int'l Law Comm'n, Rep. to the General Assembly, Articles on Responsibility of States for Internationally Wrongful Acts U.N. Doc. A/56/10, at 126 (2001) [hereinafter *ILC Articles on State Responsibility*].

[62] *See* Whaling in the Antarctic (Austl. v. Japan: N.Z. intervening), Judgment, 2014 I.C.J. Rep. 226 (Mar. 31), https://www.icj-cij.org/files/case-related/148/148-20140331-JUD-01-00-EN.pdf.

[63] *See id.* at 246, ¶ 42.

[64] *See generally* Convention on International Trade in Endangered Species of Wild Fauna and Flora, *opened for signature* Mar. 3, 1973, 993 U.N.T.S. 243. Note that van Aaken considers CITES to transform common pool resources into club goods, due to the way in which trade is restricted to those who have the required customs documentation. Anne van Aaken, *Behavioral Aspects of the International Law of Global Public Goods and Common Pool Resources*, 112 AM. J. INT'L L. 67, 77 (2018). Instead, I am focusing on the complete prohibition in trade of Annex I species, which includes sea turtles.

Appellate Body of the World Trade Organization drew on the treaty listing of sea turtles when it accepted that avoiding turtle bycatch in faraway places was an appropriate goal for a unilateral trade measure.[65] Although the United States failed to convince the Appellate Body that its import ban had been implemented in a non-discriminatory way, and thus lost the case, economists support this outcome as usefully requiring that the wealthy actor—the United States—sit down with four developing countries to determine the appropriate compensation to help finance global turtle protection.[66] The Appellate Body thus denied the individualist approach of the United States, which had required importing states to use a particular turtle excluder device in fishing methods.[67] Whether and how local discrimination can support global public goods continues to be an important conversation,[68] as is the place of third party adjudication in overseeing such approaches.

C. Club Goods or Private Goods

The notion of global public goods moves to "club goods" in the economics literature when a non-excludable good becomes excludable.[69] International security, which every country can be said to seek and enjoy without reducing available security to all (non-rival), may become the preserve of a club (excludable); indeed, the Security Council has been conceived in these terms, given it will have the final say on what constitutes a threat to international security.[70] But when asked about the legality of nuclear weapons for its 1996 Advisory Opinion, the ICJ did not address the issues in these terms, preferring instead to extend the club to global, even limitless, proportions, and using notions of inter-generational equity and humanity, as is discussed below.[71] While the inclusion of the *Nuclear Weapons* advisory opinion may seem out of place alongside the other cases involving the oceans (and Ostrom herself left out of her study situations in which participants could produce major external harm for others),[72] this Article points to analogies with the

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[65] *See generally* YOUNG, *supra* note 45, at 189–240.

[66] JAGDISH BHAGWATI, THE WIND OF THE HUNDRED DAYS: HOW WASHINGTON MISMANAGED GLOBALIZATION 100 (2002).

[67] YOUNG, *supra* note 45, 192–193.

[68] *See* Timothy Meyer, *How Local Discrimination Can Promote Global Public Goods*, 95 B.U. L. REV. 1937 (2015).

[69] *See supra* note 34 and accompanying text.

[70] *See* Barkin & Rashchupkina, *supra* note 28, at 392 ("In the case of international security, those states able and willing to spend most on military capabilities will have the greatest say over what constitutes a threat to international security.").

[71] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226 (July 8).

[72] OSTROM, *supra* note 3, at 26.

other cases, such as the related question of whether the conduct of nuclear weapons tests "might be contrary to international law on the ground that it causes radioactive contamination of the environment of a third State or of the *global commons*."[73]

"Private goods" are both excludable and non-rival, and usually secured through property rights. Ostrom rejected Hardin's prescription that property rights would best safeguard the commons.[74] Ostrom's examples were small scale, where "various members of communities enjoy complicated and overlapping entitlements – entitlements that are well understood and respected in local norms, but that are often far too sensitive and complex to alienate to strangers, except at great peril to the entire community management structure []."[75] Carol Rose has commented on the attractiveness of these arrangements in terms of "commitment, sustainability and stability."[76] Yet Rose points to the attractiveness of the opposing forms (especially of property ownership and alienability) that underlie modern property law: "the quick movement of resources into valuable uses, the refreshing openness to all comers, the encouragement to change and innovation."[77] The parallels with modern sovereignty are beguiling and deserving of engaged study, to which this Article seeks to make a modest contribution.

In some of the literature, the Law of the Sea Convention is said to have made much of the oceans into private goods, given the extension of the concept of exclusive economic zone ("EEZ") and the reduction of the open access area of the high seas.[78] While this might be true from the perspective of coastal states, it shows the malleability of the relevant concepts. An area within an EEZ may well be thought of as a club good when access rights are awarded to a foreign state for a fee, as is often done by coastal developing countries.[79] Declarations of "marine protected areas" within EEZs, which often prohibit fishing activity in efforts to protect biodiversity and the ecosystem, establish private goods that are in theory policed by the coastal state, but from the internal domestic perspective, these are commons that are

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[73] For Australia's oral submission to the ICJ in *Legality of Nuclear Weapons*, see *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. Oral Statements (Oct. 30, 1995), https://www.icj-cij.org/files/case-related/95/095-19951030-ORA-01-00-BI.pdf (the public sitting was held at 10 a.m. at the Peace Palace).

[74] OSTROM, *supra* note 3, 12–18.

[75] Rose, *supra* note 27, at 34–35.

[76] *Id.* at 35.

[77] *Id.*

[78] Barkin & Rashchupkina, *supra* note 28, at 387.

[79] *See* Margaret A. Young, *A Quiet Revolution: The Exclusivity of Exclusive Economic Zones*, *in* TRAVERSING DIVIDES: HONOURING DEBORAH CASS'S CONTRIBUTION TO PUBLIC AND INTERNATIONAL LAW (K. Rubenstein ed., ANU Press, forthcoming 2019) (on file with author).

owned by no one individual. This reinforces the point made by Samuel Cogolati and Jan Wouters, who call attention to the distinction between "open access, one the one hand, and self-government by a limited number of users actively involved in the management of the commons, on the other."[80] Given the variances in compulsory and consensual jurisdiction at the international level, these differences in conceptions can affect whether state users of a resource can bring challenges against another state.[81] Such jurisdictional vagaries are explored further in Part III, but regardless of the economic conception of the EEZ, the law assesses coastal states as holding obligations as well as sovereign rights.[82]

D. Other Conceptions of the Commons

The preceding discussion in this Part sought to apply established economic notions to goods that have been litigated internationally. Of itself, this establishes that international courts have and do adjudicate disputes over the commons, as understood at least by applications of economic theory. Yet, this is not to say that tribunals have depended upon economic concepts or methods in characterizing the disputes, nor that such methods would have been appropriate. Moreover, other conceptions of the commons advanced outside of economic theory are relevant to the selected cases.

At the risk of caricature, it might be said that the "commons" literature divides according to two premises. On the one hand, a hard-nosed, self-interested rationality when dealing with others leads to "tragedy" of open access resources unless privatized or centrally planned (Hardin) or self-governed with evolving institutions (Ostrom).[83] On the other hand, a communal orientation emphasizing practices of sharing, ritual, and empathy underpinning diverse sets of relationships is explored in historical and anthropological literature.[84] The latter set of ideas can be gleaned not just

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[80] Cogolati & Wouters, *supra* note 12, at 7.

[81] For example, see Chagos Marine Protected Area (Mauritius v. U.K) 31 R.I.A.A 359, 416–18 (Perm. Ct. Arb. 2015) when Mauritius sought to challenge the proclamation of a marine protected area in the neighboring British Indian Ocean Territory, it emphasized the United Kingdom's expansive aims of biodiversity and coral reef preservation. These aims, which went well beyond fisheries management, rendered the dispute susceptible to compulsory jurisdiction under the terms of the Law of the Sea Convention. *See id.* at 441–522 (discussing the Tribunal's jurisdiction).

[82] *See* Young, *supra* note 79; see also Tullio Scovazzi, *'Due Regard' Obligations, with Particular Emphasis on Fisheries in the Exclusive Economic Zone*, 34 INT'L J. MARINE & COAST. L. 56 (2019).

[83] *See* Hardin, *supra* note 2; OSTROM, *supra* note 3.

[84] *See* LINEBAUGH, *supra* note 53; *see also* Marc Brightman & Jerome Lewis, *Introduction: The Anthropology of Sustainability, in* THE ANTHROPOLOGY OF SUSTAINABILITY:

from the commons in medieval Europe but from accounts of the earth-centered beliefs and practices of indigenous peoples, and the recognition that paths to sustainability depend on human and non-human species.[85] International law may begin to recognize such rationalities through developments such as the Declaration on the Rights of Indigenous Peoples,[86] the Paris Agreement's reference to "Mother Earth,"[87] and concepts of animal rights.[88] In another example, the Food and Agriculture Organization has published voluntary guidelines relating to food security, which recognize that "there are publicly-owned land, fisheries, and forests that are collectively used and managed (in some national contexts referred to as commons)[.]"[89]

In the cases considered in this Article, none of these conceptions of the commons were advanced by the parties or featured in the reasoning of the majority. In the *Whaling* case, for example, neither the parties nor the Court invoked the concept of the commons, either in common pool resource, public good terms, or in the more spatial idea of global commons associated with whales' migration routes through multiple jurisdictions and the high seas.[90] Yet, there was a collective foundation to how the case was brought: Australia invoked Japan's responsibility *erga omnes partes* under the Convention, seeking to uphold compliance, "an interest it shares with all other parties."[91]

BEYOND DEVELOPMENT AND PROGRESS 1–34 (Marc Brightman & Jerome Lewis eds., 2017).

[85] *See, e.g.*, Anna Tsing, *A Threat to Holocene Resurgence Is a Threat to Livability, in* THE ANTHROPOLOGY OF SUSTAINABILITY: BEYOND DEVELOPMENT AND PROGRESS 51–65 (Marc Brightman & Jerome Lewis eds., 2017); Mattei, *supra* note 44, at 223 (elaborating on the commons and other-than-humans).

[86] *See* G.A. Res. 61/295, annex, Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007).

[87] *See* Paris Agreement, pmbl., Dec. 12, 2015, A.T.S. 24, 27 U.N.T.S. 7d. ("*Noting* the importance of ensuring the integrity of all ecosystems, including oceans, and the protection of biodiversity, recognized by some cultures as Mother Earth, and noting the importance for some of the concept of 'climate justice', when taking action to address climate change").

[88] *See* Alexander Gillespie, *Animals Ethics and International Law, in* ANIMAL LAW IN AUSTRALASIA 333 (Peter Sankoff & Steven White eds., 2009) (discussing international law and animal rights).

[89] Comm. on World Food Sec., *Voluntary Guidelines on the Responsible Governance of Tenure Land, Fisheries, and Forests in the Context of National Food Security*, at 12 (2012).

[90] *See* Whaling in the Antarctic (Austl. v. Japan; N.Z. intervening), Judgment, 2014 I.C.J. Rep. 226 (Mar. 31), https://www.icj-cij.org/files/case-related/148/148-20140331-JUD-01-00-EN.pdf. Others have described whales as the global commons. *See, e.g.*, Nico Schrijver, *Managing the Global Commons: Common Good or Common Sink?*, 37 THIRD WORLD Q. 1252, 1253 (2016).

[91] *See* Christian J. Tams, *Roads Not Taken, Opportunities Missed: Procedural and Jurisdictional Questions Sidestepped in the Whaling Judgment, in* WHALING IN THE ANTARCTIC: SIGNIFICANCE AND IMPLICATIONS OF THE ICJ JUDGMENT 193, 206 (Malgosia Fitzmaurice & Dai Tamada eds., 2016); *see also* James Crawford, *Responsibility for Breaches of Communitarian Norms: An Appraisal of Article 48 of the ILC Articles on Responsibility of*

I discuss this aspect of standing later, but some other aspects of the framing of the case are pertinent to note. The graphic photos of dead or dying whales in Australia's submission, though not given specific commentary, seem intended to generate a sense of common empathy with these marine mammals.[92] One could tie this to Christopher Stone's early call for standing for non-human species.[93] Acknowledging that whaling could be considered as causing harm to aggrieved and sympathetic humans, he instead famously called for a procedure to allow a court-appointed guardian who could be asked "how the whales view whaling."[94] By submitting a photograph of a Japanese whaler holding a rifle at a defenseless and bleeding whale, the Court was implicitly invited to reflect upon this very question.[95]

In ruling that the lethal whaling was a violation of the Whaling Convention (because it did not fall within the exception from the prohibition on whaling for scientific purposes), the Court found that Japan had a duty to give due regard to the work of the International Whaling Commission even if it did not vote in favor of its resolutions.[96] While by no means an endorsement of notions of common concern,[97] this ruling may be said to be an implicit rejection of a rationalist account of exploitation of the commons and instead supports an assessment of a reciprocal and ongoing set of social and legal practices surrounding whale protection.[98]

The possibility of alternative conceptions is of course apparent from my earlier observation that the courts do not seek to frame the disputes in terms of the commons. This possibility also enables me to reject the argument that has appeared in recent literature that global commons issues are best

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States for Internationally Wrongful Acts, *in* FROM BILATERALISM TO COMMUNITY INTEREST: ESSAYS IN HONOUR OF JUDGE BRUNO SIMMA 224, 236 (Ulrich Fastenrath et al. eds., 2011).

[92] *Whaling in the Antartic*, 2014 I.C.J Memorial of Australia (May 9, 2011), https://www.icj-cij.org/files/case-related/148/17382.pdf, at 96-103 [hereinafter Memorial of Australia].

[93] *See generally* Christopher D. Stone, Should Trees Have Standing?: Law, Morality, and the Environment (3d ed. 2010).

[94] CHRISTOPHER D. STONE, SHOULD TREES HAVE STANDING?: LAW, MORALITY, AND THE ENVIRONMENT 176 (3d ed. 2010); *see also* Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 SOUTHERN CAL. L. REV. 450 (1972).

[95] Memorial of Australia, *supra* note 102, at 98. Japan also included photographs in their submissions, which were pictures of scientific laboratories testing specimens of whale earplugs and muscles. *See Whaling in the Antarctic*, 2014 I.C.J. Counter-Memorial of Japan, at 171, 177 (Mar. 9, 2012), https://www.icj-cij.org/files/case-related/148/17384.pdf.

[96] *Whaling in the Antarctic*, 2014 I.C.J Rep. 226, at ¶¶ 83, 137.

[97] Such endorsement appeared in a Separate opinion by Judge Cançado Trindade. *See id.* at 348 (separate opinion of Judge Cançado Trindade).

[98] Japan's recent indication of its withdrawal from the IWC does of course remind one of the mutability of the 'international community as a whole' in various settings, a point I return to later.

characterized as common pool resources.[99] On the contrary, the cases generate a richer understanding than mere resource allocation and use. In addition to Whaling, the due diligence obligations that were invoked for southern bluefin tuna fishing and deep seabed mining are worthy of attention, as is discussed below. The World Trade Organization accepted that avoiding turtle bycatch in faraway places was an appropriate goal for a unilateral trade measure, and the International Court of Justice evoked humanity's shared history and obligations to the future unborn in the *Nuclear Weapons* Advisory Opinion.[100] By giving expression to the idea of an "international community as a whole[,]" which now features in the International Law Commission's ("ILC") articles on state responsibility, the tribunals allowed for an interpretation of state behavior that depended on mutual and ongoing rights and obligations. This leads to the discussion of procedure and substance in the following Parts.

III. LEGAL PROCESS BEFORE INTERNATIONAL COURTS

Having established the multiple framings evident in my selected cases, I wish now to consider some of the procedural features that affected how the cases came to be before the relevant international courts and tribunals. Most prominent are questions of standing and jurisdiction. The courts analyzed in this Article are forums in which the parties are states, acting on their own or together under the auspices of an international organization requesting an advisory opinion. Non-state actors are rarely permitted to participate. Moreover, the ability of affected states to seek to enforce rules of international law is most often curtailed by the need to obtain consent of the respondent state. Procedures differ across the ICJ, ITLOS, and WTO, as this Part explains.

A. Jurisdiction

In her small-scale, decentralized examples, Ostrom showed that mechanisms were available to stakeholders to resolve conflicts among appropriators of common pool resources and to ensure endurability.[101] In inter-state dispute settlement, constituting a forum is more difficult. Even if states consent to the jurisdiction of the ICJ through the optional clause procedure, they may make reservations or withdraw their acceptance of the

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[99] *See* Barkin & Rashchupkina, *supra* note 27, at 383.

[100] *Import Prohibition of Certain Shrimp*, *supra* note 19, at 51. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226 (July 8).

[101] OSTROM, *supra* note 3, at 100–01.

Court's jurisdiction.[102] After losing the *Whaling* case, Japan altered its optional clause declaration to ensure that it will never again be a respondent in a whaling dispute.

Even for tribunals with compulsory jurisdiction (the WTO[103] and, to a lesser extent, ITLOS), there are legal constraints on whether and how the courts can engage with commons-type issues. For the global public good of protecting an endangered species like sea turtles, for example, the acceptability of a country imposing unilateral trade measures may depend upon the ability of that country to establish a public rather than self-serving national interest. In *U.S.-Shrimp*, it was argued that the United States could not impose trade measures for the protection of sea turtles, because it lacked the jurisdictional nexus to regulate a good that was located outside of its territory.[104] The Appellate Body did not accept this argument and noted instead that there was a sufficient nexus between the sea turtles and the importing country given that waters subject to American jurisdiction were traversed by the migratory animals.[105] As previously argued, states' justifications to impose trade measures of this kind are advanced not just by the need to conserve exhaustible natural resources (as considered in *U.S.-Shrimp*), but also by their ability to take measures "necessary to protect public morals" and by the acceptance that public morality encompasses concern about faraway places.[106] This is the point at which "global commons" as an idea becomes mixed with "common concern." A wide range of environmental problems, which are exacerbated by global supply and trade, require a philosophical extension from the original commons idea of a small, closed circle of users; trade panels, the Appellate Body, and other international courts must grapple with this, not only with respect to their own jurisdiction, but also with respect to the limitations on extraterritorial action that is foundational to international law.

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[102] *See* Statute of the International Court of Justice, art. 36, https://www.icj-cij.org/en/statute (providing that states may, but are not required to, submit to the compulsory jurisdiction of the ICJ) [hereinafter Statute of the I.C.J.]; *ILC Articles on State Responsibility*, *supra* note 61, at 178.

[103] Although the jurisdiction of the Appellate Body to hear appeals is soon to be thwarted by the U.S. veto on appointments. *See generally* Ernst-Ulrich Petersmann, *How Should WTO Members React to Their WTO Crisis?*, WORLD TRADE REV., 1–23 (2019).

[104] *Import Prohibition of Certain Shrimp*, *supra* note 19. This built on earlier successful claims. *E.g.*, Panel Report, *United States – Restrictions on Imports of Tuna*, WTO Doc. WT/DS29/R (adopted June 16, 1994); *see generally* Young, *supra* note 15.

[105] *Import Prohibition of Certain Shrimp*, *supra* note 19, at 51.

[106] Young, *supra* note 15, at 310–12. Noting especially, Appellate Body Report, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc. WT/DS401/AB/R (May 22, 2014).

The jurisdictional hurdles confronting states over the southern bluefin tuna also show that enforcing rules between states over common pool resources is constrained and heavily dependent on whether states have consented to compulsory third-party settlement. ITLOS awarded provisional measures in the case brought by Australia and New Zealand against Japan, but when the case came to the merits, the subsequent ad hoc tribunal found that it did not have jurisdiction to hear the claim.[107] The second tribunal interpreted UNCLOS as requiring parties to prioritize dispute settlement through their own regional arrangements (which were consensual under the terms of the relevant regional treaty),[108] rather than relying on compulsory dispute settlement under the general treaty.[109] This decision was met with criticism, as it left the substantive questions about conservation and management unresolved.[110]

The situation is different for advisory opinions of international courts, which as mentioned in Part II may be used to resolve legal questions relating to common pool resources (like the deep seabed) or global public goods (like freedom from the threat of nuclear weapons), but which are not binding on states. Advisory opinions do not depend on the consent of litigant states, although the jurisdictional requirements are not trivial and it may well be possible for states to establish that an opinion is outside the competence of the court.[111] This occurred when the World Health Organization ("WHO") requested an opinion on the legality of the use by a state of nuclear weapons in armed conflict; the ICJ refused to deliver an opinion because it found that the request was not properly within the powers of the WHO.[112] In the alternative, the General Assembly launched a request for an opinion on the legality of the threat or use of nuclear weapons, which was considered to fall within the scope of *its* activities and thus validly made.[113] The high stakes of

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[107] *See generally* Southern Bluefin Tuna (Austl. & N.Z. v. Japan), Award on Jurisdiction and Admissibility, 23 R.I.A.A. 1 (Arb. Trib. 2000).

[108] CCSBT, *supra* note 41.

[109] Southern Bluefin Tuna Cases (N.Z. v. Japan; Austl. v. Japan), Case Nos. 3 and 4, Order of Aug. 27, 1999, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_3_4/published/C34-O-27_aug_99.pdf; *see also* Bernard H. Oxman, *Complementary Agreements and Compulsory Jurisdiction*, 95 AM. J. INT'L L. 277–312 (2001).

[110] Natalie Klein, *Litigation over Marine Resources: Lessons for Law of the Sea, International Dispute Settlement and International Environmental Law*, 28 AUSTL. YEAR BOOK INT'L L. 131 (2009). *But see* Tim Stephens, *The Limits of International Adjudication in International Environmental Law: Another Perspective on the Southern Bluefin Tuna Case*, 19 INT'L J. MARINE COASTAL L. 177 (2004).

[111] Statute of the I.C.J, *supra* note 103, at art. 65.

[112] Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996 I.C.J. Rep. 66 (July 8).

[113] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226 (July 8); *see also* General Assembly Resolution, *infra* note 130.

advisory opinions is also reflected in the difficulties faced by countries in generating sufficient support for requests to be made, as is evident from the abandoned effort by the small island state of Palau to seek support at the General Assembly for a request for an advisory opinion on climate change responsibility.[114]

In the Advisory Opinion on Deep Seabed Mining, Nauru and Tonga successfully prompted the International Seabed Authority Council to ascertain the rights and duties of states, particularly developing countries, when they sponsor exploration of the minerals on the deep seabed.[115] The Seabed Disputes Chamber of ITLOS accepted its competence to engage with these legal questions which related expressly to the Area declared by UNCLOS to be part of the common heritage of mankind.[116] A later advisory opinion by ITLOS was delivered in spite of many objections to its jurisdiction, when it interpreted its own Statute as well as other relevant constitutive instruments to find that it had competence to make rulings on illegal, unreported and unregulated fishing.[117]

These jurisdictional aspects show that generalizations about international adjudication are difficult to make: much depends on the constitutive instruments of the relevant international tribunals as well as the substantive law. In particular, the advances in compulsory jurisdiction established by UNCLOS give more open conditions for the pursuit of common interests and ideals.[118] Before turning to related questions of standing for the international community, it is prudent to point to a strategic issue in the context of current legal developments: the ongoing negotiations on marine biodiversity beyond national jurisdiction, now before the United Nations, should seek to incorporate into the new rules the compulsory jurisdiction of UNCLOS.[119]

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[114] *See generally* Stuart Beck & Elizabeth Burleson, *Inside the System, Outside the Box: Palau's Pursuit of Climate Justice and Security at the United Nations*, 3 TRANSNATIONAL ENVTL. L. 17 (2014). I note, however, that the prospect of an advisory opinion request on climate obligations to the ICJ or ITLOS is increasingly anticipated. *See* Phillipe Sands, *Climate Change and the Rule of Law: Adjudicating the Future in International Law,* 28 J. OF ENVTL. L 19 (2016).

[115] *Deep Seabed Mining* Advisory Opinion, *supra* note 18, at 35.

[116] *Id.* at 15–18.

[117] Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission, Case No. 21, Advisory Opinion of Apr. 2, 2015, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/advisory_opinion_published/2015_21-advop-E.pdf.

[118] Philip Allott, *Mare Nostrum: A New International Law of the Sea*, 86 AM. J. INT'L L. 764 (1992).

[119] *See UNCLOS*, *supra* note 50, Part XV; *see also* Margaret A. Young & Andrew Friedman, *Biodiversity Beyond National Jurisdiction: Regimes and Their Interaction*, 112 AJIL UNBOUND 123 (2018).

B. Standing

Closely related to the question of jurisdiction of international courts and tribunals is the question of which bodies have standing to pursue their claims. For contentious cases like the litigation over southern bluefin tuna and whales, only states have standing to pursue claims.[120] The nature of their legal interest is also important. The traditional understanding is that dispute settlement can be invoked only by a state that has suffered identifiable injury as a result of a breach of an international legal obligation which is owed to that state.[121] Whether a right of *actio popularis* exists before international courts and tribunals is subject to some controversy.[122] However, this issue has evolved significantly with the ILC Articles on State Responsibility, which recognized in Article 48 the "international community as a whole" as a recipient of legal obligations.[123]

As mentioned above, the *Whaling* case was launched by Australia purely on the basis of its collective interest in Japan's treaty compliance, rather than on any harm that it specifically suffered.[124] This conception of public interest standing is in line with Article 48, though no express finding was made by the Court in this regard.[125] Article 48 was however endorsed by the Seabed Disputes Chamber of ITLOS in its Advisory Opinion on deep seabed mining in *The Area,* when it observed that party states may be entitled to claim compensation for breaches of UNCLOS "in light of the *erga omnes* character of the obligations relating to preservation of the environment of the high seas and in the Area."[126]

When voting upon its request for an advisory opinion on nuclear weapons, the UN General Assembly pointed to the "serious risks to humanity" posed

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[120] Statute of the I.C.J, *supra* note 102, at art. 35; Statute of the International Tribunal for the Law of the Sea, https://www.itlos.org/fileadmin/itlos/documents/basic_texts/statute_en.pdf [hereinafter Statute of ITLOS].

[121] This is itself subject to varying application. *E.g.*, Appellate Body Report, *European Communities – Regimes for the Importation, Sale and Distribution of Bananas (EC – Bananas III)*, WTO Doc. WT/DS27/AB/R (adopted September 9, 1997). The AB ruled that a Member is "largely self-regulating" when deciding whether the action it pursues is in its interests. *Id.* at ¶ 135.

[122] *See* Nuclear Tests Case (NZ v. Fr.), Joint Dissenting Opinion of Judges Onyeama, Dillard, Jiménez de Aréchga and Sir Humpherey Waldock, 1974 I.C.J. Rep. 494, 521 (Dec. 20); *see also* FARID AHMADOV, THE RIGHT OF *ACTIO POPULARIS* BEFORE INTERNATIONAL COURTS AND TRIBUNALS (2018).

[123] *ILC Articles on State Responsibility*, *supra* note 61, at 126.

[124] *See* Whaling in the Antarctic (Austl.v. Japan; N.Z. intervening), Judgment, 2014 I.C.J. Rep. 226 (Mar.31).

[125] Tams, *supra* note 90, at 193.

[126] *Deep Seabed Mining* Advisory Opinion, *supra* note 18, at ¶ 180.

by the continuing existence of nuclear weapons.[127] Though there was no opportunity for non-governmental organizations to formally participate in the proceedings, given the lack of *amicus* provisions in the ICJ Statute or rules, a strong social movement known as the "World Court Project" had exerted pressure on states to make the request, first under the auspices of the WTO, and then through a vote at the General Assembly.[128] Country submissions referred to interests beyond the national interest in invoking the Court's role as "guardian of the legal interests of succeeding generations."[129]

Both the *Whaling* case and *U.S.-Shrimp* were proceeded by domestic litigation brought by civil society actors, who were acting on behalf of the whales and sea turtles themselves.[130] This observation may fit with commons literature that emphasizes and endorses polycentricity, but it also suggests that international law lags behind domestic legal avenues for justice. The attitudes of international tribunals to non-governmental organizations is far from inclusive, and even the tribunals that have formally allowed for *amicus* briefs (the WTO and ITLOS) are slow to grant them rights to participate[131] or refer to them in decisions.[132] To properly evaluate whether collective or communal interests in a commons can be advanced by states requires deep engagement with the relevant dispute; for example, an assessment about Australia's motivation in pursuing the cases on southern bluefin tuna and whaling requires a close analysis of inter-state relations and attitudes.[133] At the very least, the motives of states in bringing cases on behalf of the environment seem to contradict rationalist accounts of statecraft that depict litigating parties as self-serving, warranting closer empirical work that would

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[127] G.A. Res. 49/75, U.N. Doc. A/RES/49/75, Part K (Dec. 15, 1994).

[128] Kate Dewes & Commander Robert Green, *The World Court Project: How a Citizen Network Can Influence the United Nations*, 7 PACIFICA REV.: PEACE, SEC. & GLOBAL CHANGE 2, 17–37 (1995); NICHOLAS GRIEF, THE WORLD COURT PROJECT ON NUCLEAR WEAPONS AND INTERNATIONAL LAW 53–58 (Aletheia, 2nd ed., 1993).

[129] *See e.g.*, *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. Oral Statements, at ¶32 (Oct. 30, 1995), https://www.icj-cij.org/files/case-related/95/095-19951030-ORA-01-00-BI.pdf.

[130] *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2008] FCA 3; Earth Island Institute v. Christopher, 913 F. Supp. 559 (Ct. Intl. Trade 1995).

[131] The *Deep Seabed* Advisory Opinion did not grant a request from Stichting Greenpeace Council (Greenpeace International) and the World Wide Fund for Nature to participate as *amici curiae*. *Deep Seabed Mining* Advisory Opinion, *supra* note 18, at ¶ 14.

[132] On the WTO, see YOUNG, supra note 45, at 220-224. On ITLOS, see generally *Deep Seabed Mining* Advisory Opinion, *supra* note 18.

[133] *See generally* Natalie Klein, *Whales and Tuna: The Past and Future of Litigation between Australia and Japan*, 21 GEO. INT'L ENVTL. L. REV. 143 (2008); Shirley V. Scott, *Litigation Versus Dispute Resolution Through Political Processes*, *in* LITIGATING INTERNATIONAL LAW DISPUTES: WEIGHING THE OPTIONS 24 (Natalie Klein ed., 2014).

be invaluable for behavioral accounts of the commons as well as for international law.[134]

IV. RULING UPON THE SUBSTANCE

As far as the international disputes considered in this Article have included commons-type scenarios, legal norms have been applied to issues of endurability. The five cases considered in this Article demonstrate important developments relating to rights *erga omnes,* the emerging customary norm of precaution,[135] duties of due diligence, and principles of inter-generational equity, although not all tribunals accept such rights uniformly. As there is not the space to review the role of international courts in developing these principles,[136] I will limit myself to a few observations about the substance of the relevant underlying obligations.

It is clear that tools exist for courts to apply collective or communitarian interests, but they face many constraints. In its 1996 Advisory Opinion, the Court agreed that nuclear weapons had the potential to "destroy all civilization and the entire ecosystem of the planet[,]" and used evocative language to demonstrate the grave risks for both humans and non-humans.[137] President Bedjaoui noted the "collective juridical conscience" that reflected the move towards an international community and away from international law's positivist, voluntarist foundations.[138] He continued, "[a]dded to the evolution of international society itself is progress in the technological sphere, which now makes possible the total and virtually instantaneous eradication of the human race."[139] Yet while the Court ruled that the threat or use of nuclear weapons "would generally be contrary to the rules of international law applicable in armed conflict," it refused to conclude definitively on the law in the context of an extreme circumstance of self-

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[134] *See generally* Margaret A. Young, Emma Nyhan & Hilary Charlesworth, *Studying Country-Specific Engagements with the International Court of Justice*, J. INT'L DISP. SETTLEMENT (2019) (forthcoming) (on file with author).

[135] "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation." *See e.g.*, Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/26, Principle 15 (Aug. 12, 1992).

[136] *See generally* TIM STEPHENS, INTERNATIONAL COURTS AND ENVIRONMENTAL PROTECTION (2009).

[137] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶ 35 (July 8).

[138] *Id.* at 271 (Declaration of President Bedjaoui).

[139] *Id.*

defense, "in which the very survival of a State would be at stake[.]"[140] In this instance, and by a narrow margin, the freedom of the nuclear weapon holding states prevailed over the freedom of non-nuclear weapon holding states. In contrast, writing in dissent, Judge Weeramantry drew on authorities that noted the *jus cogens* status of "rules which ensure to all members of the international community the enjoyment of certain common resources (high seas, outer space, etc.)." [141]

Since the ICJ's advisory opinion was delivered, the ILC has finalized its work on state responsibility, which includes Article 48 of the ILC Articles on State Responsibility recognizing the "international community as a whole" as a holder of interests.[142] Yet the cases show that the courts are deeply reserved about the use of this concept, leading some to ask whether the concept of *erga omnes* can bear all that it is asked of it.[143] The extension of rights to the international community might even be critiqued according to Koskenniemi's well-known depiction of the two poles of international legal argumentation, where any utopian concept is exposed as disconnected from state will (and where rebounding to realism is equally open to critique, as eschewing all normativity).[144] This dilemma confronted the Court in the most recent claim on nuclear weapons. In 2016, the Marshall Islands filed a case at the ICJ—this time, under its contentious, rather than advisory, jurisdiction—over alleged failures of the UK, India and Pakistan to comply with obligations of nuclear disarmament.[145] The case could be framed in commons terms: the elimination of national arsenals of nuclear weapons

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[140] *Id.* at 266 (Order 2.E; 7 votes to 7, by the President's casting vote).

[141] *Id.* at 496 (Weeramantry, J. dissenting) (citation omitted) (emphasis added).

[142] *ILC Articles on State Responsibility*, *supra* note 61, at 126.

[143] This question has been posed even by the Judge who would have ruled substantively on the legality of nuclear weapons. In the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, 216 (July 9), Judge Higgins in her Separate Opinion stated that the dictum "is frequently invoked for more than it can bear."

[144] *See generally* MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (2006). Separately, Koskenniemi supported the Court's *non liquet* in the Advisory Opinion. *See* Martti Koskenniemi, *The Silence of Law/The Voice of Justice, in* International Law, the International Court of Justice and Nuclear Weapons 488 (Laurence Boisson De Chazournes & Philippe Sands eds., 1999).

[145] *See* Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161. The Marshall Islands also filed applications against the other nuclear-weapons holding states (China, the Democratic People's Republic of Korea, France, India, Israel, Pakistan, the Russian Federation and the United States of America), but those states had not recognized the compulsory jurisdiction of the Court pursuant to the optional clause declaration and did not accept the jurisdiction in this case. *See* Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v U.K), Preliminary Objections, Judgment, 2016 I.C.J Rep. 833, ¶ 22 (Oct. 5).

safeguards against immediate and largescale destruction of shared areas. Indeed, *erga omnes* rights were discussed by some members of the bench. While the Marshall Islands was clearly concerned about nuclear weapons given its location for many years as a testing site, Judge Crawford also emphasized that "States can be parties to disputes about obligations in the performance of which they have no specific material interests."[146] A bare majority of the Court, however, rejected the case on jurisdictional grounds.[147]

This Article's inclusion of cases from three different tribunals makes clear that the relevant substantive law is not developing uniformly. For example, ITLOS found southern bluefin tuna to warrant precautionary measures and a precautionary approach,[148] and subsequent management procedures adopted by the Commission have combined these with considerations of the ecosystem as a whole.[149] With respect to deep seabed mining, the Tribunal also recognized that determining responsibilities and obligations for mining activities in the Area was not a narrow question of determining allocation and use under the principle of "common heritage of mankind."[150] The Tribunal endorsed the precautionary approach and a combined obligation of due diligence by states.[151] The precautionary approach was accepted by some ICJ judges, including, in the cases considered here, the *Whaling* case[152] and

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[146] *Id.* at 1093, 1102 ¶ 22 (Crawford, J. Dissenting).

[147] *Id.* at 856, ¶ 59 (voting 8:8, with President's casting vote, finding there was no justiciable dispute between the parties); *see also* Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. India), Judgment, 2016 I.C.J Rep. 256, 277 ¶ 56 (Oct. 5). For separate proceedings see also Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. Pak.), 2016 I.C.J. Rep. 552, 573 ¶ 56 (Oct. 5).

[148] Southern Bluefin Tuna Cases (N.Z. v. Japan; Austl. v. Japan), Case Nos. 3 and 4, Order of Aug. 27, 1999, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_3_4/published/C34-O-27_aug_99.pdf.

[149] "The Rules of Procedure shall also be amended to task the Scientific Committee to incorporate advice consistent with a precautionary approach:

Rule 8 B is (SCIENTIFIC ADVICE)

1. The Scientific Committee shall incorporate advice consistent with the precautionary approach in its advice to the Commission[.]

COMM'N FOR THE CONSERVATION OF SOUTHERN BLUEFIN TUNA, REPORT OF THE SEVENTEENTH ANNUAL MEETING OF THE COMMISSION 1, 7 (2010). "The meeting further agreed that the ESC in future shall be asked to consider how an ecosystem approach might be incorporated into its advice to the Commission." *Id.*

[150] *Deep Seabed Mining* Advisory Opinion, *supra* note 18, at ¶ 230 (the sponsoring state "must act in good faith, especially when its action is likely to affect prejudicially the interests of mankind as a whole.").

[151] *Id.* at ¶ 242..

[152] Whaling in the Antarctic (Austl. v. Japan: N.Z. intervening), Judgment, 2014 I.C.J. Rep. 226 (Mar. 31); *see id.* at 453 (Charlesworth, J. separate opinion); *id.* at 348 (Cançado Trindade, J. separate opinion).

in the *Nuclear Weapons* advisory opinion.[153] Yet precautionary principles are applied differently in WTO litigation due to different rules set out in the covered agreements; while this was not at issue in *U.S.-Shrimp,* cases relating to sanitary and phytosanitary measures have proved highly restrictive in their application of the concept.[154]

It is also important to point out the emerging norms that might have shaped the five cases, but did not. For example, the recognition of a new geological epoch of the Anthropocene, which emphasizes the irreversible and geologically-detectable human destruction of planetary systems, has led to calls for new legal protections within an "environmental" rule of law.[155] Posthumanist conceptions of environmental law incorporate the needs of nonhumans as well as humans with radical consequences for methodologies and subjects.[156] Rights for nature have been established in domestic legal systems, including in domestic constitutions,[157] and are debated in international forums.

I noted above that the *Whaling* case included implicit submissions to the Court to consider lethal techniques from the perspective of the whale.[158] This did not, however, lead to an "earth-centered point of view" in the Court's decision. To do so would have required a very different set of underlying rights than the Convention at issue. Indeed, in the reimagining of the case as part of the "Wild Law Judgment Project"[159] (a creative rewriting of

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[153] *See, e.g.*, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, 502 (July 8) (Weeramantry, J. dissenting). The approach is also endorsed in other cases before the ICJ. *See* Nagymaros Project (Hung./Slovk.), 1997 I.C.J. Rep. 7 (Sept. 25) (although not using this term); Pulp Mills on the River Uruguay (Arg. V. Uru.), 2010 I.C.J. Rep. 14 (Apr. 20).

[154] *See* Joanne Scott & Ellen Vos, *The Juridification of Uncertainty: Observations on the Ambivalence of the Precautionary Principle within the EU and the WTO, in* GOOD GOVERNANCE IN EUROPE'S INTEGRATED MARKET 253, 273 (Christian Joerges & Renaud Dehousse eds., 2002). On invocation by respondents rather than complainants, see Margaret A. Young, *Fragmentation, in* OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW (Lavanya Rajamani & Jacqueline Peels eds., 2nd ed. forthcoming) (on file with author).

[155] *See e.g.*, Louis J Kotzé, *Global Environmental Constitutionalism in the Anthropocene, in* ENVIRONMENTAL LAW AND GOVERNANCE FOR THE ANTHROPOCENE 189 (Louis J. Kotzé ed., 2017).

[156] Andreas Philippopoulos-Mihalopoulos, *Critical Environmental Law as Method in the Anthropocene, in* RESEARCH METHODS IN ENVIRONMENTAL LAW: A HANDBOOK 131 (Andreas Philippopoulos-Mihalopoulos & Victoria Brooks eds., 2017).

[157] DAVID R. BOYD, THE RIGHTS OF NATURE: A LEGAL REVOLUTION THAT COULD SAVE THE WORLD (2017); Louis J. Kotzé & Paola Villavicencio Calzadilla, *Somewhere between Rhetoric and Reality: Environmental Constitutionalism and the Rights of Nature in Ecuador*, TRANSNATIONAL ENVTL. L. 401 (2017); Erin O'Donnell, *At the Intersection of the Sacred and the Legal: Rights for Nature in Uttarakhand, India,* J. OF ENVTL. L. 135 (2018).

[158] *See supra* note 108 and accompanying text.

[159] WAKEFIELD PRESS, EXPLORING WILD LAW: THE PHILOSOPHY OF EARTH JURISPRUDENCE

judgments following an earlier approach within feminist legal studies), the authors set up a reframed Whaling Convention which not only included provisions for the court-appointed representation of whales, but also revoked all lethal whaling, including for scientific purposes.[160]

Instead, in the stated case before the ICJ, the Court dealt with the rights contained in the existing Convention and associated sources. The Court chose not to pronounce upon the parties' intentions *vis-à-vis* the original basis of the Convention, resting its decision instead on whether the design and implementation of Japan's scientific whaling activities were reasonable in relation to achieving its stated objectives.[161] In reviewing Japan's conduct, the Court drew upon Japan's duty to give due regard to resolutions of the International Whaling Commission relating to non-lethal scientific methods, notwithstanding that the resolutions were not binding *per se*.[162] The Court's findings with respect to Japan's duties to cooperate with its peers is highly suggestive of a commons-scenario where trust and reciprocal arrangements will develop over time through institutional structures and practices. Moreover, some of the differences of views of the bench are salutary for the invocation of economic notions of common pool resources. For example, in dissent, Judge Bennouna read in the Convention a spirit of "strengthening co-operation between States parties for the purposes of managing a shared resource"[163]—an instrumentalist attitude reminiscent of common pool resources. In contrast, judges in the majority focused on obligations to cooperate without imposing a purposive construction on their legal and institutional relationships.[164]

The majority in the *Whaling* decision did not rule upon whether whales were part of nature or part of natural resources.[165] Future advocacy could go much further in demonstrating to the Court 'how the whales view whaling', and these would not be isolated to species of iconic marine mammals.

(Peter Burdon ed., 2011); Nicole Rogers and Michelle Maloney, *Law as if Earth Really Mattered: The Wild Law Judgment Project* (2017).

[160] Hope Johnson, Bridget Lewis & Rowena Maguire, *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)*, *in* LAW AS IF EARTH REALLY MATTERED: THE WILD LAW JUDGMENT PROJECT 257–281 (Nicole Rogers & Michelle Maloney eds., 2017).

[161] Whaling in the Antarctic (Austl. v. Japan: N.Z. intervening), Judgment, 2014 I.C.J. Rep. 226, ¶ 227 (Mar. 31) (concluding "that the special permits granted by Japan for the killing, taking and treating of whales in . . . are not 'for purposes of scientific research' pursuant to Article VIII, paragraph 1, of the Convention.").

[162] *Id.* at ¶ 137. *See also* Margaret A. Young & Sebastián Rioseco Sullivan, *Evolution through the Duty to Cooperate: Implications of the Whaling Case at the International Court of Justice*, 16 MELBOURNE J. INT'L L. 1 (2015).

[163] *Whaling in the Antarctic*, 2014 I.C.J. at 347.

[164] *See generally id.*

[165] *See id.*

Emerging science is proving collaborative tendencies and practices in complex fish behavior and social cognition.[166] Indeed, if collaborative behavior can be observed in fisheries, it may be asked whether the southern bluefin tuna are participating in a (disrupted) commons of their own. Whether this knowledge could have been incorporated by ITLOS in *Southern Bluefin Tuna* lends itself to perhaps comical speculation. In a similar vein, if a reimagining of the *U.S.-Shrimp* case was to be penned, the customs and indeed cosmologies associated with sea turtles could find valid legal expression. Broader reflection on the biological tendencies for "mutual aid" among species, as observed over a century ago by Kropotkin, is outside the scope of this Article but opens promising lines of further legal and political inquiry.[167]

The capacity for mutual aid to be supported by law gives rise to further questions in the context of the disputes presented in this Article. One is whether the commons includes moral or ethical commitments to care for and help others.[168] Another relates to conditions for support and distribution, and the place of law to secure these. If the rights of turtles were determinative of the case of *US-Shrimp*, for example, where would this leave the fishers in developing countries that were unable to afford the patented turtle excluder device required for access to the market of the United States? Under conditions of globalization, where privileged and economically disadvantaged communities expect markets to provide the appropriate and quantifiable price for goods (whilst also serving to protect global public goods), there is a need not only for guaranteed judicial oversight, but to develop the background social and legal arrangements for endurability and fairness of the commons.

V. CONCLUSION

International adjudication of inter-state interests in southern bluefin tuna, whales, deep seabed mining, sea turtles, and nuclear weapons provide insights into both the metaphor of the commons and the foundations of public international law. The contentious cases and advisory opinions from three

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[166] *See e.g.*, Alexander L. Vail et al., *Fish Choose Appropriately When and With Whom to Collaborate*, 24 CURRENT BIOLOGY 791 (2014).

[167] PETER KROPOTKIN, MUTUAL AID: A FACTOR OF EVOLUTION (1902). The exploration of anarchist tendencies within a theory of international law is provocative and worthy of further inquiry. So too is the contextualization of Kropotkin's theory among contemporaneous events of the period. *See* Ruth Kinna, *Kropotkin's Theory of Mutual Aid in Historical Context*, 40 INT'L REV. SOC. HIST. 2, 259–83 (1995).

[168] *See* BORIS FRANKEL, FICTIONS OF SUSTAINABILITY: THE POLITICS OF GROWTH AND POST-CAPITALIST FUTURES 387 (2018).

different forums—the ICJ, ITLOS, and the WTO Appellate Body—show that scenarios akin to the commons are being placed before a range of different international courts and tribunals. Though categorizations such as common pool resources and global public goods are not invoked by the adjudicators, this Article has shown that the facts of selected cases are open to such a framing. Give that circumstances akin to the commons do confront international adjudicators, it has been important to investigate how their reasoning differs from a scholarly community that has invoked an inexorable logic to the "tragedy of the commons,"[169] or instead traced the management of common pool resources to decentralized institutions.[170]

The Article demonstrates how the common resources and interests that led to the selected litigation could be framed not only according to definitions adopted in the economics literatures, but also according to wider conceptions from anthropology, historical studies, and behavioral science. Indeed, some of the cases were less amenable to the rationalist assumptions of the economics literature and more understandable through the lens of reciprocity and repeated cooperative endeavors that were initially assumed away and that remain to be investigated empirically in the context of international law.[171] Decisions like *Whaling* demonstrate how international courts can elaborate and augment states' duty to cooperate; such a duty is essential for the international system to adapt to global ecological realities. Yet the cases discussed in this Article also complicate expectations for international adjudication, at least in terms of theories about the commons. In *Whaling,* Australia's motivation to bring the case does not fit within a 'free-riding' frame, though self-serving rationalities may account for Japan's subsequent behavior in withdrawing from the International Whaling Commission and amending its optional clause declaration. *Southern Bluefin Tuna* was considered to have a beneficial influence on the parties' resolution of their dispute even without a substantive decision on the merits.[172] In *Nuclear Weapons,* the interests of the planet were successfully placed before the ICJ, although it proved difficult for the Court to provide the ethical imprimatur against nuclear weapons, regardless of its invocation of humanity's shared history and obligations to the future unborn.

Procedurally, the Article showed how the primary need for consent to international adjudication shaped the work of different tribunals, which were variously constituted with compulsory or consensual jurisdiction, but which all required states to be the instigators of the claims. Standing for non-state actors is not available, though the filing of *amicus* briefs was sometimes

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169 Hardin, *supra* note 2.

170 OSTROM, *supra* note 3.

171 *See generally* van Aaken, *supra* note 64.

172 *See generally* Stephens, *supra* note 136.

permitted. In general terms, where at the domestic level there is talk of the "commons," at the inter-state relations level there is talk of the "international community." Although such a community is not an observable entity, it resides in legal doctrine including *erga omnes,*[173] and the Article points to ways community interests are advanced.

The Article also points to emerging norms that are yet to find expression, such as ecological, cultural, and philosophical narratives that move away from "resources" or "goods" and towards a complex set of legal protections and understandings. Whether such revised conceptions are necessary to ensure the endurability of the commons is likely, and this Article rejects the idea that commons-scenarios in international law should be universally categorized as common pool resources. Instead, framing of the cases in commons-terms exposed interesting questions: does the emphasis on "use" and "shared use" of the commons de-emphasize other frames, such as earth-centered governance or the rights of non-human species? When nation-states advance their own interests, is the possibility of communal bonds negated? Or is the notion of "common concern" a utopian global ideal hiding valid minority needs such as the food security of a country with small land-based protein sources (Japan in *Southern Bluefin Tuna* or *Whaling*) or the development aspirations of shrimp harvesters seeking to exchange their goods for value (Malaysia et al. in *U.S.-Shrimp*)? Rather than depicting a progression from individualist appropriation to negotiated shared use and then onwards towards accepted wholesale nature protection, the cases discussed here have exposed the contingencies of these attitudes.

The cases considered in this Article demonstrate a set of arrangements that are instigated and shaped by nation-states but that nonetheless can promote or hinder shared understandings of a broader community. That courts play an educative role, and do not simply serve the objective of compliance, means that they might help to develop an ethic of belonging that moves beyond national-interest and parochialism. The implications for the notions of sovereignty are profound. This prospect must be checked, of course, by the highly contested nature of the cases, the rationalist suspicion that "global" interests are a boon for free-riders and the low expectations that global problems can be adequately dealt with, at least in time to avert environmental catastrophe. Ideals of an "international community as a whole" require a mature, reliable, just, equitable, and ongoing set of social practices, which cultivate shared objectives and a sense of fairness in common history. While it remains an open question whether such a society can develop globally, international tribunals play an undeniable role.

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[173] *ILC Articles on State Responsibility, supra* note 61, at 126.

Navigating the Compact of Free Association: Three Decades of Supervised Self-Governance

Kevin Morris

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I. INTRODUCTION

The Compact of Free Association ("Compact/COFA") between the United States ("U.S."), the Federated States of Micronesia ("FSM"), and the Republic of the Marshall Islands ("RMI"), gave the U.S. perpetual strategic denial rights to all third-party nations in the island territories, considered vital to U.S. national security.[1] In return, the Compact was designed with a focus on promoting the future self-governance and self-reliance for the two island nations.[2] Additionally, it gave the citizens of these two nations a right to freely enter into the U.S. to seek employment and educational opportunities, as well as an implied right to medical services within the U.S.[3] Importantly, the Compact established compensation for some Marshallese citizens for the loss of life, health, land, and resources due to the sixty-seven nuclear tests carried out by the U.S. between 1946–1958.[4]

With the economic provisions of the Compact set to expire in 2023,[5] and in an era in which anti-immigrant sentiment is on the rise,[6] the following

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[1] *See generally* Compact of Free Association Act of 1985, Pub. L. No. 99-239, 99 Stat. 1770 (1986).

[2] *See generally id.*

[3] *Id.*

[4] *Id.*

[5] Compact of Free Association Amendments Act of 2003, Pub. L. No. 108-188 (2003).

[6] Ingrid Anderson, *What History Reveals About Surges in Anti-Semitism and Anti-Immigrant Sentiments*, PBS NEWS HOUR (Oct. 29, 2018), https://www.pbs.org/newshour/nation/what-history-reveals-about-surges-in-anti-semitism-and-anti-immigrant-sentiments.

analysis provides domestic and international legal remedies to ensure all provisions of the Compact are performed in good faith and in accordance with the law. This paper provides a legal evaluation of the Compact itself and a summary of the treaty's impact on the island nations and the U.S. states Marshallese citizens migrate to, specifically Hawai'i. Finally, the paper will demonstrate the need for more transparency and deference during future negotiations for a more equitable agreement. The goal of this paper is to provide a legal explanation of the agreement in a manner that is translatable and useful to all stakeholders involved in negotiations for a new and improved Compact of Free Association Act of 2023.

II. HISTORY OF THE STRATEGIC TRUST TERRITORY OF THE PACIFIC ISLANDS

A. We have the "trust," the United States has the "territory"[7]

On April 2, 1947, in the aftermath of the expulsion of the Japanese from the Pacific following World War II, the U.S., in accordance with the newly formed United Nations ("UN"), assumed administrative control of the Trust Territory of the Pacific Islands ("TTPI").[8] The TTPI included the modern day nations of Palau, the Federated States of Micronesia ("FSM"), the Republic of the Marshall Islands ("RMI"), and the Northern Mariana Islands.[9]

The Charter of the UN created the framework for administrating parties[10] regarding its duties of promoting international peace and preventing international conflict in the region, along with assisting colonies in becoming self-governing states.[11] "Chapter XII of the [UN] Charter established and defined the International Trusteeship System under which colonies would be guided toward autonomy[and] Article 76 provides [] the purposes of the

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[7] Keola K. Diaz, The Compact of Free Association (COFA): A History of Failures 29 (unpublished M.A. Portfolio Project, Univeristy of Hawai'i at Mānoa) (on file with the Hamilton Library, Univerity of Hawai'i Mānoa) (emphasis added) (paraphrasing *Current Problems in the Marshall Islands: Hearings Before the Subcomm. on Territorial and Insular Affairs of the Comm. on Interior and Insular Affairs*, 94th Cong. 5 (1976) (statement of Sen. Ataji Balos, Representative, Micronesian Congress 7th District) ("History will show that it was we Marshallese who has the 'trust' while Americans had the 'territory.'")).

[8] S.C. Res. 21, art. 1–2 (Apr. 2, 1947); *see also* Timothy H. Bellas, *The Trust Territory of the Pacific Islands, in* THE NORTHERN MARIANA ISLANDS JUDICIARY: A HISTORICAL OVERVIEW 35–36 (2011).

[9] *Id.*

[10] *See* U.N. Charter art. 81.

[11] Bellas, *supra* note 8, at 35.

trusteeship[.]"[12] Article 1 of the TTPI officially designated the region as a "strategic area,"[13] making it the only trust territory in the world that the UN considered strategic and giving the region a unique exemption from international oversight.[14] Consequently, the Security Council became the sole monitoring body for the TTPI, instead of the UN General Assembly (which was the norm).[15] This gave the U.S. far more flexibility to control how the agreement would function given its ability as a permanent member of the Security Council[16] to veto any substantive resolution it disagreed with.[17]

In addition, Article 15 of the TTPI states that the terms of the agreement, which contained no end date,[18] "shall not be altered, amended or terminated without the consent" of the U.S.[19] Due in large part to the many American lives that were lost while fighting the Japanese in this part of the world, members of Congress and the Department of the Interior advocated for

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[12] *Id.* The stated purposes of the International Trusteeship System were:

a. to further international peace and security;

b. to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement;

c. to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion, and to encourage recognition of the interdependence of the peoples of the world; and

d. to ensure equal treatment in social, economic, and commercial matters for all Members of the United Nations and their nationals, and also equal treatment for the latter in the administration of justice, without prejudice to the attainment of the foregoing and subject to the provisions of Article 80.

Id.

[13] *See* S.C. Res. 21, art. 1 (Apr. 2, 1947).

[14] *See* Diaz, *supra* note 7, at 20.

[15] *See* U.N. Charter art. 83 ("All functions of the United Nations relating to strategic areas . . . shall be exercised by the Security Council."). *But see* U.N. Charter art. 85 ("The functions of the United Nations with regard to trusteeship agreements for all areas not designated as strategic . . . shall be exercised by the General Assembly."). The Security Council is a principal organ of the United Nations. U.N. Charter art. 7.

[16] *See* U.N. Charter art. 23 (listing specifically the United States of America and five other countries as "permanent members of the Security Council.").

[17] *See* U.N. Charter art. 23(2).

[18] The issue of agreements in perpetuity is a common theme in future treaties, and the implications this had on sovereignty will be discussed in Section III(b), *infra*.

[19] S.C. Res. 21, art. 15 (Apr. 2, 1947).

complete annexation of the islands.[20] Had it not been for the UN's assurances that the U.S. would be the sole administering authority of the TTPI, it seems unlikely that the U.S. would have budged from its imperialist position in an age of decolonization. Secretary of War, Henry L. Stimson, argued that "U.S. security concerns were paramount, and authority over Micronesian land did not involve the people who lived on them" because "[t]hey are not colonies; they are outposts," in an attempt to justify total military control "regardless of the fact that such authority represented the very essence of colonialism."[21]

The administration of the TTPI was transferred between the Department of the Interior ("DOI") and the Department of the Navy until it was finally vested with the DOI for the TTPI's duration in 1962..[22] The problem was that both departments did not uphold their obligations under Article 76 of the Charter to promote "the political, economic, social, and educational advancement of the inhabitants of the trust territories."[23] Contrary to the goals of the trusteeship, "[r]etired Admiral Carlton Wright expressed the Navy's governing philosophy: 'the best thing we could do . . . is to let them completely alone.'"[24]

With management decisions for the islands being made thousands of miles away in Washington D.C, the initial era of the TTPI "has sometimes been described as one of 'benign neglect,' and it is suggested that the US attempted to maintain an ethnographic zoo."[25] This is the first instance in this long-standing relationship where the U.S. government did not uphold its end of the treaty in good faith. Keeping all foreigners out, including Americans, in the name of preservation of traditional cultures,[26] allowed the region to

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[20] Diaz, *supra* note 7, at 18.

[21] *Id.* As fears of communism spread deeper into East Asia, the focus of the so-called "strategy" was on China, Korea and Vietnam, leaving the TTPI nations to play the role of a buffer zone between East and West. *Id.*

[22] Bellas, *supra* note 8, at 36.

[23] U.N. Charter art. 76.

[24] Cameron Jack Andrews, Micronesia in Modern Geopolitics 39 (Dec. 14, 2017) (unpublished B.A. thesis, University of Texas at Austin), https://repositories.lib.utexas.edu/handle/2152/63613.

> Philip Manhard, US Ambassador to the Trust Territory, affirmed that the overarching American priority during the early-TTPI was strategic [and] intended to prevent the use of the region by an outside power: "During the first 15 years of its administration, the United States took its security and defense interests and its military prerogatives very seriously, and its political, social, and economic responsibilities relatively lightly."

Id.

[25] Robert C. Kiste, *New Political Statuses in American Micronesia*, *in* CONTEMPORARY PACIFIC SOCIETIES 70 (Victoria S. Lockwood et al. eds., 1993).

[26] *Id.*

disappear from American minds and maps, even as it was placed at the front lines of the global nuclear arms race.

B. Big Brother in Bikini: Nuclear Testing in the Marshall Islands

In 1946, the U.S. military planned Operation Crossroads, the largest ever nuclear weapons test that would take place in the lagoon of Bikini Atoll in the Marshall Islands.[27] The atoll's location appeared ideal to the U.S due to its unique location that is far from air and sea routes and over 2,000 miles from Hawai'i.[28] All that was left to do was to remove the local inhabitants from the land they self-sufficiently lived on for hundreds of generations.[29] Capitalizing on Christianity, the one real connection between the Bikini Islanders and Amercians, Navy Commodore Ben Wyatt, the Military Governor of RMI, arrived in February and asked the 167 inhabitants after church services if they would be willing to sacrifice their islands "for the good of mankind and to end all world wars."[30] With no likely reason to doubt America's good faith intentions of protecting all of humankind, the local leader, Chief Juda, simply responded, "[i]f the United States government and the scientists of the world want to use our island for furthering development, which with God's blessing will result in kindness and benefit to all mankind, my people will be pleased to go elsewhere."[31] There was no reason for Chief Juda to resist the request because relocation implied they would return to their home.[32]

With permission granted from Chief Juda, Operation Crossroads got the green light, and thousands of scientists descended on the site to watch the detonation.[33] This marked the commencement of twelve years of testing a total of sixty-seven atmospheric, ground, and underwater nuclear devices in

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[27] *See* AFCF (US Navy), *Operations Crossroads, Atom Bomb Test, Bikini Atoll*, THE CATALOG (1946), https://catalog.archives.gov/id/20943.

[28] *See* FRANCIS X HEZEL, STRANGERS IN THEIR OWN LAND: A CENTURY OF COLONIAL RULE IN THE CAROLINE AND MARSHALL ISLANDS 271 (1995).

[29] *See* Diaz, *supra* note 7, at 25.

[30] HEZEL, *supra* note 28, at 271; Andrews, *supra* note 24, at 42.

[31] HEZEL, *supra* note 28, at 271. However, scholars posit that the Bikinians really had no choice in the matter. Diaz, *supra* note 7, at 25 ("Bikinians really didn't have a choice in the matter . . . they knew they had no power to face a formidable nation and deny their request."); Andrews, *supra* note 24, at 42 ("Wyatt essentially told the people of Bikini Atoll that they were being compelled to relocate, as the United States needed a new proving ground for its nuclear technology[,]" therefore leaving them with no option to dissent).

[32] *Diaz*, *supra* note 7, at 25 ("Not much thought went into the [relocation] process however because the islanders were led to believe that the migration was to be a temporary measure.").

[33] *See id.* at 25–26.

the RMI.[34] But it was not just the islands where the weapons were tested that suffered, as the radiation from the bomb "was carried east by the trade winds, and hit the relocated Bikinians on Rongerik as well as other Marshallese, and over a dozen unlucky Japanese fishermen."[35]

1. America's First Falling Out with Micronesia

By far the most destructive of all the tests was the "Bravo" shot on February 28, 1954.[36] "Bravo" is recognized as the most massive nuclear test explosion ever conducted by America and "produced a crater 6,000 feet in diameter and 240 feet deep, along with a cloud top reaching 114,000 feet high[.]"[37] Just hours after the explosion and roughly 200 miles away on Rongelap, children played in colorful powder, which they thought was snow falling from the sky.[38] In reality, it was ash, which was as radioactive as the ash from the Japanese atomic bombs.[39]

Subsequently, "[h]undreds of Marshallese on atolls downwind from the blast were affected immediately by acute radiation sickness and beta burns, and later thyroid abnormalities responsible for numerous serious medical conditions, including thyroid and other cancers."[40] As with any nuclear disaster, the radiation also affected the ecology of the land to the point that surrounding areas had to be abandoned, as was the case in Chernobyl and Fukushima.[41] Yet in the Marshall Islands, the U.S. Navy left the population

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[34] *Id.* (detailing that the first series of tests were carried out in the Bikini and Enewetak atolls, devastating the local environments with nuclear radiation that the U.S. government officials knew very well could last as long as 48,000 years).

[35] Andrews, *supra* note 24, at 43.

[36] Julianne M. Walsh, Imagining the Marshalls: Chiefs, Tradition, and the State on the Fringes of U.S. Empire 108 (August 2003) (unpublished Ph.D. Dissertation, University of Hawai'i at Manoa). "Bravo" was a "fifteen megaton hydrogen bomb [that] was 750 times more explosive than the bomb that fell on Hiroshima and vaporized an islet of Bikini atoll in seconds even as it spread radioactive fallout for thousands of miles." *Id.*

[37] *Id.* (citing Nuclear Claims Tribunal Annual Report to the Nitijela, Republic of the Marshall Islands, 1993, at 22).

[38] Robert Alvarez, *The Marshall Islands and the NPT*, BULLETIN OF THE ATOMIC SCIENTISTS (May 27, 2015), https://thebulletin.org/marshall-islands-and-npt8341.

[39] *Id.*

[40] Walsh, *supra* note 36, at 108; *accord* HEZEL, *supra* note 28, at 273. In memory of the many who were affected by this controlled disaster, March 1 in the Republic of the Marshall Islands is now an official holiday called Remembrance Day, previously known as Nuclear Victims' Day. Ron Tanner, *Remembrance Day*, MARSHALL ISLANDS STORY PROJECT, http://mistories.org/remembrance.php (last visited Feb. 2, 2018). This holiday is a grim annual reminder for the younger generations of the massive sacrifices their forefathers made for the "benefit of mankind." *Id.*

[41] *See* Diaz, *supra* note 7, at 26.

of Rongelapese and the evacuated Bikinians on their island, exposing them to the radiation for over two days before evacuating them with nearby ships.[42]

To make matters worse, scientists from the Brookhaven Laboratory disclosed that they were fully aware of the dangers the Rongelapese faced when they returned them to the island as guinea pigs for a scientific experiment.[43] When these disclosures are combined with a U.S. Defense Nuclear Agency report showing that it knew hours before the "Bravo" detonation that the winds had shifted towards Rongelap, it becomes difficult to accept America's "reasoning that complexity and cost were overriding factors over life."[44]

2. *The Compensation Remains Woefully Inadequate*

In light of these facts, it is difficult to understand why, still to this day, the U.S. Department of Energy only recognizes the residents and descendants of "The Four Atolls" (Rongelap, Utrik, Enewetak, and Bikini) as exposed, rendering them eligible for reparations and medical treatment.[45] This is especially true given the Center for Disease Control in 2000 "recommend[ed] that Ailuk, Jemo, Likiep, Wotho, and Wotje receive compensation for exposure to fallout from the Bravo test of 1954."[46] "The Four Atolls" continue to remain the only recipients of this justified special treatment, which will be discussed further in the following section.[47]

The same year of the "Bravo" test, a delegate of the RMI attended a Trusteeship Council in Kwajalein to officially protest the continued nuclear

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[42] *See id.* at 26–27; Alvarez, *supra* note 38. "Brookhaven National Laboratory scientists who were responsible for conducting radiation surveys allowed both the exposed and unexposed Rongelapese to return to Rongelap three years after the Bravo test" and assured them that it was safe to live there, despite their records indicating levels of radioactivity twenty to forty times higher than any inhabited region in the world. Diaz, *supra* note 7, at 28.

[43] *See* Diaz, *supra* note 7, at 28.

> Greater knowledge of [radiation] effects on human beings is badly needed . . . Even though the radioactive contamination of Rongelap Island is considered perfectly safe for human habitation, the levels of activity are higher than those found in other inhabited locations in the world. The habitation of these people on the island will afford most valuable ecological radiation data on human beings[.]

Id. (quoting GIFF JOHNSON, COLLISION COURSE AT KWAJALEIN: MARSHALL ISLANDERS IN THE SHADOW OF THE BOMB 13 (1984)).

[44] *Id.* at 27.

[45] Walsh, *supra* note 36, at 108 (recognizing that "[r]ecent radiation studies throughout the Marshall Islands suggest that more atolls and individuals were affected by the nuclear tests").

[46] Samuel F. McPhetres et al., *Micronesia in Review: Issues and Events, 1 July 1998 to 30 June 1999*, 12 THE CONTEMPORARY PACIFIC 209 (2000).

[47] See *infra* Section III(A).

bombardment of their island homes.[48] The battle was just beginning for the Marshallese however, as the impacts of the nuclear age are now forever engrained into their homeland and bodies. From the dome on Runit Island that is leaking radioactive waste into a rapidly rising ocean,[49] to the U.S. relocating the Bikinians back to Bikini Atoll in the early 1970s[50] (even though in 1996 the International Atomic Energy Agency ("IAEA") Advisory Group concluded that "permanent resettlement of Bikini Island under the present radiological conditions without remedial measures is not recommended"),[51] these scars from the early stages of a relationship that was built off great trust and even greater manipulation would leave a dark cloud hanging over the future of a bond that remains questionable today.[52]

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[48] Andrews, *supra* note 24, at 43. Unfortunately, even though the U.S. began compensation payments two years later in 1956, it was not until July 1958 that America completely ceased the bombing in the RMI. *Id.* at 42–43.

[49] Douglas Patient, *US Nuke Dome Leak: Fatal Radioactive Waste From 43 Tests Pouring Into Ocean,* DAILY STAR (Feb. 1, 2018), https://www.dailystar.co.uk/news/world-news/678796/runit-island-nuke-dome-leak-enewetak-atoll-radioactive-waste-pour-into-ocean-nuclear. The dome is a 30-foot-deep crater as a result of 43 nuclear tests that was later entombed in a concrete. *Id.*

[50] Thomas Maier, *Brookhaven Team Minimized Risks in Return to Bikini*, NEWSDAY (Aug. 21, 2009, 1:51 PM), https://www.newsday.com/long-island/nassau/brookhaven-team-minimized-risks-in-return-to-bikini-1.1385267?print=true. Dr. Robert Conrad, head of Brookhaven National Laboratory's medical team proclaimed: "I hope they will be happy when they come back. The radiation levels on Bikini are so very slight—and so many precautions have been taken to reduce the levels to extremely low amounts—that there should not be any real hazards for these people when they return." *Id.* However, by 1978, the Bikini people were evacuated again and Bikini Atoll was empty. *Id.*

[51] International Atomic Energy Agency, *Radiological Conditions at Bikini Atoll: Prospects for Resettlement*, RADIOLOGICAL ASSESSMENT REPORTS SERIES 2 (1998), https://www-pub.iaea.org/books/iaeabooks/4739/Radiological-Conditions-at-Bikini-Atoll-Prospects-for-Resettlement.

[52] *See* Dick Thornburgh et al., *The Nuclear Claims Tribunal of the Republic of the Marshall Islands: An Independent Examination and Assessment of Its Decision-Making Process* 3 (Jan. 2003), https://www.bikiniatoll.com/ThornburgReport.pdf.

> [T]he U.S. Government has already approved compensation claims of more than $562 million under the Downwinders' Act by persons injured as a result of nuclear tests in Nevada that were much smaller in number and magnitude than the tests conducted in the Marshall Islands. Based on our examination and analysis of the Tribunal's processes, and our understanding of the dollar magnitude of the awards that resulted from those processes, it is our judgment that the $150 million trust fund initially established in 1986 is manifestly inadequate to fairly compensate the inhabitants of the Marshall Islands for the damages they suffered as a result of the dozens of US nuclear tests that took place in their homeland.

Id.

III. COFA: A 'COMPACT' MODEL OF INDEPENDENCE AND SOVEREIGNTY

A. The Navigator's Guide Through American Bureaucracy

The 1960s did not bring about a new perception of the TTPI for America.[53] Instead, the U.S. government began to recognize the need to revise its position if it wanted to maintain strategic control of the islands.[54] President John F. Kennedy recognized the imbalance of power that existed within the TTPI, so he doubled the annual budget from $7.5 million to $15 million and commissioned a confidential group of economists to evaluate America's position.[55] The report was led by Harvard economist Anthony Solomon and was primarily a guidebook on "how to foster dependency and curry favorable views of indigenous people toward their administrative power."[56]

This was just the beginning of an American administration appearing to show sympathy for the Pacific Islanders in a manner that would persuade them to believe that a continued relationship was the desired choice.[57] Knowing very well that the rest of the world was supporting decolonization movements, Kennedy included in his speech to the UN General Assembly in 1961 that America has "sympathy and support" for the "continuing tide of self-determination" and understands colonialism—"the exploitation and subjugation of the weak by the powerful"—because America also "was once a colony."[58] This proclamation may have brought some hope to the islanders who were pushing for more independence, but it shed light on how disconnected from reality the statements were by failing to acknowledge the "plight of the indigenous people" of North America.[59]

The following year, Kennedy was compelled to release National Security Memorandum 145 setting forth the new policy aimed at improving the alliance.[60] Once more the declaration finished with a conspicuously

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[53] *See* Andrews, *supra* note 24, at 44.

[54] *See* FRIENDS OF MICRONESIA ET AL., THE SOLOMON REPORT: AMERICA'S RUTHLESS BLUEPRINT FOR THE ASSIMILATION OF MICRONESIA 2 (1969) [hereinafter THE SOLOMON REPORT].

[55] Andrews, *supra* note 24, at 44.

[56] Walsh, *supra* note 36, at 213. The Solomon Report recognized the growing trend within the UN for fostering independence and promoting self-governance and noted that it would "become more than embarrassing" to be "the only nation left administering a trust territory." THE SOLOMON REPORT, *supra* note 54, at 2.

[57] Diaz, *supra* note 7, at 32.

[58] *JFK Address at U.N. General Assembly, 25 September 1961*, John F. Kennedy Presidential Library and Museum, https://www.jfklibrary.org/Asset-Viewer/DOPIN64xJUGRKgdHJ9NfgQ.aspx, (last visited July 9, 2018).

[59] *See* Diaz, *supra* note 7, at 30–31.

[60] John F. Kennedy, *National Security Action Memorandum Number 145*, JOHN F.

imperialist goal of "developing the Trust Territory as a viable territory *permanently* associated with the United States[.]"[61] Despite this surreptitious strategy, the goal of "Americanizing" the islanders was the first time since 1947 that the U.S. upheld its end of the bargain, as trustee, and at least began making an effort to promote self-governance, and eventually, independence.[62]

1. One Step Forward for Mankind, Two Steps Back for Micronesia

As the Kennedy administration gave way to the Johnson and Nixon administrations, little progress was made regarding how to promote independence while still maintaining an affiliation with the U.S.[63] This was due in large part to the differing positions of American federal agencies.[64] In the meantime, tensions were growing in each region of the TTPI, as the Marshall Islands had already established their own Congress in 1956.[65] On Kwajalein, one of the largest atolls in the world and the location of an American military base,[66] the family owners of the island attempted to negotiate a new lease with Washington.[67] After nearly ten arduous years of negotiating for an equitable deal, they signed a ninety-nine year lease in exchange for about $1,000 an acre, or $712,500 in total.[68] When considering inflation, it is safe to say that America got the better end of the deal; one that

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KENNEDY PRESIDENTIAL LIBRARY AND MUSEUM (Apr. 18, 1962), https://www.jfklibrary.org/asset-viewer/national-security-action-memorandum-number-145 (setting goals such as initiating "programs leading to the improvement of education" and "other public services," including the "economic development of the Trust Territory").

[61] *Id.* at 2 (emphasis added).

[62] *See id.*

[63] Andrews, *supra* note 24, at 46–47.

[64] *Id.* at 46. At one end of the table, the State Department favored a single Micronesian Federation affiliated with the U.S., which would essentially leave the boundaries of the TTPI intact and lump together hundreds of distinct languages and cultures on hundreds of different islands into one central government. *See id.* At the other end of the table, the Department of Defense and Department of the Interior favored incorporating the islands as an American territory, similar to American Samoa, or a Commonwealth, respectively. *Id.*

[65] *See* Walsh, *supra* note 36, at 213–14.

[66] Coral Davenport, *The Marshall Islands are Disappearing*, THE NEW YORK TIMES (Dec. 2, 2015), https://www.nytimes.com/interactive/2015/12/02/world/The-Marshall-Islands-Are-Disappearing.html.

[67] Walsh, *supra* note 36, at 221. In 1957, when U.S. negotiators offered $500 per acre for indefinite use and were refused, they came back with a deceitful one time offer of $300,000 in cash, leading the islanders' team of negotiators to simply walk out of the room. *Id.*

[68] *Id.*

allows for continuous testing of missiles in a region that just spent a decade being contaminated by nuclear weapons.[69]

In light of how difficult it was to negotiate with Washington D.C., the islands of the TTPI formed the Congress of Micronesia in 1965.[70] However, in 1969, the very same year their Compact proposal was submitted to the U.S.,[71] Nixon "ordered his Interior Secretary to annex Micronesia, with the same unincorporated status as Guam."[72] The road to independence was not getting any easier for the territories because Nixon's administration refused to negotiate in good faith, a possible violation of the Vienna Convention on the Law of Treaties ("VCLT") Article 26.[73] Even Nixon's National Security Advisor, Henry Kissinger, proclaimed: "[t]here are only 90,000 people out there. Who gives a damn?"[74]

Although the working groups were established, no deal was made, and Nixon's goal of annexation never came to fruition, consequently fueling tensions between the island nations concerned with their individual interests.[75] "By 1970, the increasingly frustrated Micronesian negotiators wrote up four bedrock demands for resolving the status question: sovereignty, self-government, a constitution, and a revocable Compact of Free Association."[76] Similar to the Compact between the Cook Islands and New Zealand,[77] this proposal gave the U.S. exclusive "strategic control of the region while also allowing the islanders nearly-complete self-government."[78] "In response, the American negotiators (under the instructions of Kissinger) returned with an offer of Commonwealth status not substantially different from the earlier proposal of annexation[,]"[79] completely ignoring the four requests of the Micronesian negotiators.

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[69] *See U.S. Test-Fires Unarmed Missile From Calif. To Kwajalein*, STAR ADVERTISER (April 26, 2017, 1:59 PM), http://www.staradvertiser.com/2017/04/26/breaking-news/u-s-test-fires-unarmed-missile-from-calif-to-kwajalein/.

[70] *See* Walsh, *supra* note 36, at 222 ("[T]he Congress of Micronesia [was] comprised of elected Senators and Representatives from each of the six districts: Palau, Yap, Guam, Truk, Pohnpei and the Marshalls.").

[71] *See id.* at 347.

[72] Andrews, *supra* note 24, at 47.

[73] Article 26 provides: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 339 [hereinafter VCLT].

[74] Andrews, *supra* note 24, at 47 (citing DONALD F. MCHENRY, MICRONESIA: TRUST BETRAYED (Carnegie Endowment for International Peace, 1975)).

[75] *Id.* at 47–48.

[76] *Id.*

[77] *See id.* at 54.

[78] *Id.* at 48.

[79] *Id.*

2. *The Trust Officially Breaks Apart*

By 1972, the stalemate led to the Marianas reluctantly accepting a U.S. offer for Commonwealth status.[80] By contrast, Palau recognized its strategic geographical importance to the U.S. and pursued individual negotiations.[81] The Marshallese realized they had much more to bargain with than the rest of the trust because at the time, the Marshall Islands accounted for about two-thirds of Micronesia's tax revenues and were strategically located with an Army base within their territory.[82] The Marshall Islands eventually voted their way out of Micronesia in 1978,[83] leaving the diverse states of Pohnpei, Yap, Kosrae, and Chuuk as the only remaining members of the Micronesian Congress and the antecedent to the formation of the FSM.[84]

An equitable Compact is still what the remaining three states continued to bargain for, as each faced their own unique struggles for over seventeen years to finally come to an agreement.[85] Both the FSM and RMI gained their independence and recognition by the UN in 1986, the same year Congress eventually ratified the Compact.[86] When the Marshallese approved the Compact, it was mostly about "local loyalties, obligations, and culturally-framed interpretations of authority . . . rather than a wholesale endorsement of the proposed relationship with the U[.]S[.]"[87] "Of the eight atolls with extended historical interaction with Americans, six voted against the Compact."[88] As for the FSM, one of the main grievances was the permanent denial clause, which allowed for the U.S. to permanently exclude all nations from the FSM's territorial seas and bringing into question the real value of sovereignty under the Compact.[89]

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[80] *Id.*

[81] *See id.* at 49.

[82] Diaz, *supra* note 7, at 35–36.

> Tax revenues in Micronesia about this time equaled roughly $3.5 million. Well over $2 million of this amount came from the Marshalls by taxing contractor workers at Kwaj. The Marshallese wanted to keep at least 50% of this income in the Marshalls. The Marshall Islands Legislature demanded that the Congress at its next meeting enact the desired 50% tax rebate legislation. If the Congress should fail to heed that demand, "the Marshall Islands shall . . . promptly commence separate negotiations with the United States on the future political status of the Marshall Islands[.]"

Id. at 36 (citation omitted).

[83] Andrews, *supra* note 24, at 49.

[84] Diaz, *supra* note 7, at 36.

[85] *See* Walsh, *supra* note 36, at 347.

[86] Diaz, *supra* note 7, at 4.

[87] Walsh, *supra* note 36, at 347.

[88] *Id.*

[89] *See* Diaz, *supra* note 7, at 38.

The following section will provide an analysis of the treaties with the U.S. for both the FSM and RMI, highlighting the contractual benefits that each party obtained. Due to their similar language, the Compacts of both countries essentially "cede[d] strategic control of their territory for a highly privileged relationship with the United States."[90] In the end, America continued to unilaterally control the outcome of the relationship, as its "desire to maintain control over Micronesia through the Compact was carried over from the times of the Trust Territory and has played a major role in the current status of COFA migrants."[91]

B. Examining the Terms of The Compact of Free Association Act

The following section strictly analyzes "the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" of the Compacts and associated agreements, in accordance with Article 31 of the VCLT.[92] Both agreements for the RMI and FSM passed under the same U.S. Act in 1986 ("Compact I") and only differ slightly from the amended 2003 Compact, therefore, both will be discussed as a single regime. Additionally, there are a series of nine different Subsidiary Agreements that took force around the same time as the Compacts, all of which control specific provisions of COFA and will be discussed accordingly.[93]

Thanks to the subsidiary agreements, the U.S. created an "arrangement for 'strategic denial' [that] will continue in perpetuity," even if COFA expires.[94] Stewart Firth described what free association truly entailed when he stated:

> Free association for the Republic of the Marshall Islands and the Federated States of Micronesia (FSM) . . . specifically prevents a full and final decolonization by binding those states to the former administering authority in perpetuity. Separate mutual security pacts, which accompany the Compact of Free Association between the United States and each of these states, place an obligation on the United States to defend the Marshalls and the Federated States forever, and permit it to foreclose access to the military forces of third countries forever.[95]

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[90] Andrews, *supra* note 24, at 54.

[91] Diaz, *supra* note 7, at 38.

[92] *See* VCLT, *supra* note 73, at 340 (providing the general rule of interpretation of treaties).

[93] *See, e.g.*, Compact of Free Association of 1985, Pub. L. No. 99-239 § 462, 99 Stat. 1770 (1986).

[94] Compact of Free Association Act, Pub. L. No. 99-239, 1985 U.S.C.C.A.N (99 Stat. 1770) 2746, 2751.

[95] Stewart Firth, *Sovereignty and Independence in the Contemporary Pacific*, *in* 1 THE

In short, what the U.S. gained from this Compact was simple but very significant: "sole access and broad military and veto powers over the islands' regions which were considered key to U.S. defensive military interests and national security."[96] The next section will analyze the dichotomy between sovereignty and a treaty in perpetuity, as well as the amendments enacted in the 2003 extension of the Compact.

1. Contractual Benefits for the COFA Nations

First and foremost, the preamble of COFA is important to highlight because the U.S. recognized the former Trust Territories' rights to "retain their sovereignty and their sovereign right to self-determination[,]" as well as the "right to enjoy self-government[.]"[97] Once more, the essential part of the contract was an assurance from the U.S. that the main goal was to contribute to the growth or prosperity of the island nation's economies.[98] In addition, Title One of COFA allows the FSM and RMI to enter into treaties and international agreement with other sovereign nations without any interference from the United States.[99]

i. Economic Benefits

Title Two, Economic Relations, breaks down the exact amount of grant assistance that the U.S. would provide to the governments of RMI and FSM until 2003.[100] To aid RMI and FSM in their "efforts to advance the economic self-sufficiency of their peoples and in recognition of the special relationship that exists between them and the U.S.," the U.S. provided a grant:

> (1) to the Government of the Marshall Islands, $26.1 million annually for five years commencing on the effective date of this Compact, $22.1 million annually for five years commencing on the fifth anniversary of the effective date of this Compact, and $19.1 million annually for five years commencing on the tenth anniversary of this Compact. Over this fifteen-year period, the Government of the Marshall Islands shall dedicate an average of no less than 40 percent of these amounts to the capital account subject to provision for

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CONTEMPORARY PACIFIC 75, 78 (1989) (citation omitted).

96 Diaz, *supra* note 7, at 4 (citation omitted).

97 Compact of Free Association Act of 1985 § 462 (carrying over the same major principle from the TTPI of "promoting the economic advancement and self-sufficiency of the peoples of the Trust Territory of the Pacific Islands").

98 *Id.*

99 Compact of Free Association Act of 1985 § 121(c).

100 *See id.* §§ 211–219.

> revision of this percentage incorporated into the plan referred to in Section 211(b); and
>
> (2) to the Government of the Federated States of Micronesia, $60 million annually for five years commencing on the effective date of this Compact, $51 million annually for five years commencing on the fifth anniversary of the effective date of this Compact, and $40 million annually for five years commencing on the tenth anniversary of the effective date of this Compact. Over this fifteen-year period, the Government of the Federated States of Micronesia shall dedicate an average of no less than 40 percent of these amounts annually to the capital account subject to provision for revision of this percentage incorporated into the plan referred to in Section 211(b). To take into account the special nature of the assistance, to be provided under this paragraph and Section 212(b), 213(c), 214(c), 215(a)(3), 215(b)(3), 216(a), 216(b), 221(a), and 221(b), the division of these amounts among the national and state governments of the Federated States of Micronesia shall be certified to the Government of the United States by the Government of the Federated States of Micronesia.[101]

The Department of the Interior's Office of Insular Affairs ("OIA") is responsible for "disbursing and monitoring this direct economic assistance, which totaled almost $1.6 billion from 1987 through 1998."[102] The OIA reported in 2000 "that both nations have made some progress in achieving economic self-sufficiency but remain heavily financially dependent upon the United States."[103]

When the Compact was renewed in 2003 ("Compact II"), the economic provisions similarly provided for lump sum aid payments guaranteed for another twenty years.[104] However, this time the funding was subject to the provisions of the new Fiscal Procedures Agreement and the Trust Fund Agreement.[105] Accordingly, Compact II does not lay out the exact amount of funds per year that the COFA nations will receive, but instead provides that six sectors[106] receive funding based on annual improvement plans that

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[101] *Id.* § 211(a).

[102] U.S. GOV'T ACCOUNTABILITY OFF., GAO-02-40, MIGRATION FROM MICRONESIAN NATIONS HAS HAD SIGNIFICANT IMPACT ON GUAM, HAWAII, AND THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS 7 (2001).

[103] *Id.*

[104] *See* Compact of Free Association Amendments Act of 2003, Pub. L. No. 108-188 §§ 211(a), 216, 117 Stat. 2719, 2771, 2775 (2003).

[105] *Id.* § 211(a), 117 Stat. at 2772.

[106] *Id.* §§ 211(a)(1)-(6), 117 Stat. at 2772 (delineating the sectors of education, health, environment, private sector development, capacity building in the public sector, and public infrastructure).

the COFA nations are to prepare themselves, but are ultimately "subject to the concurrence of the Government of the United States."[107]

a. Subsidiary Agreements Control the Compact

The purpose of the Fiscal Procedures Agreement is to "record the procedures that are most efficient, economical, and beneficial to the discharge of the obligations and responsibilities of each government and which each party agrees to implement and abide by."[108] The agreements for both countries are essentially identical and established Joint Economic Management Committees "to strengthen management and accountability with regard to assistance provided under the Compact[.]"[109] The Committees consist "of five members, three of which shall be from the Government of the United States and two from"[110] the RMI or FSM, respectively, and are required to "meet at least once annually"[111] to carry out their primary duty of controlling the annual budget.[112]

The Trust Fund Agreement was designed as a backup plan for when the Compact expires in 2023 by providing "permanent assistance in the Compact nations without the need for continuing congressional approval" every twenty years.[113] "The purpose of the [Trust] Fund is to contribute to the economic advancement and long-term budgetary self-reliance . . . by providing an annual source of revenue, after Fiscal Year 2023."[114] As will be discussed later in this Article, critics argue that the Trust Fund, managed by the Secretary of the Interior,[115] has struggled due to transparency issues and the 2008 Financial Crisis.[116] Therefore, FSM and RMI are expected to negotiate for continuing a new form of lump sum payments beyond 2023.[117]

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[107] *Id.* § 211(c), 117 Stat. at 2773.

[108] Compact of Free Association: Fiscal Procedures, Marsh. Is.-U.S, at 1, Mar. 23, 2004, T.I.A.S. No. 04-501.7.

[109] *Id.* art. III, § 1.

[110] *Id.* art. III, § 2.

[111] *Id.* art. III, § 6.

[112] *See id.* art. III, § 5.

[113] *See* Andrews, *supra* note 24, at 55.

[114] Compact of Free Association: Trust Fund, R.M.I.-U.S., art. III, Apr. 30, 2003, T.I.A.S. No. 04-501.5 (providing the fund is "for assistance in education, health care, the environment, public sector capacity building, private sector development, and public infrastructure described in Section 211 of the Compact").

[115] Compact of Free Association Act of 2003 § 105(b)(1), 117 Stat. at 2744 (noting all appropriations pursuant to Section 221 are made by "the Secretary of the Interior, who shall have the authority necessary to fulfill his responsibilities for monitoring and managing the funds so appropriated consistent with" the Compact).

[116] *See* Andrews, *supra* note 24, at 55.

[117] *Id.*

b. Impact Relief Fund for "Affected Jurisdictions"

A new provision included in Compact II was the appropriation of impact funds for the four "affected jurisdictions" within the US.[118] This authorized "for each fiscal year from 2004 through 2023, $30,000,000 . . . to aid in defraying costs incurred by affected jurisdictions as a result of increased demands placed on health, educational, social, or public safety services or infrastructure related to such services due to the residence in affected jurisdictions of qualified nonimmigrants" from COFA nations.[119] The Office of Insular Affairs ("OIA") is responsible for allocating the $30 million accordingly, meaning it must be "used only for health, educational, social, or public safety services, or infrastructure" projects and split between the four affected jurisdictions according to COFA migrant impacts.[120]

c. Summary of Economic Benefits

America once again came out on top and the Senate Committees involved in finalizing the Compact knew this very well. The purpose of House Joint Resolution 187 was to support the passage of the Compact in 1985 per the executive branch's request to approve the bill, acknowledging that the "time has come to establish a new relationship" with the Trust Territories.[121] In one short paragraph, the Committee noted the benefits "from the Micronesia point of view."[122] "Overall, American aid to the Compact states is the most significant and costly foreign assistance regime that the United States manages in Oceania[.]"[123] However, this number is dwarfed by the amount countries, such as Egypt and Israel, receive annually in aid from the U.S.[124]

Nevertheless, "from the perspective of the United States," the Compact benefits America economically in a number of different ways that far

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[118] *See* Compact of Free Association Act of 1985 § 104(e)(2), 117 Stat. at 2739 (defining "affected jurisdiction" as Guam, Hawai'i, the Northern Marianas and American Samoa).

[119] *Id.* § 104(e)(3), 117 Stat. 2739.

[120] *See id.* §§ 104(e)(3), 117 Stat. 2739.

[121] H.R. REP. 99-188 at 4 (1985), *reprinted in* 1985 U.S.C.C.A.N. 2746, 2749.

[122] *Id.* at 2749–50 (stating that Micronesia (1) receives a perpetual "commitment from the United States to defend them against external aggression as if they were a part of the United States[;]" (2) are "eligible for foreign aid from some international organizations[;]" and (3) are "guaranteed a specified level of funding from the United States").

[123] Andrews, *supra* note 24, at 56.

[124] *See U.S. Foreign Aid by Country*, US AID, https://explorer.USaid.gov/cd/ISR, (last visited Apr. 9, 2018). In 2016, US AID reports FSM received $141 million from the U.S., whereas Egypt and Israel received $1.2 billion and $3.1 billion respectively. *See id.* (select country (i.e. Micronesia, Egypt, Israel) from drop down tab and fiscal year "2016").

outweigh the benefits to the island nations.[125] The Committee recognized American gains from the Compact in three detailed paragraphs:

> The compact guarantees US access for 30 years for a fixed price to the Kwajalein missile range, which is one of our key facilities for testing the accuracy of our intercontinental ballistic missiles. Without this long-term agreement, the US would have to negotiate periodic, and presumably more costly, base agreements. . . .
>
> . . . . The compact is also very much in the economic interests of the United States. Over a 15-year span of the compact . . . the administration estimates that the total cost of the compact will be $2.7 billion, or $300 million less than the continuation of the current level of United States assistance to the Micronesian trust territory would be over the same period. [] The compact settles all nuclear claims resulting from our nuclear weapons testing program in the Micronesian islands in the 1940's and 1950's at a cost to the United States of $150 million. At the present time, there are approximately $5 billion in nuclear claims suits pending against the U.S. government. Without the settlement contained in the compact, these suits will proceed, and it is quite possible that adverse decisions will be handed down against the U.S. government that will cost it, and thus the taxpayer, considerably more than $150 million."[126]

Thus, the American negotiators not only knew that it was important to end the Trust Agreement to avoid tarnishing America's image for controlling the last UN Trust in the world, but also knew that signing the Compact as soon as possible would indemnify them for their years of nuclear destruction, cost them less than the Trust Agreement did, and strip the owners of Kwajalein Atoll of their right to seek a better deal for the continued military control of their island.[127]

ii. Immigration Benefits

Little changed for the status of COFA migrants in Compact II as they continued to be "admitted to lawfully engage in occupations, and establish residence as a nonimmigrant in the United States[.]"[128] Included in this agreement is the right as a nonimmigrant in the U.S. to not be subject to limitations of "paragraphs (5) or (7)(B)(i)(II) of section 212(a) of the Immigration and Nationality Act [("INA")], as amended, 8 U.S.C. 1182(a)(5) or (7)(B)(i)(II)."[129] This meant COFA citizens did not have to meet any

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[125] *See* H.R. Rep. 99-188 at 5, 1985 USC.C.A.N. 2746, 2750.

[126] *Id.*

[127] *See id.*

[128] Compact of Free Association Act of 2003 § 141(a), 117 Stat. at 2798.

[129] *Id.*; *see infra* text accompanying notes 134–36 (explaining the relevant INA provisions).

"labor certification" requirements that would have deemed them "inadmissible" and therefore "ineligible to be admitted to the United States" otherwise.[130] Nor would COFA citizens ever have to possess "a valid nonimmigrant visa or border crossing identification card at the time of application for admission" required by the INA.[131] All that is required to travel to the U.S. is an unexpired passport from the FSM or RMI with unexpired entry documentation from the U.S. customs.[132]

Section 141(a)(1)-(5) of the Compact allows for five different categories of nonimmigrants from COFA nations to freely travel to and from the U.S.[133] This unrestricted right to live and work in the U.S. as a COFA national however, does not exempt them from "any ground of inadmissibility or deportability under" the INA that other nonimmigrants would face.[134] Compact II went as far as construing Section 237(a)(5) of the INA to read as follows: "any alien who has been admitted under the Compact . . . who cannot show that he or she has sufficient means of support in the United States, is deportable."[135] This ensured that the "public charge" offense applies directly to COFA citizens as well.[136]

iii. Medical and Social Welfare Benefits

On the surface, the negotiations for the Compact appeared as a way of ensuring the U.S. would continue to provide medical services to the COFA

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[130] *See* 8 U.S.C. §§ 1182(a), 1182(a)(5) (2013).

[131] *See id.* § 1182(7)(B)(i)(II).

[132] Compact of Free Association Act of 2003 § 141(d), 117 Stat. at 2799.

[133] *Id.* §141(a)(1)-(5), 117 Stat. at 2798–99. The five categories include:

> (1) a person who, on November 2, 1986, was a citizen of the Trust Territory of the Pacific Islands. . . .
>
> (2) a person who acquires the citizenship of the Federated States of Micronesia at birth, on or after the effective date of their Constitution. . . .
>
> (3) an immediate relative of a person referred to in paragraphs (1) or (2) of this section, provided that such immediate relative is a naturalized citizen of the COFA nation has been an actual resident there for not less than five years after attaining such naturalization. . . .
>
> (4) a naturalized citizen of the Federated States of Micronesia who was an actual resident there for not less than five years after attaining such naturalization and who satisfied these requirements as of April 30, 2003 . . . ; or
>
> (5) an immediate relative of a citizen of the Federated States of Micronesia, regardless of the immediate relative's country of citizenship or period of residence in the Federated States of Micronesia, if the citizen of the Federated States of Micronesia is serving on active duty in any branch of the United States Armed Forces, or in the active reserves.

Id.

[134] *Id.* § 141(f)(1), 117 Stat. at 2762.

[135] *Id.*

[136] *See* 8 U.S.C. § 1227(a)(5) (current through P.L. 116-5).

nations after the Trust ended. However, what the COFA nations "were led to believe differed [from] what was actually agreed upon" in the final document, leading to the denial of their implied rights in the U.S., including medical care.[137] In light of their immigration status as nonimmigrant "qualified aliens," Compact I entitled COFA citizens to "the federally funded medical program, Medicaid."[138] However, in 1996 the U.S. passed the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA"),[139] which effectively changed COFA nationals to "non-qualified aliens" and officially revoked their access to nearly all federal public assistance, including Medicaid.[140]

There was no doubt the negotiators for the COFA nations felt strongly about having rights to health access guaranteed by the Compact; this agreement was never forged in writing which allowed for the U.S. to justify changing its policy to deny responsibility.[141] "The availability of health access was only expressed in legal terms under the immigration statutes which were independent of policies in the Compact" and were also absent from any of the subsidiary agreements.[142] No one could have foreseen that these essential rights, which were implied in the original agreement, "had a time limit at the discretion of the United States."[143]

As a result, accessing adequate and affordable health care in the U.S. remains a challenge for COFA islanders without access to Medicaid, as "the state of Hawaii only finances care for children, pregnant women, and the aged, blind, or disabled."[144] Additionally, both the FSM and RMI have spent hundreds of millions of dollars of their grant assistance on infrastructure projects in accordance with the Compact, "though both rank in the bottom half in terms of human development among Pacific island nations."[145] The next section will examine the impacts of this legal, yet bad faith, unilateral alteration of the agreement with a focus on the State of Hawai'i and the COFA nations themselves.

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[137] Diaz, *supra* note 7, at 40.

[138] *Id.*

[139] *See generally* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996).

[140] Diaz, *supra* note 7, at 40–41.

[141] *Id.* at 41.

[142] *Id.*

[143] *Id.*

[144] Jacob Appel et al., Hawaii's COFA Islanders: Improving Health Access and Outcomes 2 (Jan. 2017) (unpublished Graduate Policy Workshop report for Governor of Hawai'i David Ige, Princeton University) (on file with Princeton University Library) [hereinafter Report for the Governor].

[145] U.S. GOV'T ACCOUNTABILITY OFF., GAO/NSIAD-00-216, U.S. FUNDS TO TWO MICRONESIAN NATIONS HAD LITTLE IMPACT ON ECONOMIC DEVELOPMENT 42 (2000).

a. Nuclear Claims Settlements for the RMI

The only medical benefit that is guaranteed by the Compact is found in Section 177 and its associated subsidiary agreement.[146] Together, they define America's acceptance of "responsibility for compensation owing to citizens of the Marshall Islands" affected by nuclear testing.[147] The agreement was signed on June 25, 1983, a year after negotiations began, and included three basic elements:

> (1) a claims fund of $150 million will be provided to the Marshall Islands Government and invested in interest-earning bonds, notes or other redeemable instruments to create a potentially permanent endowment for payment of nuclear claims;
>
> (2) the proceeds of the fund will be utilized for payments to persons known to be affected by the nuclear testing program (specifically, the people of Bikini, Enewetak, Rongelap and Utirik), and to fund a Marshallese claims tribunal to pay unknown or currently unknowable claims, and for medical care and other assistance to the Marshall Islands; and
>
> (3) in exchange for establishment of this settlement fund, the Marshall Islands Government espouses and settles all claims of its citizens arising from the nuclear testing program.[148]

"Pursuant to [Section] 23(13) of the Marshall Islands Nuclear Claims Tribunal Act 1987 . . . [the RMI] establish[ed] a list of 25 medical conditions which are irrefutably presumed to be the result of the Nuclear Testing Program."[149] "The Four Atolls" were officially designated as the only islands that have connection with the nuclear tests and remain the only islands that qualify for compensation and medical treatment.[150]

The U.S. was keen on including the espousal clause of the section 177 agreement, which "established the Nuclear Claims Trust Fund as full settlement of all past, present, and future claims against the United States" and ensured that the Compact was the only pathway for citizens of the RMI to pursue economic compensation via the Nuclear Claims Tribunal.[151] With

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[146] *See* Compact of Free Association Act of 2003 § 177, 117 Stat. at 2769–70. *See generally* Agreement Between the Government of the United States and the Government of the Marshall Islands for the Implementation of Section 177 of the Compact of Free Association, Marsh. Is.-U.S., June 25, 1983, H.R. Doc. 98-192, 308 [hereinafter Agreement for the Implementation of Section 177].

[147] Compact of Free Association Act of 2003 § 177(a), 117 Stat. at 2770.

[148] Arthur John Armstrong & Howard Loomis Hills, *The Negotiations for the Future Political Status of Micronesia (1980-1984)*, 78 AMERICAN J. OF INT'L L. 484, 493 (1984).

[149] Walsh, *supra* note 36, at 436.

[150] *Id.* at 108.

[151] U.S. GOV'T ACCOUNTABILITY OFF., GAO/NSIAD-92-229, STATUS OF THE NUCLEAR

the "compensation [to RMI] limited to a $150 million trust fund that would yield $270 million over the course of the Compact[,]"[152] coupled with the inability to file claims in any court in the future, the U.S. escaped having to pay billions of dollars from pending lawsuits that were already filed in federal courts.[153] Accordingly, based on the population of Rongelap, each citizen received more than $10,000 in compensation for their exposure to radioactivity.[154] In comparison, the U.S. settled a lawsuit with Japanese fishermen who were also impacted by the Bravo test for $2.3 million, or about $100,000 each.[155] The next section provides a discussion of how effective the distribution of compensation has been in remedying the thousands of claims received.

b. COFA Citizens in the American Armed Forces

One way a COFA migrant may benefit economically from the Compact is under Section 341, which makes them "eligible to volunteer for service in the Armed Forces of the United States[.]"[156] In reality however, this is more of a benefit to the U.S., as the FSM "has a higher per-capita enlistment rate in the U.S. military than any U.S. state and had more than five times the national per-capita average of casualties in Iraq and Afghanistan in 2008[.]"[157] The most important lesson from the language of the agreement concerning their right to enlist is simply how short the provision is.[158] In addition, nothing in the Compact or its subsidiary agreements entitle COFA citizens to any Veterans Affairs ("VA") benefits, creating obstacles for COFA veterans who proudly risked their lives for another sovereign nation but are unable to access basic VA medical help.[159] "In an era of historically low military service, the non-US citizens of Micronesia have acted as some of America's

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CLAIMS TRUST FUND 10 (1992); *see also* Agreement for the Implementation of Section 177, supra note 146, art. X.

[152] Walsh, *supra* note 36, at 352.

[153] *See* 131 CONG. REC. H6328-03 (daily ed. July 25, 1985) (statement of Rep. Bryant), 1985 WL 715955, at *46.

[154] Harry G. Prince, *The United States, The United Nations, and Micronesia: Questions of Procedure, Substance, and Faith*, 11 Mich. J. Int'l L. 11, 69 n.276 (1989).

[155] *Id.*

[156] Compact of Free Association Act of 2003 § 341, 117 Stat. at 2784.

[157] *See* Wash. State Comm'n on Asian Pac. American Affairs, *Health Equity for COFA Islanders*, CAPAA (Oct. 6, 2016), https://capaa.wa.gov/health-equity-for-cofa-islanders/.

[158] *See* Compact of Free Association Act of 2003 § 341, 117 Stat. at 2784.

[159] *See* Chad Blair, *Lawmakers Urge Medical Help For Micronesian Veterans*, CIVIL BEAT (Mar. 29, 2017), http://www.civilbeat.org/2017/03/lawmakers-urge-medical-help-for-micronesian-veterans/.

most valiant and patriotic soldiers[,]" leaving no room for excuses as to why it is too complicated for a COFA veteran to obtain VA treatment.[160]

2. *American Military Defense in Perpetuity*

Following centuries of colonial and imperial rule by a number of different nations, it is understandable why COFA nations would feel comfortable allowing the U.S. to maintain their military control over the region. However, this situation is arguably far more beneficial to the U.S. because of strategic phrasing throughout the Compact that could confuse even the best legal practitioner. What is most difficult to understand about the Compact is the extent to which America is allowed to exercise exclusive strategic denial, in part because of the absence of the use of words like "indefinite" or "perpetual" within the text of the Compacts.[161] On top of this strategic right to exclude any and all nations, Section 321 indicates the specific provisions of this section are "set forth in separate agreements, which shall remain in effect in accordance with the terms of such agreements."[162]

The separate agreement referred to is the Mutual Security Agreement signed in 1983, essentially restating the duties of Title Three and confirmed the U.S. has authority to "foreclose" access to the FSM or RMI by any third country.[163] The confusion arises from the termination and survivability

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[160] Andrews, *supra* note 24, at 58. COFA veterans have to fly themselves to Guam or Hawai'i if they want to be seen by a VA medical facility. Ku'uwehi Hirashi, *Complicated U.S. Relations Leave Veterans Without Full Health Benefits*, HAWAI'I PUBLIC RADIO (Nov. 9, 2017), https://www.hpr2.org/post/complicated-us-relations-leave-veterans-without-full-health-benefits.

[161] *See* Compact of Free Association Act of 2003 § 311, 117 Stat. 2782. Title Three, Section 311 provides:

> (a) The Government of the United States has full authority and responsibility for security and defense matters in or relating to the Federated States of Micronesia.
>
> (b) This authority and responsibility includes:
>
> (1) the obligation to defend the Federated States of Micronesia and its people from attack or threats thereof as the United States and its citizens are defended;
>
> (2) the option to foreclose access to or use of the Federated States of Micronesia by military personnel or for the military purposes of any third country; and
>
> (3) the option to establish and use military areas and facilities in the Federated States of Micronesia, subject to the terms of the separate agreements referred to in sections 321 and 323.
>
> (c) The Government of the United States confirms that it shall act in accordance with the principles of international law and the Charter of the United Nations in the exercise of this authority and responsibility.

Id.

[162] *Id.* § 321(a), 117 Stat. at 2783.

[163] *See* Agreement Between the Government of the United States and the Government of the Federated States of Micronesia Regarding Friendship, Cooperation and Mutual Security

clauses. The Compact itself provides for the mutual termination in Section 441, as well as termination by unilateral means for each country in Section 442 and 443.[164] When termination under either of the three sections occurs, the survivability sections carve out an exception for the entirety of Title Three, stating that it "shall remain in full force and effect through" the expiration of the Compact in 2023.[165]

Therefore, on the surface, it is easy to see why it would seem as if the COFA nations had the right to unilaterally terminate the arrangement, and how the Title Three defense provisions would carry on only until the expiration of the Compact. However, buried at the very end of the last survivability clause, Section 454 states, "Notwithstanding any other provision of this Compact, as amended . . . [t]he separate agreements referred to in Article II of Title Three shall remain in effect in accordance with their terms."[166] This section effectively destroys the notion that the COFA nations can unilaterally revoke this arrangement because both of the "separate agreements" provide: "This Agreement shall come into effect upon the expiration or termination of Title Three of the Compact of Free Association[,]" and "[t]his Agreement shall remain in full force and effect until terminated or otherwise amended by mutual consent."[167] Due to the requirement of mutual consent, America ultimately controls the outcome of the arrangement because there is no expiration date and the U.S. would never voluntarily give up this right.

This would explain why President Reagan stressed the importance of ratifying the Compact in his 1984 message to Congress, stating:

> [t]he defense and land use provisions of the Compact extend indefinitely the right of the United States to foreclose access to the area to third countries for military purposes. These provisions are of great importance to our strategic position in the Pacific and enable us to continue preserving regional security and peace.[168]

Concluded Pursuant to Sections 321 and 323 of the Compact of Free Association, Micr.-U.S., Oct. 1, 1982, H.R. Doc. No. 98-192, 382 [hereinafter Micronesia Mutual Security Agreement]; Agreement Between the Government of the United States and the Government of the Marshall Islands Regarding Mutual Security Concluded Pursuant to Sections 321 and 323 of the Compact of Free Association, Marsh. Is.-U.S., May 24, 1982, H.R. Doc. No. 98-192, 348 [hereinafter Marshall Islands Mutual Security Agreement].

[164] Compact II of Free Association Act of 2003 §§ 441–43, 117 Stat. at 2788–89.

[165] *Id.* § 451–53, 117 Stat. at 2828–30.

[166] *Id.* § 454, 117 Stat. at 2830.

[167] *See* Marshall Islands Mutual Security Agreement, *supra* note 163, at 351; *accord* Micronesia Mutual Security Agreement, *supra* note 163, at 382–87.

[168] Ronald Reagan, *Message to the Congress Transmitting Proposed Legislation to Approve the Compact of Free Association Between the United States and the Trust Territory of the Pacific Islands*, RONALD REAGAN PRESIDENTIAL LIBR. (March 30, 1984),

Further, as Congressman Jim Leach stated during a 1985 debate regarding the Compact:

> we have an opportunity from a strategic viewpoint to be on the brink of accomplishing something which eluded us in Vietnam, which eluded us in Iran, which seems to be eluding us in Nicaragua, and which may well have eluded us in the Philippines. We have a key element, and that is foresight backed up by the necessary action to prevent a crisis situation developing. We have an opportunity to act and not react and secure United States vital national security interests well into the next century.[169]

Accordingly, even though the "phrasing of these provisions may seem susceptible to an interpretation that unilateral termination is possible[,] [] the congressional legislative history indicates that the intent was for the arrangement of 'strategic denial' to continue in perpetuity."[170] The only form of control COFA nations have concerning Title Three falls under Section 313, which affords both COFA nations the right "on an expeditious basis, an opportunity to raise its concerns with the United States Secretary of State personally and the United States Secretary of Defense personally regarding any determination made in accordance with this section."[171]

Some scholars argue that giving up sovereign territory in perpetuity violates UN norms regarding the "proper exercise of self-determination" as it is "virtually impossible for one or more of the entities to escape from the burdens of the military arrangements."[172] Others argue, however, that refusing COFA nations the right to make this agreement would be too paternalistic and undermine their free and fair election to enter into this pact.[173] Either way, with Kwajalein leased through at least 2066,[174] coupled with this exclusive right for strategic denial in perpetuity, the U.S. got what it wanted out of the Compact by essentially retaining its most beneficial provision of the TTPI.[175]

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https://www.reaganlibrary.gov/research/speeches/33084.

[169] 131 CONG. REC. H6328-03 (daily ed. July 25, 1985) (statement of Rep. McCain), 1985 WL 715955, at *41.

[170] Prince, *supra* note 154, at 55 fn.212.

[171] *See* Compact of Free Association Act of 2003 § 313(c), 117 Stat. at 2782.

[172] Prince, *supra* note 154, at 55.

[173] *Id.* at 58.

[174] Compact of Free Association: Military Use and Operating Rights, Marsh. Is.-U.S., art. X, ¶ 3, Apr. 30, 2003, T.I.A.S. 04-501.3.

[175] *See* Compact II of Free Association Act of 2003 § 454, 117 Stat. at 2830.

IV. COMPACT IN ACTION: A SURVEY OF THE SOCIOECONOMIC IMPACTS IN COFA COUNTRIES

The following section analyzes how the contractual benefits of the Compact are being implemented for those who choose to remain in their home countries, as well as the islanders who decided to immigrate to the U.S. Both options come with their own unique challenges and experiences, which have shaped the current status of the Compact and the future of the relationship. The choice to stay in their home countries or move to the U.S. is complicated by a multitude of different social, medical, and economic factors, all of which will be discussed below.

A. The Reality of American Assistance in Promoting a Self-Reliant Micronesia

The UN Security Council officially terminated the TTPI on December 22, 1990, four years after the Compact was ratified by the U.S. Congress.[176] To do so, the U.S. had to present its termination request to the Security Council, which then had the power to approve the request after finding the U.S. had fulfilled its obligations.[177] The most obvious reason the U.S. delayed terminating the TTPI was because of the possibility that "the Soviet Union or some other country might use that forum to take the United States to task over the competency of its forty year administration of the Trust Territory."[178] As the Soviet Union was falling apart at the seams by 1989, America's concerns about the Soviets using their veto power to politicize the issue was no longer a threat, clearing the way for the official termination of the TTPI.[179]

1. Advancing Economic Development and Self-Sufficiency

In a review of the goals of the Compact, the agreement "provided a framework for the United States to work toward achieving its three main goals: (1) to secure self-government for the FSM and the RMI, (2) to assist the FSM and the RMI in their efforts to advance economic development and self-sufficiency, and (3) to ensure certain national security rights for all of

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[176] Michael R. Lupant, *From the Trust Territory of Pacific to the Federated States of Micronesia*, in Proceedings of the 24th International Congress of Vexillology 691, 691 (Scot M. Guenter & Edward B. Kaye, eds., 2011), *available at* https://nava.org/wp-content/uploads/2015/03/icv24lupant.pdf.

[177] *See* U.N. Charter art. 83.

[178] Prince, *supra* note 154, at 14.

[179] *Id.*

the parties."[180] The second goal of "economic development and self-sufficiency . . . was to be accomplished primarily through U.S. direct financial payments . . . to the FSM and the RMI."[181]

According to a U.S. Government Accountability Office ("GAO") report conducted before the renewal in 2003, the Compact funds "led to little improvement in economic development" for both nations.[182] The report highlighted how the "[h]igh public sector wages have raised the threshold for private sector wages, making the private sector less competitive in international markets."[183] Additionally, both nations focused their spending on "infrastructure projects, such as electrical power and telecommunications systems[.]"[184] "However, these projects have not generated significant private sector activity and have not been sufficient to overcome other obstacles to growth such as a remote location, a lack of natural resources, and limited managerial expertise."[185] The report went on to highlight the struggles of different business ventures that private citizens attempted to create but failed in nearly every endeavor.[186]

The GAO attributed much of these difficulties to a lack of accountability by both the Compact nations, as well as the U.S.[187] The Compact itself required both COFA nations to conduct annual reports on expenditures, "but many of the documents were of limited usefulness and did not contain sufficient information to determine whether Compact funds were being spent

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[180] U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-550T, ISSUES ASSOCIATED WITH IMPLEMENTATION IN PALAU, MICRONESIA, AND THE MARSHALL ISLANDS 4–5 (2016).

[181] *Id.* at 5 (providing that payments were to be disbursed and monitored by Interior Department.).

[182] U.S. GOV'T ACCOUNTABILITY OFF., GAO/NSIAD-00-216, U.S. FUNDS TO TWO MICRONESIAN NATIONS HAD LITTLE IMPACT ON ECONOMIC DEVELOPMENT 10 (2000).

[183] *Id.*

[184] *Id.*

[185] *Id.* at 10–11.

[186] *See id.* at 11.

> During [the GAO's] work and site visits to 80 Compact-funded projects, GAO found that many projects had experienced problems because of poor planning and management, inadequate construction and maintenance, or misuse of funds. For example, poor planning and management resulted in the incomplete construction of a costly and high-priority road in the Republic of the Marshall Islands. In numerous cases GAO found leaking roofs as the result of poor construction and maintenance. Finally, GAO identified several projects that appeared to be a misuse of funds in that it is questionable whether these projects will promote widespread economic advancement. For example, in the state of Chuuk in the Federated States of Micronesia, an ice plant intended to support community fishing operations was never built, despite receiving Compact funding, and an ice machine intended for the plant was moved to a Mayor's property.

Id.

[187] *Id.*

to promote economic development."[188] However, the U.S. also had not been upholding its oversight responsibilities, as the Departments of Interior and State did not conduct a single consultation with the two Compact nations due to disagreements concerning who was responsible until 1994, eight years after the Compact was adopted.[189] This friction culminated in the 2003 amendments and addition of the trust fund, all of which continue to be criticized as woefully inadequate in their abilities to achieve their goals.[190]

i. Compact II: New Method of Distribution, Same Results

The challenges of implementing the new oversight provisions and ensuring the purposes of the Compact are being achieved continue to exist.[191] A 2016 GAO report found that during the first ten years of the amended Compact, lack of reliable performance data and difficulties ensuring accountability for Compact funding continued to be the most significant weaknesses in achieving self-reliance.[192] The OIA blamed the problem on staffing shortages, budget constraints, as well as a lack of authority to enforce Compact requirements.[193]

Another major driving factor often left out of the discussion by the U.S. is the unique cultural differences between the COFA nations and America.[194] Local governments, however, represented by freely elected officials in a democratic fashion, still maintain a "somewhat robust system of chiefly authority."[195] "The FSM is a federation with considerable autonomy in each of the four states," resulting in varying degrees of economic progress due to their unique hierarchical social relationships in each state.[196] Similarly, in the RMI, one major critique of the Compact funding has been this: "The US should have made our leaders more accountable for the funding it provided. Because the US didn't get involved, the money was wasted, poorly invested,

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[188] *Id.*

[189] *See id.* at 12.

[190] *See id.*; *see also* Walsh, *supra* note 36, at 354–376 (discussing the criticisms of the Compact).

[191] *See generally* U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-550T, ISSUES ASSOCIATED WITH IMPLEMENTATION IN PALAU, MICRONESIA, AND THE MARSHALL ISLANDS (2016).

[192] *Id.* at 18.

[193] *Id.* at 19.

[194] *See* Andrews, *supra* note 24, at 8–16.

[195] *Id.* at 8.

[196] Gov't of the Federated States of Micr., *Federated States of Micronesia's Strategic Development Plan (2004-2023), The Next 20 Years: Achieving Economic Growth and Self-Reliance, Vol I: Policies and Strategies for Development*, ASIAN DEVELOPMENT BANK 4, https://www.adb.org/sites/default/files/linked-documents/cobp-fsm-2016-2018-ld-01.pdf (last visited Apr. 19, 2018).

or mortgaged, and now we are all suffering. *Rankein eben mour* [These days life is hard]."[197]

These cultural differences in governing led much of the discourse in COFA nations to revolve around how poorly their local leaders have managed their funds and blaming the U.S. for not doing a better job of looking after them.[198] As Dr. Julianne Walsh of the UH Manoa Pacific Island Studies Department describes this dichotomy:

> Because Marshallese people find it culturally impossible to confront their leaders, they look to the US to interfere. This is the *only* criticism of the Compact that is directly related to the United States. The discursive technique used in the following portrayals of the United States as a coach, parent, or chief is directly linked to Marshallese views of authority as residing in those who watch over, protect, and provide for others in their care. The logical extension of this local hierarchy into the international realm is critical to Marshallese understandings of their relationship with the United States. In the metaphor of the Marshallese, the US is guilty of "poor parenting."[199]

Many complain about how the money is being wasted on new commercial airlines, "the capital building, and the Outrigger Hotel[.]"[200] The Marshallese consider all of these projects to be overtly excessive and wish more focus was placed on developing the outer islands, not just Majuro and Kwajalein.[201] Due to the Compact being "founded on the notion that the U.S. would take care of the COFA citizens in exchange for defense rights[,]" and "on dependency that the U.S. purposefully created[,] the U.S. ultimately created a "permanent and favorable relationship" that has "changed the structure of Micronesian life forever[,]" and must be recognized by the U.S.[202]

ii. Infrastructure Support: Health Care and Education Access

To review, "[t]he amended compacts and their subsidiary agreements, along with the countries' development plans, target the grant assistance to six sectors—education, health, public infrastructure, the environment, public sector capacity building, and private sector development—prioritizing two

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[197] Walsh, *supra* note 36, at 366.

[198] *See id.* at 365–66.

[199] *Id* at 365. By virtue of this unique relationship with the U.S., much of the local criticism revolves around how their governments squander most of the funds on projects that do very little for the communities. *See id.*

[200] *Id* at 364.

[201] *Id.*

[202] Diaz, *supra* note 7, at 46.

sectors, education and health."[203] Education and health are intrinsically connected, as without a reliable education system, a state cannot "adequately develop the human resources to staff district health services."[204] Consequently, the few who obtain a higher education abroad do not return home, leaving resource-deficient island economies no other option than to spend their funds on "public health and primary care and cannot support robust secondary or tertiary services."[205]

The medical facilities available to the public consist of one major hospital, generally on the capital islands of the state.[206] While some of the outer islands have dispensaries open, they are often not actually in operation or lack the expertise needed to treat the patient.[207] The better hospitals can conduct a majority of expected procedures, however, many COFA citizens have to be referred off-island to places like Hawai'i for more advanced services, such as surgeries and cancer treatments.[208] The locations of these larger hospitals are also an issue for COFA citizens who reside in rural areas or on the outer islands because they have to wait until the conditions are safe for traveling by boat.[209]

On account of the limited facilities in the Compact nations, "it is estimated that one-third of the budget for health care in the Republic of the Marshall Islands in 1996 was used for off-island health care and this remains a significant source of health expenditures in the FSM as well."[210] Even though "[m]ost services available are subsidized by the government," many COFA citizens "who receive health care in Hawaii are not formally referred by their government health services" but "[r]ather seek care on their own and obtain public health insurance (i.e., Medicaid) in Hawai'i to fund their care."[211]

In examining the facilities of the islands in 2013, the GAO noted significant improvements since their 2006 visit.[212] The report also noted that

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[203] U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-550T, ISSUES ASSOCIATED WITH IMPLEMENTATION IN PALAU, MICRONESIA, AND THE MARSHALL ISLANDS 5 (2016).

[204] Seiji Yamada & Ann Pobutsky, *Micronesian Migrant Health Issues in Hawaii: Part 1: Background, Home Island Data, and Clinical Evidence*, 7 CAL. J. HEALTH PROMOTION 16, 18 (2009).

[205] *Id.*

[206] *Id.*

[207] *Id.*

[208] *Id.*

[209] Neil MacNaughton & Melissa L. Jones, *Health Concerns of Micronesian Peoples*, J. OF TRANSCULTURAL NURSING 305, 309 (2013).

[210] Yamada & Pobutsky, *supra* note 204, at 18 (citations omitted).

[211] *Id.*

[212] U.S, GOV'T ACCOUNTABILITY OFF., GAO-13-675, MICRONESIA AND THE MARSHALL ISLANDS CONTINUE TO FACE CHALLENGES MEASURING PROGRESS AND ENSURING

the larger hospitals were no longer issuing expired drugs, but could not inspect the small dispensaries because they were closed "even though their schedules indicated that they were supposed to be open."[213] On top of this, accurate mortality data is difficult to obtain from the outer islands, as it is "estimated that half of all infant deaths in the RMI were not reported at all, which created uncertainty as to the most common causes of infant deaths."[214]

Geographic isolation is partially to blame for their inadequate health care services and their struggle to control both communicable and noncommunicable diseases from having major impacts on outer islands.[215] The World Health Organization ("WHO") reported the most common chronic diseases are hypertension and diabetes, while the top four causes of death are cardiovascular disease, diabetes mellitus, chronic obstructive pulmonary disease, and cerebral-vascular disease.[216] For example:

> in Pohnpei state [FSM], a survey completed in 2008 demonstrated that 32.8% of the adult populations between the ages of 25 and 64 years were type II diabetics. This alarmingly high proportion of adults with diabetes has been attributed to the change in local diet from a traditional diet based on local foods (breadfruit, taro, banana, local fish, and other seafood) to one of that is more westernized with reliance on wheat flour, white rice, sugar, and fatty canned meats such as canned corn beef.[217]

As we can see, the westernization plan for the COFA nations has not made life significantly better regarding access to health. This lack of growth in the health sector, which is perhaps the most important program the Compact is designed to facilitate, has also proven to be detrimental to the growth of mental health providers.[218] The lack of mental health resources is especially

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ACCOUNTABILITY 29 (2013) (finding that some of the central hospitals had fixed their electrical supply issues and no longer would lose power frequently).

[213] *Id.*

[214] *Id* at 38 n.64 (discussing that with a lack of data on how children are dying, it becomes much more difficult to prevent future deaths through vaccinations and other treatments that could be available.).

[215] MacNaughton & Jones, *supra* note 209, at 307.

[216] *Id.*

[217] *Id.* at 307–08 (citation omitted).

[218] *See id.* at 308 ("One of the tragic issues facing the FSM is the lack of mental health services. Unfortunately, there are no psychiatrists or psychologists in the country and few, if any; health care providers have comprehensive training in providing mental health services. There are no beds available for patients to be hospitalized in a therapeutic milieu; although there are beds assigned for mental health they are often simply rooms attached to the regular wards. In the event that a person requires a locked unit environment there are no beds available and the island's jail cells are used for these individuals").

alarming considering WHO data indicating "the FSM has one of the highest suicide rates in the world for young adult males."[219]

There are many cultural and socioeconomic factors that play into this high rate of illness related deaths and suicides, "however, alcohol is also believed to be a major contributor to this situation[.]"[220] This issue can easily be attributed back to the lack of economic opportunities that were previously discussed, or the inadequate development of medical facilities for both physical and mental health concerns.[221] However, as the WHO indicated in their 2010 global strategy, "[p]olicies to reduce the harmful use of alcohol must reach beyond the health sector, and appropriately engage such sectors as development, transport, justice, social welfare, fiscal policy, trade, agriculture, consumer policy, education and employment, as well as civil society and economic operators."[222]

For nearly the entirety of the Compact, the GAO has continuously reported that the federal departments involved in monitoring and distributing funds have not provided adequate oversight of their projects.[223] This is of particular concern in the education realm, considering American grants and funds cover over ninety percent of the total education budget in the FSM.[224] The lack of accountability and near complete dependency on American financial assistance has inevitably led to "instances of theft, fraud, or misuse of federal funds."[225]

"The geographic isolation of these schools, lack of resources and access to technology, and a limited pool of qualified human resources are major impediments to providing quality education service."[226] With so many struggles in improving the islands' education systems, it is no surprise that nearly a quarter of the total school-aged children in the FSM are not even registered in the school system.[227] Similarly, in the RMI, the scarcity of

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[219] *Id.* 308–09 (citation omitted).

[220] *Id.* at 309.

[221] *See id.*

[222] WORLD HEALTH ORGANIZATION, GLOBAL STRATEGY TO REDUCE THE HARMFUL USE OF ALCOHOL 6 (2010), https://www.who.int/substance_abuse/msbalcstragegy.pdf.

[223] *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-02-70, EFFECTIVENESS AND ACCOUNTABILITY PROBLEMS COMMON IN U.S. PROGRAMS TO ASSIST TWO MICRONESIAN NATIONS 4 (2002).

[224] *See* OFFICE OF INSULAR AFFAIRS, BUDGET JUSTIFICATIONS AND PERFORMANCE INFORMATION FISCAL YEAR 2016, 88 (2016), https://www.doi.gov/sites/doi.gov/files/migrated/budget/appropriations/2016/upload/FY2016_OIA_Greenbook.pdf [hereinafter 2016 BUDGET JUSTIFICATIONS].

[225] U.S. GOV'T ACCOUNTABILITY OFF., GAO-02-70, EFFECTIVENESS AND ACCOUNTABILITY PROBLEMS COMMON IN U.S. PROGRAMS TO ASSIST TWO MICRONESIAN NATIONS 44 (2002).

[226] 2016 BUDGET JUSTIFICATIONS, *supra* note 224, at 88.

[227] *Id.*

resources led to OIA reporting that "one-half of high school graduates entered the college with the equivalent of a 4th to 6th-grade U.S. education[.]"[228] The underperformance of the COFA nations' education systems is yet another example of failing to meet the primary goal of increased self-reliance.

For the few who do decide to go on to college, each nation only has a single college for their residents to choose from, both of which are U.S. accredited universities that only offer two-year programs.[229] Pell Grants continue to cover nearly all of the students' tuition,[230] however only one-fifth of the students complete their course of study.[231] While the Pell Grants may be meeting their limited goals, "the poor conditions of the elementary and secondary school system, the limitations of a 2-year college, and the lack of employment opportunities limited the potential accomplishments of the Pell Grant program."[232]

Due to an inadequate education available during their childhoods, most students exhaust their Pell Grants on remedial classes and therefore do not have the available funds for completing the classes they need to graduate.[233] Ultimately, the main goal of the Pell Grant cannot be met because "skilled workers and managers [are] brought in from the United States, the Philippines, and other countries to meet the demand for technical and mid- and upper-level management positions."[234] Therefore, it is reasonable to be concerned for the future of these nations once the Compact comes to a close in light of the facts that over a third of the population is under the age of fifteen,[235] they have an unqualified workforce, and a near complete dependency on U.S. funds for education.

Every year that passes the funds have decreased accordingly, "with the amounts of the decrements to be deposited in the compact trust funds."[236]

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[228] U.S. GOV'T ACCOUNTABILITY OFF., GAO-02-70, EFFECTIVENESS AND ACCOUNTABILITY PROBLEMS COMMON IN U.S. PROGRAMS TO ASSIST TWO MICRONESIAN NATIONS 30 (2002).

[229] *See* COLLEGE OF MICRONESIA, http://www.comfsm.fm (last visited Apr. 13, 2019); COLLEGE OF THE MARSHALL ISLANDS, http://www.cmi.edu (last visited Apr. 13, 2019).

[230] U.S. GOV'T ACCOUNTABILITY OFF., GAO-02-70, EFFECTIVENESS AND ACCOUNTABILITY PROBLEMS COMMON IN U.S. PROGRAMS TO ASSIST TWO MICRONESIAN NATIONS 29 (2002).

[231] *See* NATIONAL CENTER FOR EDUCATION STATISTICS, COLLEGE OF MICRONESIA-FSM, https://nces.ed.gov/collegenavigator/?q=College+of+Micronesia&s=all&id=243638#retgrad, (last visited July 9, 2018)

[232] U.S. GOV'T ACCOUNTABILITY OFF., GAO-02-70, EFFECTIVENESS AND ACCOUNTABILITY PROBLEMS COMMON IN U.S. PROGRAMS TO ASSIST TWO MICRONESIAN NATIONS 29 (2002).

[233] *Id.* at 29–30.

[234] *Id.* at 30.

[235] *See* Central Intelligence Agency, The World Factbook, https://www.cia.gov/library/publications/the-world-factbook/geos/rm.html (last visited Mar. 9, 2019) ("Age Structure: 0-14 years: 34.26% (male 13,224/female 12,706)").

[236] U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-550T, ISSUES ASSOCIATED WITH

The GAO's most recent report on the Compact in 2016 found that "neither country had made significant progress in implementing reforms needed to improve tax income or increase private sector investment opportunities" in preparation for the change in 2023.[237] The trust fund agreements do allow for amendments by mutual consent that improve the compacts performance, "[h]owever, the legislation implementing the amended compacts requires that any amendment, change, or termination of the trust fund agreements shall not enter into force until after Congress has incorporated it into an act of Congress."[238]

Once more, the U.S. controls the destiny of the COFA nations, and as long as they continue down this path of limited accountability and integrity in upholding Americas end of the bargain, the future after 2023 looks grim for both the FSM and RMI. As of March 2016, the OIA has not submitted the second of its required five-year reviews to Congress since its initial 2004–2008 report was submitted in 2013.[239] Providing politicians with limited data to work with in determining how to approach any future amendments further strains any hope for improving impacts from the trust funds' weaknesses.[240] With near complete dependence currently on foreign aid, the Asian Development Bank projected in 2015 "that the probability of the FSM and RMI trust funds' maintaining their values through 2050 was 22 and 49 percent, respectively."[241]

There are arguably many contributing factors to the Compact nations' struggling education system, as it is undisputed that each of the local governments shares their own unique flaws and mismanagement of the funds. However, after over thirty years of report after report highlighting the lack of oversight by U.S. federal agencies, it is unacceptable for the OIA to continue to blame staff shortages as its reason for not ensuring funds are used effectively.[242] For as long as the OIA continues to ignore its obligations, "shrinking government budgets lead to fewer jobs and under-funded education and health care, [and] as global climate change leads to inundation of low-lying atolls . . . it is little wonder that Micronesians are choosing to relocate to the United States."[243]

IMPLEMENTATION IN PALAU, MICRONESIA, AND THE MARSHALL ISLANDS 16 n.31 (2016).

[237] *Id.* at 16.

[238] *Id.* at 17 n.34.

[239] *Id.* at 17 n.37.

[240] *See id.* at 18.

[241] *Id.* at 17.

[242] *See id.* at 19. This is especially true considering as early as 2013 the GAO recommended that the Interior take actions to correct the staffing but has still not addressed this recommendation. *Id.* at 19 n.43.

[243] Dina Shek & Seiji Yamada, *Health Care for Micronesians and Constitutional Rights*, 70 HAW. MED J. 4, 4 (2011).

V. COFA OPTION TWO: MIGRATION IMPACTS IN AMERICA

There is a steady increase of COFA migrants living in the U.S., with the majority of them moving to three affected jurisdictions of Hawai'i, Guam, and the Commonwealth of the Northern Mariana Islands ("CNMI").[244] The most recent U.S. Census Bureaus' report in 2010 indicated the RMI population had tripled over the previous ten years from 6,700 to 22,434 persons, with the majority of them moving to Hawai'i.[245] As this population growth accelerates due to climate change and the impacts of rising sea levels,[246] costs to states like Hawai'i will continue to see an equivalent increase in expenditures.[247]

A. Inadequate Federal Relief Funds Negatively Impact Hawai'i and COFA Residents

"The three affected jurisdictions have reported more than $2 billion in costs associated with providing education, health, and social services to compact migrants and have called for additional funding and changes in law to address compact migrant cost impacts."[248] As previously discussed, these jurisdictions are required to split the $30 million annual relief funds "based on a ratio allocation to the government of each affected jurisdiction on the basis of the results of the most recent enumeration."[249] The DOI recognizes

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[244] U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-550T, ISSUES ASSOCIATED WITH IMPLEMENTATION IN PALAU, MICRONESIA, AND THE MARSHALL ISLANDS 19 (2016).

[245] Pearl Anna McElfish et al., *Effect of US Health Policies on Health Care Access for Marshallese Migrants*, 105 AM. J. PUB. HEALTH 637, 638 (2015) ("The exact number of migrants is difficult to ascertain because COFA migrants may freely come to the United States without a visa or permanent residence card.").

[246] *See* Shek & Yamada, *supra* note 243, at 4.

> In December 2008, swells washed over Majuro, the capital of the Marshall Islands, damaging homes and forcing people into shelters. From 2007 through 2008, high tides and wave surges led to salt water damage of up to 90% of the taro crops in the outer islands of the FSM. Since it takes five years of better water conditions (no saltwater intrusion and normal rainfall) for taro to recover, Father Francis Hezel, authority on Micronesian history and culture, states, "Perhaps the larger issue is whether life in the remote atolls remains viable in today's world."

Id.

[247] *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-550T, ISSUES ASSOCIATED WITH IMPLEMENTATION IN PALAU, MICRONESIA, AND THE MARSHALL ISLANDS 19, 25 (2016).

[248] *Id.* at 19.

[249] OFF. OF INSULAR AFFAIRS, BUDGET JUSTIFICATIONS AND PERFORMANCE INFORMATION FISCAL YEAR 2018, 90 (2018), https://www.doi.gov/sites/doi.gov/files/uploads/fy2018_oia_budget_justification.pdf [hereinafter 2018 BUDGET JUSTIFICATIONS]. In 2017, Hawai'i received $12.6 million. *Id.* at 91.

however, "the current allocation of mandatory and discretionary [relief] funds [is] insufficient to meet the financial impact costs . . . associated with the Compact agreements"[250] as it only covers a fraction of what states are actually spending to host COFA migrants.[251] For example, "[i]n 2014, Hawai'i received $12 million in Compact Impact funds. . . . [h]owever, these funds covered only a small fraction of the total cost that Hawaii reported from hosting COFA islanders, estimated at $163 million."[252]

In response, Hawai'i Legislature Senate Resolution No. 142, S.D. 1 was adopted in 2007 "request[ing] that the Attorney General convene a task force to investigate and coordinate the provision of medical and social services to migrants from Freely Associated States[.]"[253] The main goal was to annually bring together nine different Hawai'i organizations[254] concerned with COFA impacts to discuss the needs of COFA migrants and consult directly with the OIA office in Honolulu.[255] The conclusions of the report were similar to the GAO reports, but acknowledged that Hawai'i understands "there was never an intent to burden the State when the Compacts of Free Association were first conceived."[256] Consequently, the state continues to call on the U.S. government to "take more responsibility to ensure that the people coming into the US are better prepared to meet the challenges they face" in Hawai'i.[257]

Unfortunately, the COFA Task Force only provided two more impact reports, with the most recent covering 2011-2014.[258] Besides the obvious need for the U.S. to help improve the medical facilities in the COFA nations

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[250] U.S. DEPT. OF THE INTERIOR, REPORT TO THE CONGRESS: 2015 COMPACT IMPACT ANALYSIS 3 (2015), https://www.doi.gov/sites/doi.gov/files/uploads/2015%20Compact%20Impact%20Analysis%20Report%20to%20the%20Congress.pdf.

[251] Report for the Governor, *supra* note 144, at 38.

[252] *Id.* at 12. In other words, Hawai'i spent about fifteen times the amount received by the relief fund on hosting COFA migrants. *Id.* at 38.

[253] ST. OF HAW. DEP'T OF THE ATT'Y GEN., FINAL REPORT OF THE COMPACTS OF FREE ASSOCIATION TASK FORCE 1 (2009), https://ag.hawaii.gov/wp-content/uploads/2013/01/cofa.pdf.

[254] The organizations include: Department of Health; The Department of Human Services; The Department of Education; The Department of Labor and Industrial Relations; The University of Hawai'i at Manoa, John A. Burns School of Medicine; The Micronesian Community Network; Micronesians United; The Institute for Human Services; and The University of Hawai'i - West Oahu. *Id.*

[255] *Id.*

[256] *Id.* at 14.

[257] *Id.*

[258] *See* Letter from David Y. Ige, Governor, State of Haw., to Esther Kia'aina, Assistant Sec'y for Insular Affairs (Aug. 27, 2015) (on file with the Department of the Interior) (Hawaii continued to report excessive impacts to Hawai'i 's budget and requested for more funding from the federal government).

to limit the amount of COFA migrants in search of better health care, the report further recommends that the U.S. Congress "introduce measures that would allow COFA residents to receive federally-funded benefits that were limited by the enactment of the Personal Responsibility and Work Opportunity Reconciliation Act of 1997."[259] Doing so would alleviate costs currently fronted by Hawai'i and, more importantly, "would be to the benefit of all Compact residents" as they would once again have access to the federally funded medical care they originally received.[260]

1. Fear of the Foreigner: Socioeconomic Issues for Compact Diaspora

When considering the previous discussion on the inadequacy of the education systems, it is no surprise that many of the migrants arrive with limited job skills and low levels of proficiency in English.[261] Honolulu's cost of living does not make life any easier as rent is one of the highest in the country.[262] Additionally, they were found to be "more likely to report unsatisfactory housing arrangements" than any other migrant community, an increasing number of landlords are choosing not to rent to COFA migrants.[263]

The high cost of living in Hawai'i has led to an estimated 1,150 COFA migrants without a home and the subject of many negative articles written about Hawai'i's homeless problems.[264] COFA migrants continue to be portrayed by local media as a major source of the state's serious homeless issue,[265] even though they only account for roughly 13% of the entire homeless population in Honolulu.[266] The negativity also stems from

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[259] *Id.*

[260] *Id.*

[261] Yamada & Pobutsky, *supra* note 204, at 18.

[262] *See e.g.*, *id.* (forcing many migrant families to choose to live in large numbers, averaging five rooms for eight to ten people).

[263] *Id.* at 18–19.

[264] *See* Report for the Governor, *supra* note 144, at 6.

[265] *See* Chad Blair, *Media Said to Fuel Micronesian Stereotypes*, HON. CIVIL BEAT (June 21, 2011), https://www.civilbeat.org/2011/06/11722-media-said-to-fuel-micronesian-stereotypes/ (reporting that media often describes Micronesians as "leeches" who use services at high costs to Hawai'i residents); Chad Blair, *No Aloha for Micronesians in Hawaii*, HON. CIVIL BEAT (June 20, 2011), https://www.civilbeat.org/2011/06/no-aloha-for-micronesians-in-hawaii/ (relating first-hand stories of Micronesians who have experienced discrimination in Hawaii); HAW. APPLESEED CTR FOR L. AND ECON. JUST., BROKEN PROMISES, SHATTERED LIVES: THE CASE FOR JUSTICE FOR MICRONESIANS IN HAWAI'I 15 (Dec. 14, 2011), http://hiappleseed.org/wp-content/uploads/2016/11/Broken-Promises-Shattered-Lives-The-Case-for-Justice-for-Micronesians-in-Hawai%CA%BBi.pdf (explaining the prevailing stereotype that Micronesians are "lazy" and are "taking all of our resources").

[266] *Homeless Service Utilization Report: Hawaii 2016*, CENTER ON THE FAMILY 7 (2016),

Hawai'i's already struggling Department of Education ("DOE") that "must utilize extra resources for many COFA students, who typically require specialized language services."[267] In 2014, the DOE spent over $87 million in 2014 to educate only 8,165 COFA students.[268] The University of Hawai'i also reported a loss of roughly $1.5 million by allowing COFA migrants to pay resident instead of non-resident tuition,[269] but never acknowledged that the same benefits are afforded to residents of fourteen different western U.S. states.[270]

This narrative was especially prevalent following the financial crisis of 2008 when the Hawai'i "media and state decision-makers called COFA migrants 'a drain on resources' or an 'unfair burden.'"[271] They were referring specifically to the taxpayers having to cover Med-QUEST, not even considering the large number of migrant workers who all pay the same income taxes as everyone else.[272] Nevertheless, the timing was perfect for Governor Linda Lingle because the State needed to cut costs; therefore appealing to anti-immigrant sentiments, support for eliminating COFA migrants access to the states Med-QUEST program was easy to obtain.[273]

i. The Fight for Equal Protection and Access to Health Care

In 2009, Hawai'i "announced that approximately 7,500 COFA migrants enrolled in Med-QUEST would be disenrolled . . . and placed in a program with fewer benefits, called Basic Health Hawai'i ("BHH")."[274] The day before the new policies were to go into effect, "attorneys from the non-profit Lawyers for Equal Justice and the law firm Alston Hunt Floyd & Ing filed a legal complaint on behalf of residents of Hawai'i from the Compact Nations objecting to BHH on constitutional and procedural grounds."[275] Fortunately,

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http://uhfamily.hawaii.edu/publications/brochures/b761f_HomelessServiceUtilization2016.pdf.

[267] Letter from David Y. Ige to Esther Kia'aina, *supra* note 258, at 2.

[268] *Id.*

[269] *Id.*

[270] The Western Interstate Commission for Higher Education (WICHE) allows residents from AK, AZ, CA, CO, ID, MT, ND, NV, NM, OR, SD, UT, WA, WY to be charged resident tuition at the University of Hawai'i. *Tuition, Fees, and Expenses*, UNIVERSITY OF HAWAI'I MANOA, http://www.catalog.hawaii.edu/tuitionfees/tuition.htm#wiche (last visited Apr. 14, 2019).

[271] *See* Susan K. Serrano, *The Human Costs of "Free Association": Socio-Cultural Narratives and the Legal Battle for Micronesian Health in Hawai'i*, 47 JOHN MARSHALL L. REV. 1377, 1388 (2014).

[272] *See* Shek & Yamada, *supra* note 243, at 5.

[273] *Id.*

[274] *Id.*

[275] *Id.* (referring to Korab v. Koller, No. 10-00483, 2010 WL 5158883, at *1 (D. Haw.

U.S. District Court Judge Michael Seabright agreed with the complaint and issued a temporary injunction preventing the State from changing the program, "citing a lack of adequate procedural protections."[276]

The fight did not end there, as the state corrected the draft rules in question and held the public hearings required by the court, effectively allowing Hawai'i to officially implement BHH on July 1, 2010.[277] These changes created an increase in reports of patients stopping their medications entirely because they could not afford them anymore.[278] Regrettably, this led to "some fragile patients deteriorat[ing], and end[ing] up in the hospital with severe complications" that the medications were designed to mitigate.[279]

The following month, Honolulu lawyers[280] filed another class action lawsuit and obtained a preliminary injunction that suspended BHH and restored Med-QUEST benefits to all COFA migrants.[281] This time, Judge Seabright agreed that denying access to Med-QUEST "was a violation of the equal protection clause of the Fourteenth Amendment to the US Constitution, which prohibits denying 'to any person within its jurisdiction the equal protection of the laws.'"[282] The injunction held strong for over three years until a three-judge panel of the Ninth Circuit overturned Judge Seabright's ruling, finding that the state had no constitutional obligation to provide COFA migrants with coverage.[283] On the same day that the plaintiffs' appeal to the U.S. Supreme Court was denied, "Governor Abercrombie's administration announced that 7400+ adult COFA residents who are not pregnant, aged, blind, or disabled will be removed from Med-Quest rolls within 120 days."[284]

Dec. 13, 2010)).

[276] *Id.*

[277] *Id.* (explaining that BHH was as basic as health coverage can be, as it cut back hospital visits, medications, and stopped reimbursing community health centers who provided language interpretations.).

[278] *Id.*

[279] *Id.* ("Those who were not previously enrolled in Med-QUEST, such as those newly arrived from the Compact Nations could not obtain coverage at all. One such patient with thyroid cancer ended up with a $23,000 hospital bill for a thyroidectomy. In that hospitals are unlikely to collect on such bills, a portion of the costs saved by the State via BHH were actually borne by hospitals.").

[280] "Lawyers for Equal Justice and pro bono attorneys from Alston Hunt Floyd & Ing and Bronster & Hoshibata." *Id.*

[281] *Id.*; *see also* McElfish et al., *supra* note 245, at 638–39.

[282] McElfish et al., *supra* note 245, at 639 (citation omitted).

[283] *Id.* (referring to Korab v. Fink, 797 F.3d 572 (9th Cir. 2014)) (citing the enactment of the PROWA).

[284] *Id.*

2. *The COFA Complex: New Presidential Administration, Same Struggle*

A report for the Governor of Hawai'i demonstrated the growing frustration and confusion of the COFA migrants who were struggling to navigate the constant obstacles the U.S. put in front of them.[285] Following the end of Med-QUEST access, COFA migrants had to scramble to get on the Affordable Care Act ("ACA") because they were now also subject to the individual mandate that required residents to obtain health care or face a fine.[286] Even though Congress recently did away with the individual mandate through their new tax bill,[287] many in the COFA community are justifiably concerned about the proposals President Trump has made for health care reform.[288]

On top of the regularly reported problem of accountability issues and poor data collection capabilities, there are other factors that are causing COFA migrants located in the U.S. further stress.[289] For example, President Trump drafted an executive order designed to locate immigrant families who are deemed a "public charge" to have them deported.[290] Additionally, COFA parents claim that cultural and linguistic discrimination are the reason many of their children do not succeed in Honolulu's schools.[291] "Parents believe

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[285] *See* Report for the Governor, *supra* note 144, at 9–11 (discussing the patient experience in "determining whether they need to enroll (or re-enroll), navigating the exchange, and accessing care.")

> When other immigrant families living in the same neighborhood as COFA islanders with similar incomes go the FQHC [Federally Qualified Health Center] and have no out-of-pocket costs because their care is covered by Med-QUEST, this creates a perception of discrimination, which further undermines COFA islander trust in the health care system. An immigrant family who has been in the United States for five or more years from a non-COFA country is eligible for Med-QUEST at no cost, while COFA islanders have no path to ever gain eligibility.

Id. at 11.

[286] *See id.* at 9.

[287] Act of Dec. 22, 2017, Pub. L. No. 115-97, § 11081, 131 Stat. 2054, 2092 (2017).

[288] Zahir Janmohamed, *Activist Spotlight: Joe Enlet Works To Uplift Pacific Islanders In The United States*, HYPHEN: ASIAN AMERICA UNABRIDGED (Jan. 30, 2018), https://hyphenmagazine.com/blog/2018/01/activist-spotlight-joe-enlet-works-uplift-pacific-islanders-united-states (discussing proposals to end the ACA and eliminate their tax credit and how they are being treated like undocumented immigrants now).

[289] *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-550T, ISSUES ASSOCIATED WITH IMPLEMENTATION IN PALAU, MICRONESIA, AND THE MARSHALL ISLANDS 18 (2016).

[290] Michael Fix & Randy Capps, *Leaked Draft of Possible Trump Executive Order on Public Benefits Would Spell Chilling Effects for Legal Immigrants*, MIGRATION POLICY INSTITUTE (Feb. 2017), https://www.migrationpolicy.org/news/leaked-draft-possible-trump-executive-order-public-benefits-would-spell-chilling-effects-legal.

[291] Sheila M. W. Matsuda, *Drop-Out Or Push-Out? Micronesian Students in Honolulu*, PASS (May 12, 2016), http://www.pass-USa.net/micronesian-students-honolulu.

these and other factors cause Micronesian students to be 'pushed out' from the public school system."[292] At a time of high anti-immigrant rhetoric in American politics, these are just some of the examples of "the deep roots of 'othering' in American immigration policies"[293] that the COFA migrants must endure on a daily basis.

To recapitulate the COFA migrants' situation: (1) when the Compact was signed in 1986 they became eligible for federally funded health care; (2) ten years later that right was removed and the states had the choice to cover them; (3) for six years Hawai'i fought to terminate their access to Med-QUEST and eventually succeeded in 2015; and (4) now the current administration continues to propose more restrictions on their already limited access to health care while also threatening to deport those in need of support.[294]

Many COFA migrants viewed the exclusion from health care coverage as a betrayal by the U.S., for none of the negotiators in 1986 foresaw this level of inequality.[295] "The Marshallese people argue that the Republic of the Marshall Islands have been 'good friends to the US,' and they would like the 'US to be a good friend' to the Marshallese people in return."[296] Since the Compact was a federal plan, the federal government should ultimately be responsible for addressing the deficiencies caused by their policies, and not leave states like Hawai'i to struggle to cover the costs of hosting COFA migrants.[297] Nevertheless, this decaying relationship still has the potential to be restored if COFA migrants are finally treated equally and provided with their fundamental human right of access to affordable, quality health care.[298]

VI. THE COMPACT COUNTDOWN BEGINS: PLANNING FOR THE UNKNOWN

As the end date quickly approaches, the future of this seventy-year long relationship remains uncertain. Based on the previous analysis of how the Compact operates, the only parts of the agreement that will change are the

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[292] *Id.*

[293] Douglas Epps & Rich Furman, *The 'Alien Other': A Culture Of Dehumanizing Immigrants In The United States*, 14 SOCIAL WORK & SOCIETY 1, 12 (2016), https://www.socwork.net/sws/article/view/485/980.

[294] *See generally* HAW. APPLESEED CTR. FOR L. AND ECON. JUST., *supra* note 265. "All legal immigrants, refugees, victims of domestic violence, trafficking victims, immigrant victims of crime and asylum seekers are all eligible to receive these benefits, but COFA residents are not." *Id.* at 3.

[295] *See* McElfish et al., *supra* note 245, at 640.

[296] *Id.*

[297] *Id.*

[298] *See id.* (noting the Universal Declaration of Human Rights Article 25, "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including . . . medical care.")

commencement of the trust fund and the termination of the impact relief funds for affected jurisdictions.[299] The issues are whether the trust fund will adequately replace the annual allotments the FSM and RMI receive, and whether any U.S. jurisdiction will continue to provide services to COFA migrants if impact relief funds end. These looming concerns are at the forefront of many conversations among COFA communities, the Hawai'i legislature, and government and military officials from all three nations who are trying to plan for an undetermined future.

A. The Future for COFA Islanders is Uncertain

As the RMI is comprised of mainly low-lying atolls, it should come as no surprise that the nation has been very outspoken about the global need for addressing climate change.[300] In 2009, RMI told the UN "Human Rights Council in a formal report that climate risks would seriously threaten nearly each and every core human rights sector, including the right to statehood for the entire nation."[301] Additionally, the RMI also "emphasized that impacts of climate change on local communities continued to worsen; a recent drought had affected a quarter of the nation and necessitated the serious involvement of the Office for the Coordination of Humanitarian Affairs of the United Nations."[302]

Despite its requests for formal international climate change policies, the RMI and FSM continue to see an increase in more intense hurricanes and coastal flooding events that devastate the island communities.[303] "While natural events had always occurred in small islands, it was irrefutable that there were climate drivers and that the scale and intensity of their impact were increasing."[304] As 2023 approaches, climate change migration to Hawai'i will likely continue to grow due to misunderstandings of what the end of the Compact means and fears that the migration policy will be rescinded.[305]

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[299] *See* 48 U.S.C. § 1921d (2017).

[300] *Marshalls President Calls for Unity on Paris Climate Agreement*, Marianas Variety (May 19, 2017), http://www.mvariety.com/regional-news/95390-marshalls-president-calls-for-unity-on-paris-climate-agreement.

[301] *See* Human Rights Council, Rep. of the Working Grp. on the Universal Periodic Review, U.N. Doc. A/HRC/30/13, at 5. [hereinafter Human Rights Council Report] ("In 2013, the country led efforts for the Pacific Islands Forum leaders to adopt the Majuro Declaration for Climate Leadership, which set forward national commitments to reduce emissions.").

[302] *Id.*

[303] *Id.*

[304] *Id.*

[305] Report for the Governor, *supra* note 144, at 14.

1. Community Action through Political Education

Despite the constant inaction on behalf of the U.S. federal government to address the interests of the impacted states, COFA communities and organizations continue to "engage in community organizing and public education to present what is at stake for the general public."[306] The COFA community proved their ability to make an impact during their fight for Med-QUEST by holding rallies and fundraisers to share their stories.[307] "Legal scholars Eric Yamamoto and Susan Serrano state, 'the real bulwark against governmental excess and lax judicial scrutiny, then, is political education and mobilization, both at the front end when laws are passed and enforced and at the back end when they are challenged in courts.'"[308]

When Hawai'i reinstated Med-QUEST, it was not because of any "treaty obligations or federal legislation" that passed, but rather because "community mobilization and collaborative practice" led to an effective "legal appeal to constitutional rights."[309] Currently, multiple community action groups across the region exist[310] that all share a common goal of assisting vulnerable COFA communities and keeping them informed of important topics.[311] These groups were instrumental in recruiting members from COFA communities to be involved in the BHH opposition movements and to present testimony at legislative hearings.[312]

Unfortunately, it is Americans who need to learn more about their unique and underappreciated relationship with these Pacific island nations because activism will not change the end date of the Compact funds.[313] For decades, COFA nations "nearly-uniformly acted in good faith towards the United States despite the shortcomings, inconsistencies, and sometimes cruelties of

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[306] Shek & Yamada, *supra* note 243, at 6–7.

[307] *See id.* at 7 (finding that "the Micronesian community in Hawai'i [is] engaging in key community organizing to bring context and a face to the narrow legal issues—in a manner reminiscent of the Japanese American redress movement, where community organizing and public education were not an afterthought but a key element of the legal redress strategy.").

[308] *Id.*

[309] *Id.*

[310] The community action groups include: Micronesian Community Network, Micronesians United, Nations of Micronesia, Micronesians United-Big Island, and Micronesian Culture Awareness Program, Pacific Resources for Education and Learning, Pacific Leadership Assistance Networks, The Fourth Branch, Micronesian Health Advisory Coalition, and Pa Emman Kabjere. *See* Sheldon Riklon et al., *The "Compact Impact" in Hawai'i: Focus on Health Care*, 69 HAW. MED. J. 7, 10 (2010).

[311] *See The Fourth Branch Mission*, THE FOURTH BRANCH, http://www.tfbmicronesia.com/our-mission/ (last visited Apr. 14, 2019).

[312] Sheldon Riklon et al., *supra* note 310.

[313] *See* Andrews, *supra* note 24, at 66.

American policymakers."[314] The U.S. federal government may be in the driver seat, but it should not discredit the COFA nations' ability to recognize that America's interest has always been geopolitical and the rise of China poses a threat to American control.[315] If American neglect for the region continues, "there is no concrete reason for the Micronesians to remain in the American camp if China offers a better deal[.]"[316]

2. *In Search of a Better Relationship Independently and Abroad*

Community leaders and COFA politicians rarely show signs of hostility towards the Compact as a whole, but that does not mean they are not "keenly aware of the flaws of the agreement."[317] These shortcomings hamper the ability of the RMI and FSM to collaboratively negotiate a potential new economic plan with the U.S. because most conversations today have been focused on independence movements and alternative sources of funding.[318] Unquestionably, these movements tie directly back to the consistent complaints of a lack of oversight and inadequate aid from the U.S.[319]

Moreover, the rise of Chinese influence is no longer a possibility; it is a real threat to America's influence in the region.[320] Instead of the traditional

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[314] *Id.* at 65.

[315] *Id.* at 66.

[316] *Id.*

[317] *Id.*

[318] *See* Dr. Vid Raatior, *Who Gains or Loses from an Independent Chuuk?*, CHUUK REFORM COALITION (June 20, 2018), http://www.chuukstate.org/who-gains-or-loses-from-an-independent-chuuk/.

[319] *See John Haglelgam Responds to Chuuk Independence Movement Questions*, THE FOURTH BRANCH (Jan. 8, 2018), http://www.tfbmicronesia.com/articles/johnhaglelgamresponds (describing the recent independence movement in Chuuk and how "Chuuk Lagoon ranked at the top of the wrecked diving spot worldwide, but the corruption, the social problems, the lack of even basic medical facility is discouraging tourists.").

[320] *See* Daniel Lin, *This Pacific Island Is Caught in a Global Power Struggle (And It's Not Guam)*, NATIONAL GEOGRAPHIC (Aug. 15, 2017), https://news.nationalgeographic.com/2017/08/yap-pacific-island-tourism-development-conservation-china-us-cofa/; David Morris, *A Remote Pacific Island Faces up to China*, THE DIPLOMAT (June 26, 2017), https://thediplomat.com/2017/06/a-remote-pacific-island-faces-up-to-china/ (discussing whether the islands of Yap should stay aligned with the U.S. or continue to make economic deals with China for tourism development); Scott Leis, *Micronesia's Future Between China and the US*, EAST ASIA FORUM (June 16, 2012), http://www.eastasiaforum.org/2012/06/16/micronesia-s-future-between-china-and-the-US/ ("Since March 2000, China has invested hundreds of millions of dollars in developing its diplomatic relationship with the FSM. Most of the money has been distributed to the same economic sectors that the US-FSM Compact intended to develop. Some of the money China invested has been deposited into a Trust Fund that will help support the FSM government after 2023, when it is likely to face severe budgetary deficits as the Compact with the US comes to an end. Beijing's money has also paid for FSM officials

American relationship of acting as "political custodians" to the COFA nations, "China promotes non-interference in the political systems of other countries as a core tenant of its foreign policy[.]"[321] Last year, FSM "President Christian was invited to Beijing by Chinese President Xi Jinping, where he was treated to the equivalent of a state dinner, at which the two discussed Chinese investment in Micronesia, opportunities for cultural exchange, and their shared concern over climate change."[322]

Whether or not this new relationship blossoms in the future, the Compact will continue to give the U.S. "strategic denial rights" which ultimately means that COFA negotiators will always be open to a new economic plan with the U.S. On that note, America must recognize their long-standing duty to develop self-sufficient economies, as evidenced, *inter alia*, in the Mutual Security Agreement, which proclaims "[t]he Government of the United States . . . recognize[s] that sustained economic advancement is a necessary contributing element to the mutual security goals expressed in this Agreement."[323] If the U.S. seriously values "the region as being of great strategic utility[,]" then it must "examine ways in which these mutual ties could be strengthened" and work towards fulfilling their end of the treaty.[324]

B. America's Strategy: State and Federal (In)Action Plans for 2023

The common theme throughout this analysis revolves around oversight issues and inadequate estimates of Compact impacts on affected jurisdictions. However, what is clear from the language of the amended Compact is the statement that "it is not the intent of Congress to cause any adverse consequences for an affected jurisdiction."[325] The GAO "recommended that the Secretary of the Interior disseminate guidelines to the affected jurisdictions that adequately address concepts essential to producing reliable impact estimates[.]"[326] Nevertheless, the only sign of compliance

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at every level to travel to China for meetings and training.").

[321] Andrews, *supra* note 24, at 61.

[322] *Id* at 67.

[323] Marshall Islands Mutual Security Agreement, *supra* note 163, at 350; *accord* Micronesia Mutual Security Agreement, *supra* note 163, at 384.

[324] Andrews, *supra* note 24, at 66.

[325] Compact of Free Association Act of 2003 § 104(e)(1), 117 Stat. at 2739; *see* U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-550T, ISSUES ASSOCIATED WITH IMPLEMENTATION IN PALAU, MICRONESIA, AND THE MARSHALL ISLANDS 25 (2016) (reporting that "the three affected jurisdictions have continued to express concerns that they do not receive adequate compensation for the growing cost of providing government services to compact migrants.").

[326] U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-550T, ISSUES ASSOCIATED WITH IMPLEMENTATION IN PALAU, MICRONESIA, AND THE MARSHALL ISLANDS 24–25 (2016) (indicating that the OIA has not followed through on these recommendations to improve

with this recommendation came last year when the DOI "signed a Statement of Work with the U.S. Census Bureau to carry out the next 5-year enumeration of [COFA] migrants[.]"[327] The problem is that this is a five-year requirement already mandated by the Compact[328] and it does nothing to address the challenges of conducting an accurate and comprehensive report that adequately documents COFA migrants and their impacts.[329]

1. Affected Jurisdictions Demand Assistance from Federal Government

Hawai'i and other affected jurisdictions are well aware of the looming end of relief funds in 2023, evidenced by respective representatives introducing bills that address the current and inevitable future burdens put on states by the Compact.[330] Considering this is an international bilateral agreement, Hawai'i's options are limited to calling on the federal government to act through the legislative process, or perhaps through the judiciary. Otherwise, the Compact itself only provides that Hawai'i may, but is not required to, submit Compact impact reports that will thereafter require the OIA to submit their findings for review by Congress.[331] In light of the difficulties Hawai'i's representatives had with seeing a proposed bill pass into law, it is perplexing to find that Hawai'i has not submitted a Compact Impact Report since 2014.[332]

i. Legislation to Nowhere: Affected Areas Call for Change

Nevertheless, there are currently two bills in the first stages of the legislative process aimed at addressing the Compact impacts on the States.[333]

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reporting from affected jurisdictions).

[327] Tanya Harris Joshua, *Interior, Census Launch 2018 Enumeration of Compact Migrants in Hawaii , Guam, Northern Mariana Islands and American* Samoa, U.S. DEP'T OF THE INTERIOR (Aug. 16, 2017), https://www.doi.gov/oia/interior-census-launch-2018-enumeration-compact-migrants-hawaii-guam-northern-mariana-islands.

[328] Compact of Free Association Act of 2003 § 104(e)(4)(A), 117 Stat. at 2739 ("The enumerations—shall be conducted at such intervals as the Secretary of the Interior shall determine, but no less frequently than every five years[.]").

[329] U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-550T, ISSUES ASSOCIATED WITH IMPLEMENTATION IN PALAU, MICRONESIA, AND THE MARSHALL ISLANDS 24 (2016).

[330] *See* McElfish et al., *supra* note 245, at 640.

[331] *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-550T, ISSUES ASSOCIATED WITH IMPLEMENTATION IN PALAU, MICRONESIA, AND THE MARSHALL ISLANDS 25 n.54 (2016).

[332] *See Compact Impact Reports*, U.S. DEP'T. OF THE INTERIOR, *https*://www.doi.gov/oia/reports/Compact-Impact-Reports (last visited Apr. 14, 2019).

[333] *See* Compact Impact Relief Act, H.R. 4761, 115th Cong. (2018); Covering our FAS Allies Act, H.R. 2982, 115th Cong. (2017).

Hawai'i senators and representatives[334] introduced the Covering Our FAS Allies Act, with the main goal of amending PROWA to once again allow COFA migrants to obtain access to Medicaid coverage from the federal government.[335] Senator Brian Schatz stated that, "[t]his bill is about the federal government taking responsibility," proclaiming that Hawai'i has done what it knows is right in covering COFA migrant costs, "but at the end of the day, the US Government – through Medicare – should provide coverage to [COFA] citizens."[336]

Additionally, delegates from Hawai'i, Guam and the Northern Mariana reintroduced the Compact Impact Relief Act in January this year.[337] According to Congresswoman Gabbard, "[t]his legislation will relieve much of this burden by increasing federal funding and resources for Hawai'i to deliver needed healthcare, education, social, public safety, and other services to COFA migrants who call Hawai'i home."[338] The bill similarly proposes the reestablishment of COFA migrant eligibility for federally funded programs and "explicitly requires that no funding or benefits are taken away from Americans in order to serve Compact migrants under any of these federal assistance programs."[339]

Currently, both bills remain in the hands of various subcommittees for review and still have a long road ahead of them before potentially becoming law.[340] If either of them does pass, not only would it offer federal reimbursements to the listed impact states, but it would also provide it to other mainland states where COFA migrants currently reside.[341] "This is significant because COFA migrants continue to migrate inland to states such

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[334] Senators Mazie K. Hirono and Brian Schatz, and Representatives Colleen Hanabusa and Tulsi Gabbard introduced the bill. *Hawai'i Delegation Leads Effort to Restore Healthcare for FAS Citizens*, BIG ISLAND NOW (June 21, 2017), http://bigislandnow.com/2017/06/21/hawaii-delegation-leads-effort-to-restore-healthcare-for-fas-citizens/.

[335] *See* Covering our FAS Allies Act, H.R. 2982, 115th Cong. (2017).

[336] *Hawai'i Delegation Leads Effort to Restore Healthcare for FAS Citizens, supra* note 334.

[337] Compact Impact Relief Act, H.R. 4761, 115th Cong. (2018) (covering the additional costs borne by the state outside of just medical coverage).

[338] Press Release, Tulsi Gabbard, Rep. Tulsi Gabbard Introduces Legislation to Increase Federal Resources for Hawaii's COFA Migrant Community (Jan. 10, 2018) (available at https://gabbard.house.gov/news/press-releases/rep-tulsi-gabbard-introduces-legislation-increase-federal-resources-hawaii-s).

[339] *Legislation to Increase Federal Resources for Migrants*, BIG ISLAND NOW (Jan. 10, 2018), http://bigislandnow.com/2018/01/10/legislation-to-increase-federal-resources-for-migrants/.

[340] *See* Compact Impact Relief Act, H.R. 4761, 115th Cong. (2018); Covering our FAS Allies Act, H.R. 2982, 115th Cong. (2017).

[341] *See* Compact Impact Relief Act, H.R. 4761, 115th Cong. (2018); Covering our FAS Allies Act, H.R. 2982, 115th Cong. (2017).

as Arkansas" and Oklahoma where there are cheaper costs of living, but do not cover COFA migrants under their own Medicare programs.[342]

Until then, Hawai'i's hands are virtually tied while they stand by in hopes of a congressional miracle from a Congress that has been more concerned with repealing old laws than making new ones.[343] On the bright side, Congress' bipartisan federal spending deal in March was hailed by Senator Schatz as "the best appropriations bill that we've seen for our state since I got here[.]"[344] Unfortunately for COFA migrants, only $4 million (a $1 million increase from last year) was allocated towards COFA impacts, and it had to be split between all affected states; a sign that the federal government still does not appreciate how beneficial this relationship is to the U.S.[345]

2. U.S. Military and Federal Government's Position: Stand Fast

Without a doubt, U.S. States and COFA migrants have done just about all they can to call on the federal government to uphold their promises in good faith.[346] Sadly, these calls have fallen on mostly deaf ears and have led to rising costs for affected jurisdictions and more hardships for COFA migrants.[347] As the federal government remains in control of the Compact fund's future, solutions need to be addressed and "should be guided by a moral compass that honors [America's] previous commitments."[348] The federal government evidently did not anticipate the impact immigration would have on the states, which unfortunately has had devastating effects on COFA migrants' lives.[349] "While solutions may not be simple," the federal

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[342] *See* McElfish et al., *supra* note 245, at 640; Zoë Carpenter, *How Years of Ruthless Nuclear Testing in the South Pacific Forged America's Most Impoverished Ethnic Group*, NARRATIVELY (July 7, 2017), http://narrative.ly/how-years-of-ruthless-nuclear-testing-in-the-south-pacific-forged-americas-most-impoverished-ethnic-group/ (illustrating the story of the COFA communities in Oklahoma and their struggles in a state that chooses not to provide Medicare to them).

[343] *See* Drew Desilver, *A Productivity Scorecard for the 115th Congress: More Laws Than Before, But Not More Substance*, PEW RESEARCH CENTER (Jan. 25, 2019), http://www.pewresearch.org/fact-tank/2017/08/29/115th-congress-productivity/.

[344] *Schatz: Federal Funding For Hawai'i To Rise*, SENATOR BRIAN SCHATZ (March 22, 2018), https://www.schatz.senate.gov/press-releases/schatz-federal-funding-for-hawaii-to-rise (providing that the bill appropriated billions of dollars in funding to programs in Hawai'i , such as "Native Hawaiian Education" ($36.4 million) and "Affordable Housing" ($41.4 million, a $5.8 million increase from last year)).

[345] *Id.*

[346] *See* Riklon et al., *supra* note 310, at 10 (organizing action groups, developing education and public awareness materials, rallying at the Capitol, and testifying at hearings).

[347] *See id.*

[348] *Id.*

[349] *See id.*

government must learn from past mistakes because "[l]eaving [these] vulnerable populations without access to adequate healthcare [only] increases the burden and cost to everyone."[350]

i. Strategic Denial: Chinese Threat Induces Military "Action"

While China continues to build up islands in the South China Sea and increase its presence in the Compact region through economic development,[351] the U.S. military has stepped up its efforts to reestablish its role in the relationship.[352] Just a year after the FSM President met with Chinese President Xi, the U.S. Navy Pacific Fleet conducted the "largest annual multilateral humanitarian assistance and disaster relief [] preparedness mission" in Yap[;][353] the same FSM state where Chinese companies began investing.[354] This is important because, as noted, loyalty is vital to this relationship and any signs of improvements on behalf of the U.S. are still going to be welcomed by the FSM and RMI.[355]

To emphasize the U.S. government's keen awareness of the importance of this relationship, the 2018 National Defense Authorization Act ("NDAA") requires a study by the Secretary of Defense to assess the "security and foreign policy interests in the Freely Associated States[.]"[356] Most notably, the report will investigate, *inter alia*, "[t]he role of [COFA] in promoting United States defense and foreign policy interests, including the United States defense posture and plans" and "[t]he economic assistance practices of the People's Republic of China in the Freely Associated States, and the implications of such practices for the United States defense and foreign policy interests in the Freely Associated States and the Pacific region."[357]

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[350] *Id.*

[351] Derek Watkins, *What China Has Been Building in the South China Sea*, N.Y. TIMES (Oct. 27, 2015), https://www.nytimes.com/interactive/2015/07/30/world/asia/what-china-has-been-building-in-the-south-china-sea.html.

[352] *See* Pacific Partnership Public Affairs, *Pacific Partnership Concludes in Yap, Continues Onward to Palau*, U.S. INDO-PACIFIC COMMAND (April 2, 2018), http://www.pacom.mil/Media/News/News-Article-View/Article/1482642/pacific-partnership-concludes-in-yap-continues-onward-to-palau/.

[353] *Id.* (ranging from "providing health screenings to nearly 130 patients," to restoring three elementary schools and "installing roofing and walls at the Yap Memorial Hospital.").

[354] Joyce McClure, *Chinese Investment Key to Hot Yap Electoral Contest*, PACIFIC ISLAND TIMES (Oct. 30, 2018), https://www.pacificislandtimes.com/single-post/2018/10/30/Chinese-investment-key-to-hot-Yap-electoral-contest.

[355] *See id.* (stating "[t]he U.S. is committed to the FSM" and "[t]here is no sunset to the dedication of the protection of FSM for a free and open Pacific.").

[356] National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-01, § 1259D(a), 131 Stat. 1283, 1688.

[357] *Id.* §§ 1259D(b)(1), 1259D(b)(3), 131 Stat. at 1688.

This is a positive indicator that perhaps the federal government will devote more time and energy towards discussing a new Compact in the coming years.

For both the FSM and RMI, the Chinese investments may prove to be the best thing for the future of their relationship with America because the island nations now have more bargaining power due to a growing threat towards American maritime dominance; the first such threat since World War Two. Whether the COFA nations use this leverage remains in question, but the results of the negotiations will again undoubtedly depend on the willingness of the U.S. government to negotiate in good faith.

VII. CONCLUSION: TRANSPARENCY AND DEFERENCE ARE PARAMOUNT FOR A FUTURE COMPACT

This analysis has demonstrated that even though the U.S. values its strategic denial rights in the region, it must also address the many flaws of the agreement that disadvantage the very people they promised to protect. Terminating the Compact, which is possible to do unilaterally,[358] would only make matters worse for all three nations because the U.S. would retain the strategic denial powers, and rights such as the free immigration status would come to an end, more than likely leading to an increased Chinese presence. As this is a highly unlikely route for either nation to take going into future negotiations, transparency on behalf of all parties involved will be vital to the future of this arrangement.[359]

A. Compact Legal Strategies: Domestic Rights and Recommendations

Citizens of the RMI and FSM have limited legal recourses for pursuing an improved relationship considering the espousal provisions included in the subsidiary Section 177 Agreement concerning claims against the U.S.[360] International law provides a potential loophole to this restriction under the "continuous nationality" rule.[361] This theory was argued by plaintiffs from

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[358] Compact of Free Association Act of 2003 §§ 442–43.

[359] This includes not only the need to expand oversight efforts on behalf of the OIA to obtain more reliable data; but will also require COFA governments to exercise their due diligence in appropriating funds accordingly, all of which is attainable with amended mandatory reporting provisions.

[360] Compact of Free Association Act of 2003 § 103(e), 117 Stat. at 2729.

[361] THOMAS LUM ET AL., CONG. RESEARCH SERV., RL32811, REPUBLIC OF THE MARSHALL ISLANDS CHANGED CIRCUMSTANCES PETITION TO CONGRESS 35 (2005) ("[T]he 'continuous nationality' rule, [is] a principle of international law which provides that a state does not have the right to ask another state to pay for damages to its citizens if they were not its citizens at the time of the loss or damage.").

the RMI who sued the U.S. in the Nuclear Claims Court in 1988, but the court claimed the principle was too novel of an area of international law and dismissed the case on different grounds.[362]

Even though the ruling only impacted those affected by nuclear tests in the RMI, it remains unclear "how a court would apply the 'continuous nationality' doctrine to an interpretation of the Compact."[363] However, if similar plaintiffs do file suit in a federal court concerning anything related to the Compact, it is very likely that the U.S. would raise the political question doctrine and insist that this is a matter that should be resolved by the Executive or Legislative branches.[364] Additionally, suing the U.S. government prior to signing a new economic package will more than likely work to the detriment of the COFA negotiators, making it wise to hold off on such claims until after 2023.

B. International Assistance: Human Rights and Treaty Violations

In 2015, the UN Human Rights Council completed its Universal Periodic Reviews ("UPR") for the FSM, RMI, and the U.S., and not a single one mentioned the Compact.[365] The only report that discussed anything related to COFA was by Special Rapporteur on Hazardous Substances, Calin Georgescu, who visited the RMI and the U.S. in 2012.[366] The report was particularly critical of America's response in 2000 to a "Changed Circumstance Petition" from the RMI.[367] They found that many of the

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[362] *Id.* at 36. (finding that pursuing these issues was premature until the claims procedures established under the Section 177 agreement were implemented and completed).

[363] *Id.* Though it is possible this principle may prove to be a viable argument in a future lawsuit for further reparations.

[364] *Id.* at 37 ("The political question doctrine . . . stands for the tenet that certain political questions are by their nature committed to the political branches and to the exclusion of the judiciary.").

[365] *See* Human Rights Council, Report of the Working Grp. on the Universal Periodic Review: Marsh. Is., U.N. Doc. A/HRC/30/13 (2015); Human Rights Council, Rep. of the Working Grp. on the Universal Periodic Review: Micr., U.N. Doc. A/HRC/31/4 (2015); Human Rights Council, Rep. of the Working Grp. on the Universal Periodic Review: U.S., U.N. Doc. A/HRC/30/12 (2015).

[366] *See generally* Calin Georgescu (Special Rapporteur on the Implications for Human Rights of Environmentally Sound Management and Disposal of Hazardous Substances and Wastes), *Rep. on His Mission to the Marsh. Is. and U.S.*, UN Doc. A/HRC/21/48/Add.1 (Sep. 3, 2012). Both the RMI and U.S. requested the rapporteur to examine the effects of the nuclear testing program in the Marshall Islands and any lingering effects. *See id.* at 3.

[367] *See id.* at 11.

> The provision on changed circumstances under article IX of the agreement [for the implementation of section 177 of the Compact] provides that additional funding may be requested from the United States Congress for loss or damage arising from the nuclear

documents the U.S. provided to the RMI during the original settlement negotiations "were incomplete and in 'deleted version only' form and labeled as 'extracted, redacted or sanitized[,]" possibly suppressing information that was vital to the compensation agreement.[368]

The U.S. argued that these allegations did "not meet the set criteria for changed circumstances and hence there was no legal basis for considering additional funds."[369] To date, the U.S. continues to withhold these documents and not address the changed circumstances petition.[370] The RMI asserts that if Section 177 truly is a full and final settlement, there was no need for Congress to add the changed circumstances clause unless their intent was to ensure future alterations were feasible.[371] The Special Rapporteur went on to emphasize the need to fulfill the basic human "right to an effective remedy by the competent national tribunals"[372] who not only have the power "to make binding decisions but should also have sufficient resources to effect the awards they make."[373]

Again, this legal approach only impacts the RMI directly, but if the FSM and RMI both argue that their human rights are violated by means of insufficiencies within the Compact,[374] UN human rights committees have

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> testing programme if such loss or damage is "discovered after the effective date" of the agreement and the "injury could not reasonably have been identified as of the effective date of the agreement" and failure to provide for the injuries would render the agreement "manifestly inadequate."

Id.; *see also* THOMAS LUM ET AL., CONG. RESEARCH SERV., RL32811, REPUBLIC OF THE MARSHALL ISLANDS CHANGED CIRCUMSTANCES PETITION TO CONGRESS (2005).

[368] *See* Rep. of the Working Group on the Universal Periodic Review: Marsh. Is., *supra* note 365, at 6.

[369] *Rep. on His Mission to the Marsh. Is. and U.S., supra* note 366, at 11.

[370] *See* Rep. of the Working Group on the Universal Periodic Review: Marsh. Is., *supra* note 382, at 6.

> Following the Special Rapporteur's report, the country had as recently as 27 April 2015 been trying to gain access to that information but to no avail. The repeated failure or refusal of the United States to provide full access to those records could only be taken as a blatant indignity towards and lack of respect for the Marshallese people and represented an ongoing violation of basic human rights.

Id.

[371] *See Rep. on His Mission to the Marsh. Is. and U.S., supra* note 366, at 11.

[372] *See* G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 8 (Dec. 10, 1948); *accord* International Covenant on Civil and Political Rights art. 2, ¶ 3, *adopted on* Dec. 16, 1966, 999 U.N.T.S. 171.

[373] *Rep. on His Mission to the Marsh. Is. and U.S., supra* note 366, at 11.

[374] Both the RMI and FSM could base their arguments on the Universal Declaration of Human Rights Article 25 providing that "[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including . . . medical care[,]" as both domestically and abroad, COFA islanders suffer from inadequate healthcare and are denied access federal coverage that was originally an implied term of the contract. *See*

proven to be an effective means for addressing these inequalities.[375] The FSM still needs to ratify both the International Covenant on Civil and Political Rights ("ICCPR") and the International Covenant on Economic, Social and Cultural Rights ("ICESCR") because both would provide the ability to have committees conduct thorough reviews of specific complaints or concerns about the Compact.[376] The RMI ratified both treaties this March and should, therefore, request their assistance in addressing the current and future concerns of their economy, as well as their status as migrants in the U.S.

Whether one of these treaty-monitoring bodies conducts its report prior to 2023 is unknown, but the five-year UPR committee will be conducting its review of all three nations again in 2020. This is an opportunity for the RMI and FSM to insist that the UPR working groups focus on the Compact. More precisely, the review should focus on whether the treaties have been performed in good faith in accordance with Article 26 of the VCLT;[377] as well as analyzing if an Article 27 violation occurred when the US enacted the PROWA (internal legislation) which eliminated an implied right to health care for COFA migrants within the Compact (bilateral treaty).[378]

C. Final Thoughts: It is Time to be on the Right Side of History

Over the course of writing this paper, many interviewees expressed a variety of different opinions about the Compact. What everyone agreed upon, however, was a shared concern about the 2023 expiration date and what will unfold. This analysis shows that because the Compact does not expire, per se, the only major impacts after 2023 will be to the impact relief fund for states, and to the FSM and RMI when the trust fund runs dry. Without a doubt, negotiations are going to take place and states will have a lot of interest in renewing an improved impact relief plan.

Before the amendments of the Compact were made in 2003, Congresswoman Patsy Mink was already submitting bills to address the COFA children who had been denied health care following the PROWA.[379]

Universal Declaration of Human Rights, *supra* note 372, art. 25, ¶ 1.

[375] *See generally* National Mechanisms for Reporting and Follow-up, UN Human Rights Office of the High Commissioner, 2016, https://www.ohchr.org/Documents/Publications/HR_PUB_16_1_NMRF_PracticalGuide.pd.

[376] *See* International Covenant on Civil and Political Rights, *supra* note 389; International Covenant on Economic, Social and Cultural Rights art. 18, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3.

[377] VCLT, *supra* note 73, art. 26.

[378] VCLT, *supra* note 73, art. 27 ("A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.").

[379] Compact of Free Association Children's Health Improvement Act of 2002, H.R. 5067,

Unfortunately, utilizing the legislative process has proven to be a failure for the last twenty years. Therefore, a solution may be for all the recognized and unrecognized impacted states to file a class action lawsuit against the federal government for damages caused by the Compact.[380] Encouraging the respective attorney generals to file a similar lawsuit as the "travel ban" injunction[381] could initiate new negotiations to assist these unique migrants with no history of terrorism and who have made some of the ultimate sacrifices for U.S. national security.

As a final recommendation, while the Trump administration continues to downplay the effects of climate change, the federal government, in particular, the U.S. military, is fully aware of the risks.[382] Kwajalein has already been fortified to withstand rising tides and so have many other bases around the U.S.[383] This same threat, however, exists for nearby atolls the Marshallese currently inhabit but unfortunately they do not have viable strategies in place for protecting their infrastructure from the next disastrous storm or king tide.[384]

If strategic denial in this region is as vital to the U.S. as they have proven throughout history, protecting the COFA nations would honor Compact section 311's obligation to protect the RMI and FSM "and its people from attack or *threats thereof* as the United States and its citizens are defended[.]"[385] Should the governments of the RMI or FSM choose to raise this issue, they can use the Section 313 right to contact the U.S. Secretaries

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107th Cong. (2002.

[380] Compact of Free Association Act of 2003 § 104(e)(1). The States could cite the Compact language, "it is not the intent of Congress to cause any adverse consequences for an affected jurisdiction." *See id.*

[381] Trump v. Hawaii, 138 S. Ct. 42, 198 L. Ed. 2d 769 (2017).

[382] *See generally* GENERAL RONALD KEYS ET AL., SEA LEVEL RISE AND THE U.S. MILITARY'S MISSION (Shiloh Fetzek et al. eds., 2016), https://climateandsecurity.files.wordpress.com/2016/09/center-for-climate-and-security_military-expert-panel-report2.pdf. "To use military parlance, the theater is, in essence, flooding. Adjusting to that rapidly changing theater will be absolutely critical for the U.S. military to maintain its ability to fulfill its mission, and for the United States to adequately pursue its national security interests." *Id.* at 5.

[383] *See id.* at 24.

[384] Curt D. Storlazzi et al., *The Impact of Sea-Level Rise and Climate Change on Department of Defense Installations on Atolls in the Pacific Ocean (RC-2334)*, SERDP 3 (2017) ("Many of the adjacent islands on Kwajalein Atoll that are inhabited and/or have US Department of Defense facilities (Ebeye, Ennylabegan, Ebadon, Ennubirr, Gagan, Gellinam, Gugeegue, Illeginni, Legan, Meck, Omelek) will face a similar fate.").

[385] *See* Compact of Free Association Act of 2003 § 311(b)(1), 117 Stat. at 2781 (emphasis added).

of State and Defense directly, and perpetually call on them to engage this global threat in the same manner as it is being addressed in America.[386]

> People must *recognize* the humanity of others and the historical roots of group-to-group grievances.[] This includes articulation of the group harms and acknowledgment of the deeply embedded prejudices reflected in the stock stories we tell about others. The afflicting party must accept *responsibility* for healing group-based wounds, whether grounded in personal culpability, receipt of privileges and benefits, or a simple desire to build community.[] Acts of *reconstruction* are aimed at building a new productive relationship, including apologies and other acts of atonement, along with efforts to restructure social and economic institutions.[] *Reparations* encompass public education, symbolic displays, and financial support for those in need.[][387]

Again, reconciliation and forgiveness are possible under the right conditions. What matters most is the U.S. negotiating in good faith while recognizing the value of this relationship and the many sacrifices citizens of the FSM and RMI have made for America.

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[386] *See id.* § 313(c).

[387] Eric Yamamoto et al., *American Reparations Theory and Practice at the Crossroads*, 44 CAL. WESTERN L. REV. 48 (2007).

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