Treading Deep Waters: Substantive Law Issues in Tuvalu's Threat to Sue the United States in the International Court of Justice

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TREADING DEEP WATERS: SUBSTANTIVE LAW ISSUES IN TUVALU'S THREAT TO SUE THE UNITED STATES IN THE INTERNATIONAL COURT OF JUSTICE

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Abstract: In 2002, in response to the United States' refusal to ratify the Kyoto Protocol, the Pacific island nation of Tuvalu, vulnerable to submersion due to the rising sea level, threatened to bring a lawsuit against the United States in the International Court of Justice for damages to its island. Outside of various jurisdictional issues that may preempt the suit, Tuvalu's suit will likely have a number of substantive law problems. Tuvalu must show not only that the United States is unlawfully causing the island damage, but also that it has a right to future damages that have yet to occur. Tuvalu might succeed by arguing principles of intergenerational rights and the precautionary principle. However, regardless of its actual likelihood of success, Tuvalu's case presents a unique opportunity to address international environmental law issues that will likely arise in future cases brought by victims of global warming.

I. INTRODUCTION

Musing over the tiny island chain of Funafuti, Charles Darwin wondered

how these low hollow coral islands bear no proportion to the vast ocean out of which they abruptly rise; and it seems wonderful that such weak invaders are not overwhelmed, by the all-powerful and never-tiring waves of that great sea.¹

Darwin's observations keenly depict the troubled relationship that the Tuvaluan people have with their beloved island home, where the sound of waves crashing against the coral is both serene and foreboding.

In fifty years, the citizens of the small island nation of Tuvalu will likely face a tragic ending to their pictorial way of life. Some scientists predict that the island, home to more than 11,000 people, will sink into the ocean by the year 2054 due to the adverse effects of global warming.²

¹ The author would like to thank Professor David Linnan and the Editorial Staff of the Pacific Rim Law and Policy Journal.
² Julia Whitty, All the Disappearing Islands: As the Ice Caps Melt and the Oceans Rise, Will Tuvalu Become a Modern Atlantis?, MOTHER JONES, July 1, 2003, available at 2003 WL 13715466.
Tuvalu may become the first populated island to be swallowed by the ocean. In 1999, the unpopulated islands of Tebua Tarawa and Abanuea were already engulfed by the Pacific Ocean.3

Nearly a million people in the world live on coral islands.4 Additionally, millions more live on land that is susceptible to the rising sea levels.5 In 1997, the Prime Minister of Tuvalu, Koloa Talake, made an impassioned plea for help to world leaders gathered to discuss climate change at a conference in Kyoto:

There is an asserted consensus that binding significant targets to reduce greenhouse gases are [sic] essential, if the catastrophic impacts of climate change on the livelihood and existence of people are to be limited . . . . For the people of low-lying island states of the world, however, and certainly of my small island country of Tuvalu in the Pacific, this is no longer a debatable argument. The impacts of global warming on our islands are real, and are already threatening our very survival and existence.6

In order to improve the grim outlook of their island’s future, Tuvaluans are fighting back against the United States, and other industrialized nations that have refused to sign the Kyoto Protocol.7 The Kyoto Protocol is a binding agreement that sets mandatory limits on

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4 Whitty, supra note 1.
5 Id.
greenhouse gas emissions. To date, 126 nations have signed the Protocol, with the United States and Australia as notable holdouts.

In response to this inaction, the Tuvaluan Prime Minister announced that the people of Tuvalu would bring a suit in the International Court of Justice ("ICJ") against nations that refused to enter into the Pact. It is unclear whether Tuvalu will actually bring a suit against the United States or any other nation. However, the exercise of analyzing potential substantive law problems in Tuvalu’s suit presents an important opportunity to address emerging international law issues.

This Comment asserts that even if Tuvalu gains jurisdiction for a suit in the ICJ against the United States, it will face numerous substantive law issues. Part II describes the history of the island, highlighting both its geographical and cultural significance, and describes the increasing problems the island is facing from the effects of global warming. Part III considers reports from the Intergovernmental Panel on Climate Change and the scientific assessment on global warming and its connection to human activities. Part IV discusses international agreements on climate change, including the United Nations Framework Convention on Climate Change and the Kyoto Protocol, and briefly addresses barriers to and options for Tuvalu in obtaining jurisdiction in the ICJ. Further, Part V analyzes Tuvalu’s substantive law claims, specifically whether Tuvalu could succeed in a request for future damages.

II. GLOBAL WARMING ENDANGERS A UNIQUE ISLAND AND ITS BRAVE PEOPLE

The island nation of Tuvalu is located in the Pacific Ocean halfway between Hawaii and Australia. It is part of the Oceania island group, one of nine atolls in the South Pacific. The sinking of volcanic islands formed

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8 Kyoto Protocol, supra note 7, at 33.
10 WORLD FACTBOOK, supra note 2; Piers Moore Ede, Come Hell or High Water: Rising Sea Levels and Extreme Flooding Threaten to Make the South Pacific’s Tuvalu the First Victim of Global Warming, ALTERNATIVES J., Jan. 1, 2003, at 1.
11 For a discussion on bringing an action against the United States under the Alien Tort Claims Act, see RoseMary Reed, Comment, Rising Seas and Disappearing Islands: Can Island Inhabitants Seek Redress Under the Alien Tort Claims Act?, 11 PAC. RIM L. & POL’Y J. 399 (2002).
12 WORLD FACTBOOK, supra note 2; Ede, supra note 10, at 1
13 Id.
the atolls, leaving a ring of coral islands around a lagoon. When Polynesians first arrived on the island approximately 200 years ago, they found it difficult to adapt to the sandy soil and sparse local food sources.

More threatening, however, than the lack of resources, was the danger of the tropical storms and cyclones that struck the island once or twice a decade. During the fiercest of these storms, the inhabitants would protect themselves from being blown into the Pacific by tying themselves to coconut palms, hoping the wind was not forceful enough to take the rooted trees as well.

Although the Tuvaluans were largely successful in protecting themselves from these natural disasters, there is a modern and unnatural disaster against which they are largely impotent—global warming. The high tides and floods that briefly overwhelmed the islands every February now occur frequently from November through March. The heavy storms that formerly hit the island once or twice a decade struck Tuvalu seven times in the 1990s, likely due to the effects of global warming. Scientists predict that with sea levels expected to increase up to eighty-eight centimeters in the next century, the future of the island above water is rather grim. Further, the rising floods and waves have increased the salt water table, harming agricultural efforts which were already difficult due to Tuvalu’s sandy island soil. During the last century, the sea level has risen at an alarming rate.
An outer reef now protects the island from the constant beating of the waves, but the growth of coral cannot keep pace with the ascending sea level.\textsuperscript{26} Approximately 11,000 Tuvaluans live on a mere twenty-six square kilometers of land.\textsuperscript{27} Remarkably, the island’s highest point is only five meters above sea level.\textsuperscript{28} As Koloa Talake, an elder statesman, puts it plainly: “We don’t have hills or mountains. All we have is coconut trees. If the industrial countries don’t consider our crisis, our only alternative is to climb up in the coconut trees when the tide rises.”\textsuperscript{29}

Realizing that the people of Tuvalu will soon have to follow their island to a salty demise or move to higher ground, the Prime Minister has requested environmental refugee status for its citizens from both Australia and New Zealand.\textsuperscript{30} While New Zealand responded to the plea by allowing seventy-five Tuvaluans to relocate annually to their country, Australia has refused to make any such offer.\textsuperscript{31} At a rate of seventy-five Tuvaluan relocations a year, the island would hypothetically be uninhabited in 140 years—ninety years after scientists predict it will be under water.\textsuperscript{32} As Tuvalu environment official Paani Laupepa remarked in a conversation with

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\bibitem{26} Paddock, supra note 15.
\bibitem{27} Witty, supra note 1, at 2; \textit{World Factbook}, supra note 2.
\bibitem{29} Paddock, supra note 28, at 1.
the British Broadcasting Company: "While New Zealand responded positively in the true Pacific way of helping one's neighbors, Australia on the other hand has slammed the door in our face." Further angering the Tuvaluan people, the Australian government has asked Tuvalu and its fellow South Pacific islands nations to allow Middle Eastern asylum seekers to live there. Panapa Nelesone, a Tuvaluan Government spokesman responded to the request by saying: "We ask them for space and now they're sending us their own people." Without support from their neighbors, Tuvaluans face a not-so-distant demise. Tuvalu's proposed suit against the United States in the International Court of Justice is as much about obtaining relief as it is about obtaining a more public and hopefully sympathetic arena. Tuvalu is not and will not be the only island affected by global warming. Regardless of whether Tuvalu is successful in the international arena, contemplating the issues Tuvalu may face in a possible suit will provide guidance for prospective actions by other nations that will surely face a similarly dire future.

III. U.N. PANEL FINDS CONNECTION BETWEEN HUMAN ACTIVITY AND GLOBAL WARMING

The international community first began to discuss climate change in the mid-1970s. In response to a growing concern, the World Meteorological Organization formed the Ad Hoc Panel of Experts on Climate Change and supported the First World Climate Conference in 1979. Nine years later, in the face of differing scientific information on climate change, the World Meteorological Organization and United Nations Environment Programme joined to form the Intergovernmental Panel on Climate Change ("IPCC") to study the effects of global warming. Since its

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34 3 Ede, supra note 10, at 3.
35 Id.
36 Id.
39 Id.

The IPCC reports attribute the increase in surface temperature to the excess release of GHGs, such as carbon dioxide, by humans.\footnote{Other greenhouse gases include water vapor, ozone, methane, nitrous oxide, and chlorofluorocarbons. See CLIMATE ACTION NETWORK, BACKGROUND INFORMATION ON CLIMATE CHANGE, at http://www.climnet.org/publicawareness/BACKGROUNDINFORMATION.html (last visited Jan. 14, 2005) [hereinafter BACKGROUND INFORMATION ON CLIMATE CHANGE].} Activities that contribute most to GHGs release are burning of fossil fuels (coal, gas, and oil) and driving carbon dioxide-emitting vehicles.\footnote{F. Sherwood Rowland, Atmospheric Changes Caused by Human Activities: From Science to Regulation, 27 ECOLOGY L.Q. 1261, 1263 (2001).} At their normal level, GHGs work to control the balance of heat within the Earth's atmosphere by releasing excess heat and trapping infrared radiation to warm the surface temperature.\footnote{U.S. ENVTL. PROTECTION AGENCY, GLOBAL WARMING CLIMATE, at http://yosemite.epa.gov/oar/globalwarming.nsf/content/Climate.html (last visited Jan. 14, 2005).} Increasing the amount of GHGs in the atmosphere leads to the atmospheric absorption of higher levels of infrared radiation, which throws off the balance and causes the surface temperature to rise.\footnote{Dr. Michael Pidwirny, Introduction to the Biosphere, in FUNDAMENTALS OF PHYSICAL GEOGRAPHY, at http://www.physicalgeography.net/fundamentals/9r.html (last visited Jan. 14, 2005).}

Over the past 250 years, the consumption of fossil fuels and cement production have emitted approximately 283 billion tons of carbon dioxide, half of those emissions occurring in the last twenty years.\footnote{FRIENDS OF THE EARTH, CLIMATE CHANGE, at http://www.foe.co.uk/campaigns/climate/issues/climate_change/ (last visited Jan. 14, 2005); BACKGROUND INFORMATION ON CLIMATE CHANGE, supra note 41.} Levels of carbon dioxide in the early 1700s were about 275 parts per million ("ppm"), while current levels are closer to 365 ppm.\footnote{G. MARLAND ET AL., U.S. DEP'T. OF ENERGY, GLOBAL, REGIONAL, AND NATIONAL CO2 EMISSIONS, IN TRENDS: A COMPENDIUM OF DATA ON GLOBAL CHANGE, available at http://cdiac.esd.ornl.gov/trends/emis/tre_glob.htm (last visited Jan. 14, 2005).} Many scientists believe that by the year 2100, carbon dioxide levels will grow to somewhere between 540 and 970 ppm.\footnote{IPCC SYNTHESIS, supra note 40, at 41.} In turn, some scientists predict that the higher levels of carbon dioxide will increase the mean global temperature from 1.4°C to 5.8°C.\footnote{Id. at 61.}

One of the main questions asked by the IPCC was whether there is a true connection between the human releases of GHGs into the atmosphere...
and climate change. In the Second Assessment Report to the IPCC, the panel noted that evidence demonstrated that humans may be responsible for some of the climate change, but that there were too many uncertainties to make such a conclusory statement. In the Third Assessment Report to the IPCC the panel concluded, despite remnants of uncertainty, that increasing releases of GHGs were likely the cause of most of the warming over the last fifty years. The Third Report also concluded that "most of [the] observed warming over [the] last fifty years [was] likely due to increases in greenhouse gas concentrations due to human activities." Although the next report will not be released until 2007, global temperatures continue to rise.

There are many scientists who have contested the findings of the IPCC. Many of them believe that the increased release of carbon dioxide in the twentieth century has no connection to global warming. In contrast to the IPCC findings that the atmosphere augments the impact of carbon dioxide leading to increased temperature, these scientists hypothesize that the atmosphere offsets increasing carbon dioxide, resulting in no temperature change. They point out that there are a number of things affecting climate change whose effects on global warming are yet uncertain, including water vapor, specifically clouds in the atmosphere.

50 Id. at sec. 2.5.
52 IPCC SYNTHESIS, supra note 40, at 31. The Report specified the connection between human activities and increase in GHGs as a "robust" finding as opposed to a "key uncertainty." The Report defines a "robust" finding as "one that holds under a variety of approaches, methods, models, and assumptions and one that is expected to be relatively unaffected by uncertainties." Id. Alternatively, the Report defines "key uncertainties" as "those that, if reduced, may lead to new and robust findings in relation to the questions of this report." Id. at 30-31.
56 Id.
The IPCC conclusion that there is a connection between the human release of GHGs and rising global temperatures is crucial to Tuvalu’s potential case before the ICJ. Two major obstacles Tuvalu may face in a suit against the United States are proving that 1) the release of GHGs causes the sea level to rise; and 2) in particular, the United States’ release of GHG’s will cause the submersion of their island. The findings of both the IPCC and those scientists who disagree with the IPCC reports would likely be a topic of debate if Tuvalu were to bring its claim against the United States to the ICJ.

IV. IT IS UNLIKELY THAT TUVALU COULD ESTABLISH THE UNITED STATES’ INTERNATIONAL LEGAL LIABILITY UNDER THE CONVENTION ON CLIMATE CHANGE AND THE KYOTO PROTOCOL

To establish the United States’ obligation to decrease the release of greenhouse gases, Tuvalu may point to the United States’ support of the United Nations Framework Convention on Climate Change (“Convention on Climate Change”). The Convention on Climate Change is a set of “remedial objectives” set forth by the United Nations in 1992 in response to increased awareness regarding global warming. More than 180 nations, including Australia, the United States, and Russia, signed onto the convention. The main objective of the Convention on Climate Change is to achieve:

[S]tabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.

visited Jan. 14, 2005) (arguing that an increase in the release of carbon dioxide has not affected global warming because global temperatures began to rise in the 1940s, prior to increased releases of carbon dioxide after 1960); Robinson, supra note 55.


60 Convention on Climate Change, supra note 58, art. 2.
The Convention on Climate Change further defines "dangerous anthropogenic interference" by specifying that "where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures... provided they are cost effective." Therefore, notwithstanding the ongoing debate regarding the cause and effect of GHG release and global warming, the Convention on Climate Change encourages preventative measures with regard to the potentially harmful release of GHGs.

Tuvalu would have difficulty asserting that the United States is bound by the Convention on Climate Change for two reasons. First, while the Convention on Climate Change does not require scientific certainty before requiring countries to take preventative measures, it does provide an exception: countries may postpone such measures when they are not cost effective. Therefore, the United States would likely defend its actions by pointing to the economic hazards of substantial emissions reduction. Second, the Convention on Climate Change is not binding, so the United States could argue that it is not required to abide by its emissions standards. If asserted, these defenses would likely prove fatal to any claims by Tuvalu that the United States is in violation of the Convention on Climate Change.

A. Even Though the Convention on Climate Change Emphasizes Steps for Reducing Green House Gas Emissions, Countries May Weigh Those Steps Against Cost-Effectiveness

The Convention on Climate Change addresses specific steps that countries must take to actively combat global warming. It envisions a combined effort of mitigation and adaptation. Mitigation refers to the active reduction of emissions of carbon dioxide and other GHGs in addition to increasing the function and reliance on sinks, such as forests and oceans. Adaptation emphasizes changing human interaction with the environment to promote less damaging effects. These changes include

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61 Id. art. 3(2).
62 Id.
63 Id.
64 Id. art. 4.
65 Id. arts. 3(3), 3(4).
66 The Convention on Climate Change defines "sinks" as: "any process, activity or mechanism which removes a greenhouse gas, an aerosol or a precursor of a greenhouse gas from the atmosphere." Id. art. 1, sec. 8.
67 Id. at pmbl.; FCCC art. 4(2)(a).
68 Perry E. Wallace, Global Climate Change and the Challenge to Modern American Corporate Governance, 55 SMU L. REV. 493, 517 n.52 (2002).
creating sea walls, moving cities, and adjusting housing. Finally, the Convention on Climate Change states that the endeavor to decrease GHGs requires efforts to increase the use and creation of alternative fuels.

In addition to protecting countries from taking prohibitively expensive precautionary measures, the Convention on Climate Change also protects the necessary industrialization efforts of developing countries. To this end, it confers different responsibilities on developed and developing countries, relying on the principle of "common but differentiated responsibilities." The convention establishes as a foundation that all countries are responsible for global warming, although it leaves financial responsibility in the hands of developed nations who are to "lead in combating climate change . . . ."

The United States is one of the nations opposed to the principle of "common but differentiated responsibility" because it puts greater economic responsibilities on developed countries. President Bush summed up his opposition to signing on to binding emissions standards stating that: "[i]t exempts 80 percent of the world, including major population centers such as China and India, from compliance, and would cause serious harm to the [U.S.] economy."

69 LAKSHMAN D. GURUSWAMY, INTERNATIONAL ENVIRONMENTAL LAW NUTSHELL, 180, 190 (2d ed. 2003).

70 Convention on Climate Change, supra note 58, art. 4(1)(e).

71 The Convention on Climate Change states that the effort to combat global warming should not impede the development or sustainability of countries. Id. art. 3(4).

72 Id. art. 3(1); PHILIPPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW: VOLUME 1: FRAMEWORKS, STANDARDS AND IMPLEMENTATION 275 (1994). This principle defines the dual role of developing and developed countries.

73 Convention on Climate Change, supra note 58, arts. 3(2), 4(1), 4(2) & 4(4). Tuvalu would likely have to deal with the principle of differentiated responsibility in its case against the United States and Australia. GURUSWAMY, supra note 67, at 189; President Bush has indicated that one of the reasons he has not endorsed the Kyoto Protocol is the economic consequences of having to carry the "weight" of responsibility for decreasing greenhouse gases when compared to developing countries. Tuvalu would likely counter that not only did the United States and Australia endorse the initial Convention on Climate Change articles that allowed for differentiated responsibility, but also that the two countries are the first and second largest producers of greenhouse gases in the world. Further, the concept of "common but differentiated responsibilities" is not unique to the Convention on Climate Change. It is present in other United Nations treaties.


B. Despite Ratification by Other Nations, the United States Continues to Oppose the Kyoto Protocol

Inasmuch as the Convention on Climate Change is non-binding, it merely obligates developed countries to “aim” towards returning to 1990 GHG emissions levels by the year 2000. In contrast, the 1997 Kyoto Protocol (“Protocol”), written as a follow-up to the Convention on Climate Change, requires developed countries to reduce emissions of carbon dioxide to five percent below 1990 levels between 2008 and 2012.

The Kyoto Protocol binds countries to specific guidelines for reduction of GHGs. The United States actively participated in the discussions of the Protocol when it was being drafted. During those discussions, the United States agreed to reduce emissions by seven percent, the European Union agreed to an eight percent reduction, and Japan to a six percent reduction.

Despite its pledge, the United States has refused to ratify the Kyoto Protocol. Following its lead, other developed countries have refused to reduce greenhouse gas emissions in accordance with the Convention on Climate Change. However, on November 5, 2004, despite his country’s past refusal to enter into the treaty, Russian President Vladimir Putin signed a bill by which Russia ratified the Kyoto Protocol in exchange for the European Union’s support of its entry into the World Trade Organization. Therefore, the Kyoto Protocol will take effect, but will still not bind nations like the United States, which refuse to accede to it.

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76 Convention on Climate Change, supra note 58, arts. 4(2)(b) & 4(2)(a).
77 Kyoto Protocol, supra note 7, art. 3(1); for a discussion on problems with the terms of the Kyoto Protocol, see Alexander Gillespie, Small Island States in the Face of Climate Change: The End of the Line in International Environment Responsibility, 22 UCLA J. ENVTL. L. & POL’Y 107, 117-19 (2003).
80 Kyoto Protocol, supra note 7, art. 3(1).
81 Kyoto Protocol Status of Ratification, supra note 9; see also supra note 75 (describing the new initiative President Bush prescribed in lieu of Kyoto.)
82 These countries include Australia. See Kyoto Protocol Status of Ratification, supra note 9.
Tuvalu would face a number of obstacles to bringing a suit in the ICJ. Most importantly, since the United States is not bound by the Kyoto Protocol, it could avoid being sued in the ICJ by refusing to consent to the Court's jurisdiction. Because it is unlikely that the United States will submit to the jurisdiction of the ICJ, Tuvalu may need to find alternative means of asserting jurisdiction. The alternative means include dispute resolution under the Law of the Sea Convention should both countries accede to it, asking the United Nations General Assembly to request an advisory opinion from the ICJ, or bringing the dispute before the Conciliation Commission of the Convention on Climate Change. Dispute resolution under the Law of the Sea Convention may be Tuvalu's most successful avenue for redress, especially if Tuvalu desires a binding decision by the ICJ. If Tuvalu chooses to ask the General Assembly to request an advisory opinion from the ICJ, it must persuade a two-thirds majority of the assembly to grant the request and would be limited to a legal determination by the ICJ, rather than the granting of relief. Lastly, Tuvalu could bring the dispute before the Conciliation Commission. However, the Commission does not yet exist and would not be able to bind the parties to any determination.

84 See JEFFREY L. DUNOFF ET AL., INTERNATIONAL LAW NORMS, ACTORS, PROCESS: A PROBLEM ORIENTED APPROACH 23 (2002); see also INTERNATIONAL COURT OF JUSTICE, GENERAL INFORMATION, at http://www.icj-cij.org/ICJWWW/ibgeneralinformation/icjwww/ibbook/Bbookframepage.htm (last visited Jan. 14, 2005) [hereinafter ICJ GENERAL INFORMATION] (unless a party is bound by treaty to the jurisdiction of the ICJ, the ICJ lacks jurisdiction absent the parties' consent).

85 There would be little motivation for the United States to submit itself voluntarily to the jurisdiction of the ICJ if for no other reason than the possibility of an adverse judgment.

A. If Ratified by the United States and Tuvalu, the Convention on the Law of the Sea Would Provide Multiple Avenues to Resolve This Dispute

Future ratification of the United Nations Convention on the Law of the Sea ("UNCLOS") by both Tuvalu and the United States may provide an avenue for Tuvalu to obtain legal judgment against the United States in an international forum. The UNCLOS specifically 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."\(^7\)

If both countries accede to the UNCLOS and Tuvalu desired to sue the United States under the convention, the UNCLOS provides five options: four dispute resolution forums and one additional binding forum for settling requests for provisional measures. First, under Article 287, countries may choose one of four forums: the International Court of Justice, The International Tribunal for the Law of the Sea, an arbitral panel, or a special arbitral panel.\(^8\) It is important to note that both parties to the dispute must agree on the forum, and if agreement is not reached, the dispute would default to an arbitration panel.\(^9\) Given the United States' reluctance to submit to the ICJ's jurisdiction, it is likely that any dispute would be settled in the arbitration panel. In addition, if Tuvalu submitted a request for provisional measures—a form of international injunctive relief—the International Tribunal for the Law of the Sea would have compulsory jurisdiction under Article 290, and this method of seeking relief has been used to varying degrees of success by other countries.\(^9\)\(^0\)

Tuvalu's main obstacle in obtaining jurisdiction under the UNCLOS will likely be proving that the UNCLOS applies to global warming issues, which have indirect effects on global waterways. However, Tuvalu could argue that the United States' continued release of pollutants into the atmosphere is directly linked to global warming and in turn to the increase of the global water table. Therefore, Tuvalu could argue that the United

\(^8\) Id., art. 287.
\(^9\) Id., art. 287(5).
States' activities have a harmful effect on the island and are in conflict with the UNCLOS.

B. Tuvalu Could Ask the United Nations General Assembly to Request an Advisory Opinion from the International Court of Justice

Yet another way for the ICJ to gain jurisdiction over the United States would be through an advisory opinion.\(^{91}\) Under the Charter of the United Nations, the Court may “give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.”\(^{92}\) Tuvalu could request an ICJ advisory opinion through certain bodies of the United Nations.\(^{93}\) In addition, “[o]ther organs of the [U.N.] and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.”\(^{94}\)

In the 1990s both the General Assembly and the World Health Organization requested an advisory opinion from the ICJ on the legality of nuclear weapons.\(^{95}\) The court held that it had jurisdiction over a request of this nature brought by the General Assembly, but not by the World Health Organization.\(^{96}\) The court ruled that despite the fact that the World Health Organization was entitled to deal with the health effects of nuclear weapons, “[w]hat ever those effects might be, the competence of the WHO [World Health Organization] to deal with them is not dependant on the legality of the acts that caused them.”\(^{97}\)

Thus, the General Assembly would be the best body to request an advisory opinion from the ICJ. Under Article 18 of the U.N. Charter, “important” questions may be brought to the ICJ by a two-thirds majority of the assembly.\(^{98}\) Tuvalu would therefore need to convince a majority of the United Nations that it has a valid and deserving claim that should be brought before the ICJ.

\(^{91}\) Strauss, supra note 86, at 3; ICJ General Information, supra note 84.
\(^{93}\) ICJ GENERAL INFORMATION, supra note 84.
\(^{94}\) Strauss, supra note 86, at 3.
\(^{95}\) Strauss, supra note 86, at 3; Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 235; Strauss, supra note 86, at 3.
\(^{96}\) Strauss, supra note 86, at 3; Legality of the Threat or Use of Nuclear Weapons, supra note 95, at 229.
\(^{97}\) Strauss, supra note 86, at 3.
\(^{98}\) U.N. CHARTER art. 18, para. 2.
However, achieving a two-thirds majority may prove difficult for Tuvalu due to the scope of the question referred to the ICJ and the potential negative legal effects on the members of the General Assembly. Another downside of requesting an advisory opinion from the ICJ is that the ICJ would only be permitted to answer the question in terms of legality and would not have the authority to grant relief to the affected parties. While an advisory opinion would bring international attention to Tuvalu's situation, it could not provide any relief for its citizens or require the United States to take action.

C. Once the Conference of the Parties to the Convention on Climate Change Establishes a Conciliation Commission It May Also Provide Tuvalu with a Forum for Its Claims

Finally, Tuvalu could attempt to bring an action through the Convention on Climate Change. Though the United States never signed the Kyoto Protocol, the original Convention requires developed countries to take measures to limit their emissions. The original framework provides for a Conciliation Commission "which shall render a recommendatory award, which the parties shall consider in good faith." The Conciliation Commission is not yet in effect because one of the requirements of the Commission is that the Conference of the Parties adopt a set of procedures. Once the procedures are set forth, the Commission would be able to take up Tuvalu's claim. It must be noted that the Commission's recommendation for an award would not be binding, but would have to be considered in good faith.

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99 When the General Assembly requested the ICJ to rule on the legality of nuclear arms, the ICJ agreed to give an opinion with less than a two-thirds majority due to the small number of countries that had nuclear arms at the time. Strauss, supra note 86, at 3. The same would not be true for Tuvalu's request, since most countries are either potentially effected by global warming or are GHG contributors. Id. at 3.
100 Id. at 3.
101 Id.; NEF, supra note 89, at 6.
102 Convention on Climate Change, supra note 58, art. 14(5); SANDS, supra note 72, at 280; Strauss, supra note 86, at 4.
103 Id.
104 Id. supra note 86, at 4.
105 Id.
VI. TUVALU'S RIGHT TO PRESENT AND FUTURE DAMAGES RELIES UPON VARIOUS SUBSTANTIVE LAW CLAIMS

Even if the ICJ had jurisdiction to hear a suit by Tuvalu against the United States, Tuvalu would still face a number of substantive law problems. Specifically, the island state would need to show that the excess release of GHG emissions by the United States is unlawfully causing it harm.

Engaging in this somewhat hypothetical exercise is useful in contemplating potential substantive obstacles that a nation attempting to enforce international environmental law would face. Even if Tuvalu may never have the opportunity to bring a case against the United States in the ICJ, other nations potentially could. Since international environmental law is evolving, considering substantive law issues of a hypothetical Tuvalu claim will be helpful to nations interested in bringing similar suits in the future.

First, Tuvalu would need to show that the release of greenhouse gases is unlawful. To accomplish this, Tuvalu could assert two general principles of customary international environmental law: 1) sovereign equality—a state’s sovereign right over its own natural resources, and 2) state liability for any activities that harm another state.106

Second, if Tuvalu sought to extend a damages claim into a claim for future damages, specifically for the eventual flooding of the island, it would likely resort to two additional arguments: intergenerational equity and the precautionary principle.107 The additional arguments may be necessary, because the ICJ has never granted damages for future harm. However, Tuvalu would face an uphill battle in using these arguments, since both fall under the category of emerging customary law.108


107 Parties to ICJ cases typically use both the intergenerational rights and the precautionary principles to support their policy arguments. See infra note 117. Forms of the precautionary principle are also present in treaties and frameworks, such as the Convention on Climate Change. See Convention on Climate Change, supra note 58, art. 3.3. Therefore, these principles may fall within the category of customary international law.

A. Tuvalu May Assert Claims of Sovereign Equality and State Liability to Prove that the United States' Activities are Unlawful

Tuvalu would first need to show that the United States is currently causing harm to the island, and that causing such harm is unlawful. As evidence of current damage, Tuvalu would likely point to the increased storm activity causing damage to above-island buildings and vegetation and to rising water tables that erode the island’s beaches and destroy local crops. While these damages are minimal in comparison to the damage Tuvalu will face when the island is submerged, Tuvalu’s best strategy will be first to argue that present damages were caused by the greenhouse gas emissions of the United States. This argument is superior to others because Tuvalu may argue a well-established legal principle of sovereign equality: one country’s activities may not cause harm to another country.109

The legal principle that one country may not cause harm to another stems from the principle of sovereign equality upon which the United Nations is founded.110 Sovereign equality allows all states to maintain certain inherent rights, which theoretically enables them to interact on a level playing field.111 One of those rights, inherent to all states, is the right to be free from physical harm caused by another state.112 The Trail Smelter Arbitration ("Trail Smelter") marks the first enunciation of this right.113 In that case, the arbitral tribunal held Canada legally responsible for damage to the United States by cross-border pollution. The Court based its decision on sovereign equality, finding that the United States had a right not to be harmed by the activities of other countries:

[U]nder the principles of international law, as well as the law of the United States, no state has the right to use or permit the use of its territory in such a manner as to cause injury . . . in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.114

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109 Ede, supra note 10, at 1.
111 U.N. Charter, supra note 92, ch. 1, art. 2.
112 DUNOFF, supra note 84, at 46.
113 TRAIL SMELTER ARBITRAL TRIBUNAL, supra note 110.
114 Id.
115 Id.
Tuvalu can use the same principle to argue that it has a right not to be harmed by other countries. Tuvalu could argue that the harmful activities of the United States are illegal and that Tuvalu has a right to redress for the damage caused by such activities. The obstacle for Tuvalu in making this argument will be to prove causation. In Trail Smelter, the United States could prove that Canada's emissions were the direct cause of their injury. Without clear and convincing proof that the United States' emissions are the cause of Tuvalu's injury, the ICJ may reject Tuvalu's claims for direct damage. Therefore, Tuvalu may need to find a way to circumvent the requirement of proving causation.

B. Tuvalu Could Ask the ICJ for Prospective Relief Based Upon Intergenerational Rights and the Precautionary Principle

While Tuvalu is already experiencing damage from global warming, the worst is yet to come. The ICJ has never granted prospective or future damages to parties. The Nuclear Test Cases were the first cases to bring the issue of prospective relief before the Court. In the first set of the Nuclear Test cases, Australia and New Zealand requested that the ICJ issue damages and injunctive relief against France for the effects of fallout from nuclear testing.\(^\text{116}\) In its request for interim measures to protect against the nuclear fallout, Australia argued that:

> It is of considerable significance that in this request Australia is seeking to assert the inviolability of its sovereign territory against the irreversible consequences of conduct which has not only been the subject of concern to Australia and its people and of scientists throughout the world, but also of universal apprehension, opposition and condemnation.... Such fear and condemnation cannot be regarded as unfounded. They testify to the harm to peoples, their environment and biosphere inherent in such tests. An essential element upon which they rest is the terrible and irreversible contribution which such tests make to the pollution of man's environment in all States, of which Australia is one.\(^\text{117}\)


Prior to the ICJ's ruling on jurisdiction, France stated that it would cease atmospheric nuclear testing. The ICJ, in turn, dismissed the cases since there was no longer a dispute between the countries. One year later, New Zealand moved to reopen its original claim because of France's intention to begin underground nuclear testing. Again dodging a decision on prospective damages, the ICJ refused to reopen the case, finding that the judgment in the initial Nuclear Test Case solely applied to atmospheric testing. Despite the ICJ's refusal in the Nuclear Test Cases to rule on the issue of prospective damages, future cases involving prospective damages from the effects of global warming may force the ICJ finally to face this issue.

If Tuvalu desires prospective redress, it would need to argue the principle of intergenerational equity and the precautionary principle. However, adopting these principles would require the Court to take a bold step toward defining international environmental law.

1. Tuvalu Should Ask for Damages Based upon the Principle of Intergenerational Equity

The principle of intergenerational rights begins with the premise that humans, as part of a "natural system," have a responsibility to protect the present and future of their environment. This responsibility is the flip side of the right to use the environment. When first expressed in the late 1980s, it was fairly foreign to the practice of international law. However,

118 Nuclear Tests, supra note 116, at 465.
119 Id. at 475.
120 Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (N.Z. v. Fr.) Case, 1995 I.C.J. 288, 298 (Sept. 22) [hereinafter "Request"].
121 Id. at 307.
122 See supra discussion in Part IV.A.
123 See supra discussion in Part IV.B.
124 Request, supra note 120. Currently, it is unclear whether the principle of intergenerational equity and the precautionary principle amount to binding international law. Tuvalu would need to argue that both principles are customary international law in order to succeed in obtaining redress of its claims based on them. Whereas treaty law is only binding on the parties to the treaty, customary international law is binding on all nations that did not persistently object to the relevant norm. Vig, supra note 108, at 14. While the ICJ has not held that either principle falls under the category of customary international law, the increasing use and recognition of both principles indicates that the ICJ may make such a finding now or in the future.
125 Weiss, supra note 108, at 106.
126 Id.
127 Id. at 107.
since the mid-1990s the principle has gained some recognition.\textsuperscript{128} Presiding ICJ Judge Christopher Gregory Weeramantry referred to it in both his separate and dissenting opinions in the Request as an "important and rapidly developing principle of contemporary environmental law."\textsuperscript{129} First introduced in the Nuclear Test Cases, intergenerational equity is a principle that the Court could apply in Tuvalu's case.

\subsection{The Nuclear Test Cases Introduced the Principle of Intergenerational Equity}

The question of intergenerational equity was important in the Nuclear Test Cases because of the potential long-term destructive effects of nuclear testing on the environment.\textsuperscript{130} As Judge Weeramantry pointed out, the fact that radioactive by-products of nuclear testing have a half-life of more than 20,000 years means that any decision of the Court on present damage to New Zealand would inevitably affect generations to come.\textsuperscript{131} Therefore, noted Judge Weeramantry, the Court had a responsibility to act as a trustee of the rights of later generations as "a domestic court is a trustee of the interests of an infant unable to speak for itself."\textsuperscript{132} Intergenerational equity could be understood as the inherent duty of the ICJ, requiring it to administer the law in a forward-thinking manner as a "trustee" of the global future, and not simply with respect to the parties before it.\textsuperscript{133} Judge Weeramantry believed that the need for recognition of intergenerational equity leads to an enforceable legal right: "The starting proposition is that each generation is both a custodian and a user of our common natural and cultural patrimony. As custodians of this planet, we have certain moral obligations to future generations which we can transform into legally enforceable norms."\textsuperscript{134}

Judge Mohamed Shahabudden also addressed the role of the Court in administering intergenerational justice, but in a more limited way.\textsuperscript{135} Judge Shahabudden explained his view that the Court's first duty is to the respective

\begin{thebibliography}{99}
\bibitem{128} \textit{Id.}; for a discussion on the "motivational and practical" problems with arguing the concept of intergenerational rights, see \textsc{Alexander Gillespie}, \textsc{International Environmental Law, Policy and Ethics} 15, 117-26 (1997).
\bibitem{129} \textit{Weiss}, \textit{supra} note 108 at 107; Request, \textit{supra} note 120, at 341.
\bibitem{130} Request, \textit{supra} note 120, at 341.
\bibitem{131} \textit{Id.}
\bibitem{132} \textit{Id.}
\bibitem{133} \textit{Id.}
\bibitem{134} \textit{Id.} See E. Brown \textsc{Weiss}, \textit{In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity} 15, 21 (1989).
\bibitem{135} Request, \textit{supra} note 120, at 341.
\end{thebibliography}
parties and the controversy before the Court.\textsuperscript{136} He described the primary function of the Court as one of “administering justice based on law”\textsuperscript{137} in accordance with international law on the disputes as submitted to the Court.\textsuperscript{138} However, he noted that this does not mean that the Court administers the law “mechanically.”\textsuperscript{139} Even lacking the full extent of power of other courts, the ICJ could sometimes act boldly following a general notion of justice, especially when the law was in doubt.\textsuperscript{140} Judge Shahbuddeen opined, however, that New Zealand’s request did not present questions of law, and the Court should have decided the case based on the law.\textsuperscript{141}

\textbf{b. The International Court of Justice Should Apply the Intergenerational Equity Principle to Tuvalu’s Case}

Determining the role of the Court would be essential in Tuvalu’s potential lawsuit. The Court faced many problems during the Nuclear Test Cases. One of them was the Court’s inherent lack of power to enforce its decisions. Prior to the case in 1975, France refused to come to the Court to argue its case and by 1995 France had refused to consent to the jurisdiction of the Court.\textsuperscript{142} The second problem was the delicate subject matter of nuclear weaponry. The issue of nuclear weapons testing was extremely political during both 1974 and 1995.\textsuperscript{143} The possession and testing of nuclear weapons was a national security issue that had been left exclusively up to individual countries.\textsuperscript{144} A holding in favor of New Zealand or Australia by the ICJ would not only address the dispute before the Court, but would also restrict a country’s right to determine its own national security policy.\textsuperscript{145} The Court was not willing to interfere with state sovereignty in such a highly political matter.

In dealing with the long-term environmental impact on the island of Tuvalu, the Court would likely return to the theory of intergenerational

\textsuperscript{136} Id.
\textsuperscript{137} Id. at 315 (citing Aerial Incident of 27 July 1955 (Isr. v. Bulg.), Preliminary Objections, 1959 I.C.J. 127 (Judgment of May 26)).
\textsuperscript{138} Request, supra note 120, at 315.
\textsuperscript{139} Id. at 316.
\textsuperscript{140} See id.
\textsuperscript{141} Id.
\textsuperscript{142} Id.
\textsuperscript{144} Id.
rights. After all, Tuvalu’s request for damages from the effects of global warming requires the Court to address an issue that will not fully materialize for another fifty years. Tuvalu should argue that the loss of land from the effects of global warming will affect generations that will never have the opportunity to experience island life.

Unlike in the Nuclear Test Cases, the Court would not need to address the national security issues that weighed so prevalently in 1975 in the Tuvalu case. The issue of state sovereignty that will affect a case brought by Tuvalu against the United States will be one of economic policy. If the ICJ finds in favor of Tuvalu and requires the United States to reduce GHG emissions, the United States could suffer significant economic setbacks from the need to decrease its consumption of “dirty” energy. Although the capitalist endeavors of a nation remain central to state sovereignty, the ICJ would be correct in its decision because global warming is a concern which trumps the pursuit of economic success. This would be especially true when the end result of the opposite ruling would be the extinction of a sovereign nation.

2. The Precautionary Principle Provides Tuvalu with a Right to Future Damages

Tuvalu could also argue that the United States should have reduced emissions and that failure to do so violates international law. To prove that the United States should have taken and still should take precautions against the harmful effects of GHG emissions, Tuvalu would likely argue that the United States failed to follow the precautionary principle. The precautionary principle suggests that a country should not refuse to regulate activity simply because it is scientifically uncertain whether the activity will cause harm.\[146\]

Various treaties and multilateral agreements incorporate elements of the precautionary principle.\[147\] For example, in 1990 the Bergen Ministerial Declaration on Sustainable Development enunciated the precautionary principle as follows:

> In order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent and attack the causes of environmental

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degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.\footnote{148}

In petitioning to the ICJ for damages in the 1995 Nuclear Test Case, New Zealand relied on the precautionary principle to request that the Court impose on France the burden of proving that no harm would result from its activities.\footnote{149} New Zealand asked the Court to follow the precautionary principle because it did not have access to the same information as France on the effects of nuclear fallout.\footnote{150} Thus, if adopted, the precautionary principle could enable the Court to proceed with a hearing on potential environmental damage rather than postponing the hearing until the plaintiff brings forth all necessary information.\footnote{151}

The precautionary principle was also at the center of a debate between the European Community ("EC"), the United States, and Canada in a dispute before the World Trade Organization ("WTO") over hormones in meat products.\footnote{152} In its appeal to the WTO, the EC argued that the precautionary principle was a rule of customary international law.\footnote{153} In contrast, both the United States and Canada refused to characterize the precautionary principle as customary international law. Instead they suggested that the precautionary principle was "an 'approach'—the content of which may vary from context to context," meaning that the principle does not stand on its own as a law, but may change depending on its intended application within a treaty.\footnote{154} The WTO appeals panel addressed this issue by acknowledging that some nations recognize the precautionary principle as customary environmental international law.\footnote{155} However, the panel stated that it was

\footnote{148}{Request, \textit{supra} note 117, at 343 (citing Bergen ECE Ministerial Declaration on Sustainable Development, 15 May 1990, in \textit{Basic Documents of International Environmental Law} 1, 558-9 (Harold Hohmann ed., 1992)).}
\footnote{149}{Request, \textit{supra} note 116, at 343.}
\footnote{150}{\textit{Id}.}
\footnote{151}{\textit{Id}.}
\footnote{153}{Hormones Case, \textit{supra} note 152, at 6-7.}
\footnote{154}{\textit{Id}. at 17.}
\footnote{155}{\textit{Id}. at 45.}
unclear whether a majority of nations accept it as customary law.\textsuperscript{156} Therefore, the panel abstained from determining this issue definitively, feeling that it was "imprudent" to make such an important determination in an appeal of this nature.\textsuperscript{157}

Opponents of the precautionary principle claim that it is impractical since it calls for neither action nor inaction and provides no guidance on dealing with potential problems.\textsuperscript{158} While the effects of global warming are overwhelmingly negative, they may have some positive aspects. For example, while there is evidence that ground-level ozone may cause various health problems, there is also evidence that it has a range of benefits including lowering risks of cataracts and skin cancer.\textsuperscript{159} It would be unclear under the precautionary principle what type of regulations a country should impose on polluters. The country would need to weigh the benefits and harms of any policy concerning the reduction of ground-level ozone, but the precautionary principle does not anticipate this problem.\textsuperscript{160}

Despite this opposition, Tuvalu should argue that the precautionary principle has become a rule of customary international law and is therefore binding on the United States. Tuvalu should further argue that the precautionary principle is essentially a rule of prior restraint. In this sense, its argument would be an extension of the holding in Trail Smelter. Whereas Trail Smelter imposes liability on a country that causes damage to another, the precautionary principle would extend the liability to actions that occur prior to the damage.\textsuperscript{161} As a prior restraint rule, the precautionary principle would create liability for current activities that may cause future damages. Since the precautionary principle holds that a country may not engage in activities when it is scientifically uncertain whether they will cause damage, liability could commence prior to the scientific certainty of damage causation.\textsuperscript{162} Thus, the United States could be held liable for its environmentally damaging policies prior to establishment of a direct correlation between them and global warming.

\textsuperscript{156} Id.
\textsuperscript{157} Id.
\textsuperscript{158} Sunstein, \textit{supra} note 146, at 1020.
\textsuperscript{159} Id. at 1040.
\textsuperscript{160} Id. at 1028.
\textsuperscript{161} \textit{See} Trail Smelter, \textit{supra} note 110 at 685.
\textsuperscript{162} \textit{See} Sands, \textit{supra} note 106, at 130.
VII. CONCLUSION

Regardless of whether Tuvalu decides to initiate a suit in the ICJ against the United States, it is a useful exercise to consider the viability of an international suit of this nature. The impending environmental damages of global warming are so great that one of the many nations about to be affected by them may soon seek legal redress at the ICJ and face substantive law issues discussed in this Comment.

If Tuvalu were to bring a suit in the ICJ, it would likely face two major substantive law obstacles. The first obstacle would be with regard to prospective relief. Though the ICJ touched briefly upon it in the Nuclear Test Cases, the ICJ has never granted prospective relief. A successful claim for prospective relief will likely depend on an ICJ stance that favors humanitarian and environmental ethics over economic policy.

Tuvalu's second obstacle would be to prove that the United States should have reduced emissions even without clear scientific proof that the excess release of emissions by the United States is the cause of Tuvalu's dire circumstance. In order to rule in Tuvalu's favor, the ICJ would need to find that the precautionary principle is a rule of customary international law and that the United States is in violation of such rule.

The ever-changing international environmental law is moving in Tuvalu's favor. Regardless of whether Tuvalu brings the United States before the ICJ, we will hear more of global warming lawsuits. With sea levels on the rise, the world will become a smaller and smaller place—and in time the vanishing will demand to be heard.