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Racing the Rising Tide: Legal Options for the Marshall Islands

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United States District Court of the District of Massachusetts

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STUDENT NOTE

RACING THE RISING TIDE: LEGAL OPTIONS FOR THE MARSHALL ISLANDS

*J. Chris Larson**

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While many nations face environmental degradation due to the actions of other sovereign countries, one nation faces total destruction. The Republic of the Marshall Islands (RMI) literally may disappear due to accelerated sea-level rise.¹ Nearly a decade ago, scientists predicted that

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1. See, e.g., Intergovernmental Panel on Climate Change Working Group II, *The Regional Impacts of Climate Change: An Assessment of Vulnerability*, Summary for Policymakers, Special Report, pt. 6.8 (Robert T. Watson et al. eds., Nov. 1997) <<http://www.ipcc.ch/pub/sr97.htm>> [hereinafter *Regional Impacts*].

accelerated sea-level rise, if not halted, will make the Marshall Islands uninhabitable.² In 1997, the Intergovernmental Panel on Climate Change (IPCC) concluded that accelerated sea-level rise may require the evacuation of low-lying island nations like the Marshall Islands.³ While diplomatic efforts are underway to stop the global warming that causes accelerated sea-level rise, these efforts are proving insufficient. This Note identifies three strategies that, either jointly or independently, may assist RMI in attaining a remedy for the destruction of their nation.

This Note first describes the threat posed by accelerated sea-level rise. A review of scientific data shows that global warming causes ocean levels to rise and that RMI may need to be evacuated. The current diplomatic efforts to decrease global warming offer few assurances to RMI. In fact, the countries that have obligated themselves to reduce global warming are actually increasing emissions of gases that cause global warming.

This paper identifies three legal theories under which RMI can obtain relief for the injuries that accelerated sea-level rise may cause. First, the signatories of United Nations Framework Convention on Climate Change (UNFCCC) are obligated to provide relief for RMI and other nations affected by accelerated sea-level rise.⁴ RMI should immediately attempt to enforce this obligation. If RMI's requests for relief under the UNFCCC are denied, then RMI can seek a judgment against the offending nations in the International Court of Justice (ICJ). Second, RMI can bring a claim in the ICJ for a breach of customary international law. Third, RMI can seek relief from the world's leading producer of greenhouse gases. A treaty obligation exists between RMI and the United States, which, broadly interpreted, may require the United States to defend RMI from accelerated sea-level

2. See MARTHA J. CRAWFORD, SOUTH PACIFIC REGIONAL ENVIRONMENT PROGRAMME, REPUBLIC OF THE MARSHALL ISLANDS NATIONAL ENVIRONMENTAL MANAGEMENT STRATEGY: STATE OF THE ENVIRONMENT REPORT 1992 PART A 22-23 (1993). See also *Possible Adverse Effects of Sea-Level Rise on Islands and Coastal Areas, Particularly Low-Lying Coastal Areas*, G.A. Res. 206, U.N. GAOR, 44th Sess., 85th plen. mtg., U.N. Doc. A/RES/44/206 (1989). The United Nations conducted the 1985 Villach Conference to address the Greenhouse Effect. See DEAN EDWIN ABRAHAMSON, THE CHALLENGE OF GLOBAL WARMING 63-67 (1989).

3. See *Regional Impacts*, *supra* note 1, pt. 6.8. The Intergovernmental Panel on Climate Change (IPCC) was established by the United Nations Environment Programme and the World Meteorological Organization in 1988. See *id.* Foreword. This IPCC report was prepared specifically for the conference of the parties to the United Nations Framework Convention on Climate Change. See *id.* pt.1.

4. See United Nations Framework Convention On Climate Change, May 9, 1992, S. TREATY DOC. NO. 102-38 (1992), 31 I.L.M. 849 (1992)[hereinafter UNFCCC].

rise. This paper concludes with some proposals on how best to enforce the three legal obligations outlined.

I. THE THREAT OF ACCELERATED SEA-LEVEL RISE AND THE MARSHALL ISLANDS

A. *The Republic of the Marshall Islands Is Especially Vulnerable to Accelerated Sea-level Rise*

In 1997, the IPCC identified the Marshall Islands as one of the nations especially vulnerable to the threat of accelerated sea-level rise due, in part, to their geography.⁵ RMI has a total of five islands and twenty-nine atolls that contain over a thousand islets.⁶ While numerous, the islands and islets possess little land mass. In total, 70.05 miles of dry land exist amidst over 750,000 square miles of the Pacific Ocean.⁷ The largest land mass in the Marshall Islands is an atoll just over six square miles in size.⁸

Though RMI is situated in the middle of open ocean, it barely breaks the surface of the water. The average land elevation is only seven feet above sea-level.⁹ The IPCC estimates that a one meter increase in sea-level would threaten to submerge 80 percent of the Majuro atoll in the Marshall Islands,¹⁰ where nearly half of the population lives.¹¹

The threat to RMI does not come from total submersion alone. The RMI government notes that its population is more immediately threatened by the loss its reefs.

Fragile coral reefs fringe the atolls, and serve as the only line of defense against the ocean surge. The clearance over the reef in the sections that are covered by water is usually no more than a couple of feet. In other places the reef is commonly only barely submerged. . . . The vulnerability to waves and storm surges is at the best of times precarious. . . . The relative safety that the islands have historically provided is now in jeopardy. . . . It is

5. See *Regional Impacts*, *supra* note 1, pt. 6.8 (identifying the same risk for the Bahamas, Kiribati and the Maldives).

6. See THE OFFICE OF PLANNING AND STATISTICS, MARSH. IS., MARSHALL ISLANDS STATISTICAL ABSTRACT 1996 3 (1996) [hereinafter STATISTICAL ABSTRACT].

7. See *id.* at 3-4.

8. See *id.* at 4.

9. See *id.* at 3.

10. See *Regional Impacts*, *supra* note 1, pt. 6.8. The IPCC estimates a sea-level rise of 15-95 cm by the year 2100. See *id.* pt. 2.

11. See STATISTICAL ABSTRACT, *supra* note 6, at 16.

likely that evacuation would have to be effected long before inundation is total.¹²

The IPCC notes that coral reefs will be damaged by any rise in temperature.¹³ In general, reefs serve as the habitat for marine species, protect small island nations from erosion and storms, and absorb carbon dioxide from the atmosphere.¹⁴ In addition, coral reefs are a home to the fish that provide the Marshallese with much of their protein needs.¹⁵ Increased temperature hinders coral reefs from growing and keeping pace with the rising ocean level, thereby putting the Marshall Islands at risk.¹⁶

Accelerated sea-level rise is not merely a theoretical prediction. Some claim that the effects of sea-level rise can already be seen throughout the Marshall Islands. For example, during World War II, the Japanese military constructed island defense bunkers.¹⁷ The bunkers stood on the beaches approximately one hundred yards from the water line.¹⁸ Today, many bunkers stand in several feet of ocean water.¹⁹ Another image clearly foreshadows the future of the Marshall Islands. Rising water has partially covered a cemetery; the top of bleached white grave markers, once on dry land, now just break the surface of brilliant crystal blue water.²⁰

To further complicate matters, the usable dry land is limited, and the population pressures are significant and growing. The current population is approximately 58,000²¹ and growing at a rate of 4.3% per annum.²² The UNFPA Country Support Team for the South Pacific considers RMI

12. *The Marshall Islands and Climate Change* (visited April 7, 1999) <<http://www.rmiembassyus.org/climate.html>>.

13. See generally William C. Burns, *Global Warming—The United Nations Framework Convention on Climate Change and the Future of Small Island States*, 6 DICK. J. ENV. L. POL. 147, 169 (1997).

14. See *id.*

15. See *id.*

16. See *Regional Impacts*, *supra* note 1, pt. 6.8.

17. See Telephone Interview with Holly Barker, Ph.D., Spokesperson for the RMI Embassy to the United States (Apr., 1999) [hereinafter Barker].

18. See *id.*

19. See *id.* Pictures of the bunkers appear surrounded by water in a travel brochure to RMI. See Office of Resources & Development, Marsh. Is., UNTITLED TRAVEL BROCHURE 2 (photo by Bert Sagara).

20. See Barker, *supra* note 17.

21. See The Embassy of Marsh. Is., *RMI Online* (last modified Mar. 18, 2000) <<http://www.rmiembassyus.org>> [hereinafter *RMI Online*].

22. See OFFICE OF PLANNING AND STATISTICS, MARSH. IS., REPORT ON THE PROCEEDINGS OF NATIONAL SEMINAR ON POPULATIONS AND DEVELOPMENT; MAJURO, JULY 10–12, 1995 18 (1995).

crowded by world standards.²³ The average population density is over 600 persons per square mile,²⁴ and certain parts are significantly more crowded.²⁵ While efforts to control population growth are underway, the pressure on existing usable land is likely to increase in the future.²⁶

RMI has few options to save its population. In fact, the IPCC suggests that, while some “adaptation strategies are theoretically possible[,] [o]n some small, low-lying island states and atolls . . . retreat away from the coasts is not an option. In some extreme cases, *migration and resettlement outside of national boundaries might have to be considered.*”²⁷ Thus, in the worst case scenario, RMI could suffer profound impacts including a substantial disappearance of their land mass.²⁸

Since retreat away from the coasts is not an option for the Marshallese, the remedy required to combat accelerated sea-level rise is as dramatic as the threat. RMI needs funding to relocate its population to new sovereign territory. Further, the hardship imposed by relocation should be compensated. Such funding would be extraordinary, but indeed, so is the loss anticipated by the Marshallese.

Relocation to new sovereign territory presents logistical challenges that some claim are insurmountable.²⁹ Yet, alternative remedies are far more improbable. For example, a global injunction on greenhouse gas emissions is not feasible because much of the world’s economy is dependent upon the emission of greenhouse gases.³⁰ The continuing increase of greenhouse gas emissions confirms the impracticability of enjoining such emissions. Therefore, despite the onerous nature of evacuation funding, RMI should be considered it as a potential legal remedy.

23. See Laurie Lewis, Office of Planning and Statistics, *People Count*, in REPUBLIC OF THE MARSHALL ISLANDS REPORT ON THE PROCEEDINGS OF NATIONAL SEMINAR ON POPULATIONS AND DEVELOPMENT; MAJURO, JULY 10–12, 1995 89 (1995).

24. See *id.*

25. Consider the islet of Ebeye; while its land mass is only 0.14 of a mile, it has over 8,000 residents. See STATISTICAL ABSTRACT, *supra* note 6, at 17. “This is equivalent to a density of about 60,000 persons in a square mile.” Lewis, *supra* note 23, at 89.

26. See Lewis, *supra* note 23, 89–90.

27. *Regional Impacts*, *supra* note 1, pt 6.8 (emphasis added).

28. See generally *id.*

29. While the population of RMI is significant, its size can be placed into perspective with the following comparison. The entire population of the Marshall Islands would fill just over half of the football stadium at the University of Michigan (capacity of approximately 107,500). See *RMI Online*, *supra* note 21; *M Go Blue: Michigan Stadium* (last modified Jul. 22, 1999) <<http://www.mgoblue.com/campusinfo/michigan-stadium.html>>.

30. See Jennifer Woodward, *Turning Down the Heat: What the United States Laws Can Do to Help Ease Global Warming*, 39 AM. U.L. REV. 203, 207–08 (1989).

B. *Greenhouse Gases, Global Warming, Sea-level Rise and the World Response*

In 1990, the president and director of the Woods Hole Research Center in Massachusetts, Dr. George M. Woodwell, predicted a sea-level rise of approximately 20 centimeters by the year 2030.³¹ The IPCC predicts a rise of 15-95 cm by the year 2100.³² These figures are hotly debated; Woodwell noted that the high-end estimates suggest a sea-level rise of as much as 5 meters by the end of the next century.³³ Natural sea-level rise is a minimal component of any predicted increase.³⁴ Collective global emissions of greenhouse gases cause acceleration beyond natural levels.³⁵ The science is, by now, familiar. Greenhouse gases are emitted by burning fossil fuels, among other methods.³⁶ These gases build up in the atmosphere and prevent solar radiation from escaping the earth.³⁷ This causes temperatures to increase.³⁸ Subsequently, the oceans rise in two ways. First, an increase in temperature causes thermal expansion, increasing the volume of the seawater itself.³⁹ Second, and more significantly, an increase in temperature will melt the polar icecaps, increasing the amount of water in the oceans.⁴⁰

Several greenhouse gases (GHGs) contribute to the rise of global temperature; these gases include carbon dioxide (CO₂), methane (CH₄), and nitrous oxide (N₂O).⁴¹ The most important of these is CO₂ since it is and will continue to be the most significant contributor to global warming.⁴² The IPCC reports that CO₂ emissions, at historical rates of fossil fuel consumption, cement production, and deforestation, "will increase

31. See George M. Woodwell, *The Effects of Global Warming*, in GLOBAL WARMING: THE GREENPEACE REPORT 117, 127-28 (Jeremy Leggett ed., 1990).

32. See *Regional Impacts*, *supra* note 1, pt. 6.8.

33. See Woodwell, *supra* note 31, at 127-28.

34. See, e.g., Daniel B. Botkin, *Global Warming: What is It, What is Controversial About It, and What We Might Do In Response to It*, 9 UCLA J. ENVTL. L. & POL'Y 119, 134-36 (1991).

35. See *id.*

36. See Jeremy Leggett, *Global Warming: The Scientific Evidence and its Implications* 2 TRANSNAT'L L. & CONTEMP. PROBS. 1, 4 (1992).

37. See *id.* at 3-6.

38. See *id.*

39. See LYNNE T. EDGERTON, NATIONAL RESOURCES DEFENSE COUNCIL, THE RISING TIDE: GLOBAL WARMING AND WORLD SEA LEVELS 19 (1991).

40. See *id.* For a discussion on the impacts of climate change on the Arctic, see Harvey A. Buckmaster, *The Arctic—A Canadian Case Study*, in THE GREENHOUSE EFFECT 61 (Harold Coward & Thomas Hurka eds., 1993).

41. See Woodward, *supra* note 30, at 203.

42. See David Schimel et al., Intergovernmental Panel on Climate Change Working Group I, *Stabilization of Atmospheric Greenhouse Gases: Physical, Biological and Socio-economic Implications*, Technical Paper III, 3 (John T. Houghton et al. eds., Feb. 1997).

atmospheric concentrations of this greenhouse gas.”⁴³ However, after years of study, even the IPCC is not sure how much of a reduction in GHG emissions is necessary to halt accelerated sea-level rise.

The ultimate concentration of greenhouse gases reached in the atmosphere, as well as the speed at which concentrations increase, is likely to influence impacts [on environmental systems], because a slower rate of climate change will allow more time for systems to adapt. However, knowledge is not currently sufficient to identify clear threshold rates and magnitudes of change.⁴⁴

While generalizations are made about the importance of reducing GHG emissions, no consensus exists on how much of a reduction would be sufficient.⁴⁵ There is no doubt, however, that some level of reduction is necessary.

The concern over the impact of GHG emissions prompted the international community to adopt the United Nations Framework Convention on Climate Change (UNFCCC). RMI was the third nation to sign and ratify the UNFCCC,⁴⁶ which entered into force on March 21, 1994.⁴⁷ As of December 1999, 181 nations had ratified the UNFCCC.⁴⁸ While the UNFCCC itself does not require member states to reduce GHG emissions, it does create a special obligation on behalf of certain member states towards RMI and other similarly situated island nations.⁴⁹ This obligation is first recognized in the preamble, which states that “low-lying and other small island countries . . . are particularly vulnerable to the adverse effects of climate change.”⁵⁰

The first protocol restricting GHG emissions was drafted in December of 1997.⁵¹ Under the Kyoto Protocol (Protocol), which quantifies the

43. *Id.* at 7.

44. *Id.* at 5.

45. See Gus Speth, *Foreword to FRANCESCA LYMAN ET AL., THE GREENHOUSE TRAP: WHAT WE'RE DOING TO THE ATMOSPHERE AND HOW WE CAN SLOW GLOBAL WARMING* ix (1990). Some sources claim climate change is virtually irreversible. See *id.*

46. See *United Nations Framework Convention On Climate Change: Marshall Islands* (visited Mar. 30, 2000) <<http://www.unfccc.de/text/resource/country/mi.html>> [hereinafter *Marshall Islands Information*].

47. See *United Nations Framework Convention on Climate Change: Signatories and Ratification of the Convention, Parties in Chronological Order-Update on Ratification of the Convention* (visited Mar. 30, 2000) <<http://www.unfccc.de/resource/conv/ratlist.pdf>>.

48. See *Marshall Islands Information*, *supra* note 46.

49. See *id.*

50. UNFCCC, *supra* note 4, Preamble.

51. See *United Nations Framework Convention on Climate Change: The Convention and the Kyoto Protocol-Status of Signatories to the Kyoto Protocol* (visited Mar. 30, 2000) <<http://www.unfccc.de/resource/convkp.html>>.

need to reduce GHG emissions,⁵² member states of the UNFCCC who both sign and ratify the Protocol obligate themselves to reduce collective emissions by at least 5% below 1990 levels by the year 2012.⁵³ While 84 countries have signed, only twenty-two have ratified the Protocol.⁵⁴

Yet despite diplomatic progress towards reducing GHG emissions, the reality behind the agreements is bleak. Annex I to the UNFCCC lists nations who, as industrialized countries, have special obligations to control GHG emissions.⁵⁵ Data released in November of 1998 from the Conference of the Parties to the UNFCCC shows that Annex I Nations, with one exception, are increasing their aggregate amount of GHG emissions.⁵⁶ Both short- and long-term measures show the increase of GHG emissions.⁵⁷ Not only have Annex I Nations increased GHG emissions from 1990 to 1996, but from 1995 to 1996, GHG emissions increased by the largest amount.⁵⁸ Therefore, while it seems that the global community acknowledges the global warming crisis, as of yet there are no substantive reductions in GHG emissions. In fact, those nations purported to be leaders in reducing GHG emissions actually are increasing their GHG emissions.

C. *The Political and Governmental Structure of the Marshall Islands*

RMI's legal options depend, in part, on some features of its unique governmental and political structure. It is therefore important to outline a few of the more significant aspects.

From 1947 until 1986, the United States administered a Trusteeship over the Marshall Islands.⁵⁹ In 1986 a "Compact of Free Association" became effective between the Marshall Islands and the United States,

52. See *id.*; *United Nations Framework Convention on Climate Change: Guide to the Climate Change Negotiation Process: The Climate Change Convention* (visited Mar. 30, 2000) <<http://www.unfccc.de/resource/process/components/response/respconv.html>> [hereinafter Guide].

53. See Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 12, 1997, art. 3(1), 37 I.L.M. 22, 33 (1998)[hereinafter Kyoto Protocol].

54. See *United Nations Framework Convention On Climate Change: Kyoto Protocol Status of Ratification* (last modified on Jan. 13, 2000) <<http://www.unfccc.de/resource/kpstats.pdf>>[hereinafter Kyoto Status].

55. See Guide, *supra* note 52.

56. Latvia is the only Annex I country to report reductions in GHG emissions. See *Summary Compilation of Annual Greenhouse Gas Emissions Inventory Data From Annex I Parties*, United Nations Framework Convention on Climate Change, Conference of the Parties, 4th Sess., Agenda Item 4(a)(I), at 7, U.N. Doc. FCCC/CP/1998/Inf.9 (1998)[hereinafter COP].

57. See Clare Breidenich et al., *Current Development: The Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 92 A.J.I.L. 315, 316 (1998).

58. See *id.*

59. See *id.* at 4; H.R. REP. No. 99-188, pt. 1, at 3 (1985).

enabling RMI to operate as “a free and sovereign nation.”⁶⁰ RMI took another step toward international independence in September of 1991 when it became a member state of the United Nations.⁶¹

Despite RMI’s independent status, the “Compact of Free Association” (Compact) maintains the close ties between RMI and the United States. Examples of these close ties are numerous. Although it is a sovereign nation, RMI can participate in domestic United States programs.⁶² Under the Compact, the United States pays RMI millions of dollars in compensation for damage caused by nuclear testing.⁶³ Congress also authorized technical assistance aid in 1982.⁶⁴ The provision of the Compact most relevant to the success of an RMI request for relief is the United States obligation to provide for RMI’s defense.⁶⁵

While it is a small nation with limited international influence, RMI has a surprisingly prominent place in the ongoing negotiations regarding climate change. RMI is a Member State and an active participant in both the UNFCCC and the Kyoto Protocol. Additionally, RMI is represented and attends all meetings of the Association of Small Islands States.⁶⁶ RMI’s significant presence in this regional organization gives it the bargaining power it will need to utilize in the legal remedies outlined below.⁶⁷

II. INTERNATIONAL OBLIGATIONS PROVIDING RMI WITH LEGAL REMEDIES FOR ACCELERATED SEA-LEVEL RISE

A. *The Potential Defendants*

The most fundamental difficulty with any legal remedy for accelerated sea-level rise is assigning responsibility. The entire global community, as producers of GHG, is responsible for accelerated sea-level rise. Therefore, identifying the party or parties to select as defendant(s) poses a difficult problem since no single defendant nor group of defendants is entirely responsible for the accelerated sea-level rise

60. OFFICE OF PLANNING AND STATISTICS, MARSH. IS., SECOND FIVE YEAR NATIONAL DEVELOPMENT PLAN 1991/92—1995/96 3 (1991)[hereinafter DEVELOPMENT PLAN].

61. See *United Nations: Member States of the United Nations* (last modified Mar. 10, 2000) <<http://www.un.org/Overview/unmember.html>>.

62. See Donald J. Senese, *The United States in Micronesia*, 18 J. OF SOC., POL. & ECON. STUD. 418 (1993).

63. See DEVELOPMENT PLAN, *supra* note 60, at 6.

64. See Senese, *supra* note 62, at 418.

65. See DEVELOPMENT PLAN, *supra* note 60, at 4. This provision will be discussed in greater detail in Part II.C. See *infra* pt. II.C.

66. See Barker, *supra* note 17; see also *Regional Impacts*, *supra* note 1, pt.9.

67. See Barker, *supra* note 17.

problem. In light of recent ICJ decisions, however, RMI may select a representative defendant or group of defendants. These defendants can be held liable even though they may only be partly responsible for RMI's injury.

Any defendant selected by RMI will raise jurisdictional objections similar to those raised by Australia when it was singled out as a defendant in a suit brought by Nauru. In that case, Nauru claimed that Australia had breached the international obligations it owed as a trustee.⁶⁸ Among several jurisdictional challenges, Australia claimed Nauru's suit was improper because the two other nations who shared trusteeship duties with Australia were not defendants in the suit.⁶⁹ Australia contended that if the ICJ were to find Australia had breached its trusteeship obligation, the ICJ should also find that the other two trustee nations had breached the same obligation.⁷⁰ Further, Australia raised the issue whether any liability for a breach of the trusteeship obligations should be joint and several or apportioned equally among the three nations.⁷¹ Therefore, Australia argued that the ICJ should not accept jurisdiction unless all three nations were made party to the suit.⁷²

The ICJ rejected these jurisdictional objections on two grounds. First, the Court determined that the question of apportioning liability, i.e., whether Australia is liable for all, one third, or some other portion, should be reserved until after the ICJ had considered the merits of the case.⁷³ The ICJ stated that the proportion of Australia's liability is "independent of the question of whether Australia can be sued alone."⁷⁴ Second, the ICJ acknowledged its practice, established in *Monetary Gold Removed from Rome in 1943*, of rejecting jurisdiction when "the legal interests of a State not party to the proceedings 'would not only be affected by a decision, but would form the very subject-matter of the decision.'"⁷⁵ The ICJ distinguished Nauru's case from *Monetary Gold*. In *Monetary Gold*, the ICJ rejected jurisdiction because, in order to find liability against the defendant parties, France, Great Britain, Northern Ireland, and the United States, the ICJ would first have to find wrong-

68. See *Certain Phosphate Lands in Nauru (Nauru v. Austl.)*, 1992 I.C.J. 240, 243 (June 26).

69. See *id.* at 255.

70. See *id.*

71. See *id.* at 258.

72. See *id.* at 258-59.

73. See *id.* at 258.

74. *Phosphate Lands in Nauru*, 1992 I.C.J. at 258.

75. *Id.* at 260 (quoting *Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.)*, 1984 I.C.J. 392, 431 (Nov. 26) which itself is quoting *Monetary Gold Removed from Rome in 1943 (Italy v. Fr.)*, 1954 I.C.J. 19, 32 (June 15)).

doing on behalf of a state not party to the suit, Albania.⁷⁶ While Albania had the right to intervene in the suit, the ICJ, unlike some national courts, could not order joinder of Albania.⁷⁷ Therefore, the ICJ held that it did not have jurisdiction; to hold otherwise would require the ICJ to find wrongdoing against a state that could not present a defense on its own behalf.⁷⁸

Unlike *Monetary Gold*, in *Nauru v. Australia* the ICJ did not need to find wrongdoing on behalf of the other Trusteeship nations in order to find wrongdoing by Australia.⁷⁹ Australia's liability was independent of the liability of the other Trusteeship nations.⁸⁰ Therefore, the ICJ had jurisdiction to hear the case because deciding the case did not require the Court to find wrongdoing by nations that were not present to defend themselves.⁸¹ The ICJ reasoned that

a finding by the [ICJ] regarding the existence of . . . responsibility attributed to Australia by Nauru might well have implications for the legal situation of the two other States concerned, but no finding in respect of that legal situation will be needed as a basis for the Court's decision on Nauru's claims against Australia.⁸²

In the case of RMI, the finding of liability against one state for accelerated sea-level rise might have legal implications for other nations not made party to the suit. However, the Court need not find any non-party state liable. Therefore, RMI would likely defeat a jurisdictional challenge even if RMI selects a single defendant or a representative group of defendants who are partially responsible for accelerated sea-level rise.

Assuming that the argument above is successful, at least three factors should influence RMI's choice of a defendant or group of defendants. First, the defendant(s) must be at least partially responsible for accelerated sea-level rise. Second, the defendant(s) must have accepted the compulsory jurisdiction of the ICJ. Third the defendant(s) must not have made a reservation for the particular claim presented here.

RMI can most readily hold responsible those nations who have knowledge of the harmful effects of GHG and continue to engage in GHG producing activities. Ideal candidates for defendants are in the

76. See *Monetary Gold*, 1954 I.C.J. at 30, 32–34.

77. See *Phosphate Lands in Nauru*, 1992 I.C.J. at 243; see also *Military and Paramilitary Activities In and Against Nicaragua*, 1984 I.C.J. at 431.

78. See *Monetary Gold*, 1954 I.C.J. at 30, 32–33.

79. See *Phosphate Lands in Nauru*, 1992 I.C.J. at 261–62.

80. See *id.*

81. See *id.*

82. *Id.*

latest UNFCCC report, which identifies the Annex I Nations who continue to increase their aggregate GHG emissions. As parties to the UNFCCC, these nations acknowledge the harmful effects of GHG emissions for member nations like RMI. Despite this information, not only have these nations failed to stabilize their emissions of GHG, but their aggregate emissions are increasing. Therefore, UNFCCC Annex I nations who continue to increase their aggregate GHG emissions are more likely to be held responsible for the injuries their actions have caused.⁸³

The ICJ has jurisdiction only for matters where the member states consent to ICJ jurisdiction.⁸⁴ Only some of the Annex I Nations have accepted the compulsory jurisdiction of the ICJ. According to Article 36(1), a party's consent to jurisdiction can be derived from treaties and conventions.⁸⁵ Further, Article 36(2) allows states to accept the compulsory jurisdiction of the ICJ via declaration.⁸⁶ Because of these provisions, RMI can only choose as defendants Annex I states who continue to increase their GHG emissions and who have also accepted ICJ jurisdiction.⁸⁷ Since nations that accept the compulsory jurisdiction of the ICJ may do so with reservations,⁸⁸ RMI's potential class of defendants is reduced even further.⁸⁹

83. See *infra* tbl. 1, left col.

84. See Statute of the International Court of Justice, as annexed to the Charter of the United Nations, June 26, 1945, arts. 36(1), 36(2), T.S. No. 993, 3 Bevens 1153, 1186 [hereinafter ICJ Statute]; see also International Court of Justice, Yearbook [1986–1987] 41 I.C.J.Y.B. 48 (1987)[hereinafter 1986–1987 Yearbook].

85. See ICJ Statute, *supra* note 84, art 36(1); see also 1986–1987 Yearbook, *supra* note 84, at 48.

86. See ICJ Statute, *supra* note 84, art. 36(2); see also *Declarations Recognizing as Compulsory the Jurisdiction of the Court*, 49 I.C.J.Y.B. 1994–1995 79 (1995) [hereinafter *Declarations Recognizing Jurisdiction*].

87. See *infra* tbl. 1, middle col.

88. See Gary L. Scott and Craig L. Carr, *The ICJ and Compulsory Jurisdiction: The Case for Closing the Clause*, 81 A.J.I.L. 57, *passim* (1987).

89. See *infra* tbl. 1, right col.

TABLE I

<i>Annex I Parties Increasing GHG Emissions</i> ⁹⁰	<i>Annex I Parties Accepting ICJ Jurisdiction</i>	<i>Annex I Parties Accepting ICJ Jurisdiction Without Applicable Reservation</i>
Australia	Australia ⁹¹	Australia ⁹²
Austria	Austria ⁹³	Austria ⁹⁴
Belgium	Belgium ⁹⁵	Belgium ⁹⁶
Canada	Canada ⁹⁷	Canada ⁹⁸
Czech Republic		
Denmark	Denmark ⁹⁹	Denmark ¹⁰⁰
France		
Germany		
Greece		
Ireland		
Japan	Japan ¹⁰¹	Japan ¹⁰²

90. See COP, *supra* note 56, at 7.

91. See *Declarations Recognizing Jurisdiction*, *supra* note 86, at 80.

92. See *id.* Australia's "declaration does not apply to any dispute in regard to which the parties thereto have agreed or shall agree to have recourse to some other method of peaceful settlement." *Id.*

93. See *id.* at 80-81.

94. See *id.* Austria's "declaration does not apply to any dispute in respect of which the parties thereto have agreed or shall agree to have recourse to other means of peaceful settlement. . . ." *Id.*

95. See *id.* at 82.

96. See *id.* Belgium's declaration does not apply to disputes before 1948 or to those where "the parties have agreed or may agree to have recourse to another method of pacific settlement." *Id.*

97. See *id.* at 85.

98. See *id.* Canada's declaration does not apply, *inter alia*, to disputes before May 1994 or to "disputes in regard to which the parties have agreed or shall agree to have recourse to some other method of peaceful settlement." *Id.*

99. See *id.* at 87-88.

100. See *id.*

101. See *id.* at 95.

102. See *id.* Japan's declaration applies only to disputes after 1958, to those disputes that "are not settled by other means of peaceful settlement," or to those disputes not subject to binding and final arbitration. *Id.*

TABLE I CONTINUED

<i>Annex I Parties Increasing GHG Emissions</i>	<i>Annex I Parties Accepting ICJ Jurisdiction</i>	<i>Annex I Parties Accepting ICJ Jurisdiction Without Applicable Reservation</i>
Monaco		
Netherlands	Netherlands ¹⁰³	Netherlands ¹⁰⁴
New Zealand	New Zealand ¹⁰⁵	
Norway	Norway ¹⁰⁶	Norway ¹⁰⁷
Slovakia		
Sweden	Sweden ¹⁰⁸	Sweden ¹⁰⁹
Switzerland	Switzerland ¹¹⁰	Switzerland ¹¹¹
United Kingdom	United Kingdom ¹¹²	
United States		

As a precondition to any action brought before the ICJ, RMI must file a declaration accepting compulsory jurisdiction of the ICJ.¹¹³ If RMI makes this declaration shortly before it brings suit, defendant nations may object. For example, the terms of the United Kingdom's and New Zealand's acceptance of compulsory ICJ jurisdiction state that they will not honor the jurisdiction of the ICJ if the party bringing the action has accepted the jurisdiction for the sole purpose of bringing the suit or has accepted jurisdiction "less than twelve months prior to the filing of the application."¹¹⁴ RMI can claim that it is accepting the jurisdiction of the ICJ as a newly admitted member to the United Nations and that the proximity to any legal action is just coincidental. This argument would,

103. *See id.* at 104.

104. *See id.* Netherlands' declaration is valid for any dispute arising after 1921 and is not subject to "some other method of pacific settlement." *Id.*

105. *See id.* at 104-105.

106. *See id.* at 106-107.

107. *See id.*

108. *See id.* at 115.

109. *See id.* Sweden's declaration is only valid for disputes arising after 1947. *See id.*

110. *See id.* at 116.

111. *See id.*

112. *See id.* at 117-118.

113. RMI does not appear in the 1995 Yearbook of the ICJ as a nation who has accepted compulsory jurisdiction of the ICJ. *See id.* at 79-119.

114. *Id.* at 104-05, 117-18.

of course, be subject to challenge. On the other hand, if RMI were to accept the jurisdiction of the ICJ now and then follow the recommendations discussed below, there would be a significant time lag between acceptance of compulsory jurisdiction and any litigation before the ICJ.¹¹⁵ The time lag would make RMI's claim in the ICJ more tenable against parties like New Zealand and the United Kingdom.¹¹⁶

B. Obligations RMI Can Enforce In The ICJ

RMI can bring a claim before the ICJ under two different legal theories. First, RMI can make a claim against developed nations who are parties of the UNFCCC for breaching their obligations thereunder. Similarly, RMI may also bring a claim against Annex I Parties of the UNFCCC for breaches of international obligations under customary international law.

1. Obligations Created By The United Nations Framework Convention On Climate Change

The UNFCCC provides RMI with a direct avenue for relief. Under the UNFCCC, RMI can request adaptation funds to cope with the climate change.¹¹⁷ RMI should use this provision to request evacuation and relocation funding.

Article 4 of the UNFCCC establishes a legal obligation for developed countries to provide for the "costs of adaptation" that RMI requires to deal with accelerated sea-level rise.¹¹⁸ Article 4(4) states that

[t]he developed country Parties . . . shall also assist the developing country Parties that are particularly vulnerable to the adverse effects of climate change *in meeting costs of adaptation* to those adverse effects.¹¹⁹

The preamble to the UNFCCC defines a "particularly vulnerable country" as a low-lying or small island country.¹²⁰ As a developing island country that is both small and low-lying, RMI clearly qualifies to receive assistance from developed nations. Therefore, developed country parties have an obligation to provide RMI with funding to help RMI adapt to

115. See *infra* pts. II.B., II.C.

116. There may be additional reasons why RMI may choose not to select a particular nation in the far right hand column of Table 1 as a defendant in any litigation before the ICJ. However, consideration of RMI's diplomatic relations with these nations is not within the scope of this paper.

117. See UNFCCC, *supra* note 4, art. 4(4).

118. See *id.*

119. *Id.*

120. See UNFCCC, *supra* note 4, Preamble.

climate change caused by global warming. Further, all parties who ratified the UNFCCC treaty thereby accepted this obligation because Article 24 prohibits any reservations.¹²¹

Of concern is the amount of funds RMI can expect to receive for adaptation and the degree of causation required to qualify for adaptation funding.¹²² While commentators explain that the significance of Article 4(4) is still unclear,¹²³ Article 4(4) may still provide RMI with the relief necessary for evacuation. While it is true that Article 4(4) lacks specificity in identifying the amount of funds that developed nations should provide for adaptation,¹²⁴ this may actually benefit RMI. Article 4(4) not only does not require a minimum contribution from participating countries, it also places no cap on contributions. Because there is no cap, RMI is free to request a sum large enough to purchase and relocate to new sovereign territory. Further, Article 4(4) does not establish a minimum level of causation as a prerequisite for the release of adaptation funds.¹²⁵ Thus, RMI can utilize the ambiguity in Article 4(4) to its advantage by defining how that language should be interpreted.

RMI must act quickly. If another vulnerable nation makes a small adaptation request prior to RMI's sizable relocation request, it may set a precedent for providing minimal relief under Article 4(4). The ambiguity inherent in Article 4(4) is an asset for RMI as long as it can be interpreted to provide RMI with a sufficient remedy. As soon as another interpretation has been accepted, RMI's options may be limited.

The first step, therefore, is for RMI to request adaptation funds from the UNFCCC. As of this writing in 1999, no requests for adaptation funds have been made under Article 4(4);¹²⁶ however, the Alliance of Small Island States (AOSIS) is encouraging its member states to make claims for adaptation funds.¹²⁷ RMI should use its leadership role within the AOSIS to convince other nations that RMI is in a strong position to

121. *See id.* art. 24.

122. *See* Daniel Bodansky, *The United Nations Framework Convention on Climate Change: A Commentary*, in *GREENING INTERNATIONAL LAW* 210, 220 (Philippe Sands ed., 1994).

123. *See id.*

124. Powerful funding mechanisms to assist developing nations control ozone depleting emissions are found within the Montreal Protocol. *See* Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, S. TREATY DOC. NO. 100-10 (1987), 26 I.L.M. 1541, adjusted and amended, June 29, 1990, S. TREATY DOC. NO. 102-4 (1991), 30 I.L.M. 539, adjusted and amended, Nov. 25, 1992, S. TREATY DOC. NO. 103-9 (1993), 32 I.L.M. 875. However these funding mechanisms have a stringent review process. *See* EDITH BROWN WEISS ET AL., *INTERNATIONAL ENVIRONMENTAL LAW AND POLICY* 651-52 (1998).

125. *See* UNFCCC, *supra* note 4, art. 4(4).

126. *See* Barker, *supra* note 17.

127. *See* EPSHEN RONNEBERG, *DRAFT OF AOSIS SUBMISSION ON NON-ANNEX 1 NATIONAL COMMUNICATIONS* (Mar. 31, 1999) (copy on file with author).

establish the significant funding potential of Article 4(4). Indeed, if RMI is able to secure relocation funding through Article 4(4), other nations with smaller claims may find it easier to make their claims.

If the UNFCCC were to reject RMI's request for adaptation funds, RMI would have a cause of action before the ICJ for a breach of a treaty obligation. This cause of action has two components. First, if the UNFCCC dismisses RMI's claim for adaptation funds without careful consideration, this rejection would breach Article 4(8) of the UNFCCC.¹²⁸ Second, if the request by RMI is given careful consideration by the UNFCCC but relocation funds are denied, this dispute is within the ICJ's jurisdiction.¹²⁹ This claim will be particularly strong because treaties are the most authoritative sources of international obligations under Article 38(1) of the Statutes of the ICJ.¹³⁰

2. Obligations Created by Customary International Law

As a second option, RMI can bring a cause of action before the ICJ for a breach of customary international law.¹³¹ Customary international law subjects to liability Annex I Countries who increase their GHG emissions because these countries have acknowledged the destructive impact of GHG emissions. The obligation violated by the defendant parties is based on the principle first recognized in the *Trail Smelter* arbitration, which established that

128. In Article 4(8), the UNFCCC requires that

[i]n the implementation of the commitments in this Article, the Parties shall give full consideration to what actions are necessary under the Convention, including actions related to funding, insurance and the transfer of technology, to meet the specific needs and concerns of developing country Parties arising from the adverse effects of climate change and/or the impact of the implementation of response measures, especially on:

(a) Small island countries;

Countries with low-lying coastal areas. . . .

UNFCCC, *supra* note 4, at 858.

129. According to the UNFCCC in Article 14(1) and 14(2), parties to the convention may declare that the ICJ will resolve any dispute concerning the interpretation or the application of the Convention. *See* UNFCCC, *supra* note 4, at 867. It is likely, therefore, that some party states to this Convention have already consented the jurisdiction of the ICJ.

130. *See* ICJ Statute, *supra* note 84, art. 38(1). Treaties and international custom are the primary sources of binding international law. *See* Mark W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 10-11 (1993). However, the ICJ recognizes judicial decisions and the writings of scholars as secondary sources. *See* PATRICIA W. BIRNIE & ALAN E. BOYLE, INTERNATIONAL LAW AND THE ENVIRONMENT 11 (1992).

131. There is an international wrongful act when "(a) conduct consisting of an action or omission is attributable to the State under international law; and (b) that conduct constitutes a breach of an international obligation of the State." Draft Articles on State Responsibility, Report of the International Law Commission, U.N. GAOR, 35th Sess., Supp. No. 10, art. 3, at 59, U.N. Doc. A/35/10 (1980) [hereinafter Draft Articles on State Responsibility].

[n]o State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes 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.¹³²

In 1949, the *Corfu Channel* case affirmed this transboundary pollution obligation.¹³³ In 1972, Principle 21 of the Stockholm Convention confirmed that each state has “the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.”¹³⁴ This language was adopted in 1992 in Principle 2 of the Rio Declaration on Environment and Development.¹³⁵ It appears again in the preamble of the UNFCCC, establishing the importance of this principle in the realm of GHG.¹³⁶

In the case of RMI, the defendant parties violated the transboundary pollution obligation by their continued and increasing emissions of GHG. “Causality, identifying the wrongdoer, proof[,] and measurement

132. *Trail Smelter (U.S. v. Can.)*, 3 R.I.A.A. 1938, 1965 (1941).

133. *See Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 4, 22 (Apr. 9).

134. Declaration of the United Nations Conference on the Human Environment, June 16, 1972, prin. 21, 11 I.L.M. 1416, 1420 [hereinafter Stockholm Declaration].

135. United Nations Conference on Environment and Development: Rio Declaration on Environment and Development, June 13, 1992, prin. 2, 31 I.L.M. 874, 876 (1992) [hereinafter Rio Declaration].

136. The wide acceptance of the principle espoused in *Trail Smelter* suggests it is a norm of *jus cogens*, a preemptory norm of general international law. *See JANIS, supra* note 130, at 62–66. Application of *jus cogens* may be especially appropriate in this case as RMI’s destruction is the ultimate violation of its sovereignty. The importance of this norm in international law and the degree to which it is being violated may provide the framework of an obligation *erga omnes*. *See generally* MAURIZIO RAGAZZI, *THE CONCEPT OF INTERNATIONAL OBLIGATIONS ERGA OMNES* (1997).

First identified in the 1970 dicta of the *Barcelona Traction* litigation, *erga omnes* refers to an obligation in which all states have a legal interest. *See id.* at 182. Ragazzi tracks the development of *erga omnes* and suggests that “[n]o State can elude the binding force these obligations, not only because States recognize that it must be so, but also (and more fundamentally) because nobody can claim special exemptions from moral absolutes.” *Id.* at 183. Examples of such obligations lie in genocide and slavery. *See id.* at 92, 105. While the doctrine regarding *erga omnes* is far from clear, Ragazzi identifies several principles found within certain obligations *erga omnes* which can, in turn, be identified in RMI’s case. *See id.* at 215. Amongst these is the requirement that an obligation *erga omnes* derive from a norm *jus cogens* (codified in international treaties) and that the obligation reflects our basic moral values. *See id.* Therefore, RMI’s situation may be ripe for an *erga omnes* argument. However, because *erga omnes* is built from dicta and because that dicta does not directly address an environmental situation such as that faced herein, developing a separate argument for RMI under an *erga omnes* rubric seems a dangerous extension of an already tenuous legal argument.

of harm” are the elements necessary to impose liability,¹³⁷ and RMI can prove each element. Scientific evidence from the IPCC establishes causality by demonstrating that GHG emissions accelerate sea-level rise. The UNFCCC reports identify the defendants.¹³⁸ The Annex I Countries acknowledge the dangers of GHG emissions, and yet they continue to increase GHG emissions.¹³⁹ Further, the reports of the IPCC and UNFCCC prove the existence of and measure the extent of the harm.¹⁴⁰ Finally, the IPCC projects that much of RMI’s land may disappear if GHG emissions continue.¹⁴¹

The defendant parties may argue that liability cannot attach because a clear showing of harm is necessary to attach liability and the harm to RMI has not yet occurred. This argument will fail for two reasons. First, there are visible effects of accelerated sea-level rise on the Marshall Islands.¹⁴² Further, anecdotal evidence of the submersion of certain parts of RMI can be bolstered by quantitative evidence.¹⁴³ Second, the situation facing RMI is a perfect application of the precautionary principle, articulated in numerous international agreements.¹⁴⁴ The precautionary principle enables a country like RMI to request relief even in the absence of scientific certainty because of the irreversible nature of environmental damage. RMI clearly cannot wait until the anticipated harm occurs before it seeks a remedy; by then, RMI will cease to exist.

The defendant party nations can also raise other defenses to RMI’s claims. First, the defendant parties may allege that “the applicable international rules and standards do not hold [them] responsible when [they have] taken necessary and practicable measures (i.e. exercised due diligence).”¹⁴⁵ As member states to the UNFCCC, these nations may claim that they are currently using their best efforts to comply with the requirements of the Convention. Though this may seem counter-intuitive considering the recent data showing increased GHG emissions, the

137. ALEXANDRE KISS & DINAH SHELTON, INTERNATIONAL ENVIRONMENTAL LAW 350 (1991).

138. *See supra* pt. II.A.

139. *See id.*

140. *See supra* notes 3 and 56.

141. *See Regional Impacts, supra* note 1, pts. 2, 6.8.

142. *See Barker, supra* note 17.

143. One land mass survey was conducted in conjunction with the census of 1988. *See, e.g., STATISTICAL ABSTRACT, supra* note 6, Foreword. Data about the exact amount of dry land on each of the atolls appears in this survey for 1988. *See, e.g., id.* Gathering more recent data regarding the decrease in land mass and other effects of the rising sea-levels would strengthen RMI’s case. For example, RMI may want to perform a current land mass survey. A survey that allows a comparison of the 1988 and 1999 RMI land mass may have a dramatic impact, especially if it shows a significant reduction in land mass.

144. *See Rio Declaration, supra* note 135, prin. 15.

145. KISS & SHELTON, *supra* note 137, at 350.

defendant parties can make this argument under the Vienna Convention on the Law of Treaties. The Vienna Convention requires all signatories to the Kyoto Protocol to refrain from acts that would defeat the objective of the Protocol.¹⁴⁶ The Protocol requires signatories to reduce GHG emissions by 5% from 1990 GHG levels; however, the parties do not have to show progress towards meeting this goal until the year 2005.¹⁴⁷ Therefore, member states can both increase GHG emissions and argue that they are in compliance with the Kyoto Protocol. Further, they may even claim that, as signatories to the Protocol, they are the world leaders taking responsibility for the damage caused by climate change.

The global community may, because of the permissive language in the Protocol, tolerate the continued increase in GHG emissions in the short-term. This tolerance may be due in part to the economic prosperity derived from the industries generating the bulk of GHG emissions. However, the global community cannot simultaneously acknowledge the harmful and permanent effects of these emissions and refuse to pay just compensation. Commentators support the view that

[c]ertain activities which cause or risk causing harm are not deemed illegal, because their benefits outweigh the risks of harm. In such a case, compensation still must be provided the victims of any substantial harm that occurs. The risk-creating conduct is permitted, but the victim does not bear the risk of the injury which results. Instead, a social responsibility is imposed upon the actor to compensate the victims for harm which occurs even though the activity is legal.¹⁴⁸

Even if the international community condones the increase in GHG emissions, RMI still deserves compensation for the injury GHG emissions cause. If the global community profits from GHG emissions, that same community should compensate RMI for the costs RMI must bear.

Another doctrine in international law may prevent recovery for RMI. Although GHG emissions from Annex I Parties harm RMI, it is not entirely clear that RMI can assess liability on *State* entities for these emissions. Under Article 11 of the International Law Commission Draft Articles on State Responsibility (ILC Draft), “the conduct of a person or a group of persons not acting on behalf of the State shall not be considered as an act of the State under international law.”¹⁴⁹ In this case, the

146. Vienna Convention on the Law of Treaties, art. 18(a), May 23, 1969, 1155 U.N.T.S. 331, 336, 8 I.L.M. 679, 686.

147. See Kyoto Protocol *supra* note 53, art. 3(2). Most Annex I Parties have signed the Protocol. See *supra* note 54.

148. KISS & SHELTON, *supra* note 137, at 350–51 (internal citations omitted).

149. Draft Articles on State Responsibility, *supra* note 131, art. 11(1), at 61.

defendant parties may claim that private industry released the GHG, and, therefore, the signatory States are not subject to liability.

The theory of State Responsibility can surmount this defense if the State in question failed to exercise due diligence in regulating private industry. The Institute of International Law recently proposed a regime of "Responsibility and Liability for Environmental Damage."¹⁵⁰ This regime holds States responsible for the actions of private actors within their own borders in cases where the state fails to exert "sufficient regulatory control over activities within its jurisdiction to meet its international obligations."¹⁵¹ A State is responsible for GHG emissions that originate within its borders, regardless of their source, if the State does not enforce a regulatory regime sufficient to curtail these emissions. The applicable provision provides that:

[f]ailure of the State to enact appropriate rules and controls in accordance with environmental regimes, even if not amounting as such to a breach of an obligation, may result in its responsibility if harm ensues as a consequence, including damage caused by operators within its jurisdiction or control.¹⁵²

Under this regime, States who obtain reprieve under Article 11 of the ILC Draft can still be held responsible for the actions within their borders that they fail to adequately control.¹⁵³

C. The United States' Obligation to Defend RMI From Accelerated Sea-level Rise

In addition to the above two theories, RMI can pursue one other legal remedy. RMI has a special relationship with the United States that may compel the United States to combat the effects of accelerated sea-level rise on RMI. This relationship allows RMI to pursue a remedy from the United States, which it otherwise might not be able to do. Even though the United States is a world leader in the production of GHG

150. See Responsibility and Liability Under International Law for Environmental Damage, Institute of International Law, Strasbourg Sess., Sept. 4, 1997, (Francisco Orrego Vicuña, rapporteur); Francisco Orrego Vicuña, *Responsibility and Liability Under International Law for Environmental Damage Resolution*, 1997 INST. INT'L L. art. 1, 4, reprinted in 10 GEO. INT'L L. REV. 269, 270 (1998)[hereinafter Vicuña].

151. Teresa A. Berwick, *Responsibility and Liability for Environmental Damage: A Roadmap for International Environmental Regimes*, 10 GEO. INT'L ENVTL. L. REV. 257, 258 (1998).

152. See Vicuña, *supra* note 150, at 270.

153. See BIRNIE & BOYLE, *supra* note 130, at 11; See also ICJ Statute, *supra* note 84, art. 38(1). While a state may challenge this theory, the ICJ will, at least, consider the views of international scholars in decisions of international law.

emissions,¹⁵⁴ RMI cannot pursue enforcement of international obligations against the United States as it can for the Annex I Parties identified in Table 1. The United States does not accept the compulsory jurisdiction of the ICJ.¹⁵⁵

The United States has, however, made some reparations for the harms it has caused.¹⁵⁶ For example, the United States buried and abandoned transformers containing PCBs on RMI during its Trusteeship.¹⁵⁷ While not accepting responsibility for the damage this caused, the United States did agree to clean up some of the waste.¹⁵⁸ The United States cited its good relationship with RMI as the reason for this clean-up effort.¹⁵⁹

RMI can invoke this good relationship to prompt United States assistance in remedying the harm due to accelerated sea-level rise. Under the Compact between the United States and RMI,¹⁶⁰ the United States generally retains the ability to assist in RMI's foreign affairs.¹⁶¹ More importantly, the United States is affirmatively obligated to defend RMI and to provide for RMI's general security.¹⁶² Though it is an admittedly aggressive interpretation of the Compact, RMI can argue that the United States is obligated to defend it from accelerated sea-level rise.¹⁶³

154. See, e.g., *Second Compilation and Synthesis of Second National Communications*, United Nations Framework Convention on Climate Change, Conference of the Parties, 4th Sess., Agenda Item 4(a)(i), at 10, U.N. Doc. FCCC/CP/1998/11/Add.2 (1998)(discussing countries' production of carbon dioxide).

155. See JANIS, *supra* note 130, at 127–28.

156. For example, during the 1954 nuclear tests conducted by the United States near the Marshall Islands, a Japanese fishing boat was damaged by nuclear fallout. See KISS & SHELTON, *supra* note 137, at 360. The Japanese government sought reparations for damage caused to the "Fukuryu Maru." See *id.* Although the United States never accepted legal responsibility, it did pay 2 million dollars. See *id.* at 360–61.

157. See Hyun S. Lee, *Post Trusteeship Environmental Accountability: Case of PCB Contamination on the Marshall Islands*, 26 DENV. J. INT'L L. & POL'Y 399, 409 (1998).

158. See *id.* at 400.

159. See *id.* at 410.

160. The Compact of Free Association was signed between the United States, RMI and the Federated States of Micronesia. See Marian Nash Leich, *U.S. Practice*, 84 A.J.I.L. 237, 237 (1990); Compact of Free Association, Oct. 10, 1986, U.S.-Marsh. Is., 99 Stat. 1770 [hereinafter Compact].

161. It is generally accepted that the United States may assist RMI in the "area of foreign affairs as may be requested and mutually agreed from time to time." Compact, *supra* note 160, § 124, at 1802.

162. See Compact, *supra* note 160, § 311-54, at 1822–26.

163. Any such interpretation requires that the threat to RMI from accelerated sea-level rise be construed as so significant that it amounts to a security matter, not one that is purely environmental or might otherwise be contemplated by Article VI of the Compact. See Compact, *supra* note 160, art. VI, § 161–63. Indeed, the potential destruction of a sovereign state is inherently tied to that nation's security regardless of the threat's origin.

This obligation is found in Title Three of the Compact.¹⁶⁴ According to Title Three, the United States has the “full authority and responsibility for *security and defense* matters in or relating to the Marshall Islands.”¹⁶⁵ This responsibility includes “the obligation to defend the Marshall Islands . . . and their peoples from attack or threats thereof as the United States and its citizens are defended. . . .”¹⁶⁶

This provision undoubtedly obligates the United States to defend RMI from military attack. The United States has sought to ensure security in the region of the Marshall Islands and Micronesia since World War II because the Japanese strike on Pearl Harbor was thought to have been staged in the Marshall Islands.¹⁶⁷ In the 1980’s, President Ronald Reagan envisioned the Compact as permanently establishing the United States’ presence in the region.¹⁶⁸

The defense and land use provisions of the Compact indefinitely extend the right of the United States to foreclose access to RMI by third countries for military purposes.¹⁶⁹ These provisions enable the United States to preserve regional security and peace.¹⁷⁰ The military protection of the Marshall Islands therefore serves the dual purposes of maintaining U.S. presence in the region and protecting RMI from foreign attack.

However, the language in Section 311 of the Compact allows for a broader interpretation of the United States’ obligation.¹⁷¹ According to

164. See Compact, *supra* note 160, at 1822–27.

165. Compact, *supra* note 160, § 311(a), at 1822 (emphasis added).

166. *Id.* § 311(b)(1), at 1822.

167. Some argue that the attack on Pearl Harbor was launched from the Marshall Islands. See Lee, *supra* note 157, at 403. This prompted the United States to ensure the region would “not pose a security threat.” *Id.* (citations omitted).

168. See generally S. REP. NO. 99-16, at 29 (1985)(letter from President Ronald Reagan to Congress regarding the Compact of Free Association); Compact, *supra* note 160, § 311(b)(2), 315, at 1822, 1823.

169. See S. REP. NO. 99-16, at 29; see generally Compact, *supra* note 160, § 311, at 1822.

170. See S. REP. NO. 99-16, at 29.

171. Section 311

(a) The Government of the United States has full authority and responsibility for security and defense matters in or relating to the Marshall Islands and the Federated States of Micronesia.

(b) This authority and responsibility includes:

(1) the obligation to defend the Marshall Islands and the Federated States of Micronesia and their peoples 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 Marshall Islands and the Federated States of Micronesia by military personnel or for the military purposes of any third country; and

this interpretation, not only must the United States defend RMI from military attack, but it must also defend RMI from all threats to its security. The loss of land from rising sea levels could be construed as a threat to RMI security.

First, Section 311 does not condition the United States' obligation to defend RMI on the type of threat.¹⁷² In looking at the body of the Compact, it is clear this was a conscious choice of the drafters. The drafters explain that the United States will defend RMI "as the United States and its citizens are defended."¹⁷³ This interpretation is bolstered by the legislative history of the Compact. The Senate Report notes that Section 311 has a broad defensive purpose.¹⁷⁴ "Of fundamental significance is the undertaking of the United States during the free association relationship to defend [RMI] and their citizens *as the United States and its citizens are defended.*"¹⁷⁵

A simple comparison demonstrates the legitimacy of a call on the United States to defend RMI from the threat of inundation. In the worst case, the IPCC projects that RMI may lose 80% of its most populated land mass in the next 100 years.¹⁷⁶ If similar evidence indicated that the United States would lose 80% of its land mass within the next 100 years, the United States government would take action. Since the United States would defend its own citizens, RMI can argue that Section 311 would require United States' defense of RMI citizens.

Second, other provisions of the Compact confirm that the United States is responsible not only for defending RMI against attack, but also for providing general security for RMI. Section 313 requires RMI to "refrain from actions" that the United States determines to be incompatible with its "authority and responsibility for *security and defense* matters

(3) the option to establish and use military areas and facilities in the Marshall Islands and 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.

Compact, *supra* note 160, § 311, at 1822.

172. *See id.*

173. *Id.* § 311(b)(1), at 1822.

174 *See* S. REP. NO. 99-16, at 6, 20; *see generally* H.R. REP. NO. 99-188, pt. 1, at 5 (1985).

175. S. REP. NO. 99-16, at 20(emphasis added).

176. *See Regional Impacts, supra* note 1, pt. 6.8. The IPCC stated that 80 percent of the Majuro Atoll is vulnerable from a one meter rise in sea level. By the year 2100, the IPCC predicts a global mean sea level increase of 15–95 cm. *Regional Impacts, supra* note 1, pt. 6.8.

in or relating to the Marshall Islands. . . .”¹⁷⁷ The Senate Report explains that “[t]he purpose of this provision is to preserve the allocation of authority and responsibility for domestic and foreign affairs to [RMI], and for security and defense to the United States.”¹⁷⁸ The description of the United States’ obligation in Section 313 is not limited to foreign military attack, but encompasses security in general.¹⁷⁹ The breadth of this obligation is emphasized by RMI’s agreement to refrain from those acts that the United States deems incompatible with its obligations.¹⁸⁰ RMI would not have agreed to give up such a large portion of its sovereign control of foreign affairs if it had not been assured of substantial protection in return.

Third, the Compact is unlike the United States’ other agreements, which commit the United States to defend other nations only from a military attack. For example Article 5 of the North Atlantic Treaty compels the parties to defend against “an *armed* attack against one or more of them in Europe or North America.”¹⁸¹ Additionally, the Compact has far reaching provisions that extend beyond the obligations that the United States owes to NATO countries. Indeed, the Compact compels the United States to treat RMI more like one of the fifty states than a sovereign nation. For example, included in the supplemental agreements to the Compact is a provision stating that “[a]ssistance under the Disaster Relief Act of 1974 shall be made available to the Marshall Islands . . . in the same manner as assistance is made available to a ‘State.’”¹⁸² The Compact includes additional obligations that emphasize the parallel treatment given United States and RMI citizens. An RMI citizen may establish residence in the United States and work as a nonimmigrant without facing many of the obstacles that citizens from other countries must overcome.¹⁸³ Further, a citizen of RMI may serve in the United States military.¹⁸⁴ Since the United States has granted RMI citizens some of the rights and privileges of United States citizens, it is understandable that the United States would also defend RMI citizens as it would also defend its own.

177. Compact, *supra* note 160, § 313, at 1822 (emphasis added).

178. S. REP. NO. 99-16, at 20.

179. *See generally id.*

180. *See* S. REP. NO. 99-16, at 20.

181. Philip Bobbitt et al., *Structuring a New Security Regime In Europe: Proceedings of the Eighty-Fifth Annual Meeting of the American Society of International Law*, 85 AM. SOC’Y INT’L L. PROC. 277, 280 (1991)(citing NATO)(emphasis added).

182. S. REP. NO. 99-16, at 241(1985).

183. *See* Compact, *supra* note 160, § 141, at 1804.

184. *See* Compact, *supra* note 160, § 341-42, at 1825.

Fourth, the obligation to defend RMI from accelerated sea-level rise is consistent with the history of the trustee relationship between the United States and the Marshall Islands, which indicates that a broad interpretation of the Compact is appropriate. Since 1947, the United States has purported to be the protector and guardian of the Marshall Islands.¹⁸⁵ While the trustee relationship ended in 1986, the fiduciary responsibility arguably continues.¹⁸⁶ The ICJ has not determined whether a fiduciary relationship among former Trustee Administrators exists beyond the termination of the trust, but Australia settled a case to avoid facing such a ruling.¹⁸⁷ Therefore, as a former trustee, the United States may have a *de facto* fiduciary responsibility to protect RMI. At the very least, the former trustee relationship supports a broad interpretation of the United States' current obligations to its former trustee nation.

Finally, RMI has paid for the promise of United States' protection in the Compact. First, in exchange for the Compact, RMI settled five billion dollars in claims against the United States nuclear testing program¹⁸⁸ for one hundred and fifty million dollars.¹⁸⁹ The Compact also freed the United States from the Trust, saving the United States hundreds of millions of dollars in Trustee administrative costs.¹⁹⁰ Further, RMI promised the United States access to RMI for ballistic missile testing.¹⁹¹ By agreeing to the Compact, RMI also provided the United States with the support of many allies in the region.¹⁹² A House Report noted that improvements in the RMI citizens' quality of life benefited the United States by preventing "Soviet subversion in the region."¹⁹³ The United States clearly has received many benefits under the Compact, and the United States should fulfill its obligations under the Compact as well.

Therefore, RMI has several grounds to argue that the Compact requires a United States defense to accelerated sea-level rise. The United

185. See generally Lee, *supra* note 157, at 403-408.

186. For an examination of the fiduciary responsibility of a former Trustee nation, see Antony Anghie "The Heart of My Home:" *Colonialism, Environmental Damage, and the Nauru Case*, 34 HARV. INT'L L.J. 445 (1993); see also Ramon E. Reyes, Jr., *Nauru v. Australia: The International Fiduciary Duty and the Settlement of Nauru's Claims for Rehabilitation of Its Phosphate Lands*, 16 N.Y.L. SCH. J. INT'L & COMP. L. 1 (1996).

187. See *supra* note 186.

188. For a general treatment on the impacts of the United States' nuclear testing program, see JANE DIBBLIN, *DAY OF TWO SUNS: US NUCLEAR TESTING AND THE PACIFIC ISLANDERS* (1988).

189. See H.R. REP. NO. 99-188, pt. 1, at 5 (1985).

190. See *id.*

191. See *id.*

192. See *id.*

193. *Id.*

States may want to dispute this interpretation. The Compact has dispute resolution procedures that can resolve such disagreements.¹⁹⁴

CONCLUSION

The data concerning accelerated sea-level rise and increasing emissions of GHG show a direct threat to the long-term existence of RMI. Action must be taken to ensure the survival of RMI. Diplomatic efforts are clearly a crucial part of RMI's strategy. However, due to the magnitude of the threat, diplomatic efforts alone are not sufficient. RMI has at least three options for enforcing legal obligations that may give it more immediate relief. If RMI is to exercise the options outlined in this Note, it must give some care to the order in which steps are taken to ensure the most favorable outcome.

While bringing an immediate action in the ICJ for the breach of customary international law may be an appealing, dramatic, and forceful measure, it seems wiser to hold this option in reserve until the other two have been exhausted.¹⁹⁵ The request for adaptation funds under Article 4(4) of the UNFCCC is the most time sensitive of the three options. If RMI is the first to make a request under Article 4(4) for relocation funding, RMI sets the agenda for the debate over the scope of Article 4(4). Further, if RMI's request under Article 4(4) is rejected, that rejection may be actionable in the ICJ. Bringing a suit before the ICJ would be much more appropriate after the claim for adaptation funds has been rejected. Such a suit, based on the breach of a treaty obligation, is more likely to be favorably received by the ICJ. Additionally, RMI can strengthen its position by combining the causes of action stemming from both the treaty and customary law violations.

Concurrent with the pursuit of adaptation funds under Article 4(4), RMI should request relief from the United States under the Compact. While the United States will resist the broad interpretation of the obligation to defend RMI, any increased involvement by the United States is likely to be beneficial. Further, the strategy of enforcing the Compact to defend RMI has more potential for success than any hostile legal action brought against the United States for its role as a main producer of GHG. By utilizing the Compact, RMI avoids asking the United States to take

194. These procedures will not take RMI before the ICJ. After an effort is made to resolve the dispute among the parties, Section 424 provides an arbitration mechanism to settle disputes under the Compact. See Compact, *supra* note 160, § 424, at 1828.

195. Note that RMI must accept the compulsory jurisdiction of the ICJ before initiating any action against the defendant parties. See *supra* pt. II.A.

responsibility for GHG emissions. RMI is simply asking the United States to defend it from the threat of accelerated sea-level rise.

Finally, those pursuing the enforcement of these legal obligations for RMI can capitalize on the symbolic significance of RMI's claim. The story of an entire nation's destruction has the potential to awaken the world to the real dangers of climate change. The actions outlined in this paper can be coordinated with public relations campaigns sponsored by environmental organizations. Media coverage will enhance political pressure to find a remedy for the citizens of RMI, who are suffering at the hands of the industrialized world. The combination of public exposure, diplomatic pressure, and international legal obligations may be enough to turn the tide, if not literally, then at least enough to compel compensation for the Marshallese people.