

CLIMATE CHANGE IN THE BAHAMAS: Using International Norms of the Sea to Slow the Warming of Bahamian Waters

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ABSTRACT

Small island developing states (SIDS) are experiencing climate change not just as a threat to their lifestyle, but as an immediate threat to their existence. Climate change poses unique risks to these islands, due to their small size, low-lying nature, lack of infrastructure, and minimal adaptation resources. Furthermore, climate change impacts the sea more than most other ecosystems. Ninety percent of global warming is occurring in the world's oceans.¹ Because SIDS are exceptionally dependent on the ocean for natural resources and various sources of income, their continued existence is dependent upon both fighting climate change and protecting oceans.

This paper will argue that the international tools being used to protect the world's oceans can also be effective tools to fight climate change. As greenhouse gas emissions continue to intensify ocean warming and irreparably harm ocean resources, SIDS can argue that these emissions violate international treaties and customary law meant to protect the ocean and its resources.

This paper will also propose three concrete ways that legal advocates for SIDS—activists, lawyers, government actors, and NGOs—can use these arguments: First, the arguments can be brought to the International Court of Justice to request an advisory opinion focusing specifically on emissions causing ocean warming. Second, they can be brought to the International Tribunal on the Law of the Sea with the same request. Finally, they can be codified into a new treaty committed specifically to slowing the warming of the world's oceans.

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1. *Vital Signs: Ocean Heat Content*, NASA GLOBAL CLIMATE CHANGE (December 2021), <https://climate.nasa.gov/vital-signs/ocean-heat/> [<https://perma.cc/N6VH-Q6FR>].

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I. INTRODUCTION

A. *Small Island Developing States are Particularly Vulnerable to Climate Change*

Small island developing states (SIDS)² experience climate change in uniquely devastating ways. As generally poorer nations, they also have few resources to combat climate change on their own. This creates a striking climate justice issue and an urgent need for new tools and remedies that SIDS can use to combat climate change. SIDS are inherently vulnerable to climate change for a host of reasons, but this paper will focus on physical vulnerability and economic vulnerability. The Bahamas will be used as a case study to illustrate these vulnerabilities.

B. *The Bahamas*

The Commonwealth of the Bahamas is an archipelago of about 700 islands—30 of which are inhabited—located in the Caribbean Sea.³ The estimated population size, as of 2021, is just 397,000 people.⁴ The economy on larger islands is a market economy heavily dependent on tourism, but smaller islands engage in more traditional practices of small fishing and farming.⁵ Each of those economic models is heavily dependent on healthy oceans.

1. The Bahamas' Unique Vulnerabilities

The Bahamas is particularly vulnerable to climate change for two reasons: physical vulnerabilities and economic vulnerabilities. First, the islands of the Bahamas are particularly vulnerable to climate change based on their physical circumstances, both geographical and environmental. Notably, the Bahamas consists of extremely low-lying islands with 80 percent of its land surface only a meter or less above sea level.⁶ This means that sea level rise, which is caused by the warming of the world's oceans, poses an existential threat to the Bahamas. Furthermore, the Bahamas relies on very fragile and relatively limited marine ecosystems for natural resources. Because the Bahamas is so isolated from international markets and because the smaller islands lack the financial means

2. "Small Island Developing States (SIDS) are a distinct group of 38 UN Member States and 20 Non-UN Members/Associate Members of United Nations regional commissions that face unique social, economic and environmental vulnerabilities." *Small Island Developing States*, UNITED NATIONS, <https://www.un.org/ohrlls/content/about-small-island-developing-states> [<https://perma.cc/PWL2-GBCM>] (last visited Nov. 20, 2021).

3. *The Bahamas*, NATIONS ONLINE, <https://www.nationsonline.org/oneworld/bahamas.htm> [<https://perma.cc/VGY9-88FY>] (last visited Nov 20, 2021).

4. *Id.*

5. *Economy of the Bahamas*, BRITANNICA, <https://www.britannica.com/place/The-Bahamas/Economy> [<https://perma.cc/Y3SW-GW7A>] (last visited Nov. 20, 2021).

6. *Bahamas*, UNITED NATIONS DEVELOPMENT PROGRAMME, <https://www.adaptation-undp.org/explore/caribbean/bahamas> [<https://perma.cc/E7YH-Y9T7>] (last visited Nov. 20, 2021).

to import food or supplies, the health of the surrounding marine environment is intrinsically tied to the health and survival of Bahamians. Additionally, the size of the Bahamian islands makes them more vulnerable to climate change. Because Bahamian islands are simply so geographically small, with some islands averaging only a mile wide in some places,⁷ Bahamian residents have limited opportunity to move to areas that are less affected by climate change.

Second, the Bahamas is particularly vulnerable to climate change based on its economic circumstances. The Bahamas ranks 130th globally in GDP⁸ and has been subject to a history of colonialism and corruption in government that leaves it largely unable to fortify itself against climate change. Infrastructure, supplies, and education are all limited in a way that creates an extremely vulnerable population with minimal adaptation options.

2. Climate Change and Bahamian Waters

Inherent vulnerabilities are not the only reason why the Bahamas' existence is at stake. The country is also subject to certain impacts of climate change that other places on earth will not experience. These impacts largely stem from increases in global ocean temperatures.

The increasing levels of greenhouse gasses in the atmosphere are trapping more heat and that heat is absorbed at the surface of the water. That heat eventually spreads to deeper waters, and around the globe, via ocean currents.⁹ Heat content in the top 700 meters of the world's oceans has been consistently rising since at least 1955, and it shows no sign of stopping.¹⁰ This trend is no different in the Caribbean.¹¹ The increase in ocean temperatures presents the greatest risk to the Bahamas in three major ways: sea level rise, more intense hurricanes, and destruction of marine ecosystems.

First, the increase in global ocean temperatures is undoubtedly causing sea levels to rise. Sea levels are rising largely because the polar ice caps are melting and water expands slightly as it warms. In the 20th century, global sea levels rose around 0.16 meters,¹² and the tropics are projected to experience

7. *Cat Island*, THE GOVERNMENT OF THE BAHAMAS (last visited Nov. 20, 2021), [<https://perma.cc/GJV4-YFXG>].

8. *GDP Ranked by Country 2022*, WORLD POPULATION REVIEW (last visited May 12, 2022), [<https://worldpopulationreview.com/countries/countries-by-gdp>], [<https://perma.cc/XCD6-9YGP>].

9. Luann Dahlman & Rebecca Lindsey, *Climate Change: Ocean Heat Content*, CLIMATE.GOV, [<https://www.climate.gov/news-features/understanding-climate/climate-change-ocean-heat-content>] [<https://perma.cc/XCD6-9YGP>] (last updated Apr. 20, 2022).

10. *Id.* at 1.3.

11. Equisha Glenn et al., *Detection of Recent Regional Sea Surface Temperature Warming in the Caribbean and Surrounding Region*, 42 GEOPHYSICAL RES. LETTERS 6785–87 (2015), [<https://agupubs.onlinelibrary.wiley.com/doi/full/10.1002/2015GL065002>] [<https://perma.cc/27JQ-QL94>].

12. *Sea Level Rise: Understanding and Applying Trends and Future Scenarios for Analysis and Planning*, MASSACHUSETTS OFFICE OF COASTAL ZONE MANAGEMENT (Dec. 2013), [<https://www.mass.gov/doc/sea-level-rise-understanding-and-applying-trends-and->

higher sea level rise than the global average.¹³ Without specific projections for the Bahamas, global sea levels have been predicted to rise between 0.24 and 0.32 meters by 2050, and 0.6 to 1.1 meters by 2100.¹⁴ Sea level rise causes the loss of coastal property, an acute threat in the Bahamas given the low-lying nature of the archipelago. Not only will homes and small businesses be subject to this fate, but so will the biggest and most luxurious resorts that keep the Bahamian economy afloat. A sea-level rise of one meter is projected to cost the Bahamian tourism industry annual losses of almost \$900 million USD, given that it would damage at least half of the tourist resorts that make the islands such appealing destinations.¹⁵ In addition to damaging manmade structures, rising sea levels will also disrupt the balance of important marine ecosystems by sending saltwater into brackish or freshwater creeks.¹⁶ The salination of freshwater reserves will lead to water insecurity for many Bahamians. Such imbalances also lead to the death of important marine ecosystems, the effects of which will be described further in this Subpart.

Second, the increase in global ocean temperatures is leading to stronger hurricanes. Warmer waters create stronger storms. Per degree Celsius of global warming, scientists have observed a 25–30% increase in category 4–5 hurricanes.¹⁷ These stronger storms lead to increased rainfall because warmer air can hold more moisture.¹⁸ The stronger storms also compound the issues on the ground, such as sea level rise, rendering them significantly more lethal.

future-scenarios-for-analysis-and-planning/download#:~:text=Global%20sea%20level%20increased%20approximately,by%202100%20(Figure%204).

13. Rosanne Martyr-Koller et al., *Home by the Sea: New Science Shows More Sea Level Rise Impacts on Small Islands*, CLIMATE ANALYTICS BLOG (Nov. 28, 2019), <https://climateanalytics.org/blog/2019/home-by-the-sea-new-science-shows-more-sea-level-rise-impacts-on-small-islands/> [<https://perma.cc/K8KP-EFBR>].

14. IPCC, SPECIAL REPORT: SPECIAL REPORT ON THE OCEAN AND CRYOSPHERE IN A CHANGING CLIMATE, SEA LEVEL RISE AND IMPLICATIONS FOR LOW-LYING ISLANDS, COASTS, AND COMMUNITIES (Sep. 24, 2019), <https://www.ipcc.ch/srocc/chapter/chapter-4-sea-level-rise-and-implications-for-low-lying-islands-coasts-and-communities/> [<https://perma.cc/L7EH-HWKX>]; Adam Voiland, *Anticipating Future Sea Levels*, NASA EARTH OBSERVATORY, <https://earthobservatory.nasa.gov/images/148494/anticipating-future-sea-levels> [<https://perma.cc/FZC2-KDFT>] (last visited Dec. 15, 2021).

15. Rosanne Martyr-Koller et al., *Home by the Sea: New Science Shows More Sea Level Rise Impacts on Small Islands*, CLIMATE ANALYTICS: THE CLIMATE ANALYTICS BLOG (Nov. 28, 2019), <https://climateanalytics.org/blog/2019/home-by-the-sea-new-science-shows-more-sea-level-rise-impacts-on-small-islands/> [<https://perma.cc/ST9U-DBBW>].

16. World Bank, *The Bahamas, Sea Level Rise*, CLIMATE CHANGE KNOWLEDGE PORTAL, <https://climateknowledgeportal.worldbank.org/country/bahamas/impacts-sea-level-rise> [<https://perma.cc/D82J-SKUV>] (last visited Nov. 20, 2021).

17. Jeff Berardelli, *How Climate Change is Making Hurricanes More Dangerous*, YALE CLIMATE CONNECTIONS (July 8, 2019), https://yaleclimateconnections.org/2019/07/how-climate-change-is-making-hurricanes-more-dangerous/?gclid=CjwKCAiA7dKMBhBCEiwAO_crFPdioIdNOXpliS7Neo1VM0rsaWPM90W3g9f9DUiBIfxA-op8fASKRoCro4QAvD_BwE [<https://perma.cc/M95H-96FD>].

18. *Id.*

In 2019, Hurricane Dorian was the strongest hurricane to make landfall in the Bahamas in the modern record,¹⁹ killing an estimated 200 residents with hundreds more missing, and causing an estimated \$3.4 billion USD in damage.²⁰ In Abaco, the hardest-hit island, more than 75% of homes were damaged, due not only to the strength of the storm, but also a lack of infrastructure built to resist such a storm.²¹ The devastation that Hurricane Dorian caused on Abaco is a foreboding illustration of how stronger hurricanes will continue to maim the Bahamas in the future.

Finally, the warmer oceans, rising sea levels, and stronger hurricanes are destroying marine ecosystems, including mangrove swamps and coral reefs. The death of these ecosystems has disastrous consequences for the Bahamian islands. The destruction of mangroves contributes to saltwater intrusion into freshwater reserves, coastal erosion, and habitat destruction.²² Those effects manifest in the form of food and water insecurity for Bahamians. Coral reefs are also bleaching out and dying as the ocean becomes not only warmer, but more acidic due to an increase in carbon dioxide in the water. In the Atlantic region of the Caribbean, more than 75% of reefs are already considered threatened by bleaching and intense hurricanes.²³ When these reefs die out, entire ecosystems that rely on them follow their fate. Across the Bahamas, the effects of such a die-off will likely manifest as a devastating hit to the fishing and tourism industries. On smaller out-islands, this will create food insecurity and financial distress.

For the foregoing reasons, the effects of climate change are especially intense and imminent for the islands of the Bahamas and Bahamian citizens. The most threatening effects—sea level rise, stronger hurricanes, and dying marine ecosystems—all arise from warmer and more acidic oceans.

3. Climate Justice Concerns

A discussion of climate change in the Bahamas would be incomplete without framing the issue from a climate justice perspective. “Climate justice” refers to the movement acknowledging that climate change can have differing—and often more catastrophic—social, economic, public health, and other adverse impacts on underprivileged populations.²⁴ Developing countries and

19. LIXION A. AVILA ET AL., NAT’L OCEANIC & ATMOSPHERIC ADMIN. & NAT’L HURRICANE SERVICE, NATIONAL HURRICANE CENTER TROPICAL CYCLONE REPORT, HURRICANE DORIAN 3 (2020), https://www.nhc.noaa.gov/data/tcr/AL052019_Dorian.pdf [<https://perma.cc/7VSC-2FR2>].

20. *Id.* at 8–9.

21. *Id.* at 9.

22. *Why Mangroves Matter*, AM. MUSEUM OF NAT. HISTORY, <https://www.amnh.org/explore/videos/biodiversity/mangroves-the-roots-of-the-sea/why-mangroves-matter> [<https://perma.cc/2FZ8-8HYV>] (last visited Nov. 20, 2021).

23. *Reefs at Risk in the Atlantic/Caribbean*, WORLD RESOURCES INSTITUTE (Feb. 18, 2011), <https://www.wri.org/data/reefs-risk-atlanticcaribbean> [<https://perma.cc/LQU9-QZQ2>].

24. Daisy Simmons, *What Is ‘Climate Justice,’* YALE CLIMATE CONNECTIONS (July 29,

SIDS do not have the requisite financial resources, physical infrastructure, health care systems, or other necessary tools to fortify themselves against climate change's effects in the way that wealthier, historically colonizing countries do. Therefore, climate change presents an immediate existential crisis in these places. Climate justice advocates focus on solutions in two realms: (1) reducing or mitigating harmful emissions and (2) strengthening community resilience through adaptation measures.²⁵

Another important climate justice concept is that, oftentimes, the populations that climate justice advocates seek to protect, including SIDS, contribute the least to climate change. For example, the Bahamas has historically contributed less than 0.01% of global emissions.²⁶ In 2016, the 58 SIDS in combination contributed only 0.2% of global emissions.²⁷ Still, as explained above, these small island communities bear a disproportionately heavy burden from climate change.

Magnifying this injustice is the fact that SIDS are often the most invested in climate change policy. Under the UN Framework Convention on Climate Change (UNFCCC), the Bahamas has committed to a 30% reduction in GHG emissions by 2030.²⁸ SIDS understand better than more insulated countries that emissions reductions are a matter of life and death in the present tense, rather than in a distant future. This is because, beyond posing a threat to their safety, lifestyle, or ability to thrive, climate change poses a threat to SIDS' very existence.

Thus, climate justice advocates acknowledge that climate change impacts the Bahamas and similarly situated countries more than it does wealthier nations in the international community. Meanwhile, the Bahamas contributes a negligible amount of global emissions *and* makes meaningful commitments to reduce its own emissions.

II. ANALYSIS: THE CURRENT STATE OF THE LAW – WHAT CAN THE BAHAMAS DO NOW?

Before we can analyze how to help the Bahamas in combating, or at least surviving, climate change, we must first recognize the issues with the current

2020), <https://yaleclimateconnections.org/2020/07/what-is-climate-justice/> [<https://perma.cc/LN98-KK8V>].

25. *Environmental & Climate Justice*, NAACP, <https://naacp.org/know-issues/environmental-climate-justice> [<https://perma.cc/J47K-MAVN>] (last visited Nov. 20, 2021).

26. THE GOV'T OF THE BAHAMAS, INTENDED NATIONALLY DETERMINED CONTRIBUTION (INDC) UNDER THE UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE (UNFCCC) 3 (2015), https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Bahamas%20First/Bahamas_COP-22%20UNFCCC.pdf [<https://perma.cc/DFG3-YY9A>].

27. Simona Marinescu, *Smallest Footprint, Biggest Trouble: Inside the Push to Measure the Vulnerability of Small Island Developing States*, UNITED NATIONS SUSTAINABLE DEV. GRP.: ACTION 2030 BLOG (Sep. 23, 2021), <https://unsdg.un.org/latest/blog/smallest-footprint-biggest-trouble-inside-push-measure-vulnerability-small-island> [<https://perma.cc/9PS3-83JZ>].

28. THE GOV'T OF THE BAHAMAS, *supra* note 26, at 4.

international legal framework. Despite persistent efforts from SIDS around the globe to get the United Nations (UN) to act in their favor²⁹ and despite statements in many international instruments claiming a focus on protecting vulnerable SIDS,³⁰ there is a severe lack of options for SIDS to combat climate change by holding larger emitters accountable. Subpart A of this paper will elaborate on a few channels that SIDS are currently pursuing before explaining why those channels are inadequate. Subsequently, Subpart B argues that a promising available channel for the Bahamas would be to turn its attention away from climate change or human rights-oriented instruments and towards ocean-centric instruments.

A. *The Available Climate Change Framework and Why It Is Inadequate*

There are few legal tools specifically designed to combat climate change on an international level. International climate change litigation has been pursued under a few different tools with varying levels of success. This Subpart will survey a few of the ways that nations, particularly SIDS, may assert claims under current law related to the effects of climate change. A few of these tools include the United Nations Framework Convention on Climate Change (UNFCCC) and related instruments, alien tort claims in the United States, and human rights claims.

1. The UNFCCC and Related Protocols

The UNFCCC is currently the main international regulatory instrument that governs greenhouse gas emissions. It frames climate change in terms of broad international principles, implying that breaching climate change obligations is “of interest to the international community as a whole.”³¹ The “ultimate objective” of the UNFCCC is for parties to achieve “the stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.”³² In sum, the UNFCCC strives to hold individual countries accountable for harm caused to the world at-large. To date, 197 parties have ratified the UNFCCC, bringing it quite close to universal participation. While the UNFCCC is useful with respect to serving as a rallying cry around climate change mitigation efforts and bolstering the formation of international environmental norms, it leaves the specific details regarding mitigation efforts to be negotiated in other instruments. Therefore, the convention itself provides little redress for the Bahamas.

29. Ryan Jarvis, *Sinking Nations and Climate Change Adaptation Strategies*, 9 SEATTLE J. FOR SOC. JUST. 447, 458–59 (2010).

30. *E.g.*, United Nations Framework Convention on Climate Change art. 3 part 1, May 9, 1992, S. Treaty Doc No. 102–38, 1771 U.N.T.S. 107 [hereinafter UNFCCC].

31. Ottavio Quirico, *Towards a Peremptory Duty to Curb Greenhouse Gas Emissions?*, 44 FORDHAM INT’L L. J. 923, 929 (2021).

32. UNFCCC, *supra* note 30, art. 2 at 4.

Two notable instruments have arisen out of the UNFCCC: the Kyoto Protocol and the Paris Agreement. The Kyoto Protocol was ratified in 1997 and required top-down binding emissions reductions from “developed” countries only. However, it was never a particularly effective tool at combatting climate change because some of the largest emitters, such as China, are not considered developed countries. Notably, the United States never signed on to the Kyoto Protocol.

The Paris Agreement was ratified nineteen years later, in 2016. Starting with the international principle that climate change is a “common concern of humankind,”³³ the Paris Agreement has been slightly more promising. The Paris Agreement removed the “developed” vs. “developing” country categorization and allows each country to define its own commitment to climate change mitigation, or its “nationally determined contribution” (NDC). This approach allows each country to consider its own economic and developmental capacity when making commitments. However, major weaknesses of the Paris Agreement include a weak enforcement system—based only on a regular reporting requirement—and a lack of any formal consequences for failing to reach a NDC. This is, critically and lamentably, an ubiquitous feature of international instruments aimed at emissions reductions. Furthermore, even if each country met its NDC, the world would still not be on track to limit climate change to the goal of 2 degrees Celsius of warming.³⁴ Despite their obvious drawbacks, however, the flexibility and lack of binding emissions reductions requirements were critical to the universal ratification of the Paris Agreement.

Thus, while climate change treaties generally set an attitude of apparent global responsibility to reduce emissions, their tangible effects on countries like the Bahamas are limited.

2. Litigation: Alien Torts Claims and Human Rights Claims

Climate change litigation has been brought under two other categories: claims in United States federal courts under the Alien Tort Statute (ATS) and human rights claims in international tribunals. The ATS states that “the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”³⁵ Therefore, it aims to give international plaintiffs a cause of action to address international wrongs. While the initial purpose of that cause of action was to give a remedy where, without one, other countries might hold the United States accountable for a wrong,³⁶ this statute seems to squarely fit claims that

33. Paris Agreement to the United Nations Framework Convention on Climate Change Preamble, Dec. 12, 2015, T.I.A.S. No. 16–1104.

34. *Effect of Current Pledges and Policies on Global Temperature*, CLIMATE ACTION TRACKER, <http://climateactiontracker.org/global.html> [<https://perma.cc/D76S-P5NJ>] (last visited Nov. 20, 2021).

35. 28 U.S.C. § 1350 (1948).

36. *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1390 (2018).

certain countries are breaching obligations to mitigate climate change. SIDS could theoretically bring claims against high-emitting countries, based in international laws prohibiting transboundary harms to the environment.³⁷

However, there are multiple barriers to successful ATS claims. The ATS has been interpreted to only be available for claims that violate norms of customary international law.³⁸ Further defined in Subpart B of this paper, customary international law consists of international obligations arising from a consistent state practice out of a sense of legal obligation. To bring an ATS claim against high-emitting countries, a court would have to find that failure to curb emissions does indeed violate customary international norms. Furthermore, turning climate change into a torts issue might have unintended distributional impacts, with wealthier victims of climate change attracting all of the plaintiffs' lawyers because they have more valuable claims based on greater economic losses.³⁹

Scholars have argued that climate justice plaintiffs may have more luck holding bigger emitters accountable by reframing environmental claims as human rights claims because international human rights laws are more robust than international environmental laws.⁴⁰ International human rights treaties can give plaintiffs claims against any foreign state implicated in an alleged rights violation. A successful plaintiff would have to argue that a failure to curb greenhouse gas emissions violates their human rights, and that such rights are embodied in a treaty or customary international law.⁴¹ However, scholars also recognize that there is not yet a clearly established international human right to be free from climate change per se.⁴² Therefore, human rights claims based on climate change should draw on rights that are not specific to environmental protection, such as the general rights to life and health.⁴³ With an arguably tenuous connection to the environment, human rights instruments' efficacy in combating climate change is unpredictable.

Thus, while it does seem appealing to shoehorn climate change issues into statutes like the ATS or human rights treaties, there are many barriers to doing so.

37. See *infra* Subpart B.

38. See generally *Sosa v. Alvarez-Machain*, 542 U.S. 692, 695 (2004).

39. Eric A. Posner, *Climate Change and International Human Rights Litigation: A Critical Appraisal*, 155 U. PA. L. REV. 1925, 1942 (2007).

40. *Id.* at 1927; Natalie L. Bridgeman, *Human Rights Litigation Under the ATCA as a Proxy for Environmental Claims*, 6 YALE HUM. RTS. & DEV. L. J 1 (2003).

41. Posner, *supra* note 39, at 1927–28.

42. William Shutkin, *International Human Rights Law and the Earth: The Protection of Indigenous Peoples and the Environment*, 31 VA. J. INT'L L. 479, 505 (1990).

43. Linda A. Malone & Scott Pasternack, *Exercising Environmental Human Rights and Remedies in the United Nations System*, 27 WM. & MARY ENV'T. L. & POL'Y REV. 365, 366–67 (2002).

3. The Weakness of Litigation in General

While most of this Subpart has focused on weaknesses in the claims available for SIDS like the Bahamas, it is worth mentioning that even if a statutorily flawless claim arose, there are downsides to pursuing litigation. First, the norms of the typical legal system are not designed for the “massive and systemic violations” that lead to climate change.⁴⁴ The solution must be holistic, rather than piecemeal. Even if any given litigation holds in favor of mitigating climate change or stopping a given dangerous activity, a single holding is not enough to insulate SIDS from the blunt of climate impacts. Second, pursuing litigation requires significant financial resources that smaller countries like the Bahamas simply do not have. Third, even if the resources were available to Bahamian lawyers, or lawyers fighting on behalf of the Bahamas, it contravenes principles of climate justice to require that these small islands spend vast amounts of time and money to hold higher-emitting countries accountable. The Bahamas, which contributes minimally to global climate change, should be able to trust international instruments to protect it, rather than having to take the political and financial risk of calling world powers into court.

4. Bahamian Environmental Law

Of course, the Bahamas is not entirely dependent on international law to protect its resources. There is an extent to which it can practice its own mitigation and adaptation techniques, which will be briefly summarized in this Subpart. However, as mentioned above, the Bahamas contributes less than .01% of global emissions. When it contributes so little to the problem, it is relatively powerless to solve, or even make a dent in, the problem on its own. Therefore, while the Bahamas does have admirable environmental laws and climate change policies, that framework is definitely not enough to delay the impending disaster rushing toward the islands.

For example, the Bahamas has an ambitious *National Policy for the Adaptation to Climate Change*, which includes both mitigation and adaptation measures. The preamble to this policy document primarily emphasizes the dangers of sea level rise and acknowledges the Bahamas’s vulnerability to rising seas “due to its archipelagic nature and the consequent extended coastline, and low elevations.”⁴⁵ The policy directs relevant Bahamian agencies to create plans and funds for sustainability in sectors including agriculture, coastal and marine resources and fisheries, energy, tourism, and more.⁴⁶ Under this policy, the Bahamas agrees to maintain its commitments under international instruments and to participate to the fullest extent possible in negotiations on

44. Maxine Burkett, *Climate Reparations*, 10 MELB. J. INT’L L. 509, 521 (2009).

45. THE NAT’L CLIMATE CHANGE COMM. & THE BAH. ENV’T, SCI., AND TECH. COMM’N, NATIONAL POLICY FOR THE ADAPTATION TO CLIMATE CHANGE ii (2005), https://www.preventionweb.net/files/60986_5b2b9776d.pdf [<https://perma.cc/SA84-AA4E>].

46. *Id.* at viii.

international climate change policies.⁴⁷ The National Climate Change Committee enforces specific provisions of the climate change policy through regular monitoring.⁴⁸

It bears repeating that, despite these national contributions to mitigating climate change, the Bahamas will be destroyed by warming seas if it cannot hold larger, wealthier, higher-emitting countries accountable for lowering their emissions.

B. *A More Promising Path: International Laws of the Sea*

While the above climate change frameworks have thus far proved insufficient in helping SIDS survive climate change, legal scholars have also considered using international laws of the sea to fight against climate change. Given the dramatic effects climate change has on the world's oceans, it makes sense that there would be significant overlap between efforts to preserve the oceans and efforts to combat climate change.

As previously explained, the health and protection of oceans is a major concern of SIDS. Therefore, looking at instruments designed to protect the sea might be a promising route for SIDS to hold larger emitters accountable for climate change. Furthermore, while climate change is still a relatively new phenomenon, with a limited number of treaties or national laws solely addressing the issue, international law has been addressing control of the sea for decades. This Subpart will describe some of the most prominent international conventions controlling countries' relationship with, rights under, and duties toward the sea.

This Subpart will focus only on instruments under which SIDS can assert their rights to a healthy ocean, rather than focusing on what enforcement mechanisms would actually lead to a healthier ocean. However, it is worth briefly noting that lack of enforcement remains a significant limitation on the efficacy of international environmental laws in general. This is largely due to both domestic politics, where no state is incentivized to put resources toward enforcement without guarantees that other states will do the same, and to the inherently decentralized nature of the international legal system, which makes it difficult for any international legal body to monitor or hold accountable any given state. In the UN's first global assessment of the environmental rule of law, it reported a widespread global failure to enforce international environmental laws.⁴⁹ Despite limitations in enforcement, international environmental laws like those described in this Subpart provide an important platform upon which SIDS can craft their international environmental claims.

47. *Id.* at 7.

48. *Id.* at 34.

49. U.N. ENV'T PROGRAMME, *Environmental Rule of Law: First Global Report viii* (Jan. 2019). https://wedocs.unep.org/bitstream/handle/20.500.11822/27279/Environmental_rule_of_law.pdf?sequence=1&isAllowed=y [<https://perma.cc/8TZL-FM9F>].

Before describing the relevant conventions of the sea in detail, it is important to note that certain major emitters, oftentimes the US, do not sign on to these treaties. However, the treaties can still be enforceable as customary international law. Customary international law arises out of treaty law when: (1) states engage in a general practice (2) out of a sense of legal obligation, or *opinio juris*.⁵⁰ While no specific length of time or number of states is required to establish a general practice, it must be “virtually uniform, extensive, and representative” among states whose interests are specially affected.⁵¹ Therefore, while no duration is required, the International Court of Justice (ICJ) has made it clear that “some period of time must elapse for a general practice to emerge; there is no such thing as ‘instant custom.’”⁵² Customary international law can include broad principles such as “no state shall cause harm to another” or the “precautionary principle”⁵³ in regards to climate change. In line with climate change concerns, customary international law prohibits transboundary harms on the environment of another state.⁵⁴

50. RESTATEMENT (THIRD) OF FOREIGN REL. L. § 102 (AM. L. INST. 1987) states in part: (1) A rule of international law is one that has been accepted as such by the international community of states

(a) in the form of customary law

(2) Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.

(3) International agreements create law for the states parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted.

51. JEFFREY DUNOFF ET. AL., *INTERNATIONAL LAW: NORMS, ACTORS, PROCESS: A PROBLEM ORIENTED APPROACH* 64 (5th ed. 2015).

52. *Id.* at 66.

53. In general, the precautionary principle can be seen in environmental law in contexts such as the Stockholm Declaration or the Rio Declaration. The Rio Declaration explicitly states that “in order to protect the environment, the precautionary approach shall be widely applied by States.” U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. 1), annex I, art. 15 (Aug. 12, 1992). It can also be found in instruments related to the sea. See United Nations Convention on the Law of the Sea art. 192, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS]; *id.* at art. 194. The principle is also exemplified in UNFCCC Art. 3 which state that “[t]he Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change.” United Nations Framework Convention on Climate Change art. 3, May 9, 1992, S. Treaty Doc No. 102–38, 1771 U.N.T.S. 107.

54. RESTATEMENT (THIRD) OF FOREIGN REL. L. § 601 (AM. L. INST. 1987) states:

(1) A state is obligated to take such measures as may be necessary, to the extent practicable under the circumstances, to ensure that activities within its jurisdiction or control

(a) conform to generally accepted international rules and standards for the *prevention, reduction, and control of injury to the environment of another state or of areas beyond the limits of national jurisdiction*; and

(b) are conducted so as not to cause significant injury to the environment of another state or of areas beyond the limits of national jurisdiction.

(2) A state is responsible to all other states

The United Nations Convention on the Law of the Sea (UNCLOS) is often referred to as the “Constitution of the Sea” and has been lauded as “the most important international effort in history to protect the marine environment.”⁵⁵ Created in 1982 and entered into effect in 1994, the treaty creates a comprehensive regime of law and order in the world’s oceans and seas, governing all uses of the oceans and their resources.⁵⁶

While important global emitters such as the U.S. are not signatories to UNCLOS, its provisions are largely regarded as customary international law and are thus binding on all states regardless of whether they signed on to the convention.⁵⁷ In the US, it has been established that UNCLOS is regarded as customary international law, except for its provisions on seabed mining.⁵⁸ Extending beyond the US, “states generally, have accepted the substantive provisions of the Convention, other than those addressing deep sea-bed mining, as statements of customary law binding upon them apart from the Convention.”⁵⁹ On the other hand, some provisions of UNCLOS have yet to be agreed upon and thus are not yet customary international law. According to the Restatement on Foreign Relations Law of the United States, the substantive provisions that are not yet custom include those on seabed mining, special rules for fishing certain species, and which types of violations require payment to the International Sea-Bed Authority.⁶⁰ The debate over those specific provisions should not be a barrier to SIDS using UNCLOS as a climate change tool, as those provisions do not strike to the heart of UNCLOS and its protection of the world’s oceans, which SIDS should emphasize.

Given that there are strong arguments for UNCLOS’s “baseline”⁶¹ provisions to be considered customary international law, this paper will analyze the

- (a) for any violation of its obligations under Subsection (1)(a), and
 - (b) for any significant injury, resulting from such violation, to the environment of areas beyond the limits of national jurisdiction.
- (3) A state is responsible for any significant injury, resulting from a violation of its obligations under Subsection (1), to the environment of another state or to its property, or to persons or property within that state’s territory or under its jurisdiction or control (emphasis added).

55. Stephen L. Kass, *United Nations Convention on Law of the Sea and Climate Change*, N.Y.L.J. (Aug. 31, 2012, 12:00 AM), http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202569335882&United_Nations_Convention_on_Law [<https://perma.cc/FLD4-XYVW>].

56. *United Nations Convention on the Law of the Sea: Overview and Full Text*, OCEANS & L. OF THE SEA U.N. (Nov. 2, 2022), https://www.un.org/depts/los/convention_agreements/convention_overview_convention.htm [<https://perma.cc/Y6TS-SZQN>].

57. See *United States v. Hasan*, 747 F.Supp.2d 599, 634 (E.D. Va. 2010) (“With respect to the ‘traditional uses’ of the sea, therefore, the United States accepts [UNCLOS] as customary international law, binding upon the United States”).

58. *Id.* at 635; *United States v. Salad*, 908 F.Supp.2d 730, 734 (E.D. Va. 2012).

59. RESTATEMENT (THIRD) OF FOREIGN REL. L. pt. V, intro. note (AM. L. INST. 1987).

60. *Id.* at n.6.

61. *United States v. Alaska*, 503 U.S. 569, 588 n.10 (1992) (“[t]he United States has not

provisions that may be most useful for SIDS to bring environmental claims. UNCLOS has a few provisions that the environmental legal community has started to recognize as having the potential to support an argument that greenhouse gas emissions violate the laws of the sea.

First, UNCLOS has a preamble that focuses on coastal and developing countries.⁶² Albeit rhetorical rather than substantive, the preamble helps set a tone for arguing that islands like the Bahamas are in dire need of protection.

Second, UNCLOS Articles 192–206 provide general obligations to prevent and reduce marine pollution. These obligations arise from activities both on land and on the sea, and states are required to enforce their obligations under international law in their own territories. UNCLOS defines “pollution of the marine environment” quite broadly, as “the introduction by man, directly or indirectly, of substances or *energy* into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities.”⁶³ This includes “deliberate” disposal of wastes or other matter from “man-made structures.”⁶⁴ Notably, this broad definition of “pollution of the marine environment” contemplates that introducing “energy,” even indirectly, into the marine environment is pollution. Because heat is a form of energy,⁶⁵ emitting carbon dioxide and other greenhouse gases constitutes a violation of UNCLOS, as it leads to an increase in heat energy in the ocean. Heat is also explicitly labeled as a pollutant in other significant environmental treaties, such as the Clean Water Act.⁶⁶ Furthermore, given the effects of warmer oceans laid out in Subpart 2. of this paper, this increase in heat satisfies the treaty’s definition of prohibited pollution: it harms living resources and marine life,⁶⁷ is a hazard to

ratified [the United Nations Convention on the Law of the Sea], but has recognized that its baseline provisions reflect customary international law”).

62. “*Bearing in mind* that the achievement of these goals will contribute to the realization of a just and equitable international economic order which takes into account the interests and needs of mankind as a whole and, in particular, the special interests and needs of developing countries, whether coastal or land-locked.” U.N. Convention on the Law of the Sea Preamble, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1944).

63. U.N. Convention on the Law of the Sea art. 1.1(4), *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994) [hereinafter UNCLOS] (emphasis added).

64. UNCLOS, *supra* note 63, at art. 1.1(5)(a).

65. *What is Thermal Energy?*, KHAN ACADEMY, <https://www.khanacademy.org/science/physics/work-and-energy/work-and-energy-tutorial/a/what-is-thermal-energy> [https://perma.cc/B5MM-S37J] (last visited Dec. 16, 2021).

66. Clean Water Act, 33 U.S.C. § 502(6).

67. For example, the bleaching of coral reefs.

human health,⁶⁸ and hinders marine activities.⁶⁹ Therefore, this broad definition does a significant amount of work in arguing that UNCLOS requires all states to cease, or at least to decrease, greenhouse gas emissions.

Third, UNCLOS Article 212 requires states to “adopt laws and regulations to prevent, reduce, and control pollution of the marine environment from or through the atmosphere.”⁷⁰ States must prevent, reduce, or control this pollution “to the fullest extent possible,” which is a demanding standard.⁷¹ While this provision was intended to cover emissions from aircraft and marine vessels,⁷² the broad definition of “pollution” in UNCLOS suggests that the provision may evolve with the definition of “pollution,” perhaps to include greenhouse gases. Also, under Article 194(2), states must “take all measures necessary to ensure that activities under their jurisdiction . . . are so conducted as not to cause damage by pollution to other states and their environment.”⁷³ “Therefore, the obligations of the Convention require states to consider the impacts of their “pollution” on other states.

Potential claims against parties, and nonparties through customary international law, would assert that states, by emitting greenhouse gases at levels that are destroying the world’s oceans, are not fulfilling their obligations under the above-mentioned sections of UNCLOS. Still, there are potential barriers to bringing a claim under UNCLOS. First, jurisdiction over non-parties, such as the US, depends on whether UNCLOS has indeed become a part of customary international law. Second, UNCLOS does not implement an absolute ban on polluting marine environments, but its provisions have instead been interpreted as a due diligence obligation, requiring states to act with “appropriate care” to minimize, rather than ban, pollution.⁷⁴ Therefore, UNCLOS gives states wide latitude in how they fulfill their obligations depending on their capabilities and resources.⁷⁵

68. For example, destruction of property and food and water insecurity.

69. For example, death of marine ecosystems bringing tourism and fishing industries to a halt.

70. UNCLOS, *supra* note 63, at art. 212.

71. *E.g.*, *Calvert Cliffs’ Coord. Comm., Inc. v. U.S. Atomic Energy Comm’n*, 449 F.2d 1109, 1114 (D.C. Cir. 1971) (“the requirement of environmental consideration ‘to the fullest extent possible’ sets a high standard for the agencies, a standard which must be rigorously enforced by the reviewing courts”).

72. *Kass, supra* note 55.

73. UNCLOS art. 194(2), *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994).

74. William C.G. Burns, *Potential Causes of Action for Climate Change Damages in International Fora: The Law of the Sea Convention*, 2 MCGILL INT’L J. SUSTAINABLE DEV. L. & POL’Y 27, 46 (Mar. 2006), <https://www.jstor.org/stable/pdf/24353740.pdf?refreqid=excelsior%3A20293489176fefce89500b2a32114c86> [<https://perma.cc/EYS4-CQMM>].

75. Daud Hassan, *International Conventions Relating to Land-Based Sources of Marine Pollution Control: Applications and Shortcomings*, 16 GEO. INT’L ENV’T. L. REV. 657, 668 (2004).

In addition to UNCLOS, there is a package of four treaties adopted at the First United Nations Conference on the Law of the Sea in 1958: The Convention on the Territorial Sea and the Contiguous Zone, The Convention on the Continental Shelf, The High Seas Convention, and The Convention of Fishing Conservation of the Living Rights of the High Seas. Together, these treaties confer upon states an array of sovereign rights over their territorial seas. Some of these rights include sovereignty over living resources within their territorial seas,⁷⁶ sovereignty over natural resources within their continental shelf,⁷⁷ and freedom to fish on the high seas.⁷⁸ Over time, these rights became codified into customary international law.⁷⁹

Legal advocates for SIDS can draw lessons from international norms in less directly related treaties, such as the UN Convention on the Law of Non-Navigational Uses of International Watercourses. While the convention applies to watercourses rather than the ocean, it illustrates the commonly accepted concept of equitable utilization, which can be applied to the ocean context.⁸⁰ Article 5 of the convention states that states “shall . . . utilize an international watercourse in an equitable and reasonable manner.”⁸¹ It gives states a duty to cooperate to achieve sustainability in any given body of water.⁸² Factors relevant to “equitable and reasonable utilization” include “climatic” factors and the “the social and economic needs” of the state concerned.⁸³ Finally, Article 7 of the convention includes accountability mechanisms for the state causing the damage to the watercourse. First, there is an obligation to avoid causing harm to another state.⁸⁴ Then, if harm does occur, the state that causes such harm “shall . . . take all appropriate measures . . . in consultation with the affected state, to eliminate or mitigate such harm,” which may include discussing compensation.⁸⁵ While, as mentioned, this treaty does not apply to the world’s oceans, it provides valuable lessons and illustrates global norms about using bodies of water in an equitable way so as not to cause harms to other states, and holds the parties that cause harms to other states accountable.

76. Convention on the Territorial Sea and the Contiguous Zone art. 1(1) *opened for signature* April 29, 1958, 516 U.N.T.S. 205.

77. Convention on the Continental Shelf art. 2(1), *opened for signature* April 29, 1958, 499 U.N.T.S. 311.

78. Convention on the High Seas art. 2, *opened for signature* April 29, 1958, 450 U.N.T.S. 82.

79. Jon L. Jacobson, *International Fisheries Law in the Year 2010*, 45 LA. L. REV. 1161, 1169 (1985).

80. DUNOFF ET. AL., *supra* note 51, at 572.

81. G.A. Res. 51/229, at 5 (July 8, 1997).

82. *Id.*

83. *Id.*

84. *Id.* at 6.

85. *Id.*

C. *Greenhouse Gas Emissions Violate These Norms of the Sea*

This brief survey of international laws protecting the sea or other bodies of water makes evident that international law bestows upon states robust sovereign rights to have healthy oceans and to benefit from the natural resources those healthy oceans provide. At the same time, greenhouse gas emissions are warming the oceans, making them unhealthy and unable to support natural resources. Thus, greenhouse gas emissions that are proven to cause warmer ocean temperatures are violations of international laws protecting the ocean.

III. PROPOSALS: SOLUTIONS FOR THE FUTURE

A. *Continue Focusing on Normative Arguments*

This paper has argued that the existing international legal framework dedicated to climate change is insufficient to help SIDS, focusing on the Bahamas as a case study. The types of claims that a country can bring are quite limited, and litigation provides only narrow relief, as piecemeal holdings do little to stem climate change writ large. Therefore, the Bahamas should focus on normative arguments that draw upon on the laws of the sea and the rights that those laws bestow upon Bahamians. Those arguments might emphasize the sovereign right to a healthy ocean, non-interference in the health of other states' environments, and more general prohibitions on harming other states, all of which are present in the aforementioned treaty law and now, customary international law. Normative arguments often set the tone and have played a central role throughout the history of international negotiations.⁸⁶ In the international climate change space, where collective action issues dominate most interactions, negotiations primarily lead to significant changes. Therefore, the tone for negotiations needs to be set right now with a focus on SIDS and their needs. The scope of global climate change far exceeds categorization or neat labels that accompany legal frameworks, and thus we must turn to an entire reframing of the global perspective in order to really achieve protection of SIDS like the Bahamas.

B. *Turning Toward the International Court of Justice*

A promising forum for the Bahamas to take these normative arguments to would be the International Court of Justice (ICJ). The ICJ is the UN's principal judicial organ with great influence over the international legal order.⁸⁷ Given that influence, the ICJ is in the best position to clarify state responsibility for the harms greenhouse gases cause to other states. That clarification can

86. Robert Falkner, *The Unavoidability of Justice – and Order – in International Climate Politics: From Kyoto to Paris and Beyond*, 21 THE BRIT. J. OF POL. AND INT'L REL. 270, 276 (2019), <https://journals.sagepub.com/doi/pdf/10.1177/1369148118819069> [perma.cc/4XWW-J28W].

87. DUNOFF ET. AL., *supra* note 51, at 21.

“help guide the negotiation process along a more meaningful path.”⁸⁸ The ICJ hears two types of cases: (1) contentious cases between states, where the court issues a binding ruling on a dispute between states and (2) advisory proceedings, where the court issues “nonbinding but authoritative”⁸⁹ answers to legal questions posed to it, usually questions clarifying international laws or obligations.⁹⁰ The ICJ can look to many sources in making a decision or issuing an advisory opinion, including treaties, which are the most authoritative, and customary international law. Given the weaknesses of litigation as a strategy in general, and the fact that the ICJ can only hear contentious cases when both states have volunteered to be under the jurisdiction of the ICJ, the Bahamas would be best off trying to get an advisory opinion.

An ideal advisory opinion would interpret international laws of the sea, such as UNCLOS, to require states to reduce emissions in order to slow ocean warming. The Bahamas could ask the ICJ to clarify whether the provisions of UNCLOS or related treaties of the sea, explored in Subpart B, create legal obligations for countries to reduce greenhouse gas emissions. If an advisory opinion did suggest that such an obligation exists, that opinion could be extremely influential in future climate negotiations.

The small island developing state of Palau provides a helpful example of requesting an advisory opinion. Similar to the Bahamas, Palau is a low-lying island dealing with immediate and intense effects of climate change, including sea level rise. Along with a coalition of other states, Palau sought an ICJ opinion on state responsibility for transboundary harms caused by greenhouse gas emissions.⁹¹ However, the case showed that the UN was not ready or willing to take on such a significant question. When Palau asked this major question in 2012, the U.S. opposed submitting the question of climate change to the ICJ, and the General Assembly could not get the sufficient amount of member votes to push the question over to the ICJ.⁹² The hesitance to take up the ques-

88. DOUGLAS A. KY SAR, YALE CTR. FOR ENVTL. LAW & POLICY, CLIMATE CHANGE AND THE INTERNATIONAL COURT OF JUSTICE 91 (2013).

89. The ICJ’s website describes advisory opinions: “Despite having no binding force, the Court’s advisory opinions nevertheless carry great legal weight and moral authority. They are often an instrument of preventive diplomacy and help to keep the peace. In their own way, advisory opinions also contribute to the clarification and development of international law and thereby to the strengthening of peaceful relations between States.” *Advisory Jurisdiction*, THE INTERNATIONAL CT. OF JUST., <https://www.icj-cij.org/en/advisory-jurisdiction> (last visited Dec. 15, 2021), [<https://perma.cc/FS2W-4D2Y>].

90. DUNOFF ET. AL., *supra* note 51, at 153.

91. *Palau Seeks UN World Court Opinion on Damage Caused by Greenhouse Gases*, U.N. NEWS (Sept. 22, 2011), <https://news.un.org/en/story/2011/09/388202> [<https://perma.cc/D3SR-QVPG>].

92. Michael B. Gerrard, *Taking Climate Change to the International Court of Justice: Legal and Procedural Issues*, SABIN CTR. FOR CLIMATE CHANGE L., CLIMATE L. BLOG (Sept. 29, 2021), <http://blogs.law.columbia.edu/climatechange/2021/09/29/taking-climate-change-to-the-international-court-of-justice-legal-and-procedural-issues> [<https://perma.cc/ZDY8-MQDT>].

tion of climate change is concerning for the Bahamas, but there may be a better chance if the question is framed more narrowly in terms of keeping the oceans healthy and sustainable. Furthermore, almost a decade has passed since Palau's request, and the issue of climate change is only getting more urgent, more well understood, and more accepted as true.

Finally, even if the ICJ did take up this question and clarify state responsibility for harms to the sea caused by greenhouse gas emissions, advisory opinions are simply advisory. Similarly, holdings on contentious cases are binding on the parties to the suit, but otherwise only advisory to the rest of the globe. However, this does not mean that going to the ICJ is not an effective step towards creating state liability for emissions. An advisory opinion would have great weight in shaping future international negotiations. International actors generally agree and "frequently cite ICJ opinions as the most authoritative interpretations of the law."⁹³ For example, a 2010 ICJ opinion rising out of a pulp mills dispute between two states is commonly invoked for the existence of a legal duty for states to conduct an environmental impact assessment for projects with transboundary harms.⁹⁴ Helpful effects from an advisory opinion could include a general duty to mitigate emissions to a level that slows global ocean temperature rise, or a requirement to analyze how emissions from new projects would increase global ocean temperatures and to consider that rise in permitting new projects.

C. *Turning Toward the International Tribunal for the Law of the Sea*

Another potential forum that can transform these normative arguments about the ocean into real climate change mitigation may be the International Tribunal for the Law of the Sea (ITLOS). ITLOS was created by UNCLOS and consists of 21 judges elected by the UNCLOS parties, based on geographic distribution.⁹⁵ ITLOS has jurisdiction over disputes concerning the interpretation or application of UNCLOS, or "international agreement[s] related to the purpose of [UNCLOS]."⁹⁶ States can agree to ITLOS's jurisdiction whether they are parties to UNCLOS or not.⁹⁷ While states are the primary parties bringing disputes to the tribunal,⁹⁸ UNCLOS provides for opportunity to include non-state parties as well.⁹⁹ While dispute settlements between parties are only binding on those parties, ITLOS has a narrow ability to issue persuasive advisory opinions upon request by states.¹⁰⁰ As with the ICJ, the Bahamas

93. DUNOFF ET. AL., *supra* note 51, at 155.

94. *See* Pulp Mills on the River Uruguay, (Arg. v. Uru.), Provisional Measure, 2006 I.C.J. 113 (July 13).

95. DUNOFF ET. AL., *supra* note 51, at 537.

96. UNCLOS, *supra* note 63, at art. 288.

97. John E. Noyes, *The International Tribunal for the Law of the Sea*, 32 CORNELL INT'L L.J. 109, 130 (1999).

98. UNCLOS, *supra* note 63, at art. 291(1); *Id.* at Annex VI, arts. 20(1), 37.

99. *Id.* at art. 305.

100. *Id.* at Annex VIII, art. 5(3) (stating that parties to a dispute may authorize a special

would be best off looking for an advisory opinion from ITLOS. An opinion clarifying the duties that high-emitting countries have to prevent harm to the world's oceans can be a powerful piece of evidence in future international climate negotiations and legislation.

While some scholars have expressed concern that the relatively recently created tribunal would be redundant and potentially in conflict with the ICJ, it also has the potential to be a “quick and efficient specialized tribunal,” whose decisions are made by judges with specialized expertise.¹⁰¹ The tribunal has provided helpful commentary for states whose environments have been harmed, making various statements on international responsibility and liability for environmental damage, but not yet in the case of climate change. For example, in past cases, the tribunal has agreed that violations of even procedural environmental obligations, such as not cooperating with other states to prevent pollution of the marine environment, may entail liability.¹⁰² Statements like this show that the tribunal is willing to acknowledge the rights that states have to healthy, sustainable oceans, and that accountability is due. Ideally, the court would be willing to take this reasoning to the more complex universe of climate change and, upon request by the Bahamas and other interested states, issue a persuasive advisory opinion attaching liability to emissions that cause ocean temperature rise.

D. *Crafting a New, Ocean-Centric Climate Change Treaty*

The most ambitious proposal moving forward would be to craft a new treaty, focusing solely on mitigating rising ocean temperatures. This treaty can pull lessons from multiple international instruments discussed in this paper. The international treaties focusing solely on climate change set a positive tone for change, but do not have the binding requirements that would lead to actual change in the necessary time frame. The international treaties focusing on the ocean also include promising provisions, but because they do not address greenhouse gases directly, it may be risky to shoehorn climate change issues into those treaties. Therefore, given this gap in treaty law, and the need for legislation over litigation when the issue of climate change is so general and massive, a new treaty focusing on mitigating rising ocean temperatures could be a promising tool for the Bahamas.

1. Normative Arguments Reemphasizing Duties to the World's Oceans

As elaborated on in Subpart A of this paper, one should not underestimate the power of normative arguments in shaping international attitudes toward climate change. Because international doctrinal law is so decentralized and difficult to enforce on any one state, international norms and customary

arbitral tribunal to formulate “recommendations”).

101. Noyes, *supra* note 97, at 111.

102. MOX Plant (Ir. v. U.K.), Case No. 10, Order of Dec. 3, 2001, ITLOS Rep. 95.

law take on a power unlike domestic legal norms. Treaties such as UNCLOS that focus on protecting the world's oceans provide simple, undeniable normative arguments against infringing on another state's sovereign right to a healthy ocean and the natural resources that go along with that. Furthermore, those principles in UNCLOS are not merely empty language but are arguably a part of customary international law. Therefore, those principles are binding on *all* states, including the large, wealthy, high-emitting countries such as the US. Where the barriers to holding countries like the U.S. accountable via litigation often seem insurmountable, these principles of customary international law seem harder to argue against. While these undeniable norms are nonetheless difficult to *enforce*, they can *inform* negotiations, treaties, agreements, and court opinions. SIDS like the Bahamas can emphasize general norms about noninterference with a state's sovereign right to a healthy ocean, and eventually create a custom of mitigating emissions in order to protect the ocean.

2. Binding Emissions Reductions to Slow Ocean Warming

Another large gap in the existing international climate change framework is the lack of binding commitments to specific emissions reductions. It would be naïve to suggest that this is not for some valid, albeit complicated, reasons. If mitigating climate change were as simple as some supreme international instrument mandating emissions reductions, there would be no issue. However, the resistance of larger, wealthier countries to reducing their emissions is not reason to stop attempting mandated reductions. While larger or landlocked countries may have a few more years of blissfully ignoring climate change, the issue is already imminent in the Bahamas. For the Bahamas, and other small island developing states, climate change is manifest, not an abstract notion of what might occur. Therefore, while including binding emissions reductions targets will decrease the political viability of any new international instrument, increases in destruction and devastation will likely lead to greater acceptance of increasingly stringent solutions. As the oceans get warmer, and as floods, superstorms, and extinctions come with that heat, the Bahamas needs binding commitments from the states most responsible for climate change.

3. Loss and Damage Provisions

Another useful provision to include in an ocean-centric climate change treaty would be one on "loss and damage." Beyond mitigation and adaptation, loss and damage is a third prong to climate change solutions that is often overlooked, largely because wealthy, powerful countries fear having to pay the price for damage already done. While adaptation is forward-looking, loss and damage concerns harms that have already happened or are unavoidable.¹⁰³ Article 8 of the Paris Agreement addresses loss and damage by stating that "Parties should enhance understanding, action and support . . . with respect

103. DUNOFF ET. AL., *supra* note 51, at 614.

to loss and damage associated with the adverse effects of climate change.”¹⁰⁴ However, illustrating the reluctance of culpable parties to engage in loss and damage compensation, the U.S. only agreed to inclusion of the Article 8 language in exchange for an agreement that “Article 8 . . . does not involve or provide a basis for any liability or compensation.”¹⁰⁵

Given the climate justice issues elaborated on above, and the lack of financial resources the Bahamas and many other SIDS have to devote to adaptation at this point, loss and damage compensation will be essential to keeping these islands and their residents alive. Therefore, an ideal international climate change agreement would have enforceable, ambitious loss and damage compensation requirements from historic emitters to small island developing states like the Bahamas. Given the lessons from Article 8 of the Paris Agreement about the willingness of high-emitting countries to voluntarily commit to such compensation, a next best option would be to include some mechanism or specific cause of action whereby SIDS can identify high-emitting countries, perhaps in the ICJ or ITLOS, and hold them accountable to such compensation.

4. Downsides and Difficulties of Creating a New Instrument

Subpart III.D of this paper was intended to be imaginative and hopeful, with the understanding that creating a new international treaty is no easy task. While drafting a law to protect the world’s oceans from global warming would be a complicated endeavor, perhaps one that is impossible to be completed in the timeframe in which we need to save our oceans, the biggest hurdle would be in getting the most culpable and influential nations to sign on to such a treaty. The world’s nations all have extremely different economic, moral, public health, and environmental priorities that shape how they prefer to approach climate change issues. Luckily, when a treaty becomes entrenched enough in state practice, it can become customary international law and thus binding on all states, regardless of whether they signed onto the treaty. However, that can take a very long time.¹⁰⁶ Perhaps it will take a length of time that small island developing states cannot afford to wait.

IV. CONCLUSION

Small island developing states like the Bahamas are facing an immediate, existential threat from climate change. Greenhouse gas emissions are undoubtedly warming our planet and the oceans at significant rates. Such warming leads to rising sea levels, more intensive weather events, and the deterioration of fragile ecosystems. Indeed, the Bahamas is at a breaking point where both lifestyles and local economies are in great peril.

104. Paris Agreement to the United Nations Framework Convention on Climate Change art. 8(3), *opened for signature* Dec. 12, 2015, T.I.A.S. No. 16–1104.

105. DUNOFF ET. AL., *supra* note 51, at 614.

106. *See supra* Subpart B.

In the international field of climate change, parties have tried to be creative in holding high-emitting countries accountable working with the limited tools available. However, the Bahamas needs more than what those tools provide. First, treaties designed specifically to combat climate change have proved minimally successful due to the voluntary nature of signing on to such treaties, and, even after countries sign on, the voluntary nature of carrying out any meaningful emissions reductions. Second, litigation under instruments not designed for climate change, such as the United States' Alien Torts Statute or international human rights treaties, is a limited tool due both to procedural barriers against bringing such claims and to the piecemeal nature of litigation that simply is incapable of confronting an issue as big and complicated as international climate change.

On a more hopeful note, this paper argued that another route currently being pursued could be particularly promising for SIDS such as the Bahamas: international treaties protecting the world's oceans. These treaties bestow upon small islands a sovereign right to healthy oceans and the natural resources they provide. This paper took the principles provided in those ocean-centric treaties and suggested ways that countries like the Bahamas, or environmentalists in defense of SIDS, can continue to fight for climate justice using such principles. First, the Bahamas should continue to focus on normative arguments about the customary international principle of a right to a healthy ocean. Such arguments, while not of immediate force in a court of law, have great potential to shape international climate negotiations and customs. Second, the Bahamas can bring such arguments to international tribunals such as the ICJ or ITLOS in search of authoritative opinions clarifying the legal obligations of high-emitting countries to mitigate their emissions. Third, and most ambitiously, the Bahamas, in conjunction with a coalition of other SIDS of climate justice activists, can consider developing a new international treaty, focusing solely on slowing the rise of ocean temperatures.

While that last option may seem too ambitious, or unlikely in such a contentious international political area, desperate times call for extreme measures. The Bahamas, and the globe's 57 other SIDS, face desperate times. The seas are rising around them and will sooner rather than later swallow them whole. Unfortunately, and perhaps ironically, their only option is to seek help from larger, wealthier, higher-emitting countries who cannot relate to their existential crisis. While the tools to seek help may seem limited now, a bit of legal creativity and faith in states' commitment to international custom provides some hope for the Bahamas.