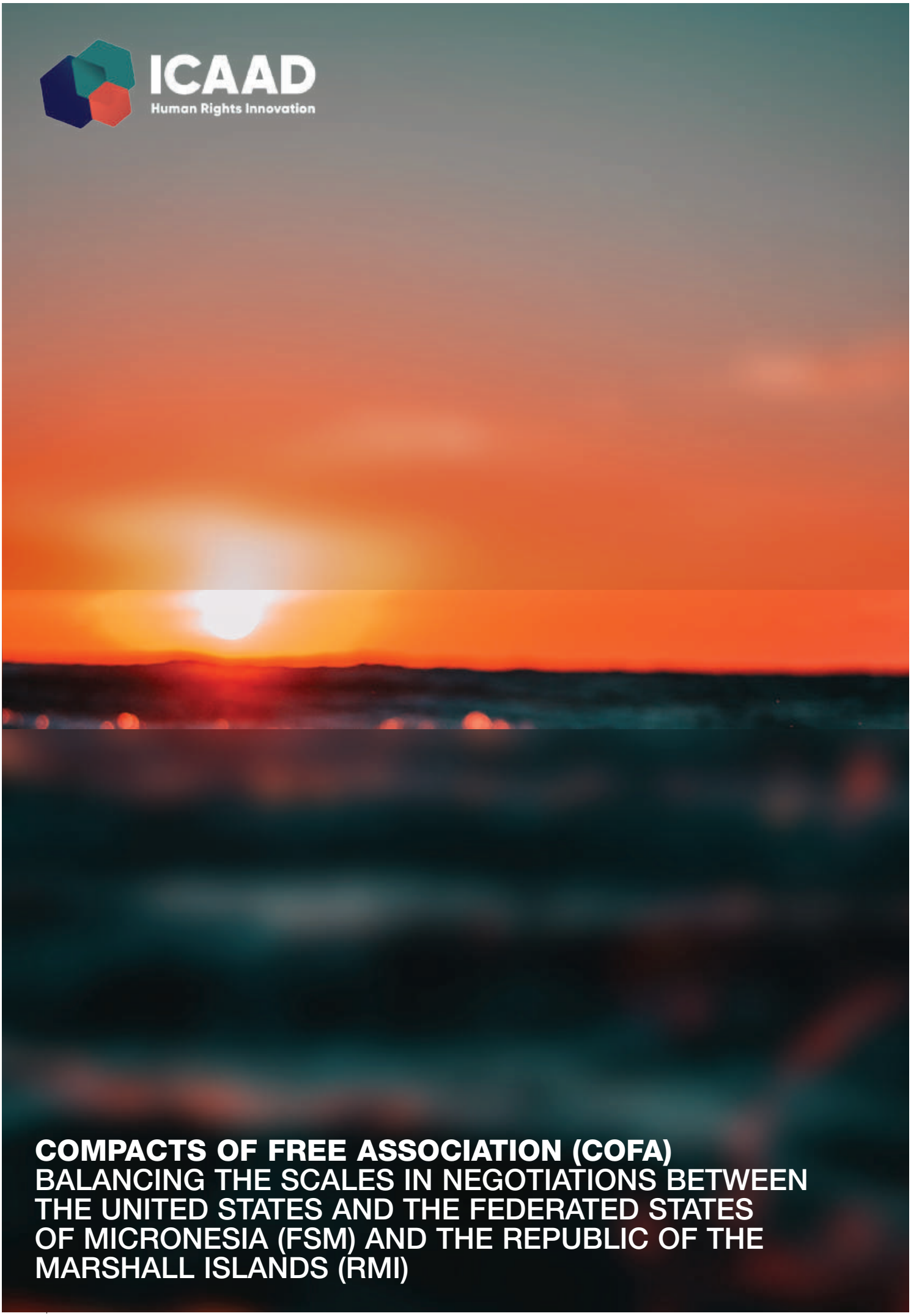


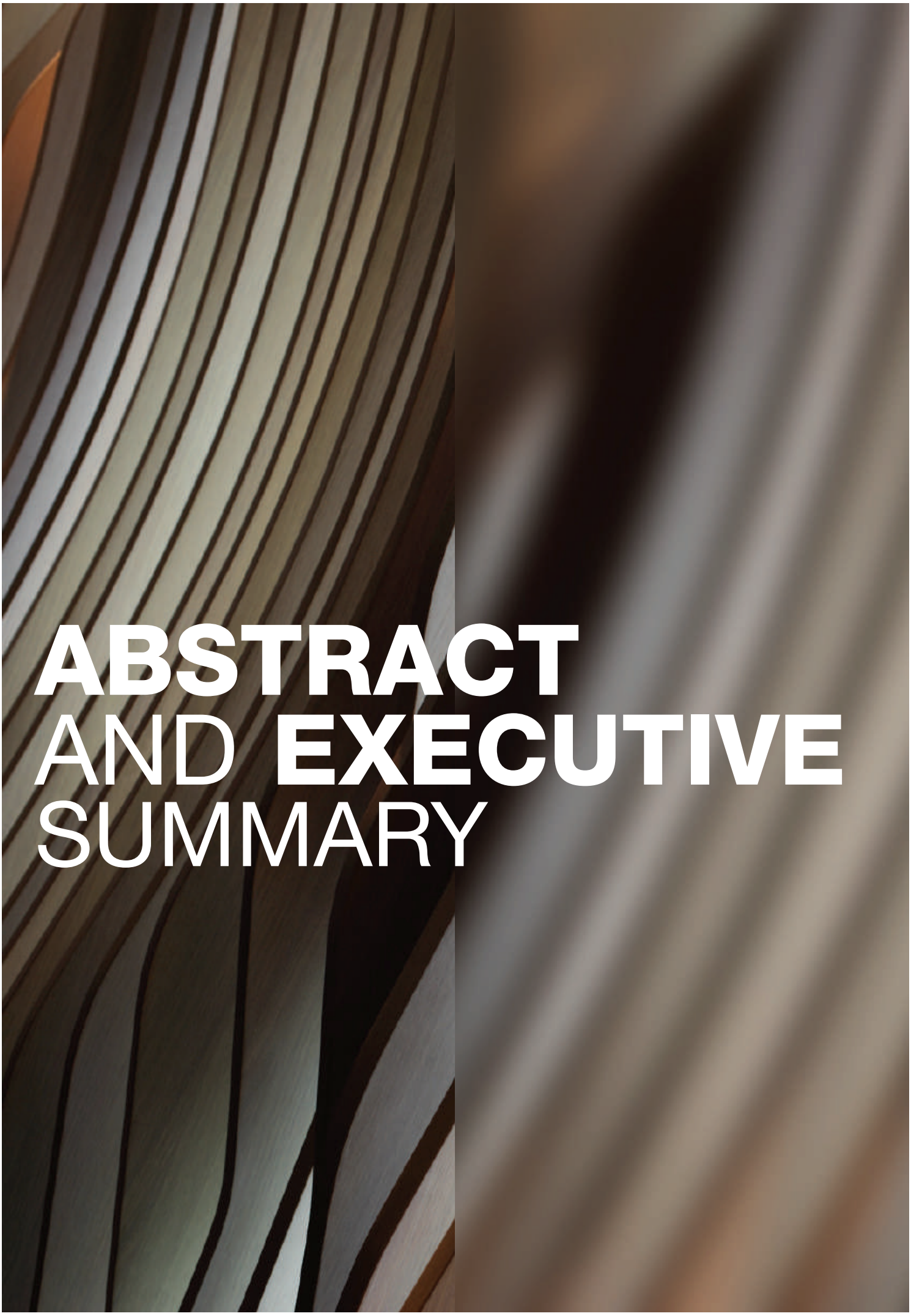
ICAAD
Human Rights Innovation

COMPACTS OF FREE ASSOCIATION (COFA)
BALANCING THE SCALES IN NEGOTIATIONS BETWEEN THE UNITED STATES AND THE FEDERATED STATES OF MICRONESIA (FSM) AND THE REPUBLIC OF THE MARSHALL ISLANDS (RMI)

CONTENTS

GLOSSARY

ACHRE	Advisory Committee on Human Radiation Experiments
ADB	Asian Development Bank
COFA	Compact of Free Association
DHS	Department of Homeland Security
DOD	U.S. Department of Defense
DOE	U.S. Department of Energy
DOI	U.S. Department of the Interior
EEZ	Exclusive Economic Zone
FAS	Freely Associated State(s)
FSM	Federated States of Micronesia
GAO	Government Accountability Office
JEMCO	Joint Economic Management Committee
JEMFAC	Joint Economic Management and Fiscal Accountability Committee
NCT	Nuclear Claims Tribunal
NDAA	National Defense Authorization Act
NEPA	National Environmental Protection Act
NNC	RMI National Nuclear Commission
PRWORA	Personal Responsibility and Work Opportunities Act
RMI	Republic of the Marshall Islands
SNAP	Supplemental Nutrition Assistance Program
SSI	Supplemental Security Income
TANF	Temporary Assistance for Needy Families
TTPI	Trust Territory of the Pacific Islands
UNCLOS	United Nations Convention on the Law of the Seas



ABSTRACT AND **EXECUTIVE** SUMMARY

ABSTRACT

In 2023, provisions of the Compact of Free Association (COFA) between the Federated States of Micronesia (FSM) and Republic of the Marshall Islands (RMI) and the U.S. are set to expire This agreement was established in 1986 with terms granting the U.S. military expansive access to the region in exchange for economic assistance and the right of citizens of the freely associated states (FAS) to live and work in the U.S., among other provisions. This assessment provides critical context for the negotiations by exploring the gaps concerning human rights and environmental protection.

EXECUTIVE SUMMARY

There are two Compacts of Free Association (COFA) with the U.S. in the northern Pacific. The first was established in 1986 between the governments of the Federated States of Micronesia (FSM), the Republic of the Marshall Islands (RMI), and the U.S. The second is between Palau and the U.S. which was eventually signed in 1994.

The key provisions of the agreements include U.S. military access and strategic denial; independent, self-governing status for the freely associated states (FAS); and economic assistance from the U.S. There are other provisions in the respective agreements that will be discussed throughout the following assessment. The economic assistance for the FSM-RMI COFA is set to expire in 2023 and the Palau economic assistance in 2024. This presents a unique opportunity to reassess the agreements as well as the relationships between the FAS and the U.S.

The issues related to the COFAs are complex, yet the common COFA narrative describes the agreement in terms of U.S. military access in exchange for economic assistance and for citizens of the FAS to live and work in the U.S. While “strategic” in terms of COFA issues is commonly used in relation to geopolitics, this strategic assessment will engage with issues related to human rights, migration, and the environment with a focus on the provisions and policies that perpetuate inequities.

U.S. relations with the FAS are often described transactionally and neglect the stark power imbalance between them. This strategic assessment aims to elevate other narratives pushed out of the conversations. Further, the opportunities for more equitable outcomes are not always clear, especially in international law. The legal analysis included in this assessment will provide insights into possible pathways for change in the negotiations and beyond.

While the negotiations themselves will be on behalf of national governments with appointed negotiators, it is important to note that these agreements have far-reaching effects on citizens and residents of all countries involved, meaning there are many important voices not present at the negotiations. Additionally, governments from all

countries and territories featured in this assessment have different agencies, mandates, and priorities.

This strategic assessment aims to provide a broad framework for understanding COFA equity issues around human rights and the environment. While not all topics detailed here will map onto the negotiations directly, they provide crucial context for understanding U.S. relations with the FAS. Additionally, with insights from key stakeholders and our law firm partner, Clifford Chance, which provided legal analysis on certain questions of immigration law, environmental law, the law of the seas, and nuclear reparations, the assessment concludes with re-imagining what equitable outcomes may look like in the future and pathways to achieve them.

This strategic assessment is intended to start and continue conversations with government representatives from the FAS and the U.S., community and NGO advocates, legal professionals, and the general public. With a broad intended audience, we have included the legal analysis in narrative form throughout the assessment as well as in chart form in the appendices.

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SUGGESTED CITATION

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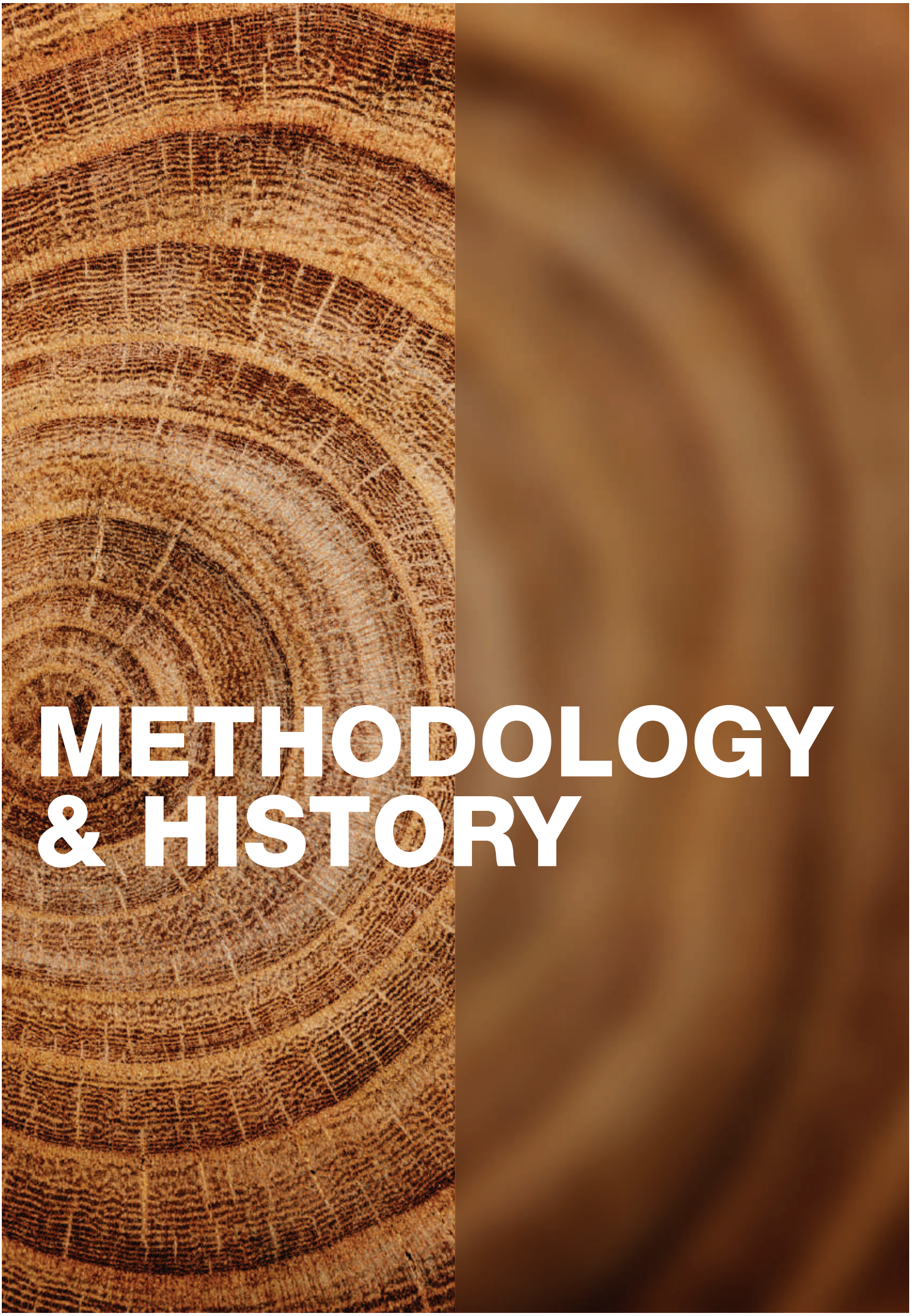


METHODOLOGY & HISTORY

METHODOLOGY

With a human rights framework and the climate crisis at the forefront of our minds, this strategic assessment will discuss the diverse possibilities around the FSM-RMI COFA. Most of the literature available on the topic is directly from U.S. bodies like the Government Accountability Office (GAO), or only covers a specific aspect of the COFAs like military access. Other resources investigate specific issues without space to consider the broader implications on the local and Indigenous populations, or they withhold or outright misrepresent information for colonial gain.

These gaps animated the desire to produce a strategic assessment (hereinafter assessment) that could raise the voices of and be accessible to a broader base of stakeholders. Conversations with stakeholders began in February 2019 with a policy brief outlining key themes from desk research.[1] Since then, in-person interviews and email/ virtual conversations helped build out and add to the key themes from the policy brief. A total of 31 organizations, government agencies/ representatives, and advocacy groups were represented, with over 85 individual collaborators.

- July 2019 in Washington, D.C.: 5 interviews
- November 2019 in Guam: 7 interviews
- December 2019 in Pohnpei, FSM: 10 interviews
- December 2019 in Majuro, RMI: 7 interviews
- December 2019 in Honolulu, Hawai'i: 2 interviews

The writing of this assessment was a combination of information shared by collaborators since February 2019 and desk research. The legal questions resulted from interviews with stakeholders, and the legal analysis on certain questions was done by our pro bono law firm partner, Clifford Chance. Collaborators were also given the option to review the assessment in its draft form, and several participated in that process. The recommendations here have been developed in conversation with collaborators which began with formal interviews and continued through the drafting process.

The theoretical framework of this assessment is grounded in human rights, as articulated in international human rights law, and environmental justice to include the complexities of geopolitics, migration, and climate change. It will become clear that the colonial nature of COFA relations continues to foster an unequal relationship privileging the U.S. which in many instances violates human rights and environmental justice. However, while borders are important and shape political realities, this assessment will center the collective responsibility of all stakeholders to uphold human rights and environmental justice. For ICAAD, this begins with international human rights law and extends to the systems analysis facilitated by our collaborators.

"… I still remember the rope. It's symbolic of growing up in the islands; I know the strong simple symbolism of ropes. I know what it takes to make ropes. I participated in making ropes and husking the coconut, burying it in the sand and beating and then drying it out and then weaving, pulling strands and watching my grandfather make it on . . . he uses his lap. So his lap is coarse from all of that. So he uses ashes from our cooking to smooth out his . . . before he makes. . . . So he uses this part of his leg when he creates that. And then when we make bigger ropes we make a lot of that and then I pull and pull. For me, the power that weaves all of that stuff, the time and energy it takes. I understand that very well and we try to do that. It's not an easy thing to try to connect people, but we're asking people to come together. Let's put our hand and be connected to the rope before we start this thing."

In honor and in memory of the great Micronesian scholar and activist, Dr. Joakim "Jojo" Peter.[2]

1. Thomas, E., *Compacts of Free Association: 2023-2024 Renewal Negotiations, Human Rights Brief* (Mar. 2019), *available at* https://icaad.ngo/2019/04/01/compacts-of-free-association-in-fsm-rmi-and-palau-implications-for-the-2023-2024-renewal-negotiations/
2. Lyons, P. & Tengan, T., *COFA Complex: A Conversation with Joakim "Jojo" Peter*, 67 American Quarterly 663 (Sept. 2015) at 677, available at https://doi.org/10.1353/aq.2015.0036.

HISTORY

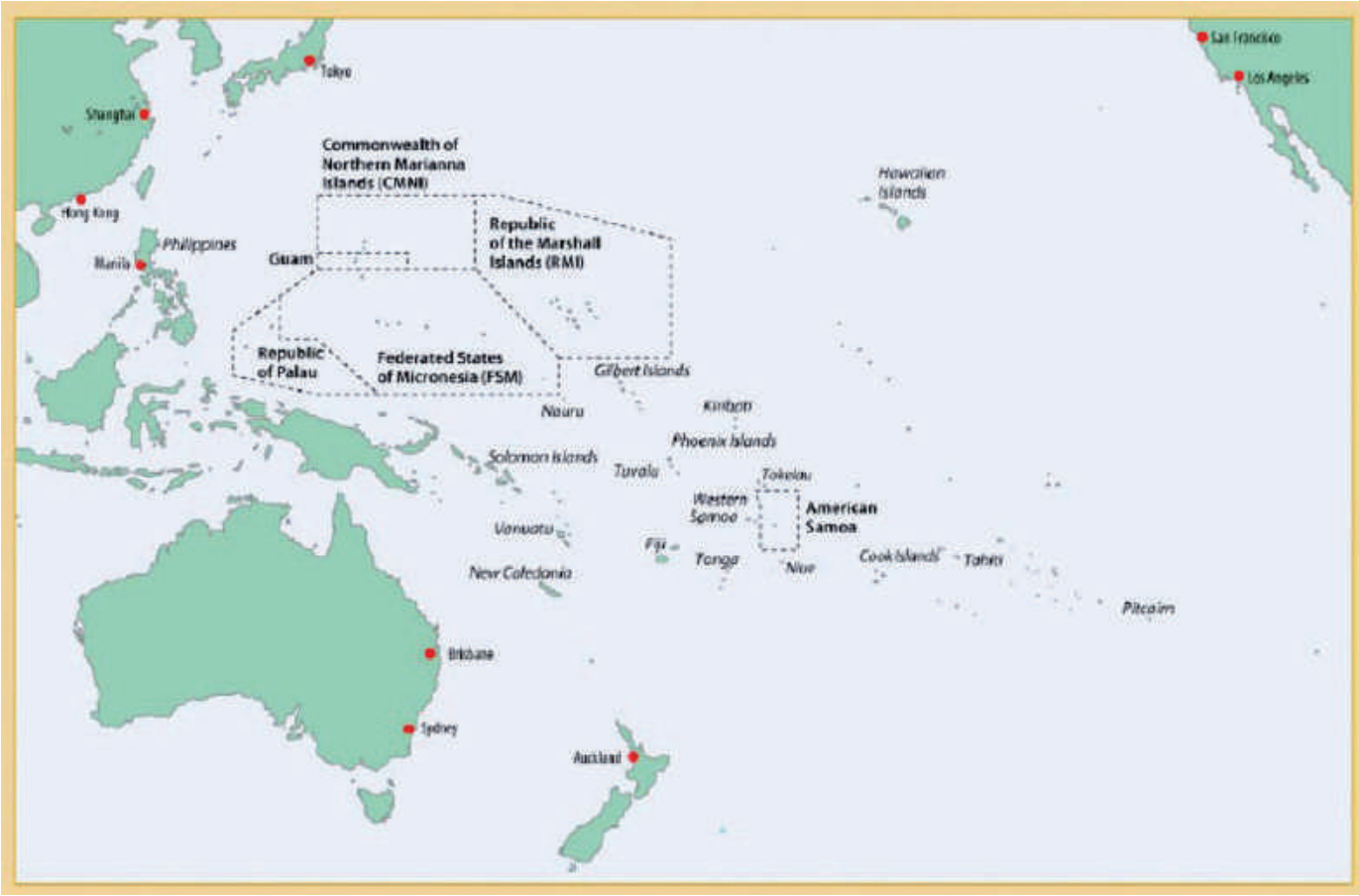
1900s **1914-1945** Japanese Colonial Administration	In the first half of the 20th century, islands in the northern Pacific region faced several forces of economic, political, and military colonization. After World War I, Japan controlled the region as a trust territory. While still a colonial power, the Japanese administration provided infrastructure and supported fisheries and agriculture.[3] During World War II, the region became the Pacific theater, subjected to some of the worst military destruction by both Japanese and American forces.
1947 Trust Territory of the Pacific Islands to the U.S	After World War II in 1947, the region, as the UN Trust Territory of the Pacific Islands (TTPI), was granted to the U.S. by the UN Security Council with no input from Micronesian communities.[4] As with other colonial relationships, the U.S. government had much to gain. This trusteeship gave the U.S. far-reaching authority in terms of land use, in which the U.S. government established that all land was eminent domain, but the agreement also required the U.S. administration to "promote the economic advancement and self-sufficiency of the inhabitants."[5] The U.S. administration maximized its military interests while largely neglecting these colonial responsibilities. The term colonialism speaks to the desires of the colonial power and the array of tactics used to secure those desires.
1946-1958 U.S. Nuclear Testing in the Marshall Islands **1950** Guam Organic Act establishes Guam as an unincorporated organized territory of the U.S. **1959** Hawai'i became a U.S. State	This loose arrangement allowed the U.S. to rapidly militarize the region. In the Marianas and the Marshall Islands, the U.S. military began seizing land and proceeded with military exercises and weapons testing.[6] As the Cold War raged on, the Marshall Islands became the site of the largest nuclear weapons testing program in the world, with over 67 weapons detonated and testing with results upwards of 1,000 times more powerful than the atomic bomb dropped on Hiroshima in addition to biological and chemical weapons tests.[7] The cost of the U.S. nuclear weapons testing program is difficult to capture due to its expansive destruction. At least six islands were entirely vaporized, and the debris polluted the land, air, and seas across the northern Pacific region during the nuclear testing period lasting from 1946 to 1958.[8] Despite the U.S. military knowing that thousands of Marshallese would be exposed to radioactive fallout, they moved many of them after the nuclear tests were complete and conducted experiments on them.[9]
1960s International Decolonization Movement	By 1961, the UN Mission to Micronesia drew attention to the U.S. colonial administration of the TTPI.[10] The U.S. had failed to redress the World War II war claims from bulldozing and shelling islands which stifled economic growth to a haunting degree.[11] While many Micronesians were considering the possibilities for self-government in the decolonization movement, the U.S. was considering how to secure military access to the region while appeasing the international community.[12]

3. Mink, P., *Micronesia: Our Bungled Trust*, 6 Tex. Int'l L. F. 181 (1970-1971) at 184, *available at* https://heinonline.org/HOL/LandingPage?handle=hein.journals/tilj6&div=16&id=&page=.
4. Bay-Hansen, C. D., *Power Geopolitics in the Pacific Age*, Inkwater Press (2011) at 179.
5. Mink, P., *Micronesia: Our Bungled Trust*, 6 Tex. Int'l L. F. 181 (1970-1971) at 183, *available at* https://heinonline.org/HOL/LandingPage?handle=hein.journals/tilj6&div=16&id=&page=.
6. Underwood, R., *The Changing American Lake in the MIddle of the Pacific*, Seminar at Georgetown University (Nov. 16, 2017), *available at* https://www.uog.edu/_resources/files/news-and-announcements/2017-2018/robert-underwood-the_changing_american_lake-111617.pdf.
7. Pevec, D., *The Marshall Islands Nuclear Claims Tribunal: The Claims of the Enewetak People*, 35 J. ON INT'L L. & POL'Y 221, 221 (2006).; Republic of the Marshall Islands v. U.S., No. 15-15636 (9th Cir. 2017), at 6.
8. Diaz, K., *The Compact of Free Association (COFA): A History of Failures*, Master's Thesis at the University of Hawai'i (Apr. 11, 2012) at 26, *available at* http://hdl.handle.net/10125/24265.
9. Barker, H. M. (2013) *Bravo for the Marshallese: Regaining Control in a Post-Nuclear, Post-Colonial World*, Wadsworth (2013) at 40.
10. Mink, P., *Micronesia: Our Bungled Trust*, 6 Tex. Int'l L. F. 181 (1970-1971), *available at* https://heinonline.org/HOL/LandingPage?handle=hein.journals/tilj6&div=16&id=&page=.
11. Mink, P., *Micronesia: Our Bungled Trust*, 6 Tex. Int'l L. F. 181 (1970-1971) at 189, *available at* https://heinonline.org/HOL/LandingPage?handle=hein.journals/tilj6&div=16&id=&page=.
12. Solomon, A. M., *The Solomon report: report by the U.S. Government Survey Mission to the Trust Territory of the Pacific Islands*, U.S. Government Survey Mission to the Trust Territory of the Pacific Islands (1963), *available at* https://trove.nla.gov.au/work/8319993.

1965 New Zealand and the Cook Islands establish a free association agreement **1969** Negotiations between Micronesian leaders and the U.S. begin **1974** New Zealand and Niue establish a free association agreement	At this time, the islands of Hawai'i had already become a state, and the U.S. had an opportunity to secure the entire region of the northern Pacific for U.S. interests. The U.S. saw[13] and continues to see[14] the concept of military strategic denial—the ability for the U.S. to deny military forces of other nations to the region—as a cornerstone of national security. This also limited the influence of other colonizing powers interested in partnering with these Large Ocean States. Negotiations for the future of the region began in 1969.[15] Micronesian leaders considered other political statuses in the Pacific and decided, given the U.S.'s unwillingness to consider full sovereignty, to push for free association with migration provisions similar to those that Niue and the Cook Islands have with New Zealand. The U.S. had only been concerned with self-determination insofar as it would quell international concerns about their colonial holdings. The agreements were an opportunity for the U.S. to maintain strategic influence in the region while supporting, in theory, the self-determination and economic self-sufficiency of FSM, RMI, and Palau. The free association agreements effectively ended the TTPI and granted independence to the island states. The agreements span government, economic, and defense relations between the U.S. and the FAS.
1986 COFA with the FSM and RMI is ratified **1987** Nuclear Claims Tribunal established **1996** PRWORA legislation strips COFA migrants of access to most public services in the U.S.	It took 17 years to determine this next step towards decolonization, and in 1986, the Compact with the FSM and RMI was ratified. Economic assistance from the U.S. began to flow in the areas of health, education, and infrastructure, and citizens of the FAS were able to live and work in the U.S. visa-free. The U.S. military also expanded its operations on the 11 islands in the RMI leased under the Military Use and Operating Rights Agreement (MUORA) attached to the COFA.[16] The Compact also included provisions for the past, present, and future redress of U.S. nuclear testing.[17] This led to the establishment of the Nuclear Claims Tribunal. Although nearly $2.4 billion was awarded in claims through the Tribunal, only a small fraction was paid out to claimants.[18] Since then, the RMI government has sought additional pathways for redress with little success as of yet.
2000-2003 Compact Amendment Negotiations	The original Compact was up for renewal negotiations before 2003, the events of which represent how relations between the U.S. and the FAS evolved.[19] The negotiations featured new paternalistic oversight measures for the economic assistance, blaming the lack of self-sufficiency on the FAS. Oversight committees were created as well as trust funds to further the aim of self-sufficiency.

13. *Id*.
14. Grossman, D., Chase, M. S., Finin, G., Gregson, W., Hornung, J. W., Ma, L., Reimer, J. R., and A. Shih, *America's Pacific Allies: The Freely Associated States and Chinese Influence*, RAND Corporation (2019), *available at* https://www.rand.org/pubs/research_reports/RR2973.html.
15. Temengil v. Trust Territory of Pacific Islands, 881 F. 2d, (1989).
16. Grossman, D., Chase, M. S., Finin, G., Gregson, W., Hornung, J. W., Ma, L., Reimer, J. R., and A. Shih, *America's Pacific Allies: The Freely Associated States and Chinese Influence*, RAND Corporation (2019), *available at* https://www.rand.org/pubs/research_reports/RR2973.html.
17. Compact of Free Association, Section 177.
18. In the Matter of the Alabs of Rongelap, et al. (2007) NCT No. 23-02440, 23-05443-B, 23-05445-B, 23-00501, at34.; The People of Bikini, et al. (2001) NCT No. 23-04134, at 45.; In the Matter of the People of Enewetak, etal., (2000) NCT No. 23-0902, at 45.; In the Matter of the People of Utirik, et al. (2006) NCT No. 23-06103, at34.; Dijken, S., et al. *Monetary Payments for Civilian Harm in International and National Practice*,AMSTERDAM INT'L L. CLINIC (2013) at 44-46, *available at* https://civiliansinconflict.org/wp-content/uploads/2017/11/Valuation_Final_Oct_2013pdf.pdf.
19. This version of the Compact is the present one and will be referred to as the amended Compact or COFA when referring specifically to changes from the initial agreement.

2014 Korab v Fink Quest Ninth Circuit Court Case	The original Compact was up for renewal negotiations before 2003, the events of which represent how relations between the U.S. and the FAS evolved.[19] The negotiations featured new paternalistic oversight measures for the economic assistance, blaming the lack of self-sufficiency on the FAS. Oversight committees were created as well as trust funds to further the aim of self-sufficiency. Since then, the failure of the U.S. to respond to historical injustices has led to ongoing injustices. The exclusion of COFA migrants from most social services including Medicaid in 1996 and the consistent neglect for any non-military concerns in U.S.-FAS relations are only part of the story.
2020 Compact negotiations begin virtually with the FSM and RMI	The historical context for the Compacts of Free Association is integral to understanding the current status quo. While the U.S. position in the region has always been driven by military interests, empty and exploitative promises of self-sufficiency have resulted in dependency and neglect. This assessment frames the Compact's history and surrounding politics in order to understand the current violations of human rights and environmental justice.



Credit: Pacific Regional Cancer Coalition


COFA
POLITICS

COFA POLITICS

The politics around the Compacts provide additional context for understanding the dynamics of the negotiations. Within the U.S. government, the FAS are administered under the Department of the Interior (DOI) despite no longer being formal colonies of the U.S. While the DOI is responsible for funding and administration, the Department of State is also involved because relations with the FAS are still relations with a foreign country. To complete the triangle of the main U.S. government entities involved, the Department of Defense (DOD) is involved because of their interests and presence in the Pacific and the FAS.

The dynamics among these three departments help to explain some of the rhetoric coming from the U.S. government. Because the DOI is tasked primarily with finding a way to fulfill the economic assistance in the budget, they work through the Senate Committee on Energy and Natural Resources. Turnover in the committee has resulted in a lack of institutional knowledge and understanding of the historical and current significance of the COFAs to the U.S. as well as the U.S. obligations in the region.

Pressure on budgets and the mandatory nature of COFA funding has also delayed promised funding as evidenced in the eight year delay in fulfilling the economic assistance to Palau per the Compact. It took the 2018 National Defense Authorization Act (NDAA) to finally appropriate funding in the Palau COFA. In this case, the DOD fulfilled the U.S.'s obligations under the agreement as opposed to DOI.

Regarding the 2023 expiration of economic assistance for the FSM-RMI COFAs, the DOI initially maintained the talking point that there would not be any economic assistance after that.[20] However, in July 2019, an interagency Senate hearing with all three departments revealed the crux of U.S. interests and the risk of ending economic assistance.

The DOD's military interests in the region paved the way, and the State Department followed knowing that diplomacy must follow in order to maximize military interests. Since Secretary of State Mike Pompeo's listening tour in the FAS at the end of 2019, it became clear that the U.S. position has since changed to becoming more open to renewing economic assistance. Yet, the problem remains that the funding still has to be authorized and appropriated by Congress.

20. Interviews in Pohnpei and Majuro in 2019.

Public and political opinions on the agreements are usually embedded with ignorance of the history and damage the U.S. has caused, as well as xenophobic racism leading to blanket anti-immigrant positions.[21] In U.S. states and territories, there is a growing network of advocates called the COFA Community Leadership Action Network (COFA-CLAN) speaking out for justice and equity for FAS citizens living in the U.S.

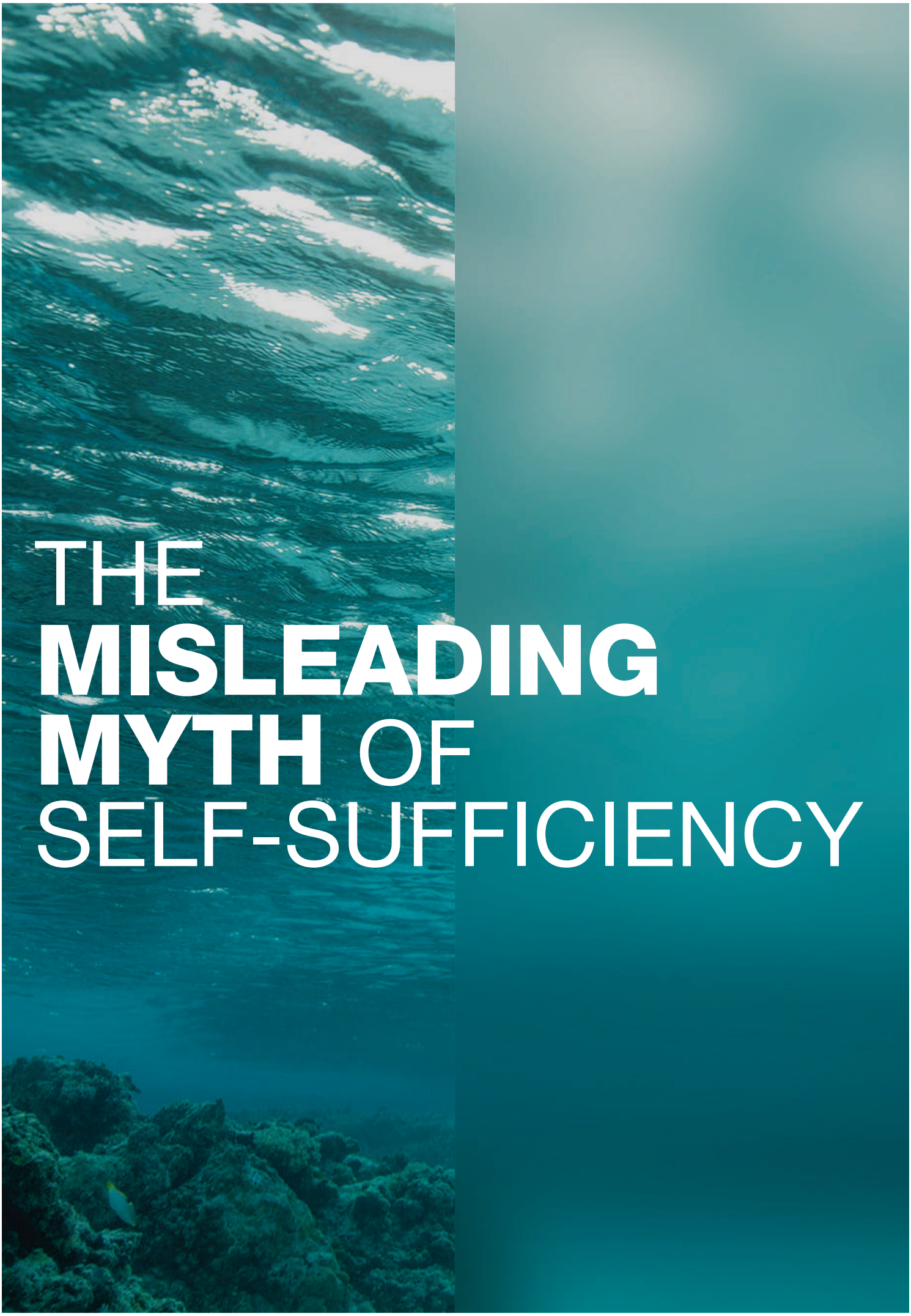
In the FAS, it is mainly high level government officials involved with COFA issues, and they tend to be appointed by the government in power at that given time. In terms of funding, as an example, the FSM Congress can request funding for meaningful public projects to the oversight committee, but the committee has the final say. Despite the oversight barriers, political buy-in to the Compacts remains high at the top government levels. Relying on U.S. economic assistance for public projects, many Congressional representatives in the FSM use national revenue for patronage projects with their constituents in order to get re-elected, leaving little incentive to rely more on national revenue as opposed to U.S. economic assistance.[22] Many other community and government leaders are affected by Compact issues, a few of which will be discussed throughout this assessment.

In terms of civic participation, the Compacts are not taught in schools in the FAS, and often domestic issues take precedence in politics. When consultations with government agencies were done for this round of negotiations in the FSM, the Compact itself remained the starting point. As is often difficult when discussing international agreements, civic participation is low. However, civic participation in even the COFA agreements is not without precedent.

The Palau Compact, while not the focus of this report, required several referenda and several different leaders to finally pass in 1994, notably eight years after the FSM-RMI Compact was ratified. The proposed U.S. military access was contentious, and 22 Palauan women brought forth a case supporting the original Constitution of Palau which would deny U.S. military access to Palauan land, water, and airspace. Against U.S. political pressure and the consequent pressure from the U.S.-backed Palau government, their advocacy managed to hold off the Compact for eight years, and the women were consequently nominated for the Nobel Peace Prize in 1988.[23]

A report from the RAND Corporation commissioned by DOD highlights the current geostrategic dynamics at play.[24] The report highlights Chinese interests in Pacific development projects and diplomacy centered on security and geopolitical influence. China's initiatives in the Pacific are also aimed to reduce Taiwan's influence.[25] Already in 2019, two of Taiwan's allies, Kiribati and the Solomon Islands, turned to China. Palau and the RMI are two of Taiwan's 14 remaining allies.[26] Concern about the influence of China is a powerful issue for the U.S., as the U.S. does not intend on losing its hegemony in the region.

21. Interviews in Washington, D.C. in 2019.
22. Interviews in Pohnpei in 2019.
23. Bedor, J. R., *Palau: From the Colonial Outpost to Independent Nation*, (2015) at 276.
24. Grossman, D., Chase, M. S., Finin, G., Gregson, W., Hornung, J. W., Ma, L., Reimer, J. R., and A. Shih, *America's Pacific Allies: The Freely Associated States and Chinese Influence*, RAND Corporation (2019), *available at* https://www.rand.org/pubs/research_reports/RR2973.html.
25. *Id*. at 24.
26. Four are in the Pacific region including Palau, RMI, Tuvalu, and Nauru. Kiribati and Solomon Islands turned to China in 2019. See Shattuck, T. J., *The Race to Zero?: China's Poaching of Taiwan's Diplomatic Allies*, 62 Orbis 334 (2020), *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7102519/#fn0020.



THE **MISLEADING MYTH** OF SELF-SUFFICIENCY

THE MISLEADING MYTH OF SELF-SUFFICIENCY

The key provisions being negotiated this round are related to economic assistance, which is set to expire in 2023. In the amended Compact, there were several measures added to contribute to the idea of self-sufficiency for the FAS. The idea of self-sufficiency was tailored specifically around the U.S.'s economic obligations, with the aim, in theory, of ending economic assistance from the U.S. in 2023. The U.S.'s reliance on the FAS for military access and strategic denial, however, will continue in perpetuity[27] so long as the Compacts are valid. These dynamics help explain how the concept of self-sufficiency functions in U.S.-FAS relations.

In 1963, Anthony Solomon, a member of then-U.S. President Kennedy's staff, reported on the strategy to maximize U.S. interests in Micronesia.[28] By increasing economic assistance to the Trust Territory, he argued their loyalty would be guaranteed as a result of economic dependency.[29] The strategy has been successful in that the economic assistance provided has not been enough to support self-sufficiency and was likely never intended to do so.

Economic dependency on the U.S. was the central strategy to ensure the longevity of U.S. military access to the region. However in 2002, U.S. State Department official Dr. John Fairlamb indicated a shift in priorities.[30] Instead of advocating for ongoing economic dependency, going into the amendment negotiations, the U.S.'s clear position was to promote the self-sufficiency of the FAS in order to end U.S. economic obligations at the 2023 expiration.

In order to achieve these ends, the amended Compact used the Compact Trust Fund as well as new forms of U.S. oversight and paternalism. The underwhelming success of the initial Compact in terms of economic development was blamed on a lack of accountability and oversight to the spending of funds by FAS governments. This attribution contributes to the myth of self-sufficiency and neglects the ways in which underdevelopment was maintained.

27. Compact of Free Association, Article V.
28. Solomon, A. M., *The Solomon report: report by the U.S. Government Survey Mission to the Trust Territory of the Pacific Islands, U.S. Government Survey Mission to the Trust Territory of the Pacific Islands* (1963), *available at* https://trove.nla.gov.au/work/8319993.
29. *Id.*
30. Fairlamb, J., *Compact of Free Association Negotiations: Fulfilling the Promise*, (Jun. 2001) *available at* https://www.fsmgov.org/comp_per.html

Contrary to the U.S.'s public promotion of economic self-sufficiency for the FAS, U.S. policy in the region has led to and sustains the current state of underdevelopment. It did not have to be this way. Prior to WWII, despite the harmful effects of colonialism, Japanese control fostered relative prosperity with fishing, sugar, pearl, and phosphate industries as well as infrastructure.[31] These gains were lost with the destruction from WWII and U.S. nuclear testing followed by subsequent neglect and isolation by the U.S. administration.

Despite the U.S. government's obligations under the Trust Territory agreement to promote self-sufficiency, the administration was primarily concerned with military endeavors. Paying barely enough to keep the colonial governments intact in the Trust Territory, the U.S. government only started paying attention after a damning UN report drew attention to the poor conditions in the islands in 1961.[32]

The report highlighted that the U.S. had not paid out the Micronesian war claims for damage caused in WWII, and even when they did, they gave compensation only to certain land owners and did not allow Micronesians to determine how it would be disbursed.[33] The U.S. colonial government had also severely limited the power of the Congress of Micronesia which had no real power to consider the needs of Micronesians.[34] Moreover, the U.S. severely stunted the economic development of the Trust Territory through:

- Tariff barriers against the sale of Trust Territory products in the U.S.;
- Colonial government single copra (coconut kernels for oil extraction) market and price stabilization;
- U.S. tariff against the sale of Micronesian fish;
- Undermining of subsistence agriculture through the promotion of U.S. imported foodstuffs;
- General discouragement of tourism due to military restrictions;
- Public works and infrastructure contracts given to U.S. companies using outside labor;
- Military and atomic weapons testing involving relocation, destruction, and contamination.[35]

Although these practices began over half a century ago, they have had long-term impacts, and similar practices continue to the present. South Korean development economist, Ha-Joon Chang, describes these neoliberal practices as "kicking away the ladder."[36] High income countries institute policies beneficial to themselves while redefining the pathway of economic development in underdeveloped countries. For example, the theory that free trade is the pathway to development largely fails to explain the trade policies of high income countries. Paradoxically, underdeveloped countries are often excluded from free trade treaties and practices in key industries anyway, as seen in the trade policies under the TTPI administration.

31. Mink, P., *Micronesia: Our Bungled Trust*, 6 Tex. Int'l L. F. 181 (1970-1971) at 184, *available at* https://heinonline.org/HOL/LandingPage?handle=hein.journals/tilj6&div=16&id=&page=.
32. UN Security Council, *Report of the Trusteeship Council to the Security Council on the Trust Territory of the Pacific Islands Covering the Period from 20 July 1961 to 16 July 1962* (Jul. 19, 1962), https://undocs.org/S/5143.
33. Mink, P., *Micronesia: Our Bungled Trust*, 6 Tex. Int'l L. F. 181 (1970-1971) at 189, *available at* https://heinonline.org/HOL/LandingPage?handle=hein.journals/tilj6&div=16&id=&page=.
34. *Id*.
35. Smith-Morris, M., *Domination and Resistance: The United States and the Marshall Islands During the Cold War*, University of Hawaii Press (2016) at 75-102.
36. Chang, Ha-Joon, Kicking Away the Ladder, Anthem Press (2002).

This inconsistency continued through the lending and policy practices of the international financial institutions (IFIs) that gained momentum in response to the Third World debt crisis of 1982, namely the World Bank, the Asian Development Bank (ADB), and the International Monetary Fund (IMF). The conditions and policy prescriptions from these institutions shared some common goals including privatizing major industries, reducing protections of domestic industries, reducing regulations on labor markets and foreign investment, and restructuring and minimizing the public sector.[37] These models also fundamentally considered environmental harm to be an economic externality as opposed to a real cost. The authority of the IFIs made these the norms of broader economic governance. A 2019 multivariate regression analysis of 135 countries from 1980 to 2014 found that these policy reforms led to an increase in economic inequality, not the reduction of poverty they had promised.[38]

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During the 1990s, the FSM and RMI joined the World Bank, which has been under U.S. leadership since its inception, and received development assistance from the ADB.[39] In evaluating the ADB's role in the FSM and RMI, the lack of poverty reduction was attributed to public sector involvement in commercial activities, a high minimum wage, and customary land tenure which discouraged foreign investment.[40] In 1996, the FSM began a Public Sector Reform Program through the ADB in order to minimize the role of the public sector.[41] In the RMI, IFIs pushed similar policies, and the World Bank encouraged the RMI to reduce subsidies to the public airline, Air Marshalls.[42] Both the FSM and RMI are now entirely dependent on United Airlines, a major U.S. airline, for mobility.

In the initial Compact, the promise of economic assistance to bolster the education, healthcare, and environment sectors seemed to be a promising pathway to self-sufficiency. The Compact Trust Funds added an additional sense of security as well. The original goal of the agreements was to support the FSM, RMI, and Palau with the economic assistance that would taper off once self-sufficiency was achieved. However, since the COFAs were implemented, economic growth has not followed expected trajectories. In 2003, U.S. negotiators attributed this to a lack of accountability and

37. Babb, Sarah, *The Social Consequences of Structural Adjustment: Recent Evidence and Current Debates*, 31 Annual Review of Sociology 199 (2005), *available at* https://doi.org/10.1146/annurev.soc.31.041304.122258.
38. Forster, T., et al., *How structural adjustment programs affect inequality: A disaggregated analysis of IMF conditionality*, 1980-2014, 80 Social Science Research 83 (2019), *available at* https://doi.org/10.1016/j.ssresearch.2019.01.001.
39. World Bank, *Evaluation of World Bank Assistance to Pacific Member Countries, 1992-2002*, (2005) at 21, *available at* http://documents1.worldbank.org/curated/en/595271468032973083/pdf/356270PAPER0Ev101OFFICIAL0USE0ONLY1.pdf.
40. *Id*. at 51, 55.
41. *Id*. at 55.
42. Kerslake, M. T., *Maloafua: Structural Adjustment Programmes: The Case of Samoa,* Doctoral Thesis at Massey University (2007), *available at* https://mro.massey.ac.nz/bitstream/handle/10179/1423/02_whole.pdf.

oversight of funds.[46] They failed to mention the influence of neoliberal structural adjustment policies, like the Public Sector Reform Program, and the barriers to trade and domestic industry development that materially stunted the FAS's capacity to develop self-sufficiency on the U.S.'s terms.

The problem is that the goal of self-sufficiency by 2023 is both ahistorical and unreasonable especially for small Pacific islands. Other countries, particularly former colonies, have not followed this path. Further, the expectation also must be different for the FAS considering how the U.S. colonial administration stunted growth for over 40 years even before the Compact.[47] That was neglected in the 2003 amendment negotiations which instead created new barriers to accessing funding.

The 2003 amended agreement for the FSM and RMI established oversight committees to address these concerns. The Joint Economic Management Committee (JEMCO) in FSM and the Joint Economic Management and Fiscal Accountability Committee (JEMFAC) in RMI were created consisting of three U.S. representatives and two from the FSM or RMI, respectively.[48] Although accountability is an important goal for any funding mechanism, the committee functions more as U.S. oversight than a supportive partnership.[49]

JEMCO and JEMFAC require quarterly performance reports on top of complicated application processes. As many other small islands, the FAS face human resources capacity issues which make these requirements debilitating. In light of these challenges, both the FSM and RMI have sought economic assistance elsewhere including the World Bank, ADB, and through bilateral agreements with countries including China, Taiwan, and Japan.

Economic assistance should be tailored to support the domestic economies of the FAS in a way that meaningfully promotes their political autonomy.[50] Past actions have worked in the opposite direction to erode trust between the U.S. and FAS. This also occurs inside of the context of unpaid nuclear claims for the islands ravaged by nuclear weapons testing by the U.S., the continued cultivation of import markets in the FAS for the U.S., outmigration, and the increased difficulty of accessing economic assistance funding. The FAS have pivoted in many directions looking to diversify their economies, however, challenges remain.

While some describe the funding the U.S. provides the FAS as aid, others describe it as payments in reciprocity for the U.S.'s military benefits.[51] If the Compacts are to continue without economic assistance, the U.S. would be retiring their small responsibility to compensate for the manufactured underdevelopment of the islands.

United Airlines in the FAS

Given the remoteness of the FAS, air travel is crucial to mobility between islands and internationally. National airlines have been largely pushed out in favor of the major U.S. airline, United. This has led to challenges, for example, when there is not enough demand for United to maintain a certain route even though it is important economically to the FAS, particularly tourism and the shipping of goods. In 2018, United closed the route from the island of Yap to Palau which forced passengers interested in this route to transit via Guam which is both inconvenient and far more expensive.[43]

The U.S. government being unable to sway United forced the FSM government to cover the route on the FSM-government subsidized Caroline Islands Air with a plane donated by the Chinese government.[44] United has also caused problems for staff from the FAS. Growing union efforts have called for higher pay, greater job security, and sufficient health insurance coverage. The airline had intimidated workers and pushed back against these efforts putting staff from the FAS in a precarious position due to lack of social safety net based on COFA migrant status while in the U.S.[45] Further, the monopoly United carries over air travel in the region allows for high and inhibiting flight costs especially considering GDP per capita in the FAS.

43. McClure, J., *Yap faces an air service meltdown*, Pacific Island Times (Jan. 3, 2018), https://www.pacificislandtimes.com/single-post/2018/01/02/Yap-faces-an-air-service-meltdown.
44. McClure, J., *Caroline Islands Air to take over Yap-Palau route*, Pacific Island Times (Jan. 4, 2018), https://www.pacificislandtimes.com/single-post/2018/01/04/Caroline-Islands-Air-to-take-over-Yap-Palau-route
45. Walker, C., *Will Unionizing Effort Leave Denver's Pacific Islanders High and Dry*?, Westword (Apr. 25, 2018), https://www.westword.com/news/united-airlines-fighting-unionizing-efforts-of-pacific-islanders-in-catering-kitchen-10228648
46. Fairlamb, J., *Compact of Free Association Negotiations: Fulfilling the Promise*, (Jun. 2001) *available at* https://www.fsmgov.org/comp_per.html
47. Hezel, F. X., *Is That the Best You Can Do? A Tale of Two Micronesian Economies*, Pacific Islands Policy (2006), *available at* http://www.micsem.org/pubs/articles/economic/frames/taleoftwofr.htm.
48. Underwood, R., *The Amended U.S. Compact of Free Association with the Federated States of Micronesia and the Marshall Islands: Less Free, More Compact*, East-West Center (2003) at 3.
49. Asian Development Bank model is more collaborative which involves ADB staff based in the islands functioning more as coaches (*See id.*) Department of Interior staff responsible for funding oversight are currently based in Honolulu and Washington, D.C.
50. Hezel, F. X., Is That the Best You Can Do? *A Tale of Two Micronesian Economies*, Pacific Islands Policy (2006), *available at* http://www.micsem.org/pubs/articles/economic/frames/taleoftwofr.htm.
51. Henderson, J., *The Politics of Association: A Comparative Analysis of New Zealand and United States Approaches to Free Association with Pacific Island States*, Victoria University of Wellington Law Review 77 (2002) at 85, *available at* https://www.wgtn.ac.nz/law/research/publications/about-nzacl/publications/special-issues/hors-serie-volume-ii,-2002/henderson.pdf


NUCLEAR
JUSTICE

NUCLEAR JUSTICE

After World War II, the Marshall Islands became testing grounds for some of the most powerful nuclear weapons in the world. The testing, which took place from 1946 to 1958, occurred mainly in the RMI and included the detonation of 23 atomic and hydrogen bombs at Bikini Atoll and 43 atomic and hydrogen bombs at Enewetak Atoll with fallout spreading throughout the region.[52] In addition to vaporizing at least six islands and displacing hundreds of residents, the U.S. government ran highly unethical human radiation experiments, withheld information that would force the U.S. to remedy some of the destruction caused, and paid out only a fraction of the claims awarded by the established Nuclear Claims Tribunal.

The harm caused by the U.S. nuclear weapons testing program in the RMI is expansive, ongoing, and remains largely without remedy by the U.S. This section expands upon the concept of nuclear justice with a specific focus on the diplomatic, legislative, and legal efforts for redress as well as potential pathways forward. The RMI National Nuclear Commission (NNC) defines nuclear justice under five pillars including compensation, healthcare, environment, national capacity, and education and awareness but makes it clear that:

> Nuclear justice means different things to different people. Justice isn't only about numbers and programs. It is also about the need to heal ourselves and our land. Justice is what makes us feel strong and emboldened to act, and the ability to teach our children about their unique history. Justice can be the small acts of reconnecting people's names with their histories, so they are not just an AEC/DOE test subject number, but the grandparent, sibling, cousin, auntie, or uncle of a family. And justice can be the large acts of securing adequate funding to pay the large awards adjudicated by Tribunal judges or securing a cancer care facility that can provide every family with care, regardless of whether they can prove their location on just one day (e.g. March 1, 1954) of a 12-year nuclear weapons testing program.[53]

52. Georgescu, C., *Report of the Special Rapporteur on the Implications for Human Rights of the Environmentally Sound Management and Disposal of Hazardous Substances and Wastes*, UN HRC (2012) at 1, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G12/163/76/PDF/G1216376.pdf?OpenElement.
53. Marshall Islands National Nuclear Commission, *Nuclear Justice for the Marshall Islands A Strategy for Coordinated Action FY2020-FY2023*, (2019) at 10.

Although the U.S. military took some steps to move residents out of harm's way during the testing,[54] the impact on communities is embedded in historical memory, and the lack of reparations has continued to affect the RMI. In addition to displacement and its long-term effects, the radiation has had long-lasting health impacts on the population. A high proportion of cancer diagnoses in the Marshall Islands are related to radiation,[55] and many women faced reproductive issues including bearing children with congenital anomalies.[56] Food and water sources were also contaminated, forcing many Marshallese to become dependent on food imports from the U.S. As opposed to traditional food sources and agriculture, food imports are linked to higher rates of obesity, which is a risk factor for further negative health outcomes.[57]

In an attempt to provide final redress for the damage caused, the U.S. accepted responsibility for some of the harm in Section 177 of the COFA. This section also referred to and incorporated a side agreement that would constitute "adequate settlement of all such claims which have arisen in regard to the Marshall Islands and its citizens and which have not as yet been compensated or which in the future may arise."[58] Designed to be the sole recourse for claimants against the U.S. government, the Section 177 Agreement provides for the establishment of a Nuclear Claims Tribunal (NCT), which was intended to remedy all past, present, and future effects of the U.S. nuclear testing program.[59] The US provided $150 million to be paid in accordance with the terms of the settlement. Congress authorized these funds when it approved the COFA agreement.

In 1987, pursuant to the Section 177 Agreement, the Marshall Islands legislature, the Nitijela, passed the Nuclear Claims Tribunal Act, formally establishing the NCT. Citizens of RMI brought numerous claims to the NCT.[60] Over the years, the NCT awarded damages for personal injuries and property damage of nearly $2.4 billion[61] which far exceeded the $150 million provided for in the Section 177 agreement.[62] In fact, the Nuclear Claims Tribunal ran out of funds in 2010. Many individuals whose claims were awarded have died without receiving compensation. Compared to the nearly $1.2 trillion that will be spent on modernizing the U.S. nuclear forces, the payout for remaining awarded claims from the Nuclear Claims Tribunal would be minuscule.[63]

Further, the Section 177 Agreement denoted only four atolls that would be compensated and included in the nuclear healthcare program (Bikini and Enewetak as the ground zero locations and Rongelap and Utrik as communities downwind from the Bravo event on March 1, 1954). This excluded the numerous other atolls contaminated

54. During the largest and most powerful test, Castle Bravo, the atoll of Rongelap was intentionally not evacuated in order to run the Project 4.1 medical study on the effects of such radiation. Smith-Morris, M., *Domination and Resistance*: *The United States and the Marshall Islands During the Cold War*, University of Hawaii Press (2016) at 75-102.
55. National Institutes of Health, *Estimation of the Baseline Number of Cancers Among Marshallese and the Number of Cancers Attributable to Exposure to Fallout from Nuclear Weapons Testing Conducted in the Marshall Islands*, Nuclear Claims Tribunal (2004), https://web.archive.org/web/20131016002503fw_/http://www.nuclearclaimstribunal.com/NCI_Report_92804.pdf.; Imaizumi, M., et al., *Radiation Dose-Response Relationships for Thyroid Nodules and Autoimmune Thyroid Diseases in Hiroshima and Nagasaki Atomic Bomb Survivors 55-58 Years After Radiation Exposure*, 295 J. OF AM. MED. ASSOCIATION 1011 (2006) at 1011, *available at* https://doi.org/10.1001/jama.295.9.1011.; Simon, S. L., et al., Radiation Doses and Cancer Risks in the Marshall Islands Associated with *Exposure to Radioactive Fallout from Bikini and Enewetak Nuclear Weapons Tests*: Summary, 99 HEALTH PHYSICS 105 (2010) at 105, available at https://doi.org/10.1097/hp.0b013e3181dc523c.
56. See Public Comment by Glenn Alcalay in Advisory Committee on Human Radiation Experiments, (Mar, 15, 1995), available at https://nsarchive2.gwu.edu/radiation/dir/mstreet/commeet/meet12/trnsc12a.txt.
57. Lin, T. K., et al., *The Effect of Sugar and Processed Food Imports on the Prevalence of Overweight and Obesity in 172 Countries*, Globalization & Health (2018) at 11, *available at* https://doi.org/10.1186/s12992-018-0344-y.
58. COFA was enacted into US law by 48 U.S.C. § 1901.
59. Approval of U.S.-FSM Compact of Free Association and the U.S.-RMI Compact of Free Association, 48 U.S.C. § 1921(177) (2006).
60. See, e.g., In the Matter of the People of Enewetak, et al., NCT No. 23-0902, Decision and Order, September 23, 1996.
61. In the Matter of the Alabs of Rongelap, et al. (2007) NCT No. 23-02440, 23-05443-B, 23-05445-B, 23-00501, at34.; The People of Bikini, et al. (2001) NCT No. 23-04134, at 45.; In the Matter of the People of Enewetak, etal., (2000) NCT No. 23-0902, at 45.; In the Matter of the People of Utirik, et al. (2006) NCT No. 23-06103, at34.; Dijken, S., et al. *Monetary Payments for Civilian Harm in International and National Practice*, AMSTERDAM INT'L L. CLINIC (2013) at 44-46, *available at* https://civiliansinconflict.org/wp-content/uploads/2017/11/Valuation_Final_Oct_2013pdf.pdf
62. For a thorough summary of the NCT cases, see Dick Thornburgh, The Nuclear Claims Tribunal of the Republic of the Marshall Islands: An Independent Examination and Assessment of Its Decision-Making Processes (January 2003), available at https://www.bikiniatoll.com/ThornburgReport.pdf ("Thornburgh Report").
63. CBO, *Approaches for Managing the Costs of U.S. Nuclear Forces, 2017 to 2046*, (2017), *available at* https://www.cbo.gov/system/files/115th-congress-2017-2018/reports/53211-nuclearforces.pdf.

with fallout,[64] of which, many residents were not informed or evacuated and/or were exploited in the human radiation experiments—details of which were revealed when the Advisory Committee on Human Radiation Experiments (ACHRE) declassified thousands of documents pertaining to the testing program in 1994.[65]

Prior to the provision for the creation of the NCT in the COFA, several cases were initiated in the Court of Federal Claims regarding claims for nuclear testing conducted by the federal government, which were consolidated into three suits based on the claimants—Juda I, Peter I, and Nitol I.[66] The Juda line of cases involved residents of the Bikini Atoll in RMI; the Peter cases involved residents of the Enewetak Atoll in RMI; and the Nitol cases involved residents of atolls and islands in RMI that were not used as atomic test sites. After the establishment of COFA, the Court of Federal Claims dismissed the surviving claims in all three cases, holding that the Section 177 Agreement stripped courts of jurisdiction over nuclear claims.[67] Plaintiffs appealed arguing that the claims should not be dismissed and that the court had subject matter jurisdiction. The Federal Circuit consolidated the appeals of Juda II, Peter II, and Nitol II in the case People of Enewetak v US.[68] The appeal of Juda II was dismissed at the request of plaintiffs after funds were appropriated for the benefit of the People of Bikini. The Federal Circuit affirmed the decision of the Claims Court in Peter II and Nitol II, dismissing the claims.[69]

Antolok included a similar group of plaintiffs as the cases in the Claims Court, and like those cases was initiated before COFA entered into force. In Antolok, the plaintiff class consisting of approximately three thousand present and former residents of the northern RMI islands and atolls directly downwind from the nuclear test sites filed a claim seeking damages for personal injuries and death pursuant to the Federal Tort Claims Act (FTCA).[70] The Court held that through the COFA, the US had withdrawn its consent to be sued under the FTCA with respect to the covered nuclear claims. This case affirmed that the courts determined that the COFA governed all nuclear claims to be brought by RMI and its citizens.

When the funds appropriated for the NCT proved "manifestly inadequate" (in the words of former U.S. Attorney General Richard Thornburgh, as explained further below) in light of the number of awarded claims, pursuant to a provision in the Section 177 Agreement, the RMI submitted a Changed Circumstances Petition to Congress on September 11, 2000, requesting additional funds.[71] The Changed Circumstances Petition's monetary requests included unpaid NCT personal injury awards of $14 million; unpaid NCT property damages awards to Enewetak Atoll and Bikini Atoll totaling $949 million; $50 million for medical services infrastructure; and $45 million annually for 50 years for a health care program for those exposed to radiation.

64. Document: 0410289, Atolls Upon Which Significant Nuclear Fallout Could Have Occurred from the Pacific Proving Grounds During Atmospheric Testing (DRAFT, no final version), 1973, http://data.alexwellerstein.com/mindd/PDF/0410289.pdf; Document: 0411456, Radioactive Debris from Operation Castle: Islands of the Mid-Pacific, 1955, http://data.alexwellerstein.com/mindd/PDF/0411456.pdf; While the Bravo test is often cited for its magnitude, it is important to note still that more than a dozen other tests surpassed the size of the Hiroshima bomb. See Barker, H., Bravo for the Marshallese, Wadsworth (2013) at 152.
65. The DOE has since removed these documents from their public database online but left physical collections in the RMI and the Embassy of the RMI in Washington, D.C. Efforts by an international archivist team made them publicly available online again. See Wellerstein, A., *Marshall Islands Nuclear Document Database, available at* http://data.alexwellerstein.com/mindd/.
66. *Id*.; Peter v. United States, 6 Cl. Ct. 768 (1984); Nitol v. United States, 7 Cl. Ct. 405 (1984). For a summary of these and other federal court cases related to the nuclear claims, see Appendix 1.
67. See Juda v. United States, 13 Cl. Ct. 667; Peter v. United States, 13 Cl. Ct. 691; Nitol v. United States, 13 Cl. Ct. 690 (1987).
68. People of Enewetak v. United States, 864 F.2d 134 (Fed. Cir. 1988).
69. *Id*.
70. Antolok v. United States, No. 85-2471, slip op. at 8 (D.D.C. Jun. 16, 1987); Antolok v. United States, 873 F.2d 369 (D.C. Cir. 1989).
71. Congressional Research Service, *Republic of the Marshall Islands Changed Circumstances Petition to Congress*, (May 16, 2005), available at https://fas.org/sgp/crs/row/RL32811.pdf.

> In 2002, the RMI retained former U.S. Attorney General Thornburgh to undertake an independent examination of the NCT's processes in support of the Changed Circumstances Petition. The resulting report found that the NCT was properly run, and the trust fund was manifestly inadequate to properly compensate the affected communities.[72] The report provides a detailed review of the NCT's history, its procedures, and its analytical approach. With regard to funding, the report stated: Although early Members of the Tribunal may have had a different view, the Tribunal never felt that its ability to render awards should be limited by the initial amount of the trust fund established in 1986 by Section 177 of the Compact of Free Association. We understand that both the Tribunal and the claimants before it regarded the initial $150 million trust fund as an arbitrary figure established through the political process that was never intended to approximate either the total damages suffered by the people of the Marshall Islands as a result of the U.S. nuclear testing program or the compensation to which they should ultimately be entitled. Whether Congress intended otherwise is a political issue upon which we express no opinion. We note, however, that the U.S. Government has already approved compensation claims of more than $562 million under the Downwinders' Act by persons injured as a result of nuclear tests in Nevada that were much smaller in number and magnitude than the tests conducted in the Marshall Islands. Based on our examination and analysis of the Tribunal's processes, and our understanding of the dollar magnitude of the awards that resulted from those processes, it is our judgment that the $150 million trust fund initially established in 1986 is manifestly inadequate to fairly compensate the inhabitants of the Marshall Islands for the damages they suffered as a result of the dozens of U.S. nuclear tests that took place in their homeland.[73]

Also included in the Changed Circumstances Petition was redress for atolls outside of the four selected by the U.S. to be deserving of compensation and healthcare. Documents declassified under the ACHRE helped to substantiate the lived experiences of Marshallese and harm caused beyond what the U.S. was willing to admit to in the Section 177 Agreement. Several atolls which were not informed or evacuated during the Bravo test and affected by radioactive contamination, including Ailuk and Likiep,[74] also put forward claims to the NCT after 2000, but these cases were never heard.[75]

In response to the Changed Circumstances Petition, the U.S. Department of State released its own report compiled by an interagency group (Departments of State, Energy, and Defense) evaluating the legal and scientific bases of the Petition.[76] This interagency report opposed the RMI's Changed Circumstances Petition. Ultimately, Congress did not act on the Changed Circumstances Petition and did not appropriate additional funds to pay outstanding awards. Congress did not issue a rationale for not acting to appropriate additional funds, but the basis of the Executive Branch report was that circumstances had not changed sufficiently to warrant additional funds.[77]

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72. Dick Thornburgh, The Nuclear Claims Tribunal of the Republic of the Marshall Islands: An Independent Examination and Assessment of Its Decision-Making Processes (January 2003), available at https://www.bikiniatoll.com/ThornburgReport.pdf ("Thornburgh Report").
73. *Id*. at 3.
74. *See* Amicus Curiae Brief Opposing Set-off of Lost-use Damages, NCT No. 23-06103; Claims for Compensation on Behalf of the People of Likiep Atoll, NCT No. 23-06980-B.; Takemine, S., *Invisible Nuclear Catastrophe Consequences of the U.S. Atomic and Hydrogen Bomb Testings in the Marshall Islands: Focusing on the "Overlooked" Ailuk Atoll*, 39 Hirshima Peace Science 43 (2017) at 56, *available at* https://ir.lib.hiroshima-u.ac.jp/files/public/4/45729/20180515141616686730/hps_39_43.pdf.; Document: 0410289, Atolls Upon Which Significant Nuclear Fallout Could Have Occurred from the Pacific Proving Grounds During Atmospheric Testing (DRAFT, no final version), 1973, http://data.alexwellerstein.com/mindd/PDF/0410289.pdf; Document: 0411456, Radioactive Debris from Operation Castle: Islands of the Mid-Pacific, 1955, http://data.alexwellerstein.com/mindd/PDF/0411456.pdf.
75. Amicus Curiae Brief Opposing Set-off of Lost-use Damages, NCT No. 23-06103; Claims for Compensation on Behalf of the People of Likiep Atoll, NCT No. 23-06980-B
76. Report Evaluating the Request of the Government of the Republic of the Marshall Islands Presented to the Congress of the United States of America (November 2004), available at https://2001-2009.state.gov/p/eap/rls/rpt/40422.htm
77. *Id*.; see also "Republic of the Marshall Islands Changed Circumstances Petition to Congress," CRS Report for Congress, available at https://fas.org/sgp/crs/row/RL32811.pdf.

In 2007, Judge Miller of the Federal Claims Court dismissed two cases, People of Bikini and John, which each involved a series of claims related to the original harms and the failure to adequately fund the trust fund.[78] The court found that the claims were either barred by the same jurisdiction stripping provision that was decisive in the earlier cases or were barred by the statute of limitations. That decision was upheld on appeal,[79] and the Supreme Court denied the petition for writ of certiorari.[80]

In 2014, the RMI sought justice at the International Court of Justice (ICJ) by arguing that the signatories to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) were not making efforts to disarm.[81] The case was dismissed on grounds similar to that of other cases relating to nuclear weapons, and the U.S. was not even a respondent because the government does not recognize the ICJ.[82] The ICJ case showed that there is a space to be heard on these issues at an international level, but a path to remedy non-proliferation particularly from the U.S. appears unlikely. In 2017, the United States Court of Appeals for the Ninth Circuit heard another case from the Marshall Islands against U.S. nuclear proliferation, but it was ruled outside of the jurisdiction of the domestic courts.[83]

On the legislative side, there were several attempts by New Mexico Senator Jeff Bingaman to put forth the Republic of the Marshall Islands Supplemental Compensation Act which would provide ex gratia payments, allowed in the COFA.[84] While the bills died in the Senate Environmental and Natural Resources Committee each time and Senator Bingaman has since left office, the legislative pathway remains a strong option.

In exploring potential pathways, there are diplomatic, legal, and legislative options. Diplomatically, the negotiations are a prime opportunity to revisit the harm caused by the U.S. and the inadequacy of redress. Further, the legislation put forward in the past remains a strong opportunity for ex gratia payments to fulfill some of the unpaid claims. In terms of legal pathways, unfortunately, the reasoning in previous federal court cases severely limits the available legal options for seeking a remedy. The Section 177 Agreement strips US courts of jurisdiction over claims based on personal injury or property damage resulting from the nuclear trials. Further, any claim that arose at the time of testing and relocation (which took place in the 1940s and 1950s), or upon the passage of COFA, or with the establishment of the Nuclear Claims Tribunal, will be barred by the statute of limitations. A constitutional suit based on the adequacy of the tribunal will require showing some government action within the six-year limitations period. That said, it has been over two decades since the Changed Circumstances Petition was submitted, so the RMI government may wish to renew the Changed Circumstances Petition.

U.S. nuclear testing between 1946 and 1958 caused significant harm in the RMI specifically to displaced Marshallese, those included in human radiation experiments, families of those who experience higher rates of cancer from radiation, and the land, air, and sea. While part of the COFA, Section 177, was established to recognize and redress past, present, and future harms, efforts to do so have fallen short of expectations.

What pathways exist to achieve compensation for the outstanding awarded nuclear claims as a part of nuclear justice for the RMI?

78. People of Bikini v. United States, 77 Fed. Cl. 744 (2007); John v. United States, 77 Fed. Cl. 788 (2007).
79. People of Bikini v. United States, 554 F.3d 996 (Fed. Cir. 2009).
80. People of Bikini v. United States, 559 U.S. 1048 (2010) (denying certiorari).
81. *UN court throws out Marshall Islands' nuclear weapons case*, BBC (2016), https://www.bbc.com/news/world-asia-37560663.
82. Schmitz, M.D., *Decision of the International Court of Justice in the Nuclear Arms Race Case*, HARV. INT'L L. J. (2016), *available at* http://www.harvardilj.org/2016/11/decision-of-the-international-court-of-justice-in-the-nuclear-arms-race-case/
83. Republic of the Marshall Islands v. U.S., No. 15-15636 (9th Cir. 2017), at 7.
84. *See* S. 342 (112th) Republic of the Marshall Islands Supplemental Nuclear Compensation Act of 2011, S. 342 (112th); Republic of the Marshall Islands Supplemental Nuclear Compensation Act of 2010, S. 2941 (111th); Republic of the Marshall Islands Supplemental Nuclear Compensation Act 2008. S. 1756 (110th)

ENVIRONMENTAL PROTECTION

ENVIRONMENTAL PROTECTION

LASTING EFFECTS OF NUCLEAR TESTING

There is lasting damage from the nuclear testing program to the environment as well. Despite the position of the U.S. government that the islands in which testing occurred may now be safely inhabited, a 2019 study by Columbia University found otherwise.[85] One part of the study found several soil samples to have higher concentrations of gamma radiation than the Chernobyl Exclusion Zone, the result of a nuclear disaster that happened in 1986.[86] Another part of the study found samples of fruit on some islands to exceed international standards for radiation.[87] These findings come after over 60 years of radioactive decay and potential natural disruption following the testing program.

In 1977, the U.S. Army built a temporary structure on Runit Island, called the Runit Dome, to contain nuclear waste from testing in the Enewetak and Bikini atolls. It currently holds over 3.1 million cubic feet of radioactive waste including 130 tons of radiated soils from Nevada which was transported to the Marshall Islands.[88] During the construction, many of the 4,000 U.S. military service members who worked to build the dome were not aware that they were working with radioactive materials.[89] Further, the Runit Dome is a current environmental threat to local communities.

While it has always been a concern that the Runit Dome would be insufficient to contain the nuclear waste, there has been recent attention on the danger of storm surges and rising sea levels exposing the region to expansive contamination. The National Defense Authorization Act (NDAA) of 2020 required a report to Congress on the condition of the Runit Dome as well as its effects on the environment.[90] The initial report was released in June 2020 and indicated from only a visual assessment of the Dome and long-term projections that the area is safe and of little concern.[91]

85. Abella, M. K. I. L., et al., *Background gamma radiation and soil activity measurements in the northern Marshall Islands*, 116 PNAS 15425 (Jul. 30, 2019) at 15429, available at https://doi.org/10.1073/pnas.1903421116.; Topping, C. E. W., et al., *In situ measurement of cesium-137 contamination in fruits from the northern Marshall Islands*, 116 PNAS 15414 (Jul. 30, 2019), *available at* https://doi.org/10.1073/pnas.1903481116.
86. Abella, M. K. I. L., et al., *Background gamma radiation and soil activity measurements in the northern Marshall Islands*, 116 PNAS 15425 (Jul. 30, 2019) at 15429, *available at* https://doi.org/10.1073/pnas.1903421116.
87. Topping, C. E. W., et al., *In situ measurement of cesium-137 contamination in fruits from the northern Marshall Islands*, 116 PNAS 15414 (Jul. 30, 2019), *available at* https://doi.org/10.1073/pnas.1903481116.
88. Rust, *S., How the U.S. betrayed the Marshall Islands, kindling the next nuclear disaster*, L.A. Times (Nov. 10, 2019), https://www.latimes.com/projects/marshall-islands-nuclear-testing-sea-level-rise/.
89. *Id*.
90. National Defense Authorization Act (NDAA) of 2020
91. Department of Energy, *Report on the Status of the Runit Dome in the Marshall Islands*, (Jun, 2020) at 4, https://www.energy.gov/sites/prod/files/2020/06/f76/DOE-Runit-Dome-Report-to-Congress.pdf.

While the Department of Energy will be conducting a groundwater radiochemical analysis program as required under the Insular Areas Act of 2011, they cited none of the existing evidence, for example, the soil samples from 2017-2018 that indicate significant levels of all five radionuclide concentrations observed.[92]

Given concerns that the Department of Energy and the U.S. government as a whole will only selectively acknowledge the harm caused by nuclear testing, leaving nuclear justice unrealized, the RMI National Nuclear Commission, among others, has called for a third party assessment of the safety and structural integrity of the Runit Dome. The DOE's groundwater radiochemical analysis program should also employ Marshallese observers through the National Nuclear Commission to ensure accountability.

> *"I'm like, how can it [the dome] be ours? We don't want it. We didn't build it. The garbage inside is not ours. It's theirs." Hilda Heine, former President of the RMI in September 2019*[93]

- **The U.S. must take full responsibility for the NTP and its damage by employing third party assessments of the Runit Dome with the aim of removing it from the Marshall Islands.** In addition to the lack of compensation for the awarded nuclear claims, the U.S. has failed to remedy the concerns related to the Runit Dome. Assessments of the safety and structural integrity of the Runit Dome must be done by a third party, not the Department of Energy.

CLIMATE CHANGE ADAPTATION

The impact of climate change cannot be overstated. Carbon emissions from high income countries like the U.S. have caused disproportionate harm to the land, air, and sea in the northern Pacific and around the world. This injustice extends far beyond the end of the nuclear testing program and continues to threaten livelihoods and human rights. Further, the 2018 Intergovernmental Panel on Climate Change reminds us that the next ten years are critical to slowing the effects of climate change.[94]

One of the aspects of economic assistance through the COFA is environmental sector grants. However, the oversight measures and parameters for the funding make it difficult to apply the funding responsively. The COFA environmental sector grants are supposed to go to the national and state Environmental Protection Agencies (EPAS) through one year projects approved by JEMCO/JEMFAC. Given the difficulty of finding projects that fit that timeline and requirements, most EPAs in the FSM, for example, have shifted to local funding.

In the FSM, this problem is intertwined with the easing of environmental regulations by EPAs including lax environmental impact statements. This easing of these standards at the state EPA level has actually drawn even more interest from China and other bilateral donors looking for infrastructure projects in which they can procure their own labor and resources. This is one area in which the U.S. and FSM overlap in interests. There is an opportunity here for the U.S. to continue these environmental sector grants in a more manageable way with added technical assistance.

92. Abella, M. K. I. L., et al., *Background gamma radiation and soil activity measurements in the northern Marshall Islands*, 116 PNAS 15425 (Jul. 30, 2019), *available at* https://doi.org/10.1073/pnas.1903421116.
93. Rust, S., *How the U.S. betrayed the Marshall Islands, kindling the next nuclear disaster*, L.A. Times (Nov. 10, 2019), https://www.latimes.com/projects/marshall-islands-nuclear-testing-sea-level-rise/.
94. Intergovernmental Panel on Climate Change (IPCC), *Summary for Policymakers of IPCC Special Report on Global Warming of 1.5°C approved by governments*, (Oct. 8, 2018), https://www.ipcc.ch/2018/10/08/summary-for-policymakers-of-ipcc-special-report-on-global-warming-of-1-5c-approved-by-governments/.

In terms of climate change and displacement, there has been internal relocation of families and individuals in the region from outer islands to larger, more populous islands due to both increasing challenges to livelihoods on outer islands and for increased educational and economic opportunities. Climate change poses serious threats to livelihoods and access to basic needs; however, there remains a desire by many to adapt and stay. Those who relocate internally or to another country like the U.S. often make the decision based on multiple contributing factors, of which climate change could be one.

RISING SEA LEVELS

Rising sea levels in particular raise questions around the status of maritime boundaries under international law, which are determined based on land. The UN Convention on the Law of the Seas (UNCLOS), which forms the core of international maritime law, defines the Exclusive Economic Zone (EEZ) as a zone extending 200 nautical miles from a state's "baseline" where the state has exclusive rights to the resources within the water and on or under the sea floor. The baseline is a state's delineation between internal waters and the territorial sea and is deposited with the UN Secretary General under UNCLOS Article 16.

The dependence on baseline delineations is critical for low-lying Large Ocean States in the Pacific. For example, the RMI, the most low-lying of the COFA states, is only 70 square miles of land among its 29 atolls and 5 islands, but their EEZ spans over 1.3 million square miles of the Pacific Ocean. With EEZ determinations reliant on baseline delineations, there is an interpretative gap when we consider islands submerged as a result of rising sea levels.

This situation was not addressed in the UNCLOS. Further complicating efforts is the fact that the U.S. has not ratified UNCLOS. The U.S. is a signatory to UNCLOS and recognizes it as customary international law, but the lack of ratification somewhat limits the extent to which novel UNCLOS interpretations can be relied upon. Regardless, how these maritime boundary issues are resolved is critical to the political and cultural sovereignty of COFA states.

One reading of the UNCLOS suggests that defining the baseline by geographic points under Article 7 means that "notwithstanding subsequent regression of the low-water line, the straight baselines shall remain effective until changed by the coastal State." In other words, the baseline may remain even after the island is submerged.[95]

However, this UNCLOS based approach may not suffice. COFA states may lose the right to an EEZ and continental shelf even with a geographic points baseline. Article 121(3) distinguishes islands from "[r]ocks which cannot sustain human habitation or economic life of their own." Rocks thus have no EEZ or continental shelf. There are some suggestions that UNCLOS Article 7 could provide some respite in that "[t]he limits of the [continental] shelf established by a coastal State … shall be final and binding." This could effectively tie the rights to the seabed to avoid an unreasonable result.[96]

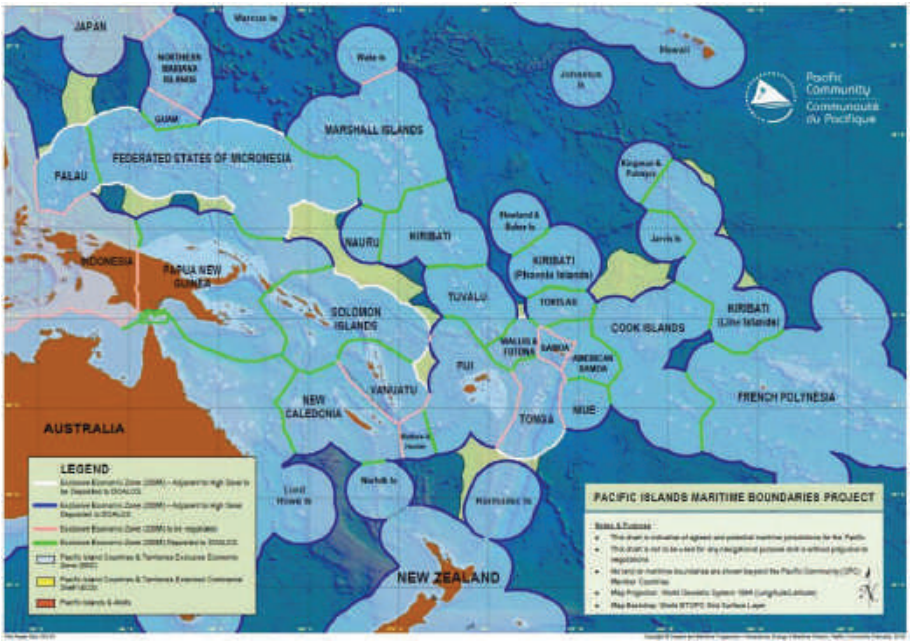
Beyond the UNCLOS there are other sources of international law that could guide the treatment of maritime boundaries in the event that Pacific islands are submerged. For example, the South China Sea Arbitration Tribunal noted that parties should

95. See comments by Rosemary Rayfuse in Nathanial Gronewold, *Island Nations May Keep Some Sovereignty if Rising Seas Make Them Uninhabitable*, N.Y. Times (May 25, 2011), https://archive.nytimes.com/www.nytimes.com/cwire/2011/05/25/25climatewire-island-nations-may-keep-some-sovereignty-if-63590.html
96. Hayashi, M., *Islands' Sea Areas: Effects of a Rising Sea Level*, Sasakawa Peace Foundation (June 10, 2013), https://www.spf.org/islandstudies/research/a00003.html.

consider "whether there is evidence that human habitation has been prevented or ended by forces that are separate from the intrinsic capacity of the feature. War, pollution, and environmental harm could all lead to the depopulation, for a prolonged period, of a feature that, in its natural state, was capable of sustaining human habitation." Of note for those in search of a technological solution to sea level rise, this decision also suggests that states may be able to use artificial means to preserve land from loss to sea level rise (in contrast to China's approach in that case which was to use artificial means to expand boundaries beyond historical limits).

Finally, the COFA states may be able to rely on state practice to guide the interpretation of this issue as it forms the basis of customary international law. Critically, state practice can reflect what states believe their legal obligations are in situations that are otherwise novel international law issues – such as what happens to maritime boundaries when sea levels rise. The U.S. has also taken advantage of state practice in this manner – U.S. military installations in COFA states will not be legally impacted by sea level rise. The relevant baselines have been registered, and they need not be updated even if the physical territory changes.

Similarly, COFA states and other Pacific islands have taken steps to "freeze" their boundaries through bilateral treaties. For example in 2012, a series of bilateral treaties establishing the maritime boundaries of Kiribati, Nauru, Tuvalu, Cook Islands, Niue, Tokelau, and the RMI were signed at the meeting of the Pacific Islands Forum. Also notable is the Pacific Maritime Boundaries Project (PMBP), which involves a partnership between the South Pacific Community (SPC) and Australia, and serves a critical role in allowing Pacific island states to revise domestic legislation where necessary, and prepare submissions to the UN to give full international notice of maritime boundaries.[97]



Pacific Islands Maritime Boundaries Project, Pacific Community[98]

97. *See Pacific Maritime Boundaries: IHO S-121 Maritime Boundaries and Limits Data Specification funded by Forum Fisheries Agency*, Pacific Community, available at http://www.pacgeo.org/static/maritimeboundaries/; Clive Schofield, C. & Freestone, D., *Islands Awash Amidst Rising Seas: Sea Level Rise and Insular Status under the Law of the Sea*, 34 The International Journal of Marine and Coastal Law 391 (2019) at 405-406, available at https://doi.org/10.1163/15718085-13431098.
98. Pacific Community, *Pacific hailed global leader in determining shared maritime boundaries*, (Jul. 11, 2019), https://www.spc.int/updates/blog/2019/07/pacific-hailed-global-leader-in-determining-shared-maritime-boundaries.

REMEDIES FOR ENVIRONMENTAL HARM AND CLIMATE CHANGE

There are limited options for recourse for environmental harm due to climate change through Article VI of the FSM-RMI COFA. Article VI of the FSM-RMI COFA provides that the governments of the FSM and RMI can sue the U.S. government under the National Environmental Policy Act (NEPA),[99] a statute requiring the government to take certain procedural steps prior to taking action, such as granting leases or permits on public land.

Article VI of the FSM-RMI COFA covers environmental protections relating to the FSM and RMI. Section 161(a)(2) of the FSM-RMI COFA provides that NEPA shall apply to actions of the United States government in relation to the FSM-RMI COFA and related agreements as if the RMI and FSM were part of the U.S. Additionally, according to Section 162(f) of the FSM-RMI COFA, for any action brought against the U.S. government for claims under Sections 161(a), 161(d), or 161(e) of the FSM-RMI COFA, the governments of the RMI and FSM would be considered citizens of the U.S..

NEPA requires U.S. federal agencies to consider the impact of their actions on the environment prior to making decisions.[100] Actions covered by NEPA are broad and include issuing permits, taking action regarding federal land management, and constructing public facilities, including highways. NEPA is not about the substance of government action, but rather it is about the government's decision making process. Cases have been brought under NEPA against the U.S. government for failure to consider the effects of certain government action on climate change by organizations, individuals, and state and local governments. If the governments of the FSM or RMI were to bring such a case, they would need to identify relevant action taken by the U.S. government, such that NEPA would apply. Article VI of the FSM-RMI COFA would likely not provide a route to bring a claim against the U.S. for its general inaction on regulating climate change though.

99. Pub. L. No. 91–190.
100. U.S. Environmental Protection Agency, *What is the National Environmental Policy Act?*, https://www.epa.gov/nepa/what-national-environmental-policy-act.

Section 161(a)(3) of the FSM-RMI COFA provides that when it comes to an Environmental Impact Statement required by Section 161(a)(2) of the FSM-RMI COFA,[101] the standards of the following statutes should be taken into account: the Clean Air Act, the Endangered Species Act, the Clean Water Act, the Ocean Dumping Act, the Toxic Substances Control Act, and the Resources Conservation and Recovery Act of 1976. As noted above, the challenge in bringing a case for climate change under these statutes is that it would require identifying action by the U.S. government in relation to the FSM or RMI that required an Environmental Impact Statement pursuant to NEPA and tying that government action and conduct in the Environmental Impact Statement (or failure to do so) to climate change affecting the FSM or RMI.

Based on these requirements, finding recourse for climate change would likely be difficult under these provisions of the FSM-RMI COFA considering that much of the U.S. government's actions in the FSM and RMI predated the COFA and thus would not have, and could not have, triggered an Environmental Impact Statement requirement as "activities under the Compact and its related agreements."

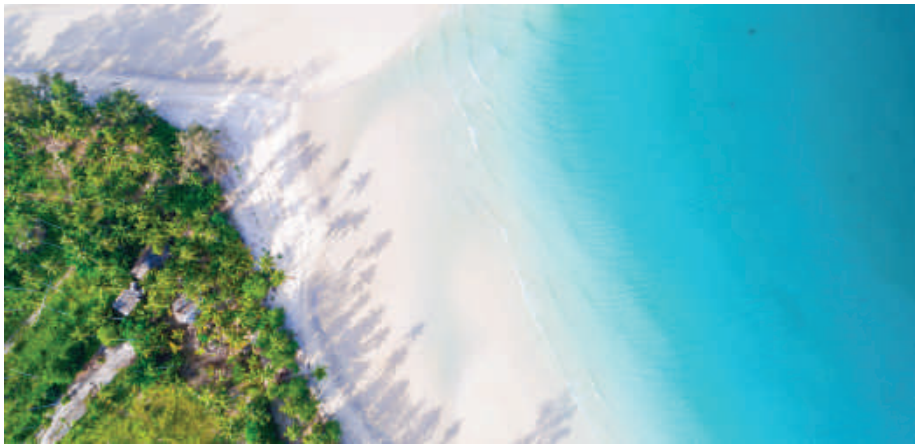
Outside of remedies available through the FSM-RMI COFA, there are other potential legal pathways (outside the COFA) for civil relief for the U.S. government's inaction on climate change. As described below, potential options include pursuing claims against the government under public trust doctrine, the Fifth Amendment's Takings Clause, or the Fifth Amendment's Due Process Clause. Additionally, some claims against the United States government for its role in climate change have been brought under the Federal Tort Claims Act and the federal common law claim of public nuisance.[102] These claims are still rather novel and although plausible, courts have been reluctant to recognize the validity of such claims.

Generally, a climate change case against the U.S. would face questions of justiciability, standing, and separation of powers. In the U.S., most of the public trust doctrine cases brought have been dismissed early on for lack of standing. *Juliana, et al. v. United States of America, et al*.,[103] was a case brought against the U.S. government that proceeded further than most of these cases. However, the Ninth Circuit eventually dismissed the *Juliana case*, as it found that the plaintiffs had not established the redressability requirement for standing. The FSM or RMI governments or their respective citizens could also try to bring an inverse condemnation claim that relies on the Fifth Amendment's Takings Clause. Asserting a claim for climate change damage against the U.S. government pursuant to the Takings Clause is a novel theory that has not yet proven successful.[104] Different types of action can give rise to an inverse condemnation claim, including physical invasion or damage to land or a regulatory taking that deprives owners of the economic value of the land.[105] A foreseeable consequence of climate change, and one that affects the FSM and RMI, is rising sea levels.

101. Section 161(a)(2) of the COFA.
102. See e.g., Katrina Canal Breaches Litigation, 696 F.3d 436, 449–52 (5th Cir. 2012); Connecticut v. Am. Elec. Power Co., 582 F.3d 309 (2d Cir. 2009), rev'd American Elec. Power Co., Inc. v. Connecticut, 564 U.S. 410 (2011).
103. No. 18-36082, 2020 WL 254149 (9th Cir. 2020).
104. Rosenberg, J., Condemn(the)nation: *Holding the United States Accountable Through Inverse Condemnation Claims for its Role in Bringing About and Then Failing to Mitigate and Adapt to Certain Effects of Climate Change*, 26 Buffalo Environmental Law Journal 85 (2019), available at https://digitalcommons.law.buffalo.edu/belj/vol26/iss1/4.
105. Id.

There is another potential pathway that has yet to be explored fully, climate change as a security issue. The U.S. government's responsibility "to promote efforts to prevent or eliminate damage to the environment and biosphere and to enrich understanding of the natural resources of the Marshall Islands and the Federated States of Micronesia"[106] is clear in section 161 of Article VI. While the barriers to using Article VI in isolation have been explained here, the U.S. military has recognized climate change as an immediate threat to national security[107] which paves the way for invoking the U.S. government's "full authority and responsibility for security and defense matters in or relating to the Marshall Islands and the Federated States of Micronesia".[108]

The climate crisis and environmental degradation raises important questions for the process of environmental sector grants through the COFA as well as a larger question about the impact of rising sea levels on maritime boundaries and land use. While pathways for U.S. climate action are few, the connection between climate change and security is likely to only get stronger.



Not only has the U.S. contributed disproportionately to the climate crisis, but the U.S. also faces some of the consequences when it comes to national security. Threats to U.S. military bases and an increased potential for conflict are factors[109], but for relations with the FAS, U.S. access to the region is at stake. Further, there is competition in soft diplomacy in that other countries have been faster to support climate adaptation projects in the region. Drawing the connection between climate and security would require an enforcement mechanism, and the Judicial Review pathway currently available in Article VI, Section 162 could be expanded to account for damage to the environment as a result of climate change.

- **Expand Title I, Article VI, Section 162 applicability to environmental security issues.** Climate change is a security issue, and current avenues for the FAS to hold the U.S accountable for inaction on climate change are few to none.

106. Title I, Article VI, Section 161.
107. Department of Defense, *2014 Climate Change Adaptation Roadmap*, (2014) at 1, *available at* https://www.acq.osd.mil/eie/downloads/CCARprint_wForward_e.pdf.
108. Title III, Article I, Section 311(a).
109. Schewe, E., *Why Climate Change Is a National Security Issue*, JSTOR Magazine (Oct. 25, 2018), *available at* https://daily.jstor.org/why-climate-change-is-a-national-security-issue/.

U.S. MILITARY LAND USE

U.S. MILITARY LAND USE

Although the COFAs were a response to the international pressure to decolonize, the U.S. has never fully rescinded its colonial authority. This is particularly true with respect to U.S. military land use. The story of Ebeye and Kwajalein illustrates ongoing concerns. During WWII, the U.S. captured Kwajalein among other Marshallese atolls and established a labor camp for Marshallese to help with war clean-up and the building of a military base.[110] The Trust Territory arrangement and the U.S.'s position on the UN Security Council ensured that the U.S. had no international oversight in its decision making about security throughout the Trust Territory. As nuclear testing quickly became a priority, in 1951, the U.S. Navy ordered 559 Marshallese living at the Kwajalein labor camp where they worked for the U.S. military to move to the island of Ebeye.

Consistent with the colonial expectations of the U.S., this land grab required no explanation nor compensation.[118] In 1964, the U.S. military forcibly relocated over 1,500 Marshallese from islands in the Kwajalein atoll to clear the Mid-Atoll Corridor for missile testing.[119] Those displaced were brought to Ebeye island which quickly saw an overcrowding problem with unfulfilled promises of housing and services from the U.S. Now, Ebeye, an island of one-tenth of a square mile supports a population density higher than Manhattan or Hong Kong -- without any high-rise buildings.[120]

Enenkio Land Grab

The U.S. claims that it annexed Enenkio on January 17, 1898, when the USS Bennington — en route to newly U.S.-controlled Guam — was directed to formally annex the island, though there are no official naval records of this annexation.[111] However, the history of the Spanish-American War, and the Treaty of Paris that resolved it, provide evidence that Enenkio was always a part of the Marshall Islands and was ceded from the Spanish to the Germans in 1885 and subsequently confirmed as German territory in 1898. Pursuant to a bilateral agreement between Germany and Spain on December 17, 1885, Spain sold all its rights to islands east of the 164th meridian east to Germany, which would include Enenkio.[112] On September 10, 1898, another agreement between Germany and Spain following the Spanish-American War stated that all Spanish possessions not ceded to the U.S. in the Spainish-American peace treaty would be ceded to Germany.[113] Given that Enenkio was not included in the Treaty of Paris, Enenkio legally belonged to Germany after the Spanish-American War.[114] This means that Enenkio belonged to the Germans, and would have been part of the Trust Territory of the Pacific Islands and eventually the Republic of the Marshall Islands.

110. Micronesia Support Committee, *Marshall Islands: A Chronology: 1944-1981*, (1992) at 5, *available at* https://www.osti.gov/opennet/servlets/purl/16365056.pdf.
111. Spennemann, D. H. R., *The United States Annexation of Wake Atoll, Central Pacific Ocean*, 33 Journal of Pacific History 239 (Sept. 1998), *available at* https://www.jstor.org/stable/25169392.
112. *Id*.
113. *Id*.
114. *Id*.
115. *See* finding that the British failed to complete the process of decolonization with regard to Mauritius because it excised the Chagos Islands in exchange for a one-time payment to the Mauritian government and has maintained control of the territory ever since. International Court of Justice, Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion (Feb. 25, 2019), https://www.icj-cij.org/en/case/169/advisory-opinions.
116. Waiti, D. & Lorrenij, R., *Sustainable management of deep sea mineral activities: a case study of the development of national regulatory frameworks for the Republic of the Marshall Islands*, 95 Marine Policy 388 (Sept. 2018), https://doi.org/10.1016/j.marpol.2017.03.025.
117. *Id*.
118. Hirshberg, L., Nuclear Families: *(Re)producing 1950s Suburban America in the Marshall Islands*, 26 OAH Magazine of History 39 (Oct. 2012) at 40, https://doi.org/10.1093/oahmag/oas034.
119. Smith-Morris, M., *Domination and Resistance: The United States and the Marshall Islands During the Cold War*, University of Hawaii Press (2016) at 108-109.
120. Latest census data from the RMI has Ebeye's population at 9,164, which means the population density if 80,177 people per square mile. See Economic Policy, Planning, and Statistics Office, *The RMI 2011 Census of Population and Housing Summary and Highlight Only*, (Feb. 2012) at 7, https://www.doi.gov/sites/doi.gov/files/migrated/oia/reports/upload/RMI-2011-Census-Summary-Report-on-Population-and-Housing.pdf. Comparatively, Manhattan's population density is approximately 69,467 people per square mile. See U.S. Census Bureau, *Quickfacts: New York Country (Manhattan Borough), New York* (2010), https://www.census.gov/quickfacts/fact/table/newyorkcountymanhattanboroughnewyork/PST045218#PST045218). Hong Kong's is 17,311 per square mile. *See* Hong Kong Special Administrative Region Government Information Service Department, Hong Kong: The Facts, (Apr. 2015), https://www.gov.hk/en/about/abouthk/factsheets/docs/population.pdf.

The ongoing effects of U.S. military land use including the displacement and maintained inequality between the Kwajalein base and Ebeye expose the colonial nature of present U.S.-RMI relations. Missile testing blasted the lagoon with uranium, and the U.S. Army studies have found alarming rates of polychlorinated biphenyls (PCBs) in the lagoon from leakages on the base.[121] PCBs are linked to liver disease, adult-onset jaundice, low birth weight, thyroid disease, compromised immunity, and mental health-related issues.[122]

In addition to contamination, the overcrowding and lack of health and sanitation infrastructure on Ebeye has led to high rates of communicable diseases including tuberculosis, hepatitis B, syphilis, and outbreaks of cholera and dengue fever are still common.[123] The link between the U.S. military occupation and the ongoing public crises in Ebeye is clear historically. During the Trust Territory, sewage was dumped directly into the lagoon which led to bacteria rates 25,000 times higher than U.S. and UN minimum safety standards.[124] Furthermore, the PCB contamination has created an issue of toxic fish in the lagoon around Kwajalein and Ebeye and further exacerbates reliance on imported foods.

At present, 90% of Ebeye households rely on imported food sources, primarily from the U.S.[125] A recent study has linked the growing dependence on imported foods over locally-sourced foods with obesity and diabetes further contributing to the public health crisis.[126] Despite the U.S.'s supposed interests in remedying health issues in the RMI, hospitals in Majuro and Ebeye struggle to meet healthcare demands, and Marshallese people are not allowed to access the hospital on Kwajalein unless it is an emergency, in which case, it is still not guaranteed.[127]

The U.S. failed to fulfill its obligations under the Trust Territory agreement in the RMI, but particularly in Ebeye. The U.S. did not use Kwajalein Atoll for international peace and security. It was used for war preparation as a site for intercontinental ballistic missile (ICBM) and antiballistic missile systems (ABM) testing in the heat of the Cold War. The U.S. failed to promote the political, economic, social, and educational advancement of the Marshallese people. Even when RMI declared independence

There is no evidence that the U.S. excised Enenkio from the RMI when the RMI declared independence from the U.S., and any such excision would be illegal under international law, as the ICJ's 2019 Advisory Opinion concerning the Chagos Islands makes clear.[115] The RMI's maritime boundaries have already been declared through agreements with Kiribati, Nauru, and the FSM, as well as through the Maritime Zones (Declaration) Act of 2016.[116] However, this legislation extends the RMI's EEZ to include Enenkio Island (Wake Island). This has the potential to present significant legal issues down the road, as this island is disputed territory between the U.S., the RMI, and the island's residents. This portion of the EEZ also contains significant potential mineral resources, and while the deposits are not currently financially feasible to extract, ownership of these mineral resources will inevitably be disputed.[117] In addition to losing a potentially profitable portion of its EEZ to the U.S. if sovereignty over Enenkio is not established, the RMI, as one of the most vulnerable nations in the world with respect to rising sea levels, must also be prepared to dispute claims that its EEZ has shifted because certain atolls or islets are no longer above sea level.

121. U.S. Army Institute of Public Health, *Draft Southern US Army Garrison*–Kwajalein Atoll Fish Study, (2014) at 6, *available at* https://rmi-data.sprep.org/system/files/Kwajalein_Public_Release_Southern_USAG-KA_Fish_Study_2014_nomemo.pdf.; Johnson, G., *Fish at Kwaj dangerous to eat*, The Marshall Islands Journal, (Jul. 18, 2019), https://marshallislandsjournal.com/fish-at-kwaj-dangerous-to-eat/. As of 1977, PCBs were no longer permitted to be imported to or manufactured in the United States. Lee, H. S., *Post Trusteeship Environmental Accountability*: *Case of PCB Contamination on the Marshall Islands*, 26 DENV. J. INT'L L. & POL'Y 399, (1998) at 409, *available at* https://digitalcommons.du.edu/cgi/viewcontent.cgi?article=1600&context=djilp. The transformers thought to be the primary source of PCB leakage on Kwajalein were brought to the Marshall Islands at some point during the Trust Territory administration, though it is unclear precisely when. 408–09. Some of these transformers were then buried or abandoned on atolls in the Marshall Islands, and in the 1990s were eventually found to be leaking PCBs into the soil and the water.
122. U.S. Department of Health and Human Services, *Toxicological Profile for Polychlorinated Biphenyls (PCBs)*, (Nov. 2000) at 5, *available at* https://www.atsdr.cdc.gov/toxprofiles/tp.asp?id=142&tid=26; U.S. Department of Veteran's Affairs, Public Health: *Polychlorinated Biphenyls (PCBs),* https://www.publichealth.va.gov/exposures/pcb/index.asp.
123. Riklon, S., Alik, W., Hixon, A & Palafox, N. A., The "*Compact Impact" in Hawai'i: Focus on Health Care*, 69 HAW. MED. J. 7, (June 2010) at 7, *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3123150/.; Center for Nation Reconstruction and Capacity Development, *Ebeye 2023: Comprehensive Capacity Development Master Plan* (July 2012) at 15, *available at* https://www.westpoint.edu/sites/default/files/inline-images/centers_research/national_reconstruction_capactity_development/pdf%20tech%20reports/Ebeye%2520Report.pdf. A 2000 cholera epidemic infected more than 400 people and killed six. Yamada, S., Riklon, S. & Maskarinec, G. G., *Ethical Responsibility for the Social Production of Tuberculosis*, 13 J. of Bioethical Inquiry 57 (Mar. 2016) at 58, *available at* https://doi.org/10.1007/s11673-015-9681-1.
124. Smith-Morris, M., *Domination and Resistance: The United States and the Marshall Islands During the Cold War*, University of Hawaii Press (2016) at 105, 116-117.
125. Ichiho, H. M., Seremai, J., Trinidad, R., Paul, I, Langidrik, L., & Aitaoto, N., *An Assessment of Non-Communicable Diseases, Diabetes, and Related Risk Factors in the Republic of the Marshall Islands, Kwajelein Atoll, Ebeye Island: A Systems Perspective,* 72 Haw. J. of Med. & Pub. Health 77 (May 2013) at 77, 78, *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3689463/.
126. *Id*.
127. Center for Nation Reconstruction and Capacity Development, *Ebeye 2023: Comprehensive Capacity Development Master Plan* (July 2012) at 18, *available at* https://www.westpoint.edu/sites/default/files/inline-images/centers_research/national_reconstruction_capactity_development/pdf%20tech%20reports/Ebeye%2520Report.pdf.; Rust, S, *Huge waves and disease turn Marshall Islands into 'a war zone,' health official says*, LA Times, (Dec. 5, 2019), https://www.latimes.com/environment/story/2019-12-05/marshall-islands-waves-flooding-disease-war-zone.

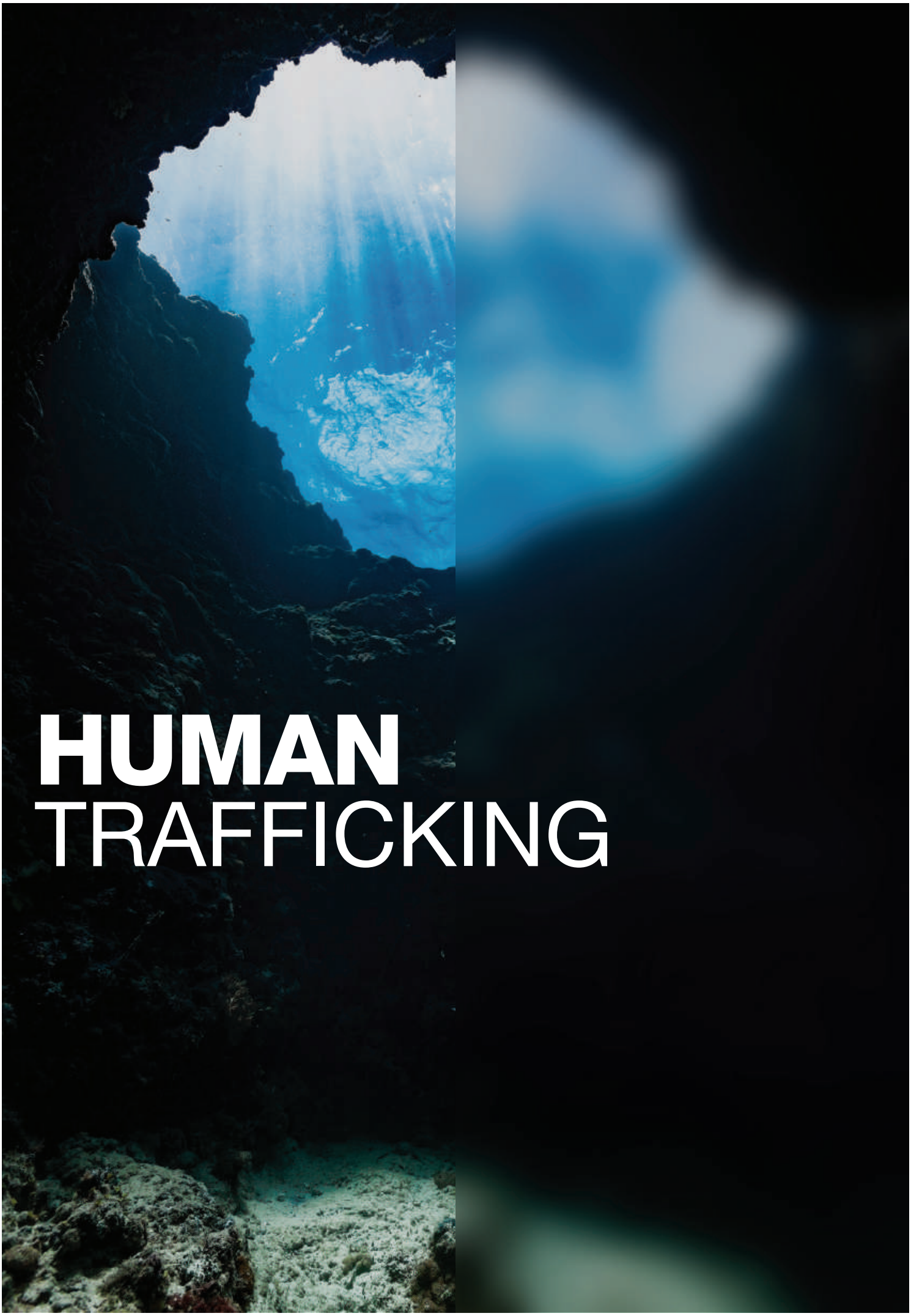
in 1979, the U.S. military maintained their occupation. This put the Marshallese government in a difficult position for the initial COFA negotiations.[128] Quite distinct from the rhetoric of a mutually beneficial relationship, one negotiator described:

> The problem is not whether it was a good deal or not but that it was a sine qua non of the Compact. The US basically said: "if you don't accept this deal, and expunge us [of past wrongs, including the nuclear testing program], then there will be no Compact, no termination of trusteeship, and you will be a trust territory forever." At that time, RMI negotiators conceded because our elders at the time desired an end to the trusteeship.[129]

At present, displaced communities have had to fight for promised compensation. In the case of Kwajalein landowners, they were not provided compensation for past use until they signed a renewal of the land lease. The current MUORA also allows for the potential of future forced displacement and property alienation.[130] Far from a remedy, the COFA and related agreements including the MUORA are parts of the problem, and if they cannot be renegotiated on equal terms, they require modifications at minimum.

- **Require the U.S. to restore lands it has taken for its use upon U.S. withdrawal from the country.** Article X, section 3 of the MUORA absolves the U.S. of responsibility to restore defense sites to their former condition. If restoration is not possible, compensation with enforcement mechanisms would be warranted. This is crucial considering continued PCB contamination and the potentially leaking Runit Dome.
- **Require that U.S. environmental statutes and regulations that govern Kwajalein and any military site mirror those applied in the U.S.** At the moment, respective U.S. authorities are given significant discretion in determining similar standards. Mirrored standards must also include either citizen suit provisions or an explicit avenue for remedy. These equal expectations would also mandate that the U.S. is held accountable for their environmental harm and harm to communities.

128. Aguon, J., *What We Bury at Night*, Blue Ocean Press (2008) at 33.
129. Id.
130. Agreement Regarding the Military Use and Operating Rights of the Government of the United States in the Republic of the Marshall Islands Concluded Pursuant to Sections 321 and 323 of the Compact of Free Association, as Amended, Article III, Section 2.


HUMAN
TRAFFICKING

HUMAN TRAFFICKING

ADOPTIONS

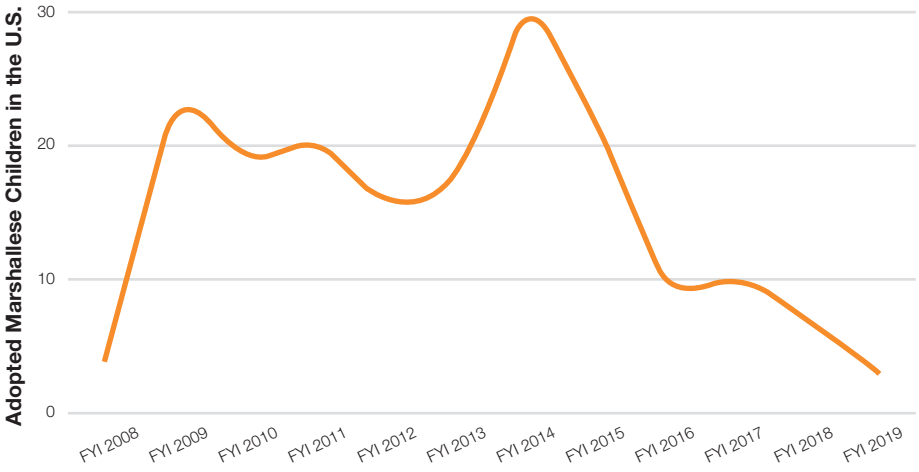
The special relationship between the U.S. and the FAS that allows visa-free movement between countries has also created opportunities for exploitation, adoptions being one example. Intercountry adoptions are not inherently problematic, but the lack of regulation enforcement of adoption policy in the U.S. in accordance with the Compact itself[131] as well as international human rights law[132] allows for impunity around illicit adoptions from the RMI to the U.S.

While there is no way of knowing exactly how many Marshallese children have been adopted in the U.S, in the late 1990s, the RMI had the highest adoption rate per capita in the world with a peak of 500 Marshallese children adopted in 1999.[133] Some have argued that adoption provided an opportunity for children to live better lives in the U.S.; however, the lack of regulation and reports of ranging ethics raises larger questions. These reports of coercion through payments and promises made to birth mothers in adoptions in the 1990s led the Marshall Islands Parliament to place a moratorium on international adoptions. This was upheld until the 2002 Adoption Act passed which required adoptive parents to come to the RMI and complete the adoption through the Central Adoption Authority (CAA).[134]

Since then, reported adoptions through the CAA have decreased significantly. Official Marshallese adoptions to the U.S. have been under 30 annually since at least 2008 according to the U.S. State Department.[135] However, increased reports of illicit Marshallese adoptions in the U.S. outside of the formal pathway have raised suspicions.[136] The Amended Compact in 2003 added a provision to explicitly bar anyone traveling to the U.S. for the purposes of adoption from visa-free movement. In theory, they require a special visa, but this is rarely enforced.

131. *See* Article IV, Section 141 (b): "a person who is coming to the United States pursuant to an adoption outside the United States, or for the purpose of adoption in the United States, is ineligible for admission under the Compact and the Compact, as amended.
132. *See* the United Nations Convention on the Rights of the Child, article 22, sections a, c, d, and e.
133. Roby, J. L., & Ife, J., H*uman rights, politics and intercountry adoption: An examination of two sending countries*, *52 International Social Work 661* (2009) at 664, *available at* https://doi.org/10.1177/0020872809337680.; Schachter, J., *Intercountry Adoption/Global Migration: A Pacific Perspective*, 18 Asia Pacific Journal of Anthropology 305 (2017) at 312, *available at* https://doi.org/10.1080/14442213.2017.1349170.
134. Roby, J. L., & Matsumura, S., *If I Give You My Child, Aren't We Family*?: A Study of Birthmothers Participating in Marshall Islands–U.S. Adoptions, 5 Adoption Quarterly 7 (2002) at 8, *available at* https://doi.org/10.1300/J145v05n04_02.
135. U.S. State Department, Intercountry Adoption Annual Reports, *available at* https://travel.state.gov/content/travel/en/Intercountry-Adoption/adopt_ref/adoption-publications.html.
136. Joyce, K., "*Do You Understand That Your Baby Goes Away and Never Comes Back?*", The New Republic (Apr, 22, 2015), https://newrepublic.com/article/121556/arkansas-adoption-preys-cultural-misunderstanding-marshallese

U.S. STATE DEPARTMENT DATA ON OFFICIAL ADOPTIONS



To work around this provision, private attorneys have relied on Marshallese women making it to the U.S. in order for the adoption to then be subject to state adoption law.[137] The U.S. State Department requires that adoptions from the RMI, as non-Hague adoptions, require that the child is defined as an orphan under U.S. law.[138] While the State Department is aware that Marshallese adoptions must go through the CAA, the Hague Convention and the label of orphan allows U.S. personnel to determine what is in the "best interests of the child."[139]

While consent of the birth mother is required, there remain two major issues. The first is the legal barriers that have led to tragic misunderstandings of the nature of closed adoptions. The other issue is around illicit adoptions which are lucrative for private attorneys and often involve coercion of Marshallese birth mothers. While this is internationally defined as human trafficking, there is a dire lack of U.S. enforcement to stop black market adoptions and ensure that all Marshallese adoptions go through Majuro at the CAA.

The idea of family based on closed and permanent parent-child relationships is a Western concept encoded in the 1993 Hague Convention. In the RMI, the resulting concept of a closed adoption does not easily translate cross-culturally.[140] The idea of relinquishing one's child to never see them again is not in the realm of possibility. Some birth mothers do, of course, understand the terms of closed adoptions in the U.S. and the impossibility of enforcing international communication with the adoptive parents. However, barriers including false promises by private attorneys[141] and legal proceedings and documentation not translated to Marshallese contribute to these misunderstandings.

137. Schachter, J., *Intercountry Adoption/Global Migration: A Pacific Perspective*, 18 Asia Pacific Journal of Anthropology 305 (2017) at 312, available at https://doi.org/10.1080/14442213.2017.1349170.
138. *Id*.
139. *Id*.
140. Joyce, K., "*Do You Understand That Your Baby Goes Away and Never Comes Back?*", The New Republic (Apr, 22, 2015), https://newrepublic.com/article/121556/arkansas-adoption-preys-cultural-misunderstanding-marshallese.
141. Roby, J. L., & Matsumura, S., *If I Give You My Child, Aren't We Family?: A Study of Birthmothers Participating in Marshall Islands–U.S. Adoptions, 5 Adoption Quarterly 7 (2002) at 25, available at* https://doi.org/10.1300/J145v05n04_02.

One of the few studies of Marshallese birth mothers who participated in adoptions found that 87.7 percent of the 73 respondents would not have relinquished their children if they had known beforehand that they would never see or hear from them again.[142] Of the same respondents, 82.5 percent believed their children would come back to the Marshall Islands when they turned 18.[143]

In Hawai'i and Arkansas, attempts have been made to require separate consent hearings in Marshallese for Marshallese birth mothers; however, one judge in Washington County, Arkansas said it only pushed private adoption attorneys to go to other counties and states to complete the adoptions.[144] The reality is that the demand for adoptions in the U.S. has driven private attorneys to exploit the lack of enforcement.

Investigative reporting from the Honolulu Civil Beat[145] and The New Republic[146] have highlighted some of the recent stories of illicit adoptions that fall through the cracks. One private attorney facilitated 40 adoptions between December 2016 and August 2019 by offering them each $10,000 USD.[147] Under the international Palermo Protocol,[148] the abuse and exploitation involved in Marshallese adoptions that do not go through the CAA and involve financial incentives, coercion, and/ or abuse constitute human trafficking.[149]

In order to ensure the wellbeing of Marshallese families, particularly women and their children, the U.S. must respond to this in a consistent manner. Some private attorneys have been arrested and charged, but investigations have been sparse and fail to ge at the crux of the issue. While the RMI has not ratified the Hague Convention, they agree that independent adoptions undermine safeguards in place, for example, through the CAA.[150] The U.S. has failed to streamline adoptions accordingly and allowed family court judges, even when aware of the problem, to ignore it as an issue of immigration law.[151]

Official adoption numbers from the Marshall Islands to the U.S. are low, but investigative reporting suggests that the illicit adoption market is alive and well and relying on the lack of enforcement of COFA provisions.

How can the U.S. stop lawyers from exploiting COFA migration provisions in coercing and manipulating Marshallese birth mothers?

LABOR EXPLOITATION

The special migration provisions for FAS citizens also create opportunities for labor exploitation. In 2002, investigative reporting uncovered a group of recruiters who used these special migrations provisions to bring over 2,000 Micronesians and Marshall Islanders on one-way tickets to work in the U.S.[152] The recruiters were paid by employers who then signed the workers on illegal contracts binding them to work for a period of time or else pay damages, among other exploitative practices.[153]

142. *Id*.
143. Roby, J. L., & Matsumura, S., *If I Give You My Child, Aren't We Family?: A Study of Birthmothers Participating in Marshall Islands–U.S. Adoptions, 5 Adoption Quarterly 7 (2002) at 24, available at* https://doi.org/10.1300/J145v05n04_02.
144. Dugdale, E., & Hill, J., *Why A Crackdown On This Growing Adoption Pipeline Just Hasn't Worked*, Honolulu Civil Beat (Nov, 2018), https://www.civilbeat.org/2018/11/why-a-crackdown-on-this-growing-adoption-pipeline-just-hasnt-worked-2/
145. Honolulu Civil Beat, *Black Market Babies*, https://www.civilbeat.org/projects/black-market-babies/.
146. Joyce, K., "Do *You Understand That Your Baby Goes Away and Never Comes Back?*", The New Republic (Apr, 22, 2015), https://newrepublic.com/article/121556/arkansas-adoption-preys-cultural-misunderstanding-marshallese.
147. Hill, J., *Crackdown On Illegal Marshallese Adoptions Comes After More Than A Decade Of Inaction*, Honolulu Civil Beat (Oct. 9, 2019), https://www.civilbeat.org/2019/10/crackdown-on-illegal-marshallese-adoptions-comes-after-more-than-a-decade-of-inaction/.
148. 2000 Protocol to the UN Convention on Transnational Organized Crime: To Prevent and Suppress and Punish Trafficking in Persons, Especially Women and Children, GA 55/25 (Nov. 15, 2000), *available at* https://www.ohchr.org/en/professionalinterest/pages/protocoltraffickinginpersons.aspx.
149. Schachter, J., *Intercountry Adoption/Global Migration: A Pacific Perspective*, 18 Asia Pacific Journal of Anthropology 305 (2017) at 315, *available at* https://doi.org/10.1080/14442213.2017.1349170.
150. Hill, J., Dugdale, E., *Marshallese Adoptions Fuel A Lucrative Practice For Some Lawyers*, Honolulu Civil Beat (Nov. 2018), https://www.civilbeat.org/2018/11/marshallese-adoptions-fuel-a-lucrative-practice-for-some-lawyers/.
151. Dugdale, E., & Hill, J., *Why A Crackdown On This Growing Adoption Pipeline Just Hasn't Worked*, Honolulu Civil Beat (Nov, 2018), https://www.civilbeat.org/2018/11/why-a-crackdown-on-this-growing-adoption-pipeline-just-hasnt-worked-2/.
152. Roche, W. F. Jr., & Mariano, W., *Trapped in servitude far from their homes*, Baltimore Sun (Sept. 15, 2002), https://www.baltimoresun.com/bal-te.indent15sep15-story.html.
153. *Id*.

In response to this egregious example of human trafficking bound up in the Compact, the 2003 Amended Compact also included a related agreement regarding labor recruitment practices.[154] The agreement requires that the U.S. investigate labor exploitation and offers protocols for recruiters operated in the FAS.[155] While this is done by and between governments, COFA migrants, as noncitizens, are unable to access government-supported legal services and do not have a right to free counsel in civil cases when such provisions might be needed for protection and redress.[156]

In 2019, appeals came from COFA migrants working at Seaboard Triumph Foods in a meat-packing plant in Iowa. The company had recruited over 200 Micronesians wanting legal workers given the fear of what the Trump Administration's xenophobia could bring in terms of immigration crackdowns. Not long after, reports surfaced of Seaboard representatives confiscating passports, hiding employment contracts, and harassing newly recruited Micronesian workers.[157]

In response, the FSM government invoked the 2003 agreement on labor recruitment practices in a letter to the U.S. State Department.[158] The Iowa state government then withheld financial incentives to the corporation until an investigation was conducted. Less than a month after the investigation began, it found the charges to be unfounded and the financial incentives were restored to Seaboard Triumph Foods.[159]

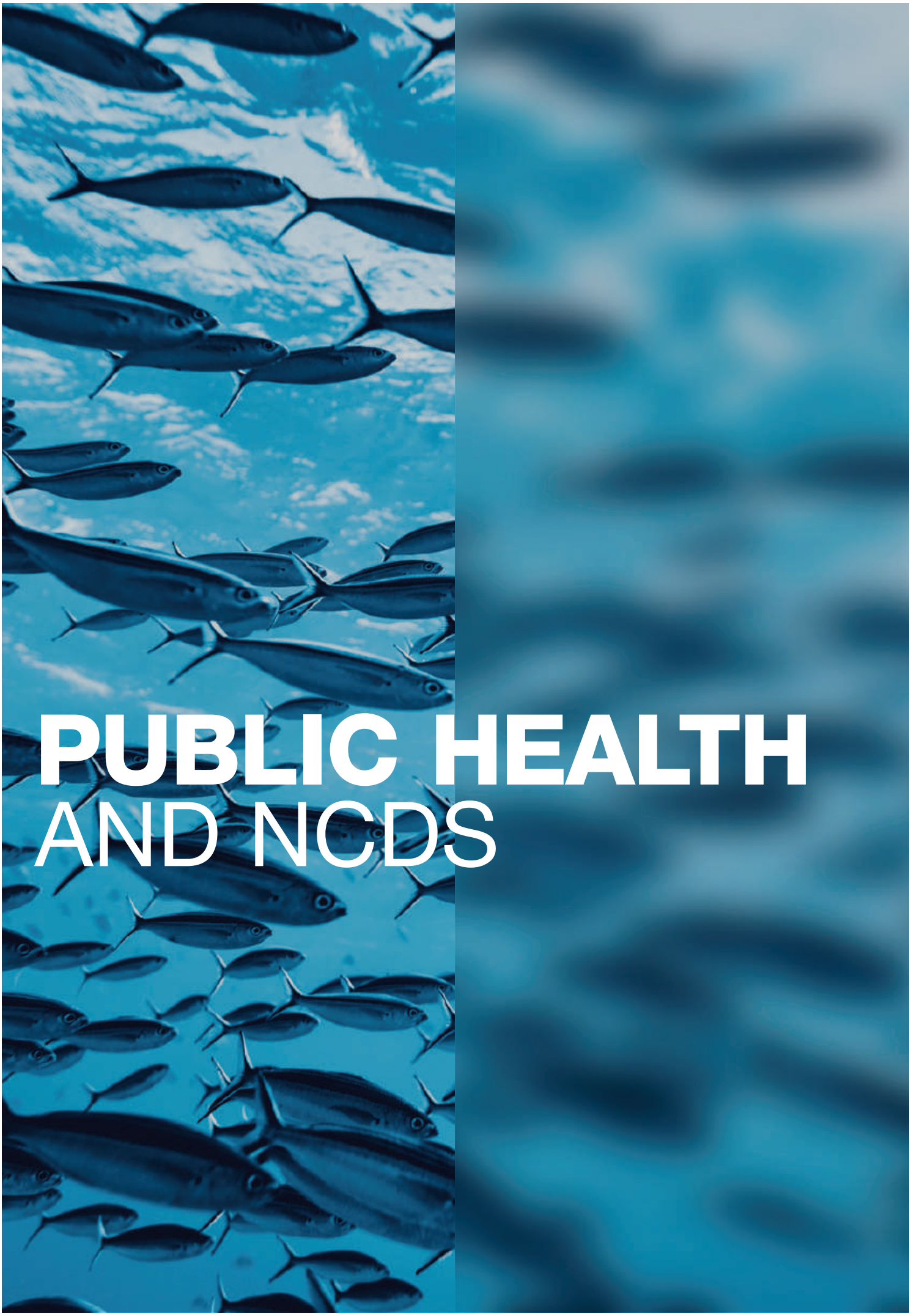
This has not been the only case. The GAO reported that COFA migrants from Hawai'i, Guam, and Oregon shared stories of workplace discrimination or unfair treatment.[160] A report by the Hawaii Advisory Committee to the U.S. Commission on Civil Rights also illustrated how COFA migrants face discrimination in employment and low official reporting can be linked to concerns of retaliation by employers.[161]

It should not come as a surprise that recruiters and corporations are incentivized to exploit labor from the FAS through the Compact. As such, it is crucial that COFA migrants have sufficient protection and opportunities for redress. The FAS governments have managed recruiting practices within the FAS, but the U.S. has largely failed to hold corporations accountable for labor exploitation.

Some labor recruiters from the U.S. have used the COFA migration provisions to exploit COFA migrant labor. The Seaboard Triumph Foods example demonstrates that the U.S. government may be lacking in enforcement capabilities to hold corporations accountable.

Are the current provisions of the COFA labor agreement sufficient in responding to exploitative practices by U.S. recruiters?

154. Agreement Regarding Protections for Citizens of the Republic of the Federated States of Micronesia (FSM) Seeking to Engage in Employment in the United States Pursuant to Recruitment or Other Placement Services, *available at* https://www.state.gov/wp-content/uploads/2019/02/04-625.3-Micronesia-Compact-Labor.EnglishOCR.pdf
155. COFA, Section 175(b).
156. Agreement Regarding Protections for Citizens of the Republic of the Federated States of Micronesia (FSM) Seeking to Engage in Employment in the United States Pursuant to Recruitment or Other Placement Services, at C, 3B, vi, *available at* https://www.state.gov/wp-content/uploads/2019/02/04-625.3-Micronesia-Compact-Labor.EnglishOCR.pdf
157. Hofschneider, A., *Federated States of Micronesia Alleges Trafficking in Iowa*, Honolulu Civil Beat (Sept. 30, 2019), https://www.civilbeat.org/beat/federated-states-of-micronesia-alleges-trafficking-in-iowa/.
158. Embassy of the Federated States of Micronesia, Letter No. 19-12, *available at* https://gov.fm/files/DipNo-19-12.pdf.
159. Shike, J., *Sioux City Pork Plant Incentives Restored*, Drovers (Jan. 13, 2020), https://www.drovers.com/article/sioux-city-pork-plant-incentives-restored.
160. Gootnick, D., *Populations in U.S. Areas Have Grown, with Varying Reported Effects*, GAO (Jun. 2020) at 44, available at https://www.gao.gov/assets/710/707555.pdf.
161. Fujimori-Kaina, N., et al., *Micronesians in Hawaii: Migrant Group Faces Barriers to Equal Opportunity: A Briefing Report from the Hawaii Advisory Committee to the U.S. Commission on Civil Rights*, Hawaii Advisory Committee to the U.S. Commission on Civil Rights (Mar. 2019) at 26, *available at* https://www.usccr.gov/pubs/2019/08-13-Hawaii-Micronesian-Report.pdf.



PUBLIC HEALTH AND NCDS

PUBLIC HEALTH & NCDS

Non-communicable diseases (NCDs) currently pose one of the most significant threats to public health in the RMI and the FSM. Diabetes and heart disease are leading causes of death in both nations,[162] with studies finding that NCD-related deaths account for over eighty percent of deaths in the RMI[163] and the FSM.[164] Further, youth lifestyle indicators suggest that prevalence of diabetes, heart disease, cancer, hypertension, and stroke will continue to increase in years to come.[165]

This NCD epidemic finds its roots in U.S. colonialism and military activity on the islands. During its administration of the Trust Territory, the U.S. cultivated and subsidized a shift away from subsistence farming and fishing practices toward an urbanized, import-reliant economy and induced reliance on imported food aid.[166] This brought about a shift from healthy traditional foods like taro, breadfruit, and fresh fish to imported meat, fish, and rice.[167] This change has become deeply rooted in the RMI and FSM to such an extent that foods like Spam and rice are now considered "traditional."[168]

In the RMI, this dietary shift is the direct result of nuclear testing and ongoing military presence. All of the RMI experienced at least some fallout from the nuclear testing, and this fallout contaminated the food supply, leading to widespread illness on the atolls that experienced the heaviest fallout and a widespread stigmatization of the local foods that had become irradiated.[169] Though much of the lagoon was already off-limits

162. Kool, B., Ipil, M., & McCool, J., *Diabetes Mellitus-related Foot Surgeries in the Republic of the Marshall Islands in Micronesia*, 78 Hawai'i Journal of Medicine & Public Health 12 (Jan. 2019), *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6333959/.; Aitaoto, N. & Ichiho, H., *Assessing the Health Care System of Services for Non-Communicable Diseases in the US-affiliated Pacfic Islands: A Pacfic Regional Perspective*, 72 Hawai'i Journal of Medicine & Public Health 106 (May 2013), *available at* https://pubmed.ncbi.nlm.nih.gov/23901369/.
163. Ichiho, H., et al., *An Assessment of Non-Communicable Diseases, Diabetes, and Related Risk Factors in the Republic of the Marshall Islands, Kwajelein Atoll, Ebeye Island A Systems Perspective*, 72 Hawai'i Journal of Medicine & Public Health 77 (May 2013), *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3689463/.
164. Gopalani, S. V., et al., *Premature Mortality From Noncommunicable Diseases in the Federated States of Micronesia*, 2003–2012, 29 Asia Pacific Journal of Public Health 171 (Mar. 7, 2017), *available at* https://doi.org/10.1177/1010539517696555.
165. Riklon, S., Alik, W., Hixon, A., & Palafox, N. A., *The "compact impact" in Hawaii*: focus on health care, 69 Hawaii Medical Journal 7 (May 2010), *available at* https://pubmed.ncbi.nlm.nih.gov/20539994/.
166. McElfish, P. A. et al., *Diabetes Disparities and Promising Interventions to Address Diabetes in Native Hawaiian and Pacific Islander Populations*, 18 Current Diabetes Reports (Mar. 2019), *available at* https://doi.org/10.1007/s11892-019-1138-1.; Galvin, G., *From the Islands to the Ozarks*, U.S. News & World Report (Mar. 6, 2019), https://www.usnews.com/news/healthiest-communities/articles/2019-03-06/marshall-islands-migrants-face-health-challenges-in-arkansas; McElfish, P. A., *Health Beliefs of Marshallese Regarding Type 2 Diabetes*, 40 American Journal of Health Behavior 248 (Mar. 2016), *available at* https://dx.doi.org/10.5993%2FAJHB.40.2.10.
167. *Id*.; Ichiho, H., et al., *An Assessment of Non-Communicable Diseases, Diabetes, and Related Risk Factors in the Republic of the Marshall Islands, Kwajelein Atoll, Ebeye Island A Systems Perspective*, 72 Hawai'i Journal of Medicine & Public Health 77 (May 2013) at 77, 78, *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3689463/.
168. Brower, K., *The Atolls of Arkansas: Doomed by climate change, Marshall Islanders find a new home in Springdale*, Sierra Club (Dec. 27, 2018), https://www.sierraclub.org/sierra/2019-1-january-february/feature/atolls-arkansas-marshall-islands-marshallese.
169. Georgescu, C., *Report of the Special Rapporteur on the Implications for Human Rights of the Environmentally Sound Management and Disposal of Hazardous Substances and Wastes*, UN HRC (2012) at 7, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G12/163/76/PDF/G1216376.pdf?OpenElement.

for fishing due to ongoing missile testing on the U.S. base on Kwajalein, PCB contamination from the U.S. base on Kwajalein has created an ongoing problem of toxic fish for residents of Kwajalein Atoll, including the thousands who live in the densely populated urban center of Ebeye.[170] Medical studies have established the clear links between these colonial and military activities and the NCD epidemic, as well as to the astronomical rates of tuberculosis that these islanders experience.[171]

These issues follow COFA migrants to the U.S., where familiarity and affordability drive an ongoing reliance on white rice and canned fish and meat in the face of healthier, but more expensive, alternatives.[172] For example, studies have found that 46.5 percent of Marshallese people living in Arkansas have diabetes, and 21.4 percent have pre-diabetes.[173] In Hawai'i, 44.2 percent of Marshallese adults in Hawai'i have type 2 diabetes, and 25.3% have pre-diabetes. One doctor who works with Marshallese in Iowa estimates that nearly 80 percent of the clinic's Marshallese patients have kidney disease.[174] Approximately half of the COFA migrants living in the U.S. are uninsured, which means that they cannot access the preventative care or treatment that may improve health outcomes.[175]

170. U.S. Army Institute of P ublic Health, *Draft Southern US Army Garrison*–Kwajalein Atoll Fish Study, (2014) at 6, *available at* https://rmi-data.sprep.org/system/files/Kwajalein_Public_Release_Southern_USAG-KA_Fish_Study_2014_nomemo.pdf.; Johnson, G., *Fish at Kwaj dangerous to eat*, The Marshall Islands Journal, (Jul. 18, 2019), https://marshallislandsjournal.com/fish-at-kwaj-dangerous-to-eat/.; Lee, H. S., Post Trusteeship *Environmental Accountability: Case of PCB Contamination on the Marshall Islands*, 26 DENV. J. INT'L L. & POL'Y 399, (1998) at 399, 409, *available at* https://digitalcommons.du.edu/cgi/viewcontent.cgi?article=1600&context=djilp.
171. Yamada, S., Riklon, S. & Maskarinec, G. G., *Ethical Responsibility for the Social Production of Tuberculosis*, 13 J. of Bioethical Inquiry 57 (Mar. 2016) at 57, 58, *available at* https://doi.org/10.1007/s11673-015-9681-1.
172. McElfish, P.A., et al., *Family Model of Diabetes Education with a Pacific Islander Community*, 41 Diabetes Education 706 (Dec. 2015) at 706, *available at* https://doi.org/10.1177/0145721715606806.
173. Id.; see also McElfish, P. A., *Health Beliefs of Marshallese Regarding Type 2 Diabetes*, 40 American Journal of Health Behavior 248 (Mar. 2016), *available at* https://dx.doi.org/10.5993%2FAJHB.40.2.10.
174. Diamond, D., *They Did Not Realize We are Human Beings*, POLITICO (Jan. 26, 2020), https://www.politico.com/news/magazine/2020/01/26/marshall-islands-iowa-medicaid-103940.
175. McElfish, P. A., Purvis, R., Riklon, S., & Yamada, S., *Compact of Free Association Migrants and Health Insurance Policies: Barriers and Solutions to Improve Health Equity*, 56 Inquiry (Dec. 11, 2019), *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6906344/.

COFA MIGRANTS IN THE U.S.

COFA MIGRANTS IN THE U.S.

The COFA migration policy, which allows citizens of the FAS to live and work in the U.S. visa-free, is a key feature of the agreements. Since ratification, many FAS citizens have moved to the U.S. and its territories. The table shown provides estimates of FAS citizens living in the U.S. and its territories.

Migration is an important option for citizens of the FAS for complex and interconnected reasons like family reunification, economic opportunities, healthcare access, and environmental degradation among others. The U.S. government tends to veer toward an immigration policy of reducing immigration from the FAS by way of two options:

1) make immigration more challenging for COFA migrants or

2) improve development outcomes in freely associated states to prevent out-migration.[176] The reality is that the migration provisions in the COFAs are important to the FAS, and threatening them could undermine the future of the agreements.

COFA State Populations	
FSM	105,544
RMI	53,127
Palau	21,729

COFA Migrants in the U.S. (2013-2017 Estimates)[178]	
U.S. States (excl. Hawai'i)	36,400

COFA Migrants in Other U.S. Insular Areas (2018 Estimates)[177]	
Guam	18,874
Hawai'i	24,755
CNMI	2,535
American Samoa	25

There are also additional issues impacting COFA migrants in the U.S. that the U.S. government has failed to address. When the COFAs were signed, COFA migrants had access to the same public services as other immigrants. They pay the same taxes as American citizens. However, the Personal Responsibility Work Opportunity Reconciliation Act of 1996 (PRWORA) explicitly changed the status of COFA migrants to non-qualified aliens, thereby effectively denying them most federal benefits including health insurance for non-emergency needs. While some states have expanded state coverage for COFA migrants, the tension between the state and federal governments and the piecemeal outcomes of legislation have failed to adequately provide social and welfare benefits for COFA migrants.

An example of this can be seen in Hawai'i's state Basic Health Hawai'i (BHH) program. The BHH was established so as to disenroll COFA migrants from the main state healthcare program and enroll them instead in BHH, which has severely restricted coverage. In 2010, a case was made by Micronesian community groups in Hawai'i

176. Gootnick, D., *Compacts of Free Association: Issues Associated with Implementation in Palau, Micronesia, and the Marshall Islands*, GAO (2016), *available at* https://www.gao.gov/products/GAO-16-550T.
177. U.S. Census Bureau, *2018 Estimates of Compact of Free Association (COFA) Migrants*, at 4 (Apr. 26, 2019), *available at* https://www.doi.gov/sites/doi.gov/files/uploads/2018-cofa-report.pdf.
178. Gootnick, D., *Populations in U.S. Areas Have Grown, with Varying Reported Effects*, GAO (Jun. 2020), *available at* https://www.gao.gov/assets/710/707555.pdf.

that the BHH violated the 14th Amendment of the U.S. Constitution because it discriminated against COFA migrants on the basis of alienage. While a Federal District Court ruling agreed, the state government appealed the case to the Ninth Circuit Court in 2012.[179] In 2014, the Ninth Circuit Court ruled that Hawai'i, and all states under the court's jurisdiction, are not constitutionally required to provide state-run healthcare for COFA migrants.

In an amicus brief, advocates illustrated the history of colonial harm on Micronesians as well as the ongoing failure to repair any damage from the past or to reduce ongoing harm.[180] They argued that the case was not about state benefits or welfare for immigrants, but rather "it is about repairing the persisting damage of injustice uniquely suffered by the people of the Federated States of Micronesia (FSM), the Republic of the Marshall Islands (RMI) and the Republic of Palau (Palau)."[181] As outlined throughout this assessment, they also mention U.S. militarization, nuclear testing, the decimation of social and economic structures, and the ongoing failure of the U.S. to claim responsibility for these injustices.

Where efforts have been made to expand Medicaid to COFA migrants, it has been piecemeal and limited. For example, under the Children's Health Insurance Program Reauthorization Act of 2009, some states and territories have expanded Medicaid access to children and/ or pregnant women. However, only 28 states and territories have included coverage for both pregnant women and children.[182]

Healthcare inequities are not the only example. As another example, there was a confusing back-and-forth about whether or not COFA migrants were eligible for the Free Application for Federal Student Aid (FAFSA) which allows them to qualify for financial aid in higher education. Even though they are eligible to apply with the FAFSA, they are only eligible for federal Pell grants among the range of government-supported loans and grants. Further, financial aid often only accounts for a small portion of the cost of education at a U.S. university.

Another example of how challenging this piecemeal approach to everyday life for COFA migrants is the REAL ID Act. From 2005, the REAL ID Act excluded COFA migrants from typical drivers' license and identification guidelines that allow for drivers' licenses lasting five to eight years and instead mandated that they get renewed driver's licenses every year. In 2018, the REAL ID Modification of Freely Associated States Act amended the 2005 REAL ID Act to authorize states to issue COFA migrants full-term driver's licenses or ID cards.[183]

Regardless, under the Trump administration, the Department of Homeland Security (DHS) interpreted the guidelines to exclude COFA migrants from getting drivers licenses and state IDs altogether stating that they would have to use their visas. However, COFA migrants do not need visas to be in the U.S. The incoherence of federal policy in addition to tensions between states and the federal government led to frustration

179. Korab et al. v. Koller et al., Civ. No. 10-00483 JMS/KSC, Order Granting Plaintiffs' Motion for Preliminary Injunction, *available at* https://hiequaljustice.org/wp-content/uploads/2018/07/Korab43.pdf.
180. Amici Curiae Brief of the Japanese American Citizens League-Honolulu, Korab v. McManaman, No. 11-15132, 2011 WL 3672693, (9th Cir. Aug. 24, 2011).
181. Id. at 3.
182. Gootnick, D., *Populations in U.S. Areas Have Grown, with Varying Reported Effects*, GAO (Jun. 2020) at 33, *available at* https://www.gao.gov/assets/710/707555.pdf.
183. Pub. L. No: 115-323: REAL ID Act Modification for Freely Associated States Act

and confusion at all levels which ultimately resulted in barriers to public services, housing, welfare, and employment for COFA migrants, to name a few.

There are two broad options for COFA migrants to gain better access to federal benefits. One is a passive approach whereby COFA migrants seek to adjust their immigration/citizenship status (e.g., becoming lawful permanent residents (green card holders) or becoming naturalized citizens) such that they acquire the appropriate status that allows them to be eligible for federal benefits. The other is a more fundamental and active approach, whereby legislative action is taken to reclassify COFA migrants as "qualified aliens" or as individuals who are otherwise eligible for such federal benefits.

There is not necessarily an apparent federal level policy change for green card applications and naturalization because COFA migrants, being citizens of sovereign nations, face more or less the same procedures as would any other foreign national who applies for a green card or citizenship. One categorical advantage that FAS citizens have over the green card process compared to other foreign nationals is the armed forces "special immigrant" option,[184] whereby COFA migrants who serve or served in the U.S. armed forces are eligible for a simplified process for applying for lawful permanent resident status.

Compared to a broad-based policy change, encouraging FAS citizens or COFA migrants to become legal permanent residents (LPRs) or naturalized citizens can be incremental and time consuming. However, considering the dramatic increase in the number of Caribbean immigrants who became naturalized citizens in the aftermath of PRWORA,[185] lawful permanent residence and/or naturalization are legitimate options to consider for COFA migrants and helping such COFA migrants navigate the pathway to lawful permanent resident status or citizenship may provide meaningful relief until broader policy changes take place. However, obtaining U.S. citizenship is an imperfect solution for FAS citizens that could cost their FAS citizenship and accordingly, their land rights in the FAS.

As for legislative action, Medicaid is arguably the most important federal benefit that needs to be restored for COFA migrants. As mentioned above, years of nuclear testing and environmental damage have affected the health of FAS citizens in profound ways, and an important aspect of migration to the U.S. or its territories is gaining access to sufficient healthcare. Unfortunately, while more than twenty bills to reinstate COFA eligibility for Medicaid have been introduced at the federal level since 2001,[186] actual progress has been slow. In May 2020 and June 2020, two bills that address the restoration of Medicaid eligibility for COFA migrants – the Health and Economic Recovery Omnibus Emergency Solutions Act (HEROES Act)[187] and the Patient Protection and Affordable Care Enhancement Act[188] – passed in the U.S. House of Representatives. The HEROES Act bill was the first bill addressing this matter to pass the House of Representatives vote in about 25 years. These bills and others address the issue of Medicaid access by proposing identical amendments to PRWORA such

FAS citizens are allowed to live and work in the U.S. visa-free under the COFAs. However, policies towards COFA migrants at the tension between federal, state, and territory governments have routinely stripped basic protections and access to services for COFA migrants.

How can COFA migrant status be clarified at the federal level to extend protections and access to services sufficiently and consistently?

184. U.S. Citizenship and Immigration Services, *Policy Manual: Chapter 8 - Members of the U.S. Armed Forces, available at* https://www.uscis.gov/policy-manual/volume-7-part-f-chapter-8.
185. Mahoney A., *The Health and Well-Being of Caribbean Immigrants in the United States*, Routledge (2012) at 154.
186. Asian & Pacific Islander American Health Forum, *Health Care for COFA Migrants*, https://www.apiahf.org/resource/health-care-for-cofa-citizens/.
187. Congress.gov, H.R.6800 – The HEROES Act, https://www.congress.gov/bill/116th-congress/house-bill/6800/text.
188. Congress.gov, H.R.1425 – Patient Protection and Affordable Care Enhancement Act, https://www.congress.gov/bill/116th-congress/house-bill/1425.

that COFA migrants can be included under the definition of "qualified aliens" for purposes of Medicaid eligibility. However, the HEROES Act and Patient Protection and Affordable Care Enhancement Act bills still need to pass the Senate vote and be signed into law by the President. Political hurdles, not lack of effort, remain a significant barrier to enacting laws that would restore Medicaid to COFA migrants.

Yet, examples set by certain laws enacted during the years following the implementation of PRWORA suggest that overcoming such political and legislative hurdles is not impossible. For example, the following laws restored federal benefits to a certain extent for other non-COFA non-citizens with respect to Medicaid, Social Security Income (SSI), and Supplemental Nutrition Assistance Program (SNAP, formerly known as Food Stamps):

- Balanced Budget Act of 1997 (BBA)[189]
- Noncitizen Benefit Clarification and Other Technical Amendments Act of 1998[190]
- Agricultural Research, Extension, and Education Reform Act of 1998[191]
- Farm Security and Rural Investment Act (Farm Bill) of 2002 (including Food Stamp Reauthorization Act)[192]
- SSI Extension for Elderly and Disabled Refugees Act of 2008[193]
- Children's Health Insurance Program Reauthorization Act of 2009 (CHIPRA)[194]

The technical approach to restoration in these laws vary. The BBA and the Noncitizen Benefit Clarification and Other Technical Amendments Act respectively amended provisions of PRWORA to provide additional exceptions to the general rules that prevented benefit eligibility for non-citizens,[195] whereas CHIPRA amended certain codified sections of the Social Security Act[196] by specifically overriding PRWORA: "A State may elect … to provide medical assistance …. notwithstanding…the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, to children and pregnant women who are lawfully residing in the United States." But, regardless of the approach, the track record of these legislations show that the restoration of federal benefits for individuals who became ineligible upon the passage of PRWORA is not unprecedented. Although eligibility for Temporary Assistance for Needy Families (TANF) benefits has for the most part not been addressed in legislations subsequent to PRWORA, eligible immigrants who had received benefits prior to PRWORA, children, persons over 65 years old, and the disabled have largely recovered some benefits under Medicaid, SSI, and SNAP. This goes to further show that it is feasible to consider various options to restore not only Medicaid eligibility (as discussed above), but also the other federal benefits that have been restored for other non-citizens.

Further, from an equity standpoint, there are arguments of fairness to be made in favor of reinstating federal benefits for COFA migrants. The BBA and the Agricultural

189. Pub. L. No. 105-34.
190. Pub. L. No. 105-306.
191. Pub. L. No. 105-185.
192. Pub. L. No. 107-171.
193. Pub. L. No. 110-328.
194. Public Law 111-3; 74 Fed. Reg. 47,517 – 47,536 (Sept. 16, 2009); 42 C.F.R. 457.
195. Section 401(b) of PRWROA (amended by Noncitizen Benefit Clarification Act) lists exceptions to the general rule barring non-qualified aliens from federal public benefits and 402(a)(2) of PRWORA (amended by BBA) lists exceptions to the general rule barring qualified aliens from federal programs.
196. 42 U.S.C. 1396b(v).

Research, Extension, and Education Reform Act were signed into law with the acknowledgement that PRWORA unfairly treats legal immigrants and that such unfair treatment was not the intended effect of welfare reform.[197] Although COFA migrants are not classified as "immigrants", but rather "non-immigrants without visas",[198] [199] their status closely resembles that of legal permanent residents or others (e.g., refugees and asylees) that are legally present in the U.S. on a permanent basis in that COFA migrants are also lawfully residing in the U.S. for an indeterminate period of time. This sets COFA migrants apart from other individuals in the "non-qualified alien" category (e.g., students, visitors, and temporary workers). Accordingly, unfair treatment in welfare benefits with respect to legal immigrants would reasonably have a similarly unfair impact on COFA migrants, and therefore needs to be addressed through legislative action.

Another issue to consider in terms of equitable treatment is that COFA migrants pay income taxes in the U.S. Taxation and receipt of social security payments were a focal point of recent decisions[200] from the First Circuit and U.S. District Court of Guam that concluded that the U.S. government's denial of social security benefits to U.S. citizens living in territories is unconstitutional. The government relied on Supreme Court cases *Califano v. Torres* and *Harris v. Rosario* that affirm Congress's ability to differently treat the territories from the states with regard to federal benefit programs if Congress can point to a "rational basis" for doing so, and proffered the rationale that SSI benefits are paid from general revenues funded by federal income taxes, and residents of U.S. territories generally do not pay federal income tax. If the government's logic is that benefits should be provided on the basis of taxation, then, arguably, COFA migrants who pay taxes in the U.S. should be afforded access to benefits.

Further, the courts' decisions relied on the fact that residents of the Commonwealth of the Northern Mariana Islands (CNMI) do not pay income taxes, and yet still receive benefits because they have secured them in their negotiation with the federal government. While CNMI's status is different because it is a U.S. commonwealth whereas the FAS are sovereign states, the CNMI example can provide a basis for the argument that such benefits are negotiable matters (rather than an inherent right originating from territorial status), and therefore can and should be negotiated for in the Compact negotiations.

Another similar example is Cuba. The relationship between the United States and Cuba is unique, in that Cubans are given several pathways to U.S. citizenships and thus, access to public benefits. The 1966 Cuban Adjustment Act (CAA),[201] permits Cubans to apply for a green card after being present in the United States for one year. Applicants under the CAA may receive work authorization while their application is pending.

197. Clinton, W. J., *Statement on Signing the Agricultural Research, Extension, and Education Reform Act of 1998, available at* https://www.presidency.ucsb.edu/node/226581.
198. Compact of Free Association between the Government of the United States and the Government of the Federated States of Micronesia, and Compact of Free Association between the Government of the United States and the Government of the Republic of the Marshall Islands, Public Law 99-239 (1986); Compact of Free Association Amendments Act, Public Law 108-188 (2003); Compact of Free Association between the Government of the United States and the Government of Palau, Public Law 99-658 (1986); U.S. Citizens and Immigration Services, *Status of Citizens of the Freely Associated States of the Federated States of Micronesia and the Republic of the Marshall Islands*, https://www.uscis.gov/sites/default/files/USCIS/Verification/I-9%20Central/FactSheets/FactSheet-Status_of_Citizens_of_Micronesia_Marshalls_Islands.pdf.; U.S. Citizens and Immigration Services, *Status of Citizens of the Republic of Palau*, https://www.uscis.gov/sites/default/files/USCIS/Verification/I-9%20Central/FactSheets/FactSheet-Status_of_Citizens_of_Palau.pdf.
199. Padilla, A., D'Avanzo, B., & Schwartz, S., *Eligibility for Health Insurance For Immigrants and Their Families*, National Immigration Law Center (Nov. 17, 2016) *available at* https://www.nilc.org/wp-content/uploads/2016/12/Slides-for-Nov-17-Webinar.pdf.
200. Law360.com, *Ruling May Show Sea Change In Territorial Access to Benefits*, https://www.law360.com/articles/1286356/print?section=appellate.
201. CAA, Pub. L. 89-732 (Nov. 2, 1966), https://www.govinfo.gov/content/pkg/STATUTE-80/pdf/STATUTE-80-Pg1161.pdf.

That being said, any federal level policy change regarding benefits eligibility of COFA migrants should be examined in conjunction with the potential impact of the Inadmissibility on Public Charge Grounds final rule[202] implemented by DHS on February 24, 2020. The final rule applies to applicants for admission to the U.S. and aliens seeking to adjust their status to that of a lawful permanent resident from within the U.S. The final rule clarifies the factors considered when determining whether someone is "likely at any time to become a public charge" and therefore inadmissible to the U.S. and ineligible to become a lawful permanent resident. "Likely at any time to become a public charge" means more likely than not at any time in the future to receive one or more public benefits for more than 12 months total within any 36-month period, and inadmissibility is determined based on the totality of circumstances.

The public benefits that come under the scrutiny of the public charge rule are benefits relating to Medicaid, SSI, SNAP, and TANF – i.e., exactly those benefits that COFA migrants have been excluded from pursuant to PRWORA and are struggling to regain. Further, COFA migrants, unlike certain other categories of non-citizens, are not exempt from the public charge rule. Accordingly, the application of the public charge rule and the restoration of eligibility for federal benefits could potentially have the effects of inhibiting FAS citizens' migration to the U.S. entirely, pressuring current beneficiaries to consider disenrolling from any benefits they are receiving,[203] and discouraging efforts to adjust status to that of a green card holder,[204] and also, would likely dampen any positive effect of a restoration of COFA eligibility for federal benefits, if COFA migrants are discouraged from taking advantage of their reinstated eligibility for fear of being negatively reviewed by the forward-looking "totality of circumstances" public charge rule. Any changes at the federal level regarding COFA migrants should be comprehensively thought out and planned such that what seems like a solution does not reveal itself to give rise to additional problems.

In light of the high stakes in play in connection with the public charge rule and use of public benefits by non-citizen populations in the U.S., it is not surprising that the public charge rule has already been challenged in several different cases brought in district courts.[205] All such district courts granted plaintiffs' motions for preliminary injunctions and in all such cases DHS appealed that the Second , Fourth, Seventh, and Ninth Circuit Courts stay the district courts' preliminary injunctions. While the Fourth and Ninth Circuit Courts have granted the motions to stay, the Second and Seventh Circuit Courts affirmed the district courts' preliminary injunctions (albeit with a modified scope in the case of the Second Circuit).[206] It remains to be seen how and whether the public charge rule will persist, given that the current injunctions are preliminary and highly limited in scope to only a handful of jurisdictions.

202. 84 Fed. Reg. 41,292 – 41,408 (Aug. 14, 2019); 8 C.F.R. 103, 212 – 213, 245, and 248; U.S. Citizen and Immigration Services, *Final Rule on Public Charge Ground of Inadmissibility, available at* https://www.uscis.gov/archive/archive-news/final-rule-public-charge-ground-inadmissibility.
203. Mass disenrollment from public benefits occurred in the aftermath of PRWORA due to fear and confusion, even among immigrants who remained eligible for public benefits. Similar occurrences are expected from the public charge rule. See Ponce, N., *The UCLA Center for Health Policy Research's Public Comment on proposed changes to the federal "public charge" immigration test*, (Dec. 13, 2018), *available at* https://healthpolicy.ucla.edu/newsroom/press-releases/pages/details.aspx?NewsID=311.
204. *See New York v. U.S. Dept. of Homeland Security*, Nos. 19-3591, 19-3595, 2020 WL 4457951 (2d Cir. Aug. 4, 2020), at 2 (noting that "as a practical matter, the Rule is likely to be applied primarily by USCIS as it adjudicates applications for adjustment of status … than [by U.S. Customs and Border Protection] … at a port of entry").
205. *See New York v. U.S. Dept. of Homeland Security*, 19-cv-07777 (S.D.N.Y.)*; Make the Road New York v. Cuccinelli,* 19-cv-07993 (S.D.N.Y.); *CASA de Maryland, Inc. v. Trump,* No. 19-cv-2715 (D. Md.)*; Cook Cty. v. Wolf,* No. 19-cv-6334 (N.D. Ill.)*; City and Cty. of San Francisco v. USCIS,* No. 19-cv-4717 (N.D. Cal.)*; California v. DHS,* No. 19-cv-4975 (N.D. Cal.)*; Washington v. DHS,* No. 19-cv-5210 (E.D. Wash.).
206. *See CASA de Maryland, Inc. v. Trump,* 414 F.Supp.3d 760 (4th Cir. 2020)*; City & Cty. of San Francisco v. USCIS,* 944 F.3d 773 (9th Cir. 2019)*, Cook Cty. v. Wolf,* 962 F.3d 208 (7th Cir. 2020), *New York v. U.S. Dept. of Homeland Security,* Nos. 19-3591, 19-3595, 2020 WL 4457951 (2d Cir. Aug. 4, 2020).

- **COFA migrants must be exempt from the Public Charge Final Rule.** While it has not been applied on a large scale, the discretionary application of the rule is dangerous. COFA migrants must be exempt from this rule that neglects the over 80 years of colonial harm perpetrated by the U.S. in the FAS.
- **Restore public benefits to COFA migrants at a federal level.** Public benefits should be available to COFA migrants not only because of the colonial damage caused by the U.S. in the FAS but also because COFA migrants pay taxes when they live in the U.S.

"COMPACT IMPACT"

The political dynamics of the Compacts extend to U.S. states and territories which have hosted growing communities of COFA migrants. States and territories impacted through the COFA migration provisions, including American Samoa, Guam, the CNMI, and Hawai'i, have called for federal funding to support services for COFA migrants. In 2003, the amended compact included support for territories and states with health, educational, social, or public safety services or related services impacted by COFA migrants, called the Compact Impact funding.

The Compact Impact is a complex issue. There is a humanitarian argument for Compact Impact funding in that it supports state and territory governments to support public services for COFA migrants. However, these arguments can also be used as leverage in federal politics and often gain momentum from underlying xenophobic racism. In practice, this argument often follows common U.S. political scapegoating of immigrants of color, which, in this case, is used to bolster funding requests to the federal government.

COFA migrants are legally permitted to live and work in the U.S. They also pay taxes and contribute to local communities and economies. The xenophobic racism often neglects the horrific colonial history of the U.S in the region as well as the institutional challenges that COFA migrants face when living in U.S. states and territories.

In addition to the harmful rhetoric around the Compact Impact, DOI has neglected its primary duties in fulfilling the agreed upon funding protocols. GAO found that DOI has been providing little to no information to Congress, which is required under the COFA provisions, since at least 2011.[209] Further, DOI established guidelines to assist jurisdictions in providing information specific to the needs of COFA migrants in 2014 but have still not distributed these guidelines to affected jurisdictions.[210]

FAS CITIZENS IN THE U.S. MILITARY

Micronesians serve in the U.S. military at around twice the per capita rate of any U.S. state, and they have also died at a per capita rate that is five times higher than the national average during the wars in Iraq and Afghanistan.[207] This is due in large part to the active recruitment efforts that the U.S. military branches direct toward youth in the FAS, some of whom did not even know that the U.S. was at war when they enlisted.[208] Yet, even with the Compacts which allow for them to serve in the military, there are few provisions for veterans services, adequate healthcare, or benefits.

- **Veterans from the FAS must be provided equal support and access to veterans services as those from the U.S.** If that cannot be guaranteed, the U.S. military must be required to disclose that information when recruiting.

207. Hofschneider, A., Broken Promises, Shattered Lives: The Case For Justice For Micronesians In Hawai'i, Hawai'i Appleseed Center For Law And Economic Justice (Dec. 14, 2011), *available at* http://hiappleseed.org/wp-content/uploads/2016/11/Broken-Promises-Shattered-Lives-The-Case-for-Justice-for-Micronesians-in-Hawai%CA%BBi.pdf; Nobel, J., A *Micronesian Paradise--for U.S. Military Recruiters*, TIME (Dec. 31, 2009), http://content.time.com/time/world/article/0,8599,1950621,00.html.
208. Chad Blair, The Story of Micronesians Fighting America's Wars, Honolulu Civil Beat (Oct. 24, 2017), https://www.civilbeat.org/2017/10/chad-blair-the-story-of-micronesians-fighting-americas-wars/; Nobel, J., A Micronesian Paradise--for U.S. Military Recruiters, TIME (Dec. 31, 2009), http://content.time.com/time/world/article/0,8599,1950621,00.html.; Tony Azios, Uncle Sam wants Micronesians for US military, The Christian Science Monitor (May 5, 2010), https://www.csmonitor.com/World/Asia-Pacific/2010/0505/Uncle-Sam-wants-Micronesians-for-US-military.
209. Gootnick, D., *Improvements Needed to Assess and Address Growing Migration*, GAO (Nov. 2011), *available at* https://www.gao.gov/products/GAO-12-64.
210. Gootnick, D., *Populations in U.S. Areas Have Grown, with Varying Reported Effects*, GAO (Jun. 2020) at 24, *available at* https://www.gao.gov/assets/710/707555.pdf.

The argument remains that federal Compact Impact funding will support public institutions in supporting COFA migrants. While funding is an important priority, it must be specifically used to support COFA migrants and must come in conjunction with policies to protect COFA migrants in the U.S. Organizations like the Micronesia Resource Center (MRC) in Guam and We Are Oceania (WAO) in Hawai'i work to help COFA migrants navigate complicated and barrier-ridden institutions. While funding should directly support these organizations and others like them, these organizations can also advise broader funding strategies by providing insights about the institutional barriers that COFA migrants face everyday in order to improve equity at a systems level.

Compact Impact funding is an important provision in supporting public services for COFA migrants, but it can be used to scapegoat tax-paying COFA migrants for burdening public services. This neglects the U.S.'s harmful colonial history in the region as well as the successful efforts by grassroots organizations supporting COFA migrants everyday.

How can Compact Impact funding support state and territory governments to best support COFA migrants access to public services?

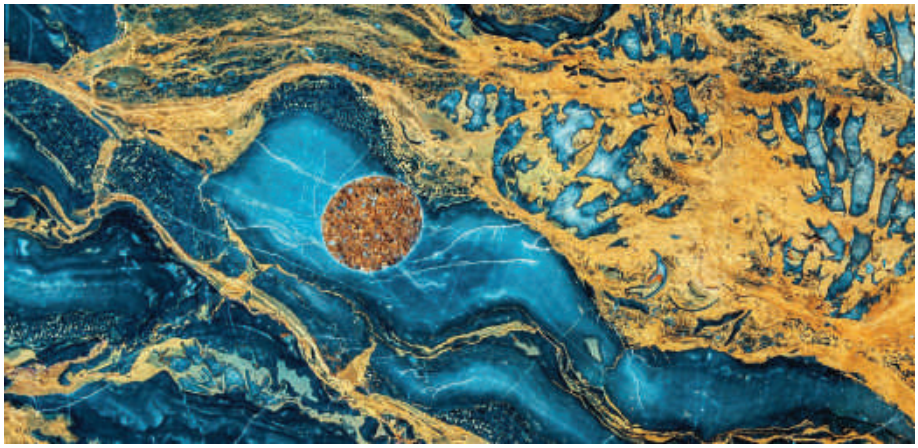
COVID-19

The current COVID-19 pandemic has brought devastating consequences world-wide, and it has exacerbated many of the equity issues discussed in this assessment. Both the FSM and RMI have restricted travel and taken measures to prepare for potential outbreaks. The ADB and U.S. government have offered economic assistance and some support for health facilities.[211] The FAS themselves are largely protected at this stage, but COFA migrants in the U.S. are facing disproportionate risks.

In Arkansas[212], California[213], Hawai'i[214], Utah[215], and Oregon[216], data show the risk of contracting COVID-19 is significantly higher for COFA migrants. Analysis of this skewed risk distribution can be linked to the many equity issues COFA migrants face in the U.S. Many COFA migrants are essential workers or work in the service industry. With little or no access to unemployment insurance, the pressure is high to continue working when employers and governments offer little to no safety provisions.

A survey by the Arkansas Coalition of Marshallese found that 82% of Marshallese and Pacific Islanders surveyed have essential workers in their households.[217] 51% reported household members with diabetes, obesity or high blood pressure, and 15% have household members that are 65 years or older.[218] These risks are amplified in certain industries like meat-packing plants, many of which recruit COFA migrants, and are failing to protect workers.[219]

211. Johnson, G., *Marshall Islands extends travel ban while making exceptions*, Radio New Zealand (Jun. 15, 2020), https://www.rnz.co.nz/international/pacific-news/419001/marshall-islands-extends-travel-ban-while-making-exceptions.
212. Johnson, G., *Coronavirus perfect storm engulfs Marshall Islanders in US*, Radio New Zealand (Jul. 9, 2020), https://www.rnz.co.nz/international/pacific-news/420744/coronavirus-perfect-storm-engulfs-marshall-islanders-in-us.
213. Radio New Zealand, *Pacific Islanders in parts of California six times more likely to get COVID-19*, (Jul. 20, 2020), https://www.rnz.co.nz/international/pacific-news/421592/pacific-islanders-in-parts-of-california-six-times-more-likely-to-get-covid-19
214. Hofschneider, A., *COVID-19 Cases Among Pacific Islanders Surge in Hawaii*, Honolulu Civil Beat (Jun. 29, 2020), https://www.civilbeat.org/2020/06/covid-19-cases-among-pacific-islanders-surge-in-hawaii/.
215. Radio NZ, *Utah Pacific Islanders called on to do more to combat Covid-19*, (Jul. 20, 2020), https://www.rnz.co.nz/international/pacific-news/421568/utah-pacific-islanders-called-on-to-do-more-to-combat-covid-19
216. Hofschneider, A., *Pacific Islanders In Oregon Have the Highest Rate of COVID-19*, Honolulu Civil Beat (Apr. 23, 2020), https://www.civilbeat.org/beat/pacific-islanders-in-oregon-have-the-highest-rate-of-covid-19/.
217. Pedro, M., *Arkansas Coalition of Marshallese Responds to New Findings Showing Higher Rates of COVID-19 in Pacific Islander Communities,* Arkansas Coalition of Marshallese (May 15, 2020), *available at* https://static1.squarespace.com/static/5b9fb75e0dbda34bc2ff148e/t/5ebebdf327a05d4e10cbb3b5/1589558771962/acompressrelease.pdf.
218. *Id*.
219. Paschal, O., *Families of Tyson workers with COVID-19 condemn company's labor practices*, Facing South (June. 24, 2020), https://www.facingsouth.org/2020/06/families-tyson-workers-covid-19-condemn-companys-labor-practices.



Issues including the high rates of homelessness and the overcrowding of homes among COFA migrants exacerbate the existing workplace and community risk.[220] For those who are exposed to COVID-19, the explicit exclusion from access to affordable healthcare and many social services has left many more vulnerable if exposed to COVID-19. This pandemic heightens the already existing stress that FAS residents and migrants endure due to exclusion from adequate social resources and compounds the harms that stem from the legacy of such exclusion.

220. Marcoux, S., *COVID-19: A Disproportionately Devastating Disease for Marshallese in Hawai'i*, Columbia Law School Human Rights Institute (Apr. 13, 2020), https://web.law.columbia.edu/human-rights-institute/covid-19-Hawai%E2%80%99i%27s-Marshallese.

CONCLUSION

CONCLUSION

The preamble of the COFA agreements recites:

> Affirming that their Governments and their relationships as Governments are founded upon respect for human rights and fundamental freedoms for all, and that the peoples of the Trust Territory of the Pacific Islands have the right to enjoy self-government;

It is clear that these aspirations have not been attained in U.S. relations with the FAS. This assessment explored several of the gaps between these aspirations and reality. The terms of the COFA have important ramifications for all FAS citizens as well as U.S. and U.S. territory residents. The provisions involve issues around human rights, migration, and the environment that warrant close attention. This assessment combined the work and conversations of over 85 collaborators as well as legal analyses led by law firm Clifford Chance.

This assessment is not exhaustive, and it covers issues that cannot be solely addressed within the negotiations. The negotiations themselves address the provisions of the COFAs directly, but U.S.-FAS relations extend beyond the negotiating table. Further, as several collaborators identified, the negotiations take place behind closed doors. Bilateral agreement negotiations are not democratic spaces. While the FAS governments conducted consultations in some form, we hope this strategic assessment opens conversations to explore all pathways for advocates to engage in and around the COFAs.

In discussing each of the challenges in this assessment, we have presented recommendations, pathways for action, or questions for further exploration in order to achieve more equitable outcomes in U.S.-FAS relations. These are summarized here.

RECOMMENDATIONS

- **The U.S. must take full responsibility for the NTP and its damage by employing third party assessments of the Runit Dome with the aim of removing it from the RMI.** In addition to the lack of compensation for the awarded nuclear claims, the U.S. has failed to remedy the concerns related to the Runit Dome. Assessments of the safety and structural integrity of the Runit Dome must be done by a third party, not solely the Department of Energy.

- **Expand Title I, Article VI, Section 162 applicability to environmental security issues.** Climate change is a security issue, and current avenues for the FAS to hold the U.S accountable for inaction on climate change are few to none.
- **Require the U.S. to restore lands it has taken for its use upon U.S. withdrawal from the country.** Article X, section 3 of the MUORA absolves the U.S. of responsibility to restore defense sites to their former condition. If restoration is not possible, compensation with enforcement mechanisms would be warranted. This is crucial considering continued PCB contamination and the potentially leaking Runit Dome.
- **Require that U.S. environmental statutes and regulations that govern Kwajalein and any military site mirror those applied in the U.S.** At the moment, respective U.S. authorities are given significant discretion indetermining similar standards. Mirrored standards must also include either citizen suit provisions or an explicit avenue for remedy. These equal expectations would also mandate that the U.S. is held accountable to their environmental harm and harm to communities.
- **COFA migrants must be exempt from the Public Charge Final Rule.** While it has not been applied on a large scale, the discretionary application of the rule is dangerous. COFA migrants must be exempt from this rule that neglects the over 80 years of colonial harm perpetrated by the U.S. in the FAS.
- **Restore public benefits to COFA migrants at a federal level.** Public benefits should be available to COFA migrants not only because of the colonial damage caused by the U.S. in the FAS but also because COFA migrants pay taxes when they live in the U.S.
- **Veterans from the FAS must be provided equal support and access to veterans services as those from the U.S.** If that cannot be guaranteed, the U.S. military must be required to disclose that information when recruiting.

PATHWAYS FOR ACTION

- Avenues for nuclear compensation at this stage
  - Nuclear justice must be addressed in the COFA negotiations with the RMI. Here, the U.S. must take responsibility for the extensive, nationwide harm caused, recognize the awarded and unheard claims at the Nuclear Claims Tribunal, fund the awarded claims and the Nuclear Claims Tribunal to take the unheard cases, and provide sufficient healthcare for all Marshallese people.
  - If this strategy falls short, the RMI could submit another Changed Circumstances Request in conjunction with a legislative strategy to win compensation through ex gratia payments from the U.S. Congress.
- Response to environmental damage
  - Article VI of the FSM-RMI COFA does not provide significant remedies for any potential harm caused by climate change. Litigation pursuant to causes of action, such as the public trust doctrine or the Takings Clause, are novel theories but would offer more meaningful remedies.
  - With respect to maritime boundaries in the face of rising sea levels, the U.S. should support existing efforts by the COFA states to freeze their existing boundaries and thereby preserve their maritime entitlements. These efforts,

alongside a formal recognition that the COFA states have the right to use artificial means to preserve those entitlements, would essentially make clear that the parties believe this to be their legal obligation in the face of rising sea levels. This is particularly important as states are unlikely to be able to acquire land from other states as remedy for damages from sea level rise. Acquiring land from other states is likely to be politically fraught, and is not addressed in the UNCLOS or other sources of international law.

- Best way to clarify COFA migrant status federally
  - With respect to helping COFA migrants gain better access to federal benefits, the options are twofold and not mutually exclusive. One is helping COFA migrants navigate the pathway to lawful permanent resident status or citizenship and the other is broad-based legislative action to reclassify COFA migrants as a class of non-citizens who are eligible for those federal benefits from which they were excluded due to PRWORA. Further, these options should be considered in the context of the newly implemented public charge rule, which, in its current form, would foreseeably have severe negative implications for COFA migrants if and when COFA migrants regain eligibility to various federal benefits. Negotiations on the topic of COFA migrant welfare in the U.S. will inevitably need to address both the reinstatement of public benefits and the impact of the public charge rule (including the outcome of current litigations over the public charge rule).
  - COFA migrants and stakeholders may want to consider the relationship between the United States and other jurisdictions as potential models.

REMAINING QUESTIONS

- How can the U.S. stop lawyers from exploiting COFA migration provisions in coercing and manipulating Marshallese birth mothers?
- Are the current provisions of the COFA labor agreement sufficient in responding to exploitative practices by U.S. recruiters?
- How can COFA migrant status be clarified at the federal level to extend protections and access to services sufficiently and consistently?
- How can Compact Impact funding support state and territory governments to best support COFA migrants access to public services?

APPENDIX

COFA – CASE LAW ON CLIMATE CHANGE AND NUCLEAR CLAIMS

Climate Change Case Law

The question posed was whether there is a pathway through Article VI of the COFA for civil relief in terms of U.S. inaction on environmental protection. As explained in greater detail below, civil relief is not likely from Article VI of the COFA, as that section provides for the governments of the Federated States of Micronesia (FSM) and the Republic of the Marshall Islands (RMI) to sue the United States government under the National Environmental Policy Act (NEPA), a statute requiring the government to take certain procedural steps prior to taking action, such as granting leases or permits on public land. This chart also considers other potential legal pathways (outside the COFA) for civil relief for the U.S. government's inaction on climate change. As described below, potential options include pursuing claims against the government under public trust doctrine, the Fifth Amendment's Takings Clause, or the Fifth Amendment's Due Process Clause. Additionally, some claims against the United States government for its role in climate change have been brought under the Federal Tort Claims Act and the federal common law claim of public nuisance.[1] These claims are still rather novel and although plausible, courts have been reluctant to recognize the validity of such claims.

COFA Section 161(a)(3) - National Environmental Policy Act (NEPA)

Overview

Years before COFA, which provided that RMI and FSM can sue the United States under NEPA, citizens of the islands filed lawsuits alleging the United States violated the statute with regard to the islands. In *People of Enetwak v. Laird*, the plaintiffs were suing to prevent the United States government from detonating explosives on the island as part of the nuclear program experiments. The Court granted the plaintiffs' motion for preliminary injunction, holding that NEPA applied to the Trust Territories as they were subject to the authority of the United States and did not have an independent government to protect them from U.S. actions.[2]

In *People of Saipan v. United States Dept. of Interior*, citizens of FSM filed a lawsuit challenging a lease by the High Commissioner of the Trust Territory permitting Continental Airlines to build and operate a hotel on public land adjacent to Micro Beach, Saipan. The District Court determined that the Trust Territory government is not a government agency subject to NEPA. The Ninth Circuit on appeal held that if the High Court of the Trust Territory denied it had jurisdiction over the High Commissioner (an American citizen) then the plaintiffs could refile in district court.[3]

Article VI of the COFA covers environmental protections relating to the FSM or RMI. Section 161(a)(2) of the COFA provides that NEPA shall apply to actions of the United States government in relation to the COFA and related agreements as if the RMI and FSM were part of the United States. Additionally, according to Section 162(f) of the COFA, for any action brought against the United States government for claims under Sections 161(a), 161(d) or 161(e) of the COFA, the governments of the RMI and FSM would be considered citizens of the United States.

NEPA requires United States federal agencies to consider the impact of their actions on the environment prior to making decisions.[4] Actions covered by NEPA are broad and include issuing permits, taking action regarding federal land management, and constructing public facilities, including highways. NEPA is not about the substance of government action, but rather it is about the government's decision making process.

1. *See e.g.,* Katrina Canal Breaches Litigation, 696 F.3d 436, 449–52 (5th Cir. 2012); Connecticut v. Am. Elec. Power Co., 582 F.3d 309 (2d Cir. 2009), rev'd American Elec. Power Co., Inc. v. Connecticut, 564 U.S. 410 (2011).
2. People Of Enewetak v. Laird, 353 F. Supp. 811 (D. Haw. 1973).
3. People of Saipan v. United States Dept. of Interior, 502 F.2d 90 (9th. Cir. 1974).
4. "What is the National Environmental Policy Act?," https://www.epa.gov/nepa/what-national-environmental-policy-act#:~:text=NEPA%20requires%20federal%20agencies%20to,federal%20land%20management%20actions%2C%20and.

Overview	Section 161(e) of the COFA provides that the President of the United States can exempt the government from the requirements of Section 161(a)(3) or 161(a)(4) of the COFA if the President determines it is in the "paramount interest" of the United States to do so. Cases have been brought under NEPA against the United States government for failure to consider the effects of certain actions on climate change by organizations, individuals, and state and local governments. The first NEPA litigation involving climate change was decided more than 30 years ago, with many more cases litigated since then.[5]
Cases	*Center for Biological Diversity v. National Highway Traffic Safety Administration* (NHTSA), 538 F.3d 1172 (9th Cir. 2008) • The plaintiffs sued, challenging a rule issued by the NHTSA, which set fuel economy standards, as the plaintiffs argued that the Environmental Assessment conducted by the NHTSA did not adequately assess the cumulative impact of GHG on the environment. • The Ninth Circuit held that federal agencies have to evaluate climate change impacts under NEPA. The Ninth Circuit rejected the NHTSA's argument that climate change is "largely a global phenomenon."[6] According to the Ninth Circuit, the Environmental Assessment was inadequate and the corresponding finding of no significant impact was arbitrary and capricious. Therefore, the Court remanded and ordered the preparation of a full Environmental Impact Statement. • Following the opinion in Center for *Biological Diversity v. National Highway Traffic Safety Administration*, President Obama's Administration issued guidance on how governmental agencies should consider climate change for Environmental Impact Statements.[7] That guidance was revoked with an executive order issued by President Trump in 2017.[8] Since that change, federal courts have still found that government agencies must consider the effect of carbon pollution when deciding whether to approve a major project, such as granting oil and gas leases. (*e.g., see WildEarth Guardians v. Zinke below*). *WildEarth Guardians v. Zinke,* 368 F.Supp.3d 41 (D.D.C. 2019) • The case was brought by WildEarth Guardians and Physicians for Social Responsibility. The plaintiffs asked the federal district court for the District of Columbia to vacate 397 oil and gas leases on public lands in Colorado, Utah, and Wyoming. • Plaintiffs challenged oil and gas leases issued by the Bureau of Land Management (BLM) under NEPA arguing that the BLM • "failed to analyze the direct, indirect, and cumulative effects of the sale and resulting development of these lands on the climate, in violation of NEPA."[9] • The plaintiffs stated they had an interest in vacating the leases because the members of the plaintiff groups used and enjoyed federal land where the leases were granted as well as adjacent land for "hiking, fishing, hunting, camping, photographing scenery and wildlife, wildlife viewing, aesthetic enjoyment, and engaging in other vocational, scientific, and recreational activitiesand such lands would be affected by pollution from the oil and gas drilling and processing activities permitted by such leases.[10]

5. City of Los Angeles v. Nat'l Highway Traffic Safety Admin., 912 F.2d 478 (D.C. Cir. 1990).
6. Center for Biological Diversity v. National Highway Traffic Safety Administration, 538 F.3d 1172 (9th Cir. 2008).
7. CEQ Releases Final Guidance on Greenhouse Gases and Climate Change, available at https://obamawhitehouse.archives.gov/administration/eop/ceq/initiatives/nepa/ghg-guidance.
8. Presidential Executive Order on Promoting Energy Independence and Economic Growth, (Mar. 28, 2017), https://www.whitehouse.gov/presidential-actions/presidential-executive-order-promoting-energy-independence-economic-growth/.
9. Complaint at 3, WildEarth Guardians v. Zinke, 368 F.Supp.3d 41 (D.D.C. 2019).
10. Complaint at 7-9, WildEarth Guardians v. Zinke, 368 F.Supp.3d 41 (D.D.C. 2019).

Cases	• The Court denied defendants motion for summary judgement and granted in part plaintiffs' motion for summary judgement.
	  • The Court agreed that the discussion of climate impacts was insufficient.
	  • While precise quantification of Greenhouse Gas ("GHG") emissions was not feasible at this stage, there was sufficient data for the BLM to be able to generate forecasts.
	• The Court determined that BLM did not take a hard look at GHG emissions from drilling and downstream activities and that it could not delay that analysis until the drilling stage.
	• As required by the opinion, the BLM conducted more detailed analysis of the environmental impact of the leases and the plaintiffs continued litigation, arguing that the new analysis was arbitrary and capricious and "riddled with errors."[11] Litigation on this matter was ongoing as of July 2020.

COFA Section 161(a)(3) - Relevant Environmental Statutes	
Overview	Section 161(a)(3) of the COFA provides that when it comes to an Environmental Impact Statement required by Section 161(a)(2) of the COFA,[12] the standards of the following statutes should be taken into account: • Clean Air Act • Endangered Species Act • Clean Water Act • Ocean Dumping Act • Toxic Substances Control Act • Resources Conservation and Recovery Act of 1976 The challenge in bringing a case for climate change under these statutes is that it would require identifying action by the United States government in relation to FSM and RMI that required an Environmental Impact Statement pursuant to NEPA and tying that government action and conduct in conducting an Environmental Impact Statement (or failure to do so) to climate change affecting the FSM or RMI. Based on these requirements, finding recourse for climate change would likely be difficult under these provisions of the COFA considering that much of the U.S. government's actions in the FSM and RMI predated the COFA and thus would not have, and could not have, triggered an Environmental Impact Statement requirement as "activities under the Compact and its related agreements." There is no case law on point where the FSM or RMI or Palau have filed lawsuits against the United States concerning this issue. While lawsuits have been filed in the United States against the government or federal agencies relating to climate change and the government's obligations under federal environmental laws, these lawsuits are very fact-specific and thus it is difficult to draw analogies that might be brought by FSM or RMI. The below cases exemplify the interplay of NEPA and the federal statutes enumerated in COFA in U.S. litigation.

11. Motion at 54, WildEarth Guardians v. Zinke, No. 1:16-cv-01724-RC (D.D.C. 2020).
12. Section 161(a)(2) of the COFA.

Cases	*Northwest Environmental Advocates v. National Marine Fisheries Service,* 460 F.3d 1125 (9th Cir. 2006). • The Ninth Circuit affirmed a District Court decision, holding that the Environmental Impact Statement by the United States Army Corp of Engineers regarding a project to deepen the Columbia River navigation channel was adequate. • The plaintiffs alleged that the Army Corps' report failed to take a "hard look" at various impacts of the channel deepening project, an argument that both the District Court and Ninth Circuit rejected. • The plaintiffs also alleged that another defendant, the National Marine Fisheries Services, violated the Endangered Species Act by failing to adequately consider the impact of dredging activities on protected salmonids, although the rulings on this claim were not raised on appeal. *Hillsdale Environmental Loss Prevention, Inc. v. United States Army Corps of Engineers,* 2011 U.S. Dist. LEXIS 69245 (D. Kan., 2011). • A group of environmental groups filed a lawsuit challenging the decision of the United States Army Corp of Engineers to issue a permit under the Clean Water Act for the construction of a rail yard and logistics park in Kansas. The Army Corp determined that there was a finding of no significant impact, so it did not conduct a full Environmental Impact Statement. • The plaintiffs challenged the permit and sufficiency of the Army Corps' review, alleging a full Environmental Impact Statement was required. The Court held that the environmental review was sufficient and that the Army Corps was not required to undertake a full Environmental Impact Statement.
Public Trust Doctrine	
Overview	The public trust doctrine is an alternative claim for addressing harms caused by climate change outside of the framework of the COFA. Citizens and groups in various jurisdictions around the world have brought lawsuits against their respective governments to take action against climate change under the public trust doctrine. Generally, a climate change case against the United States would face questions of justiciability, standing, and separation of powers. In the United States, most of the public trust doctrine cases brought have been dismissed early on for lack of standing.
Cases	*Juliana, et al. v. United States of America, et al.*, No. 18-36082, 2020 WL 254149 (9th Cir. 2020) • This case dates back to 2015 when a group of minors filed a case asserting that the federal government violated their constitutional rights by causing dangerous carbon dioxide concentrations. This case involved both an argument under the public trust doctrine and an argument under the Fifth Amendment's Due Process Clause. • In early 2020, the Ninth Circuit reversed the orders of the federal district court for the District of Oregon denying the government's motion to dismiss the action. • The Ninth Circuit ruled that plaintiffs asserting a claim against the federal government for infringement of a Fifth Amendment due process right to a "climate system capable of sustaining human life" did not have standing for relief by Article III courts. The reason the Ninth Circuit found that the plaintiffs had not established the redressability requirement for standing. • The plaintiffs have stated that they plan to petition the United States Supreme Court for a writ of certiorari.

Takings Claim	
Overview	The FSM or RMI or their respective citizens could also try to bring an inverse condemnation claim that relies on the Fifth Amendment's Takings Clause. Asserting a claim for climate change damage against the United States government pursuant to the Takings Clause is a novel theory, and one that litigants have failed to successfully argue in court so far.[13] Different types of action can give rise to an inverse condemnation claim, including physical invasion or damage to land or a regulatory taking that deprives owners of the economic value of the land.[14] A foreseeable consequence of climate change, and one that affects the FSM and RMI, is rising sea levels. An argument could be made to establish a takings claim against the government for climate change whether the harm to property was permanent or temporary. The Supreme Court found in a case in 2012 that a government-induced temporary flooding of land could constitute a taking of property under the Fifth Amendment's Takings Clause.[15] Where a taking is temporary, the plaintiffs have to establish: "(1) a protectable property interest under state law; (2) the character of the property and the owners' 'reasonable-investment backed expectations'; (3) foreseeability; (4) causation; and (5) substantiality."[16] While this is a potential avenue for the governments of the FSM and RMI and their respective citizens, there are challenges in bringing a takings lawsuit for government action or inaction as evidenced in the Court of Appeal's decision in the St. Bernard case summarized below.

Cases	*St. Bernard Parish Government v. United States,* 121 Fed.Cl. 687 (2015) & *St. Bernard Parish Government v. United States,* 887 F.3d 1354 (2018)
	
	• In this case, plaintiffs sued the United States in Federal Claims Court for damages to their homes due to flooding that resulted from Hurricane Katrina in 2005 and other hurricanes due to the failure of the United States government to properly maintain or modify the Mississippi River-Gulf Outlet channel and government construction and operation of such channel.
	
	• The Federal Claims Court found that the federal government was liable for a temporary taking based on both governmental action and inaction.
	
	  • The Army Corps of Engineers had constructed the channel and after becoming aware that it could cause a storm surge that may cause serious property damage in New Orleans the government did not correct the issue.
	
	  • Thus, the Federal Claims Court found a taking by the Army Court of Engineers of the properties that had flooded due to construction of and failure to maintain the channel.
	
	• The government appealed the award and the plaintiffs' cross appealed on the basis that the award was insufficient. The Court of Appeals reversed the decision of the Federal Claims Court, holding that the failure of the government to properly maintain the channel could not be the basis of a takings claim—that is takings liability does not arise from the government's failure to act.

13. Joseph Rosenberg, Condemn(the)nation: Holding the United States Accountable Through Inverse Condemnation Claims for its Role in Bringing About and Then Failing to Mitigate and Adapt to Certain Effects of Climate Change, Buffalo Environmental Law Journal (2019).
14. *Id.*
15. Arkansas Game & Fish Comm'n v. United States, —— U.S. ——. 133 S.Ct. 511, 522, 184 L.Ed.2d 417 (2012),
16. *See* 133 S.Ct. at 522–23.

Nuclear Claims Case Law

Overview

During the period June 30, 1946, to August 18, 1958, the United States conducted a series of nuclear tests in the Marshall Islands that included detonation of 23 atomic and hydrogen bombs at Bikini Atoll and 43 atomic and hydrogen bombs at Enewetak Atoll (Bikini Atoll and Enewetak Atoll are two islands of the RMI island chain). These tests necessitated removal of the inhabitants and their relocation to other islands and resulted in severe physical destruction at the atolls directly involved, as well as radioactive contamination at other parts of the RMI island chain.

Section 177 of COFA states that the US government accepted responsibility for harms resulting from the nuclear testing program. This section also referred to and incorporated a side agreement that would constitute "adequate settlement of all such claims which have arisen in regard to the Marshall Islands and its citizens and which have not as yet been compensated or which in the future may arise."[17] Finally, this section also stated that the US will provide $150 million to be paid in accordance with the terms of the settlement. Congress authorized these funds when it approved the COFA agreement. The Agreement between the Government of the United States and the Government of the Marshall Islands for the Implementation of Section 177 of the Compact (Section 177 Agreement) provides for the establishment of a Nuclear Claims Tribunal (NCT). In 1987, pursuant to the Section 177 Agreement, the Marshall Islands legislature, the Nitijela, passed the Nuclear Claims Tribunal Act, formally establishing the NCT. Citizens of RMI brought numerous claims to the NCT.[18] Over the years, the NCT awarded damages for personal injuries and property damage that far exceeded the $150 million provided for in the Section 177 agreement.[19] When the trust fund was exhausted, remaining awards went unpaid.

Prior to the provision for the creation of the NCT in the COFA, several cases were initiated in the Court of Federal Claims regarding claims for nuclear testing conducted by the federal government, which consolidated into three suits based on the claimants–*Juda I, Peter I, and Nitol I*.[20] The Juda line of cases involved inhabitants of the Bikini Atoll in RMI; the Peter cases involved inhabitants of the Enewetak Atoll in RMI; and the *Nitol* cases involved inhabitants of atolls and islands in RMI that were not used as atomic test sites. After the establishment of COFA, the Court of Federal Claims dismissed the surviving claims in all three cases, holding that the Section 177 Agreement stripped courts of jurisdiction over nuclear claims. *See Juda II, Peter II,* and *Nitol II*.[21] Plaintiffs appealed arguing that the claims should not be dismissed and that the court had subject matter jurisdiction. The Federal Circuit consolidated the appeals of *Juda II, Peter II*, and *Nitol II* in People of *Enewetak*.[22] The appeal of *Juda II* was dismissed at the request of plaintiffs following the enactment of special legislation which appropriated funds for the benefit of the People of Bikini. The Federal Circuit affirmed the decision of the Claims Court in *Peter II* and *Nitol II*.[23]

Antolok included a similar group of plaintiffs as the cases in the Claims Court, and like those cases was initiated before COFA entered into force. In *Antolok* the plaintiff class consisting of approximately three thousand present and former residents of the northern RMI islands and atolls directly downwind from the nuclear test sites filed a claim seeking damages for personal injuries and death pursuant to the Federal Tort Claims Act (FTCA).[24] The Court held that through COFA the United States had withdrawn its consent to be sued under the FTCA with respect to the covered nuclear claims. This case affirmed that the courts determined that COFA governed all nuclear claims to be brought by RMI and its citizens.

17. COFA was enacted into US law by 48 U.S.C. § 1901.
18. *See, e.g.*, In the Matter of the People of Enewetak, et al., NCT No. 23-0902, Decision and Order, September 23, 1996.
19. For a thorough summary of the NCT cases, see Dick Thornburgh, *The Nuclear Claims Tribunal of the Republic of the Marshall Islands: An Independent Examination and Assessment of Its Decision-Making Processes* (January 2003), available at https://www.bikiniatoll.com/ThornburgReport.pdf ("Thornburgh Report").
20. *Id*.; Peter v. United States, 6 Cl. Ct. 768 (1984); Nitol v. United States, 7 Cl. Ct. 405 (1984).
21. Juda v. United States, 13 Cl. Ct. 667; Peter v. United States, 13 Cl. Ct. 691; Nitol v. United States, 13 Cl. Ct. 690 (1987).
22. People of Enewetak v. United States, 864 F.2d 134 (Fed. Cir. 1988).
23. *Id*.
24. Antolok v. United States, No. 85-2471, slip op. at 8 (D.D.C. Jun. 16, 1987); Antolok v. United States, 873 F.2d 369 (D.C. Cir. 1989).

Overview

When the funds appropriated for the NCT proved inadequate and pursuant to a provision in the Section 177 Agreement, the RMI submitted a Changed Circumstances Request to Congress on September 11, 2000, requesting additional funds. The Changed Circumstances Request's monetary requests include unpaid NCT personal injury awards of $14 million; unpaid NCT property damages awards to Enewetak Atoll and Bikini Atoll totaling $949 million; $50 million for medical services infrastructure; and $45 million annually for 50 years for a health care program for those exposed to radiation.

In 2002, the RMI retained former United States Attorney General Richard Thornburgh to undertake an independent examination of the NCT's processes in support of the Changed Circumstances Request. The resulting report found that the NCT was properly run, and the trust fund was manifestly insufficient to properly compensate the affected communities.[25] The report provides a detailed review of the NCT's history, its procedures, and its analytical approach. With regard to funding, the report stated:

> Although early Members of the Tribunal may have had a different view, the Tribunal never felt that itsability to render awards should be limited by the initial amount of the trust fund established in 1986 by Section 177 of the Compact of Free Association. We understand that both the Tribunal and the claimants before it regarded the initial $150 million trust fund as an arbitrary figure established through the political process that was never intended to approximate either the total damages suffered by the people of the Marshall Islands as a result of the U.S. nuclear testing program or the compensation to which they should ultimately be entitled. Whether Congress intended otherwise is a political issue upon which we express no opinion. We note, however, that the U.S. Government has already approved compensation claims of more than $562 million under the Downwinders' Act by persons injured as a result of nuclear tests in Nevada that were much smaller in number and magnitude than the tests conducted in the Marshall Islands. Based on our examination and analysis of the Tribunal's processes, and our understanding of the dollar magnitude of the awards that resulted from those processes, it is our judgment that the $150 million trust fund initially established in 1986 is manifestly inadequate to fairly compensate the inhabitants of the Marshall Islands for the damages they suffered as a result of the dozens of U.S. nuclear tests that took place in their homeland.[26]

In November 2004, the U.S. Department of State released its own report compiled by an interagency group (Departments of State, Energy, and Defense) evaluating the legal and scientific bases of the Petition.[27] The report opposed the RMI's Changed Circumstances Request. Ultimately, Congress did not act on the Changed Circumstances Request and did not appropriate additional funds to pay outstanding awards. Congress did not issue a rationale for not acting to appropriate additional funds, but the basis of the Executive Branch report was that circumstances had not changed sufficiently to warrant additional funds.[28]

In 2007, Judge Miller of the Federal Claims Court dismissed two cases, *People of Bikini* and *John*, which each involved a series of claims related to the original harms and the failure to adequately fund the trust fund.[29] The court found that the claims were either barred by the same jurisdiction stripping provision that was decisive in the earlier cases or were barred by the statute of limitations. The decision was upheld on appeal,[30] and the Supreme Court denied the petition for writ of certiorari.[31]

25. Dick Thornburgh, *The Nuclear Claims Tribunal of the Republic of the Marshall Islands: An Independent Examination and Assessment of Its Decision-Making Processes* (January 2003), available at https://www.bikiniatoll.com/ThornburgReport.pdf ("Thornburgh Report").
26. *Id*. at 3.
27. Report Evaluating the Request of the Government of the Republic of the Marshall Islands Presented to the Congress of the United States of America (November 2004), available at https://2001-2009.state.gov/p/eap/rls/rpt/40422.htm.
28. *Id*.; see also "Republic of the Marshall Islands Changed Circumstances Petition to Congress," *CRS Report for Congress*, available at https://fas.org/sgp/crs/row/RL32811.pdf.
29. People of Bikini v. United States, 77 Fed. Cl. 744 (2007); John v. United States, 77 Fed. Cl. 788 (2007).
30. People of Bikini v. United States, 554 F.3d 996 (Fed. Cir. 2009).
31. People of Bikini v. United States, 559 U.S. 1048 (2010) (denying certiorari).

Remaining Options for Remedy	The reasoning in the decisions summarized below severely limits the available options for seeking a remedy. The Section 177 Agreement strips US courts of jurisdiction over claims based on personal injury or property damage resulting from the nuclear trials. Further, any claim that attached at the time of testing and relocation (which took place in the 1940s and 1950s), passage of COFA, or the establishment of the Nuclear Claims Tribunal will be barred by the statute of limitations. A constitutional suit based on the adequacy of the tribunal will require showing some government action within the limitations period. That said, it has been over two decades since the Changed Circumstances Request was submitted, so the relevant governments of FSM and RMI may wish renew the Changed Circumstances Request.
Cases	*Juda v. United States,* 6 Cl. Ct. 441 (1984) (*"Juda I"*) • Plaintiffs, who were residents of the Bikini Atoll, brought this case in the US Court of Federal Claims to seek damages for harm they suffered as a result of US nuclear testing at Bikini Atoll. These residents were relocated by the U.S. military, were exposed to dangerous levels of radiation, and Bikini Atoll suffered lasting environmental damage. The Court denied the U.S.'s motion to dismiss and allowed claims based on the Fifth Amendment Takings Clause and implied contract to proceed. • Plaintiffs raised three causes of action: (1) an unlawful taking of Bikini Atoll from March 7, 1946, to January 24, 1979 (from when the Bikinians were removed from the atoll to when the atoll was deeded back); (2) an unlawful taking that began on January 24, 1979, and would continue for the next 20 to 60 years (due to continuing radiation); and (3) breaches of fiduciary responsibilities imposed in 1946, which do not depend upon the Trusteeship Agreement, but are claimed to arise from a contract implied-in-fact that obligates defendant to protect the health, well-being and economic condition of the Bikini people. • Defendant's motion to dismiss was denied as to the Bikini claims that there were (1) takings in violation of the Fifth Amendment, and (2) breaches of an implied-in-fact contract that arose in 1946 and which created fiduciary obligations owed to the people of Bikini. • The Court rejected the United States' statute of limitations and sovereign immunity arguments. The Bikini people were returned back to the Bikini atoll without proper diligence by the US and exposed to dangerous levels of radiation. The extent of the damage was not known until 1979, which was within the six-year statute of limitations period for this case that was filed in 1981. • The Court held that the Fifth Amendment Takings Clause was applicable in the trust territory. • Note: The surviving claims were eventually dismissed in *Juda II* (see below).
	Peter v. United States, 6 Cl. Ct. 768 (1984) ("*Peter I*") • Plaintiffs, who were residents of the Enewatak Atoll, brought this case in the US Court of Federal Claims to seek damages for harm they suffered as a result of U.S. nuclear testing at Enewatak Atoll. The entire population was removed from the atoll by the U.S. military, suffered significant hardship at the relocation site (including inadequate food and material necessities), and the population has been unable to return to portions of the atoll that are still contaminated. The Court denied the U.S.'s motion to dismiss with respect to an implied contract with the Enewatak people.

Cases	• Plaintiffs raised four causes of action: (1) unlawful taking of the atoll between December 1947 and April 1980; (2) breach of an implied-in-fact contract that imposed upon the United States responsibilities toward the Enewetak people in the nature of a fiduciary; (3) failure to comply with the terms of the Trusteeship Agreement, allegedly a bilateral contract between the United States and the Security Council of the United Nations; and (4) breach of agreements contained in the September 16, 1976, "Agreement Terminating Rights, Title, and Interest of the United States to Enewetak Atoll" as implemented by the "Release and Return of Use and Occupancy Rights to Enewetak Atoll." • The Court held that the statute of limitations barred the taking claims of the Enewetak people. Unlike the Bikini people, the Enewatak were aware at the time of relocation in 1947 that they would not be able to return to the affected islands. Their claim thus accrued in 1947, so the six-year limitations period had run by the time the case was filed. • The Court granted the United States motion to dismiss plaintiff's third claim on the basis of the Trusteeship Agreement. • The Court held that the Trusteeship Agreement did not create rights for third party beneficiaries and dismissed plaintiffs' fourth claim regarding a breach of agreements between the U.S. and U.N.. • Defendant's motion to dismiss was denied as to the Enewetak claim that there were breaches of an implied-in-fact contract that imposed on the United States responsibilities in the nature of a fiduciary. • Note: The surviving claims were eventually dismissed in Peter *II* (see below).
	Nitol v. United States, 7 Cl. Ct. 405 (1984) (*"Nitol I"*) • This case was heard simultaneously and by the same US Court of Federal Claims Judge as Juda I and Peter I, and was a consolidation of 12 remaining cases filed in the Claims Court by plaintiffs who were residents of islands and atolls that were not nuclear test sites but who were affected by nuclear fallout. • Plaintiffs raised three causes of action: (1) an unlawful taking of plant life, fish life, fishing rights, the land, the lagoon, the waters of the lagoon, and surrounding ocean of the atoll or island; (2) breach of an implied-in-fact contract between the people of the Marshall Islands and the United States that obligated the United States as a fiduciary to protect the health, well-being and economic condition of the Marshallese people; and (3) breach of fiduciary duties arising out of the Trusteeship Agreement, which is characterized as a bilateral contract between the United States and United Nations. • The Court rejected the U.S.'s argument that the claims were barred by the statute of limitations. The statute of limitations was tolled because plaintiff's reasonably relied on the U.S. government's assertion that the islands were safe and they properly alleged that the U.S. fraudulently concealed the actual levels of contamination. • The Court held that the Fifth Amendment takings clause extended to property in the trust territory of Micronesia and referred to discussion of this issue in Juda I. • The Court granted the United States' motion to dismiss with respect to Count 2, finding that the elements for an implied-in-fact contract had not been adequately alleged. • The Court also granted the United States' motion to dismiss with respect to Count 3.

Cases	*Juda v. United States,* 13 Cl. Ct. 667 (1987) (*"Juda II"*) • After COFA came into effect, the United States filed a motion to dismiss the remaining claims in Juda I, arguing that the jurisdiction stripping provisions of the Compact Act implementing COFA and the Section 177 Agreement left the Court without jurisdiction. The Court agreed. • The relevant provisions of the Compact Act (g) ESPOUSAL PROVISIONS. - (1) It is the intention of the Congress of the United States that the provisions of section 177 of the Compact of Free Association and the Agreement between the Government of the United States and the Government of the Marshall Islands for the Implementation of Section 177 of the Compact (hereafter in this subsection referred to as the "Section 177 Agreement") constitute a full and final settlement of all claims described in Articles X and XI of the Section 177 Agreement, and that any such claims be terminated and barred except insofar as provided for in the Section 177 Agreement. (2) In furtherance of the intention of Congress as stated in paragraph (1) of this subsection, the Section 177 Agreement is hereby ratified and approved. It is the explicit understanding and intent of Congress that the jurisdictional limitations set forth in Article XII of such Agreement are enacted solely and exclusively to accomplish the objective of Article X of such Agreement and only as a clarification of the effect of Article X, and are not to be construed or implemented separately from Article X. • Plaintiffs argued that the Compact did not end the Trusteeship Agreement as a matter of international law so the Compact had not yet gone into effect, but that the Agreement had to be terminated by the UN Security Council. The Court held that trusteeship termination and Compact implementation are two separate issues. The trusteeship could not be terminated without the approval of the UNSC. The UNSC did not terminate the trusteeship until 1990. The Compact agreement, however, had gone into effect. • The Court held that the Section 177 Agreement could not be carved out from COFA as a whole. • The Court rejected plaintiffs argument that the jurisdiction stripping provisions of the Section 177 Agreement were contingent on the validity of the espousal provision. Thus, effectively, the plaintiffs had no recourse in the courts. • Plaintiffs appeal was settled in Bikini v. United States, 859 F.2d 1482 (Fed. Cir. 1988) (discussed below).
	Peter v. United States, 13 Cl. Ct. 691 (1987) *("Peter II")* • After COFA came into effect, the United States filed a motion to dismiss as to the remaining claims in *Peter I*, arguing that the jurisdiction stripping provisions of the Compact Act implementing COFA and the Section 177 Agreement left the Court without jurisdiction. The Court agreed, referring to the reasoning in Juda II. • Plaintiff's appeal was denied in *People of Enewetak v. United States*, 864 F.2d 134 (Fed. Cir. 1988) (discussed below).

Cases	*Nitol v. United States,* 13 Cl. Ct. 690 (1987) (*"Nitol II"*) • After COFA came into effect, the United States filed a motion to dismiss as to the remaining claims in *Nitol I*, arguing that the jurisdiction stripping provisions of the Compact Act implementing COFA and the Section 177 Agreement left the Court without jurisdiction. The Court agreed, referring to the reasoning in Juda II. • Plaintiff's appeal was denied in People of Enewetak v. United States, 864 F.2d 134 (Fed. Cir. 1988) (discussed below).
	People of Enewetak v. United States, 864 F.2d 134 (Fed. Cir. 1988) • This case was an appeal of *Peter II* and *Nitol II* upholding the decision of the claims court to dismiss the cases. • The Court refused to override Congress's intention to use the alternative procedure to resolve these claims based on "mere speculation that the alternative remedy may prove to be inadequate." • Otherwise the court simply adopted the reasoning in *Juda II* and left the plaintiffs with the NCT as a remedy.
	Bikini v. United States, 859 F.2d 1482 (Fed. Cir. 1988) • *Juda II* plaintiffs agreed to dismissal of appeal in response to a law that provided, in part, for the appropriation of $90 million over a five year period that was added to the Resettlement Trust Fund for the People of Bikini. The Resettlement Trust Fund was separate from the Nuclear Claims Trust Fund and was originally created to fund relocation of Bikinians in 1978 after a radiological survey found that the Bikini Atoll remained dangerously contaminated.
	Antolok v. United States, 873 F.2d 369 (D.C. Cir. 1989) • While the COFA and settlement were in negotiation, approximately three thousand present and former residents of the northern Marshall Islands and atolls directly downwind from the nuclear test sites a case in the District Court for the District of Columbia, seeking damages for personal injuries and death resulting from their exposure to dangerous levels of radiation. They brought their claims under the FTCA. Once COFA came into effect, the district court dismissed the case for lack of subject matter jurisdiction, and plaintiff appealed. • The Court of Appeals held that Congress validly withdrew jurisdiction over these claims as part of the Compact Act. • The Court rejected plaintiff's argument that the Section 177 Agreement made the withdrawal of jurisdiction contingent on the validity of the espousal. Plaintiff's had argued that as a matter of international law, the RMI could not espouse the claims of the Marshallese people in order to make the settlement described in the Section 177 Agreement.[32] The Court disagreed and thought that the RMI government could adopt and settle its citizens' claims on their behalf, leaving individuals without recourse in U.S. courts • The Court held, alternatively, that plaintiffs' claims were barred under the political question doctrine.

32. "In international law the doctrine of "espousal" describes the mechanism whereby one government adopts or "espouses" and settles the claim of its nationals against another government." See Antolok v. United States, 873 F.2d 369 (D.C. Cir. 1989).

John v. United States, 77 Fed. Cl. 788 (2007)

- This case was brought by a similarly defined plaintiff class as Peter I and II—former residents of the Enewatak Atoll. The case was brought after the plaintiffs failed to achieve remedy through the Nuclear Claims Tribunal because of the insufficiency of US funding for the claims Trust Fund.
- Plaintiffs allege: (1) a temporary taking of Enewetak Atoll by the United States between December 1947 and October 1980 and of select portions within Enewetak from October 1980 through the next twenty to fifty years; (2) breach of an implied-in-fact contract formed by the conduct of the United States, which constituted "a commitment to care for [plaintiffs'] physical, economic, educational, cultural, and other needs until it returned their atoll in substantially the condition in which it had received it or paid compensation for any significant changes"; (3) "a taking of plaintiffs' taking claim for the use and occupation of Enewetak Atoll by the United States in failing to fund the Nuclear Claims Tribunal so as to deny just compensation"; (4) an unlawful taking of plaintiffs' property interest manifested in their implied-in-fact contract claim for failure to provide for adequate funding of the NCT; (5) a taking of Enewetak Atoll through the formation of the Compact of Free Association in 1986; and (6) a breach of implied-in-fact contract fiduciary duties through formation of the Compact of Free Association.
- For Count 3, the Court held that Congressional inaction on the Changed Circumstances Request was insufficient to constitute government action and there was nothing else within the six-year statute of limitations period to constitute a taking.
- Counts 5 and 6 alleged harm that occurred outside the six-year statute of limitations period.
- With respect to count 3 and 4, the court acknowledged that the court in *Juda II* and *People of Enewatak* had left open the possibility of future litigation if the NCT proved inadequate, but it found that Congress could still act on the Changed Circumstances Request, so these claims were not ripe. The court stated, "Congress has not yet exercised its option to 'authorize and appropriate funds' for the Marshall Islands. The court is in no position to find that the alternative procedure, as contemplated by the Compact Act, has run its course. Congress must consider the Changed Circumstances Request and take such action as it deems appropriate."[33]
- The Court rejected plaintiff's argument that the government should be equitably estopped from invoking the statute of limitations. The plaintiffs argued that they had previously received assurances from the US government, including from Assistant Attorney General of the Lands and Natural Resources Division of the US DOJ, that additional funds would be made available if the $150 million proved inadequate. The Court concluded that plaintiffs were well aware of the details of the Changed Circumstances provision at a time within the statute of limitations.
- The Court also rejected the plaintiffs' argument that the statute of limitations should be equitably tolled.
- The Court also held that plaintiffs had failed to state a claim with respect to Count 3 (there was no assurance of additional funding that had been taken) and to Count 4 and 6 (any implied duties were erased by the Compact).
- The Court held that collateral estoppel precluded plaintiffs from relitigating issues relating to the subject matter jurisdiction of the court to hear Counts 1 and 2 because the Court had decided this issues with respect to the same claims previously.

33. John v. United States, 77 Fed. Cl. 788, 812 (2007).

Cases	• Counts 2 and 6 should also be dismissed under the withdrawal of jurisdiction in the Section 177 agreement. The takings claims also fell within this withdrawal. These claims all were directly based on damages resulting from the nuclear testing, which were intended to be heard in the NCT. • The court also held, alternatively, that plaintiffs' claims should be dismissed pursuant to the political question doctrine. The question of the validity of the espousal of the Marshallese people's claims in order to reach a settlement with the U.S. is a question of foreign policy committed to the Executive Branch. • Plaintiffs appeal was denied in *People of Bikini v. United States*, 554 F.3d 996 (Fed. Cir. 2009) (see below).
	People of Bikini v. United States, 77 Fed. Cl. 744 (2007) • This case was brought by a similarly defined plaintiff class as *Juda I* and *II*—former residents of the Bikini Atoll. The case was brought after the plaintiffs failed to achieve remedy through the Nuclear Claims Tribunal because of the insufficiency of US funding for the claims Trust Fund. • Plaintiffs alleged: (1) a Fifth Amendment taking of plaintiffs' claims before the NCT for public use based on the failure to fund the award; (2) a breach of fiduciary duties created by an implied-in-fact contract that was formed by the conduct of the United States, "obligating defendant as a fiduciary to protect the health, well-being, economic condition and lands of the Bikini people"; (3) a breach of an implied-in-fact contract by (a) failing to seek additional funds from Congress; (b) interfering with plaintiffs' efforts to secure additional funds for the NCT; and (c) failing and refusing to fund adequately the award issued by the NCT; (4) a breach of the implied duties and covenants due to plaintiffs as "intended direct third-party beneficiaries of the Compact agreements signed between the defendant and the [Republic of the Marshall Islands] Government"; (5) a takings claim for the use and occupation of Bikini Atoll by the Government based on the passage of the Compact of Free Association in 1986 and the failure adequately to fund the NCT; and (6) a breach of the fiduciary obligations imposed on the Government in 1946 through the formation of the Compact of Free Association between the United States and the Republic of the Marshall Islands. • The Court held that: (1 – 4) there had been no government action that could constitute a taking within the six-year statute of limitations under the Tucker Act (Congressional inaction on the Changed Circumstances Request did not constitute government action); (5) while previous decisions had left open the possibility of future litigation on the adequacy of the NCT, the case was not ripe because Congress could still act on the Changed Circumstances Request. • Regarding claim (6), any breach of fiduciary duties would have taken place in 1986 upon the formation of COFA, so it was well outside the six-year statute of limitations period. • The Court rejected plaintiffs' argument that the government should be equitably estopped from invoking the statute of limitations. The plaintiffs argued that they had previously received assurances from the US government, including from Assistant Attorney General of the Lands and Natural Resources Division of the US DOJ, that additional funds would be made available if the $150 million proved inadequate. The Court concluded that plaintiffs were well aware of the details of the Changed Circumstances provision at a time within the statute of limitations. • The Court also rejected the plaintiffs' argument that the statute of limitations should be equitably tolled. • The Court held that the plaintiffs were collaterally estopped from litigating issues related to the court's subject matter jurisdiction because the Court had decided this issues with respect to the same claims previously. This conclusion applied to Counts 2, 4, and 6.

Cases	• The Court also issued an alternative holding based on the political question doctrine. According to the court, plaintiffs' objections to the adequacy of the settlement's terms call for an examination of the terms of the "international compact between the two governments" and investigation of complex issues of fact, not a narrow legal issue. • Plaintiffs appeal was denied in *People of Bikini v. United States,* 554 F.3d 996 (Fed. Cir. 2009) (see below).
	People of Bikini v. United States, 554 F.3d 996 (Fed. Cir. 2009) • This was an appeal of the decisions of the Court dismissing the claims in *People of Bikini v. United States*, 77 Fed. Cl. 744 (2007) and *John v. United States*, 77 Fed. Cl. 788 (2007). The court upheld the decisions of the lower court. • The appellate court did not review plaintiffs' claims individually but instead dismissed all on the basis of the jurisdiction stripping provision in the Section 177 Agreement. • Like the court in *Antolok* (discussed above), the court concluded that the validity of the espousal provision was a political question.

COFA IMMIGRATION

	FSM/RMI	PALAU
Immigration Process for FAS Citizens		
Background	1. After WWII, FSM/RMI/Palau became part of the UN strategic Trust Territory under the administrative control of the U.S. The COFA Act of 1985 terminated U.S. trusteeship over the former Trust Territory of the Pacific Islands ("TTPI"), and established Federated States of Micronesia (FSM), Republic of Marshall Islands (RMI), and Palau (FSM and RMI, together, "FSM/RMI" and collectively with Palau, "Freely Associated States" or "FAS") as independent nations with a special relationship with the U.S. The governments of the FSM, RMI, and Palau each entered into a Compact of Free Association with the U.S. in 1986, and certain provisions of the Compact agreements for FMS and RMI were amended in 2003 (collectively, the "Compacts"). 2. On February 24, 2020, the U.S. Citizenship and Immigration Services (USCIS) implemented the Inadmissibility on Public Charge Grounds final rule.[1] The final rule applies to applicants for admission to the U.S. and aliens seeking to adjust their status to that of a lawful permanent resident ("LPR", aka Green Card holder) from within the U.S. The final rule clarifies the factors considered when determining whether someone is "likely at any time to become a public charge" and therefore inadmissible to the U.S. and ineligible to become LPR. "Likely at any time to become a public charge" means more likely than not at any time in the future to become a public charge (*i.e.*, more likely than not at any time in the future to receive one or more public benefits for more than 12 months total within any 36-month period). Inadmissibility is determined based on the totality of circumstances. a. COFA residents are not listed among the classes of immigrants that are exempt from this rule, such as: i. (i) Refugees, (ii) Asylees, (iii) Afghans and Iraqis with special immigrant visas, (iv) certain nonimmigrant trafficking and crime victims, (v) petitioners under Violence Against Women Act, (vi) Special Immigrant Juveniles, and (vii) those to whom Department of Homeland Security (DHS) grants a waiver. b. Public Benefits that are not considered as Public Charge: ii. (i) Benefits received by an alien enlisted in the U.S. armed forces, or is serving in active duty or in any of the Ready Reserves, (ii) benefits received by spouse and children of U.S. service members, (iii) benefits received by children born to, or adopted by, U.S. citizens living ex-U.S., (iv) benefits received on behalf of a legal guardian (DHS will only consider benefits directly received), and (v) certain Medicaid benefits (treatment of emergency medical condition, benefits in connection with Individuals with Disabilities Education Act, school-based benefits to individuals below the age limit for secondary education, benefits received by aliens under 21 and pregnant women). c. Factors that are taken into consideration: i. Receipt of 1 or more public benefits for more than 12 months total within any 36-month period. ii. Employment history and prospect of future employment. iii. Diagnosis of serious medical condition and lack of insurance or inability to pay medical costs. iv. Previously found by an immigration judge or Board of Immigration Appeals to be inadmissible or deportable based on public charge grounds.	

1. 84 Fed. Reg. 41,292 – 41,408 (Aug. 14, 2019) ; 8 C.F.R. 103, 212 – 213, 245, and 248 ; U.S. Citizen and Immigration Services, *Final Rule on Public Charge Ground of Inadmissibility,* available at https://www.uscis.gov/archive/archive-news/final-rule-public-charge-ground-inadmissibility.

	FSM/RMI	PALAU
U.S. Citizenship Status[2]	1. FAS citizens are not U.S. citizens or nationals. 2. FAS citizens admitted to the U.S. do not have a status of LPR under the Immigration and Nationality Act (INA).	
Rights of Admission to the U.S.[3]	1. Citizens of FAS are entitled to travel and apply for admission to the U.S. as non-immigrants without visas. 2. Admission is not guaranteed. Most grounds of inadmissibility under U.S. immigration laws (e.g., criminal conviction) apply. 3. If admitted, they are granted an unlimited length of stay.	
Eligibility for Admission to the U.S.[4]	1. Birth citizens of FAS; former TTPI citizens. 2. Naturalized citizens of FAS of at least 5 years with certificate of actual residence.	
	3. Immediate relative (spouse or unmarried child under 21) of (1) if: a. Such immediate relative meets certain additional conditions (naturalization, residency, marriage period); or b. The person in (1) is serving on active duty in any branch of the U.S. armed forces or in the active reserves.	
	Not Eligible: 1. Mere possession of passport (by investment, passport sale, or similar program) does not qualify for immigration privileges. 2. FSM/RMI citizen seeking to come to U.S. for the purpose of placing a child for adoption in the U.S. (does not matter whether child has already been born)	Not Eligible: 1. Spouses and children that are not citizens of Palau. Such non-citizens must apply for admission under U.S. immigration laws that apply to their nationality and the U.S. immigration status that is sought. Also, if required, they need a U.S. visa

2. Compact of Free Association between the Government of the United States and the Government of the Federated States of Micronesia, and Compact of Free Association between the Government of the United States and the Government of the Republic of the Marshall Islands, Public Law 99-239 (1986); Compact of Free Association Amendments Act, Public Law 108-188 (2003); Compact of Free Association between the Government of the United States and the Government of Palau, Public Law 99-658 (1986); U.S. Citizens and Immigration Services, *Status of Citizens of the Freely Associated States of the Federated States of Micronesia and the Republic of the Marshall Islands*, https://www.uscis.gov/sites/default/files/USCIS/Verification/I-9%20Central/FactSheets/FactSheet-Status_of_Citizens_of_Micronesia_Marshalls_Islands.pdf.; U.S. Citizens and Immigration Services, *Status of Citizens of the Republic of Palau*, https://www.uscis.gov/sites/default/files/USCIS/Verification/I-9%20Central/FactSheets/FactSheet-Status_of_Citizens_of_Palau.pdf.
3. *Supra* note 2.
4. *Supra* note 2.

	FSM/RMI	PALAU
Documentation for Admission to the U.S.[5]	1. FAS Citizen: Valid, unexpired FSM/RMI/Palau passport. No visa or other documentation required.	
	2. Non-Birth Citizens: a. Valid, unexpired passport; b. Certificate of residency; c. Marriage certificate; d. Spouse's military orders; e. Other documents to demonstrate eligibility.	2. Non-Birth Citizens: a. Valid, unexpired passport; b. Certificate of residency; c. Other documents to demonstrate eligibility.
Proof of Admission to the U.S.[6]	1. U.S. Customs and Border Patrol (CBP) will stamp the passport with a special admission stamp and also issue a Form I-94 (Arrival/Departure Record). Either the admission stamp or Form I-94 is the COFA resident's evidence of alien registration.	
Term/ Conditions of Admission to the U.S.[7]	1. Abide by terms/conditions prescribed by Dept of Homeland Security. 2. The laws of the U.S. dictate the terms and conditions of the non-immigrant stay. Must obey laws of the U.S., and of the state/locality. 3. Grounds of deportability that generally apply to other foreign nationals (*e.g.*, conviction for aggravated felony) apply.	
	4. COFA resident may be deported if, after admission, they cannot show sufficient means of support in the U.S.	
Admission to the U.S. under INA and Lawful Permanent Residence[8]	1. In certain circumstances, FAS citizens/residents who are not eligible for admission without a visa as nonimmigrant under the Compacts may be able to apply for nonimmigrant visa (Tourism & Visit, Temporary Employment & Business, Study & Exchange) or immigrant visa (Family-Based, Fiancée, Employment-Based, Diversity, Returning Resident) under the immigration laws generally applicable to all foreign nationals. 2. COFA resident who goes through the immigrant visa process is issued a Green Card upon admission to the U.S. on the immigrant visa.	
Labor Recruitment Arrangement[9]	1. FSM/RMI citizens coming to the U.S. under a labor recruitment arrangement are provided, under the Compact, certain rights, including a full disclosure of terms/ conditions of the arrangement. 2. Such citizens should contact respective embassy for information about their rights to full disclosure.	

5. *Supra* note 2.
6. *Supra* note 2.
7. *Supra* note 2.
8. *Supra* note 2.
9. *Supra* note 2.

	FSM/RMI	PALAU
Rights of COFA Residents in the U.S.		
General	1. COFA residents admitted to the U.S. under the Compacts may reside, work, and study in the U.S..	
Driver's License / ID Card	1. REAL ID Act Modification of Freely Associated States Act of 2018:[10] a. REAL ID Act of 2005 and regulations authorize REAL ID compliant states to issue temporary or limited-term REAL ID compliance driver's licenses and ID cards to certain nonimmigrant aliens who satisfy other REAL ID requirements. Such temporary driver's licenses or ID cards cannot be issued with a validity period longer than the alien's authorized period of stay in the U.S. or, if no definite end to the period of authorized stay, a period of 1 year. Because COFA residents can stay in the U.S. indefinitely, states that issue temporary driver's licenses or ID cards to COFA residents generally subject those licenses or ID cards to the 1-year limit. b. REAL ID Act Modification of Freely Associated States Act amended the 2005 REAL ID Act to authorize states to issue COFA residents full-term REAL ID driver's licenses or ID cards. The final rule amended the regulatory definition of "temporary lawful status" to specifically exclude COFA residents, such that COFA residents are eligible for full-term licenses or ID cards, provided they satisfy other requirements of REAL ID Act.	
Employment Authorization	1. Once FAS citizen is admitted into the U.S., category of eligibility for admission does not matter for employment. 2. COFA residents may freely seek employment in the U.S. and are eligible to work in the U.S. as nonimmigrants for an unlimited length of time. 3. To satisfy the document presentation requirement, employees may choose a document or combination of documents listed on Form I-9, in the section "Lists of Acceptable Documents",such as:[11] a. Form I-766 (Employment Authorization Document (EAD)). i. Also used to apply for Driver's License, and other situations where secure U.S. government-issued ID/immigration status is requested. b. Combination of government-issued ID card and unrestricted Social Security card.	
	c. Combination of FSM/RMI passport and Form I-94 reflecting admission under the Compacts i. Passport + I-94 combination establishes identity and employment authorization.	

10. 84 Fed. Reg. 46,423 – 46,426 (Sept. 4, 2019) ; Federal Register, Minimum Standards for Driver's Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes; Implementation of the REAL ID Act Modification for Freely Associated States Act, https://www.federalregister.gov/d/2019-19023.
11. U.S. Citizen and Immigration Services, Federated States of Micronesia, Republic of the Marshall Islands, and Palau, https://www.uscis.gov/i-9-central/complete-correct-form-i-9/who-needs-form-i-9/federated-states-micronesia-republic-marshall-islands-and-palau.

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Education	1. COFA residents admitted under the Compact may study at any school in the U.S..	
Military Service	1. COFA residents admitted under the Compact are eligible to volunteer for service in the U.S. armed forces (under Section 341 of the Compacts).	
Diplomats Visa	1. FAS Citizens coming to the U.S. for diplomatic duties or work at an international org must obtain appropriate nonimmigrant visa in "A" or "G" classifications to have official status recognized. 2. Department of State strongly recommends other FAS citizens to have a visa when coming to the U.S. for official activities on behalf of their governments.	
U.S. Consular Support	1. Under Section 126 of the Compacts, U.S. extends consular assistance to FAS citizens in foreign countries on the same basis as for U.S. citizens, subject to consent of the foreign country. 2. U.S. Consular offices also help FAS citizens extend and renew their FAS passports. These services are available if the FAS country has no diplomatic/consular representation in the foreign country.	
U.S. Federal/State Benefits to COFA Residents		
Background	1. Prior to 1996, COFA residents were eligible for federal public benefits (except emergency services and programs expressly listed), because they were considered "permanently residing under color of law" (PRUCOL), which is an eligibility status not defined in statute. Historically, PRUCOL has been used to provide a benefit to certain foreign nationals who the government knows are present in the U.S., but whom it has no plans to deport or remove. 2. In 1996, Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA),[12] known as welfare reform, which established comprehensive limitations and requirements on the eligibility of all non-citizens for means-tested, federally funded assistance (i.e., Supplemental Nutrition Assistance Program (fka Food Stamps), Supplemental Security Income (SSI) program, Temporary Assistance for Needy Families (TANF), and Medicaid). PRWORA divided non-citizens into two general categories for purposes of benefit eligibility – "qualified aliens" and "non-qualified aliens". Non-citizens who are "non-qualified aliens" (e.g., COFA residents) generally are not eligible for almost all federal assistance provided directly to households or individuals (with limited exceptions for emergency medical services and disaster relief).	

12. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, H.R. 3734, 104th Cong..

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Health	1. PRWORA of 1996[13] – statutorily barred COFA residents from Medicaid and the Children's Health Insurance Program (CHIP). Some states continue to provide health care services to COFA residents using their own funds. a. Medicaid still provides payment for treatment of an emergency medical condition for people who meet all Medicaid eligibility criteria in the state (e.g., income and state residency), but do not have an eligible immigration status. b. Numerous bills have been introduced to reinstate Medicaid for COFA residents but little progress has been made. 2. Like other workers in the U.S., COFA residents are also able to participate in employer-based health care plans if one is offered by their employer.[14] 3. Unborn Child Option ("Fetus" Option) added to CHIP in 2002 (promulgated by Dept of Health and Human Services (HHS))[15] – regulations were modified to include fetuses under the definition of children, allowing states to provide CHIP coverage to fetuses. Since fetuses do not have an immigration status, states arguably can use this option to provide prenatal care services to pregnant women under CHIP, regardless of their immigration status (e.g., COFA residents). 4. Children's Health Insurance Program Reauthorization Act (CHIPRA) of 2009[16] – gave states the option to provide Medicaid and CHIP coverage to pregnant women and children "lawfully residing in the United States," even if they did not meet the 5-year residency requirement.[17] As of December 2019, over 30 states have elected to cover lawfully residing children and/or pregnant women under Medicaid/CHIP. a. "Lawfully residing" means "lawfully present" (which COFA residents satisfy) and a resident of the state.[18] b. Coverage can be for pregnant women under Medicaid and CHIP and/or children up to age 19 for CHIP or up to age 21 for Medicaid. The state can provide just Medicaid or both Medicaid and CHIP, but not just CHIP. 5. Affordable Care Act (ACA) of 2010[19] – citizens and individuals who are "lawfully present" in the U.S. are subject to the requirement to have health insurance coverage (aka the "individual mandate") and are eligible for new coverage options offered through the health insurance Marketplace. "Lawfully present" includes individuals with "non-immigrant status" and therefore includes COFA residents.[20] Further, COFA residents who meet the income thresholds may also be eligible for financial assistance to help pay for a health care plan.[21]	

13. *Id*.
14. Asian American Policy Review, Medicaid Parity for Pacific Migrant Populations in the United States, https://aapr.hkspublications.org/2014/06/02/medicaid-parity-for-pacific-migrant-populations-in-the-united-states/.
15. 67 Fed. Reg. 61,955 – 61,974 (Oct. 2, 2002) ; 42 C.F.R. 457.
16. Public Law 111-3 ; 74 Fed. Reg. 47,517 – 47,536 (Sept. 16, 2009) ; 42 C.F.R. 457.
17. Medicaid, Medicaid and CHIP Coverage of Lawfully Residing Children & Pregnant Women, https://www.medicaid.gov/medicaid/enrollment-strategies/medicaid-and-chip-coverage-lawfully-residing-children-pregnant-women.
18. Centers for Medicare & Medicaid Services, "Re: Medicaid and CHIP Coverage of 'Lawfully Residing' Children and Pregnant Women" (July 1, 2010), http://downloads.cms.gov/cmsgov/archived-downloads/SMDL/downloads/SHO10006.pdf.
19. The Patient Protection and Affordable Care Act, Public Law 111–148 (March 23, 2010) and the Health Care and Education Reconciliation Act of 2010 (Reconciliation Act), Public Law 111–152 (March 30, 2010), collectively are referred to as the Affordable Care Act.
20. National Immigration Law Center, " 'Lawfully Present' Individuals Eligible Under the Affordable Care Act" (September 2012), https://www.nilc.org/wp-content/uploads/2015/10/lawfully-present-imm-categories-ACA-2016-07.pdf.
21. McElfish, P. A., Purvis, R. S., Riklon, S., & Yamada, S. (2019). Compact of Free Association Migrants and Health Insurance Policies: Barriers and Solutions to Improve Health Equity. *Inquiry : a journal of medical care organization, provision and financing, 56,* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6906344/.

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Health	a. Eligible for advanced premium tax credit subsidies. b. Subject to financial penalties for not enrolling in a health plan. c. While ACA gave greater access to low-cost insurance plans through the newly created health insurance Marketplace, many COFA residents still struggle to afford the new plans even with subsidies. 6. On February 24, 2020, USCIS implemented the Inadmissibility on Public Charge Grounds final rule.[22] The final rule clarifies the factors considered when determining whether someone is "likely at any time to become a public charge" and therefore inadmissible to the U.S. and ineligible to become LPR. a. The use of public benefits could be considered a negative factor in a public charge inadmissibility determination. b. Enrollment in a Marketplace plan (with/without premium tax credits) is not a public benefit under the public charge rule. c. For children under 21 and pregnant women, enrollment in Medicaid or CHIP will not be considered a public benefit under the public charge rule. 7. State-Level Policies: It is up to individual states to decide whether/how to continue Medicaid coverage for COFA residents with state funds. Some states have acted to grant COFA residents access to health care through their own programs or through programs that break down barriers for all immigrants, often using state-only dollars. For instance:[23] a. Arkansas i. COFA residents are ineligible for the Private Option, Arkansas's Medicaid-funded private insurance coverage for individuals at or near the poverty level. Starting in 2018, Arkansas elected the state option to provide ArKids (Arkansas's CHIP program) coverage to all lawfully residing children, including COFA citizens under the age of 19, as well as pregnant women. ii. Marshallese adults still lack Medicaid coverage in Arkansas. b. California i. Provides Medicaid coverage to all otherwise eligible, lawfully residing immigrants.	

22. *Supra* note 1.
23. McElfish et al., *supra* note 21; *see also* Asian & Pacific Islander American Health Forum, https://www.apiahf.org/focus/health-care-access/cofa/.

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Health	c. Hawai'i i. Subsequent to PRWORA, COFA Medicaid coverage in Hawai'i had been funded solely from state funds. Until 2009, COFA migrants in Hawai'i had been covered by the state's Medicaid program, Med-QUEST, if they met the income and asset requirements. In July 2010, approximately 7500 COFA residents in Hawai'i were unenrolled from Med-QUEST and enrolled in the Basic Health Hawai'i program, which offered limited benefits. Newly arrived COFA residents were unable to obtain any health coverage. Class action lawsuit was filed in 2010, challenging the constitutionality of the Basic Health Hawaii plan that deprived health coverage based on national origin and immigration status, as violating the equal protection clause of the 14th Amendment of the U.S. Constitution. ii. Hawai'i moved to enroll COFA residents in the ACA. However, many COFA residents cannot afford the deductibles and co-payments required by insurance obtained through the ACA. Specific groups, such as children and pregnant women, may be Medicaid eligible. d. New York i. Provides Medicaid coverage to all otherwise eligible, lawfully residing immigrants. e. Oregon i. Oregon implemented a unique insurance program that pays the ACA health insurance premium for qualified COFA residents. Under Oregon's HB4071 (2016) COFA Premium Assistance Program, the state supplements health insurance premiums and all out-of-pocket expenses for COFA residents living in Oregon. ii. Specific groups such as children and pregnant women, may be Medicaid eligible. f. Washington i. Covers the premiums and out of pocket costs for COFA residents who are not eligible for Medicaid and who are enrolled in a silver plan on the state's health exchange. Specific groups, such as children and pregnant women, may be Medicaid eligible.	
Social Security	1. COFA residents admitted under the Compact may obtain Social Security Number (SSN) and Social Security Card from the Social Security Administration. The Social Security Card issued to COFA resident will be unrestricted (i.e., issued without the statement "Valid for Work Only with DHS Authorization").[24] a. SS Card establishes employment authorization. b. Must be obtained in the U.S., not U.S. Embassy in FAS. 2. Social Security Disability Insurance (SSDI); Supplemental Security Income (SSI) a. COFA residents are not eligible because they are not included as a class of eligible non-citizen.	

24. U.S. Department of Interior, https://www.doi.gov/sites/doi.gov/files/migrated/oia/islands/upload/2008_1001_SSN_InfoSheet.pdf.

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Unemployment (CARES Act)[25]	1. Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020 a. Recovery Rebate[26] i. CARES Act provides the issuance of one-time payments (recovery rebates) to help individuals recover from COVID-19. ii. Only individuals with valid Social Security numbers and people who qualify as "resident aliens" as defined by the IRS are eligible to receive the payment. Noncitizens are considered as resident aliens if they meet either the Green Card test or the substantial presence test (i.e., must have been physically present in the U.S. for a minimum period required by the IRS). COFA residents would seem to be eligible under this standard. iii. Recovery rebate or unemployment compensation is not considered in public charge determinations.[27] b. Unemployment Insurance[28] i. Immigration-related eligibility requirements for UI benefits is currently not clear under the CARES Act. The CARES Act establishes, among other provisions, federal funding for 3 major UI programs (Pandemic Unemployment Assistance, additional weeks of benefits, and additional $600 in federal weekly compensation). Such federal funding may trigger the restriction in 8 USC §1611, a provision of the 1996 PRWORA that limits eligibility for federal public benefits to "qualified aliens." If this is the case, COFA residents (who are not included in the definition of "qualified aliens") would be ineligible for UI benefits under the CARES Act. ii. UI is not considered in public charge determinations.[29]	
Education (Federal Student Aid)[30]	1. FAS citizens are "non-citizens" that are eligible for FSA, and do not require a SSN to complete a FAFSA. 2. Parent's citizenship/immigration status does not impact eligibility for FSA. 3. Eligible for Federal Pell Grants only. 4. Eligible for Federal Pell Grants, Federal Supplemental Educational Opportunity Grants (FSEOG), and Federal Work Study.	

25. Coronavirus Aid, Relief and Economic Security Act, Public Law 116-136 (2020).
26. Congressional Research Service, "Recovery Rebates and Unemployment Compensation under the CARES Act: Immigration-Related Eligibility Criteria" (April 7, 2020), https://crsreports.congress.gov/product/pdf/LSB/LSB10442.
27. CARES Act 2020 Recovery Rebate is characterized as a "tax credit" for the 2020 tax year, and the definition of "public benefit" at 8 C.F.R. 214.21(b)(c) excludes tax credits from the list of public benefits (the regulation defines public benefit to include "Any Federal, States, local, or tribal cash assistance for income maintenance (other than tax credits)").
28. *Supra* note 26.
29. U.S. Citizenship and Immigration Services, Policy Manual, https://www.uscis.gov/policy-manual/volume-8-part-g-chapter-10#S-B (USCIS includes "Unemployment benefits" and "Worker's compensation" in its "non-exhaustive list of public benefits that USCIS does not consider in the public charge inadmissibility determination as they are considered earned benefits.").
30. Federal Student Aid, https://studentaid.gov/understand-aid/eligibility/requirements/non-us-citizens.

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COFA Residents' Pathway to Lawful Permanent Resident Status		
General	1. COFA residents may become LPRs if eligible under immigration laws through: a. Immigrant visa process (alien who plans to live permanently in the U.S. obtains an immigrant visa, and once admitted to the U.S. on the immigrant visa, the alien is issued a Green Card by USCIS); or b. Adjustment of resident status within the U.S. (process by which non-citizens already in the U.S. can obtain LPR status by "adjustment of status") 2. As a general matter, people must be granted LPR status before naturalization as a U.S. citizen. 3. As of February 24, 2020, new USCIS regulations apply to the definition and factors for "public charge" status. USCIS will determine whether applications for admission to the U.S. or applications for adjustment to immigration status will be denied because the applicant is likely at any time to become a public charge.	
Adjustment of Status **(Members of U.S. Armed Forces)**[31]	1. INA allows certain special immigrants physically present in the U.S. to adjust their status to that of a LPR. "Special immigrant" includes various categories, such as religious workers, special immigrant juveniles, employees and former employees of the U.S. government, or others who have benefited the U.S. government abroad. Such special immigrants apply for adjustment under the employment-based fourth preference (EB-4) immigrant category. 2. Armed Forces Immigration Adjustment Act of 1991 – created a "special immigrant" category for certain qualifying military members, recognizing alien military members (including COFA residents) for years of service to the U.S. This status is comparable to the special immigrant status awarded to certain U.S. government workers in the Panama Canal and long-term employees of international organizations residing in the U.S. 3. Requirement: 12 years honorable, active duty service in the U.S. Armed Forces or 6 years of honorable, active duty if the member has re-enlisted for additional 6 years. 4. Other Criteria: among others – a. Physically present in the U.S. to file and adjudicate. b. Eligible to receive an immigrant visa. i. Special Immigrant Armed Forces Member ("SIAFM") can establish eligibility for an immigrant visa by obtaining classification from USCIS by filing a Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360). c. Merits favorable exercise of discretion.[32] 5. Treatment of Family Members a. Spouse or unmarried child under 21 may, if otherwise eligible, accompany or follow-to-join the principal applicant. Spouse and child, as derivative applicants, may apply to adjust status under same immigrant category and priority date as principal applicant.	

31. U.S. Citizenship and Immigration Services, *Policy Manual: Chapter 8 - Members of the U.S. Armed Forces, available* at https://www.uscis.gov/policy-manual/volume-7-part-f-chapter-8.
32. 8 USC §1255(a): "The status of an alien who was inspected and admitted or paroled into the United States or the status of any other alien having an approved petition for classification as a VAWA self-petitioner may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed."

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Policy Changes at Federal Level		
General	1. As previewed in the preceding sections of this document, when the Compacts were first signed, COFA residents were eligible for Medicaid and other federal benefits as lawfully present migrants or PRUCOL. After PRWORA was enacted in 1996, COFA residents were excluded from most federally funded benefits programs because they were not included in the category of "qualified aliens." While children and pregnant women have been restored certain access to Medicaid and CHIP benefits through CHIPRA of 2009, COFA residents are still largely ineligible for federal means-tested benefits (i.e. SSI, TANF, SNAP, and Medicaid). Given this background, there seems to be two options for COFA residents to gain better access to such federal benefits – (1) COFA residents can adjust their immigration/citizenship status in order for themselves to become "qualified aliens" or otherwise eligible for federal benefits and (2) legislative action can be taken to reclassify COFA residents as "qualified aliens" or as individuals who are otherwise eligible for such federal benefits. a. Changing immigration/citizenship status would simply be (i) adjusting status to LPR (which is a category of "qualified alien") and/or (ii) becoming naturalized citizens (which would mean broader access to federal benefits than for "qualified aliens"). There is not necessarily a an apparent federal level policy change for green card applications and naturalization, because COFA residents, being citizens of sovereign nations, face more or less the same procedures as would any other foreign national who applies for a green card or citizenship. One categorical advantage that FAS citizens have over the green card process compared to other foreign nationals is the armed forces "special immigrant" option discussed in the section above. Compared to a broad-based policy change, encouraging FAS citizens/COFA residents to become LPRs or naturalized citizens can be incremental and time consuming. However, considering the dramatic increase in the number of Caribbean immigrants who became naturalized citizens in the aftermath of PRWORA,[33] these are legitimate options to consider. b. Reclassifying COFA residents entails passing legislation that amends and supplements the wording of PRWORA to include COFA residents as a category of "qualified aliens", carve out an exception to the rule for COFA residents, clarify that "lawfully present" non-citizens are still eligible to access benefits (as is the case for children and pregnant women under CHIPRA), or effectuate other similar change that would allow COFA residents to be eligible for benefits. Such broad-based policy change is further discussed below.	

33. Mahoney A., *The Health and Well-Being of Caribbean Immigrants in the United States*, Routledge (2012) at 154

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Federal Level Policy Action	1. Legislative Action for Restoration of Medicaid for COFA Residents: a. The most prominent piece of federal benefit that COFA residents are excluded from are Medicaid benefits. More than twenty bills to reinstate COFA eligibility for Medicaid have been introduced at the federal level since 2001.[34] Some of the most recent legislative efforts in the U.S. are as follows: i. Health Equity and Accountability Act (HEAA) of 2018,[35] a partisan bill supported by Democratic Representatives and Senators and an Independent Senator. No Republican Representatives or Senators have given support to HEAA. A version of the HEAA has been introduced in each Congress for the past 10 years. The HEAA is a broad proposal for achieving health equity for COFA residents and includes many policy provisions including restoring Medicaid and removing immigration status as a barrier for COFA migrants across public programs and data collection.[36] ii. Covering Our FAS Allies Act (COFA Act),[37] a bipartisan bill introduced on October 23, 2019, in the House of Representatives,[38] is a companion legislation to the COFA Act introduced in the Senate on July 23, 2019. The COFA Act bill proposes to reinstate Medicaid eligibility for COFA residents. iii. Health and Economic Recovery Omnibus Emergency Solutions Act (HEROES Act),[39] a second stimulus bill that was passed in the House of Representatives on May 15, 2020, focusing on aiding families in the U.S. during the COVID-19 pandemic. In addition to expanding aid to families during the COVID-19 outbreak, the HEROES Act restores Medicaid eligibility for COFA residents. The HEROES Act is the first legislation passed in the House of Representatives to address this matter in about 25 years.[40] iv. Patient Protection and Affordable Care Enhancement Act ("Affordable Care Enhancement Act"),[41] which expands health care coverage through the ACA, was passed in the House of Representatives on June 29, 2020, just a few days after the Trump administration asked the Supreme Court to declare the Affordable Care Act unconstitutional.[42] The Affordable Care Enhancement Act notably aims to bridge a gap in health coverage for COFA communities by reinstating Medicaid coverage for COFA residents. b. Each of the bills listed above include identical language with respect to amending Section 402(b)(2) of PRWORA by way of including a Medicaid exception for COFA residents, such that COFA residents are considered "qualified aliens" for purposes of Medicaid eligibility. While the HEROES Act and the Affordable Care Enhancement Act bills have both passed the House vote, they will still need to pass the Republican-controlled Senate and be signed by the President.	

34. Asian & Pacific Islander American Health Forum, Health Care for COFA Migrants, https://www.apiahf.org/resource/health-care-for-cofa-citizens/.
35. Congress.gov, H.R.5942 – Health Equity and Accountability Act of 2018, https://www.congress.gov/bill/115th-congress/house-bill/5942.
36. McElfish et al., *supra note* 21.
37. Congress.gov, H.R.4821 – Covering our FAS Allies Act, https://www.congress.gov/bill/116th-congress/house-bill/4821. Related bills include the Heroes Act bill and Patient Protection and Affordable Care Enhancement Act bill.
38. Asian & Pacific Islander American Health Forum, Bipartisan Bill will Restore Medicaid Coverage for COFA Citizens, https://www.apiahf.org/press-release/bipartisan-bill-will-restore-medicaid-coverage-for-cofa-citizens/.
39. Congress.gov, H.R.6800 – The Heroes Act, https://www.congress.gov/bill/116th-congress/house-bill/6800/text. Related bills include the COFA Act bill and Patient Protection and Affordable Care Enhancement Act bill.
40. Asian & Pacific Islander American Health Forum, HEROES Act to Restore Medicaid Benefits to COFA, https://www.apiahf.org/press-release/heroes-act-to-restore-medicaid-benefits-to-cofa-senate-must-address-lack-of-resources-on-language-access/.
41. Congress.gov, H.R.1425 – Patient Protection and Affordable Care Enhancement Act, https://www.congress.gov/bill/116th-congress/house-bill/1425. Related bills include the Heroes Act bill and COFA Act bill.
42. NYTimes.com, Trump Administration Asks Supreme Court to Strike Down Affordable Care Act, https://www.nytimes.com/2020/06/26/us/politics/obamacare-trump-administration-supreme-court.html.

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Federal Level Policy Action	2. Restoration of Federal Benefits for Non-COFA Non-Citizens: a. While PRWORA restricted access to federally funded programs for most legal immigrants (including COFA residents who were excluded from the category of "qualified aliens"), in the years following the implementation of PRWORA, Congress made several federal restorations[43] [44] [45] for non-COFA non-citizens with respect to Medicaid, SSI, and SNAP by amending relevant provisions in PRWORA. i. Balanced Budget Act of 1997 (BBA)[46] – (i) Grandfathered SSI eligibility for "qualified aliens" who were receiving SSI at the time of PRWORA's enactment and who were residing in the U.S. at that time, if they become disabled or blind, and (ii) extended the period of SSI eligibility to September 30, 1998, for "non-qualified aliens" who were already receiving SSI at the time of PRWORA's enactment. Also restored derivative Medicaid eligibility for "qualified aliens" who were already receiving SSI at the time of PRWORA's enactment. ii. Noncitizen Benefit Clarification and Other Technical Amendments Act of 1998 ("Noncitizen Benefit Clarification Act")[47] – Fully restored SSI eligibility for "non-qualified aliens" who were already receiving SSI benefits at the time of PRWORA's enactment. Also restored derivative Medicaid eligibility for "non-qualified aliens" who were already receiving SSI at the time of PRWORA's enactment. iii. Agricultural Research, Extension, and Education Reform Act of 1998[48] – Restored eligibility for SNAP (food stamps) to legal immigrant children, elders, and disabled individuals who entered the U.S. before enactment of PRWORA. The law also extended the refugee exemption from the food stamp bar from five to seven years. iv. Farm Security and Rural Investment Act (Farm Bill) of 2002 (including Food Stamp Reauthorization Act)[49] – Broadly restored access to food stamps for LPRs who have lived in the U.S. for at least five years, all LPR children (regardless of the residency requirement), and those that are disabled (regardless of the residency requirement). It also effectively restored food stamps to refugees. v. SSI Extension for Elderly and Disabled Refugees Act of 2008[50] – Extended the time period of SSI eligibility for certain refugees, asylees, and other humanitarian immigrants by an additional two years, conditioned on a good faith effort to pursue U.S. citizenship. Also retroactively extended the time period of SSI eligibility for certain "qualified aliens" whose SSI eligibility period expired. The legislation had a sunset date of September 30, 2011. vi. CHIPRA of 2009 – Gave states the option to provide Medicaid and CHIP assistance to children and pregnant women who are "lawfully residing" (i.e., including COFA children and pregnant women) in the U.S. without a five-year delay. Many, but not all, states participate.	

43 Singer A., Welfare Reform and Immigrants: A Policy Review, https://www.brookings.edu/research/welfare-reform-and-immigrants/.
44. Mahoney A., The Health and Well-Being of Caribbean Immigrants in the United States, https://books.google.com/books?id=lQQsBgAAQBAJ&pg=PA154&lpg=PA154&dq=Agricultural+research+extension+and+education+reform+act+noncitizen&source=bl&ots=drQNd50_ah&sig=ACfU3U0tviLQ-PSbXgXlnscJb48MdhVzRA&hl=en&sa=X&ved=2ahUKEwizlLu7pbnqAhX7oHIEHWalCl8Q6AEwB3oECAoQAQ#v=onepage&q=Agricultural%20research%20extension%20and%20education%20reform%20act%20noncitizen&f=false.
45. https://books.google.com/books?id=aRstU_nW-VwC&pg=RA2-SA3-PA12&lpg=RA2-SA3-PA12&dq=Agricultural+research+extension+and+education+reform+act+noncitizen&source=bl&ots=m-tMeKJzhX&sig=ACfU3U0OXfLPRFgQpl69bTk0qN4zLERgvw&hl=en&sa=X&ved=2ahUKEwizlLu7pbnqAhX7oHIEHWalCl8Q6AEwBXoECAsQAQ#v=onepage&q=Agricultural%20research%20extension%20and%20education%20reform%20act%20noncitizen&f=false.
46. Pub. L. No. 105-34.
47. Pub. L. No. 105-306.
48. Pub. L. No. 105-185.
49. Pub. L. No. 107-171.
50. Pub. L. No. 110-328.

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Federal Level Policy Action	3. The technical approach in the restoration laws vary. The BBA and the Noncitizen Benefit Clarification Act respectively amended provisions of PRWORA to provide additional exceptions to the general rules that prevented benefit eligibility for non-citizens,[51] whereas CHIPRA amended certain codified sections of the Social Security Act[52] by specifically overriding PRWORA: "A State may elect … to provide medical assistance …. notwithstanding…the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, to children and pregnant women who are lawfully residing in the United States."[53] But, regardless of the approach, the track record of these legislations show that the restoration of federal benefits for individuals who became ineligible upon the passage of PRWORA is not unprecedented. Although eligibility for TANF has for the most part not been addressed, eligible immigrants who had received benefits prior to PRWORA, children, persons over 65 years old, and the disabled have largely recovered some benefits under Medicaid, SSI and SNAP. This goes to further show that it is feasible to consider various options to restore not only Medicaid eligibility (as discussed above), but also the other federal benefits that have been restored for other non-citizens. 4. Further, from an equity standpoint, there are arguments of fairness to be made in favor of reinstating federal benefits for COFA residents. The BBA and the Agricultural Research, Extension, and Education Reform Act were signed into law with the acknowledgement that PRWORA unfairly treats legal immigrants and that such unfair treatment was not the intended effect of welfare reform.[54] Although COFA residents are not classified as "immigrants", but rather "non-immigrants without visas",[55] [56] their status closely resembles that of LPRs or others (e.g., refugees and asylees) that are legally present in the U.S. on a permanent basis in that COFA residents are also lawfully residing in the U.S. for an indeterminate period of time. This sets COFA residents apart from other individuals in the "non-qualified alien" category (e.g., students, visitors, and temporary workers). Accordingly, unfair treatment in welfare with respect to legal immigrants would reasonably have a similarly unfair impact on COFA residents, and therefore needs to be addressed through legislative action. Another issue to consider in terms of equitable treatment is that COFA residents pay income taxes in the U.S. Taxation and receipt of social security payments were a focal point of recent decisions[57] from the First Circuit and U.S. District Court of Guam that concluded that the U.S. government's denial of social security benefits to U.S. citizens living in territories is unconstitutional. The government relied on Supreme Court cases *Califano v.* Torres and Harris v. Rosario that affirm Congress's ability to differently treat the territories from the states with regard to federal benefit programs if it can point to a "rational basis" for doing so, and proffered the rationale that SSI benefits are paid from general revenues funded by federal income taxes, and residents of U.S. territories generally do not pay federal income tax. If the government's logic is that benefits should be provided on the basis of taxation, then, arguably, COFA residents who pay taxes in the U.S. should be afforded access to benefits. Further, the courts' decisions relied on the fact that residents of Northern Mariana Islands do not pay income taxes, and yet still receive benefits because they have secured them in their negotiation with the federal government. While NMI's status is different because it is a U.S. commonwealth whereas the FAS are sovereign states, the NMI example can provide a basis for the argument that such benefits are negotiable matters (rather than an inherent right originating from territorial status), and therefore can and should be negotiated for in the Compact negotiations.	

51. Section 401(b) of PRWROA (amended by Noncitizen Benefit Clarification Act) lists exceptions to the general rule barring non-qualified aliens from federal public benefits and 402(a)(2) of PRWORA (amended by BBA) lists exceptions to the general rule barring qualified aliens from federal programs.
52. 42 U.S.C. 1396b(v).
53. *Supra* note 16.
54. Clinton, W. J., *Statement on Signing the Agricultural Research, Extension, and Education Reform Act of 1998, available at* https://www.presidency.ucsb.edu/node/226581.
55. *Supra* note 2.
56. Padilla, A., D'Avanzo, B., & Schwartz, *S., Eligibility for Health Insurance For Immigrants and Their Families*, National Immigration Law Center (Nov. 17, 2016) *available at* https://www.nilc.org/wp-content/uploads/2016/12/Slides-for-Nov-17-Webinar.pdf.
57. Law360.com, Ruling May Show Sea Change In Territorial Access to Benefits, https://www.law360.com/articles/1286356/print?section=appellate.

	FSM/RMI	PALAU
PUBLIC CHARGE RULE & COFA RESIDENTS		
Potential Impact of Public Charge Rule	1. As mentioned at the beginning of this document, as of February 24, 2020, DHS has implemented an updated Public Charge rule that considers the "totality of circumstances" on whether an individual is "likely at any time to become a public charge." The federal policy actions discussed in the section above should be reviewed in conjunction with the potential impact of the Public Charge rule. The Public Charge final rule[58] lists, among other things, the following as "Public Benefits": a. SSI, TANF, and other Federal, State, local, or tribal cash assistance for income maintenance (other than tax credits). b. SNAP (or food stamps). c. Non-emergency Medicaid for non-pregnant adults. d. Federal housing assistance (including public housing and Housing Choice Vouchers). 2. The number of immigrants who could be deemed ineligible for LPR based on the new rule is small, due to the fact that there are very few benefit programs that are open to non-citizens who do not already possess a green card.[59] This is true of COFA residents in the status quo – the only "public benefit" currently open to COFA residents is federal housing assistance. However, DHS has not exempted the applicability of the public charge rule for FAS citizens arriving in the U.S. or COFA residents, otherwise. This is likely to pressure current beneficiaries to consider disenrolling from any benefits they are receiving,[60] discouraging efforts to adjust status to that of a green card holder,[61] and also, would likely dampen any positive effect of a restoration of COFA eligibility for federal benefits, if COFA residents are discouraged from taking advantage of their reinstated eligibility for fear of being negatively reviewed by the forward-looking "totality of circumstances" public charge rule. 3. The public charge rule has been challenged in several different district courts,[62] with such district courts granting plaintiffs' motions for preliminary injunctions and in all such cases DHS appealed that the Second, Fourth, Seventh, and Ninth Circuit Courts stay the preliminary injunctions. The Fourth and Ninth Circuit Courts have granted the motions to stay, whereas the Second and Seventh Circuit Courts have affirmed the district courts' preliminary injunctions (albeit with a modified scope in the case of the Second Circuit).[63] Notably, the most recent August 4, 2020 decision from the Second Circuit concluded that the public charge rule runs against the legislative intent of the Immigration and Nationality Act as well as the settled meaning of "public charge" as intended by Congress when deciding to affirm the preliminary injunction.[64] Regardless, the current injunctions in effect are preliminary and limited in scope to only a handful of jurisdictions, and accordingly, it remains to be seen how far reaching the impact of the public charge rule will turn out to be.	

58. 84 Fed. Reg. 41,292 – 41,408 (Aug. 14, 2019).
59. Migration Policy Institute, https://www.migrationpolicy.org/news/public-charge-denial-green-cards-benefits-use.
60. Mass disenrollment from public benefits occurred in the aftermath of PRWORA due to fear and confusion, even among immigrants who remained eligible for public benefits. Similar occurrences are expected from *the public charge rule. See Ponce, N., The UCLA Center for Health Policy Research's Public Comment on proposed changes to the federal "public charge" immigration test*, (Dec. 13, 2018), *available at* https://healthpolicy.ucla.edu/newsroom/press-releases/pages/details.aspx?NewsID=311.
61. *See New York v. U.S. Dept. of Homeland Security*, Nos. 19-3591, 19-3595, 2020 WL 4457951 (2d Cir. Aug. 4, 2020), at 2 (noting that "as a practical matter, the Rule is likely to be applied primarily by USCIS as it adjudicates applications for adjustment of status … than [by U.S. Customs and Border Protection] … at a port of entry").
62. *See New York v. U.S. Dept. of Homeland Security*, 19-cv-07777 (S.D.N.Y.); *Make the Road New York v. Cuccinelli*, 19-cv-07993 (S.D.N.Y.); *CASA de Maryland, Inc. v. Trump*, No. 19-cv-2715 (D. Md.); *Cook Cty. v. Wolf*, No. 19-cv-6334 (N.D. Ill.); *City and Cty. of San Francisco v. USCIS*, No. 19-cv-4717 (N.D. Cal.); *California v. DHS*, No. 19-cv-4975 (N.D. Cal.); *Washington v. DHS*, No. 19-cv-5210 (E.D. Wash.).
63. *See CASA de Maryland, Inc. v. Trump*, 414 F.Supp.3d 760 (4th Cir. 2020); *City & Cty. of San Francisco v. USCIS*, 944 F.3d 773 (9th Cir. 2019), *Cook Cty. v. Wolf*, 962 F.3d 208 (7th Cir. 2020), *New York v. U.S. Dept. of Homeland Security*, Nos. 19-3591, 19-3595, 2020 WL 4457951 (2d Cir. Aug. 4, 2020).
64. The Second Circuit pointed out its disagreement with the conclusions made by the Seventh and Ninth Circuits that there is no settled meaning of "public charge".

COFA IMMIGRATION – EXAMPLES OF OTHER TYPES OF ARRANGEMENTS WITH THE UNITED STATES

American Samoa	
Immigration process for American Samoan citizens	
Background	1. American Samoa became a U.S. territory beginning in 1900, when local chiefs ("matai") ceded the largest island to the United States. The U.S. Navy exercised authority over the territory until 1951. The Department of the Interior has held this authority ever since. American Samoa adopted its own constitution in 1967.
U.S. Citizenship Status	1. Section 308(1) of the Immigration and Nationality Act of 1952 (8 U.S.C. § 1408(1)) (the INA) and the Insular Cases[1] established American Samoan as non-citizen nationals of unincorporated territories.[2] a. The Insular Cases are a series of six U.S. Supreme Court cases decided in 1901 that concern the status of the U.S. territories and the constitutional rights of their residents obtained by the United States after the Spanish-American War (through the Treaty of Paris). The territories include: Puerto Rico, Guam, and the Philippines, and later, the U.S. Virgin Islands, American Samoa, and the Northern Mariana Islands. b. One of the major policies that stemmed from the Insular Cases is the territorial incorporation doctrine and it is still in effect today. The doctrine dictates that residents of unincorporated territories (i.e., territories that are not incorporated into the U.S.) do not enjoy the full rights and protections of the U.S. Constitution. 2. American Samoans have brought 14th Amendment challenges in recent years: a. *Tuaua v. U.S.*, 788 F.3d 30 (D.C. Cir. 2015): The DC Circuit held the Citizenship Clause does not provide a fundamental territorial right to birthright citizenship. In part, the court reasoned the American Samoan people have not "formed a collective consensus" on U.S. citizenship. Some American Samoans have resisted U.S. citizenship given the implications for the traditional Samoan system of communal land ownership, whereby extended families ("aiga") communally own land that the matais (Samoan chiefs) administer. The Supreme Court denied certiorari. b. *Fitisemanu v. U.S.*, No. 18-36 (D. Utah Dec. 12, 2019): A Utah district court granted summary judgement in favor of the plaintiffs, holding that persons born in American Samoa are U.S. citizens under the Citizenship Clause and that Section 308(1) of the INA is unconstitutional. The court ordered the Government to issue new passports to American Samoans. The decision is pending appeal in the 10th Circuit, with six amicus briefs supporting the plaintiffs' claims.[3]
Documentation for Admission to the U.S.	1. The U.S. State Department issues U.S. passports to American Samoans with a notation that reads "THE BEARER IS A UNITED STATES NATIONAL AND NOT A UNITED STATES CITIZEN."

1. *See* Section on Puerto Rico for a description of all six cases.
2. https://www.law.cornell.edu/uscode/text/8/1408. *See De Lima v. Bidwell*, 182 U.S. 1, 2, 21 S. Ct. 743 (1901).
3. https://pasquines.us/2020/05/14/six-amicus-briefs-filed-in-support-of-citizenship-in-us-territories/

Rights of American Samoan residents in the U.S.	
General	1. American Samoan residents admitted to the U.S. may reside, work, and study in the U.S..[4]
Driver's License / ID Card	1. REAL ID Act Modification of Freely Associated States Act of 2018: REAL ID Act of 2005 and regulations authorize REAL ID compliant states to issue temporary or limited-term REAL ID compliance driver's licenses and ID cards to certain nonimmigrant aliens who satisfy other REAL ID requirements. Such temporary driver's licenses or ID cards cannot be issued with a validity period longer than the alien's authorized period of stay in the U.S. or, if no definite end to the period of authorized stay, a period of one year. American Samoa's compliance is under review as of March 2020, meaning federal agencies can accept American Samoan driver's licenses and identification cards. This includes for federally regulated commercial aircraft.[5]
Employment Authorization	1. American Samoans are eligible for employment in the U.S. They must complete the 1-9 Form and present required documents.[6] 2. American Samoans may not hold public positions that require U.S. citizenship by law (e.g. police officers).
Military Service	1. American Samoans are eligible to volunteer for service in the U.S. armed forces and have done so at higher rates per capita than other U.S. states and territories. 2. Unnaturalized American Samoans cannot vote for their commander in chief, serve in special services, or rise to certain positions.
Voting & Representation	1. Unlike individuals from other U.S. territories, American Samoans residing in the U.S. mainland have no right to run for office. American Samoans cannot vote in federal elections or participate on a jury.
U.S. Federal/State Benefits to American Samoan Residents	
Health	1. Section 1101 of the Social Security Act treats American Samoa as a state for the purposes of Medicaid and the State Children's Health Insurance Program (CHIP) unless otherwise provided. This provision classifies American Samoa as a state only under certain titles of the Act. The Secretary of Health and Human Services may waive or modify most Medicaid requirements for American Samoa under Section 1902(j). This allows American Samoa to administer the Medicaid program itself, even where the Act does not classify American Samoa as a state.[7] a. Medicaid eligibility for residents of American Samoa are not evaluated on an individual basis. Rather, American Samoa receives federal funding in proportion to its low-income population. b. The federal government's match rate is set at 55% for American Samoa, returning $1.25 for every $1 the territory spends. 2. American Samoans residing in the U.S. are eligible for health coverage as state law provides (e.g. New York treats American Samoans as U.S. citizens).

4. 8 U.S.C. 1408, https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1408&num=0&edition=prelim.
5. https://www.dhs.gov/xlibrary/assets/real-id-act-text.pdf; *see also* https://www.dhs.gov/real-id/american-samoa.
6. Instructions, Form I-9, https://secure.i9.talx.com/Popups/Documents/I-9InstructionsNew.pdf
7. https://www.ssa.gov/OP_Home/ssact/title11/1101.htm; https://www.ssa.gov/OP_Home/ssact/title19/1902.htm; https://www.medicaid.gov/state-overviews/american-samoa.html.

Health	3. Affordable Care Act (ACA) of 2010[8] – citizens and individuals who are "lawfully present" in the U.S. are subject to the requirement to have health insurance coverage (aka the "individual mandate") and are eligible for new coverage options offered through the health insurance marketplace. "Lawfully present" includes residents of American Samoa. Further, American Samoans residents who meet the income thresholds may also be eligible for financial assistance to help pay for a health care plan.
Social Security	1. American Samoans who reside in the U.S. or obtain U.S. citizenship may obtain a Social Security Number (SSN) and Social Security Card from the Social Security Administration. Residents of American Samoa are not eligible. 2. Section 1308 of the Social Security Act places a $1,000,000 mandatory ceiling on the amount of annual federal grants from the Department of Health and Human Services to certain programs in American Samoa.[9]
Education (Federal Student Aid)	1. American Samoan citizens are "non-citizens" eligible for Federal Student Aid (FSA) and may apply for Free Application for Federal Student Aid (FAFSA). 2. American Samoans who receive U.S. citizenship must contact the Social Security Administration with an update of status in order to avoid delays in receiving student financial aid. 3. American Samoans are eligible for Federal Pell Grants.
American Samoan Residents' Pathway to Lawful Permanent Resident Status	
General	1. Individuals who have resided in the U.S., including American Samoa, continuously for five years may apply for full U.S. citizenship through naturalization. Applicants must meet the following requirements: a. Be 18 or older at the time of the filing; b. Have lived in a U.S. Citizenship and Immigration Services district or state for at least 3 months upon filing; c. Have been physically present in the U.S. for at least 30 months of the preceding five years; d. Continuously resided in the U.S. from the filing until naturalization; e. Pass an English test and a U.S. history and civics test; and f. Meet moral character standards. 2. Applicants submit the N-400 form and $725 fee.[10]

8. https://www.govinfo.gov/content/pkg/PLAW-111publ148/pdf/PLAW-111publ148.pdf.
9. https://www.govinfo.gov/app/details/USCODE-2010-title42/USCODE-2010-title42-chap7-subchapXI-partA-sec1308/summary.
10. https://www.uscis.gov/sites/default/files/files/form/n-400instr.pdf.

Family Petitions	1. The INA does not include provisions that apply to non-citizen nationals filing visa petitions. The Board of Immigration Appeals (BIA) has issued two relevant decisions: a. *In the Matter of B------, 6* I&N Dec. 655 (BIA 1955): Non-citizen nationals may not file petitions for family under the U.S. citizen petitioner category but may file petitions under the permanent resident petitioner category of Section 203(a)(2). b. *Matter of Ah San*, 15 I&N Dec. 315 (BIA 1975): Non-citizen nationals may file family petitions regardless of whether the national resides or intends to reside on the U.S. mainland.
Family Petitions	2. The BIA has not decided whether the spouse or child of non-citizen national may self-petition under the Section 204 widower or Violence Against Women Act (VAWA) provisions.
Commonwealth of the Northern Mariana Islands (CNMI)	
Immigration Process for CNMI Citizens	
Background	1. The U.S. administered the northernmost Mariana islands under the Trust Territory of the Pacific Islands on the UN's behalf. When the U.S. entered into negotiations with island representatives, the Marianas broke with the other island and voted to become the Commonwealth of the Northern Mariana Islands (CNMI). The U.S. adopted the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America in 1976.[11] 2. The CNMI is now a self-governing commonwealth with U.S. sovereignty over foreign affairs and defense. Section 902 of the Covenant established a continuing process for consultation between the U.S. and the CNMI.
U.S. Citizenship Status	1. Article III of the Covenant (Pub. L. No. 94-241, 90 Stat. 263) grants birthright U.S. citizenship to those born in the CNMI. Section 304 entitles those citizens to "all privileges and immunities of citizens in the several States." Section 501(a) applies Section 1 of the 14th Amendment to the CNMI as if the CNMI were "one of the several states."[12] 2. There is no pathway to U.S. citizenship through CNMI residency alone.
Documentation for Admission to the U.S.	1. CNMI residents who became U.S. citizens under Section 301 of the Covenant and those who have since achieved birthright citizenship are entitled to U.S. passports.[13] 2. The U.S. will issue passports to person born in the Northern Mariana Islands between January 9, 1978 and November 3, 1986 who did not qualify under Section 301. *Sabangan v. Powell,* 375 F.3d 818 (9th Cir. 2004).

11. https://www.congress.gov/116/plaws/publ24/PLAW-116publ24.htm.
12. Section 301, https://uscode.house.gov/statutes/pl/94/241.pdf.
13. *Id*.

Rights of CNMI Residents in the U.S.	
General	1. CNMI residents with U.S. citizenship: may reside, work, and study in the U.S.. 2. CNMI residents without U.S. citizenship: The Covenant originally granted control over immigration to the CNMI government, drawing foreign contract workers to the CNMI. There is no established pathway to U.S. citizenship for those who establish CNMI residency alone, and these residents cannot move to other parts of the U.S.. The 2008 Consolidated Natural Resources Act extended federal immigration law to the CNMI and provided the CW visa program as a transition program for non-citizen workers. The U.S. extended this through December 31, 2029 to meet labor demands.
Driver's License / ID Card	1. REAL ID Act Modification of Freely Associated States Act of 2018: REAL ID Act of 2005 and regulations authorize REAL ID compliant states to issue temporary or limited-term REAL ID compliance driver's licenses and ID cards to certain nonimmigrant aliens who satisfy other REAL ID requirements. Such temporary driver's licenses or ID cards cannot be issued with a validity period longer than the alien's authorized period of stay in the U.S. or, if no definite end to the period of authorized stay, a period of 1 year. The CNMI's compliance is under review as of March 2020, meaning federal agencies can accept CNMI driver's licenses and identification cards. This includes for federally regulated commercial aircraft.
Employment Authorization	1. CNMI residents who are U.S. citizens are automatically eligible for employment in the U.S. They must complete the 1-9 Form and present required documents. 2. CNMI employers must use the I-9 Form with new hires as of November 28, 2011. Individuals working in the CNMI hired on or before November 27, 2009 are not required to complete the I-9 Form.
Military Service	1. CNMI residents are eligible to volunteer for service in the U.S. armed forces. CNMI U.S. citizens can become commissioned officers and gain special security clearances.
Voting & Representation	1. Federal Representation: a. CNMI residents who are U.S. citizens vote in primaries but not in the U.S. presidential election. b. The CNMI directly elects one representative to the U.S. House by simple majority for a 2-year term. This representative can vote while serving on a committee but not on "full floor" House votes. 2. CNMI Elections. a. CNMI residents directly elect the governor by absolute majority. b. The CNMI has a bicameral legislature elected by simple majority.

U.S. Federal/State benefits to CNMI residents	
Health	1. Section 1902(j) of the Social Security Act[14] gives the CNMI broad authority to operate its Medicaid program. The Secretary of Health and Human Services may waive or modify most Medicaid requirements, subject to the Section 1108 cap. a. The CNMI has one Medicaid hospital servicing the area. b. Rather than match CNMI Medicaid expenditures at a set rate, the federal government matches CNMI spending until exhausting funds available under Medicaid and the ACA. c. The ACA provided the CNMI with $9.1 million in Medicaid funding rather than establish a health marketplace. 2. CNMI citizens residing in the U.S. are eligible for state health coverage as state law provides (e.g. Michigan treats those born in the CNMI on or after November 4, 1986 as U.S. citizens).
Social Security	1. CNMI residents and CNMI-born individuals residing in the U.S. may obtain a Social Security Number (SSN) and Social Security Card from the Social Security Administration. 2. An individual with U.S. citizenship and residing in the CNMI may qualify for the Supplemental Security Income program.
Education (Federal Student Aid)	1. Individuals from the CNMI who possess U.S. citizenship are "U.S. citizens" eligible for FSA and may apply for FAFSA. These individuals may have to provide a birth certificate to their educational institution.
CNMI Residents' Pathway to Lawful Permanent Resident Status	
General	1. The CNMI has a parole program for long-term residents under the Northern Mariana Island Long-Term Legal Residents Relief Act (Pub. Law 116-24).[15] Under this Act, the U.S.CIS automatically extended parole and employment authorization for certain CNMI residents who are not U.S. citizens. However, the U.S.CIS has limited the program to residents already paroled after ending the categorical CNMI parole program. To qualify, an individual must: a. Have been lawfully present in the CNMI on the date of the bill's enactment or December 31, 2018; b. Is not a citizen of the Marshall Islands, Micronesia, or Palau; and c. Have resided continuously and lawfully in the CNMI from November 28, 2009 on.

14. https://www.congress.gov/116/plaws/publ24/PLAW-116publ24.pdf
15. CAA, Pub. L. 89-732 (November 2, 1966) https://www.govinfo.gov/content/pkg/STATUTE-80/pdf/STATUTE-80-Pg1161.pdf.

Cuba	
Immigration Process for Cuban Citizens	
Background	1. Cuban immigration to the U.S. first ramped up after the 1959 Cuban Revolution. The U.S. granted humanitarian parole to these immigrants with the discretion Section 212(d)(5) of the INA provides the Secretary of Homeland Security for "urgent humanitarian reasons or significant public benefit." The U.S. then passed the 1966 Cuban Adjustment Act (CAA),[16] which allows Cubans to apply for a green card after being present in the U.S. for one year. 2. During the 1980 Mariel Boatlift, many Cubans and Haitians did not qualify for asylum under the INA. The Carter Administration labeled these immigrants "Cuban-Haitian Entrants" and exercised discretionary parole authority to grant admission. A new provision in the Immigration Reform and Control Act (Pub. Law 99-603)[17] allowed these immigrants to become lawful permanent residents. 3. The U.S. adopted the Wet Foot/Dry Foot policy in 1995.[18] Under this policy, the U.S. would return individuals who were intercepted at sea to Cuba but grant parole to those who reached U.S. soil. The Cuban government agreed not to retaliate against those who tried and failed to immigrate, and the U.S. would not refuse those who feared persecution. President Obama ended this policy in 2017 following attempts to normalize relations with Cuba. 4. In 2007, the U.S. created the Cuban Family Reunification Parole Program (CFRP)[19] to allow certain U.S. citizens and lawful permanent residents to apply for parole for family members in Cuba. The program has stalled since the U.S. ended most of its embassy operations in 2017.
U.S. Citizenship Status	*See section on Lawful Permanent Residence below.*
Documentation for Admission to the U.S.	1. Cubans may lawfully enter with an immigration visa. Those who are paroled will receive a foil in their passports similar to a visa. 2. Cubans who enter the U.S. without documentation may later adjust status under the CAA (see below).
Rights of American Cuban Citizens in the U.S.	
General	1. Cubans who receive parole may come to the U.S. before receiving an immigration visa.
Employment Authorization	1. Applicants under the CAA may apply for work authorization while the Form I-485 is pending. 2. Beneficiaries of the CFRP may apply for work authorization while awaiting lawful permanent resident status.

16. CAA, Pub. L. 89-732 (November 2, 1966) https://www.govinfo.gov/content/pkg/STATUTE-80/pdf/STATUTE-80-Pg1161.pdf.
17. https://www.govinfo.gov/content/pkg/STATUTE-100/pdf/STATUTE-100-Pg3445.pdf.
18. https://cu.usembassy.gov/visas/immigrant-visas/cuban-parole-programs/cfrp-program/.
19. https://cu.usembassy.gov/visas/immigrant-visas/cuban-parole-programs/cfrp-program/.

U.S. Federal/State benefits to Cuban citizens	
Health	1. Medicaid and CHIP: lawful permanent residents, individuals who have been paroled to the U.S. for at least one year, and Cuban/Haitian entrants are "qualified non-citizens" eligible to receive Medicaid and CHIP coverage. A five-year waiting period may apply. 2. ACA: citizens and individuals who are "lawfully present" in the U.S. are subject to the requirement to have health insurance coverage (aka the "individual mandate") and are eligible for new coverage options offered through the health insurance Marketplace. This includes lawful permanent residents, Cuban/Haitian entrants, and those paroled into the U.S.
Social Security	1. Social Security: Individuals who have only a stamped Form I-94 and a parole stamp may receive only a non-work SSN. 2. Supplemental Security Income: Cuban-Haitian entrants are eligible for SSI for seven years after entry/grant of that status. These entrants must meet the same requirements as U.S. citizens. Cuban-Haitian entrants are also eligible for Temporary Assistance for Needy Families.
Education (Federal Student Aid)	1. Lawful permanent residents, Cuban/Haitian Entrants, and recipients of humanitarian or indefinite parole are "non-citizens" eligible for FSA and may apply for FAFSA. 2. Cubans who receive U.S. citizenship must contact the Social Security Administration with an update of status in order to avoid delays in receiving student financial aid.
Cuban citizens pathway to lawful permanent resident status	
General	1. Cuban Adjustment Act:[20] Cubans who have been physically present in the U.S. for one year may become lawful permanent residents. The same grounds for inadmissibility apply except the public charge, labor certification, and document requirements provisions. Applicants must: a. File a Form I-485 after having been in the U.S. for at least one year; b. Have been inspected and admitted or paroled after January 1, 1959; c. Remain physically present in the U.S.; d. Be admissible for lawful permanent residence or eligible for a waiver; and e. Merit the use of discretion. 2. Cubans who enter the U.S. without documentation may file an asylum claim and benefit from the CAA while that claim is pending adjudication.

20. Id. at n.14.

Family Petitions	1. The Cuban Family Reunification Parole Program – An individual may petition for parole for a relative in Cuba if: a. The individual is a U.S. citizen or lawful permanent resident; b. The individual has an approved Form I-130; c. The relative has not yet received an immigration visa; d. The individual received an invitation from the State Department's National Visa Center to participate; e. The relative is a Cuban national living in Cuba; and f. The relative has received an invitation to participate in the program. 2. Immediate relatives (spouses, unmarried children under 21 years, and parents over 21 years old) are not eligible because they can apply for immigrant visas upon approval of the Form I-130. 3. Parole is not automatic. Those who have committed serious crimes or who cannot pass a background check will not be granted parole.
Guam	
Immigration Process for Guam Nationals	
Background	1. Guam is an unincorporated U.S. territory under the Guam Organic Act of 1950 (Pub. Law 630, 64).[21] The island is of strategic importance to the U.S. military. In the early 1900, Guam representatives lobbied Congress to improve the island's standing. As a reward for Guam's sacrifices in World War II, the Department of Defense began working toward U.S. citizenship for Guam's residents, culminating in the Guam Organic Act that extended U.S. citizenship and a bill of rights to those living on Guam.
U.S. Citizenship Status	1. The Guam Organic Act granted citizenship to "native inhabitants" of Guam. This included those born in and residing in Guam since April 11, 1899, and their descendants. Because this citizenship derives from statute, Guam's inhabitants are entitled only to those constitutional rights deemed "fundamental." (*Rogers v. Bellei*, 401 U.S. 815, 827 (1971)). 2. The Insular Cases defined certain fundamental rights and applicable to Guam: a. The Bill of Rights. b. Amendments 13 and 15. c. Amendment 14 except the first sentence ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.").
Documentation for Admission to the U.S.	1. Guam residents with U.S. citizenship are eligible for U.S. passports. They must complete the standard DS-11 form.

21. https://www.loc.gov/law/help/statutes-at-large/81st-congress/session-2/c81s2ch512.pdf.

Rights of Guam Nationals in the U.S.	
General	1. Guam residents admitted to the U.S. may reside, work, and study in the U.S..
Driver's License / ID Card	1. REAL ID Act Modification of Freely Associated States Act of 2018: REAL ID Act of 2005 and regulations authorize REAL ID compliant states to issue temporary or limited-term REAL ID compliance driver's licenses and ID cards to certain nonimmigrant aliens who satisfy other REAL ID requirements. Such temporary driver's licenses or ID cards cannot be issued with a validity period longer than the alien's authorized period of stay in the U.S. or, if no definite end to the period of authorized stay, a period of one year. Guam is compliant with the REAL ID Act. Federal agencies can accept Guam identification cards and driver's licenses
Employment Authorization	1. Guam residents are automatically eligible for employment in the U.S. The I-9 form treats persons born in Guam as U.S. citizens.
Military Service	1.Guam residents are eligible to volunteer for service in the U.S. armed forces. They enlist at a higher rate than any U.S. state.
Voting & Representation	1. Prior to 1970, the U.S. President appointed Guam's governors. The Department of the Interior oversees Guam, with the Governor's actions subject to veto. 2. Since 1972, Guam has been allowed to elect a non-voting representative to the U.S. House. Guam-born U.S. citizens cannot vote for the U.S. President.
U.S. Federal/State benefits to Guam nationals	
Health	1. Medicaid and CHIP: The Guam Department of Health and Social Services administers Guam's Medicaid program. Section 1101(a)(1) of the Social Security Act provides Guam is a state for the purposes of Medicaid and CHIP unless otherwise indicated. a. Guam may use local poverty levels to establish income-based eligibility and is exempt from other poverty-related provisions. b. Guam uses CHIP funds for children in Medicaid after exhausting Medicaid funds. 2. ACA – citizens and individuals who are U.S. citizens living in the U.S. are subject to the requirement to have health insurance coverage (aka the "individual mandate") and are eligible for new coverage options offered through the health insurance Marketplace. This includes residents of Guam.

Social Security	1. Guam natives who relocate to the U.S. may obtain a Social Security Number (SSN) and Social Security Card from the Social Security Administration. Residents of Guam have historically not been eligible for benefits. 2. Instead of Supplemental Security Income, Guam relies on former federal-state programs: Old-Age Assistance, Aide to the Blind, and Aid to the Permanently and Totally Disabled. The Secretary of Health and Human Services administers these programs. 3. A federal district court in Guam granted summary judgment on June 19, 2020, in favor of a Guam resident seeking social security benefits. The plaintiff, who is disabled, was born and raised in the U.S. and had been receiving benefits before relocating to live with family in Guam. She asserted Equal Protection claims under the Fifth and Fourteenth Amendments and the Organic Act of Guam, as similarly situated citizens in the CNMI are entitled to social security. The government argued it is logical to exclude Guam residents from benefits because they generally do not pay federal income tax. The court noted, however, that residents of the CNMI also do not pay federal income tax and social security benefits are not dependent on an individual's tax contributions. The court rejected the government's arguments about cost, Guam's economy, and the territorial status of Guam and the CNMI.[22]
Education (Federal Student Aid)	1. Guam residents are "U.S. citizens" eligible for FSA and may apply for FAFSA.
Puerto Rico	
Immigration Process for Puerto Rico	
Background	1. During the 1898 Spanish-American War, United States invaded Puerto Rico. When Spain lost the war, Puerto Rico along with other Spanish territories, including Guam and the Philippines, were ceded to the United States.

22. https://www.law360.com/appellate/articles/1286356/ruling-may-show-sea-change-in-territorial-access-to-benefits?nl_pk=804daf7f-a70c-42c2-b640-b83013dda1ef&utm_source=newsletter&utm_medium=email&utm_campaign=appellate. Clifford Chance has a copy of the summary judgment order on file.

U.S. Citizenship Status	1. For the two years following the Spanish-American War, Puerto Rico was under U.S. military rule until the 1900 Foraker Act (or Organic Act of 1900) reestablished a civilian government and specified Puerto Rico's territory status, 48 U.S.C.A. § 731.[23] While Puerto Ricans were able to elect a legislature, the U.S. President appointed the island's governor and other major officials. The Foraker Act did not grant Puerto Ricans citizenship, instead Puerto Ricans were granted a nonvoting representative in Congress. 2. The Insular Cases[24] led to Puerto Rico being declared an unincorporated territory with no clear path to statehood. a. In *Huus v. N.Y. & P.R. S.S. Co.*, 182 U.S. 392 (1901): the court held that a vessel engaged in trade between Puerto Rico and New York is engaged in coastal trade and not foreign trade; b. In *Downes v. Bidwell*, 182 U.S. 244 (1901): the court held that Puerto Rico did not become a part of the United States within the meaning of Article I, Section 8 of the Constitution; c. In *Armstrong v. United States*, 182 U.S. 243 (1901): the court invalidated tariffs imposed on goods exported from the United States to Puerto Rico after ratification of the treaty between the United States and Spain; d. In *Dooley v. United States*, 182 U.S. 222 (1901): the court held that the right of the U.S. President to exact duties on imports into the United States from Puerto Rico ceased after the ratification of the peace treaty between the United States and Spain; e. In *Goetze v. United States*, 182 U.S. 221 (1901): the court held that Puerto Rico and Hawaii were not foreign countries within the meaning of United States tariff laws; and, f. In *De Lima v. Bidwell*, 182 U.S. 1 (1901): the court held that when Puerto Rico was acquired by the United States through cession from Spain, it was not a "foreign country" within the meaning of tariff laws. 3. In 1917, the U.S. granted citizenship to Puerto Ricans through the Jones-Shafroth Act, 48 U.S.C.A. § 733.[25] 4. In 1952,[26] Congress approved a constitution that recast Puerto Rico as a U.S. commonwealth capable of independently conducting its own affairs, including choosing its own leaders.[27]
Documentation for Admission to the U.S.	1. Puerto Rican residents with U.S. citizenship are eligible for U.S. passports. They must complete the standard DS-11 form.

23. https://www.govinfo.gov/content/pkg/USCODE-2009-title48/html/USCODE-2009-title48-chap4-subchapI.htm.
24. See discussion of American Samoa, p.1. See also Juan R. Torruella, Ruling America's Colonies: The Insular Cases, 32 Yale L. & Pol'y Rev. 57 (2013), https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1652&context=ylpr.
25. https://www.govinfo.gov/content/pkg/USCODE-2009-title48/html/USCODE-2009-title48-chap4-subchapI.htm
26. Public Law 447, 82d Cong. (66 Stat. 327), https://www.govinfo.gov/content/pkg/STATUTE-66/pdf/STATUTE-66-Pg327.pdf#page=1.
27. While Puerto Rico is currently a commonwealth of the United States and shares many similarities with other states, Puerto Rico is still treated as a territory under Article 4, Section 3, of the U.S. Constitution (the territorial clause). This clause gives Congress broad authority to govern U.S. territories, which include Puerto Rico (the most populous), American Samoa, Guam, the Northern Mariana Islands, and the Virgin Islands. The territories are granted some measures of self-rule by Congress, but lack their own overall sovereignty.

Rights of Puerto Rico nationals in the U.S.	
General	1. Puerto Rican residents may reside, work, and study anywhere in the U.S..
Driver's License / ID Card	1. REAL ID Act Modification of Freely Associated States Act of 2018: REAL ID Act of 2005 and regulations authorize REAL ID compliant states to issue temporary or limited-term REAL ID compliance driver's licenses and ID cards to certain nonimmigrant aliens who satisfy other REAL ID requirements. Such temporary driver's licenses or ID cards cannot be issued with a validity period longer than the alien's authorized period of stay in the U.S. or, if no definite end to the period of authorized stay, a period of 1 year. Puerto Rico is compliant with the REAL ID Act. Federal agencies can accept Puerto Rican identification cards and driver's licenses.
Employment Authorization	1. Puerto Rican residents are automatically eligible for employment in the U.S..
Military Service	1. Puerto Rican residents are eligible to volunteer for service in the U.S. armed forces.
Voting & Representation	1. Puerto Ricans residents cannot cast electoral votes in U.S. presidential elections or in U.S. congressional elections, although residents may vote in presidential primaries. 2. Puerto Ricans residents can vote for a resident commissioner who represents the island's interests in Washington, D.C., but the commissioner is not a voting member of Congress.
U.S. Federal/State benefits to U.S. Puerto Rican Nationals	
Health	1. Medicaid and CHIP: The Puerto Rican Department of Health administers Puerto Rico's Medicaid program. Section 1101(a)(1) of the Social Security Act provides that Puerto Rico is a state for the purposes of Medicaid and CHIP unless otherwise indicated.[28] 2. ACA – citizens and individuals who are U.S. citizens living in the U.S. are subject to the requirement to have health insurance coverage (aka the "individual mandate") and are eligible for new coverage options offered through the health insurance Marketplace. Puerto Rico does **not** have an individual mandate requirement.
Social Security	1. Puerto Ricans residing in the U.S. may obtain a Social Security Number (SSN) and Social Security Card from the Social Security Administration. Historically, Puerto Rican residents have not been entitled to benefits. 2. In *U.S. v. Vaello-Madero*, No. 956 F.3d 12 (D.P.R. 2018), the First Circuit held on April 10, 2020 the exclusion of Puerto Ricans from social security benefits invalid. The defendant lived in New York and collected social security benefits before relocating to Puerto Rico where his benefits continued. The U.S. claimed the defendant owed $28,081 in overpaid benefits. The First Circuit found residency in Puerto Rico to be irrelevant to the purpose of the program. The First Circuit rejected similar cost and tax arguments (see Guam above) and noted Puerto Rico contributes $4 billion annually in federal taxes – more than six states and the CNMI. The court agreed that social security is aimed at citizens who pay less income tax as low-income individuals. Because the exclusion of Puerto Ricans was not rationally related to a legitimate government interest, the First Circuit affirmed summary judgment for the defendant.[29]

28. See also https://www.medicaid.gov/state-overviews/puerto-rico.html.
29. https://www.law360.com/articles/1262711. Clifford Chance has a copy of the summary judgment on file.

Education (Federal Student Aid)	1. Puerto Rican residents are U.S. citizens eligible for FSA and may apply for FAFSA.[30]
U.S. Virgin Islands	
Immigration Process for U.S. Virgin Islands Nationals	
Background	1. The U.S. Virgin Islands became a unincorporated U.S. territory after Denmark handed control of the islands over to the United States via the Treaty of the Danish West Indies in 1916 (finalized January 17, 1917),[31] when the United States purchased them for $25 million in gold in an effort to improve military positioning during critical times of World War I. The territory is made up of Saint Croix, Saint John, Saint Thomas, and Water Island.
U.S. Citizenship Status	1. The U.S. Virgin Islands were administered by the U.S. Navy from 1917 to 1931. Full U.S. citizenship to all residents born in the U.S. Virgin Islands was extended in 1932 by an act of Congress, including those born in and residing in the U.S. Virgin Islands since January 17, 1917, and their descendants. In 1936, the Organic Act of the Virgin Islands, and subsequent amendments in 1954, accorded greater measure of self-government, although the islands would not have an elected governor until 1970.[32]
Documentation for Admission to the U.S.	1. U.S. Virgin Island residents with U.S. citizenship are eligible for U.S. passports. They must complete the standard DS-11 form.
Rights of U.S. Virgin Islands Nationals in the U.S.	
General	1. U.S. Virgin Island residents may reside, work, and study anywhere in the U.S..
Driver's License / ID Card	1. REAL ID Act Modification of Freely Associated States Act of 2018: REAL ID Act of 2005 and regulations authorize REAL ID compliant states to issue temporary or limited-term REAL ID compliance driver's licenses and ID cards to certain nonimmigrant aliens who satisfy other REAL ID requirements. Such temporary driver's licenses or ID cards cannot be issued with a validity period longer than the alien's authorized period of stay in the U.S. or, if no definite end to the period of authorized stay, a period of 1 year. The U.S. Virgin Islands are compliant with the REAL ID Act. Federal agencies can accept U.S. Virgin Islands identification cards and driver's licenses.
Employment Authorization	1. U.S. Virgin Island residents are automatically eligible for employment in the U.S..
Military Service	1. U.S. Virgin Island residents are eligible to volunteer for service in the U.S. armed forces.
Voting & Representation	1. The U.S. Virgin Islands have had an elected Governor since 1970. Although those born in the territory are citizens by statute, their elected representative in the U.S. Congress may only vote in committee and not in floor votes. 2. The U.S. Virgin Islands does not cast electoral votes for the president of the United States. However, residents participate in the Democratic and Republican presidential nominating processes.

30. https://fafsa.ed.gov/fotw1920/help/fotw14a.htm.
31. https://www.doi.gov/sites/doi.gov/files/migrated/oia/about/upload/vitreaty.pdf.
32. https://uscode.house.gov/view.xhtml?path=/prelim@title48/chapter12&edition=prelim.

U.S. Federal/State Benefits to U.S. Virgin Islands Nationals	
Health	3. Medicaid and CHIP: The U.S. Virgin Islands Department of Human Services administers U.S. Virgin Islands' Medicaid program. Section 1101(a)(1) of the Social Security Act provides U.S. Virgin Islands is a state for the purposes of Medicaid and CHIP unless otherwise indicated. a. U.S. Virgin Islands may use local poverty levels to establish income-based eligibility and is exempt from other poverty-related provisions. b. U.S. Virgin Islands uses CHIP funds for children in Medicaid after exhausting Medicaid funds, (among others). 4. ACA – citizens and individuals who are U.S. citizens living in the U.S. are subject to the requirement to have health insurance coverage (aka the "individual mandate") and are eligible for new coverage options offered through the health insurance Marketplace. This includes residents of the U.S. Virgin Islands.
Social Security	1. U.S. Virgin Island residents may obtain a Social Security Number (SSN) and Social Security Card from the Social Security Administration. 2. Residents of the U.S. Virgin Island are not eligible for Supplemental Security Income. Instead, the U.S. Virgin Island relies on former federal-state programs: Old-Age Assistance, Aide to the Blind, and Aid to the Permanently and Totally Disabled. The Secretary of Health and Human Services administers these programs.
Education (Federal Student Aid)	1. U.S. Virgin Islands residents are "U.S. citizens" eligible for FSA and may apply for FAFSA.[33]

33. https://fafsa.ed.gov/fotw1920/help/fotw14a.htm.

COFA – LAND RIGHTS AND MARITIME BOUNDARIES

Introduction	
Sources of Law	
United Nations Convention on the Law of the Sea	The United Nations Convention on the Law of the Sea ("**UNCLOS**" or "**Law of the Sea Convention**") is a 1982 international treaty defining the rights and obligations of nations regarding the use of the seas and oceans.[1] UNCLOS established the International Tribunal for the Law of the Sea ("**ITLOS**"), the International Seabed Authority ("**ISA**"), and the Commission on the Limits of the Continental Shelf ("**CLCS**"). UNCLOS seeks to promote international dialogue, peace, the equitable and efficient use of resources, conservation, and the "protection and preservation of the marine environment." (Preamble). • Island and Sea Boundaries: UNCLOS replaced the freedom of the sea principle with a system of sovereign zones. UNCLOS formally recognized the Exclusive Economic Zone ("EEZ"): a zone extending 200 nautical miles from a State's baseline where the State has exclusive rights to the resources within the water and on or under the sea floor. Article 121 distinguishes islands from "[r]ocks which cannot sustain human habitation or economic life" and therefore lack an EEZ and continental shelf. • Dispute Resolution: State Parties may agree to any peaceful means of settling disputes on the interpretation and application of UNCLOS. States may select a means of settlement per Article 287 and exempt themselves from jurisdiction over certain disputes which appear in Article 298. As of August 2019, none of the COFA States has elected a means under Article 287, and only Palau has reserved an exemption under Article 298. • Ratification: UNCLOS entered into force in 1994 without ratification from many of the 157 original signatories, including the United States. As of June 2020, 168 States are party to the treaty. The Marshall Islands ("RMI") and Micronesia ("FSM") became State Parties in 1991, with Palau joining in 1996.
South China Sea Arbitration	In 2013, the Philippines initiated a case against China in an arbitral tribunal constituted under UNCLOS. The dispute concerned China's "nine-dash line," a sweeping depiction of its territorial claim in the South China Sea. Beginning in 2009, China had stepped up its efforts to consolidate its position in the region, including using its military, coast guard, and maritime militia to harass foreign ships; to explore and extract resources in disputed areas; and, starting in 2013, to construct artificial islands and basing military and civilian assets there. The Philippines asked the tribunal (1) to find that the nine-dash line was invalid under UNCLOS, (2) to determine the maritime rights generated by certain land features, and (3) to declare that China had interfered with the Philippines' right to exploit resources within the Philippines' claimed waters. China did not participate in the arbitration and argued that the tribunal lacked jurisdiction because (1) the "essence" of the dispute concerned territorial sovereignty, (2) China and the Philippines had agreed to settle disputes through negotiations, and (3) the dispute "would constitute an integral part of maritime delimitation."[2]

1. *Available at:* https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf.
2. Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines (7 December 2014), available at https://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml.

	The tribunal's judgement was overwhelmingly favorable to the Philippines.[3] The tribunal concluded that UNCLOS "comprehensively" governs the parties' respective rights to maritime areas in the South Chi na Sea, so to the extent that the nine-dash line did not correspond to the provisions of UNCLOS governing maritime zones, it was invalid. The tribunal also held that none of the recently-created features in the Spratly Islands generated an EEZ. For a feature to be considered an island, which generates an EEZ, it must be capable of sustaining a stable community of people or economic activity that is not dependent on outside resources or purely extractive in nature. This analysis must be based on the features in their natural condition, and not after construction of artificial islands, installation of desalination plants, etc. The tribunal found that, based on historical evidence, these features could not sustain habitation without outside support. Finally, as a result of its conclusion that certain areas were part of the Philippines' EEZ, the tribunal held that certain activities by China were illegal for interfering with the Philippines' rights under UNCLOS. This judgement is the most important decision interpreting key treaty provisions that are relevant for small island nations coping with sea level rise (see discussion below).
State Practice & Customary International Law	State practice is critical because it forms the basis of customary international law. Customary international law is one of the sources of public international law alongside treaties (such as UNCLOS), general principles of law, and international comity to some extent. State practice is defined as the actions that states take with legal conviction. For state practice to develop into customary international law, it must be sufficiently widespread, representative, and consistent, and have a recognition that a rule of law or legal obligation is involved.[4] State practice takes many forms depending on the context in which it occurs. With respect to emerging areas of maritime law, state practice refers to (among other things) the extent to which states have coalesced or begun to coalesce around certain approaches. For example, how have groups of Pacific states interpreted maritime boundaries in the face of rising sea levels?
US Stance	The United States was involved in the Conference on the Law of the Sea and subsequent negotiations to modify UNCLOS. The US has not ratified UNCLOS, largely for political reasons and domestic concerns over the extent to which international law establishes primacy over US law (and particularly the US Constitution). The US government (and federal courts) largely recognizes UNCLOS as reflective of customary international law, and largely acts in accordance with it - for example in its treatment of EEZs and maritime boundaries in the Arctic.

3. *Available at*: https://www.pcacases.com/pcadocs/PH-CN%20-%2020160712%20-%20Award.pdf.
4. See North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands [1969] ICJ Rep 3). Can also be described as a combination of (1) "widespread" repetition by States + (2) a sense of obligation (opinio juris) + (3) not rejected by a "significant" number of states.

Maritime Boundaries	
What happens to the maritime boundaries of small island states when they are submerged by rising sea level?	
Overview	Rising sea levels threaten COFA states' sovereignty and maritime rights. International law recognizes a series of maritime zones and corresponding rights. While UNCLOS does not offer definitive answers as to how these zones and rights will change as land recedes, the three other sources provide some insight.
UNCLOS Approach	**Basic Sea Boundary Scheme[5]** **Internal Waters:** A party has the same sovereign rights over internal lakes, rivers, and tidewaters as it has over its other territory. UNCLOS denies innocent passage through internal waters. **Baseline:** The baseline divides internal waters from the beginning of the territorial sea. UNCLOS Article 5 allows parties to use normal baselines to measure the territorial sea (i.e. from the low-water line); UNCLOS allows for two additional kinds of baselines (see below). Article 7 allows for straight baselines where the coastline is indented or highly unstable (e.g. entrances of bays and river mouths). Article 9 allows for straight lines across the mouth of a river between points on the low-water line. Article 10 concerns bays. States then publish and deposit a copy of baseline delineations with the UN Secretary-General under Article 16. **Territorial Sea:** The territorial sea extends 12 nautical miles from the baseline. The party has sovereignty and jurisdiction over these waters, the seabed, and subsoil. UNCLOS allows for innocent passage through the sea and transit passage through international straits, but no innocent passage for aircraft. **Contiguous Zone:** The contiguous zone extends up to another 12 nautical miles. The party has the right to use this zone to prevent and punish illegal conduct occurring within the territorial sea. However, this does not include air and space rights. **EEZ:** The EEZ extends 200 nautical miles from the territorial sea. The party has the exclusive right to exploit or conserve resources within the water, sea floor, and subsoil. UNCLOS Article 56 allows parties to construct artificial islands and conduct research and preservation efforts in the EEZ. Within the EEZ, the party also has the high sea air rights found in Articles 88-115. Parties have only resource and law enforcement rights in the EEZ, and may not prohibit or limit navigation or overflight. **Continental Shelf:** This seabed slope extends beyond the EEZ's 200 nautical miles with the Commission on the Limits of the Continental Shelf to prevent abuse. The party has rights over non-living resources and sedentary living resources, and may build artificial islands. Other states may harvest non-sedentary and living resources (e.g. fish), lay cables and pipelines, and conduct research. The party cannot restrict navigation. Per Article 76, parties register the outer limits of the continental shelf with the Commission on the Limits of the Continental Shelf after receiving recommendations from the Commission.

5. For a full explanation of the basic boundaries, see The Fletcher School, Tufts University, Law of the Sea: A Policy Primer, Chapter 2: Maritime Zones, available at https://sites.tufts.edu/lawofthesea/chapter-two/.

UNCLOS Approach

Island Boundaries & Retreating Baselines

An island is a "naturally formed area of land, surrounded by water, which is above water at high tide." UNCLOS Art. 121(1). UNCLOS Article 6 allows islands on atolls or with reefs to measure the territorial sea from a baseline of the "seaward low-level-water line of the reef." Under Article 13(1), parties may use low-tide elevation land as a baseline for the territorial sea where that land does not exceed the territorial sea of the mainland or island. Low-tide elevations cannot help form a straight baseline absent an installation that is permanently above sea level or international recognition. UNCLOS Art. 7(4).

UNCLOS is silent as to physical changes after a party has registered its baseline.[6] Defining the baseline by geographic points under Article 7 means that "notwithstanding subsequent regression of the low-water line, the straight baselines shall remain effective until changed by the coastal State." In other words, the baseline may remain even after the island is submerged.[7]

However, the COFA states may still lose the right to an EEZ and continental shelf. Article 121(3) distinguishes islands from "[r]ocks which cannot sustain human habitation or economic life of their own." Rocks thus have no EEZ or continental shelf. UNCLOS Article 76(8), however, states that "[t]he limits of the [continental] shelf established by a coastal State … shall be final and binding." Some suggest this implies the seabed also retains a special status to avoid an unreasonable result.

COFA states would then maintain sovereignty through the seabed and within the registered baseline as long as they have deposited data on these boundaries with the UN Secretary-General.[8]

Dispute Settlement & Exemptions

UNCLOS Article 235 obligates parties to cooperate in settling disputes, while Article 279 limits disputes to those concerning the treaty's interpretation or application. The Vienna Convention on the Law of Treaties ("**VCLT**"), which governs treaty interpretation, applies to UNCLOS through Article 293(1).

UNCLOS Article 287 allows States to choose a dispute settlement mechanism via declaration, with arbitration as the default mechanism. Where parties elect the same mechanism, that mechanism governs unless the parties otherwise agree. Where parties do not elect the same mechanism, the dispute goes to arbitration unless they otherwise agree. The other mechanisms are the ITLOS, ICJ, or a special arbitral tribunal under Annex VIII. The ITLOS and ICJ offer the benefit of publicity and public pressure.[9] Micronesia, the Marshall Islands, and Palau have not declared a preference.[10]

UNCLOS Article 298 allows states to refuse settlement of certain categories of disputes under the treaty's mechanisms: (1) sea boundary delimitations and sovereignty, (2) military activities, and (3) Security Council action. Palau has elected to exempt itself from the first category of disputes.

6. Roberto A. Cámara Stougaard-Andresen, Thesis, Climate Change and the Law of the Sea Convention (2009), at 23, available at http://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=1973940&fileOId=1973941.
7. *See* Rosemary Rayfuse's comments in Nathanial Gronewold, *Island Nations May Keep Some Sovereignty if Rising Seas Make Them Uninhabitable*, N.Y. Times (May 25, 2011), https://archive.nytimes.com/www.nytimes.com/cwire/2011/05/25/25climatewire-island-nations-may-keep-some-sovereignty-if-63590.html.
8. Moritaka Hayashi, Islands' Sea Areas: Effects of a Rising Sea Level, Sasakawa Peace Foundation (June 10, 2013), https://www.spf.org/islandstudies/research/a00003.html.
9. *Id*.
10. *See* UN Oceans & Law of the Sea, Settlement of Disputes Mechanism (2019), available at https://www.un.org/Depts/los/settlement_of_disputes/choice_procedure.htm.

South China Sea Approach

Dispute Settlement & Exemptions

China exempted itself from all three categories under UNCLOS Article 298 (see above) and cited the article throughout its South China Sea position paper.[11] China argued, "the unilateral initiation by the Philippines of the present arbitration constitutes an abuse of the compulsory procedures provided in the Convention and a grave challenge to the solemnity of the dispute settlement mechanism under the Convention."[12] China argued it had exempted itself from jurisdiction over questions of territorial sovereignty, and thus did not participate in the suit. The tribunal clarified the decision did not address sovereignty issues. ¶ 5.

As mentioned above, only Palau has made the same exemption and could adopt China's position in a future dispute. Micronesia and the Marshall Islands may be subject to future claims involving their territorial sovereignty.

Island Boundaries & Retreating Baselines

As discussed above, the tribunal interpreted Article 121 in order to decide the Philippines' claims (1) that certain shoals and reefs are "rocks" and not entitled to an EEZ or continental shelf, and (2) China has unlawfully interfered with the Philippines' exclusive rights within its EEZ and continental shelf.

Article 121(3) of UNCLOS states that "Rocks which cannot sustain human habitation or an economic life of their own shall have no exclusive economic zone or continental shelf." The judgement provided significant clarification of this provision:

1. The use of the term "rock" does not require that a feature be composed of rock in the geologic sense in order to fall within the scope of the provision. The tribunal interpreted "rocks" as a "category of island." Defining "rock" in the geological sense "would mean that any high-tide features formed by sand, mud, gravel, or coral – irrespective of their other characteristics – would always generate extended maritime entitlements." The article's intent could not have been to allow greater rights to less stable features, the tribunal reasoned. ¶ 481. The name of the feature is irrelevant. ¶ 482.
2. The use of the term "cannot" makes clear that the provision concerns the objective capacity of the feature to sustain human habitation or economic life. Actual habitation or economic activity at any particular point in time is not relevant, except to the extent that it indicates the capacity of the feature.
3. The use of the term "sustain" indicates both time and qualitative elements. Habitation and economic life must be able to extend over a certain duration and occur to an adequate standard.
4. The logical interpretation of the use of the term "or" discussed above indicates that a feature that can sustain either human habitation or an economic life of its own will be entitled to an exclusive economic zone and continental shelf. South China Sea Arbitration at ¶ 504.

While the tribunal's interpretation was demanding, the judgement left open some hope for features that were previously inhabited but are rendered uninhabitable by sea level rise:

> "[T]he Tribunal should consider whether there is evidence that human habitation has been prevented or ended by forces that are separate from the intrinsic capacity of the feature. War, pollution, and environmental harm could all lead to the depopulation, for a prolonged period, of a feature that, in its natural state, was capable of sustaining human habitation." South China Sea Arbitration at ¶ 549.

Thus, to the extent that sea level rise from anthropogenic climate change is considered environmental harm, a small island that becomes uninhabitable may still give rise to maritime rights under UNCLOS.

11. Position Paper of the People's Republic of China, supra note 2, at ¶¶ 58, 70, 74, 77, 79.
12. *Id.* at ¶ 74.

State Practice	Pacific island states have taken concrete measures to properly delineate their maritime boundaries, which also acts to "freeze" those boundaries in the face of rising sea levels. This is primarily achieved at the bilateral treaty level given the extent to which maritime boundaries overlap. For example in 2012, a series of bilateral treaties establishing the maritime boundaries of Kiribati, Nauru, Tuvalu, Cook Islands, Niue, Tokelau, and the Marshall Islands were signed at the meeting of the Pacific Islands Forum. Of particular note as a measure of state practice is the Pacific Maritime Boundaries Project (PMBP)[13]. The PMBP involves a partnership between the South Pacific Community (SPC) and Australia, and serves a critical role in allowing Pacific island states to revise domestic legislation where necessary, and prepare submissions to the UN to give full international notice of maritime boundaries[14]. Critically, these developments take place amidst a clear expression by Pacific island states to preserve their existing maritime boundaries in the face of rising sea levels. Examples of this include the Pacific Island Forum's 'Framework for a Pacific Oceanscape[15],' the 2015 Taputapuātea Declaration on Climate Change[16], the 2018 Delap Commitment[17], and the Boe Declaration on Regional Security[18].
US Approach	The US participated in negotiations but did not ratify UNCLOS out of opposition to the deep seabed mining provisions. The US announced it would respect the navigation and overflight rights of other States under UNCLOS "so long as the rights and freedoms of the [US] and others under international law are recognized by such coastal states." In fact, the US went farther than UNCLOS in allowing other states to conduct scientific research within the US EEZ.[19] President Bush encouraged ratification, and the Senate Foreign Relations Committee held four hearings on ratification in 2012, although the Senate did not take a full vote in either case.[20] The US has negotiated bilateral agreements with several countries with overlapping boundaries, including Canada, Mexico, New Zealand, Russia, the UK, Venezuela, and other island nations.[21] The US and Micronesia signed a maritime boundaries agreement in 2014, although the treaty has yet to enter into force. Article 5 of this agreement maintains the treaty will not affect either party's duties and rights under international law and UNCLOS.[22] In a February 2020 report, the US State Department found the Marshall Islands' archipelagic baseline for the Ratak Chain exceeds the maximum water-to-land ratio and would need readjustment to reduce the amount of water relative to land within the baseline system. The US does not recognize the boundaries the Marshall Islands claims around what it calls "Enenkio" and the US calls Wake Island.[23]

13. *See* Pacific Maritime Boundaries: IHO S-121 Maritime Boundaries and Limits Data Specification funded by Forum Fisheries Agency, available at http://www.pacgeo.org/static/maritimeboundaries/
14. *See* Clive Schofield and David Freestone. "Islands Awash Amidst Rising Seas: Sea Level Rise and Insular Status under the Law of the Sea." The International Journal of Marine and Coastal Law 34.3 (2019) at 405-406.
15. Available at https://www.forumsec.org/wp-content/uploads/2018/03/Framework-for-a-Pacific-Oceanscape-2010.pdf
16. Available at http://www.samoagovt.ws/wp-content/uploads/2015/07/The-Polynesian-P.A.C.T.pdf
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18. Available at https://www.forumsec.org/2018/09/05/boe-declaration-on-regional-security/
19. *Statement on United States Oceans Policy*, RONALD REAGAN PRESIDENTIAL LIBRARY & MUSEUM (Mar. 10, 1983), https://www.reaganlibrary.gov/research/speeches/31083c.
20. Office of Ocean and Polar Affairs, *Law of the Sea Convention*, U.S. DEPT. OF STATE (Mar. 7, 2019), https://www.state.gov/law-of-the-sea-convention/.
21. List available at https://www.state.gov/u-s-maritime-boundaries-agreements-and-treaties/.
22. Available at https://www.state.gov/wp-content/uploads/2019/10/19-718-Micronesia-Maritime-Boundary-Treaty.pdf.
23. U.S. Dept. of State Bureau of Oceans and Int'l Envt'l and Scientific Affairs, Limits in the Seas No. 145 Republic of the Marshall Islands: Archipelagic and other Maritime Claims and Boundaries (Feb. 14, 2020), https://www.state.gov/wp-content/uploads/2020/02/LIS-145-Marshall-Islands.pdf.

What happens to a state's EEZ when sea levels rise?	
Overview	The EEZ was one of the most important developments from UNCLOS. Rising sea levels have the potential to cause instability as States dispute shifting EEZ boundaries. The COFA states are less likely to maintain their present EEZs. The text of UNCLOS appears to disfavor submerging States. The South China Sea decision does, however, leave room for an equitable solution. The US and other States will likely interpret the decision and UNCLOS as it aligns with their strategic interests in the region.
UNCLOS Approach	UNCLOS does not address land loss. A strict view would dictate that as sea levels rise, baselines and EEZ boundaries retreat, and an island that can no longer support habitation becomes a "rock" and loses its EEZ.[24] UNCLOS does not, however, require states to update baselines as land recedes. Still, many believe the EEZ shifts as baselines recede unlike permanent continental shelves.[25] UNCLOS Article 74 requires States with "opposite or adjacent" coasts to negotiate EEZ boundaries. Any agreements the parties reach govern future disputes. Where States do not arrive at an agreement, boundary disputes are submitted to the dispute settlement process. The COFA states share boundary limits with several other States and have negotiated agreements among themselves, with the US, Kiribati, and Nauru. The US and the Marshall Islands have not negotiated an agreement on the boundary delineation with Wake Island.[26] As sea levels continue to rise, the agreements will govern shifting EEZs. Where States have not negotiated EEZ boundaries, rising sea levels pose more of a threat. For example, Indonesia relied on the South China Sea decision to justify an expansion of its EEZ by claiming three Palauan islands were no longer entitled to an EEZ.[27] COFA states may need to negotiate with these States or resort to the dispute resolution mechanisms.
South China Sea Approach	The tribunal did not find the text of Article 121(3) particularly elusive as to the article's underlying purpose. However, the language of "human habitation" and "an economic life of its own" indicated the "the character or scale" of activity the article requires. Most importantly, the context of the Convention indicates a connection between Article 121(3) and the creation of the concept of the EEZ. Thus, Article 121(3) "is inextricably linked with the expansion of the coastal State jurisdiction through the exclusive economic zone." ¶ 512. The Convention sought to balance the interests of coastal developing States and traditional maritime States. ¶515. Ultimately, the purpose of Article 121(3) is "to prevent such expansion from going too far. It serves to disable tiny features from unfairly and inequitably generating enormous entitlements to maritime space that would serve not to benefit the local population, but to award a windfall to the (potentially distant) State to have maintained a claim to such a feature." ¶ 516. Article 121(3)'s "human habitation" feature connects the population of a coastal State to the benefits the EEZ seeks to preserve. ¶ 517. The limitations in Article 121(3) seek to prevent "encroachment on international seabed … [and] the inequitable distribution of maritime spaces." ¶ 535.

24. Cámara Stougaard-Andresen, supra note 6, at 23-24.
25. *See*, *e.g.*, Kevin Chand & James Sloan, Submerged States and the Legal Rights at Risk, Ocean Law Bulletins (Mar. 30, 2017), http://www.sas.com.fj/ocean-law-bulletins/submerged-states-and-the-legal-rights-at-risk; Sarra Sefriou, Adapting to Sea Level Rise: A Law of the Sea Perspective, (Mar. 2017), https://www.researchgate.net/publication/315854053_Adapting_to_Sea_Level_Rise_A_Law_of_the_Sea_Perspective.
26. Emily Artack & Jens Kruger, Status of Maritime Boundaries in Pacific Island Countries (2015), https://spccfpstore1.blob.core.windows.net/digitallibrary-docs/files/71/716ac31d7ae4ea58f061d62e935dcc5f.pdf?sv=2015-12-11&sr=b&sig=bo3ZXJpGR8TfN4kS15CWcU1u3fzOe8GlCBdl2sg39ik%3D&se=2021-01-07T18%3A33%3A24Z&sp=r&rscc=public%2C%20max-age%3D864000%2C%20max-stale%3D86400&rsct=application%2Fpdf&rscd=inline%3B%20filename%3D%22WP11_Maritime_Boundary_Delimitations_E.pdf%22.
27. Evan Laksmana, *Why Indonesia's New Map is Not (All) About the South China Sea*, THE STRATEGIST (Aug. 1, 2017), https://www.aspistrategist.org.au/indonesias-new-map-not-south-china-sea/.

South China Sea Approach	The tribunal does describe the "critical factor" of the "human habitation" requirement as "the non-transient character of the habitation, such that the inhabitants can fairly be said to constitute the natural population of the feature." ¶ 227. However, by "non-transient character," the tribunal more likely referred to States relocating populations to extend sea boundaries. Further, the tribunal insisted the "human habitation" requirement demands a case-by-case analysis and rejected a formulaic test. "[H]uman habitation entails more than the mere survival of humans on a feature and [] economic life entails more tan than the presence of resources." ¶ 546. The "most reliable evidence" is the "historical use" of the feature. ¶ 549. As described above, the tribunal is willing to consider war, pollution, and environmental harm. That an island State that has partially or fully submerged should maintain its island status is thus consistent with the purpose of Article 121. COFA states would neither be "going too far" nor receiving a windfall by maintaining their present rights. The EEZ "benefit[s]" remain for the coastal State population for the future even if the population temporarily loses access to some resources. The South China Sea decision, although discouraging abuse of EEZs, supports the contention that an island would retain its EEZ despite receding baselines.
State Practice	Prior to the establishment of the PMBP, Pacific states made attempts in the 1990s to properly delineate the extent of their EEZs. This was driven by the need to share income from fishing license fees due to the states under the US Tuna Treaty[28]. More recently, under the auspices of the Pacific Islands Forum Fisheries Agency, Pacific states have been negotiating and delimiting their own EEZs where there is overlap with neighboring countries. For example, under a 2016 Service Level Agreement, EEZ and maritime boundary mapping data is collected and exchanged within states – with a specific focus on the kind of data that is useful for economic uses[29].
US Approach	The US established an EEZ by presidential proclamation in 1983.[30] The Proclamation creates an EEZ that mirrors the UNCLOS EEZ and asserts the rights the US has "to the extent permitted by international law" while allowing lawful uses by other States. As discussed above, the US also recognizes the EEZs of other States consistent with UNCLOS. In the February 2020 report discussed above, the US said the Marshall Islands' EEZ and corresponding rights is "generally consistent" with UNCLOS. The report did not discuss rising sea levels. In a similar report from December 2014, two years before the South China Sea decision, the US released a similar report criticizing China's claims. The US read UNCLOS to say "[s]ubmerged features that do not emerge above water at high tide are not 'islands' and are not entitled to maritime zones" and rather form the seabed for other maritime zones. The US criticized China's unilateral boundary delineation claim and claim to historic rights.[31] The US had a measured response to the decision to balance its alliance with the Philippines and regional security.[32] It appears the US can reconcile its limited support for the South China Sea decision and support for the COFA states. The COFA state would not be claiming historic rights but rather reserving present rights as sea levels rise. If the international community did recognize historic rights to EEZ boundaries, the COFA states would pass the three-prong test of (1) open and notorious use of waters, (2) continuous use, and (3) recognition from others.[33] Whether the US chooses to support the COFA states will likely be a strategic decision.

28. *See* Clive Schofield and David Freestone. "Islands Awash Amidst Rising Seas: Sea Level Rise and Insular Status under the Law of the Sea." The International Journal of Marine and Coastal Law 34.3 (2019) at 405.
29. *See* Pacific Maritime Boundaries: IHO S-121 Maritime Boundaries and Limits Data Specification funded by Forum Fisheries Agency, available at http://www.pacgeo.org/static/maritimeboundaries/
30. Proclamation No. 5030, 3 C.F.R. 1983 (1983), available at https://www.archives.gov/federal-register/codification/proclamations/05030.html.
31. U.S. Dept. of State Bureau of Oceans and Int'l Envt'l and Scientific Affairs, Limits in the Seas No. 143 China: Maritime Claims in the South China Sea (Dec. 5, 2014), https://www.state.gov/wp-content/uploads/2019/10/LIS-143.pdf.
32. See U.S. Dept, of State, Press Statement, Decision in the Philippines-China Arbitration (July 12, 2016), https://2009-2017.state.gov/r/pa/prs/ps/2016/07/259587.htm; Eric Hyer, *Here's How the South China Sea Ruling Affects U.S. Interests*, WASHINGTON POST (Aug. 11, 2016), https://www.washingtonpost.com/news/monkey-cage/wp/2016/08/11/heres-how-the-south-china-sea-ruling-affects-u-s-interests/.
33. *Id*. at 21-22.

Remedial	
Do states have any ability to obtain "new" land from other states when sea levels rise?	
Overview	States do not likely have a right to obtain "new" land from other states.
UNCLOS Approach	UNCLOS Article 235 establishes liability for a State's failure to fulfill international obligations. The article requires parties to ensure recourse is available within their legal systems for "adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction." States are to cooperate to ensure "prompt and adequate compensation," and cooperate to "further development" of international law on liability. The article mentions compulsory insurance or compensation funds as examples of potential relief. It does not appear that the drafters considered "new" land as an option for relief but the text does leave open this possibility if States so choose.
South China Sea Approach	The tribunal did not address this question. The tribunal did find that China had caused severe harm to the coral reef environment and had a duty to adopt measures to prevent such damage. ¶¶ 961, 979, 983. The tribunal found China in breach of its obligations but did not order compensatory damages. Given that neither party contested the obligation to comply with UNCLOS and the dispute resolution, the tribunal did not make any further declarations. ¶ 1201.
State Practice	States have relocated portions of their populations to other lands within their territory because of rising sea levels.[34] States are less likely to voluntarily provide "new" land to populations displaced by rising sea levels. Kiribati's former president used international financial aid to purchase new land in Fiji for permanent resettlement.[35] COFA states may consider seeking reimbursement for land purchases. Additionally, individuals may have the right to seek asylum in other countries as victims of climate change according to a new case from the UN Human Rights Committee.[36]
US Approach	The US has not expressed a position on this question. That said, the US would likely oppose such a remedy or any case based on the US contribution to climate change.
Can states use artificial measures to "expand" their existing land when sea levels rise?	
Overview	States are not necessarily prevented from using artificial measures to expand their existing land when sea levels rise. The effect of these measures on maritime boundaries is less clear, however. Expansion of land beyond pre-existing levels likely will not give rise to expanded maritime zones. International law may adapt to changing circumstances, though, and allow maritime boundaries to endure despite inundation due to sea level rise. In this case, artificial measures would not be necessary viewed solely from the perspective of maritime boundaries. Alternatively, states may be able to use artificial measures to preserve pre-existing land from erosion or flooding. This could also allow for the maintenance of maritime zones.

34. Amanda Bertana, Relocation as an Adaptation to Sea-Level Rise: Valuable Lessons form the Narikoso Village Relocation Project in Fiji, Univ. of California Press (Dec. 2019), https://online.ucpress.edu/cse/article/3/1/1/108909/Relocation-as-an-Adaptation-to-Sea-Level-Rise.
35. Ben Walker, *An Island Nation Turns Away from Climate Migration, Despite Rising Seas*, INSIDE CLIMATE NEWS (Nov. 20, 2017), https://insideclimatenews.org/news/20112017/kiribati-climate-change-refugees-migration-pacific-islands-sea-level-rise-coconuts-tourism.
36. UN Landmark Case for People Displaced by Climate Change, AMNESTY INT'L (Jan. 20, 2020), https://www.amnesty.org/en/latest/news/2020/01/un-landmark-case-for-people-displaced-by-climate-change/.

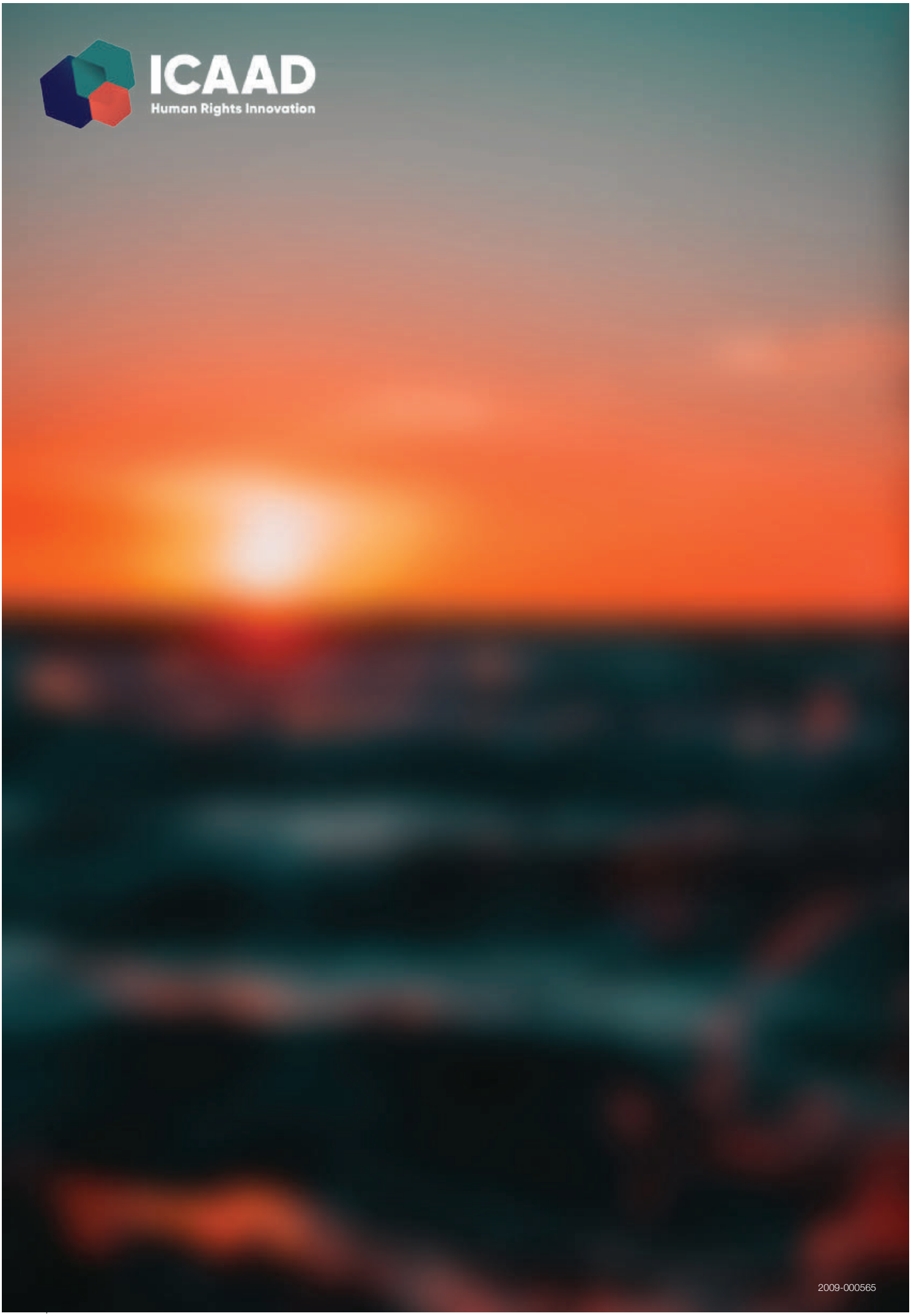
UNCLOS Approach	The limits of the territorial sea, contiguous zone, and exclusive economic zone are all defined by reference to baselines which depend on coastlines that will likely shift significantly for many states due to sea level rise. UNCLOS did not anticipate the problem of sea level rise and so did not explicitly deal with the effects on these zones. Respected legal scholars and state practice suggest that it may be possible for these zones to be preserved. The International Law Association, which is a respected and influential organization of international legal thinkers, passed a resolution in 2018 that stated, "on the grounds of legal certainty and stability, provided that the baselines and the outer limits of maritime zones of a coastal or an archipelagic State have been properly determined in accordance with the 1982 Law of the Sea Convention, these baselines and limits should not be required to be recalculated should sea level change affect the geographical reality of the coastline."[37] A number of states have attempted to put this principle into practice through detailed surveys of their baselines defined in terms of coordinates rather than in relation to changeable coastlines. A series of declarations from Pacific Island leaders, such as the 2015 Taputapuātea Declaration, the 2018 Delap Commitment and Boe Declaration encourage the continuation of efforts to define baselines, delineate maritime boundaries, and deposit this information with the UN. If these efforts are successful, artificial land-building is not necessary for the purposes of maritime zones. It could, however, be another means of trying to preserve boundaries in the face of legal uncertainty. Artificial land building to add to territory where it did not exist before has not been viewed favorably. For example, in In Re Duchy of Sealand, it was held that a British Second World War platform attached to the seabed off the coast of the United Kingdom did not fulfil the requirement of territory since territory must "consist in a natural segment of the earth's surface" and "come into existence in a natural way."[38] Likewise, as discussed below, the South China Sea arbitral panel denied that China's island-building projects in the South China Sea gave rise to maritime zones. Projects to preserve pre-existing territory have not yet been considered, and pose very different considerations from aggressive land-building projects considered previously.
South China Sea Approach	The panel was not friendly to artificial measures to expand territories in the South China Sea arbitration. The panel held that the analysis of habitability or economic use must be conducted in relation to features in their natural state, and on this basis denied status to many Chinese installations. The panel did, however, leave options for states coping with inundation due to sea level rise. It held that "the Tribunal should consider whether there is evidence that human habitation has been prevented or ended by forces that are separate from the intrinsic capacity of the feature. War, pollution, and environmental harm could all lead to the depopulation, for a prolonged period, of a feature that, in its natural state, was capable of sustaining human habitation."[39] This suggests that even if a feature comes to be uninhabitable due to sea level rise, it may still give rise to maritime zones. This could also imply that artificial measures to preserve a feature in its "natural state" may be permissible.
State Practice	There have been some limited examples of using artificial measures to expand states' existing, particularly by the RMI and Kiribati.[40] More modest land reclamation projects are unlikely to draw much ire, but to the extent that projects expand or modify pre-existing maritime zones, they may be challenged. Any land-building that affected a maritime boundary with another state is highly unlikely to be successful.

37. ILA, *Resolution 5/2018: Committee on International Law and Sea Level Rise, available at* http://www.ila-hq.org/images/ILA/Resolutions/ILAResolution_5_2018_SeaLevelRise.pdf
38. *Re Duchy of Sealand* (Administrative Court of Cologne) (1978) 80 ILR 683.
39. South China Sea Arbitration (Phil. v. China), Award, PCA Case No. 2013-19, ¶ 549 (Perm. Ct. Arb. 2016), http://www.pcacases.com/web/sendAttach/2086.
40. *See e.g.* Jon Letman, Rising seas give island nation a stark choice: relocate or elevate, National Geographic, November 19, 2018, available at https://www.nationalgeographic.com/environment/2018/11/rising-seas-force-marshall-islands-relocate-elevate-artificial-islands/ ; Kiribati looks to artificial islands to save nation from rising sea levels, Pacific Beat, ABC News, 16 February 2016, available at https://www.abc.net.au/news/2016-02-17/artificial-islands-perhaps-the-only-option-to-save-kiribati/7175688

US Military	
What happens to the military land use agreement when the "land" is submerged?	
Overview	Section 311(c) of the COFA agreement states the US will "act in accordance with the principles of international law and the Charter of the United Nations in the exercise of this authority and responsibility." Article IV Section 1 of the COFA supplementary agreement, Agreement Regarding the Military Use and Operating Rights of the Government of the United States in the Federated States of Micronesia gives the US the right "within the defense sites and within the seabeds, water areas and airspace adjacent to or in the vicinity of the defense sites" to use "such measures as are necessary for their use, security and defense."[41] Article IV of the same agreement with the Marshall Islands contains the same language.[42] Article V of the Palau supplemental agreement uses the same language but replaces "defense sites" with "exclusive-use areas," which it defines as "areas which are reserved exclusively for use by the [US]."[43] The agreement specifies in Article 1 that Palau has jurisdiction and sovereignty over land and maritime zones only as consistent with international law. As discussed above, UNCLOS does not obligate states to update baseline delineations. The Marshall Islands and Micronesia have registered straight baselines.[44] Palau has registered its EEZ but does not appear to have registered a straight baseline.[45] From the above discussion, the COFA states will likely retain sovereignty through at least the seabed, meaning the military agreements will remain in force. Where the US will be able to conduct military operations beyond the land and seabed will depend on the outcome of the above questions.

41. *Available at* https://www.doi.gov/sites/doi.gov/files/migrated/oia/about/upload/Compact-Subsidiary-Agreements-for-the-FSM.pdf.
42. *Available at* https://www.doi.gov/sites/doi.gov/files/uploads/CompactRMISubsidiaryAgreements.pdf.
43. *Available at* https://www.doi.gov/sites/doi.gov/files/migrated/oia/about/upload/ROP-COFA-Subsidiary-Agreements.pdf.
44. Marshall Islands, Submission in Compliance with the Deposit Obligations Pursuant to the UN Convention on the Law of the Sea (UNCLOS), https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/MHL_Deposit_MZN120.html; Micronesia, Submission in Compliance with the Deposit Obligations Pursuant to the UN Convention on the Law of the Sea (UNCLOS), https://www.un.org/Depts//los/LEGISLATIONANDTREATIES/STATEFILES/FSM.htm
45. Palau, Submission in Compliance with the Deposit Obligations Pursuant to the UN Convention on the Law of the Sea (UNCLOS), https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/PLW.htm.

NOTES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