Sea Level Rise and the Freely Associated States: Addressing Environmental Migration Under the Compacts of Free Association

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INTRODUCTION

Few issues in the climate change debate today are as compelling or as contested as sea level rise.[1] In the coming century, rising sea levels have the potential to submerge coastal regions and displace millions of people.[2] While countries throughout the world will be affected, the Intergovernmental Panel on Climate Change (IPCC) has identified small island nations as "especially vulnerable."[3] Because these nations are physically small and often have high population densities, underdeveloped economies, and scarce resources, many will have difficulty adapting to the effects of sea level rise and any associated population displacement.[4] Some island nations could disappear completely,[5] in which case entire national populations would be forced to relocate abroad.

Three small island nations vulnerable to sea level rise—the Republic of the Marshall Islands (the RMI), the Federated States of Micronesia (the FSM), and the Republic of Palau (Palau)—have relationships of "free association" with the United States.[6] These

1. For an account of the current debate surrounding the projected rise of sea levels, see Justin Gillis, *As Glaciers Melt, Science Seeks Data on Rising Seas*, N.Y. TIMES, Nov. 13, 2010, at A1, *available at* http://www.nytimes.com/2010/11/14/science/earth/14ice.html.

2. *See* NICK BROOKS ET AL., SEA LEVEL RISE: COASTAL IMPACTS AND RESPONSES 1 (2006), *available at* http://independent.academia.edu/NickBrooks/Papers/452061/Sea_level_rise_coastal_impacts_and_responses (estimating that fifty percent of the world's population will live within 100 kilometers of a coast by 2030); Jon Barnett & Michael Webber, *Accommodating Migration to Promote Adaptation to Climate Change* 12 (World Bank, Policy Research Working Paper No. 5270, 2010), *available at* http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2010/04/13/000158349_20100413131732/Rendered/PDF/WPS5270.pdf (referencing studies that indicate that a one meter rise in sea levels will affect 145,000,000 people).

3. Nobuo Mimura et al., *Small Islands*, *in* CLIMATE CHANGE 2007: IMPACTS, ADAPTATION AND VULNERABILITY: CONTRIBUTION OF WORKING GROUP II TO THE FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 687, 689 (M.L. Parry et al. eds., 2007) [hereinafter IPCC WORKING GROUP II 2007 REPORT], *available at* http://www.ipcc-wg2.gov/AR4/website/16.pdf.

4. *See id.* at 690–93.

5. Nathaniel Gronewold, *Island Nations May Keep Some Sovereignty if Rising Seas Make Them Uninhabitable*, N.Y. TIMES, May 25, 2011, http://www.nytimes.com/cwire/2011/05/25/25climatewire-island-nations-may-keep-some-sovereignty-if-63590.html ("Global sea level rise has put a handful of nations at risk of extinction—small island states in the Pacific and Indian oceans.").

6. *See generally* Chimène I. Keitner & W. Michael Reisman, *Free Association: The United States Experience*, 39 TEX. INT'L L.J. 1, 4–12 (2003) (explaining association between two states from the perspective of international law).

Freely Associated States (FAS) are sovereign nations that have negotiated Compacts of Free Association with the United States, under which the U.S. provides the states with certain types of assistance and has full "authority and responsibility . . . for security and defense matters" relating to the states.[7] While the central provisions of the Compacts address foreign assistance and defense, the Compacts are comprehensive in scope and fully define the relationships between the U.S. and the FAS.[8] This Note focuses on the immigration provisions of the Compacts, which give citizens of the FAS the right to enter, work, and live in the U.S. with few restrictions. Although these provisions were originally negotiated long before rising sea levels threatened the habitability of islands within the FAS, because current refugee and immigration laws do not adequately address human displacement associated with climate change, these provisions could inadvertently serve as one of the few immigration options open to citizens of the FAS who choose to, or are forced to, relocate abroad due to rising sea levels.[9]

This Note discusses whether the immigration provisions of the Compacts will provide an adequate framework to address migration from the FAS connected with sea level rise. Part I of this Note describes the relationship between the U.S. and the FAS under the Compacts of Free Association, focusing on the rights of citizens of the FAS to enter, work, and live in the United States. Part II describes the vulnerability of the FAS to sea level rise and asserts that the current international legal frameworks applicable to refugees and immigrants will offer little protection to citizens of the FAS displaced by rising sea levels. Part III analyzes the immigration provisions of the Compacts as a mechanism to address migration from the FAS connected with sea level rise. It argues that the immigration provisions will not provide an adequate solution to permanent or large-scale population displacement, but they could form part of an adaptive response to the climate change pressures that threaten the future of these island nations. Any adaptive response to climate change in the FAS, however, must prioritize the rights of the citizens of the FAS to remain in their countries under safe and sustainable conditions.

7. *See* Compact of Free Association Amendments Act of 2003, Pub. L. No 108-188, § 331(a), 117 Stat. 2720, 2781; *see also* Act of Nov. 14, 1986, Pub. L. No. 99-658, § 312, 100 Stat. 3672, 3695.

8. *See infra* Part I.A.2.

9. *See infra* Part II.B.

I. THE COMPACTS OF FREE ASSOCIATION AND THEIR IMMIGRATION PROVISIONS

This Part briefly summarizes the historical relationship between the FAS and the United States to explain the origin and scope of the Compacts of Free Association. It then examines the immigration provisions of the Compacts and the use of these provisions in recent years by citizens of the FAS, providing the foundation for the Note's assessment of the role these provisions may play in addressing future population displacement from the FAS connected with sea level rise.

A. The Development of the Compacts of Free Association

1. Historical Background

At the end of World War II, the United Nations (U.N.) created an international trusteeship system for the administration of trust territories.[10] These trust territories included the former League of Nations mandated territories,[11] territories separated from "enemy states" as a consequence of World War II, and other territories voluntarily placed under the trusteeship system.[12] The system was designed, in part, "to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence."[13] Eleven trust territories emerged under the U.N. Trusteeship System,[14] all of which were administered by the U.N. or a member state according to the terms of the U.N. Charter and individual trusteeship agreements.[15]

10. *See* U.N. Charter art. 73–88 (providing the framework for the Trusteeship System). The U.N. Trusteeship System was established "for the administration of territories whose peoples have not yet attained a full measure of self-government." *Id.* art. 73. For a history of the Trusteeship System, see generally CHARMAINE E. TOUSSAINT, THE TRUSTEESHIP SYSTEM OF THE UNITED NATIONS (1956).

11. The League of Nations Covenant established a mandate system for the administration of former colonial territories after World War I. *See* League of Nations Covenant art. 22. For a description of the mandate system, see generally QUINCY WRIGHT, MANDATES UNDER THE LEAGUE OF NATIONS (1930).

12. U.N. Charter art. 77.

13. *Id.* art. 76.

14. *The United Nations and Decolonization*, UNITED NATIONS, http://www.un.org/en/decolonization/its.shtml (last visited Nov. 11, 2011).

15. *See* U.N. Charter art. 75, 81; HAROLD F. NUFER, MICRONESIA UNDER AMERICAN RULE 34 n.52 (1978).

One of the eleven trust territories administered under the U.N. Trusteeship System was the Trust Territory of the Pacific Islands (TTPI), a vast area in Micronesia encompassing three island chains—the Caroline Islands, the Marshall Islands, and the Northern Mariana Islands.[16] Formerly a mandate of Japan under the League of Nations Mandate System,[17] these islands played a significant role in the Pacific battles of World War II and came under U.S. control in 1944.[18] The U.S. negotiated a strategic trusteeship[19] of the islands with the U.N. in 1947 to preserve its military interests in the Pacific,[20] securing the rights "to establish naval, military and air bases" and "station and employ armed forces in the territory."[21] It exercised these military rights aggressively in the years following the creation of the trusteeship relationship, establishing a controversial nuclear testing program in the islands that continued through 1958.[22]

It was not until the 1960s that a significant movement towards

16. *See* A. John Armstrong, *The Emergence of the Micronesians to the International Community: A Study of the Creation of a New International Entity*, 5 BROOK. J. INT'L L. 207, 210 (1979) [hereinafter Armstrong, *The Emergence of the Micronesians*].

17. Japan received a mandate from the League of Nations to administer the islands in 1920. *See* NUFER, *supra* note 15, at 10–11. For a history of the period of Japanese control of the islands, see *id.* at 10–26.

18. Prior to withdrawing from the League of Nations in 1935, Japan began constructing military bases on the islands. *See id.* at 11–12. Several Japanese submarines that participated in the attack on Pearl Harbor left for Hawaii from Micronesia. *See* SUE RABBITT ROFF, OVERREACHING IN PARADISE: UNITED STATES POLICY IN PALAU SINCE 1945 48–49 (1991) (describing the battle between the United States and Japan over these islands as "horrendous").

19. Article 82 of the U.N. Charter provides that "[t]here may be designated, in any trusteeship agreement, a strategic area or areas which may include part or all of the trust territory to which the agreement applies." U.N. Charter art. 82. Strategic trusteeships were overseen by the Security Council of the United Nations, while non-strategic trusteeships were overseen by the General Assembly. *Id.* art. 83, 85. The TTPI was the only strategic trusteeship created in the history of the U.N. Trusteeship System. *See* ROFF, *supra* note 18, at 57.

20. NUFER, *supra* note 15, at 46–47 (quoting Warren R. Austin, the U.S. ambassador to the U.N. in 1947, as saying that "security is the overriding consideration in a strategic area . . . . These islands constitute an integrated strategic physical complex vital to the security of the United States . . . . Our purpose is to defend the security of these islands in a manner that will contribute to the building up of genuine, effective, and enforceable collective security for all members of the United Nations.").

21. *See id.* at 29 (quoting the Trusteeship Agreement).

22. *Id.* at 47. Between 1946 and 1958, the U.S. performed sixty-seven nuclear tests in the Marshall Islands. *See U.S. Nuclear Testing Program in the Marshall Islands*, MARSH. IS. NUCLEAR CLAIMS TRIBUNAL, http://www.nuclearclaimstribunal.com/testing.htm (last visited Oct. 19, 2011).

self-government in the TTPI began to take shape.[23] In 1964, facing pressure from the U.N. to secure political advancement in the territory,[24] the U.S. created the Congress of Micronesia, a bicameral legislature comprised of elected representatives from the trust islands.[25] Soon after, the Congress of Micronesia passed an act establishing the Future Political Status Commission, tasked with making recommendations for the political future of the trust territory.[26] Acknowledging both "the need for Micronesia[n] self-government and the fact of long-standing American interest in [the] area," the Commission recommended in 1969 that the Trust Territory "be constituted as a self-governing state and that this Micronesian state . . . negotiate entry into free association with the United States."[27]

Soon after the Commission made its recommendation, the TTPI began to split into distinct political groups. The Northern Mariana Islands rejected the concept of free association, choosing to become a commonwealth under the sovereignty of the U.S. in the mid-1970s.[28] While the remaining two island chains ultimately

23. *See* ROGER W. GALE, THE AMERICANIZATION OF MICRONESIA: A STUDY OF THE CONSOLIDATION OF U.S. RULE IN THE PACIFIC 111 (1979) ("[W]hen the Kennedy Administration began, there was as yet no Micronesian in a responsible executive position on either the district or territorial level.").

24. In 1960, U.N. General Assembly Resolution 1514 "[r]ecogni[zed] that the peoples of the world ardently desire the end of colonialism in all its manifestations" and declared that "[i]mmediate steps shall be taken, in Trust and Non-Self-Governing Territories . . . to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire." G.A. Res. 1514 (XV), U.N. GAOR, 15th Sess., Supp. No. 16, U.N. Doc. A/4684, at 66–67 (Dec. 10, 1960). The U.N. also issued a report in 1961 urging the U.S. to advance efforts to develop self-government in the TTPI. *See* GALE, *supra* note 23, at 100–01 ("The report . . . did make it quite clear to anyone concerned . . . that the anti-colonial image Kennedy was trying to portray was open to question in the case of the Trust Territory.").

25. Leonard Mason, *Unity and Disunity in Micronesia: Internal Problems and Future Status*, *in* POLITICAL DEVELOPMENT IN MICRONESIA 203, 212 (Daniel T. Hughes & Sherwood G. Lingenfelter eds., 1974). The Micronesian Congress was created by order of the U.S. Department of the Interior "with the idea that the TTPI would determine its future political status collectively." *See* Keitner & Reisman, *supra* note 6, at 36; *see also* Trust Territory of the Pacific Islands, Legislative Authority for the Congress of Micronesia, 29 Fed. Reg. 13,613, 13,613 (Sept. 28, 1964).

26. Mason, *supra* note 25, at 214.

27. REPORT OF THE FUTURE POLITICAL STATUS COMMISSION OF THE CONGRESS OF MICRONESIA (1969), *quoted in* DONALD F. MCHENRY, MICRONESIA: TRUST BETRAYED 92 (1975).

28. *See* Roger S. Clark, *Self-Determination and Free Association—Should the United Nations Terminate the Pacific Islands Trust?*, 21 HARV. INT'L L.J. 1, 8–11 (1980). The Commonwealth is known as the Commonwealth of the Northern Mariana Islands (CNMI).

fragmented into three political entities—the RMI, the FSM, and Palau—each chose to pursue a relationship of free association with the United States.[29]

2. The Relationships of Free Association

Free association occupies the "middle ground between integration and independence."[30] It is characterized by a formal association between two states in which one state cedes to the other "a fundamental sovereign authority and responsibility for the conduct of its own affairs."[31] The basic principles of the relationships of free association between the U.S. and the states that emerged from the TTPI were agreed to in 1978 after almost a decade of negotiation: pursuant to bilateral agreement the people of Micronesia would "enjoy full internal self-government" and "have authority and responsibility for their foreign affairs," while the U.S. would "have full authority and responsibility for security and defense matters in or relating to Micronesia."[32] Any agreement of free association would be subject to the approval of the Micronesian people, as expressed in a U.N. observed plebiscite, and, once approved, could be unilaterally or mutually terminated by the parties to the agreement.[33]

The U.S. signed a Compact of Free Association incorporating these principles in 1982 with the FSM, and in 1983 with the RMI. [34]

29. *See* Keitner & Reisman, *supra* note 6, at 37–38.

30. *See id.* at 2; *see also* Arthur John Armstrong, *Strategic Underpinnings of the Legal Regime of Free Association: The Negotiations for the Future Political Status of Micronesia*, 7 BROOK. J. INT'L L. 179, 181 (1981) [hereinafter Armstrong, *Strategic Underpinnings of the Legal Regime of Free Association*] ("Within the parameters of the free association norm, two governments can organize their relationships in a theoretically infinite variety of ways between the polar norms of independence and integration.").

31. Armstrong, *Strategic Underpinnings of the Legal Regime of Free Association*, *supra* note 30, at 182; *see also* Keitner & Reisman, *supra* note 6, at 5 ("A relationship of association in contemporary international law is characterized by recognition of the significant subordination and delegation of competence by one of the parties (the associate) to the other (the principal), but maintenance of the continuing international status of statehood of each component.").

32. Armstrong, *The Emergence of the Micronesians*, *supra* note 16, at 209, 260–61.

33. *See id.*

34. Act of Jan. 14, 1986, Pub. L. No. 99-239, pmbl., 99 Stat. 1770, 1800–01. Pursuant to its terms, the Compact could not enter into force until it was (1) approved by the governments of the RMI and the FSM; (2) approved by a plebiscite conducted in both the RMI and the FMS "for the free and voluntary choice by the peoples of the Trust Territory of the Pacific Islands of their future political status through informed and democratic processes;" and (3) approved by the government of the U.S via constitutionally valid procedures. *See id.* §§ 411–

The people of the RMI and the FSM approved the Compact in plebiscites conducted in 1983,[35] and the Compact entered into force on October 21, 1986, following an affirmative vote by the U.S. Congress.[36] The Compact established that the FSM and RMI were sovereign nations with authority over their internal and foreign affairs, but for fifteen years the U.S. would have "full authority and responsibility for security and defense matters in or relating to" these two states, which included the obligation to defend the islands from attack and the rights to build and use military facilities on the islands and to deny military personnel from any other country access to the islands.[37] During this fifteen-year period, the U.S. also agreed to provide each state with programmatic and economic assistance.[38] In 2003, both the RMI and the FSM signed amended Compact agreements with the U.S., affirming the relationships of free association between the countries.[39] The amended Compacts provide for a total of $3.6 billion in financial assistance to the RMI and the FSM over twenty years, including contributions to trust funds that are intended to replace U.S. grant assistance when it expires in 2023.[40] The defense rights and obligations of the U.S. in the RMI and the FSM will continue as long as the Compact agreements remain in effect,[41] with U.S. access to certain sites on the Kwajalein Atoll in the RMI guaranteed until 2086.[42]

412.

35. *Id.* pmbl.

36. *See* Bureau of E. Asian & Pac. Affairs, *Background Note: Marshall Islands*, U.S. DEP'T OF STATE (Aug. 19, 2011), http://www.state.gov/r/pa/ei/bgn/26551.htm. In 1990, both the RMI and the FSM were recognized by the United Nations Security Council as self-governing entities in free association with the United States. *See* Keitner & Reisman, *supra* note 6, at 48.

37. Act of Jan. 14, 1986, Pub. L. No. 99-239, §§ 311–312, 321, 352, 99 Stat. 1770.

38. *Id.* § 211.

39. *See* Compact of Free Association Amendments Act of 2003, Pub. L. No. 108-188, 117 Stat. 2720.

40. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-163, COMPACTS OF FREE ASSOCIATION: MICRONESIA AND THE MARSHALL ISLANDS FACE CHALLENGES IN PLANNING FOR SUSTAINABILITY, MEASURING PROGRESS, AND ENSURING ACCOUNTABILITY 1 (2006) [hereinafter GAO, COMPACTS OF FREE ASSOCIATION], *available at* http://www.gao.gov/new.items/d07163.pdf; *see also* Compact of Free Association Amendments Act of 2003 §§ 103–104.

41. Compact of Free Association Amendments Act of 2003 § 354(a).

42. GAO, COMPACTS OF FREE ASSOCIATION, *supra* note 40, at 11. The Kwajalein Atoll is "an important part of U.S. ICBM testing, missile defense testing, and space surveillance operations." U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-02-119, FOREIGN RELATIONS: KWAJALEIN ATOLL IS THE KEY U.S. DEFENSE INTEREST IN TWO MICRONESIAN NATIONS 14 (2002), *available at* http://www.gao.gov/new.items/d02119.pdf.

The U.S. and Palau signed a similar Compact of Free Association in 1986.[43] After receiving the approval of the U.S Congress and a majority of the people of Palau, the Compact entered into force in 1994.[44] The Compact originally provided for direct grant assistance from the U.S. to Palau through 2009, including contributions to a trust fund intended to provide Palau with fifteen million dollars annually from 2010 through 2044.[45] The Compact's security and defense provisions, comparable to the provisions found in the agreements between the U.S. and the RMI and the FSM, are binding until 2044 unless altered by mutual consent.[46] The economic and defense provisions of the Compact do not expire, but they are subject to a mandatory schedule of formal review by both governments on the fifteenth, thirtieth, and fortieth anniversaries of the effective date of the Compact.[47] In 2010, after the fifteen-year review of the Compact, the U.S. agreed to extend direct grant assistance to Palau until 2024.[48]

B. Immigration Under the Compacts of Free Association

In addition to the assistance and defense measures, the original Compact between the U.S. and the RMI and the FSM provided most residents of each state with significant rights of immigration to the United States.[49] Similar provisions were included in the

43. *See* Proclamation No. 6726, 59 Fed. Reg. 49,777, 49,777–78 (Sept. 27, 1994).

44. *Id.* Palau became a member state of the U.N. soon after the U.S. Congress approved the Compact with Palau in 1994. Keitner & Reisman, *supra* note 6, at 38 n.222.

45. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-559T, COMPACT OF FREE ASSOCIATION: PROPOSED U.S. ASSISTANCE TO PALAU AND ITS LIKELY IMPACT 1 (2011), *available at* http://www.gao.gov/new.items/d11559t.pdf.

46. The Compact with Palau forecloses the "territorial jurisdiction of the Republic of Palau . . . to the military forces and personnel or for the military purposes of any national except the United States of America," and states that "[t]he Government of the United States has full authority and responsibility for security and defense matters in or relating to Palau." Act of Nov. 14, 1986, Pub. L. No. 99-658, §§ 311–312, 100 Stat. 3672, 3994–95. *See also* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-732, PALAU'S COMPACT OF FREE ASSOCIATION: PALAU'S USE OF AND ACCOUNTABILITY FOR U.S. ASSISTANCE AND PROSPECTS FOR ECONOMIC SELF-SUFFICIENCY 11 (2008) [hereinafter GAO, PALAU'S COMPACT OF FREE ASSOCIATION], *available at* http://www.gao.gov/new.items/d08732.pdf.

47. GAO, PALAU'S COMPACT OF FREE ASSOCIATION, *supra* note 46, at 11.

48. As of the writing of this Note, the amended agreement is awaiting approval by the U.S. Congress. *See* S. 343, 112th Cong. § 1 (2011).

49. During the negotiations leading up to the enactment of the amended Compacts, the government of the RMI explained that "[t]he immigration provisions of the Compact . . . were critical to the viability of the free association political status model as proposed by the U.S. and negotiated by our governments. Without the immigration terms developed in the

Compact between the U.S. and Palau.[50] The rights of immigration were included in the Compacts "to strengthen ties between the United States and the [FAS]."[51] While the amended Compacts signed in 2003 narrowed the scope of the original provisions somewhat, citizens of the FAS continue to possess and exercise unique rights of access to the United States.[52]

1. Rights of Immigration Under the Compacts

Under the amended Compact agreements, three general categories of people from the FAS may "be admitted to, lawfully engage in occupations, and establish residence as a nonimmigrant in the United States and its territories and possessions . . . without regard" to certain requirements of the Immigration and Nationality Act (INA).[53] These three categories include: (1) any person who was a citizen of the TTPI and therefore became a citizen of the RMI, the FSM, or Palau on the effective date of the Compacts; (2) any person who acquires the citizenship of the RMI, the FSM, or Palau at birth; and (3) certain categories of naturalized citizens of the RMI, the FSM, and Palau, or relatives of such citizens.[54] People

Compact negotiations the RMI may not have been able to accept the free association model." Gov't of the Republic of the Marsh. Is., *RMI Comments on Draft GAO Report Regarding Migration Under Compact of Free Association* (Sept. 4, 2001), *in* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-02-40, MIGRATION FROM MICRONESIAN NATIONS HAS HAD SIGNIFICANT IMPACT ON GUAM, HAWAII, AND THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS 61 (2001) [hereinafter GAO 2001 MIGRATION REPORT], *available at* http://www.gao.gov/new.items/d0240.pdf.

50. *See* Act of Nov. 14, 1986, Pub. L. No. 99-658, § 141, 100 Stat. 3672, 3682 (providing certain nonimmigrant rights within the United States).

51. GAO 2001 MIGRATION REPORT, *supra* note 49, at 8.

52. *See id.* ("U.S. Immigration and Naturalization Service (INS) officials have stated that these rights granted to FAS migrants are unique; there are no other nations whose citizens enjoy this degree of access to the United States.").

53. *See* Compact of Free Association Amendments Act of 2003, Pub. L. No. 108-188, § 141, 117 Stat. 2720, 2760–63; *see also* Act of Jan. 14, 1986, Pub. L. No. 99-239, § 141, 99 Stat. 1770, 1804–05.

54. Compact of Free Association Amendments Act of 2003 § 141(a). Under the amended Compact agreements the U.S. signed with the RMI and the FSM, the immigration provisions apply to the following categories of naturalized citizens and their relatives: (1) an immediate relative of a person in one of the first two categories described above if that person is a naturalized citizen of the RMI or the FSM, has been an actual resident of either state for at least five years, and, in the case of a spouse, has been married to the person who falls into one of the first two categories for at least five years; (2) a person who became a naturalized citizen of the RMI or the FSM and was an actual resident of either state after obtaining citizenship for at least five years prior to April 30, 2003, and who continues to be an actual resident of either state; and (3) an immediate relative of a citizen of the RMI or the FSM if that citizen is serving on active duty in any branch of the United States Armed Forces. *See id.*

in these categories may enter the U.S. without a visa and are not required to comply with the labor qualification provisions of the INA.[55] They "shall be considered to have the permission of the Government of the United States to accept employment in the United States."[56]

Admission to the United States, however, is not guaranteed. The amended agreements between with the RMI and the FSM state that, except for the explicitly mentioned exemptions, the INA applies in full to any person admitted to or seeking to enter the United States, and "any alien who has been admitted under the Compact, or the Compact, as amended, who cannot show that he or she has sufficient means of support in the United States, is deportable."[57] While the Compact between the U.S. and Palau does not explicitly incorporate other sections of the INA, it is the position of the Department of Homeland Security, the agency in charge of citizenship and immigration in the United States, that the grounds for inadmissibility under the INA also apply to Palauans seeking entry to the United States.[58] This interpretation is

According to the Compact between the U.S. and Palau, the immigration provisions apply to any naturalized citizen of Palau who has been a resident of Palau for at least five years and who holds a certificate of residence. Act of Nov. 14, 1986 § 141(a).

55. The amended Compacts with the RMI and the FSM provide exemptions from INA sections 212(a)(5) (relating to labor certification and qualifications) and 212(a)(7)(B)(i)(II) (stating that non-immigrants must possess a valid visa). Compact of Free Association Amendments Act of 2003 § 141(a). The Compact with Palau also provides an exemption from the passport requirements of the INA. Act of Nov. 14, 1986 § 141(a). The amended agreement between the U.S. and Palau established pursuant to the fifteen-year Compact review would eliminate the exemption from providing a valid passport. *See* S. 343, 112th Cong. § 1 (2011).

56. Compact of Free Association Amendments Act of 2003 § 141(d); *see also* Act of Jan. 14, 1986 § 141(a) ("[Persons admitted under the Compact] shall be considered to have the permission of the Attorney General of the United States to accept employment in the United States"); U.S. CITIZENSHIP AND IMMIGRATION SERVS., FACT SHEET: STATUS OF THE CITIZENS OF THE FREELY ASSOCIATED STATES OF THE FEDERATED STATES OF MICRONESIA AND THE REPUBLIC OF THE MARSHALL ISLANDS 4 (2005) [hereinafter MICRONESIA AND MARSHALL ISLANDS FACT SHEET], *available at* http://www.uscis.gov/files/pressrelease/Compacts_FS_021105.pdf (stating that citizens of the RMI and the FSM admitted under a Compact "may freely seek employment in the United States" with an unexpired passport from the RMI or the FSM and an unexpired Form I-94); U.S. CITIZENSHIP AND IMMIGRATION SERVS., FACT SHEET: STATUS OF CITIZENS OF THE REPUBLIC OF PALAU 3 (2008) [hereinafter PALAU FACT SHEET], *available at* http://www.uscis.gov/files/pressrelease/PalauFS.pdf (stating that Palauan citizens admitted under the Compact are eligible to work in the United States after applying for and receiving a U.S. Government-issued "Employment Authorization Document").

57. Compact of Free Association Amendments Act of 2003 § 141(f).

58. *See* PALAU FACT SHEET, *supra* note 56, at 3 ("The grounds of removability generally applicable to aliens in the United States, such as conviction for an aggravated felony, apply to

consistent with the decision reached by the U.S. Court of Appeals for the Ninth Circuit in *United States v. Terrence*,[59] in which the court reinstated the indictment of a Palauan citizen who had been deported from Guam on the basis of a criminal conviction and had later re-entered Guam without the permission of the Attorney General, as required by U.S. law.[60] The Palauan citizen, Terrence, had moved to dismiss the indictment on the grounds that the Compact provided him with immunity from U.S. immigration laws.[61] The court held that the plain language of the Compact exempted Palauan citizens only from the particular provisions of the INA mentioned in the Compact—all other provisions apply in full to Palauan citizens in the United States or seeking to enter the United States.[62] Therefore, according to the terms of the Compacts and the holding of *Terrence*, a person from the FAS seeking admission to the United States may be denied entry under the INA on the basis of health, criminal history, national security, or because the Attorney General determines the individual is likely to become a public charge.[63]

When entry is granted, a person admitted under the Compacts is currently permitted to stay in the United States indefinitely.[64] However, such a person is not a lawful permanent resident[65] as

persons admitted under the Compact.").

59. United States v. Terrence, 132 F.3d 1291, 1292 (9th Cir. 1997).

60. *Id.* at 1292–93.

61. *Id.* at 1293–94.

62. *Id.* at 1294–95.

63. *See* 8 U.S.C. § 1182(a) (2006). In order to deny a person entry on the basis of being likely to become a charge, "there must be evidence that they are likely to be supported at the expense of the public." *E.g.*, *In re* Keshishian, 299 F. 804, 805 (S.D.N.Y. 1924).

64. *See* MICRONESIA AND MARSHALL ISLANDS FACT SHEET, *supra* note 56, at 1; PALAU FACT SHEET, *supra* note 56, at 1. The amended Compacts between the U.S. and the FSM and the RMI provide that admission under the Compacts "shall be for such time and under such conditions as the Government of the United States may by regulations prescribe." Compact of Free Association Amendments Act of 2003, Pub. L. 108-188, § 141, 117 Stat. 2720, 2763, 2801. In 2000, the Department of Homeland Security issued regulations applicable to the residency of Compact migrants in U.S. territories and possessions. *See* 8 C.F.R. § 214.7 (2011). The regulations establish that a person admitted under a Compact who is a habitual resident of a U.S. possession or territory, who has been physically present in that possession or territory for at least 365 days, and who is not a dependent or a full time student is subject to removal from the U.S. if he or she: "(i) Is not and has not been self-supporting for a period exceeding 60 consecutive days . . . ; or (ii) Has received unauthorized public benefits by fraud or willful misrepresentation; or (iii) Is subject to removal pursuant to section 237" of the INA (which addresses classes of deportable aliens). *Id.*

65. A lawful permanent resident, also known as a "Green Card holder," has been "lawfully accorded the privilege of residing permanently in the United States as an immigrant in

defined by the INA, and admission under a Compact "does not confer . . . the right to establish the residence necessary for naturalization under the [INA]."[66] A person admitted under a Compact may still apply for lawful permanent resident alien status or U.S. citizenship in accordance with the requirements of the INA, but that person must comply with the same laws and procedures that are applicable to other foreign nationals seeking such status.[67]

2. Citizens of the FAS in the United States

A significant portion of the total population of the FAS has migrated to the United States, primarily in pursuit of employment, educational opportunities, and health care, or to accompany migrating family members.[68] Survey data from the U.S. Census Bureau gathered between 2005 and 2009 indicates that approximately 56,000 migrants from the FAS—almost twenty-five percent of all FAS citizens—currently live in the United States and its Pacific territories and possessions.[69] In a 2011 report to Congress, the U.S. Government Accountability Office estimated that "approximately 68 percent of compact migrants [are] from the FSM, 23 percent [are] from the [RMI], and 9 percent [are] from Palau."[70] The majority (roughly fifty-eight percent) of FAS migrants reside in Guam, Hawaii, and the Commonwealth of the

accordance with" the INA. 8 U.S.C. § 1101(a)(20) (2006).

66. Compact of Free Association Amendments Act of 2003 § 141; Act of Nov. 14, 1986, Pub. L. 99-658, § 141, 100 Stat. 3672, 3683. Under the INA, "No person . . . shall be naturalized unless such applicant . . . immediately preceding the date of filing his application for naturalization has resided continuously, after being lawfully admitted for permanent residence, within the United States for at least five years . . . ." 8 U.S.C. §1427(a) (2006). Admission under a Compact does not constitute lawful admission for permanent residence and does not count toward the five-year period required for naturalization.

67. Act of Nov. 14, 1986 § 141; Compact of Free Association Amendments Act of 2003 § 141; *see also* MICRONESIA AND MARSHALL ISLANDS FACT SHEET, *supra* note 56, at 3–4 ("FSM and RMI citizens admitted to the United States under the Compacts may reside, work and study in the United States, but they are not 'lawful permanent residents' (also known as 'green card holders') under the Immigration and Nationality Act. They are not precluded, however, from becoming lawful permanent residents if otherwise eligible under the immigration laws, either through the immigrant visa process or by adjustment of status within the United States. A person must be granted lawful permanent resident status in the United States if he or she eventually wishes to apply for naturalization as a U. S. citizen.").

68. GAO 2001 MIGRATION REPORT, *supra* note 49, at 3, 18.

69. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-64, COMPACTS OF FREE ASSOCIATION: IMPROVEMENTS NEEDED TO ASSESS AND ADDRESS GROWING MIGRATION 12 (2011), *available at* http://www.gao.gov/assets/590/586236.pdf.

70. *Id.* at 15.

Northern Mariana Islands (CNMI).[71] In the mainland United States, at least nine states have estimated FAS migrant populations of more than 1000.[72]

II. THE IMPLICATIONS OF SEA LEVEL RISE FOR MIGRATION UNDER THE COMPACT IMMIGRATION PROVISIONS

While the Compacts of Free Association are comprehensive documents detailing the rights and obligations of the ongoing relationships of free association between the U.S. and the FAS, they were not designed to aid the FAS in addressing the impacts of climate change. This Part explains that in the next century, a major effect of climate change—sea level rise—is expected to stress the resources of the FAS and impact the habitability of many coastal regions and islands in the FAS, leading to potentially significant population movements. This Part also argues that because the current legal frameworks applicable to immigrants and refugees do not adequately address migration associated with the effects of climate change, the immigration provisions of the Compacts will likely serve as the primary path of migration for citizens of the FAS who choose to, or are forced to, relocate abroad due to rising sea levels.

A. Sea Level Rise as a Force for Migration from the FAS

1. Sea Level Rise

Global average sea levels rose markedly in the last decade of the twentieth century and are continuing to rise at an alarming rate.[73] Scientists attribute sea level rise to two processes closely connected to climate change: thermal expansion of the oceans and melting ice formations.[74] These processes, however, are not fully

71. *Id.* at 12–13.

72. *Id.* at 13.

73. Between 1993 and 2003 the global average sea level rose at an average rate of approximately 3 millimeters per year, compared to an average of 1.8 millimeters per year from 1961 to 2003. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: SYNTHESIS REPORT 30 (2007) [hereinafter 2007 SYNTHESIS REPORT], *available at* http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr.pdf.

74. Nathaniel L. Bindoff et al., *Observations: Oceanic Climate Change and Sea Level*, *in* CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS 385, 409 (S. Solomon et al. eds., 2007) ("The two major causes of global sea level rise are thermal expansion of the oceans (water expands as it warms) and the loss of land-based ice due to increased melting.").

understood, making it difficult to project exactly how quickly the oceans will continue to rise over the coming centuries.[75] Data presented at the 2009 United Nations Framework Convention on Climate Change held in Copenhagen showed that the rate of sea level rise during the first decade of the twenty-first century had far surpassed previous IPCC projections.[76] Revised projections based on this data conclude that global sea levels will rise one meter during the next century.[77] However, recent calculations focusing on observed changes in the polar ice sheets indicate that the rise could be as much as two meters.[78] Further, even if global warming forces are stabilized, changes in ocean temperature will continue to contribute to sea level rise for several centuries.[79]

While rising sea levels will impact coastal regions throughout the world,[80] small island states such as the FAS are particularly vulnerable to the effects of sea level rise.[81] Rising sea levels will reduce the physical size of these islands and, in the case of low-lying atolls,[82] could submerge entire islands completely.[83] Long before a

75. *See id.* ("An important uncertainty relates to whether discharge of ice from the ice sheets will continue to increase as a consequence of accelerated ice flow, as has been observed in recent years. This would add to the amount of sea level rise, but quantitative projections of how much it would add cannot be made with confidence, owing to limited understanding of the relevant processes."); *see also* KATHERINE RICHARDSON ET AL., SYNTHESIS REPORT FROM CLIMATE CHANGE: GLOBAL RISKS, CHALLENGES & DECISIONS 10 (2009) [hereinafter COPENHAGEN REPORT], *available at* http://climatecongress.ku.dk/pdf/synthesisreport ("[M]odels of the behaviour of the[] polar ice sheets are still in their infancy.").

76. COPENHAGEN REPORT, *supra* note 75, at 8 ("Since 2007, reports comparing the IPCC projections of 1990 with observations show that some climate indicators are changing near the upper end of the range indicated by the projections or, as in the case of sea level rise . . . at even greater rates than indicated by IPCC projections.").

77. *Id.* at 9.

78. Gillis, *supra* note 1, at A1.

79. *See* COPENHAGEN REPORT, *supra* note 75, at 10; *see also* 2007 SYNTHESIS REPORT, *supra* note 73, at 46 ("Anthropogenic warming and sea level rise would continue for centuries due to the time scales associated with climate processes and feedback, even if [greenhouse gas] concentrations were to be stabilized.").

80. *See, e.g.*, BROOKS ET AL., *supra* note 2, at 1.

81. *See generally* IPCC WORKING GROUP II 2007 REPORT, *supra* note 3, at 687–716.

82. An atoll is a ring of small islets comprised of coral reefs that encircle a lagoon. The average height above sea level of an atoll is two meters. *See* Jon Barnett & W. Neil Adger, *Climate Dangers and Atoll Countries*, 61 CLIMATIC CHANGE 251, 322 (2003).

83. *See* Peter Roy & John Connell, *Climatic Change and the Future of Atoll States*, 7 J. COASTAL RESEARCH 1057, 1061 (1991) ("Islands on atoll rims vary enormously in size and shape but . . . rarely rise more than 3 metres above mean sea level rise."); *see also* J. Chris Larson, Note, *Racing the Rising Tide: Legal Options for the Marshall Islands*, 21 MICH. J. INT'L L. 495, 495 (2000) (noting that the Marshall Islands "literally may disappear due to accelerated sea-level

threat of near or total inundation is realized, however, the effects of sea level rise will seriously impact the resources—and therefore the populations—of many small islands. Sea level rise will cause shorelines to erode, which will extend the reach of storm surges and exacerbate the impact of flooding.[84] Sea level rise will also diminish groundwater reserves, posing a serious threat to already scarce water resources.[85] Deteriorating water supplies will, in turn, impact soil quality and vegetation.[86] Atoll states will feel these effects most acutely, but small island states with hillier regions well above sea level are also vulnerable to these impacts.[87]

2. Environmental Migration and the FAS

There is widespread disagreement regarding the link between environmental change and migration.[88] Migration is often "multi-causal" in nature and may result from a combination of numerous social, economic, and political factors.[89] Given the many causes that may influence any one person's decision to migrate, the degree to which environmental change "is the primary driver of simply one of many drivers of migration" is often not fully

rise").

84. *See* Roy & Connell, *supra* note 83, at 1060. A storm surge is an abnormal rise of water associated with a storm, which can cause significant flooding along coastal areas. *See, e.g.*, *Storm Surge Overview*, NAT'L WEATHER CENTER, http://www.nhc.noaa.gov/surge/ (last visited Sept. 2, 2011).

85. IPCC WORKING GROUP II 2007 REPORT, *supra* note 3, at 695–97.

86. *Id.* at 689 ("Sea-level rise, inundation, seawater intrusion into freshwater lenses, soil salinisation, and decline in water supply are very likely to adversely impact coastal agriculture.").

87. *See* Ilan Kelman & Jennifer J. West, *Climate Change and Small Island Developing States: A Critical Review*, 5 ECOLOGICAL & ENVTL. ANTHROPOLOGY 1, 3 (2009) ("Even larger [small island states] with much land area well above potential sea level rise . . . could have problems since most settlements and infrastructure are in the coastal zone . . . ."); *see also* THE WORLD BANK, CITIES, SEAS, AND STORMS: MANAGING CHANGE IN PACIFIC ISLAND ECONOMIES 717 (2000), *available at* http://siteresources.worldbank.org/INTPACIFICISLANDS/Resources/4-VolumeIV+Full.pdf (describing the impact of climate change on Viti Levu, Fiji, an island with low lying coastal areas and interior regions well above sea level).

88. INT'L ORG. FOR MIGRATION, MIGRATION, ENVIRONMENT AND CLIMATE CHANGE: ASSESSING THE EVIDENCE 35 (2009), *available at* http://publications.iom.int/bookstore/free/migration_and_environment.pdf ("[T]he research literature on environmental migration has tended to fall into two broad categories (1) work done by "minimalists" who suggest that the environment is only a contextual factor in migration decisions and (2) work done by "maximalists" who claim that the environment directly causes people to be forced to move.").

89. *Id.* at 17.

understood.[90] Sea level rise, for example, will "patently make[] certain coastal areas and small island states uninhabitable."[91] However, as described above, it will also stress the land and resources of many small islands, which is expected, in turn, to impact food and water security, economic growth, and public health.[92] Therefore, while some people within the FAS may be forced to physically retreat from rising seas in the coming decades, in other cases, the stress associated with the impacts of sea level rise "may provide a 'push' influence on migration" patterns.[93]

While it is impossible to predict the extent to which the impacts of sea level rise will influence migration patterns within the FAS over the next century, it is clear that there is the potential for significant population movement. The RMI, a nation of five single islands and twenty-nine coral atolls, has an average elevation of just over two meters above sea level and is therefore one of the most vulnerable of all small island states to the effects of sea level rise.[94] Roughly half of its 61,000 inhabitants live in the nation's capital, Majuro,[95] which is located on an atoll that would lose approximately eighty percent of its landmass to a one-meter rise in sea level.[96] In 2010, the RMI announced plans to construct a five-kilometer seawall to control the effects of erosion and severe flooding, which have already caused millions of dollars in damage and forced people to relocate temporarily.[97]

90. *Id.* at 17–18. *See also* Barnett & Weber, *supra* note 2, at 5 ("Knowledge of the relationship between environmental change and migration is limited, a point recognized by almost all researchers working on this topic." (citation omitted)).

91. OLI BROWN, INT'L ORG. FOR MIGRATION, MIGRATION AND CLIMATE CHANGE 17 (2008).

92. *Id.* at 16–18.

93. E.J. Moore & J. W. Smith, *Climatic Change and Migration from Oceania: Implications for Australia, New Zealand, and the United States of America,* 17 POPULATION & ENV'T 105, 116 (1995); *see also* Fabrice Renaud et al., *Control, Adapt or Flee: How to Face Environmental Migration?*, INTERSECTIONS, no. 5, 2007, at 1, 16 ("[E]nvironmental degradation is a serious problem that can be exacerbated by several social, economic, political and global environmental factors and could thus become one of the major 'push' factors in the future.").

94. REPUBLIC OF THE MARSH. IS., REPUBLIC OF THE MARSHALL ISLANDS UPDATED REPORT ON THE BARBADOS PROGRAMME OF ACTION (BPOA) 2 (2004), *available at* http://www.sidsnet.org/docshare/other/20041117171107_MARSHALL_ISLANDS_NAR_November_2004.doc.

95. Bureau of E. Asian & Pac. Affairs, *supra* note 36.

96. IPCC WORKING GROUP II, THE REGIONAL IMPACTS OF CLIMATE CHANGE: AN ASSESSMENT OF VULNERABILITY, SUMMARY FOR POLICYMAKERS 13 (1997), *available at* http://www.ipcc.ch/pdf/special-reports/spm/region-en.pdf.

97. *See Vulnerable Atoll Nation Plans Seawall to Block Rising Seas,* INDEPENDENT (Nov. 4, 2011), http://www.independent.co.uk/environment/vulnerable-atoll-nation-plans-seawall-

While the FSM and Palau contain some hillier islands with peaks that rise hundreds of meters above sea level,[98] their citizens have also begun to feel the effects of sea level rise. Coastal erosion and saltwater intrusion associated with sea level rise have diminished freshwater resources in both the FSM and Palau in recent years, resulting in significant agricultural losses.[99] In fact, some residents of the FSM have already moved from outer atolls to islands with higher elevations in part because of increased saltwater in their wells.[100] Rising sea levels may also physically displace many of the inhabitants of these two countries. Seventeen percent of the FSM's 129,000 inhabitants live on low-lying atolls and seventy percent live near the coast, most of which is low-lying and very vulnerable to sea level rise.[101] Twenty-five percent of Palau's land mass has an elevation of less than ten meters,[102] and seventy percent of its 20,000 inhabitants live on an island of just seven square miles.[103]

In most cases around the world, future migration related to the effects of climate change is expected to occur largely within existing state boundaries.[104] As described above, however, the

to-block-rising-seas-2124747.html.

98. The FSM's highest peak rises 791 meters above sea level. FEDERATED STATES OF MICR., VIEWS ON THE POSSIBLE SECURITY IMPLICATIONS OF CLIMATE CHANGE TO BE INCLUDED IN THE REPORT OF THE SECRETARY-GENERAL TO THE 64TH SESSION OF THE UNITED NATIONS GENERAL ASSEMBLY 1 (2009), *available at* http://www.un.org/esa/dsd/resources/res_pdfs/ga-64/cc-inputs/Micronesia_CCIS.pdf. Palau contains islands with peaks rising more than two hundred meters above sea level. *See* OFFICE OF ENVTL. RESPONSE & COORDINATION, OFFICE OF THE PRESIDENT OF THE REPUBLIC OF PALAU, NATIONAL REPORT TO THE WORLD SUMMIT ON SUSTAINABLE DEVELOPMENT 3 (2002), *available at* http://www.un.org/esa/agenda21/natlinfo/wssd/palau.pdf.

99. Sea level rise has raised the salt content of the FSM's limited freshwater resources in recent years. FEDERATED STATES OF MICR., *supra* note 98, at 2; *see also* ASIAN DEV. BANK, CLIMATE CHANGE AND ADAPTATION ROADMAP: PALAU: COUNTRY PARTNERSHIP STRATEGY (2009–2013) 1 (2009), *available at* http://www.adb.org/Documents/CPSs/PAL/2009/PAL-Climate-Change.pdf.

100. FEDERATED STATES OF MICR., *supra* note 98, at 6.

101. *See* FEDERATED STATES OF MICR., *supra* note 98, at 6; FEDERATED STATES OF MICR., PACIFIC ADAPTATION TO CLIMATE CHANGE 10 (2006), *available at* http://www.sprep.org/att/irc/ecopies/countries/fsm/64.pdf; U.N. DEP'T OF ECON. & SOC. AFFAIRS, STATISTICS DIV., WORLD STATISTICS POCKETBOOK: SMALL ISLAND DEVELOPING STATES 27 (2003), *available at* http://www.un.org/special-rep/ohrlls/sid/SIDSpocketbook.pdf.

102. OFFICE OF ENVTL. RESPONSE & COORDINATION, OFFICE OF THE PRESIDENT OF THE REPUBLIC OF PALAU, *supra* note 98, at 3.

103. MINISTRY OF RES. & DEV., REPUBLIC OF PALAU, REPUBLIC OF PALAU NATIONAL ASSESSMENT REPORT: BARBADOS PROGRAMME OF ACTION + 10 REVIEW 6 (2005), *available at* http://www.sidsnet.org/docshare/other/20041102123930_Palau_BPOA+10_Final.pdf.

104. *See* BROWN, *supra* note 91, at 17 ("Where climate change exacerbates migration, it is likely to be predominantly internal migration away from rural areas within developing

options for internal relocation in the FAS will be limited due to the lack of available land, increasing population densities, and scarce resources. In light of these realities, it is possible that some portion of the population will increasingly choose to, or will eventually be forced to, immigrate from the FAS to other nations as the effects of sea level rise intensify.

B. Obstacles to Addressing Environmental Migration from the FAS Through Current Legal Frameworks

There is widespread agreement that existing legal frameworks do not adequately address human displacement connected to the effects of climate change.[105] As explained below, current refugee and immigration laws and policies will provide few protections to citizens of the FAS who choose to, or are forced to, relocate abroad due to rising sea levels.

1. Refugee Law

The Convention Relating to the Status of Refugees, which articulates the universally accepted definition of refugee, defines a refugee as:

> Any person who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country . . . .[106]

countries."); *see also* INT'L ORG. FOR MIGRATION, *supra* note 88, at 23.

105. *See* SUSAN F. MARTIN, CLIMATE CHANGE AND MIGRATION 3–6 (2010) (summarizing the existing gaps in immigration laws and policies as applied to environmental migrants); Bonnie Docherty & Tyler Giannini, *Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees,* 33 HARV. ENVTL. L. REV. 349, 357 (2009) ("No legal instrument specifically speaks to the issue of climate change refugees, and no international institution has the clear mandate to serve this population, which needs human rights protection and humanitarian aid."); Aurelie Lopez, *The Protection of Environmentally-Displaced Persons in International Law*, 37 ENVTL. L. 365, 367 (2007) (asserting that "the current international legal regime disregards the correlation between environmental degradation and human migration."). *But see* Jessica B. Cooper, Note, *Environmental Refugees: Meeting the Requirements of the Refugee Definition*, 6 N.Y.U. ENVTL. L.J. 480 (1998) (arguing that people who are forced to migrate because of environmental degradation qualify as refugees under international law).

106. Convention Relating to the Status of Refugees, July 28, 1951, art. 1, para. A(2), 189 U.N.T.S. 137, *as amended by* Protocol Relating to the Status of Refugees, Jan. 3, 1967, art. 1, para. 2, 19 U.S.T. 6223, 606 U.N.T.S. 267.

Most commentators argue that people who cross international borders to escape the impacts of climate change will not qualify as refugees under this definition, and will therefore be unable to claim any rights associated with refugee status.[107] As Jane McAdam and Ben Saul have explained, people who are displaced because of the effects of climate change will not fit within the framework of refugee law because climate change cannot be characterized as persecution and because it "is inevitably indiscriminate."[108] Citizens of the FAS who migrate in connection with sea level rise, therefore, will be unable to claim protection under international refugee law because they will be "escaping environmental pressures, rather than the enumerated persecutions."[109]

2. Temporary Protection Measures

In recent years, several countries have adopted short-term immigration policies in response to natural disasters. In the wake of the 2004 Pacific tsunami, for example, Switzerland, the United Kingdom, and Canada temporarily suspended the deportation of citizens from Southeast Asian countries affected by the tsunami.[110] Australia and Canada also "fast-tracked" visa applications for asylum claimants from those countries.[111] Policy decisions such as these, however, have been temporary and discretionary measures intended to respond to exigent natural disasters.[112] As such, they do not provide models or precedents of protection for those permanently displaced by slow-onset climate change events such as sea level rise.

The United States has also enacted a law that provides some assistance to people who are unable to return to their home country due to a natural disaster, but, like the policies discussed above, it is discretionary in nature and was not designed to provide

107. *See* Docherty & Giannini, *supra* note 105, at 357–58; Lopez, *supra* note 105, at 377–88.

108. Jane McAdam & Ben Saul, An Insecure Climate for Human Security? Climate-Induced *Displacement and International Law* 8 (Sydney Ctr. for Int'l Law, Working Paper No. 4, 2008), *available at* http://sydney.edu.au/law/scil/documents/2009/SCILWP4_Final.pdf; *see also* Lopez, *supra* note 105, at 377–88.

109. Gregory S. McCue, Note, *Environmental Refugees: Applying International Environmental Law to Involuntary Migration*, 6 GEO. INT'L ENVTL. L. REV. 151, 157 (1993).

110. MARTIN, *supra* note 105, at 4.

111. INT'L ORG. FOR MIGRATION, *supra* note 88, at 415.

112. MARTIN, *supra* note 105, at 4.

a long-term solution for people displaced by the effects of climate change. Under the law, the Attorney General of the United States may grant Temporary Protected Status (TPS) to citizens of a foreign country already present in the U.S. where

> (i) there has been an earthquake, flood, drought, epidemic, or other environmental disaster in the state resulting in a substantial, but temporary, disruption of living conditions in the area affected, (ii) the foreign state is unable, temporarily, to handle adequately the return to the state of aliens who are nationals of the state, and (iii) the foreign state officially has requested designation under this subparagraph . . . .[113]

Citizens of countries granted TPS are permitted to stay and work in the United States for an eighteen-month period.[114] Because this law applies only to foreign nationals already in the United States when TPS is granted, and, once granted, is offered for only a limited period of time in response to a temporary disruption of living conditions, TPS would provide fewer rights and privileges to the citizens of the FAS than the current immigration provisions of the Compacts of Free Association.

3. Immigration Laws

Finland and Sweden appear to be the only two countries with immigration laws that address longer-term displacement associated with environmental disasters. Finland's Aliens Act provides that an alien residing in Finland may be issued a residence permit if "he or she cannot return to his or her country of origin or country of former habitual residence as a result of an environmental catastrophe."[115] Similarly, Sweden's Aliens Act states that foreign nationals in Sweden who are "unable to return to the[ir] country of origin because of an environmental disaster" may receive a residence permit.[116] Some experts have asserted that these laws "may . . . apply to longer term conditions, such as submergence of island states."[117] However, because the acts fail to define

113. 8 U.S.C. § 1254a(b)(1)(B) (2006).

114. *Id.* § 1254a(b)(2)(B).

115. Aliens Act § 88(a)(1) (Fin.), *available at* http://www.finlex.fi/en/laki/kaannokset/2004/en20040301.pdf.

116. 4 Ch. 2(3) § Aliens Act (Svensk författningssamling [SFS] 2005:716)(Swed.), *available at* http://www.sweden.gov.se/content/1/c6/06/61/22/bfb61014.pdf.

117. INT'L ORG. FOR MIGRATION, *supra* note 88, at 415; *see also* MARTIN, *supra* note 105, at

"environmental catastrophe" or "environmental disaster," it is not clear whether these governments will extend the coverage of these laws to people affected by slow-onset climate change events such as sea level rise. Moreover, like TPS in the United States, they appear only to apply to foreign nationals already present in Finland or Sweden at the time the environmental disaster occurs.

To date, no country has directly addressed migration connected with the effects of climate change through immigration laws.[118] Instead, migration "from slow-onset climate change and other environmental hazards that limit economic opportunities [is] treated in the same manner as other economically motivated migration."[119] Foreign nationals confronted with the effects of climate change who are seeking temporary or permanent admission to another country are therefore in the same legal position as most other people seeking admission to that country. Because "destination countries [typically] admit persons to fill job openings or to reunify with family members,"[120] some citizens of the FAS affected by sea level rise may be able to immigrate to countries other than the United States, but their admission would depend on the specific immigration laws and quotas of each country.

III. ADDRESSING ENVIRONMENTAL MIGRATION FROM THE FAS DUE TO SEA LEVEL RISE UNDER THE COMPACTS OF FREE ASSOCIATION

The effects of sea level rise will inevitably stress the resources and economies of the FAS this century, increasing population pressures in those states. If sea level rise approaches or passes one meter, it is possible that entire communities in coastal regions and on atoll islands in the FAS will be forced to permanently relocate. Given the absence of international laws or agreements addressing human displacement connected with the effects of climate change, the immigration provisions of the Compacts currently present one of the few immigration options available to citizens of the FAS affected by sea level rise. This Part analyzes whether the immigration provisions of the Compact present an adequate framework to respond to population movements from the FAS connected with sea level rise. It begins by analyzing the primary

4 (the rules "foresee that some persons may be in need of permanent solutions.").

118. MARTIN, *supra* note 105, at 4.

119. *Id.* at 4.

120. *Id.* at 3.

limitations of the immigration provisions and concludes that the current provisions will not adequately address large-scale migration or permanent, forced relocations from the FAS. Notwithstanding the limitations, however, voluntary migration from the FAS to the United States could form part of an adaptive response to climate change in the FAS.

A. The Limitations of the Compact Immigration Provisions

While the immigration provisions of the Compacts are unique and significant, they are limited in scope and could not on their own adequately address large-scale or permanent, forced population movements from the FAS associated with sea level rise. This subsection addresses the most salient limitations of these provisions.

As an initial consideration, some citizens of the FAS affected by sea level rise will not have the funds or support to make use of the Compact immigration provisions. While the current Compacts provide that most citizens of the FAS may enter, live, and work in the United States, neither the United States nor the governments of the FAS appear to provide direct financial support or other types of assistance to support migration to the United States. Therefore, unless the United States or the governments of the FAS begin to offer such assistance, only those FAS citizens who possess the financial and social resources necessary to migrate will be able to exercise the immigration rights contained in the Compacts. With unemployment rates surpassing sixty percent in the RMI,[121] it is likely that a significant portion of the citizens of the FAS affected by sea level rise would need financial and other types of support if they were forced to leave their homes and relocate abroad.

Similarly, some citizens of the FAS who do have the funds to travel to the United States could still face significant legal barriers to entering the United States. As discussed in Part I.B, *Terrence* and the 2003 Compact amendments establish that a citizen of the FAS may be denied admission to the United States under the INA on health related grounds or if the Attorney General determines he or she is likely to become a public charge.[122] While it is not clear if or how frequently the Attorney General would exercise these provisions of the INA to deny entry to citizens of the FAS, the

121. Bureau of E. Asian & Pac. Affairs, *supra* note 36.
122. *See* discussion *supra* Part I.B.

possibility remains that highly vulnerable groups—such as the sick, the elderly, and those with limited resources, education, or vocational skills—would be barred from relocating to the United States if displaced by sea level rise.

Further, citizens of the FAS who are permitted to enter the United States are not guaranteed permanent residency in the United States. According to the terms of the 2003 amendments, the government of the United States can, at any time, issue regulations limiting the length of time citizens of the RMI and the FSM are permitted to remain in the United States.[123] Moreover, as discussed in Part I.B, except for certain specific provisions relating to documentation and labor certification, the INA applies in full to Compact migrants.[124] A citizen of the FAS affected by sea level rise who migrates to the United States could, therefore, potentially be deported if he or she is unable to support him or herself in the United States.[125] Surveys conducted by the Department of the Interior in 1997 and 1998 estimated that over fifty percent of Compact migrants living in Guam, Hawaii, and the CNMI were living in poverty, suggesting that a significant number of Compact migrants who have moved to the United States have not been able to support themselves once there.[126] While, again, it is not clear if or how often the government of the United States would attempt to deport citizens of the FAS under the relevant provisions of the INA, the possibility is a concern nonetheless.

Finally, one of the most significant limitations of the Compact immigration provisions is that the status of FAS migrants in the United States is inherently uncertain under the terms of the current Compacts. The Compacts are unilaterally terminable by any party; the government of the United States must only provide the RMI, the FSM, or Palau with six months notice if it intends to terminate a Compact.[127] If unilateral termination occurs, the Compacts provide that economic and other assistance to the FAS may continue on mutually agreed terms.[128] The terms of future

123. *See* Compact of Free Association Amendments Act of 2003, Pub. L. No. 108-188, § 141, 117 Stat. 2720, 2760–63.

124. *See* discussion *supra* Part I.B.

125. *See* GAO 2001 MIGRATION REPORT, *supra* note 49, at 3.

126. *Id.*

127. Compact of Free Association Amendments Act of 2003 § 442; Act of Nov. 14, 1986, Pub. L. No. 99-658, § 442, 100 Stat. 3672, 3700.

128. Compact of Free Association Amendments Act of 2003 § 451; Act of Nov. 14, 1986 § 451.

Compact migration and the rights of those citizens of the FAS living in the United States could, therefore, be altered or eliminated, possibly leaving those citizens of the FAS living in the United States without the right to remain. Neither the FAS nor the United States have thus far communicated an intent to unilaterally terminate the Compacts—in fact, the amended 2003 Compacts expressly "[a]ffirm[] the common interests of the United States of America and the [RMI and the FSM] in creating and maintaining their close and mutually beneficial relationship."[129] However, the existence of the unilateral termination provisions means that there is no guarantee that the immigration rights granted to citizens of the FAS under the Compacts will continue to exist long-term.

The relocation of individuals or communities should be "the option of last resort" in responding to the effects of climate change.[130] However, the current projections of sea level rise indicate that there is a strong possibility that many islands in the FAS will lose resources and land mass in the coming century, causing populations living in those areas to relocate elsewhere.[131] If this occurs, the people affected will need significant assistance before, during, and after they relocate, as well as certain basic and guaranteed legal rights. The limitations described above compel the conclusion that if international relocation of a significant number of FAS citizens becomes necessary, the current immigration provisions in the Compacts would be wholly inadequate on their own to respond to such a critical situation.

B. Immigration and Adaptation

An adaptive response to climate change "aims to strengthen the capacity of societies and ecosystems to cope with and adapt to climate change risks and impacts."[132] While the current

129. Compact of Free Association Amendments Act of 2003 pmbl.

130. Barnett & Webber, *supra* note 2, at 27 ("It is notable that the emerging evidence suggests that people are reluctant to move from islands which sustain their material cultures, lifestyles, and identities. There is arguably, therefore, a legal requirement of all parties to the International Covenant on Economic, Social and Cultural Rights to protect the social and cultural rights of people living on atolls through deep cuts in greenhouse gas emissions and a significant effort to enable them to adapt to climate change. Failing this, atoll islands may cease to be able to sustain existing numbers of people, and in the longer-term may be subsumed. In this case, relocation of atoll island communities may be the option of last resort." (citations omitted)).

131. *See supra* Part II.A.

132. Office of the United Nations High Comm'r for Human Rights, Rep. on the

immigration provisions of the Compacts would not be adequately responsive to a situation in which a significant portion of FAS citizens are forced to relocate abroad due to rising sea levels, voluntary migration from the FAS to the United States could form part of a broader adaptive response to climate change in the FAS in the coming decades.

Voluntary migration from the FAS to the United States under the Compacts has the potential to strengthen the adaptive capacity of the FAS as the effects of sea level rise stress the resources and economies of these states.[133] According to a 2010 report issued by the World Bank, "in most cases, and in aggregate, migration seems to contribute positively to the capacity of those left behind to adapt to climate change. It also most often leads to net gains in wealth in receiving areas."[134] While there are significant informational and financial barriers to migration, the long history of migration between the FAS and the United States means that there are developed patterns of migration and FAS migrants in the United States with "knowledge of where to go, how to get there, and ways to make a life upon arrival."[135] The special immigration rights granted to citizens of the FAS under the Compacts also eliminate many of the legal barriers to entering the United States and obtaining employment that immigrants often face.

Voluntary Compact migration could also enhance the adaptive capacity of the FAS by increasing remittances and strengthening social networks. Remittances have been found to "smooth consumption of basic needs such as food across seasons; sustain access to basic needs in times of livelihood shocks, such as drought; finance the acquisition of human, social, physical, and natural capital; and increase demand and so stimulate local production."[136] Prior to the negotiations leading up to the 2003 Compact amendments, officials from the FSM estimated that FSM citizens living in the United States were sending remittances of three to five million dollars back to the FSM.[137] Increased remittances from the

Relationship Between Climate Change and Human Rights, 10th Sess., ¶ 12, U.N. Doc. A/HRC/10/61 (Jan. 15, 2009), *available at* http://www.unhcr.org/refworld/docid/498811532.html.

133. There is a growing body of evidence suggesting "that migration can enhance capacity to adapt to climate change." *See* Barnett & Webber, *supra* note 2, at 22.

134. *Id.*

135. *Id.*

136. *Id.*

137. GAO 2001 MIGRATION REPORT, *supra* note 49, at 3.

United States could ease some of the economic impacts of sea level rise in the FAS. Further, migrants who are able to establish themselves abroad and return to their country of origin "can enhance the adaptive capacity of communities of origin, by: bringing understanding of the world and of climate change risks and response; consolidating social networks; transmitting money and goods; and transferring new skills."[138]

Migration must, of course, form only one part of any response to sea level rise in the FAS. As Philip Muller, the RMI's ambassador to the U.N., stated in 2011, "[L]and is our identity, not an interchangeable commodity," and every effort must be made to ensure the continued existence of islands that are threatened by sea level rise.[139] Given the real and immediate threat of sea level rise to the FAS, the strong relationship that exists between the FAS and the United States, and the absence of international agreements that address human displacement connected with climate change, however, it is time to revisit the immigration provisions of the Compacts against the background of sea level rise to assess the role migration may play in responding to the effects of climate change in the FAS in the coming decades.

IV. CONCLUSION

A one-meter rise in sea level is expected to have a significant impact on population movements throughout the world during the next century. It is widely argued that current immigration and refugee laws do not adequately address human displacement associated with climate change. This is a matter of particular concern for small islands states such as the FAS, as a one-meter rise in sea level poses a threat to the long-term habitability of many coastal regions and low-lying islands within these states. While the FAS have signed Compacts of Free Association with the United States that allow many of their citizens to enter, work, and live in the United States with limited restrictions, the current immigration provisions of the Compacts will be insufficient on their own to address large-scale or permanent, forced migration from the FAS connected with sea level rise. Therefore, agreements or frameworks that address the particular needs and rights of people

138. Barnett & Webber, *supra* note 2, at 23.

139. *Nations Prepare for Climate Change Fight*, THE MARSHALL ISLANDS JOURNAL, June 3, 2011, at 6, 6.

who are permanently displaced from their states due to the effects of climate change must be developed. In the absence of such agreements, voluntary migration from the FAS to the United States under the Compacts has the potential to increase the capacity of the FAS to adapt to the effects of climate change, but it should be only one component of a strategy that prioritizes the rights of the citizens of the FAS to remain in the FAS under safe and sustainable conditions.