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Tides of Climate Change: Protecting the Natural Wealth Rights of Disappearing States

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Worldwide, there are approximately sixty states for which sea level rise is an existential threat. Described as the "sinking island states," these low-lying ocean nations are battling with challenges that no other state has ever experienced. From a legal perspective, for the first time in human history, law must address the legal consequences of state extinction. One aspect of this new phenomenon is the question of what is to happen to the natural resource rights of a state that no longer exists. Much of the discussion surrounding this question is taking place in the abstract, such that scholars assume that complete loss of territory entails loss of statehood and therefore loss of rights to natural wealth.

In this Article, I argue that we cannot assume what needs to be proven. To determine the impact of any legal event on legal rights, one must answer a series of questions pertaining to the nature of the rights, the character of the holder of the rights, the legal relationship that established the rights, and the circumstances that led to the legal event. When applied to the "sinking island states," this analytical framework produces very different results than the ones thus far contemplated. The framework I suggest in this Article, therefore, not only is analytically accurate, but also avoids the unjust outcomes prescribed by contemporary legal discussions about the fate of these disappearing states.

INTRODUCTION

In 2007, a group of five families boarded boats off the coast of Carteret, a small island in the South Pacific. As the boats were sailing away from the island, the passengers gave a long last look at their disappearing home. In their desperate departure, the inhabitants of Carteret joined a rapidly growing class of climate change refugees. Fortunately for the Carteretians, the disappearing island of Carteret is part of Papua New Guinea, whose government resettled the refugees in new territory only a few dozen miles away from their original home.[1]

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1. *See* Dan Box, *Human Tide*, 81 GEOGRAPHICAL: ROYAL GEOGRAPHICAL SOC'Y MAG., Dec. 2009, at 32; Veronika Bilkova, *A State Without Territory?*, 47 NETH. Y.B. INT'L L. 19, 34 (2016); Rosemary Rayfuse, *International Law and Disappearing States: Maritime Zones and the Criteria for Statehood*, 41 ENVTL. POL'Y. & L. 281, 284 (2011). *See generally* John Connell, *Vulnerable Islands: Climate Change, Tectonic*

The option of resettlement as a community in new territory is unavailable for the inhabitants of Small Island Developing States ("SIDS").[2] Worldwide, there are approximately sixty SIDS dispersed among three geographical regions: the Caribbean, the Pacific, and the Atlantic, Indian Ocean, and South China Sea.[3] As low-lying island territories, many SIDS might become uninhabitable or even completely submerged by sea level rise.[4]

The economies of SIDS are mostly coastal and marine-based.[5] Their populations are concentrated in coastal zones,[6] and their remote locations provide them with exclusive access to very large ocean spaces. Despite their small sizes, many SIDS are large ocean nations, with an average ocean space twenty-eight times larger than their land mass.[7] For example, the small archipelago of Kiribati has 3.5 million square kilometers of ocean space, making it the nation with the twelfth largest Exclusive Economic Zone ("EEZ") in the world.[8] It is no surprise then that SIDS are heavily dependent on coastal and marine resources and that the fishing industry is a major source of nutrition and revenue for SIDS.[9]

The threat of disappearance has contributed to SIDS' image as the poster child or "canary in the coalmine" of the imminent threat to human society posed by climate change.[10] One issue that is troubling SIDS is the question of what is to happen to SIDS' rights to natural wealth, and specifically the most valuable national asset of SIDS, their resource-rich EEZs.[11] According

Change, and Changing Livelihoods in the Western Pacific, 27 CONTEMP. PAC. 1 (2015); Derek Wong, *Sovereignty Sunk? The Position of 'Sinking States' at International Law*, 14 MELB. J. INT'L L. 346, 359 (2013).

2. *See* Rayfuse, *supra* note 1, at 284.

3. Because there are no official criteria for defining SIDS, the number of SIDS in academic literature varies. Most accounts list between fifty to sixty countries as SIDS. *See* U.N. Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States [hereinafter UN-OHRLLS], Small Island Developing States in Numbers Climate Change Edition 5, 40–41 (2015), https://perma.cc/4A62-HRAP [hereinafter UN-OHRLLS 2015]; UN-OHRLLS, Small Island Developing States: Small Islands Big(ger) Stakes 2, 26–27 (2011), https://perma.cc/M3DY-LM3J [hereinafter UN-OHRLLS 2011].

4. *See* Jenny Grote Stoutenburg, *Implementing a New Regime of Stable Maritime Zones to Ensure the (Economic) Survival of Small Island States Threatened by Sea-Level Rise*, 26 INT'L J. MAR. & COASTAL L. 263, 265 (2011); LEONARD A. NURSE & ROGER F. MCLEAN, CLIMATE CHANGE 2014—IMPACTS, ADAPTATION, AND VULNERABILITY: PART B: REGIONAL ASPECTS 1618 (Thomas Spencer & Kazuya Yasuhara eds., 2014).

5. *See* Maxine Burkett, *The Nation Ex-Situ: On Climate Change, Deterritorialized Nationhood and the Post-Climate Era*, 2 CLIMATE L. 345, 351 (2011).

6. *See* UN-OHRLLS 2011, *supra* note 3, at 6.

7. *See* UN-OHRLLS 2015, *supra* note 3, at 12–14.

8. *See* ASIAN DEV. BANK, PACIFIC ECON. MONITOR 31 (July 2016).

9. *See* Global Conference on the Sustainable Development of Small Island Developing States, *Programme of Action for the Sustainable Development of Small Island Developing States*, U.N. Doc. A/Conf.167/9 (May 6, 1994); UN-OHRRLS 2015, *supra* note 3; FORUM COMMUNIQUE, FORTIETH PACIFIC ISLANDS FORUM para. 15 (2009).

10. Jane McAdam, *'Disappearing States', Statelessness and the Boundaries of International Law*, *in* CLIMATE CHANGE AND DISPLACEMENT: MULTIDISCIPLINARY PERSPECTIVES 105, 107 n.10 (Jane McAdam ed., 2010).

11. The EEZ is an ocean area in which a state has exclusive rights to exploit and use resources. It stretches from the coastline out to 200 nautical miles. Ninety percent of the world's fish catch are contained in EEZs. *See* Peter H. Sand, *Sovereignty Bounded: Public Trusteeship for Common Pool Resources?*, 4

to conventional legal thinking, SIDS' rights to maintain their EEZs will extinguish as the oceans cover SIDS' territories. Two legal theories support this result. Under the Montevideo Convention on the Rights and Duties of States ("Montevideo Convention"),[12] territory is a criterion for statehood.[13] No territory, scholars argue, means no state, and therefore no national EEZ rights.[14] Alternatively, according to the 1982 United Nations Convention on the Law of the Sea ("UNCLOS"),[15] the international legal instrument that introduced EEZs, an island territory that "cannot sustain human habitation or economic life of [its] own shall have no [EEZ]."[16] Commentators therefore argue that when sea level rise renders SIDS territory "barren rocks," the EEZ rights of SIDS will cease to exist.[17]

For SIDS, the issue of losing EEZ rights is intertwined with the question of political and communal survivability.[18] For four decades, SIDS have been trying to avoid piecemeal migration and secure territory in other countries

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Global Envtl. Pol. 47, 47 (2004). For a general discussion concerning the richness of natural resources in EEZ and the outer continental shelf and their importance to SIDS' economies, see Ann Powers & Christopher Stucko, *Introducing the Law of the Sea and the Legal Implications of Rising Sea Levels*, *in* Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate 123, 131–32 (Michael B. Gerrard & Gregory E. Wannier eds., 2013).

12. Montevideo Convention on the Rights and Duties of States, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19 [hereinafter Montevideo Convention].

13. *See* McAdam, *supra* note 10, at 109–10.

14. *See* Krystyna Marek, Identity and Continuity of States in Public International Law 7 (1968) ("a State would cease to exist . . . if its territory were to disappear (e.g. an island which would become submerged)"); Sumudu Atapattu, *Climate Change: Disappearing States, Migration, and Challenges for International Law*, 4 Wash. J. Envtl. L. & Pol'y. 1, 19 (2014); *see also* David D. Caron, *When Law Makes Climate Change Worse: Rethinking the Law of Baselines in Light of a Rising Sea Level,* 17 Ecology L.Q. 621, 650 (1990); Alberto Costi & Nathan Jon Ross, *The Ongoing Legal Status of Low-Lying States in the Climate-Change Future*, *in* Small States in a Legal World 101, 112–13 (Petra Butler & Caroline Morris eds., 2017); Emily Crawford & Rosemary Rayfuse, *Climate Change and Statehood*, *in* International Law in the Era of Climate Change 243 (Rosemary Rayfuse & Shirley V. Scott eds., 2012); Abhimanyu George Jain, *The 21st Century Atlantis: The International Law of Statehood and Climate Change Induced Loss of Territory*, 50 Stan. J. Int'l L. 1, 7 (2014); Rosemary Rayfuse, *W(h)ither Tuvalu? International Law and Disappearing States*, U.N.S.W. Fac. L. Res. Series No. 9 (Apr. 1, 2009); Rayfuse, *supra* note 1, at 284; A.H.A Soons, *The Effects of a Rising Sea Level on Maritime Limits and Boundaries*, 37(2) Neth. Int'l. L. Rev. 207, 230 (1990); Jenny Grote Stoutenburg, *When Do States Disappear? Thresholds of Effective Statehood and the Continued Recognition of "Deterritorialized" Island States*, *in* Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate, *supra* note 11, at 57, 60–63, 71; Stoutenburg, *supra* note 4, at 265 n.11; Lilian Yamamoto & Miguel Esteban, *Vanishing Island States and Sovereignty*, 53 Ocean & Coastal Mgmt. 1, 21–22 (2009).

15. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

16. *Id.* at art. 121(3).

17. *See* Rayfuse, *supra* note 1, at 282; Soons, *supra* note 14, at 216–17; Stoutenburg, *supra* note 4, at 267–68.

18. *See* Susin Park (Head of U.N. High Comm'r for Refugees Office of Switzerland and Liechtenstein), *Climate Change and the Risk of Statelessness: The Situation of Low-Lying Island States*, U.N. Doc. PPLA/2011/04, at 12–13 (May 2011). In international law, issues of preservation of statehood in the face of extreme threats to sovereignty are addressed through the principle of state continuity. This Article is concerned with the vindication of SIDS' rights to natural wealth using the legal vehicle of EEZs. I use the term "survivability" to refer to preservation of natural wealth rights and "continuity" to refer to preservation of statehood post-submergence.

to which they can safely relocate their population.[19] Maintenance of EEZ rights post-relocation will greatly increase SIDS' prospects to secure alternative territory;[20] it may also serve as an economic foundation for relocated SIDS communities.[21]

In this Article, I argue that the current international legal framework is not designed for and does not contemplate complete loss of national territory due to sea level rise. A contextual and purpose-oriented reading of the two dominant international legal frameworks governing statehood and EEZs reveals that they are unable to generate adequate answers to questions of state extinction and, more specifically, EEZ survivability. The Montevideo Convention is a treaty concerned with the creation of states in international law, not the termination of already-recognized states. Montevideo-based discourses about the disappearance of states are unsupported by the Convention's text or purpose and conflict with public international law's firmly established principle of state continuity. The legal regime established under UNCLOS is concerned with the apportionment of maritime entitlements between political entities, not the divestment of such rights in catastrophes. Finding that the current international legal framework is ill-suited to address the question of state continuity and EEZ survivability, I approach the question *de novo*.

To generate answers to the questions underlying the issue of EEZ survivability, we must first understand the legal nature of EEZs. I perform a historical legal analysis of EEZs' origins and character. My analysis reveals that EEZs are fiduciary arrangements designed to safeguard the collective rights of the 'people.' By identifying that EEZ rights belong to the 'people' and not the state, I demonstrate that the academic focus on statehood is misguided. Because rights in the EEZ vest in the 'people,' only the disappearance of the 'people' entails loss of EEZ rights. I then engage in a positive analysis of the right to self-determination, concluding that complete loss of territory is not a legal event that terminates the legally recognized collective identity of the people. Based on this understanding, I develop institutional arrangements and legal remedies to safeguard the EEZ rights of the people of SIDS.

The Article proceeds as follows. Part I discusses the legal problem addressed in this Article. I examine the Montevideo-based view that loss of

19. *See* Bilkova, *supra* note 1, at 36; Costi & Ross, *supra* note 14, at 114–15; McAdam, *supra* note 10, at 122; Geoffrey Palmer, *Small Pacific Island States and the Catastrophe of Climate Change*, *in* SMALL STATES IN A LEGAL WORLD 3, 9 (Petra Butler & Caroline Morris eds., 2017); Rayfuse, *supra* note 1, at 284–85.

20. *See* Valentina Baiamonte & Chiara Redaelli, *Small Islands Developing States and Climate Change: An Overview of Legal and Diplomatic Strategies*, J. PUB. & INT'L AFF. 6, 18–19 (2017) (discussing the asymmetry in climate change impacts that weakens SIDS' bargaining power in global politics).

21. *See id.* at 13 (describing Kiribati's purchase of land in Fiji and India's attempt to achieve access to the Maldives' EEZ in return for allowing the government of the Maldives to acquire land in India for the safe relocation of its population in the event of sea level rise); *see also* McAdam, *supra* note 10, at 122, 127–28; Rayfuse, *W(h)ither Tuvalu?*, *supra* note 14, at 12.

territory entails loss of sovereignty and argue that this view is theoretically and empirically flawed. It is theoretically flawed because it is based on a misguided reading of the Montevideo Convention as providing for state-annulment. It is empirically flawed because there have been numerous instances in international law of states that maintained sovereignty despite losing one or more of the indicia of statehood. I then critically engage the view that EEZ rights will extinguish upon complete loss of territory. I examine the premises of UNCLOS, the purposes underlying the pertinent provisions, and the approaches taken to address geographical instability by the framers of UNCLOS. My analysis demonstrates that UNCLOS is an instrument for apportioning maritime rights between sovereign political entities, not divesting rights in catastrophes.

In Part II, I perform a historical legal analysis of maritime entitlements. This analysis identifies two competing legal theories of EEZ rights: a naturalist property theory of communal ownership and a positivist theory of sovereign rights. I demonstrate that both theories classify an EEZ as a fiduciary relationship, in which the state manages the EEZ on behalf of the people. Part III engages the question of EEZ survivability through the prism of trust law. I demonstrate that when applied to EEZs, the conceptual framework of trusts indicates that rights in EEZs belong to the 'people,' not the state. Thus, only the disappearance of the 'people' will entail loss of EEZ rights. I then perform a legal analysis examining whether complete loss of territory necessarily means disappearance of the 'people.' I find that there are strong arguments supporting continuity of the 'people' of SIDS post-submergence. The Article concludes with proposed institutional arrangements and legal remedies to protect the EEZ rights of the people of SIDS post-submergence.

I. The Myths of Legal Disappearance

A. *The Flaws of Montevideo Criteria in Determining State Continuity*[22]

According to customary international law, for an entity to be recognized as a state, it must meet four requirements known as the Montevideo Criteria.[23] The requirements are: permanent population, defined territory, effec-

22. This section critiques the argument that statehood or sovereignty will be lost upon complete loss of territory. Using existing scholarship on the potential effects of sea level rise on SIDS' sovereignty, I demonstrate that the link between territory and legal personality in international law is not as significant as some scholars assume. Since the argument is developed in the context of EEZ survivability, it does not purport to exhaust all issues underlying the complex question of how loss of territory affects sovereignty. For further reading on these issues, see generally Burkett, *supra* note 5; Costi & Ross, *supra* note 14; Jacquelynn Kittel, *The Global "Disappearing Act": How Island States Can Maintain Statehood in the Face of Disappearing Territory*, 2014 Mich. St. L. Rev. 1207, 1220 (2014); McAdam, *supra* note 10; Stoutenburg, *When Do States Disappear?*, *supra* note 14.

23. *See* Kittel, *supra* note 22, at 1220; *see also* Malcolm N. Shaw, International Law 144 (7th ed. 2014); Gregory E. Wannier & Michael B. Gerrard, *Disappearing States: Harnessing International Law to*

tive government, and capacity to enter into relations with other states.[24] Considering the Montevideo Criteria in the abstract, one might conclude that SIDS will lose statehood once one of the four indicia of statehood is lost. For instance, an island state would fail to meet all requirements when its territory becomes uninhabitable and therefore it can no longer support the existence of permanent population within its borders. This view, which dominates global political discourse on climate change and SIDS, has also been advanced by several legal scholars.[25]

However, the issue of state continuity is more complex than a simplistic reading of the Montevideo Convention suggests. The norms of international law that determine the status of states were developed in the context of creating new states, not as mechanisms for determining the continuity of already-recognized states.[26] Unlike the question of establishing statehood, the issue of continuity of an existing state is a different legal question.[27] The problem with trying to answer this question is that involuntary state 'extinction' is unknown to modern international law. Indeed, since the establishment of the United Nations in 1945, there has not been a single case of involuntary state extinction;[28] there is no international law of state extinction.[29] Moreover, there are no precedents, no rules, no authority, and no legal custom addressing climate-induced loss of statehood.[30] Thus, not only is there no legal basis for the assumption of state disappearance, but also "to assume that sovereignty is lost with state disappearance retards the potential for creative solutions to an entirely novel problem."[31]

International law is premised on the principle of state continuity, whereby a state, once recognized in international law, continues to exist indefinitely.[32] The identity of a state may change; its name, borders, population, and form of government are all subject to change. But its status as a state is not.[33] The fundamental principle of state continuity works against an *a priori* assumption of climate-induced state extinction. It is the reason why many states have continued to exist in international law, despite drastic

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Preserve Cultures and Society, *in* 1 CLIMATE CHANGE: INTERNATIONAL LAW AND GLOBAL GOVERNANCE: LEGAL RESPONSES AND GLOBAL GOVERNANCE 615, 620 (Oliver C. Ruppel et al. eds., 2013); Baiamonte & Redaelli, *supra* note 20, at 8.

24. Montevideo Convention, *supra* note 12, art. 1.

25. *See, e.g.*, *supra* note 14 and accompanying text; *see also* EDWIN EGEDE & PETER SUTCH, THE POLITICS OF INTERNATIONAL LAW AND INTERNATIONAL JUSTICE 103 (2013); Wannier & Gerrard, *supra* note 23, at 620–23.

26. *See* Costi & Ross, *supra* note 14, at 101–02; Jain, *supra* note 14, at 28–29.

27. *See* Costi & Ross, *supra* note 14, at 110; Jain, *supra* note 14, at 28–29.

28. *See* McAdam, *supra* note 10, at 110–11.

29. *See* JAMES R. CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 715 (2007); Atapattu, *supra* note 14, at 18–19; *see also* Costi & Ross, *supra* note 14, at 102; Park, *supra* note 18, at 6.

30. *See* Atapattu, *supra* note 14, at 18–19; Baiamonte & Redaelli, *supra* note 20, at 9; Costi & Ross, *supra* note 14, at 103, 114; Jain, *supra* note 14, at 31; Park, *supra* note 18, at 6.

31. Costi & Ross, *supra* note 14, at 103, 113.

32. *See* CRAWFORD, *supra* note 29, at 667–68.

33. *See id.*

changes in their government, territory, population, or international relations.[34]

The history of international law is replete with examples of recognized states that at one time, or even continually, have failed to meet one or more of the Montevideo Criteria. The reason is that "[a] State is not necessarily extinguished by substantial changes in territory, population or government, or even, in some cases, by a combination of all three."[35] For instance, Poland maintained its status as a state during the Second World War despite being occupied by the Soviet Union and Germany and having no territory and no effective government.[36] The government of Poland established itself in exile, a common practice in international law for recognizing a state while its government is detached from its territory.[37] Similarly, SIDS' governments could maintain legal personality as governments in exile,[38] as was the case with Czechoslovak National Council or the Polish National Committee during the First World War.[39] Indeed, "nothing in international law prevents *ex-situ* continuity of sovereignty."[40]

Some writers have suggested that SIDS establish a confederacy with another state,[41] or that other states cede territory to a threatened island for its continued existence.[42] In these cases, "pre-existing maritime zones would continue to remain effective."[43] Bolder scholars have advanced the idea of deterritorialized states.[44] Rayfuse offers the example of the Sovereign Order of Malta as a precedent for a deterritorialized sovereign entity recognized indefinitely in international law, as well as the example of the Holy See between 1870 and 1929.[45] Burkett suggests a new concept of international

34. *See id.*

35. *Id.* at 700.

36. The Polish government in exile was recognized as the sovereign *ex-situ* of Poland. *See* Costi & Ross, *supra* note 14, at 113; CRAWFORD, *supra* note 29, at 522, 702.

37. *See* Costi & Ross, *supra* note 14, at 113; Rosemary Rayfuse, *International Law and Disappearing States: Utilising Maritime Entitlements to Overcome the Statehood Dilemma*, *U.N.S.W. L. Res. Paper No. 2010-52,* at 10–11 (2010); Stoutenburg, *When Do States Disappear?*, *supra* note 14, at 68.

38. Provided that they are hosted by a third state that allows them to act as governments in exile. *See* Stoutenburg, *When Do States Disappear?*, *supra* note 14, at 68–70; Park, *supra* note 18, at 12–13.

39. *See* Stoutenburg, *When Do States Disappear?*, *supra* note 14, at 70. *But cf.* Bilkova, *supra* note 1, at 29 (arguing that neither was a fully sovereign state during the times they lacked territory).

40. Costi & Ross, *supra* note 14, at 113.

41. *See* Rayfuse, *supra* note 37, at 8–9.

42. *See id.*; Park, *supra* note 18, at 17–18.

43. Rayfuse, *supra* note 37, at 8–9.

44. *See* Burkett, *supra* note 5, at 356; Costi & Ross, *supra* note 14, at 113; Wannier & Gerrard, *supra* note 23, at 623–27. *But cf.* Bilkova, *supra* note 1 (arguing that while the concept of deterritorialized states is theoretically plausible, it will introduce substantial legal challenges).

45. Rayfuse, *supra* note 37, at 10. Established in Jerusalem in 1099, the Sovereign Military Order of Malta is a Christian humanitarian chivalric order. It has a government and constitution, but no territory. Its "citizens" are the Knights and Dames of the Order. The Order maintains international relations with states, has ambassadors, and is a permanent observer at the United Nations. During the period between 1870 and 1929, the Holy See had no territory but maintained diplomatic relations and enjoyed recognition from other states as a sovereign entity. *See* Wannier & Gerrard, *supra* note 23, at 623–24. Costi and Ross use the same examples to support their argument in favor of a non-state sovereign entity of interna-

law which she terms the *Nation Ex-situ*, an evolutionary legal entity that builds on past experience with governments in exile, occupied indigenous communities, and other non-territorial international entities.[46] Stoutenburg has observed that the Vatican is considered a state despite having no permanent population[47] and that many failed states have enjoyed continued recognition while having no effective government.[48] In fact, Congo gained recognition as a state while having no effective government.[49]

The main reason for continued recognition of failed and incapacitated states is the refusal of international law to recognize situations "brought about in contravention to fundamental principles of international law."[50] The defense of statehood in such cases is not merely a pragmatic policy aimed at deterring unacceptable use of force but rather a substantive legal doctrine grounded in the protection of individual and collective human rights.[51] Since complete submergence poses unprecedented threats to individual and collective human rights, the doctrine could be invoked by SIDS to support post-submergence maintenance of statehood.[52] Furthermore, several scholars have argued that the failure of the international community to reduce greenhouse gases to a level that will not endanger SIDS constitutes a violation of obligatory norms of international law.[53] Thus, SIDS could argue that their statehood should be preserved post-submergence, because statehood is "presumed to persist when challenged by a wrong at international law."[54]

The novelty of the problem and the complexity of the underlying considerations make predictions about the future of SIDS' statehood conjectural at

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tional law. Costi & Ross, *supra* note 14, at 123–25. *But cf.* Bilkova, *supra* note 1, at 32 (arguing that both examples are of non-state legal persons of international law).

46. Burkett, *supra* note 5, at 356–63.

47. The State of the Vatican population is comprised of officials temporarily residing within its borders. Their 'nationality' terminates when they no longer hold office. *See* Stoutenburg, *When Do States Disappear?*, *supra* note 14, at 66.

48. *See id.* at 69.

49. Congo gained recognition as a state while being in a state of internal civil war with various secessionary movements fighting over power and two separate governments, each claiming to be the lawful government. *See* Crawford, *supra* note 29, at 56–57.

50. Jenny Grote Stoutenburg, Disappearing Island States in International Law 265 (2015); *see also* Wannier & Gerrard, *supra* note 23, at 627–28.

51. *See* Costi & Ross, *supra* note 14, at 114.

52. *See* Wannier & Gerrard, *supra* note 23, at 629.

53. Since the most influential states in geopolitics are also the biggest emitters of greenhouse gases, the consensual international legal regime surrounding climate change was developed around the notion of "common but differentiated responsibilities." Benoît Mayer, *The Relevance of the No-Harm Principle to Climate Change Law and Politics*, 19 Asia Pac. J. Int'l L. 79, 80 (2016). However, as recently observed by Mayer, obligatory norms such as the "no harm rule" exist separately from international agreements and are therefore applicable to any state action (or inaction). *See id.* at 86; *see also* Stoutenburg, *When Do States Disappear?*, *supra* note 14, at 72–76. For a general discussion of obligatory norms in international law and the duties they impose on states in the context of climate change, see generally Int'l Law Ass'n, *Declaration of Legal Principles Relating to Climate Change*, Res. 2/2014 (Apr. 7–11, 2014); Expert Group on Global Climate Obligations, Oslo Principles on Global Climate Change Obligations (Mar. 1, 2015); Jain, *supra* note 14, at 10–11.

54. Costi & Ross, *supra* note 14, at 114.

best. The discussions conducted by scholars concerning SIDS' statehood are at the forefront of international law and beyond the scope of this Article.[55] While the exact time of state termination is indeterminate, history and precedent make it likely that SIDS' statehood will be maintained at least as long as there is some population on SIDS territory and probably for a period of time thereafter. Indeed, indicia of statehood could be maintained through governance, distinct population, and international relations, even if these are exercised on an alternative territory.[56]

B. The Inadequacy of UNCLOS in Determining EEZ Survivability[57]

The concept of EEZ was introduced in 1982 by UNCLOS States Parties.[58] UNCLOS Articles 56 and 57 provide that coastal states have exclusive economic rights in an area that extends no more than 200 nautical miles from their coastlines.[59] Known as "the constitution of the oceans,"[60] UNCLOS has obtained almost universal ratification with 157 State signatories.[61] Even the few states that did not ratify UNCLOS—for example, the United States—follow and apply most of the provisions of UNCLOS.[62] Based on its widespread acceptance in law and practice, many scholars agree that the

55. *See supra* note 22 and accompanying text.

56. *See* McAdam, *supra* note 10, at 117 ("[I]t is unlikely that small island States will readily relinquish their claims to statehood. State practice suggests that the international community would be willing to continue to accept maintenance of the status quo (recognition of ongoing statehood) even when the facts no longer seem to support the state's existence."); Rayfuse, *supra* note 37, at 8–9 (providing the 1870s example of New Iceland).

57. I do not address the question of "baselines" under UNCLOS Article 5. The issue of whether the EEZ will recede as sea levels rise has been discussed at length by other scholars. There are very strong arguments supporting a reading of UNCLOS as providing for permanent baselines. *See, e.g.*, David A. Caron, *Climate Change, Sea Level Rise and the Coming Uncertainty in Oceanic Boundaries: A Proposal to Avoid Conflict*, *in* 65 Publications on Ocean Development: Maritime Boundary Disputes, Settlement Processes, and the Law of the Sea 1 (Seoung-Yong Hong & Jon M. Van Dyke eds., 2008); Moritaka Hayashi, *Sea Level Rise and the Law of the Sea: Legal and Policy Options*, *in* Proceedings of the International Symposium on Islands and Oceans 78, 83 (Terashima ed., 2009); Jose Luiz Jesus, *International Tribunal for the Law of the Sea*, *in* Governing Ocean Resources: New Challenges and Emerging Regimes: A Tribute to Judge Choon-Ho Park 25 (Van Dyke et al. eds., 2013); Clive Schofield & David Freestone, *Options to Protect Coastlines and Secure Maritime Jurisdictional Claims in the Face of Global Sea Level Rise*, *in* Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate 141, 153–63 (Michael B. Gerrard & Gregory. E. Wannier eds., 2013); Soons, *supra* note 14.

58. *See* Stoutenburg, *supra* note 4, at 266.

59. UNCLOS, *supra* note 15, arts. 56(1)–57, 67.

60. Ambassador Tommy T.B. Koh, President of the Third United Nations Conference on the Law of the Sea, A Constitution for the Oceans, Address at the Conference at Montego Bay (Dec. 6 and 11, 1982), https://perma.cc/8L34-VZ9E.

61. For a list of UNCLOS signatories, see United Nations Treaty Collection, *Status of Treaties: United Nations Convention on the Law of the Sea*, https://perma.cc/Z6F5-MZVB (last visited Jan. 30, 2018).

62. *See* Ryan P. Kelley, *UNCLOS, but No Cigar: Overcoming Obstacles to the Prosecution of Maritime Piracy*, 95 Minn. L. Rev. 2285, 2296–97 (2011); Wannier & Gerrard, *supra* note 23, at 630.

concept of 200-nautical-miles EEZ has been established as a customary norm of international law.[63]

UNCLOS Article 121(3) provides that "[r]ocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf."[64] Although controversial because of its ambiguity,[65] the language of Article 121(3) suggests that long before SIDS' territories submerge, SIDS will lose their EEZs and continental shelves.[66] Sea level rise is a process, not a one-time event. Before sovereign countries sink into the ocean, nature will first take its toll, gradually eroding their islands' viability as life-supporting ecosystems.[67] Coastal erosion, king tides, soil salination, and increases in the rate and magnitude of storms will probably render SIDS territory uninhabitable long before the last grain of SIDS soil disappears into the ocean.[68]

The ambiguous language of Article 121(3) makes it difficult to provide definitive answers to the question of whether SIDS will lose their EEZs with the loss of habitation capacity. Article 121(1) defines an island for the purposes of UNCLOS as "a naturally formed area of land, surrounded by water, which is above water at high tide."[69] Article 121(3) explains that a barren rock cannot be recognized as an island, but neither Article 121(1) nor Article 121(3) determine the conditions for stripping an already-recognized island-state of its established rights.[70] As an instrument of maritime law,

63. *See* James E. Bailey III, *The Exclusive Economic Zone: Its Development and Future in International and Domestic Law*, 45 La. L. Rev. 1269, 1282 (1985); Cisse Yacouba & Donald McRae, *The Legal Regime of Maritime Boundary Agreements*, *in* International Maritime Boundaries 42 (Colson & Smith eds., 2005).

64. UNCLOS, *supra* note 15, art. 121(3).

65. The exact meaning of Article 121(3) is yet to be settled. Article 121(3) introduced the qualification that only an island capable of sustaining human habitation and economic life of its own is entitled to an EEZ. The "habitation potential" requirement represents a drastic departure from custom and treaty as existed prior to UNCLOS. The language of the provision does not provide definitive answers as to what qualifies as "human habitation," "economic life," or "of their own." Unlike other provisions of UNCLOS, Article 121 did not receive much attention during negotiations. Repeated requests from participants to the deliberations to provide more context and avoid using ambiguous terms were not heeded. The textual difficulties and the contextual challenges introduced by Article 121(3) have led scholars to doubt the value of consensus reached in UNCLOS as it applies to Article 121(3). Unlike other provisions of UNCLOS, Article 121(3) is not considered customary international law and its exact meaning is left to be revealed through states' practices in the future. *See* E.D. Brown, *Rockall and the Limits of National Jurisdiction of the UK: Part I*, 2 Marine Pol'y 181, 205–06 (1978); Jonathan I. Charney, *Rocks that Cannot Sustain Human Habitation*, 93 Am. J. Int'l L. 863, 866 (1999); Alex G. Oude Elferink, *Clarifying Art. 121(3) of the Law of the Sea Convention: The Limits Set by the Nature of International Legal Processes*, 6 Boundary & Sec. Bulletin 58, 59 (1998); Barbara Kwiatkowska & Alfred H.A. Soons, *Entitlement to Maritime Areas of Rocks Which Cannot Sustain Human Habitation or Economic Life of Their Own*, 21 Neth. Y.B. Int'l L. 139, 140–43 (1990).

66. *See* Schofield & Freestone, *supra* note 57, at 147; Yamamoto & Esteban, *supra* note 14, at 4–6; *see also* Stoutenburg, *supra* note 4, at 268; Rayfuse, *W(h)ither Tuvalu?*, *supra* note 14, at 6–7.

67. *See* Baiamonte & Redaelli, *supra* note 20, at 6–7.

68. *See* Jain, *supra* note 14, at 4–6; McAdam, *supra* note 10, at 108–09.

69. UNCLOS, *supra* note 15, art. 121(1).

70. This line of reading of Article 121 has been advanced by Japan in its dispute with China over sovereignty in the South China Sea. *See* Yamamoto & Esteban, *supra* note 14, at 5.

UNCLOS assumes statehood. UNCLOS was entered into by sovereign states and is aimed at regulating relationships between sovereign states. Because sovereignty is a starting point for UNCLOS, the concern of Article 121(3) is simply to determine the boundaries of the existing and undisputed sovereignty of member states.[71] It is a check against invalid extensions of sovereignty, not a mechanism for divesting established sovereign rights.[72]

Additionally, as explained by Judge José Luiz Jesus of the International Tribunal for the Law of the Sea, the notion of sea level rise and its potential implications on maritime boundaries did not occupy the minds of the parties who negotiated UNCLOS.[73] Since the drafters of UNCLOS did not contemplate sea level rise, they could not have intended the conditions for EEZ recognition to be applied for widespread annulment.[74] Indeed, the text of UNCLOS does not provide for divestment. In the absence of language supporting divestment, it would be a fallacy to assume that the drafters of UNCLOS intended that the language of apportionment be also read as providing for divestment.

This reading is supported by Article 76(9), which provides that "[t]he coastal State shall deposit with the Secretary-General of the United Nations charts and relevant information, including geodetic data, permanently describing the outer limits of its continental shelf . . . ."[75] A reading of Article 121(3) as allowing for the annulment of outer continental shelf boundaries is in direct conflict with the text of Article 76(9) that provides for permanent affixing of continental shelf boundaries.[76]

Furthermore, in cases where UNCLOS parties were confronted with unstable coastlines, they opted for fixed boundaries. UNCLOS Article 7(2) provides that "[w]here because of the presence of a delta *and other natural conditions* the coastline is highly unstable . . . [boundaries] . . . shall remain effective."[77] The parties to UNCLOS fixed the boundaries of naturally shifting coastlines and the outer continental shelf to maintain certainty, provide

71. *See* Maritime Delimitation and Territorial Questions (Qatar v. Bahr.), Judgment, 2001 I.C.J. 40, ¶ 185 (Mar. 16) (explaining that maritime rights derive from a state's sovereignty and that under Article 121 the "territorial situation" of the state is relevant for determining the *extent* of maritime rights).

72. *See* Charney, *supra* note 65, at 866.

73. Jose Luiz Jesus, *Rocks, New-Born Islands, Sea Level Rise and Maritime Space*, *in* NEGOTIATING FOR PEACE 579, 601 (Joachim Abr. Frowein et al. eds., 2003).

74. *See id.*

75. UNCLOS, *supra* note 15, art. 76(9).

76. *See* Wannier & Gerrard, *supra* note 23, at 631. The contradiction does not arise under a non-divesting reading of Article 121(3). The divesting interpretation of Article 121(3) is also in conflict with UNCLOS objectives of conservation of resources and promotion of efficiency, because it introduces incentives for artificial preservation of islands that are in danger of inundation. *See* Palmer, *supra* note 19, at 9–10 (discussing the Maldives examination of the option of man-made island protection which will cost the United States $6 billion); *see also* Costi and Ross, *supra* note 14, at 105. For a discussion of UNCLOS objectives, see *infra* notes 270–273 and accompanying text.

77. UNCLOS, *supra* note 15, art. 7(2) (emphasis added).

stability, and avoid conflicts.[78] Under UNCLOS, certainty, stability, and peace trump geographical vicissitudes.[79]

UNCLOS is designed to regulate relationships between sovereign states, not to determine issues associated with loss of sovereignty.[80] Maritime entitlements are assumed to exist *ab initio* as rights of member states whose sovereignty is a prerequisite for UNCLOS.[81] UNCLOS is therefore a primary source for answering questions about the interpretation, apportionment, and extent of maritime entitlements, but it cannot answer questions of survivability.[82]

C. On the Survivability of Legal Rights

In law, loss of legal personality does not necessarily entail loss of rights associated with the personality. Testate and intestate succession are universal examples of the survival of legal rights when the legal person who held the rights has ceased to exist.[83] Some rights are terminated upon death, while other rights survive.[84] Moreover, some rights not only survive death but continue to be interpreted and enforced in light of the deceased's interests.[85] International copyright law provides 50 years' post-mortem protection to works created by individual authors, with many countries applying longer terms.[86] In business law, a defunct corporation may be revived years after its

78. In its preamble, UNCLOS sets forth its general objectives of "strengthening of peace, security, cooperation and friendly relations among all nations." UNCLOS, *supra* note 15, pmbl. For a discussion of the relationship between stable boundaries and peace, see Caron, *supra* note 57, at 13–14; Jesus, *supra* note 73, at 593; Stoutenburg, *supra* note 4, at 271.

79. UNCLOS, *supra* note 15, pmbl; *see also* Stoutenburg, *supra* note 4, at 273–74 (arguing that UNCLOS introduced a legal trend departing from the naturalist principle of the law of the sea that "the land dominates the sea" in favor of a more positivist approach that grants authority over maritime spaces "irrespective of their adjacency to land territory").

80. *See* Jain, *supra* note 14, at 36 (arguing that UNCLOS "provides the legal basis for the international regime governing marine spaces and resources" and as such, UNCLOS is concerned with "mere[ ] entitlements of subjects of international law." These entitlements are secondary to "rights associated with statehood . . . the very basis of international legal personality."). Jain argues that there can be no maritime entitlements for a submerged island under UNCLOS. His argument is rigidly textual, hardly comprehensive, and does not engage the underlying purpose of the relevant UNCLOS provisions.

81. *See* Lea Brilmayer & Natalie Klein, *Land and Sea: Two Sovereignty Regimes in Search of a Common Denominator*, 33 N.Y.U. J. INT'L L. & POL. 703, 710 (2001).

82. *See* Costi & Ross, *supra* note 14, at 112.

83. The concept of succession after death is universal, existing in civil law, common law, canon law, Jewish law, Sharia law, and traditional Chinese law. *See, e.g.*, Robert M. Marsh, *Weber's Misunderstanding of Traditional Chinese Law*, 106 AM. J. SOC. 281, 286 (2000); George A. Pelletier Jr. & Michael Roy Sonnenreich, *A Comparative Analysis of Civil Law Succession*, 11 VILL. L. REV. 323 (1966); Shahbaz Ahmad, *Cheema, Shia and Sunni Laws of Inheritance: A Comparative Analysis*, 10 PAK. J. ISLAMIC RES. 69 (2012); Mary F. Radford, *The Inheritance Rights of Women Under Jewish and Islamic Law*, 23 B.C. INT'L & COMP. L. REV. 135 (2000).

84. Certain contractual rights (*e.g.*, pension payments), classes of property rights (*e.g.*, joint tenancy), and entitlements (*e.g.*, social security payments) extinguish upon death.

85. *See* Kirsten Rabe Smolensky, *Rights of the Dead*, 37 HOFSTRA L. REV. 763, 771 (2009).

86. *See* Lisa M. Brownlee, *Recent Changes in the Duration of Copyright in the United States and European Union: Procedure and Policy*, 6 FORD. INTELL. PROP. MEDIA & ENT. L.J. 579, 584–85, 589 (1996).

termination and immediately regain its rights, as if it never ceased to exist.[87] In international law, a state can disappear and reemerge with the same rights it held before it was terminated.[88] In the 1938 *Anschluss*, Austria ceased to exist as a state.[89] It reemerged in 1946, reasserting the rights it held as a 'person' in international law before its termination.[90] Similarly, the Baltic states reappeared in the 1990s after fifty years of non-existence, reasserting the rights they held prior to their disappearance.[91] When a state is succeeded by another state, the new state inherits the rights, interests, property, and duties of the extinct state.[92]

If we follow standard legal analysis, the question of whether a right survives loss of legal personality is often contingent on the classification of the right. For example, in private law, a personal right extinguishes with death, a non-personal right does not.[93] A similar distinction cannot be found in public international law, because states do not have personal rights. But international law does distinguish between state and sovereign rights. The two Vienna Conventions on Succession of States govern the transfer of rights and interests from predecessor states to successor states.[94] As sovereign rights, natural wealth rights are not affected by the provisions of the Vienna Conventions.[95]

We cannot assume what needs to be proven—that if there is no state, there are no rights. To determine survivability of EEZ rights, we must identify the holder of the rights and the nature of the relationship between the rights and the holder. For instance, if EEZ rights belong to the state, then the rights exist as long as the state exists; but if EEZ rights are sovereign rights, a non-state sovereign entity may continue to enjoy EEZ rights even after statehood is lost. To identify the holder of EEZ rights, we need to look

87. *See, e.g.*, Stock Pot Rest., Inc. v. Stockpot, Inc., 737 F.2d 1576 (Fed. Cir. 1984); *In re* Na-Mor, Inc., 437 B.R. 482, 487 (Bankr. D. Mass. 2010); Hitch v. Cassidy, No. 93E-05-029, 1994 WL 380492, at *2 (Del. Super. Ct. 1994), *aff'd*, 655 A.2d 307 (Del. 1995); Swale Inv. v. Nat'l Bank of Greece, [1997] O.J. No. 4997 (Can. Ont. Ct. J.); Reliable Life Ins. v. Ingle, [2009] CanLII 28225 (Can. Ont. Super. Ct. J.).

88. *See* Wong, *supra* note 1, at 382.

89. *See* MAREK, *supra* note 14, at 346.

90. *See* Wong, *supra* note 1, at 382.

91. *See* CRAWFORD, *supra* note 32, at 689–91; *see also* Wong, *supra* note 1, at 382 (providing more examples).

92. *See supra* notes 56–57 and accompanying text.

93. *See* Hebrew Univ. of Jerusalem v. Gen. Motors, 903 F. Supp. 2d 932, 936 (C.D. Cal. 2012), *vacated on other grounds*, 2015 WL 9653154 (C.D. Cal. 2015); Thomas Yates & Co. v. Am. Legion, 370 So. 2d 700, 701 (Miss. 1979).

94. Vienna Convention on Succession of States in Respect of Treaties arts. 31, 34, Aug. 23, 1978, 1946 U.N.T.S. 3; Vienna Convention on Succession of States in Respect of State Property, Archives and Debts art. 15, Apr. 8, 1983, U.N. Doc. A/CONF.117/14.

95. Vienna Convention on Succession of States in Respect of Treaties, *supra* note 94, art. 13; Vienna Convention on Succession of States in Respect of Property, Archives and Debts, *supra* note 94, art. 15(4).

outside UNCLOS. Our focus should be the legal traditions that gave rise to maritime entitlements.[96]

II. Understanding the Legal Nature of Maritime Entitlements

A. History, or Where Did EEZs Come From?

The origins of state sovereignty in coastal and marine resources may be traced to ancient 'international' arrangements between the Babylonians, Egyptians, and Greeks.[97] The Romans classified the sea as *res communis*, or property belonging to all nations.[98] However, the notion of the sea as a common, non-exclusive resource was not adopted by nations that succeeded the Roman Empire.[99] It was only in 1609, when Hugo Grotius published his famous book *Mare Liberum*, that the Roman doctrine of the freedom of the seas was resurrected.[100]

In *Mare Liberum*, Grotius asserted that the sea cannot be reduced to private property because it cannot be occupied, a necessary condition for the creation of private property in individuals or nations.[101] Grotius recognized limited jurisdiction over coastal waters,[102] but determined that any part of the sea beyond coastal waters that cannot be occupied is "free and open to all."[103] Grotius's view was too controversial for its time. It did not conform to the practice of maritime nations in the 17th century to claim sovereignty

96. If UNCLOS were the source of maritime entitlements, non-member states would not have maritime rights. However, several non-signatory states claim extensive maritime boundaries that are recognized by other states. For example, Benin, El Salvador, and Somalia are non-UNCLOS states, each claiming territorial seas extending to 200 nautical miles. *See* U.N. Div. for Ocean Affairs and the Law of the Sea, Table of Claims to Maritime Jurisdiction (July 15, 2011), https://perma.cc/2GT6-7NFC.

97. *See* Leslie M. Macrae, *Customary International Law and The United Nations' Law of the Sea Treaty*, 13 Cal. W. Int'l L.J. 181, 183 (1983). For a discussion of a much earlier development, see Gayl Westerman, The Juridical Bay 33–34, 48 (1987) (noting that the proprietary attitude towards the sea emerged with the development of ports as early as 7,000 years BCE).

98. The Roman freedom of the seas doctrine was probably more declaratory than the actual expression of legal intent. Since Rome was the dominant international maritime power of its time, the statement was more a means to ensure "free use of the seas for Roman citizens" than an actual legal doctrine of maritime liberty. Macrae, *supra* note 97, at 184–85; Westerman, *supra* note 97, at 36. The Roman Empire surrounded the Mediterranean and controlled it to the degree that Romans started calling the Mediterranean "mare nostrum" (our sea). Olga Tellegen-Couperus, A Short History of Roman Law 32 (1993).

99. Venice asserted sovereignty over the Adriatic Sea; Genoa over the Ligurian Sea; Denmark, Sweden, and Poland over parts of the Baltic; Tuscans and Pisans over the Tyrrhenian Sea; the Turks over the Black Sea; and England over the Sea of England. *See* Richard Barnes, Property Rights and Natural Resources 175 (2009); David Kenneth Leary, International Law and the Genetic Resources of the Deep Sea 81 n.8 (2007); Westerman, *supra* note 97, at 37–38.

100. *See* Leary, *supra* note 99, at 80–81.

101. *See* Macrae, *supra* note 97, at 188.

102. *See* Robin R. Churchill and Alan V. Lowe, The Law of the Sea 71 (1999).

103. Hugo Grotius, The Freedom of the Seas, or the Right Which Belongs to the Dutch to Take Part in the East Indian Trade 31–32 (James Brown Scott ed., Ralph Van Deman Magoffin trans., 1916) (1633).

over large ocean tracts.[104] Most legal scholars rejected Grotius's idea of the sea as open to all.[105] Grotius's theory, however, challenged legal theorists to develop justifications for ocean sovereignty.[106]

Writing a few years after Grotius, William Welwood argued that property rights are contingent on enforcement and that the right to exclude from coastal waters is therefore a manifestation of property interests.[107] John Selden refined Welwood's theory by applying the notion of dominion. According to Selden, "countries could control as much sea territory as they could dominate militarily."[108] Selden's position was accepted as more authoritative than Grotius's theory.[109] Selden's theory, however, did not prescribe the breadth of sovereign dominion over the sea.[110] With a legal justification to assert sovereignty, the claims of maritime nations to ocean jurisdiction grew excessive.[111] Over time, it became apparent that a doctrine was necessary to limit states' claims to ocean territory and provide for an end to conflicts over ocean sovereignty.[112] The solution came in 1702 when Bynkershoek suggested the "cannon-shot rule," asserting that sovereignty should be limited to the distance a state could effectively control from the coast, or simply "as far as cannon will carry."[113]

Bynkershoek's simple and efficient compromise was well received by theorists and statesmen.[114] But as the compromise gained traction, a concern of an arms race arose. The cannon-shot formula introduced an incentive to establish coastal batteries and develop better coastal artillery as a means to increase effective dominion over the sea.[115] In 1782, Galiani suggested fixing the territorial belt at three miles, a distance larger than the actual range

104. *See* WESTERMAN, *supra* note 97, at 38–42.

105. *See* LEARY, *supra* note 99, at 81.

106. At the time Grotius published *Mare Liberum*, assertions of sovereignty were maintained by the exercise of force and lacked coherent legal theory. *See* WESTERMAN, *supra* note 97, at 42–43.

107. WILLIAM WELWOOD, AN ABRIDGEMENT OF ALL SEA-LAWES, 218–21 (1613); *see also* CHURCHILL & LOWE, *supra* note 102, at 71–72.

108. LEARY, *supra* note 99, at 81.

109. But not completely. *See id*.

110. Scholars who wrote between the fourteenth and seventeenth centuries proposed different jurisdictional limits, ranging from sixty miles to "a two-day voyage," "all that it needed," and "all that the portion of the sea in which a bottom could be found." WESTERMAN, *supra* note 97, at 48 n.55.

111. *See id*. at 47; *see also* H. S. K. Kent, *The Historical Origins of the Three-Mile Limit*, 48 AM. J. INT'L L., 537 (1954).

112. *See* WESTERMAN, *supra* note 97, at 47.

113. *Id*. at 49–50.

114. Ram Prakash Anand, Origin and Development of the Law of the Sea: History of International Law 139 (1983).

115. Literally, Bynkershoek's formula stated that "the dominion of the land ends where the power of arms terminates." *Id*. at 138. As a practical doctrine, the cannon-shot rule allowed for an increase in the breadth of seaward boundaries with the increase in the force of arms. *See* WESTERMAN, *supra* note 97, at 50 n.60. However, because the range of cannons varied tremendously and increased over time, see Caron, *supra* note 57, at 3, the flexibility inherent to the cannon-shot rule introduced uncertainty in international relations, see Wolfgang G. Vitzthum, *From the Rhodean Sea Law to UNCLOS III*, *in* MARINE ISSUES: FROM A SCIENTIFIC, POLITICAL AND LEGAL PERSPECTIVE 11 (Peter N. Ehlers et al. eds., 2002). To avoid the unnecessary establishment of coastal batteries all along the coast, Galiani suggested fixing the territorial sea to three miles. *See* CHURCHILL & LOWE, *supra* note 102, at 78.

of a cannon at the time, but a reasonable and convenient compromise to which everybody could agree.[116] The "three-mile rule" thus became a fixed negative limit.[117] While some coastal states continued to claim sovereignty rights in coastal waters far beyond the three-mile belt,[118] most countries agreed that claims up to three miles could not be denied.[119] By the early nineteenth century, the "twin pillars" of a territorial sovereign belt of coastal waters and freedom of the high seas beyond it were firmly established in international law.[120]

The twentieth century brought new challenges to ocean governance. The growing interest in oil and improvements in technology made marine resources more lucrative than ever. Following the First World War, coastal countries once again engaged in a race for ocean enclosure. As more and more countries asserted wider sea claims, there arose a need for reaching a satisfactory global compromise to prevent friction between nations.[121] The 1930 Hague Convention was the first modern attempt to reach such a consensus.[122] By 1949, the United Nations International Law Commission observed that many states had unilaterally asserted claims that greatly differed from the status of claims that preceded the 1930 Hague Convention.[123] The need for codification was critical.

In 1945, the United States claimed exclusive jurisdiction over marine resources in and above the outer continental shelf.[124] President Truman's outer continental shelf proclamation initiated a series of similar unilateral assertions of sovereignty. Mexico followed suit later in 1945, and Argentina in 1946.[125] In 1947, Chile and Peru were the first to claim exclusive sovereignty over marine areas extending 200 nautical miles from their coastlines.[126] In 1948, Costa Rica, the Bahamas, and Jamaica did the same.[127] In

116. *See id.*

117. Caron views President Jefferson's 1793 declaration of a three-mile American territorial sea as the defining moment when Galiani's idea gained practical legal force. Caron, *supra* note 57, at 3–4.

118. *See* WESTERMAN, *supra* note 97, at 48 n.56.

119. The Netherlands refused to accept any notion of territorial seas due to its concern of being excluded from the North Sea herring fisheries. *See id.* at 48 n.56.

120. CHURCHILL & LOWE, *supra* note 102, at 72; LEARY, *supra* note 99, at 82.

121. *See* CHURCHILL & LOWE, *supra* note 102, at 78.

122. *See id.* at 79.

123. 2 Y.B. INT'L L. COMM'N 43, U.N. Doc. A/CN.4/1/Rev.1 (Apr. 19, 1949).

124. Proclamation No. 2667, Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf, 10 Fed. Reg. 12303 (Sept. 28, 1945); Proclamation No. 2668. Policy of the United States with Respect to Coastal Fisheries in Certain Areas of the High Seas, 10 Fed. Reg. 12304 (Sept. 28, 1945).

125. *See* Hersch Lauterpacht, *Sovereignty Over Marine Area*, BRITISH Y.B. INT'L L. 376, 380 (1950).

126. *Presidential Declaration Concerning Continental Shelf* (23 June 1947), *translation from* 2 INT'L L.Q. 135, *reprinted in* LAWS AND REGULATIONS ON THE REGIME OF HIGH SEAS (1951), at 6–7, ST/LEG/SER.B/1, U.N. Sales No. 1951 V.2 (1951); *Concerning Submerged Continental or Insular Shelf* (Aug. 11, 1947), *translation from* 2 INT'L L.Q. 137, *reprinted in* LAWS AND REGULATIONS ON THE REGIME OF HIGH SEAS (1951), at 16–17, ST/LEG/SER.B/1, U.N. Sales No. 1951 V.2 (1951).

127. *See* Lauterpacht, *supra* note 125, at 380–81.

1949, ten Middle Eastern nations issued unilateral declarations regarding sovereignty over resources on the continental shelf.[128]

In 1952, the first international agreement proclaiming a "principle" of states' exclusive control in the 200 nautical miles zone was signed between Chile, Ecuador, and Peru.[129] Many other coastal states immediately followed with sovereignty assertions of varying breadth.[130] The series of regional international agreements recognizing sovereignty in coastal waters set the stage for UNCLOS.[131] The first U.N. Conference on the Law of the Sea ("UNCLOS I") was held in Geneva in 1958. UNCLOS I attempted to codify the exclusive sovereign rights of coastal states to the seabed and subsoil of the continental shelf.[132] The legal status of the superjacent waters remained undetermined.[133] The notion of a contiguous zone extending to twenty-four miles was introduced,[134] but not many states were eager to consent to this demarcation. Similar attempts at reaching a consensual limit on jurisdictional claims to territorial waters at the second U.N. Convention on the Law of the Sea ("UNCLOS II") also failed in 1960.[135]

The notion of "continental shelf," on which several states based their claims of sovereignty, had little utility in the law. Some costal states had continental shelves extending out to 300 miles, while others had none.[136] Basing a legal regime on disparate geographical features was problematic and failed to provide certainty or efficiency in the utilization of ocean resources.[137] As a compromise, the International Law Commission suggested recognizing jurisdiction over an area that "will need definition but it need not depend on the existence of a continental shelf."[138] In 1971, Kenya had suggested the concept of EEZ, to satisfy the demands of both the states that claimed 200 miles of territorial sea and maritime powers that opposed what they saw as appropriation of the ocean. This compromise maintained the

128. Nicaragua did as well. *See* Satya N. Nandan, *The Exclusive Economic Zone: A Historical Perspective*, *in* The Law and the Sea: Essays in Memory of Jean Carroz 171 (1987); Lauterpacht, *supra* note 125, at 381.

129. *Declaration on the Maritime Zone* (Aug. 18, 1952), *reprinted in* Laws and Regulations on the Regime of the Territorial Sea, at 723–24, ST/LEG/SER.B/6, U.N. Sales No. 1957. V.2 (1956).

130. *See* Rene-Jean Dupuy & Daniel Vignes, Handbook on the New Law of the Sea 275–76 (1991).

131. *See* Nandan, *supra* note 128; *see also* Gail Osherenko, *New Discourses on Ocean Governance: Understanding Property Rights and the Public Trust*, 21 J. Envtl. L. & Lit., 317, 321–22 (2006).

132. Convention on the Continental Shelf, Apr. 29, 1958, 499 U.N.T.S. 7302.

133. *Id*. at art. 3.

134. Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, 516 U.N.T.S. 205, art. 24.

135. *See* Dupuy & Vignes, *supra* note 130, at 262.

136. Lauterpacht, *supra* note 125, at 384–85.

137. *See id*.

138. 1 Y.B. Int'l L. Comm'n 223, A/CN.4/SER.A/1950; *see also* Myres Smith MacDougal & William Thomas Burke, The Public Order of the Oceans: A Contemporary International Law of the Sea 672 (2d ed. 1987).

freedom of navigation sought by maritime powers, while guaranteeing the economic sovereignty of territorialist coastal states.[139]

When the third U.N. Convention on the Law of the Sea ("UNCLOS III") convened in 1973, the stage was set for codification. The Kenyan compromise and the disconnection of geographical features from maritime boundaries cleared the way for consensus. But states still needed a small push to reach an agreement. UNCLOS provided the incentive for consent through the international law principle of mutual recognition. Jurisdictional claims are recognized between countries making or recognizing similar claims. Thus, countries adhering to the management regime of UNCLOS would enjoy mutual recognition from other countries that are parties to UNCLOS; and countries that are not UNCLOS signatories would not enjoy recognition of their claims from UNCLOS members.[140] This incentive led many states with extensive territorial sea claims to retract their unilateral assertions of sovereignty and join UNCLOS.[141] The agreement reached in UNCLOS III set the boundaries of the territorial sea at twelve miles, a contiguous zone extending for an additional twelve miles, and an EEZ extending to 200 miles.

The evolution of the EEZ regime highlights its origin in the wedding of sovereignty and legal compromise. EEZ first appeared on the international stage as an assertion of complete sovereignty, but it gained consensus through a compromise that narrowed sovereignty's reach. The success of UNCLOS was not in establishing rights in marine resources, which existed long before UNCLOS. The lasting achievement of UNCLOS was its ability to bring the nations of the world to an almost universal agreement regarding the breadth and reach of these rights.

B. Two Competing Theories of Maritime Entitlements

Since maritime entitlements preceded UNCLOS, we must answer the following question: which legal arrangement begat maritime entitlements? Was it a contractual, constitutional, or perhaps property interest? Legal taxonomy is important, because classification often determines survivability;[142] classification also affects the structure of governance regimes and, in cases of violation, available legal remedies.

1. *The Naturalist-Proprietary View*

In many arguments advanced by scholars during the debate on ocean sovereignty, the justifications for and against ocean sovereignty are both couched in property discourse. This goes beyond the use of words like "ti-

139. *See* DUPUY & VIGNES, *supra* note 130, at 277.
140. *See* CHURCHILL & LOWE, *supra* note 102, at 80.
141. *See id.*
142. *See supra* notes 93–95 and accompanying text.

tle" and "usufruct;" rather, the rationale underlying pre-UNCLOS doctrines is proprietary.[143] The analysis of Grotius is grounded in the premise that the ocean is a form of property and that what distinguishes it from other forms of property is that it cannot be occupied, a necessary condition for nations to claim title in ocean spaces.[144] The counter-doctrine of *Mare Clausum*, as advanced by Welwood and Selden, is also proprietary in nature; these authors use the language of exclusion as a justification for sovereignty over the ocean.[145]

Framing the debate in terms of private law, scholars who constructed the framework of maritime entitlements during the seventeenth through nineteenth centuries used the doctrine of adverse possession.[146] The arguments under this doctrine were factual, revolving around a nation's ability to exclude others from parts of the ocean. The legal rationale underlying these debates was that exclusion entails ownership. Even Bynkershoek's cannon-rule compromise was based on exclusion—a coastal nation was entitled to that territory which it could effectively control.[147] When taken for what it is—a discussion about exclusive control over resources—the use of property theory to justify sovereignty over marine resources is not surprising. Seen in this light, the parallel to property is immediate, because exclusion is the "most essential stick" in the bundle of rights we call property.[148]

To the scholars who laid the foundations for the law of the sea, sovereignty (*imperium*) and ownership (*dominium*) were not separate but rather existed in conjunction with each other, "so the power to rule and to legislate, which is the power of *imperium*, could extend so far as the ruler and legislator possessed *dominium*, or the rights of an owner."[149] These writers, in the naturalist tradition of international law, developed rules according to the view that states, the 'persons' of international law, are subject to the same norms as individuals in municipal legal systems.[150] Under this theory, state entitlements to sovereignty and territory correspond with legal conceptions of individual autonomy and property.[151] It is not surprising that during the 250 years that this juridical approach dominated international law, the evolution of maritime entitlements followed standard theory regarding the emergence of property rights in natural resources. While the breadth of maritime

143. *See* BARNES, *supra* note 99, at 252.

144. *See supra* note 101 and accompanying text; *see also* BARNES, *supra* note 99, at 170–71.

145. *See supra* notes 107–109 and accompanying text.

146. *See* ROBERT L. FRIEDHEIM, NEGOTIATING THE NEW OCEAN REGIME 12 (1993).

147. *See id.*; WESTERMAN, *supra* note 97, at 49–50.

148. *See, e.g.*, Dolan v. City of Tigard, 512 U.S. 374, 384 (1994); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1044 (1992).

149. Ivan A. Shearer, *The Limits of Maritime Jurisdiction, in* THE LIMITS OF MARITIME JURISDICTION 52 (Clive H. Schofield et al. eds., 2013) (citing DANIEL P. O'CONNELL, THE INTERNATIONAL LAW OF THE SEA 14 (Ivan A. Shearer ed., 1982)).

150. *See* Edwin DeWitt Dickinson, *The Analogy Between Natural Persons and International Persons in the Law of Nations*, 26 YALE L.J. 564, 566–67 (1917).

151. *See id.* at 566–69.

boundaries fluctuated over time, the extent of maritime entitlements correlates with changes in fishing techniques, growth of global demand, and most importantly, the development of technology.[152] The further a nation could exert its influence, the more ocean territory it claimed.[153]

Shifts in the ability to exclude are the main drivers of property evolution,[154] because "[p]roperty rights evolve depending on the benefits and costs associated with defining and enforcing rights."[155] Put simply, property rights in natural resources emerge when the cost of defining, monitoring, and enforcing them makes it profitable to do so.[156] This calculus could be determined by increase in market demand, but is often driven by technological breakthroughs. It is technology that lowers the cost of monitoring and enforcement; it is invention that allows prospectors to reduce the cost of extraction to a profitable level.[157] This is exactly the process that led to the emergence of maritime entitlements.[158] Throughout most of history, the inability to monitor passage in the adjacent seas inhibited the ability of coastal states to appropriate the ocean. Scarcity was not an issue:

> The possibility of exclusive appropriation did not exist because it was simply too difficult to fend off competitors when there was no way to inhabit permanently the areas in question. The incentive did not exist because exclusivity was not a necessary condition for states to get what they wanted from the seas.[159]

The balance of costs and benefits began to change at the start of the twentieth century, and rapidly increased after the Second World War, when scarcity and technology made exclusion possible and desirable.[160] Eckert considers the trend toward enclosure of ocean territories that occurred during the twentieth century a classic example of the "internalizing externalities" Demsetzian theory of property.[161]

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152. *See* Robert B. Krueger, *The Convention of the Continental Shelf and the Need for Its Revision and Some Comments Regarding the Regime for the Lands Beyond*, 1 NAT. RESOURCES L. 1 (July 1968).

153. *See id.*; *see also* DUPUY & VIGNES, *supra* note 130, at 262–63.

154. "Ability to exclude" means both the physical ability, that is the feasibility of the endeavor, but also the economic ability, that is the cost of enforcing property rights relative to the value of the resource in the market. When the cost of enforcement is higher than the value of the resource, property rights will not emerge. *See* Terry L. Anderson & P.J. Hill, *The Evolution of Property Rights: A Study of the American West*, 18 J.L. & ECON. 163, 172 (1975).

155. TERRY L. ANDERSON & DONALD R. LEAL, FREE MARKET ENVIRONMENTALISM 23 (2001).

156. *See id.* (noting that, at any given time, existing property rights "reflect the perceived costs and benefits of definition and enforcement"); *see also* Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 354–55 (1967) (noting that conversion to private property occurs when the benefits of conversion outweigh the costs).

157. *See* ANDERSON & LEAL, *supra* note 155, at 23.

158. *See* Brilmayer & Klein, *supra* note 81, at 705–07.

159. *Id.* at 708.

160. *See id.* at 709; Osherenko, *supra* note 131, at 329; *see also* Gordon R. Munro, *Internationally Shared Fish Stocks, the High Seas, and Property Rights in Fisheries*, 22 MAR. RES. ECON. 425, 426 (2007) (providing an economic explanation of the process as it applies to fisheries in the EEZ).

161. ROSS D. ECKERT, THE ENCLOSURE OF OCEAN RESOURCES 14–16 (1979).

To many international law scholars, the logic of state 'ownership' of coastal resources is outdated. As discussed in the following section, the global regime that arose in the wake of the Second World War changed the discourse from property to sovereignty.[162] However, not everyone agrees with the modern sovereignty-based view. Some scholars and not a few developing coastal states continue to subscribe to the naturalist-proprietary justification of maritime entitlements.[163] Those who reject the sovereignty doctrine do so based on the observation that the extension of sovereignty to 200 nautical miles was done in the service of an economic goal—the extraction of resources.[164] As such, while state control in the EEZ does have some characteristics of sovereignty, it cannot be said to reflect sovereignty in the same way as the police power of the state.[165] Indeed, "the coastal state does not have sovereignty over the exclusive economic zone but only 'sovereign rights' for a specific purpose—the management of natural resources and other economic activities."[166] If the global regime of ocean governance is one that is wholly justified by the efficient and effective management of resources, then not only is it more accurate to frame it in property terms,[167] it is also necessary to fulfill that justification.[168]

2. *The Positivist-Sovereignty Doctrine*

The positivist-sovereignty doctrine views UNCLOS as a constitutive moment in international law in which states, the 'persons' of international law, mutually agreed to depart from the previous control-based justification in favor of a more egalitarian approach to ocean sovereignty.[169] The traditional naturalist view emerged at a time when a few maritime powers dominated the seas. It reflected political (and technological) realities of the colonial era and mostly benefited the strong and the quick to assert claims.[170] However, the dramatic increase in the number of state actors in the post-colonial era changed the balance of power in global politics.[171] During the second half of the twentieth century, a new international legal discourse emerged, one fo-

162. *See infra* Section II.B.2.

163. *See, e.g.*, Jain, *supra* note 14, at 21–22 (defending a property-based justification of statehood).

164. *See* UNCLOS, *supra* note 15, art. 56 (granting sovereign rights solely for the purpose of "exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds").

165. *See* DUPUY & VIGNES, *supra* note 130, at 254; *see also* Brilmayer & Klein, *supra* note 81, at 710.

166. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 514 cmt. c (AM. L. INST. 1987). However, the right to exclude in the EEZ is also heavily curtailed. *See id.* cmt. d ("In the exclusive economic zone of any state, all other states may exercise most high seas freedoms.").

167. *See* DUPUY & VIGNES, *supra* note 130, at 254 (observing that this view conflates *imperium* and *dominium* and therefore maintains the Grotian position).

168. *See* BARNES, *supra* note 99, at 252; Munro, *supra* note 160.

169. *See infra* notes 182–185 and accompanying text.

170. *See* Brilmayer & Klein, *supra* note 81, at 712.

171. *See* DUPUY & VIGNES, *supra* note 130, at 281.

cused more on equity and conservation than on the use of power.[172] It viewed maritime entitlements as an inherent sovereign right of any coastal state, regardless of occupancy or ownership.[173] Under the new post-colonial doctrine, rights of nations over marine resources "extend not from proprietorship but from sovereignty,"[174] which is derived from the inherent "legal right of a nation to exercise power over its territory."[175]

Sovereignty, as the notion came to be understood in the post-colonial era, is embodied in the state.[176] It is the inherent right of a state to the "lawful control over its territory generally to the exclusion of other states, authority to govern in that territory, and authority to apply law there."[177] Under the modern view of sovereignty, all nations enjoy permanent sovereignty over their natural resources,[178] "a basic constituent of the right [of nations] to self-determination, and, therefore, essential to a nation's economic sovereignty and development."[179]

The modern sovereignty-based doctrine was affirmed at the 1930 League of Nations Codification Conference at The Hague.[180] By 1958, when the Convention on the Continental Shelf was signed, the notion of state sovereignty over marine resources had become the accepted principle for parties to the Convention.[181] During the years leading to UNCLOS, the control-based approach yielded to entitlements established in juridical processes.[182] The transition from occupancy to sovereignty was grounded in the unwillingness of the parties to UNCLOS to accept the distributional effects of a power-based doctrine. In a world of "first come, first served," developing countries would "be last to arrive and would probably not be served at

172. *See* Brilmayer & Klein, *supra* note 81, at 712.

173. *See* Osherenko, *supra* note 131, at 334.

174. Mary Turnipseed et al., *The Silver Anniversary of the United States' Exclusive Economic Zone: Twenty-Five Years of Ocean Use and Abuse, and the Possibility of a Blue Water Public Trust Doctrine*, 36 ECOLOGY L.Q. 1, 37 (2009).

175. *Id.* at 32.

176. *See id.*

177. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 206 cmt. b (AM. L. INST. 1987).

178. *See* G.A. Res. 1803 (XVII), U.N. Doc. A/1803(XVII) (Dec. 14, 1962) subsequently extended to maritime resources by G.A. Res. 3016 (XXVII), U.N. Doc. A/RES/3016 (Jan. 15, 1973).

179. Turnipseed et al., *supra* note 174, at 32 (quoting Franz Xaver Perrez, *The Relationship Between "Permanent Sovereignty" and the Obligation Not to Cause Transboundary Environmental Damage*, 26 ENVTL. L. 1187, 1190 (1996)).

180. *See* DUPUY & VIGNES *supra* note 130, at 257.

181. *See* Brilmayer & Klein, *supra* note 81, at 710–11. While the principle originated in the context of the territorial sea and the continental shelf, it is relevant to the EEZ as well. The evolution of the EEZ converged with the development of other legal concepts of marine sovereignty like the territorial sea and the continental shelf. *See supra* Section II.A; *see also* WINSTON CONRAD EXTAVOUR, THE EXCLUSIVE ECONOMIC ZONE: A STUDY OF THE EVOLUTION AND PROGRESSIVE DEVELOPMENT OF THE INTERNATIONAL LAW OF THE SEA 20–21 (1979).

182. *See* Brilmayer & Klein, *supra* note 81, at 710; Turnipseed et al., *supra* note 175, at 28 (noting that the array of maritime conventions that emerged in 1958 and later, including UNCLOS I, II, and III, were "an attempt to stem some of the more aggressive claims to the high seas").

all."[183] Under the positivist-sovereignty doctrine, "international law may, by agreement among sovereign nations, extend rights of sovereignty to groups of states,"[184] and therefore secure an egalitarian solution through equal negotiation.[185]

The agreement reached among nations in UNCLOS extended sovereignty rights of coastal states to specific marine resources. Under the positivist-sovereignty doctrine, UNCLOS is viewed as a codification instrument that rearranged and reclassified the array of ocean-related claims that existed before it came into force.[186] What UNCLOS did not do was grant property rights in marine resources.[187] In accordance with the views of its signatories, UNCLOS refrained from using property terms,[188] signifying the deliberate choice to depart from occupancy-based regimes.[189]

C. The National Right to Marine Resources as an International Trust

Subsections A and B described two theoretical frameworks, the naturalist and the positivist, each identifying EEZ rights as originating in a different family of legal rights. According to the naturalist view, EEZ rights are proprietary in nature. The positivist view, however, views the EEZ as stemming from the state's sovereignty over its natural resources. This Subsection brings the two approaches together. As I explain, regardless of which legal path we choose to take, the naturalist or the positivist, the legal classification of EEZ rights remains the same. Sovereign rights to marine resources are forms of trusts, held by governments as trustees for the people.

Sand classifies sovereignty rights in the EEZ as fiduciary obligations.[190] According to Sand, given the array of restrictions imposed on the coastal state in its management of the EEZ, "the analogy to 'ownership' rights becomes so diluted as to evoke a different legal analogy altogether, that is, the role of the nation state becomes more akin to a kind of public trusteeship."[191] For a property scholar, Sand's observation may seem peculiar, as the legal concept of public trust is firmly grounded in property law.[192] Under the doctrine of public trust, which evolved from ancient Roman law,[193] the

183. Brilmayer & Klein, *supra* note 81, at 711.
184. Osherenko, *supra* note 131, at 334.
185. *See* Shearer, *supra* note 149, at 51.
186. *See id*.
187. *See* Osherenko, *supra* note 131, at 334; Turnipseed et al., *supra* note 175, at 37.
188. *See* Osherenko, *supra* note 131, at 333.
189. *See* Brilmayer & Klein, *supra* note 81, at 710.
190. Sand, *supra* note 11, at 48, 55; Osherenko, *supra* note 131, at 334 (citing in agreement); Turnipseed et al., *supra* note 175, at 37 (citing in agreement).
191. Sand, *supra* note 11, at 48 (emphasis omitted); Osherenko, *supra* note 131, at 334 (citing in agreement); Turnipseed et al., *supra* note 175, at 37 (citing in agreement).
192. *See* Jack H. Archer et al., The Public Trust Doctrine and the Management of America's Coasts 21 (1994).
193. *See* Bertram C. Frey, *The Public Trust in Public Waterways*, 7 Urb. L. Ann. 219, 220–24 (1974); Bertram C. Frey & Andrew Mutz, *The Public Trust in Surface Waterways and Submerged Lands of the Great Lakes States*, 40 U. Mich. J.L. Reform 907, 920–21 (2007).

sovereign holds certain commonly-owned natural resources in trust for the public interest in perpetuity.[194] Sand acknowledges the property origins of the public trust doctrine[195] but argues that the doctrine has evolved beyond the contours of property to occupy a separate field of law which he identifies as environmental trusteeship.[196]

To support his observation, Sand enumerates forms of environmental trusts in comparative as well as international environmental law. An environmental trust, according to Sand, is a legal structure that imposes fiduciary responsibilities on the government in its management of designated natural resources.[197] What used to be a common law property-based doctrine, explains Sand, is now a universal concept of environmental law.[198] Indeed, since its rediscovery by Professor Sax in 1970,[199] the public trust doctrine has expanded to many jurisdictions and enjoys growing international recognition, with many countries and international treaties applying environmental trusteeship to a constantly increasing pool of natural resources.[200]

As an ancient Roman Law doctrine, the notion of public trust influenced various legal regimes, including the common law of England and the civil law of France and Spain.[201] Many scholars regard it as a natural law construct, as the view of the sovereign as a protector of natural resources for the people has emerged independently in disparate cultures and legal regimes.[202] Even according to the Institutes of Justinian, the Roman legal code associated with the introduction of the public trust in the West,[203] the doctrine is rooted in natural law.[204] Yet, two developments support Sand's separation of the public trust doctrine from its naturalist-proprietary origins. The first is the movement of international law away from concepts of property; the second is the emergence of non-proprietary environmental trusts in interna-

194. *See* Gerald Torres & Nathan Bellinger, *The Public Trust: The Law's DNA*, 4 WAKE FOREST J. L. POL'Y 281, 284 (2014); Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 485–86 (1970).

195. Sand, *supra* note 11, at 49.

196. *Id.* at 49–54.

197. *Id.* at 48–49.

198. *Id.* at 48–54.

199. Sax, *supra* note 194.

200. *See, e.g.*, Michael C. Blumm & Rachel D. Guthrie, *Internationalizing the Public Trust Doctrine: Natural Law and Constitutional and Statutory Approaches to Fulfilling the Saxion Vision*, 44 U.C. DAVIS L. REV. 741, 760–07 (2012) (analyzing twelve legal systems across four continents in which the public trust doctrine is recognized and applied in the protection of natural resources); *see also* Sand, *supra* note 11, at 49–54 (2004). For more discussion of the public trust doctrine in international law, see generally Mary Turnipseed et al., *The Public Trust Doctrine and Rio+20*, Third Nobel Laureate Symposium on Global Sustainability 1, 2–3 (2012); Allan Kanner, *The Public Trust Doctrine, Parens Patriae, and The Attorney General as the Guardian of the State's Natural Resources* 16 DUKE ENVTL. L. & POL'Y F. 57, 81–82 (2005) (discussing the doctrine's revival within the United States).

201. *See* James G. Wilkins & Michael Wascom, *The Public Trust Doctrine in Louisiana*, 52 LA. L. REV. 861, 863 (1992); Turnipseed et al., *supra* note 175, at 10.

202. *See, e.g.*, Turnipseed et al., *supra* note 175, at 10.

203. *See* Frey & Mutz, *supra* note 193, at 918.

204. *See* Frey, *supra* note 193, at 221.

tional and domestic law. However, it is important to note that while sovereign EEZ rights may be classified as a modern positivist environmental trust, there is also a strong case for their classification as a classic property-based public trust.

The proprietary framework underlying modern international maritime law[205] views the high seas as the common property of mankind.[206] UNCLOS Article 86 makes clear that the EEZ is not included in the parts of the ocean that constitute the high seas.[207] But appropriation of the EEZ by a coastal state did not change the classification of EEZ space from common property to private property. Instead, it merely contracted the pool of owners; UNCLOS "reduced the common owners from a global community to citizens of particular states, but . . . did not change the fundamental nature of ownership."[208] The regime established under UNCLOS provides coastal states with the right "to manage the EEZ on behalf of the people, the common property owners."[209] Under this view, the duties of the state to the people are revealed as a classic public trust.

Sand's international environmental trust is aligned with the positivist-sovereignty justification for maritime entitlements. The public trust framework, on the other hand, is a natural law element that fits the naturalist-proprietary justification of maritime entitlements. Positivism and natural law are the two main theoretical sources of international law.[210] Since both theories co-exist and underlie the modern framework of maritime law,[211] it should come as no surprise that the fiduciary nature of the EEZ may be explained by either.

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205. *See* Turnipseed et al., *supra* note 175, at 34–35 ("Though [UNCLOS] and associated customary international law make no express mention of property rights, it is evident that certain property rights accompanied the extension of nations' sovereignty over their neighboring seas.").

206. *See supra* Section II.A; *see also* UNCLOS, *supra* note 15, arts. 1 (defining treaty "Area" as "the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction"), 136 ("The Area and its resources are the common heritage of mankind."), 137(2) ("All rights in the resources of [these areas] are vested in mankind as a whole . . . .").

207. UNCLOS, *supra* note 15, art. 86 ("The provisions of this Part apply to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State."); *see also* DUPUY & VIGNES, *supra* note 130, at 284–91 (explaining the status of the EEZ).

208. Osherenko, *supra* note 131, at 331. This conclusion is also supported by the provisions of UNCLOS pertaining to the parts of the ocean beyond the EEZ. *See supra* note 206 and accompanying text. It is inferred by negative implication that the ocean areas outside of these spaces have been excluded from the common ownership of mankind. *See also* Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 AM. J. INT'L L. 295, 310 (2013) (stating that UNCLOS rights and duties may be seen as imposing on sovereigns as "power-wielding property owners").

209. Osherenko, *supra* note 131, at 340.

210. *See generally* Jianming Shen, *The Basis of International Law: Why Nations Observe*, 17 DICKINSON J. INT'L L. 287 (1999).

211. *See supra* discussion in Section II.A. On the inseparability of positivism from naturalism in international law, see generally MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 131–133, 308 (2005); Frederic Megret, *International Law as Law*, *in* THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW 68–69 (James Crawford & Martti Koskenniemi eds., 2012).

A U.S. Supreme Court case from 1979 illustrates the difference between a naturalist property-based public trust and a positivist environmental trusteeship. In *Hughes v. Oklahoma*,[212] the Supreme Court struck down an Oklahoma law prohibiting the export of fish caught in Oklahoma as violating the Commerce Clause. Oklahoma's defense of the law was rooted in the common law notion of state ownership of wildlife. Common law at the time of the *Hughes* decision held that "the wild animals and fish within a state's border are . . . owned by the state in its sovereign capacity for the common benefit of all its people."[213] Oklahoma argued that the state ownership of wildlife confers a right and duty to regulate the taking of wildlife.[214]

The Supreme Court rejected this argument. In a landmark decision that overturned centuries of settled common law, the Court severed state regulation of wildlife from its classic property justification. According to the Court, the "ownership language" used in cases leading to *Hughes* should be understood as legal fiction expressing "the importance to its people that a State have power to preserve and regulate the exploitation of an important resource."[215] Modern legal analysis, opined the Court, does not require the continued use of fictional ownership constructs, as it is widely accepted that the state has police power to regulate its own resources, irrespective of communal ownership rights of the people.[216]

In dissent, Justice Rehnquist, joined by Chief Justice Burger, criticized the Court's construction of state ownership rights as misrepresenting the relationship between the state as sovereign, the people, and the state's resources. The traditional ownership-based doctrine, explained the dissenters, is not a legal fiction but rather a public trust. Under this public trust, "the wild fish and game located within the territorial limits of a State are the common property of its citizens and . . . the State, as a kind of trustee, may exercise this common 'ownership' for the benefit of its citizens."[217] The state is therefore not an owner in the conventional sense, but rather a trustee with a "substantial interest in preserving and regulating the exploitation of the fish and game and other natural resources within its boundaries for the benefit of its citizens."[218] The dissenters argued that there was no need for the court to disconnect state ownership from the state's power to regulate, as the state did not really own the wildlife in the first place.

212. 441 U.S. 322 (1979).
213. *Id.* at 324–25.
214. *Id.* at 325.
215. *Id.* at 334 (internal citations omitted).
216. *Id.* at 334–35 (internal citations omitted).
217. *Id.* at 341 (Rehnquist, J., dissenting) (emphasis added, internal citations omitted).
218. *Id.* at 342 (Rehnquist, J., dissenting) (internal citations omitted).

The Supreme Court's departure from wildlife ownership constructs did not absolve the state from its fiduciary responsibilities to the people.[219] As the California Court of Appeals recently explained:

> "[W]hile the fiction of state ownership of wildlife is consigned to history, the state's responsibility to preserve the public's interest through preservation and wise use of natural resources is a current imperative. In essence, the public trust doctrine commands that the state not abdicate its duty to preserve and protect the public's interest in common natural resources." Thus, whatever its historical derivation, it is clear that the public trust doctrine encompasses the protection of undomesticated birds and wildlife.[220]

In many ways, the *Hughes* holding parallels the transition in international law from naturalist principles to positivist constructs. The Court in *Hughes* disconnected ownership from a state's police power. The separation of the two did not vacate the state's fiduciary obligations, but merely changed the legal justification for the trusteeship. Justice Rehnquist's dissent in *Hughes* highlights that while the fiduciary obligation could be attributed to the state's sovereign interest in protecting its common resources, the proprietary analysis would reach the same result, albeit through a different legal path. Crawford's observation that "the substrate of the State is not property, it is the people of the State seen as a collective"[221] explains the fiduciary nature of the EEZ. Regardless of the legal path taken, naturalist or positivist, the state remains an agent of the collective.[222] As James Madison noted in the Federalist Papers, "[t]he federal and State governments are in fact but different agents and trustees of the people."[223] The view of the state as an agent-trustee of the people is firmly entrenched in international law with "[a] long tradition of scholarship" to support it.[224] As explained by Benvenisti, "as the trustees of their people, [sovereigns] have fiduciary duties to them and only to them. Precisely because sovereignty inheres in the people, the primary responsibility of its agents is held to be that of protecting and promoting their citizens' interests."[225]

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219. *See* Kanner, *supra* note 200, at 74 (clarifying that "[a]fter Hughes, the trust responsibility that accompanied state ownership remained").

220. Ctr. for Biological Diversity, Inc. v. FPL Grp., Inc., 83 Cal. Rptr. 3d 588, 599 (Cal. Ct. App. 2008) (quoting In re Complaint of Steuart Transp. Co., 495 F. Supp. 38, 40 (E.D. Va. 1980)); *see also* Clajon Produce Corp. v. Petera, 854 F. Supp. 843, 850–51 (D. Wyo. 1994) (finding that the *Hughes* ruling did not alter states' responsibilities in governing and managing wildlife) (citing Mountain States Legal Found. v. Hodel, 799 F.2d 1423, 1426–27 (10th Cir. 1986)).

221. Crawford, *supra* note 29, at 717.

222. *See* Archer et al., *supra* note 192, at 31 n.64.

223. The Federalist No. 46 (James Madison).

224. See Benvenisti, *supra* note 208, at 307–08; *see also* Eyal Benvenisti, *The Paradoxes of Sovereigns as Trustees of Humanity: Concluding Remarks*, 16 Theoretical Inq. L. 535, 544–47 (2015); Evan Fox-Decent, *Constitutional Legitimacy Unbound*, *in* Philosophical Foundations of Constitutional Law 121 (David Dyzenhaus & Malcolm Thorburn eds., 2016).

225. Benvenisti, *supra* note 208, at 296.

Sovereignty over natural resources emanates from the right of people to self-determination,[226] which, by definition, is a collective right.[227] The intimate relationship between the people and their land underlies the manifestation of self-determination in sovereignty over a particular territory and the natural resources attached to it.[228] Similarly, it is the same relationship that underlies the naturalist notion of *res communis*, that is, that certain natural resources are common to the nation's citizens. "As much as it is an extension of the personal right to autonomy, sovereignty is also the extension of the private claim for ownership. Both ownership and sovereignty are claims for the intervention in the state of nature by carving out valuable space for exclusive use [by the collective]."[229] That is why complete severance of sovereignty from property is an impossible legal task.[230]

III. Prescriptions for a Better Future

A. The Significance of the Fiduciary Relationship to the Survivability of EEZ Rights

A trust is a trilateral relationship.[231] In the context of EEZs, the three parties to the legal relationship are the community (trustor), the state (trustee), and the people (beneficiaries). In this relationship, the state acts as trustee of the natural resource for the benefit of the people.[232] The community could be either the community of nations or the citizens of the state at the time of the transfer of resources into the trust.[233] Wood explains the legal nature of the relationship:

> At its core, the doctrine declares public property rights originally and inherently reserved through the people's social contract with

226. *See* Milan Bulajie, Principles of International Development Law: Progressive Development of the Principles of International Law Relating to the New International Economic Order 82, 263, 284 (2d ed. 1993); Franz Xaver Perrez, *The Relationship Between "Permanent Sovereignty" and the Obligation Not to Cause Transboundary Environmental Damage*, 26 Envtl. L. 1187, 1190 (1996); *see also* Ian Brownlie, *Legal Status of Natural Resources in International Law*, 162 Recueil Des Cours 245, 255 (1979).

227. *See* James Summers, Peoples and International Law 1 (2d ed. 2014). Note that collective self-determination entails the right of the people to "freely dispose of their natural wealth and resources" for their own ends. International Covenant on Civil and Political Rights art. 1, Dec. 16, 1966, 999 U.N.T.S. 171.

228. *See* Cara Nine, Global Justice and Territory 82–93 (2012) (developing a Lockean theory of particular territorial rights based on the relationship between the collective and the territory); David Miller, *Territorial Rights: Concept and Justification*, 60 Pol. Stud. 252 (2012) (particular territorial rights emanate from the addition of material and symbolic value to the territory by the people); *see also* Jain, *supra* note 14, at 23.

229. Benvenisti, *supra* note 208, at 308.

230. *See* Turnipseed et al., *supra* note 174, at 36.

231. Trustor-trustee-beneficiaries. *See, e.g.*, Benjamin J. Richardson, Fiduciary Law and Responsible Investing: In Nature's Trust 110 (2013).

232. *See* Sand, *supra* note 11, at 55.

233. The choice between the two depends on the choice between the naturalist-proprietary or positivist-sovereignty view.

> their sovereign governments. The trust remains an attribute of sovereignty that cannot be alienated by any legislature. This principle designates government as trustee of crucial natural resources and obligates it to act in fiduciary capacity to protect such assets for the beneficiaries of the trust, which includes both present and future generations of citizens.[234]

The conceptual frameworks of public and environmental trusts prove extremely useful to questions of survivability. Under these frameworks, legal challenges that arise in the context of EEZ rights and obligations "can be elucidated by comparison to the well-developed body of law regarding private and charitable trusts."[235] The fiduciary prism highlights that the focus of legal scholars on statehood is misguided. In a fiduciary relationship, the state is an agent of the beneficiaries entrusted with responsibilities to manage the trust corpus on the beneficiaries' behalf. The relevant legal entity for determining the rights in this relationship is not the state-trustee but the people-beneficiaries. As holders of the equitable interest, the beneficiaries are at the core of the fiduciary relationship.[236]

Since the rights in the EEZ belong to the 'people,'[237] only a disappearance of the 'people' could entail loss of rights. Thus, for the formula "no state equals no EEZ" to be correct, one must first establish that "no state equals no 'people.'" SIDS are nations among nations. Because SIDS are recognized states, the status of SIDS' citizens as 'peoples' is undisputed. SIDS' rights to continuity as nations are protected in international law, so is the right of SIDS' people to self-determination.[238] Self-determination is not a temporary right that could simply disappear. Under international law, the right to self-

234. Mary Christina Wood, Nature's Trust: Environmental Law for a New Ecological Age 336–37 (2014).

235. Archer et al., *supra* note 192, at 30–44; Turnipseed et al., *supra* note 174, at 32 (noting that charitable trusts are a superior analogy because "they too benefit numerous and generally unidentified communities or citizenries and may be of indefinite durations").

236. Sand, *supra* note 11, at 56. An equitable interest is an "interest held by virtue of an equitable title (a title that indicates a beneficial interest in property and that gives the holder the right to acquire formal legal title) or claimed on equitable grounds, such as the interest held by a trust beneficiary." Black's Law Dictionary 361 (2d pocket ed. 2001); *see also* Nine, *supra* note 228, at 15 ("The collective signifies the agent that holds rights when the state no longer exists . . . the collective is the normative source of territorial rights. A state, by contrast, is merely a set of institutions. It is a tool to establish jurisdictional authority. As a tool, it isn't itself the holder of the relevant rights.").

237. *See* Dorothée Cambou & Stefaan Smis, *Permanent Sovereignty over Natural Resources from a Human Rights Perspective: Natural Resources Exploitation and Indigenous Peoples' Rights in the Arctic*, 22 Mich. St. Int'l L. Rev. 347, 359–60 (2013) (clarifying that although the exercise of permanent sovereignty over natural resources is entrusted to states, international human rights law identifies the right as stemming from the people's right to self-determination). International human rights law "confers on people the right to freely dispose of natural resources vis-à-vis their State." The state exercises permanent sovereignty over natural resources "for the wellbeing of the peoples." *Id.*

238. Self-determination is a *jus cogens* norm of international law incorporated into the U.N. Charter and the International Covenant on Civil and Political Rights. The application of self-determination to sovereignty over natural resources is also considered *jus cogens. See* Alexander Orakhelashvili, Peremptory Norms in International Law 51–52 (2008).

determination of internationally recognized 'people' is inalienable and permanent.[239] Moreover, once a 'people' have been recognized as a 'self,' a nation among nations, an external threat to statehood does not strip the 'people' of their 'self.' If anything, it strengthens it. After a state has been established, the principle of self-determination becomes dormant, "enclosed within sovereignty."[240] In times of crisis, when state existence is threatened, self-determination springs back to the fore,[241] to safeguard "the cultural, ethnic and/or historical identity or individuality (the 'self') of [the] collectivity, that is, of [the] 'people.'"[242]

Because SIDS are recognized states in international law, to determine the fate of SIDS' EEZs, one need not address the complicated question of what underlies the right to self-determination.[243] Based on the currently applicable international law, self-determination, once established, would hardly be deprived solely because of the loss of territory.[244] Loss of territory impairs the ability to exercise certain rights associated with the right to self-determination, sovereignty being prominent among them. But the complete loss of territory is not an event that undermines the integrity of an already-recognized 'self.'[245] In the context of sea level rise, this conclusion indicates that populations of SIDS that relocate as a community and maintain their separate collective identity in a host state will continue to be recognized in international law as a 'people.'[246]

The maintenance of legal status as a 'people' is significant to EEZ rights because, under both theories of EEZ, the rights in the EEZ attach to the 'people.' Loss of territory is therefore significant not for the continuity of the 'people,' but rather for the validity of the 'people's' claim to the EEZ. While EEZ rights originate in the 'people,' an entitlement to a specific EEZ flows *ab initio* from the territory to which the EEZ is attached.[247] It therefore follows that the claim of a relocated community to EEZ rights in its former

239. *See* DAVID RAIC, STATEHOOD AND THE LAW OF SELF-DETERMINATION 229, 232 (2002).

240. Martti Koskenniemi, *National Self-Determination Today: Problems of Legal Theory and Practice*, 43 INT'L & COMP. L.Q. 241, 246 (1994).

241. *See id*.

242. RAIC, *supra* note 239, at 223.

243. *See* Kathleen McVay, *Self-Determination in New Contexts: The Self-Determination of Refugees and Forced Migrants in International Law*, 28 UTRECHT J. EUR. & INT'L L. 36, 39 (2012); Aleksandar Pavkovic & Peter Radan, *In Pursuit of Sovereignty and Self-Determination: Peoples, States and Secession in the International Order*, 3 MACQUARIE L.J. 1, 2 (2003).

244. *See* McVay, *supra* note 243, at 46; Jain, *supra* note 14, at 9 (but arguing that maritime entitlements will be lost); NINE, *supra* note 228, at 14–15.

245. Territory is important for recognizing self-determination, not for unrecognizing it—a process unknown to international law. It should be noted that even for recognizing self-determination, the territory criteria could be satisfied by "real, imagined, past, present, and future" territory. Jens David Ohlin, *The Right to Exist and the Right to Resist*, *in* THE THEORY OF SELF-DETERMINATION 70, 80 (Fernando R. Tesón ed., 2016). This is especially true in cases where territorial integrity is compromised. In such instances, historical ties to territory could prevail over territorial integrity. *See id.*; *see also* SUMMERS, *supra* note 227, at 122.

246. *See* McVay, *supra* note 243, at 46.

247. *See supra* note 81 and accompanying text.

territory is contingent on the community's ability to demonstrate a meaningful connection to that territory.[248] Here, time is of essence. The more time that elapses from the date of departure, the harder it is for relocated people to demonstrate a lasting and meaningful connection to a previous territory.[249]

International law provides a safe harbor for temporary situations that could be used by SIDS. As previously noted, in not a few cases, entities that have lost one or more of the indicia of statehood enjoyed continued recognition in international law as sovereign states.[250] The common thread among these precedents is temporariness, the belief that the state of affairs undermining the integrity of the state is provisional.[251] A similar argument could be made by peoples of SIDS. At least in the short term, the argument that dislocation is temporary provides a strong ground for maintaining legal connection with the territory.[252] As long as there is a possibility that efforts to combat climate change will yield positive results in reducing sea level rise to the level it was before inundation, a relocated community may still have a valid argument that the lost territory is theirs.[253]

B. Institutional and Legal Responses

The identification of EEZ rights as connected to the 'people' allows legal scholars to break the logjam that hindered discussions about EEZ rights in a post-climate-change world. Moving from abstract discourses to analyses of particular rights facilitates new thinking about the legal environments surrounding these rights. This movement invites identification and development of institutional and legal arrangements for safeguarding EEZ rights and appropriate remedies for potential violations.[254] Such arrangements could come in the form of the establishment of international institutions to

248. *See supra* note 228 and accompanying text.

249. *See* McVay, *supra* note 243, at 46; *see also* Baiamonte & Redaelli, *supra* note 20, at 13.

250. *See supra* notes 35-40 and accompanying text.

251. *See* Bilkova, *supra* note 1, at 28, 41; *see also* Remedios Monteiro v. The State of Goa, (1970) 1 SCR 87 (India) (the "doctrine of non-recognition" in international law does not apply to permanent situations).

252. This outcome is not necessarily true for every collective right. The international system of maritime entitlements is grounded in a naturalist-proprietary framework. Its modern positivist manifestation coexists and relies on its naturalist foundation. *See supra* note 211 and accompanying text. It is the coalescence of naturalist infrastructure and positivist structures that provides for the survivability of maritime entitlements post-submergence. For a general discussion of the proprietary nature of territorial rights, and especially rights in natural resources, see NINE, *supra* note 228, at 11-13.

253. *See* CRAWFORD, *supra* note 29, at 704 (explaining that "the lapse of time in and of itself does not extinguish title; what is required is a settlement of the underlying problem—either an explicit settlement, as with Southern Rhodesia, Namibia and East Timor, or a general acceptance by the international community as a whole that the situation has been resolved"). *But cf*. Remedios Monteiro, *supra* note 251; Bilkova, *supra* note 1, at 28.

254. *See* Sand, *supra* note 11, at 56–57. Sand discusses international institutional arrangements to safeguard against potential failure of states to act according to the terms of environmental trusteeships. If the international community is responsible for safeguarding the beneficiaries' rights against violations committed by their own sovereign, that duty applies in greater strength to violations by external forces.

ensure enforcement of the trust or designated guardians with legal powers to represent the people-beneficiaries.[255]

1. *Institutional Arrangements*

An International Equitable Trust. One such legal institution is an international equitable trust. An equitable trusteeship for safeguarding the rights of incapacitated peoples is not an innovation. In 1945, the United Nations established a trusteeship system that placed vast parts of the planet in a transitory trust system designed to support and guide collectives as they transition to sovereignty.[256] This system reflects "the main contours of an equitable trust,"[257] and may serve as an international precedent for outlining an equitable EEZ trusteeship.[258] Both the naturalist-proprietary and the positivist-sovereignty approaches support the creation of international equitable EEZ trusts. Under the naturalist view, the property interests of the holders of equitable title should be protected from external violations. The positivist position should be examined in light of the justifications that underlie the international consent to extend rights of sovereignty to resources in the EEZ.

Three legal principles supported the introduction of EEZs in UNCLOS. The first is the principle of equity. The sovereignty doctrine aspires for fairness in the allocation of maritime resources. It rejects the notion of occupancy that introduced an incentive to "rush and grab" marine resources by a few powerful states,[259] and replaces it with a distributional approach that allocates resources equally among coastal states. Equity is one of the general principles of law recognized by civilized nations,[260] and as such it serves as a source of international law.[261] While the definition of equity in international law varies, the essence of the principle is the promotion of justice and fair-

255. *See id*.

256. *See* JOHN W. HEAD, INTERNATIONAL LAW AND AGROECOLOGICAL HUSBANDRY: BUILDING LEGAL FOUNDATIONS FOR A NEW AGRICULTURE 316–17 (2017).

257. *Id*. at 316.

258. Unlike the notorious mandate system, there have been several recent examples of successful international territorial administration. *See, e.g.*, BERNHARD KNOLL, THE LEGAL STATUS OF TERRITORIES SUBJECT TO ADMINISTRATION BY INTERNATIONAL ORGANISATIONS 44, 92 (2008) (discussing the examples of East Timor, Kosovo, and Namibia).

259. *See* Continental Shelf (Tunis. v. Libyan Arab Jamahiriya), Judgment, 1982 I.C.J. 18, ¶ 70 (Feb. 24, 1982) (separate opinion of Jimenez de Aréchaga, J.).

260. Vaughan Lowe, *The Role of Equity in International Law*, 12 AUSTL. Y.B. INT'L L. 54, 55 (1989); ANDREAS SOFRONIOU, INTERNATIONAL LAW, GLOBAL RELATIONS, WORLD POWERS 71 (2017).

261. *See* OWEN MCINTYRE, ENVIRONMENTAL PROTECTION OF INTERNATIONAL WATERCOURSES UNDER INTERNATIONAL LAW 122 (2007) (providing three alternative justifications for the use of equity in international law). For a detailed discussion of the normative applicability of equity in international law, see CHRISTOPHER G. WEERAMANTRY, UNIVERSALISING INTERNATIONAL LAW 264–73 (2004).

ness.[262] Equity is "directly applicable as law"[263] and has been applied in numerous ways to promote justice in international law.[264]

As the legal principle that "has given international law the concept of international mandates and trusts,"[265] equity provides the strongest support for establishing an international equitable trust for protecting SIDS' EEZ rights. The prospect of SIDS losing their maritime zones due to sea level rise is extremely unjust. It effectively means that the most disadvantaged countries of the world will pay the price of actions taken by the richest and most powerful nations on Earth.[266] With a combined population of 65 million and non-industrialized economies, SIDS have contributed less than 0.03 percent of total worldwide CO_2 emissions,[267] but few other nations will suffer the harsh consequences of climate change as SIDS will.[268] If SIDS are to lose their territory and their EEZ rights, they will be victimized thrice for acts they did not commit. Not only will their people become landless refugees, but their only means of subsistence will become a global common—benefit-

262. Margaret White explains equity as "justice attained through what is fair." Margaret White, *Equity—A General Principle of Law Recognised by Civilised Nations?*, 4 Queensland U. Tech. L. & Just. J. 103, 103 (2004). Degan & Hazu use Lalande's definition: "certain and spontaneous sense of right and wrong, especially as it manifests itself in the assessment of a concrete and specific case." Vladimir-Đuro Degan & Jadranski zavod Hazu, *Equity and International Law in Maritime Delimitations*, 49 Poredbeno Pomorsko Pravo 139, 154 (2010). Goldie defines "international equity" as "the compendium of concepts supporting, promoting, and implementing those entitlements, benefits and satisfactions which are validated by society's contemporary sense of justice and fairness." L.F.E. Goldie, *Equity and the International Management of Transboundary Resources*, *in* Transboundary Resources Law 103, 111 (Albert E. Utton & Ludwik A. Teclaff eds., 1987). For Lowe, it is "general principles of justice as distinguished from any particular system of jurisprudence or the municipal law of any State." Lowe, *supra* note 260, at 54.

263. Continental Shelf (Tunis. v. Libyan Arab Jamahiriya), Judgment, 1982 I.C.J. 18, ¶ 71 (Feb. 24); *see also* Anastasios Gourgourinis, *Equity in International Law Revisited (with Special Reference to the Fragmentation of International Law)*, 103 Am. Soc. Int'l L. Proc. 79, 80 (2009); P. van Dijk, *Equity; A Recognized Manifestation of International Law?*, *in* International Law and Its Sources: Liber Amicorum Maarten Bos 17 (Wybo P. Heere ed., 1988).

264. *See generally* Michael Akehurst, *Equity and General Principles of Law*, 25 Int'l & Comp. L.Q. 801 (1976); White, *supra* note 262.

265. Weeramantry, *supra* note 261, at 247.

266. SIDS face many environmental, economic, and social challenges. The most common challenges are excessive dependence on international trade, small domestic markets that prevent the benefits of economies of scale, high and disproportionate costs of energy, infrastructure, communication, and public administration, vulnerability to ecological disturbances and limited ability to recover from environmental shocks, narrow resource base, ecological fragility, limited freshwater resources, and increasing amounts of hazardous waste. *See* UN-OHRLLS, *About the Small Island Developing States*, https://perma.cc/HR7J-JLXP (last visited Jan. 30, 2018); U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), annex I, Chapter 17G, 17.123-17.126 (Aug. 12, 1992); Global Conference on the Sustainable Development of Small Island Developing States, *Rep. for the Global Conf. on the Sustainable Development of Small Island Developing States,* U.N. Doc. A/CONF.167/9, annex II, pmbl. (May 6, 1994).

267. *See* Baiamonte & Redaelli, *supra* note 20, at 14.

268. *See* Palmer, *supra* note 19, at 3.

ing the same countries whose wrongful actions led to the disappearance of SIDS.[269]

The second principle underlying the EEZ regime is the special interest of the coastal state in the preservation of its marine resources.[270] This principle, first articulated in Article 6 of the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas,[271] was later strengthened in the UNCLOS provisions granting coastal states regulatory powers for the protection and preservation of the marine environment.[272] UNCLOS Part XII includes 46 articles concerning marine conservation and protection.[273] Preservation is not served, however, if SIDS' EEZ rights are not guaranteed. In the absence of international protection, the imminent loss of EEZ rights will drive SIDS to deplete their marine resources. Supporting the relocation of their populations will require substantial investments, as will the adaptation to climate change impacts before emigration becomes the option of last resort. With no international protections for their EEZ rights, SIDS will have no incentive to manage their marine resources sustainably. Faced with the prospect of losing their exclusive rights, SIDS will probably exhaust their resources to reap as much value as possible before the exclusive right expires.

The third principle underlying the sovereign right to marine resources is the preferential rights of coastal states in the utilization of ocean resources. This principle, now widely recognized in international law,[274] was first articulated by the International Court of Justice ("ICJ") in the 1951 *Norwegian Fisheries* case.[275] In that case, the ICJ recognized rights to marine resources that are grounded in "the vital needs of the population."[276] The preferential rights approach was upheld at the Rome Technical Conference of 1955,[277] and later during the deliberations of UNCLOS I and II.[278] The strongest support for the preferential rights of coastal states came from Brazil, Cuba, and Uruguay which emphasized that marine resources are "of fundamental importance to the economic development of the coastal State or

269. *See, e.g.*, Ann Powers, *Sea-Level Rise and Its Impact on Vulnerable States: Four Examples*, 73 LA. L. REV. 151, 167–68 (2012) (providing the example of Tuvalu and noting that most of the ships licensed to fish in Tuvaluan waters are from highly developed countries like the United States, Japan, and Spain).

270. *See* 2 Y.B. INT'L L. COMM'N 218, ¶ 96, U.N. Doc. A/CN.4/76 (1953).

271. Convention on Fishing and Conservation of the Living Resources of the High Seas, Apr. 29, 1958, 559 U.N.T.S. 285. For a discussion of the evolution of the principle in international law, see EXTAVOUR, *supra* note 181, at 118–20.

272. *See* DUPUY & VIGNES, *supra* note 130, at 255.

273. *See* Osherenko, *supra* note 131, at 342.

274. *See* EXTAVOUR, *supra* note 181, at 121.

275. Norwegian Fisheries (U.K. v. Nor.) 1951 I.C.J. 116, 142 (Dec. 18, 1951).

276. *Id.* at 142; *see also* DUPUY & VIGNES, *supra* note 130, at 282.

277. *See* EXTAVOUR, *supra* note 181, at 121.

278. *See id.* at 122–23; The Volga (Russ. v. Austl.), Case No. 11, Judgment of Dec. 23, 2002, Declaration of Vice-President Vukas, 2002 ITLOS Rep. 11, 42–43; SHIGERU ODA, FIFTY YEARS OF THE LAW OF THE SEA: WITH A SPECIAL SECTION ON THE INTERNATIONAL COURT OF JUSTICE 213 (2003); JOSÉ ANTONIO DE YTURRIAGA, THE INTERNATIONAL REGIME OF FISHERIES: FROM UNCLOS 1982 TO THE PRESENTIAL SEA 103–04 (1997).

the feeding of its population."[279] In 1974, the ICJ recognized "preferential rights" as a concept of customary international law, "particularly in favour of countries or territories in a situation of special dependence on coastal fisheries."[280] As explained by Vice-President Vukas of the International Tribunal on the Law of the Sea, the preferential rights doctrine "has been the essential factor" in establishing EEZs.[281] SIDS economies are heavily dependent on marine resources.[282] This reliance will only grow during the transitory period of emigration and resettlement, when the only remaining source of revenue from SIDS economies is the licensing of EEZ activities. This income could serve as the lifeline for climate refugees in dire need of financial aid. It is what guarantees their relocation, their survival as a collective, and their continued existence as a people.[283]

Successor Trustee. In her exploration of SIDS' statehood in a post-climate-change world, Rayfuse suggested that to preserve their sovereignty, SIDS could associate with another country in a confederacy.[284] Similarly, to preserve their EEZ rights, SIDS could contract with a third party to serve as a successor trustee.[285] In trust law, the loss of capacity by a trustee has no bearing on the rights and duties arising under the trusteeship.[286] When a trustee is no longer capable of carrying out her duties, a successor trustee is appointed.[287]

The advantage of a successor trustee regime is that, while the trustee could be a host country, it does not have to be. SIDS could choose an international body, a powerful maritime nation, or a coastal state lying close to the resource. The flexibility of the successor trustee regime allows SIDS the benefits of relocation to a friendly state, without the obligation of transferring EEZ rights to the host state. Obviously, some states might demand EEZ rights in return for hosting SIDS but that is not necessarily the case. SIDS may prefer relocating to states that are unable to exercise sovereignty over the EEZ of SIDS. The successor trustee regime allows SIDS to establish

279. EXTAVOUR, *supra* note 181, at 122–23; The Volga, 2002 ITLOS Rep. at 42–43.

280. Norwegian Fisheries, 1951 I.C.J. at 142.

281. The Volga, 2002 ITLOS Rep. at n.5; *see also* Fisheries Jurisdiction (Ger. v. Ice.), Judgment, 1974 I.C.J. 175, ¶44–47.

282. *See* Burkett, *supra* note 5, at 351.

283. *See supra* note 20 and accompanying text.

284. *See supra* note 41 and accompanying text.

285. For a contractual relationship to be feasible, SIDS must have a valid claim to maritime entitlements post-submergence. The analysis provided in this Article establishes such a claim.

286. RESTATEMENT (FIRST) OF TRUSTS § 397 (AM. L. INST. 1935) ("[A] disposition for charitable purposes will not fail because of the failure of the trustee to act or for want of a trustee.").

287. RESTATEMENT (SECOND) OF TRUSTS § 108 (AM. L. INST. 1959) ("If a trust is created and there is no trustee or if the trustee, or one of several trustees, ceases for any reason to be trustee, a new trustee can be appointed."); *see also id.* at cmt. A ("The rule stated in this Section is applicable whether no trustee is named by the settlor or the trustee named dies or is or becomes incapable of acting as trustee or disclaims or resigns or is removed."). Any party with an interest in the trust corpus may initiate a proceeding to appoint a successor trustee. RESTATEMENT (THIRD) OF TRUSTS § 34 (AM. L. INST. 2003).

a tripartite revenue sharing arrangement by which the successor trustee, the host state, and SIDS communities share the benefits of SIDS' EEZs.

2. *Legal Remedies*

The two institutional courses of action suggested above rely on political will and international cooperation. Unfortunately, SIDS might not be able to muster the political support necessary to translate these options from theory into practice in a world of *realpolitik*.[288] Pleading before an international tribunal for remedies is an alternative course of action to protect the EEZ rights of SIDS that does not require diplomacy. SIDS should therefore consider a cause of action in equity to provide for transitory justice to threatened SIDS communities. The principle of equity is especially fitting for "anomalous cases" where rigid application of existing legal frameworks will result in injustice.[289] Two recognized remedies are applicable to SIDS' EEZ rights: equity *infra legem* and equity *praeter legem*.[290]

Equity *infra legem*, also known as accessory equity, is applied when several different interpretations of legal text are possible. Applying equity *infra legem*, a judge will choose the interpretation that best promotes equitable results.[291] In the words of the ICJ, it is "that form of equity which constitutes a method of interpretation of the law in force."[292] Equity *infra legem* does not require the judge to create solutions, but rather to choose the equitable solution among the different possible interpretations arising under the applicable law.[293] In the context of SIDS' maritime entitlement, equity *infra legem* could support a reading of UNCLOS Article 7(2)'s "highly unstable" coastlines as encompassing all coastlines subject to climate-induced intermittent geographical change.[294] Such a reading will avoid the unjust consequences prescribed by a reading of UNCLOS Article 121(3) as an EEZ-divesting mechanism.[295]

Equity *praeter legem* is equity used to fill gaps in the law or, more precisely, "to remedy the insufficiencies of international law and fill its logical

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288. *See* Baiamonte & Redaelli, *supra* note 20, at 10.

289. Cayuga Indians (U.K. v. U.S.), 6 R.I.A.A. 173, 179 (1926).

290. *See* Akehurst, *supra* note 264, at 801; McIntyre, *supra* note 261, at 129. Two other remedies, equity *contra legem* (a remedy provided "in derogation from the law, to remedy the social inadequacies of the law") and decisions *ex aequo et bono* ("decisions which 'do not have to be at all related to judicial considerations'") could only be used by permission of the parties and are therefore not discussed herein. Lowe, *supra* note 260, at 56.

291. *See* McIntyre, *supra* note 261, at 129.

292. Frontier Dispute (Burk. Faso v. Mali), Judgment, 1986 I.C.J. 554, ¶ 28 (Dec. 22, 1986).

293. Fisheries Jurisdiction (U.K. v. Ice.), Judgment, 1974 I.C.J. 3, ¶ 78 (July 25, 1974) ("It is not a matter of finding simply an equitable solution but an equitable solution derived from the applicable law.").

294. Wannier & Gerrard, *supra* note 23, at 633–34. It could also justify a reading of "baselines" under UNCLOS Article 5 as fixed rather than ambulatory. *See* Powers & Stucko, *supra* note 11, at 130–31.

295. Distributional justifications also support this reading. *See* Caron, *supra* note 57, at 1.

lacunae."[296] The major legal challenges underlying the issue of sinking states have no specified recourse in international law. Treaties and traditional rules were not designed to address such an unthinkable reality.[297] Indeed, "the physical undermining of whole states represents an extreme failure of the international community and constitutes an entirely novel problem for public international law."[298] However, the fact that there are no specifically-designed solutions in law to a problem is no reason for allowing injuries to last. One of the fundamental principles of equity is that "equity will not suffer a wrong to be without a remedy."[299] There is ample legal space for equity-based solutions to remedy the unjust consequences of climate change. In the context of EEZ rights, two established equitable doctrines could be applied to fill existing voids in law. These are the doctrines of c*y pres* and unjust enrichment.

The doctrine of *cy pres* is an ancient principle of charitable trust law.[300] The phrase comes from the Norman French "*cy pres comme possible,*" which translates to "as near as possible."[301] The doctrine is applied to maintain the operation of charitable trusts where their original purpose had become impossible or impracticable to carry out.[302] Under c*y pres*, instead of allowing the trust to fail, a court will redesignate the purpose of the trust to some other purpose "that reasonably approximates the designated purpose."[303] *Cy pres* is not restricted to trust law. Courts and legislators have expanded its operation to the fields of gift law,[304] class action law,[305] and estate law.[306] As an equitable doctrine designed to ease the conflict between original intent and changing circumstances,[307] it is especially applicable to resource management regimes.[308] An international tribunal could apply *cy pres* as an eq-

296. Lowe, *supra* note 260, at 56.

297. *See supra* note 30 and accompanying text.

298. Costi & Ross, *supra* note 14, at 106.

299. McIntyre, *supra* note 261, at 126.

300. The origins of the doctrine have been traced to Roman Institutes of Justinian. *See* Chris J. Chasin, *Modernizing Class Action Cy Pres Through Democratic Inputs: A Return To Cy Pres Comme Possible*, 163 U. Pa. L. Rev. 1463, 1465 (2015); Edith L. Fisch, *Cy Pres Doctrine and Changing Philosophies*, 51 Mich. L. Rev. 375, 375 (1953).

301. Chasin, *supra* note 300, at 1465 n.3.

302. *See* Restatement (Second) of Trusts § 399 (Am. L. Inst. 1959).

303. Restatement (Third) of Trusts § 67 (Am. L. Inst. 2003).

304. *See* John K. Eason, *Motive, Duty, and the Management of Restricted Charitable Gifts*, 45 Wake Forest L. Rev. 123, 124–25 (2010); William P. Sullivan, *The Restricted Charitable Gift as Third-Party-Beneficiary Contract*, 52 Real Prop. Tr. & Est. L.J. 79, 107–08 (2017).

305. *See* Chasin, *supra* note 300, at 1470.

306. *See, e.g.*, *In re* Estate of Lamb, 97 Cal. Rptr. 46, 49 (Dist. Ct. App. 1971).

307. *See* Fisch, *supra* note 300, at 383–85.

308. Based on this understanding, scholars have developed a *cy pres* application for conservation easements and a *cy pres*-based common law fund for remedying environmental harms. *See* Nancy A. McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 Harv. Envtl. L. Rev. 421 (2005); Jason J. Czarnezki & Mark L. Thomsen, *Advancing the Rebirth of Environmental Common Law*, 34 B.C. Envtl. Aff. L. Rev. 1 (2007).

uity *praeter legem* remedy to address the plight of SIDS communities.[309] Using *cy pres*, the trust regime of the EEZ would be adjusted to maintain its original purposes, such as benefiting the people of SIDS while maintaining equity, sustainability, and subsistence. For instance, such a regime could impose trusteeship responsibilities on third parties vis-à-vis SIDS communities for a designated period.

Alternatively, SIDS communities could sue vessels of countries who violate their EEZ rights post-submergence. Damages could be hard to prove in such cases; if the people of SIDS are no longer able to extract marine resources by themselves, it might be difficult for them to demonstrate that extraction of resources by others has caused them damage. Instead of opting for a damages-based action, SIDS communities could choose a cause of action in restitution.[310] Restitution is a remedy devised to prevent unjust enrichment.[311] Both unjust enrichment and restitution are recognized in international law,[312] with the concept of unjust enrichment being recognized "as a general principle of international law."[313]

In international law, unjust enrichment "stands on equal footing" with the general principle of equity.[314] Guided by principles of justice and fairness, the doctrine of unjust enrichment and the equitable remedies created to further its purpose are "inherently flexible," allowing international tribunals to focus on reestablishing a just balance between two parties, "one of whom has enriched himself, with no cause, at the other's expense."[315] In such cases, unjust enrichment "gives one party a right of restitution of anything of value that has been taken or received by the other party."[316] Unjust enrichment is especially suitable "where strict application of some other standard would not *adequately* compensate the plaintiff in a case where an

309. *See* Baiamonte & Redaelli, *supra* note 20, at 10 ("One possible solution [to the lack of protection for SIDS' populations] could consist in adapting the existing legal framework to the peculiarities of climate-induced displacement. The specific needs of climate-displaced people could thus be met through creative interpretation or extrapolation by analogy.") (internal quotation omitted).

310. *See* Olwell v. Nye & Nissen Co., 173 P.2d 652, 653 (Wash. 1946) ("It is uniformly held that in cases where the defendant *tort feasor* has benefited by his wrong, the plaintiff may elect to 'waive the tort' and bring an action *in assumpsit* for restitution. Such an action arises out of a duty imposed by law devolving upon the defendant to repay an unjust and unmerited enrichment.").

311. *See* Roscoe Pound, *The Progress of the Law, 1918–1919: Equity*, 33 HARV. L. REV. 420, 421 (1920); *see also* CARYL A. YZENBAARD ET AL., BOGERT'S THE LAW OF TRUSTS AND TRUSTEES § 471 (digital ed. 2017) ("Many courts, especially in recent years, apply the remedy of a constructive trust in order to prevent unjust enrichment. In fact, the imposition of a constructive trust to prevent unjust enrichment is probably the primary basis at the present time.").

312. *See* Ana Vohryzek, *Unjust Enrichment Unjustly Ignored: Opportunities and Pitfalls in Bringing Unjust Enrichment Claims under ICSID,* 31 LOY. L.A. INT'L & COMP. L. REV. 501, 519–22 (2009).

313. Saluka Inv. BV v. Czech, Partial Award, at 92 (Perm. Ct. Arb. 2006), https://perma.cc/X9V9-C8S5.

314. Charles Manga Fombad, *The Principle of Unjust Enrichment in International Law*, 30 COMP. & INT'L L.J. S. AFR. 120, 123–24 (1997).

315. Sea-Land Services, Inc. v. Iran, 6 Iran-U.S. Cl. Trib. Rep. 149, 168–69 (1984) (quoting F. Francioni, *Compensation for Nationalisation of Foreign Property: The Borderland Between Law and Equity*, 24 INT'L COMP. L.Q. 255, 273 (1975)).

316. Saluka Inv., *supra* note 313, at 92.

injustice has taken place, or to deter willful violations in the future."[317] To achieve a just result, the equitable foundation of unjust enrichment "makes it necessary to take into account all the circumstances of each specific situation."[318]

Until the extracted marine resource (or its value) is returned to the community, SIDS' rights could be protected by a restitution-based remedy known as a "constructive trust."[319] A constructive trust applies when property or rights have "been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest."[320] In these instances, equity will vest title in the wronged party and regard the holder of the property as a trustee.[321] One of the clear benefits of a constructive trust is that it attaches to the property and traces any consideration given in exchange for the property, including profits and fruits.[322]

Conclusion

Climate change is one of the greatest challenges humanity has ever faced. As a global problem with local and diffused causes,[323] it may only be met through international cooperation. For SIDS, the politically-negotiated framework achieved in Paris in 2015 is simply "too little too late."[324] To safeguard their rights, SIDS must creatively utilize existing legal instruments that were neither designed for nor contemplative of a catastrophe as serious as climate change. To date, most scholars who have searched for legal responses to the plight of SIDS applied relevant legal norms rigidly and in disregard of the novelty of the problem or the uniqueness of the surrounding circumstances.

The fact that contemporary legal instruments are ill-suited for addressing the plight of SIDS does not mean that the law has nothing to offer. Underlying any legal instrument are fundamental legal principles that may offer better solutions. Chief among these is the principle of equity, "under which is concealed the creative force which animates the life of the law."[325] In this Article, I have demonstrated that careful articulation of the legal relation-

317. Cross v. Berg Lumber Co., 7 P.3d 922, 935 (Wyo. 2000) (emphasis added).

318. Sea-Land Services, 6 Iran-U.S. Cl. Trib. Rep. at 168–69 (quoting Jiménez de Aréchaga, *International Law in the Past Third of a Century*, 159 Recueil des Cours 1, 299–00 (1978)).

319. Pound, *supra* note 311, at 421. Like all unjust enrichment remedies, constructive trusts are aimed at furthering equity. *See* Chevron Corp. v. Donziger, 974 F. Supp. 2d 362, 639 (S.D.N.Y. 2014), *aff'd*, 833 F.3d 74 (2d Cir. 2016) (stating that a constructive trust is "the formula through which the conscience of equity finds expression") (quoting Moore v. Crawford, 130 U.S. 122, 128 (1889)).

320. Chevron Corp., 974 F. Supp. 2d at 639 (quoting Moore, 130 U.S. at 128).

321. *See id.*; Yzenbaard et al., *supra* note 311, at 1.

322. *See* Yzenbaard et al., *supra* note 311, at 1.

323. *See* Ryan Jarvis, *Sinking Nations and Climate Change Adaptation Strategies*, 9 Seattle J. for Soc. Just. 447, 455 (2010).

324. Palmer, *supra* note 19, at 16.

325. José Puig Brutau, *Juridical Evolution and Equity*, *in* Essays in Jurisprudence in Honor of Roscoe Pound 82, 84 (Ralph A. Newman ed., 1962).

ships involved and the positions of the affected legal interests clears the way for equitable remedies to be applied as forms of transitory justice to SIDS.

The achievement of this Article is in the basic understanding that SIDS are no different than any other legal entity. When the question of the EEZ rights of SIDS is framed as a legal question of survivability, to answer it, we are required to perform a standard legal analysis of rights. The benefits of the legal framework that is the outcome of this analysis are not in its sophistication but rather in its potential to facilitate new discussions on a range of legal problems many have thus far viewed as hopeless. The ability to maintain EEZ rights post-submergence increases SIDS' geopolitical position. With a legal claim to their EEZs, SIDS have better prospects for relocation and economic stability. Scholars of ocean governance and those interested in climate-induced migration could and should apply the legal framework detailed herein to develop legal and policy instruments for protecting and utilizing SIDS' EEZ rights in the long-term.