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SMALL ISLAND DEVELOPING STATES GREEN DEFENSE: STATEHOOD,
SOVEREIGNTY, AND THE PATRON'S DILEMMA*James Brody*

INTRODUCTION

This article investigates gaps in coverage under the 1982 United Nations Convention on the Law of the Sea (UNCLOS) and the 1933 Montevideo Convention on the Rights and Duties of States (Montevideo Convention) for Small Island Developing States (SIDS), low-lying coastal states, and low-lying island states. SIDS tend to be low-lying island states and face existential threats from global sea level rise, which results in gaps in coverage that undermine SIDS ability to foster coalitions. Part II of this article will discuss the shortcomings of international law related to the rise in sea level due to climate change. Part III will discuss the significance of new norms for SIDS as they respond to UNCLOS and Montevideo Convention gaps. Particularly, SIDS *opinio juris* is the beginning of new customary international law under the specially affected states doctrine. Part IV will discuss alternatives outside international environmental law, focusing on the new role of national and international militaries in advancing environmental principles at home and abroad. Finally, in Part V, this article will explore the NATO Green Defense Framework as a model of logical outgrowth of SIDS practice. Security cooperation offers SIDS an opportunity to re-establish stability in anticipation of territorial uncertainty, damage, and humanitarian disaster caused by climate change.

I. STATEHOOD IS NECESSARY FOR RECOGNITION UNDER INTERNATIONAL LAW

Under international law, sovereignty is distinct from the principle of statehood.¹ A sovereign nation is authorized by its constituents and institutions, so its subjects are in turn bound by the nation's decisions.² On the other hand, statehood conveys recognized international rights and obligations. With statehood, a political unit may engage in certain legitimate

¹ Celia R. Taylor, *A Modest Proposal: Statehood and Sovereignty in a Global Age*, 18 U. PA. J. INT'L ECON. L. 745, 753 (1997) ("Uncoupling 'statehood' from 'sovereignty' facilitates a scheme in which a State can cede some 'sovereign' elements while remaining a full, legitimate international actor.").

² See *id.* at 765 ("As demonstrated by a State's entry into human rights treaties, which grant bodies such as the United Nations the power to monitor and sanction States for internal actions, some of this transfer is purposeful.").

forms of violence against combatants.³ International law and binding international agreements control the permissible means and methods a state may use for warfare.⁴ By comparison, a violent non-state actor could be labeled a terrorist;⁵ thus, modern states are incentivized to coexist with other political communities out of respect for the rights of other recognized states and to avoid being labeled as engaging in terroristic acts.⁶ In order to preserve their own rights, states must balance their actions with the incentives created under international law, such as their interest in self preservation as a sovereign political unit.⁷

A. Statehood Defined

The definition of statehood is controversial given that the constitutive and declaratory theories are in contention. The constitutive theory of statehood claims that a new state comes into being only when existing states recognize it.⁸ In contrast, the declaratory theory automatically confers statehood when the following four elements are met: (1) a permanent population, (2) a defined territory, (3) a government, and (4) the capacity to enter into relations with other states.⁹

Previously, international law did not recognize a definitive legal characterization of statehood;¹⁰ however, the Montevideo Convention

³ See Convention (IV) respecting the Laws and Customs of War on Land art. 22-28, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 (legal use of force in the pursuit of military objectives is limited).

⁴ *Id.*

⁵ See generally Matthew Lippman, *The New Terrorism and International Law*, 10 TULSA J. COMP. & INT'L L. 297 (describing the development of international customs leading to post-9/11 condemnation of terrorism and state-sponsored terrorism).

⁶ *Id.* at 365 ("The Committee's success in encouraging formal action against terrorism, in the end, must be evaluated in light of the ability and willingness of individual states to act against terrorism and to refrain from the sponsorship of terrorist attacks.").

⁷ See *id.* at 352 ("A more comprehensive text [than the Convention for the Prevention and Punishment of Terrorism] which either incorporates existing instruments by reference or which encompasses their substantive provisions . . . likely is to meet resistance from reticent States.").

⁸ Robert J. Delahunty & John Yoo, *Statehood and the Third Geneva Convention*, 46 VA. J. INT'L L. 131, 142 (2005).

⁹ Montevideo Convention on the Rights and Duties of States art. 1, Dec. 26, 1933, 165 L.N.T.S. 19.

¹⁰ Michael Gagain, *Climate Change, Sea Level Rise, and Artificial Islands: Saving the Maldives' Statehood and Maritime Claims Through the 'Constitution of the Oceans'*, 23 COLO. J. INT'L ENV'T L. & POL'Y 77, 87 (2012).

enshrined the declaratory theory elements as the objective legal standard for statehood.¹¹

B. Sea Level Rise is a Threat to SIDS Statehood

As sea level rise impacts established maritime zones, small island, low-lying islands, and low-lying coastal states respond to the gaps in UNCLOS coverage by executing instruments intended to supersede state sovereignty threats. The uncertain nature of statehood is complicated by the national security threat of anthropogenic climate change, which is resulting in sea level rise. SIDS are disproportionately impacted by sea level rise compared to other states because they are losing landmass, and in some cases, they face complete submersion.¹² The United Nations acknowledged concerns over SIDS security interests due to sea level rise,¹³ including their very existence.¹⁴ The United Nations High Commissioner for Refugees stated that when "the entire territory of a State [is] permanently submerged, inevitably there could be no population attached to it or a government in control of it."¹⁵ Thus, SIDS may risk losing statehood because of complete loss of landmass.

¹¹ See JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 45 (2006) (stating the best known formulation of the basic criteria for statehood is that laid down in Article 1 of the Montevideo Convention).

¹² See generally U.N. Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States, Remarks at the High Level Ministerial Breakfast Meeting on Migration and Climate Change – A Focus on SIDS (Sept. 26, 2019), <https://www.un.org/ohrlls/news/remarks-high-level-ministerial-breakfast-meeting-migration-and-climate-change-%E2%80%93-focus-sids> [<https://perma.cc/4KG3-S865>] (“We truly risk running out of time and we all must redouble our efforts to enhance effective partnerships, increase awareness and action on the climate-migration nexus”) [hereinafter UN High Office Remarks] .

¹³ See G.A. Res. 63/281, U.N. Doc. A/RES/63/281, at 2 (Jun. 11, 2009) (The UN was “[d]eeply concerned that the adverse impacts of climate change, including sea level rise, could have possible security implications”).

¹⁴ See G.A. Res. 63/213, U.N. Doc. A/RES/63/213 (Feb. 10, 2009), https://www.un.org/esa/dsd/resources/res_pdfs/ga-64/cc-inputs/PSIDS_CCIS.pdf [<https://perma.cc/PZ8J-JV8T>] (“[T]he adverse effects of climate change and sea-level rise present significant risks to the sustainable development of small island developing States, that the effects of climate change may threaten the very existence of some of them and that adaptation to the adverse effects of climate change and sea-level rise therefore remains a major priority for small island developing States”).

¹⁵ U.N. High Commissioner for Refugees, *Climate Change and Statelessness: An Overview* 1-2 (May 15, 2009), <https://www.unhcr.org/en-us/protection/environment/4a1e50082/climate-change-statelessness-overview.html> [<https://perma.cc/WP8M-ZPQ9>].

In addition to losing landmass, extreme temperatures, rising sea levels, and slow onset effects can also force the migration of SIDS populations.¹⁶ While it is unclear whether a substantial loss of defined territory would terminate a nation's statehood, recognition by existing states could potentially prevent that termination. Importantly, a nation's statehood may not survive the loss of its government and permanent population as a result of climate migration.

C. The "Anticipation Effect" of Potential Loss of Statehood

SIDS must turn to mechanisms other than self-help in their pursuit of stability, such as international relations.¹⁷ International relationships tend to be formed under the principal-agent theory. The principal nation serves the role of "patron." The agent nation, such as a SIDS, serves the role of the "client." When forming international relationships, patron states consider client states based on anticipated compliance in future agreements.

Further, under the principal-agent theory, the client nation's compliance with the agreement is not certainty but a possible outcome based on the two parties' interests and dependencies because of the .¹⁸ A client is more likely to comply with a patron when that patron can act unilaterally, and the interests of the patron diverge from the client.¹⁹ When a client loses agency, they are perceived to become passive by the patron as it loses the ability to leverage its participation in the agreement with the patron to secure future transactions with that patron.²⁰ Therefore, a patron

¹⁶ See generally UN High Office Remarks, *supra* note 12.

¹⁷ U.N. High Commissioner for Refugees, Climate Change and Statelessness: An Overview 261-62 2 (May 15, 2009),

<https://www.unhcr.org/en-us/protection/environment/4a1e50082/climate-change-statelessness-overview.html> [<https://perma.cc/WP8M-ZPQ9>] ("work on alliance politics . . . has failed to explore how these variables affect each other in inter-alliance bargaining . . . to diminish incentives to free-ride, interveners may benefit from diminishing their capacity to act unilaterally, perhaps by removing related personnel or institutions.").

¹⁸ Barbara Elias, *The Big Problem of Small Allies: New Data and Theory on Defiant Local Counterinsurgency Partners in Afghanistan and Iraq*, 27 SEC. STUD. 233, 239 (2018) ("when intervening forces propose policies that would potentially create competition, local allies are motivated to comply to avoid being undercut by other actors").

¹⁹ *Id.* at 250 ("the data supports the hypothesized interaction effect between interests and dependencies [. . .] When the United States is dependent on a smaller ally, the interests of the local partner largely determines the likelihood of compliance").

²⁰ See Taylor, *supra* note 1, at 775 ("Each mechanism of transferring capital from one country to another enables the capital provider to impose some constraint on the recipient government's ability to act freely . . . It is the relative ability of a sovereign to exercise its traditional powers in the creation and operation of each type of capital transfer agreement which has relevance for our conceptualizations of statehood and sovereignty.").

state's devaluation of an enduring relationship with a SIDS is the anticipated effect of a SIDS as a client losing statehood.²¹

A SIDS' perceived influence is another integral variable of these patron-client relationships.²² Consequently, SIDS would lose most—if not all—leverage based on perceived influence once they are deterritorialized by sea level change.²³ Patron state interests in the habitability of SIDS territory and alignment with the SIDS regime are undermined by the severe consequences of sea level rise.²⁴ SIDS face potential abandonment as patrons struggle to guarantee interests in security negotiations.²⁵ For the patron state, the rational decision is to fulfill humanitarian obligations to SIDS refugees and not to initiate any additional obligations to a perceived soon-to-be extinct state.²⁶

D. Sea Level Rise is a Threat to SIDS' Interests

Even when a SIDS' statehood is secure, the risk to state strategic interests is substantial. According to the Intergovernmental Panel on Climate Change (IPCC), the mean sea level is projected to increase between .38 meters to .77 meters globally by the year 2100.²⁷ This uncertainty threatens the security of many SIDS and low-lying coastal states, as they face substantial or total loss of land mass to the sea. As a result, SIDS must confront an environmental disaster that imminently threatens the habitation of their territory in extreme cases.

²¹ See Elias, *supra* note 18, at 260 ("The embedded US political dependencies introduced in this model affect the ability, or inability, of US officials to apply coercive techniques in inter-alliance bargaining encounters that other studies indicate are critical to promoting local compliance . . . [The variation in local compliance] suggest that local allies are neither the puppets of larger partners or [sic] tyrants willfully entrapping foreign allies in quagmire.").

²² See *id.* at 235 ("Often times, if the local regime collapses, so does the political and military mission of the intervening power.").

²³ Barbara Elias, *The Big Problem of Small Allies: New Data and Theory on Defiant Local Counterinsurgency Partners in Afghanistan and Iraq*, 27 SEC. STUD. 233, 235 (2018).

²⁴ See *id.* at 237 ("local allies would likely have greater willpower in negotiations with intervening forces because they are often battling for their survival").

²⁵ See *id.* ("Compromise is easier when faced with challenges to nonessential security policy, which may provide an advantage to local allies in bargaining.").

²⁶ See *id.* at 237-38 ("Such internal contradictions in managing local allies have led some security scholars to label modern COIN intervention a 'political impossibility.'").

²⁷ VALERIE MASSON-DELMOTTE ET. AL., WORKING GROUP I TO THE SIXTH ASSESSMENT REPORT OF THE IPCC, CLIMATE CHANGE 2021: THE PHYSICAL SCIENCE BASIS, 78-79 fig. TS.4 (2021).

E. SIDS' Interests Under UNCLOS Maritime Jurisdictional Zones

The second gap in international law coverage is under UNCLOS, which established state maritime jurisdictional zones with associated rights and obligations.²⁸ SIDS have substantial economic, security, cultural, and jurisdictional interests in these maritime zones because they encompass (1) the territorial sea, (2) the contiguous zone, and (3) the exclusive economic zone.²⁹

Under UNCLOS, coastal ports fall within the exclusive jurisdiction of the SIDS.³⁰ The SIDS territorial sea is measured twelve nautical miles from a coastal baseline.³¹ SIDS exercise exclusive sovereignty in territorial seas to regulate resources like fisheries and exercise limited sovereignty in contiguous zones (CZ).³² The CZ is measured from the edge of the territorial sea to twenty-four miles from the coastal baseline,³³ in which the SIDS may act to prevent violations of customs, sanitary, immigration, and fiscal laws and regulations.³⁴ The SIDS Exclusive Economic Zone (EEZ) spans from the edge of the territorial sea to 200 nautical miles offshore.³⁵ Within their EEZ, SIDS have the sovereign right to explore, exploit, conserve and manage natural resources.³⁶

The rise of global mean sea level poses a threat to all ocean spaces adjacent to SIDS. Since maritime zones are established using a normal baseline from the low-water line along the coast,³⁷ sea level rise has the potential to significantly shrink all spatial national claims to maritime

²⁸ See generally U. N. Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397; 21 I.L.M. 1261.

²⁹ See *id.*

³⁰ *Id.* § 2 art. 11 ("the outermost permanent harbour works which form an integral part of the harbour system are regarded as forming part of the coast").

³¹ *Id.* § 2 art. 3 ("Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles . . .").

³² *Id.* § 4 art. 33(1)(a)-(b) ("the coastal State may exercise the control necessary to . . . prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations [and] punish infringement of the above laws and regulations [within their contiguous zone] . . .").

³³ *Id.* § 4 art. 33(2).

³⁴ *Id.* § 4 art. 33(1)(a)-(b).

³⁵ *Id.* § 5 art. 57 ("the coastal State has . . . sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living . . . and with regard to other activities in the economic exploitation and exploration of the zone . . .").

³⁶ *Id.*

³⁷ *Id.*

jurisdiction as the low-water line moves inland.³⁸ UNCLOS typically measures baselines "as marked on large-scale charts officially recognized by the coastal state."³⁹ However, as sea levels rise, baseline shifts and state charts become obsolete and unrecognizable from the physical coast. Certainty over SIDS maritime sovereignty and jurisdiction erodes, which further highlights the insufficiency of UNCLOS as a source of legal security for SIDS.

F. SIDS Preemptive Practices

In anticipation of sea level rise consequences, SIDS began a trend of unilateral and multilateral declarations to permanently establish baselines that do not consider changes in sea level in an attempt to diplomatically address the national security threats created by sea level rise. The long-term goal was to preserve SIDS statehood and sovereignty under UNCLOS.⁴⁰

In 2015, seven leaders of Polynesian States and Territories in the Pacific Region signed the Taputapuatea Declaration on Climate Change in Papeete, Tahiti.⁴¹ The member nations declared that climate change is a direct threat to territorial integrity, security interests, sovereignty, and in some cases, the very existence of Party SIDS.⁴² Additionally, it acknowledged that UNCLOS baselines are calculated from above water-level lands that may become submerged.⁴³ The signatories sought to permanently establish baselines without considering sea level rise.

Then in 2016, the Republic of the Marshall Islands passed new legislation repealing the 1984 Maritime Zones Declaration Act in its entirety and the Republic declared all maritime zones anew.⁴⁴ This demonstrated the emergence of *opinio juris* to unilaterally declare and preemptively publish SIDS' jurisdictional baselines, limits, and boundaries .

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Pacific Island Forum, *Pacific Islands Forum Leaders Declaration on Climate Change Action* (Sept. 10, 2015), <https://www.forumsec.org/wp-content/uploads/2017/11/2015-Pacific-Island-Forum-Leaders-Declaration-on-Climate-Change-Action.pdf> [<https://perma.cc/68X9-7FB5>].

⁴² *Id.* ¶ 1 (the members were "deeply concerned about the serious impacts of, and growing threat, posed by climate change to the economic, social, environmental and cultural well-being and security of the Pacific Island Countries and Territories . . .").

⁴³ *Id.*

⁴⁴ Republic of the Marshall Islands Maritime Zones Declaration Act, Bill No. 13 §§ 118, 120 (2016) (declaring new and repealing previous archipelagic baselines).

This *opinio juris* is an extension of previous regional strategies of the South Pacific island nations, such as the 2010 Framework for a Pacific Oceanscape.⁴⁵ The first strategic priority of the framework was to establish maritime jurisdictional rights and responsibilities.⁴⁶ Considering national interest, it proposes that party states should submit coordinates and charts delineating maritime zones to the UN.⁴⁷ The goal of this submission is to (1) comply with UNCLOS, and (2) to address that sea level rise and environmental change on highly vulnerable baselines.⁴⁸

II. INTERNATIONAL ENVIRONMENTAL LAW REGIMES ARE INSUFFICIENT FOR SIDS' CONCERNS

International law provides tools for addressing global environmental crises only if those laws are binding upon other nations. SIDS' individual and regional practices are non binding "soft" law.⁴⁹ Soft law is created by (1) communicating a message, (2) repeating that message, (3) cross-referencing a message, and (4) establishing guidelines from concurrent international authorities.⁵⁰ Here, SIDS are the governmental source and origin of soft law declarations of permanent baselines and other responses to sea level rise threats, which demonstrates a trend towards a new international law norm.

⁴⁵ Cristelle Pratt & Hugh Govan, International Framework for a Pacific Oceanscape: A Catalyst for Implementation of Ocean Policy (Nov. 2010), <http://www.forumsec.org/wp-content/uploads/2018/03/Framework-for-a-Pacific-Oceanscape-2010.pdf> [<https://perma.cc/NN7J-U5Y3>].

⁴⁶ *Id.* at 31 ("The majority of maritime boundaries in the Pacific are yet to be negotiated and declared, notwithstanding their importance for ocean management and security over interests . . . the immediate priority for Pacific States is to establish and declare their baselines and maritime zones").

⁴⁷ *Id.* at 32 ("Pacific Island Countries should in their national interest, deposit with the United Nations, base-point coordinates as well as charts and information delineating their maritime zones").

⁴⁸ *Id.* ("The implications from climate change and sea-level rise, on the highly vulnerable baselines . . . could be addressed through concerted regional unity and diplomatic efforts that advocates for the permanent establishment of declared baselines and maritime zones.").

⁴⁹ See Alan Boyle, *Further Development of the Law of the Sea Convention: Mechanisms for Change*, 563 INT'L COMPAR. L. Q., 54(3), 2005, at 569 (2005) ("But if such a [regional] treaty were representative of a pattern of regional treaties, spread across different regions, and possibly giving effect to UN policy endorsed by consensus at a global level, its evolutionary value as an interpretative guide would be significantly enhanced.").

⁵⁰ See Just. Lorne Sossin & Chantelle van Wiltenburg, *The Puzzle of Soft Law*, 58 OSGOOD HALL L.J. 623, 650 ("In our view, the key to reviewing soft law is appreciating its impact, and not just its origins . . . we propose that courts consider the extent to which the soft law shapes the discretion of decision makers and the culture of decision making in a public body.").

The legal effect of SIDS soft law is the indirect expression of two elements of binding customary international law: (1) a general and consistent practice of states, and (2) the sense of legal obligation that motivated that practice, also known as *opinio juris*. Likely, the national security threat to SIDS spurred a sufficient sense of legal obligation to form *opinio juris* and that the regional agreements are *prima facie* of SIDS state practices.

A. SIDS Development of International Environmental Law

Currently, SIDS' declarations indicate an obligation under international law to adjust, entrench, or otherwise accommodate for jurisdictional baseline interests in response to sea level rise. Once these declarations of maritime baselines translate into ripe obligations of similarly impacted states, SIDS may assert legal claims to the declared maritime jurisdictions in international courts. The International Court of Justice's (ICJ) North Sea Continental Shelf cases set precedent for the transition of state practice to binding *opinio juris*. There, Germany claimed a "just and equitable share" of the North Sea continental shelf based on its sovereign claim to the coastline.⁵¹ Denmark and the Netherlands challenged that claim and argued Article 6 of the Convention on the Continental Shelf in the Geneva Convention controlled the North Sea continental shelf,⁵² which would require the continental shelf to fall within a line equidistant to the coastal baseline.⁵³

The ICJ held that Article 6 of the Convention was not "a norm-creating provision" so no binding law was passed into customary international law, therefore Denmark and the Netherlands' did not have claims to the North Sea continental shelf.⁵⁴ The equidistant-special circumstances rule was determined not to be "accepted . . . by the *opinio juris*, so as to have become binding for countries which have never, and do not become, parties to the convention."⁵⁵ The ICJ explained that state practice, the first element of customary international law, including that of states whose interests are specially affected should be extensive, virtually uniform, and "show a general recognition that a rule of law or legal

⁵¹ North Sea Continental Shelf (Fed. Repub. Ger. v. Den. & Neth.), Judgment, 1969 I.C.J. 3, at 20 (Feb. 20, 1969).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 42.

⁵⁵ *Id.*

obligation is involved,"⁵⁶ the second element of customary international law. While customary law did not apply in the instant case, the holding outlines the procedure through which soft law can attain binding status on all states regardless of formal membership to a treaty.

The International Court of Justice judgment establishes the doctrine of “specially affected states” in international law jurisprudence.⁵⁷ Under this doctrine, a practice that emerges into a customary law must include countries “whose interests were specially affected” by the practice, but involvement of countries that are specially affected is not sufficient in and of itself to result in law.⁵⁸ Here, SIDS are governed by the specially affected states doctrine because (1) SIDS hold a small amount of landmass as territory for population, (2) SIDS maritime jurisdictional interests make up a large part of SIDS economic interests, and (3) those territorial and economic interests under UNCLOS are specially affected by the threat of sea level rise compared to other states. As a result, SIDS with similar vulnerabilities created agreements and issued declarations in response to this threat. Those declarations are comparable to the North Sea Continental Shelf holding because both include extensive and virtually uniform state practices that implicitly affirm the formation of customary international law. Therefore, SIDS’ declarations are likely to fall within the jurisprudence of the specially affected states doctrine.

SIDS acted to preempt challenges to state recognition and maritime baseline measurements due to their subjective legal obligation. SIDS’ obligation stems from the existential and sovereign necessity of the state because of coverage gaps under the Montevideo Convention, sea level rise’s threat to national security, and UNCLOS’ impractical coastal baseline measurements for maritime jurisdictions.

B. SIDS Sovereignty Under International Environmental Law

The stakes of SIDS concerns are prominent in reference to the gaps in protections afforded under international conventions. National security interests are significant in the text of UNCLOS, whose objectives included

⁵⁶ *Id.* at 44.

⁵⁷ *See generally* Shelly Aviv, *The Specially-Affecting States Doctrine*, 112 AM. J. INT. LAW., no.2, 244-253 (2018).

⁵⁸ *See id.*

the promotion of (1) regional stability,⁵⁹ (2) maritime strategic mobility,⁶⁰ and (3) sovereignty in territorial seas.⁶¹ In addition, UNCLOS demonstrated freedom of navigation is central to state maritime power through its acknowledgment that freedom of navigation is essential for global economic prosperity, peace, stability, and security.⁶² UNCLOS provides the framework that enables the international community to share the sea.

UNCLOS is also central to oceanic environmental regulation and requires members to report coordinates and charts to the UN.⁶³ Member states also promote environmental protections through development and enforcement of measures under UNCLOS.⁶⁴ Ultimately, UNCLOS demonstrates a historical shift from states struggling over maritime power to cooperative development of maritime law.

This cooperative approach is threatened by sea-level rise and other global scale effects of climate change. Increases in sea level illustrates the delicate balance between SIDS sovereignty, international humanitarian law, and international environmental regulation under UNCLOS. During the 2016 Interim Report, the International Law Association (ILA) stated that the consequences of "partial and complete inundation of state territory" and "depopulation" of SIDS required more attention in the international community.⁶⁵ After intersessional meetings held in 2017 and 2018, the ILA drafted a Declaration of Principles intended to protect people displaced due to sea level rise.⁶⁶ The ILA Declared Principles included the duty to protect and assist, respect human rights, take positive action, cooperate, and

⁵⁹ See U. N. Convention on the Law of the Sea, *supra* note 28, at 205 ("provisions concerning rights and interests under the Convention shall be implemented for the benefit of the people of the territory with a view to promoting their well-being and development," which also promotes regional stability).

⁶⁰ *Id.* § 2 art. 90 ("Every State, whether coastal or land-locked, has the right to sail ships flying its flag on the high seas.").

⁶¹ *Id.* § 11 art. 245 ("Coastal States, in the exercise of their sovereignty, have the exclusive right to regulate, authorize and conduct marine scientific research in their territorial sea.").

⁶² *Id.* Part VII § 1 art. 87(2) ("These freedoms [including navigation] shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas . . .").

⁶³ *Id.* Part II § 2 art. 16.

⁶⁴ See U.N. Convention on the Law of the Sea, *supra* note 28, at art. 117-18, 192.

⁶⁵ Int'l Law Ass'n, Johannesburg Conference (2016): Int'l Law and Sea Level Rise 1 (Seventy Seventh Session, Aug. 2016), https://www.ila-hq.org/en_GB/documents/conference-report-johannesburg-2016-11 [<https://perma.cc/77YV-VMM3>].

⁶⁶ Comm. on Int'l Law and Sea Level Rise, *Resol. 6/2018* (Aug. 19, 2018), https://www.ila-hq.org/en_GB/documents/conference-resolution-sydney-2018-sydneydeclaration [<https://perma.cc/KRE9-7KU9>].

evacuate persons affected by sea level rise.⁶⁷ As previously discussed, these principles demonstrate willingness of non-SIDS to acknowledge obligations to SIDS under humanitarian law. This declaration parallels the establishment of *opinio juris* for a human right to a healthy environment for populations.

However, the Declaration of Principles supports the argument that non-SIDSs anticipate the loss of SIDS statehood and influence. In turn, SIDS have good cause to fear abandonment and are likely to continue turning to nontraditional mechanisms in response; however, the question remains as to what recourse or remedies SIDS will pursue regarding the loss of sovereign land and maritime territory.

With the insufficiency of the ILA Declared Principles on a humanitarian basis, there are other principles that offer promise. For example, UNCLOS's preamble states that matters not regulated by UNCLOS are governed by the rules and principles of general international law.⁶⁸ This includes the 1958 Geneva Conventions and other multilateral and bilateral instruments.⁶⁹ Principles governing international law include (1) domination of the sea by the land, (2) freedom of the seas, (3) equity, (4) good faith, (5) historic rights and title, (6) the protection of the rights of coastal and non-coastal states, (7) permanent sovereignty over natural resources, and (8) abiding by agreements.⁷⁰ SIDS declarations and other state practices directly addressing the threat of sea level rise will appeal to these other general sources of international law where gaps in UNCLOS exist. Additionally, customary international law will become the source of binding international law for SIDS claims that may otherwise fail under the terms of international treaties. As similarly impacted states adopt declarations and other state practices, the objective is likely to be the establishment of new delineations of coastal baselines for SIDS through the development of binding customary international law under the doctrine of specially affected states.

⁶⁷ *Id.* at 3-5.

⁶⁸ U. N. Convention on the Law of the Sea, *supra* note 28, at 25 ("Affirming that matters not regulated by this convention continue to be governed by the rules and principles of general international law . . .").

⁶⁹ *See id.* at art. 19(2) (listing activities "considered to be prejudicial to peace, good order or security of the coastal State").

⁷⁰ Int'l Law Comm'n, Rep. on the Work of Its Seventy-Second Session, U.N. Doc. A/76/10, at 195 (2021).

III. EXTERNAL SOLUTIONS TO GAPS IN INTERNATIONAL ENVIRONMENTAL LAW

The current international environmental law frameworks do not provide sufficient protections for SIDS interests. Given SIDS' unique characteristics and needs, they must explore other avenues to ensure protection and stability for the future.

A. Flaws in the International Humanitarian Approach

The ILA identified humanitarian principles as the appropriate response to this controversy, but the Declared Principles fail to adequately address SIDS' needs. The international humanitarian principles protect civilians during displacement; however, they do not address the underlying issues of loss of territory, sovereignty, statehood, and recognition of claims in the international community.

B. SIDS Clients and the Patron's Dilemma

SIDS adopted proactive practices, namely baseline declarations, in an attempt to address their existential threats.⁷¹ The traditional proactive strategy to sea level rise is adaptation, which mobilizes infrastructure development, technology transfers, financial resources, and expertise mobilization.⁷² However, this strategy proves difficult for SIDS, because larger and wealthier patron states are unlikely to invest in client states that signal vulnerability and instability.

Alliances endure when there is an incentive for client states to deliver on their obligations. Without these incentives, security agreements only succeed in establishing a patron's meddling in client affairs. Here, the client SIDS face the existential threat of sea level rise. There is no floor to

⁷¹ See generally LOUISE VAN SCHAİK ET AL., FIGHTING AN EXISTENTIAL THREAT: SMALL ISLAND STATES BRINGING CLIMATE CHANGE TO THE UN SECURITY COUNCIL (Planetary Security Initiative Mar. 2008), <https://www.planetarysecurityinitiative.org/news/small-island-states-bringing-climate-change-un-security-council> [<https://perma.cc/WT5A-JX2H>] (briefing active SIDS campaigns for security due to climate change).

⁷² See Rep. of the Int'l Meeting to Review the Implementation of the Programme of Action for the Sustainable Development of Small Island Developing States, at 78-79, U.N. Doc. A/CONF.207/11 (Jan. 14 2005), <https://digitallibrary.un.org/record/549467?ln=en> [<https://perma.cc/T85E-ZGLL>] ("Adaptation to environmental vulnerability and climate change is vital but will force difficult choices and tradeoffs in policy making . . . Many participants stressed the importance of partnerships for sharing experience and best practices, the development of technologies and the building of management capacities for vulnerability reduction and disaster management.").

the risk of entering into security cooperation and investing in a SIDS when that SIDS may become destabilized and deterritorialized. Patrons are likely to consider a reactive approach that focuses on SIDS humanitarian efforts over substantial agreements. This alternative establishes protocols for quantifying SIDS loss of life, economic value, and territory. Patrons would quantify a return on their investment based on the probability of the success of their SIDS agent. A deterritorialized SIDS is unlikely to be able to offer traditional returns on investments such as contribution to coalition, provision of territorial access, or UN votes if they lack statehood.

The interests of SIDS and patron states differ because SIDS interests are existential while patron interests are purely strategic. Larger and wealthier patron states are unlikely to invest in states that signal vulnerability and instability. Thus, patron states try to predict whether clients will prevail in security issue, a matter that may be challenging for SIDS.

The *status quo* under current international law regimes is advantageous to patron states and disadvantageous to SIDS. Patron states that may enter into international agreements and provide resources are likely to anticipate that technology transfers and adaptation agreements with SIDS are poor investments because they may (1) perceive the vulnerability of SIDS and (2) assume that SIDS will develop customary international law that may negatively impact the patron state's interests under the *status quo*. The effect of this anticipation is rational, but it creates a tragic disincentive to support SIDS in resolving maritime jurisdictional claims.

Simultaneously, larger and wealthier patron states would benefit from the stability of the smaller and less wealthy states by virtue of increased stability in the international community. If the patron state decides to invest, then it may be captured in a sunk-cost investment into a SIDS. This phenomenon is known as the "patron's dilemma" in the field of international security cooperation.

However, SIDS facing climate change's existential threat are unlikely to find humanitarian approaches attractive or useful. SIDS will likely seek security and be motivated appropriately. Patron states are generally motivated by strategic benefits in a global legal system and capitalist market while the motivations of SIDS incentivize defection, are asymmetrical, and are likely to result in opportunism.

Even assuming that SIDS and large, wealthy patron states would benefit from SIDS security stability, sea level rise threats to SIDS statehood and sovereignty transforms patron-client international security agreements into one-sided negotiations. Security assistance and aid is typically motivated by six factors: (1) client economic need, (2) geography, (3) economic rewards and instrumentality, (4) patron strategic interests, (5) disruption of hostile negotiations, and (6) patron influence in the domestic affairs of the client.⁷³ All six factors are directly impacted by the threat of sea level rise where a client state is a SIDS. Patrons prefer to offer tangible aid disbursements in exchange for long-term obligations.⁷⁴ Patron selection will be biased against SIDS clients due to the impacts of sea level rise. Therefore, SIDS clients are unlikely to be selected for security aid in the first place, and if selected they are not allocated sufficient aid in order to make a meaningful difference.

C. The Expanding Role of Militaries in Environmental Stewardship

When patron or client states face threats to their national security, a typical response is to participate in security cooperation.⁷⁵ Historically, security interests override environmental interests.⁷⁶ For example, the national security apparatus of the American government is permitted to prioritize military objectives in the public interest over environmental protection.⁷⁷

In the U.S., military prioritization over the environment came under scrutiny in *Winter v. NRDC*.⁷⁸ In a 5-4 decision, the Supreme Court

⁷³ See Robert O. Keohane, *The Big Influence of Small Allies*, FOREIGN POL'Y., No. 2, at 168, 170-71 (Spring 1971).

⁷⁴ See STEPHEN M. WALT, THE ORIGINS OF ALLIANCES 147-53 (Robert Jervis et al. eds., Cornell University Press 1987) ("At the moderate level, allies risked tangible losses or made important diplomatic sacrifices to support their partners . . . Alliances lasting several years reflect repeated calculations of interest and provide a clearer indication of how the members have weighed their options.")

⁷⁵ See *id.* at 149 ("We are therefore dealing with two broad types of balancing . . . Common to both types, however is the desire to acquire support from others in response to an external threat.")

⁷⁶ See DEP'T OF NAVY, CHIEF OF NAVAL OPERATIONS INSTR. 5090.1: ENVIRONMENTAL READINESS PROGRAM MANUAL tbl. 10-6 (Jun. 25, 2021), <https://www.secnav.navy.mil/doni/SECNAV%20Manuals1/5090.1.pdf> [<https://perma.cc/8RUT-L69E>] (listing the US Navy's forty nine listed NEPA Categorical Exclusions, actions that do not trigger the preparation of an Environmental Assessment or Environmental Impact Statement)

⁷⁷ See generally *id.*

⁷⁸ *Winter v. Nat'l Res. Def. Council*, 555 U.S. 7 (2008)

reviewed a preliminary injunction that paused military submarine sonar exercises in an area because the sonar exercises were causing serious injuries to marine mammals.⁷⁹ The NRDC claimed the sonar technology rendered those mammals susceptible to "permanent hearing loss" and "decompression sickness."⁸⁰ However, the Navy objected to the burdens of (1) powering down sonar when surfacing, (2) establishment of a 2,200-yard shutdown zone, and (3) time spent to develop realistic training missions.⁸¹ The Court balanced those interests with (1) the equitable "ecological, scientific, and recreational interests"⁸² and (2) the statutory requirement for Environmental Impact Statements (EIS) under the National Environmental Policy Act of 1969 (NEPA),⁸³ while also considering the public's interest in conducting novel submarine training with active sonar under realistic conditions during its review.⁸⁴ The Supreme Court reversed and vacated the NRDC preliminary injunction based on the balance of equity and public interests,⁸⁵ finding that "the ultimate legal claim is that the Navy must prepare an EIS [in accordance with NEPA], not that it must cease sonar training."⁸⁶ This holding marked a shift in the Department of Defense (DOD) accountability under U.S. environmental regulations.⁸⁷ The holding consequentially required the DOD to adopt environmental stewardship when planning their military activities.⁸⁸

The holding in *Winter v. NRDC* further implicates the incorporation of environmental stewardship into U.S. military activities abroad. In response, the DOD recognized new norms, including the conservation of historical and cultural resources⁸⁹ along with natural resources and

⁷⁹ *Id.* at 27.

⁸⁰ *Id.* at 14.

⁸¹ *Id.* at 28.

⁸² *Id.* at 33.

⁸³ *Id.* at 23.

⁸⁴ *Id.* at 23 ("even if such plaintiffs have shown irreparable injury from the Navy's training exercises, any such injury is outweighed by the public interest and the Navy's interest in effective, realistic training of its sailors").

⁸⁵ *Id.*

⁸⁶ *Id.* at 32.

⁸⁷ *Id.* at 26 ("Of course, military interests do not always trump other considerations, and we have not held that they do.").

⁸⁸ See ENVIRONMENTAL PROGRAM READINESS MANUAL, *supra* note 76, at 35-3.21(b) ("Prudent environmental stewardship requires enhancing the Navy's ability to determine quickly and accurately if active sonar training, testing, or maintenance had been conducted in proximity to a specific marine mammal event . . . This requirement applies to all units (e.g., surface, submarine, aviation, and other platforms) that employ active sonar or other acoustic devices.").

⁸⁹ Dep't of Def. Manual, 4715.05-V1: Overseas Environmental Baseline Guidance Document: Conservation 9 (Jun. 29, 2020) at 9 ("Installations must . . . develop and

endangered species.⁹⁰ Additionally, the DOD must (1) use environmental management systems in mission planning and execution,⁹¹ (2) manage environmental health risks that military activities generate,⁹² (3) comply with Final Governing Standards (FGS) to protect the environment for foreign countries identified by the Under Secretary of Defense for Acquisition and Sustainment,⁹³ and (4) reconcile host-nation environmental standards with Executive Orders and DOD directives.⁹⁴

As a hypothetical, if the U.S. first decides to engage in security cooperation with a SIDS, then the U.S. would negotiate to establish a base or substantial installation in the SIDS. Next, Final Governing Standards (FGS) would be drafted by the DOD to capture the SIDS domestic laws, U.S. base rights, any existing Status of Forces Agreements (SOFA) in the case of a formal alliance like NATO, or other applicable international agreements into formal environmental practices adhered to in the management of the military base or substantial installation.⁹⁵ The SIDS' domestic environmental laws govern through the FGS. Accordingly, environmental planning has become a fundamental component of DOD planning, siting of bases, and other security activities. Attractive client states are able to incorporate their domestic regulations with the U.S. through DOD security cooperation instruments.

D. Environmental Stewardship and Security Cooperation

Instead of waiting for foreign patron states to consider entrance into security agreements with SIDS, SIDS would benefit more from entrance into security agreements with each other instead. Security cooperation between SIDS avoids the challenges of negotiating with larger and wealthier nations; contributes to the development of regional and individual SIDS practice; and supports the acknowledgment of those practices under customary international law.

maintain an inventory of historic and cultural resources in areas under DoD control . . . [and] establish appropriate measures to protect and preserve known historic or cultural resources . . .").

⁹⁰ See *Id.* at 11-13 (U.S. overseas military installations must evaluate risks to species and their habitats, then create and implement a management plan in accordance with U.S. and host-nation designations).

⁹¹ *Id.* at 4.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ DEP'T OF THE NAVY, JAGMAN A-1-b 5800.7F: MANUAL OF THE JUDGE ADVOCATE GENERAL 5-13 (2012).

NATO is one example of effective compatibility between security cooperation and environmental stewardship. Under the NATO Standard Agreement (STANAG), member nation military commanders must commit to two principles. The first is "to balance [environmental protection] against risks to the forces and mission accomplishment."⁹⁶ The second is that "exercises under peacetime conditions should be conducted in a manner consistent with applicable environmental regulations."⁹⁷ Security cooperation in NATO is informed by the NATO Status of Forces Agreement (SOFA), an international instrument that determines the legal obligations of a Party member's military to the environment of the host nation.⁹⁸

One strength of a SOFA is the explicit distinction between "sending" and "receiving" states.⁹⁹ Under the NATO SOFA, the receiving state, also called the host-nation, waives all claims against any other contracting party for damage to property owned by the receiving state and used by the sending state on the condition that the damage was caused in the execution of duties connected with the treaty operation.¹⁰⁰ As a result, the NATO SOFA conveys no specific environmental duties on member states but allows for compensatory protocols through a general provision.¹⁰¹

This arrangement under a formal and binding security cooperation agreement is more flexible and enforceable than current SIDS unilateral declarations under international environmental law. While compensatory protocols under international environmental law do exist, they provide insufficient coverage for developing states who are most in need of infrastructure, resources, and/or technology and historically contributed to

⁹⁶ North Atlantic Treaty Standardization Agreement art 2-1, Mar. 8, 2018, STANAG 7141, AJEPP-4.

⁹⁷ *Id.* at 3-1.

⁹⁸ Alexander Cooley & Daniel H. Nexon, "The Empire Will Compensate You": The Structural Dynamics of the U.S. Overseas Basing Network, 11 PERSPS. ON POLS, Issue 4, 1034, 1037 (Dec. 2013),

<https://www.cambridge.org/core/journals/perspectives-on-politics/article/abs/empire-will-compensate-you-the-structural-dynamics-of-the-us-overseas-basing-network/13A040F9E14540969BAF778BA021D75E> [<https://perma.cc/AUB6-FVYK>].

⁹⁹ *Id.*

¹⁰⁰ North Atlantic Treaty Status of Forces Agreement art. VIII 1, Oct. 27, 1953, 4 U.S.T. 1792, T.I.A.S. 2846,

¹⁰¹ *Id.* art. VIII 2(a) ("In the case of damage caused . . . the issue of liability of any other Contracting Party shall be determined and the amount of damage shall be assessed . . . by a sole arbitrator"); see 99 Cong. Rec. 8835-38 (1953) (advising ratification of the NATO SOFA with reservations); see also 32 C.F.R. §151.6 (the U.S. may request that criminal and civil action abroad is conducted under U.S. law in U.S. courts).

climate change the least.¹⁰² SIDS will not realistically establish compensation or liability protocols for sea level rise and environmental impacts to their territories through an international environmental regime such as UNCLOS. However, alternatives such as security agreements, SOFAs, and multi- or bilateral agreements contribute to the development of SIDS practice and *opinio juris* under customary international law.

E. The Green Defense Framework

NATO's military activities have a significant environmental impact, and the framework explicitly acknowledges this reality.¹⁰³ NATO noted the proliferation of new sustainable and environmentally conscious technology,¹⁰⁴ proposing a unified "green" effort for all member nations and their militaries in order to fulfill the norms of environmental stewardship.¹⁰⁵ The Green Defense Framework supported NATO's commitment to fulfilling environmental obligations as regional practice.¹⁰⁶

Specifically, the NATO Green Defense Framework calls for increased environmental oversight and sharing of best practices.¹⁰⁷ Overall, the Framework takes another step to tie together all efforts in a regional alliance to mitigate environmental risks and reduce environmental impacts

¹⁰² See Paris Agreement to the United Nations Framework Convention on Climate Change art. 8, Dec. 12, 2015, T.I.A.S. No. 16-1104 (leaving open the possibility for liability and compensation for damage in the future while only establishing collaboration for damage assessments) [<https://perma.cc/2SJE-P65L>]; *but see* Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal art. 12 Mar. 22, 1989, 1673 U.N.T.S. 57 (establishing a compensation protocol that has not entered into force pending ratification of 20 Parties) [<https://perma.cc/DUH3-D2CJ>].

¹⁰³ NATO, *North Atlantic Treaty Green Defence Framework* ¶ 8, NATO LIBRARY (Feb. 2014), https://natolibguides.info/ld.php?content_id=25285072 ("NATO will consider how 'green' policies and research could be promoted within the Alliance, with the aim of enhancing national efforts") [<https://perma.cc/3GVW-ACCG>]; *see* NATO, *Wales Summit Declaration* ¶ 110, NATO E-LIBRARY (Sep. 05, 2014), https://www.nato.int/cps/en/natohq/official_texts_112964.htm ("Key environmental needs . . . will further shape the future security environment in areas of concern to NATO and have the potential to significantly affect NATO planning and operations") [<https://perma.cc/2Q38-CJBV>].

¹⁰⁴ *North Atlantic Treaty Green Defence Framework*, *supra* note 103, at ¶ 2.

¹⁰⁵ *Id.* ¶ 5 (outlining the three pillars of the Green Defence framework).

¹⁰⁶ *Id.* ¶ 4 ("Increased energy efficiency responds to environmental concerns in Allies' public opinion and demonstrates that NATO is responsive to them.")

¹⁰⁷ *See generally id.*

without compromising defensive military strategy.¹⁰⁸ As it relates to the member nations, the Framework identifies areas of engagement with partner nations and international organizations.¹⁰⁹ Environmental stewardship transitioned from U.S. military activities to a role of regional state practice in promotion of cooperation among allies and partners. The UNCLOS mandate was to promote national security through the law of the sea.¹¹⁰ SIDS attempted to formulate elements of customary international law in response to territory loss from sea level rise through UNCLOS baseline declarations.¹¹¹ SIDS may consider entering into patron-client relations with non-SIDS to further preempt loss of statehood and jurisdiction; however, the existential nature of sea level rise from climate change undermines the principles of international environmental law, humanitarian law, and security cooperation that would otherwise minimize SIDS interstate conflict.¹¹² A green defense framework offers the opportunity for SIDS to create a pattern of state practice that directly addresses the consequences of sea level rise without exposing SIDS to biased patron states and to select international partners to satisfy the specially-affected state doctrine to develop customary law.

IV. THE ADVANTAGES OF SIDS MULTILATERAL SECURITY COOPERATION AGREEMENTS

Gaps in coverage under international law place SIDSs in an unenviable position. The threat of sea level rise to SIDS' national security will be a source of tension in the international community if the freedom of navigation on the high seas is jeopardized by a nation's attempt to secure their maritime jurisdictions or their very existence.

A. *SIDS Green Defense Complements Existing SIDS Practice*

International law provides frameworks for peaceable resolution of interstate conflicts, but the SIDS-issued declarations and charts denoting permanent baselines for maritime zone measurements is an aggressive practice and a reaction to the existential crisis SIDS face. In contrast,

¹⁰⁸ *Id.* at ¶ 24 ("This would also make NATO better prepared to respond to the environmental challenges and resource constraints outlined in the Strategic Concept, and would enhance operational resilience.").

¹⁰⁹ *Id.* at ¶¶ 19-23.

¹¹⁰ See U. N. Convention on the Law of the Sea, *supra* note 28, at 205 ("provisions concerning rights and interests under the Convention shall be implemented for the benefit of the people of the territory with a view to promoting their well-being and development").

¹¹¹ See *supra* text accompanying note 48.

¹¹² See *supra* section II.D.

establishment of a SIDS green defense framework would complement, continue, and repeat current SIDS practices.¹¹³ The framework would acknowledge the concept of "green defense" as the appropriate lens to "understand the serious challenge presented by climate change and . . . its security implications."¹¹⁴ Moreover, while uni- and multilateral declarations are captured by the UNCLOS framework, the diversity of UNCLOS membership diluted the SIDS bloc's ability to protect their unique interests.¹¹⁵ SIDS can strengthen their positions on UNCLOS baseline measurements, sovereignty, and statehood through green defense cooperation.

B. SIDS Green Defense Supports the Specially Affected States Doctrine

SIDS green defense formalizes a SIDS-centric international law lens. The NATO Green Defense Framework enshrined environmental stewardship and security interests within the context of a vast military defensive alliance. SIDS may adopt this approach to communicate and further a "public call for its member governments to support an ambitious, binding . . . agreement."¹¹⁶ NATO Secretary General Jens Stoltenberg explained at COP 26 that "climate change is a crisis multiplier. It forces people to flee. It increases competition over scarce resources like water and land. It makes the world a more dangerous place."¹¹⁷ NATO is preparing to not only reduce their emissions, but to secure the habitation of populations.¹¹⁸ Additionally, the American intelligence community includes

¹¹³ See *supra* text accompanying note 48.

¹¹⁴ U.N. Secretary-General's Message to International Conference on the Implications of Climate Change for Defense (Oct. 14, 2015), <https://www.un.org/sg/en/content/sg/statement/2015-10-14/secretary-generals-message-international-conference-implications> [https://perma.cc/8LGQ-YYQP].

¹¹⁵ Division for Ocean Affairs and the Law of the Sea, *Chronological Lists of Ratifications of, Accessions and Successions to the Convention and the Related Agreements*, UN LAW OF THE SEA DIVISION (May 28, 2021), https://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm#The%20United%20Nations%20Convention%20on%20the%20Law%20of%20the%20Sea (only 15 states in the world have not ratified UNCLOS) [https://perma.cc/6ZLW-K7XJ].

¹¹⁶ U.N. Secretary General, *supra* note 114 (referring to NATO's statement to its members to support an ambitious version of the Paris Agreement).

¹¹⁷ Michael Birnbaum, *Climate Change is Highlighted as a Security Issue as NATO Leader visits COP26*, WASHINGTON POST (Nov. 02, 2021), <https://www.washingtonpost.com/climate-environment/2021/11/02/nato-global-warming-cop26-glasgow/> [https://perma.cc/8FS9-PWNF].

¹¹⁸ NATO, PROTECTION OF CIVILIANS: ALLIED COMMAND OPERATIONS HANDBOOK 15 (2019), <https://shape.nato.int/resources/3/website/ACO-Protection-of-Civilians-Handbook.pdf> ("In order to protect civilians, the unique characteristics of the population within the operating

climate change in its risk models.¹¹⁹ Adoption of SIDS green defense establishes climate change as a national security issue, and promotes cooperation among SIDS as a security bloc advancing national practices in accordance with the doctrine of specially affected states.

C. SIDS Green Defense Recontextualizes International Principles

Deterritorialization is the central issue to a formulation of SIDS green defense as SIDS territory actively shrinks due to sea level rise. Given the UNCLOS gaps, "[t]he existing law of the normal [coastal] baseline does not offer an adequate solution";¹²⁰ specifically, "loss of a State's territory to rising sea levels is not primarily a baseline or law of the sea issue."¹²¹ It is instead an issue of statehood, and therefore state security.¹²² This claim is supported by preeminent scholarship in international law. The ILA identified loss of sea level rise deterritorialization as a distinct nexus of "fundamental aspects [of] elements of statehood under international law, human rights, refugee law, and access to resources, as well as broader issues of international peace and security."¹²³

Current SIDS practice and declarations fail to capture the insufficiency of mere declarations of UNCLOS baseline measurements. UNCLOS was not intended to be the sole basis for the resolution of local maritime disputes, leaving SIDS burdened with engaging all dimensions of international law in order to develop states practices to protect their statehood. The rational consequence is that SIDS must allocate resources to new practices. A SIDS green defense framework would reinforce SIDS claims to statehood and maritime jurisdiction by recontextualizing broader

environment have to be considered during the decision making process, to include their . . . resiliencies and vulnerabilities") [<https://perma.cc/ZUW4-VBQZ>].

¹¹⁹ THE OFF. OF THE DIR. OF NAT'L INTEL., NATIONAL INTELLIGENCE ESTIMATE 6 (Oct. 21, 2021), <https://www.dni.gov/index.php/newsroom/reports-publications/reports-publications-2021/item/2253-national-intelligence-estimate-on-climate-change> (discussing growing interstate competition over key minerals and technologies used in renewable energy and decarbonization) [<https://perma.cc/8P6E-RHBQ>].

¹²⁰ Int'l Law Ass'n, Comm. On Int'l Law and Sea Level, Rep. on its Seventy-Fifth Session, at 385-428 (Aug. 2012), <https://www.ila-hq.org/index.php/committees> [<https://perma.cc/7SET-BLPM>].

¹²¹ *Id.*

¹²² *See supra* Section II.B.

¹²³ *See* Int'l Law Ass'n, Comm. on Int'l Law and Sea Level, Conference Rep. on its Seventy-Eighth Session, at 3 (June 2018), https://www.ila-hq.org/en_GB/documents/conference-report-sydney-2018cteeversion [<https://perma.cc/72J9-LQ39>] (*citing* Int'l Law Ass'n, Comm. On Int'l Law and Sea Level Res. 1/2012 ¶ 7 (Aug. 30, 2012)).

international principles within formal and explicitly security-centric agreements.

D. SIDS Green Defense Mitigates Vulnerability to the Patron's Dilemma

A SIDS green defense framework resolves conflict with non-SIDS patron states where the UNCLOS does not. Under UNCLOS, larger and wealthier states have different interests and stakes than SIDS, specifically that larger states are also preparing for conflict, scarcity, and crisis due to climate change. SIDS can avoid the dissonance of these interests through security agreements with other specially affected SIDS that repeat the permanent baseline declarations in service of stability, peace, and freedom of navigation. This approach aligns with the intent of UNCLOS, allowing SIDS to continue to entrench existing entitlements measured under UNCLOS Article 6. SIDS may also reframe "perverse incentives to artificially preserve baselines . . . that might otherwise become invalid" by cooperating with similarly affected SIDS.¹²⁴ A SIDS green defense approach would establish SIDS security interests in opposition to "the adverse impacts of climate change, to which few [SIDS] contributed."¹²⁵

A SIDS green defense framework will provide practical clarity on the complex matter of SIDS sea level rise and loss of statehood. As a state practice, security agreements make SIDS organizationally resilient to the review of future tribunals or ICJ judgments.¹²⁶ The approach is particularly appropriate for establishing practical utility through SIDS private necessity arguments. Specifically, SIDS may use green defense to confront the principle that "the land dominates the sea," an issue raised by the ILA.¹²⁷ A provision affirming, rejecting, or qualifying this principle in the context of anthropogenic sea level rise that threatens SIDS statehood is likely to be persuasive. SIDS positions require arguments affirming statehood, undermining arguments based upon a bright line declaratory theory of the concept and supporting constructive recognition. A SIDS green defense framework allows SIDS to hybridize norms of environmental stewardship, the SIDS public interest in national security, and principles of international law in an instrument that resolves gaps in coverage.

¹²⁴ *Id.* at 14.

¹²⁵ *Id.*

¹²⁶ *Id.* at 15

¹²⁷ *Id.* at 16.

CONCLUSION

The future of SIDS is bleak as the rise in global mean sea level presents a threat to the very political existence of these states, setting aside the potential damage to soil, infrastructure, loss of life and injury to their population. As sea levels continue to increase throughout the next century, it is highly probable that these States will face legal challenges to current maritime zone entitlements, which would undermine SIDS sovereignty. Those zones could become a legal fiction under UNCLOS. Additionally, anthropogenic sea level rise is a national security threat to SIDS. These states have already begun a trend in issuing public declarations and UN submissions that attempt to stall the issue of maritime zones, but the question remains as to the consequences of deterritorialization of a SIDS. Where the principles and Conventions of international environmental law fail to provide answers, States must enact practical policies that preserve their existence before their recognition in the international community erodes. The United Nations continues to facilitate SIDS calls for action in the international community; however, SIDS also has the opportunity to build an international coalition. The relationship between environmental stewardship and security agreements, as embodied in the NATO Green Defense Framework, offers a means through which SIDS may take proactive steps towards ensuring peace, security, and ultimate survival for their nations.

* * *

THE MARINE MAMMAL PROTECTION ACT PROTECTS THE
RIGHT TO PUBLIC DISPLAY OF WILD MARINE MAMMALS, NOT
RELEASE BACK INTO THE WILD

Brianna Grimes

American zoos and aquariums pride themselves on their rescue and rehabilitation programs, yet many stranded and injured marine mammals never return to the wild, regardless of being fully rehabilitated. Many releasable mammals are kept in captivity due to the availability of permits to keep releasable rehabilitated marine mammals. This article will argue that the Marine Mammal Protection Act—which was created to protect marine mammals—is harming rehabilitated animals by allowing zoos and aquariums to keep them for public display, rather than return them to the wild. Beginning with a discussion of marine mammal rehabilitation and the legal framework of the Marine Mammal Protection Act, this article will illustrate how captive facilities fail to meet their legal obligations and are unsuitable for marine mammals. Accordingly, the current laws should be changed to prohibit granting permits to keep rehabilitated marine mammals that are deemed releasable for public display purposes. Lastly, this article will identify the social, judicial, and legislative trends which indicate that this prohibition would be a welcomed change, despite the potential obstacles to implementation.

INTRODUCTION

Marine mammals have unique physical characteristics that enable them to thrive in the extreme temperatures, depths, pressure, and darkness of the marine environment.¹ Four taxonomic groups are used to categorize marine mammals: cetaceans (whales, dolphins, and porpoises), pinnipeds (seals, sea lions, and walruses), sirenians (manatees and dugongs), and marine fissipeds (polar bears and sea otters).² Most marine mammals spend

¹ *Marine Mammals*, NATIONAL OCEANIC AND ATMOSPHERIC ADMIN., <https://www.noaa.gov/education/resource-collections/marine-life/marine-mammals> (last visited Nov. 10, 2022) [<https://perma.cc/9PRL-BBJZ>].

² *Id.* For the purpose of this article, “marine mammals” hereinafter refers only to cetaceans and pinnipeds that are subject to NOAA Fisheries’ jurisdiction. Sirenians and marine fissipeds protection is under the jurisdiction of the U.S. Fish and Wildlife Service. *Understanding Marine Mammal Protections*, NOAA FISHERIES, <https://www.fisheries.noaa.gov/insight/understanding-marine-mammal-protections#:~:text=protect%20marine%20mammals%3F-,Which%20marine%20mammals%20does%20NOA>

their lives swimming freely in the ocean; however, some marine mammals may become injured and require rehabilitation at some point during their lives.

While some injuries are caused by natural threats, most are the result of anthropogenic activity. Natural causes of injury include unusual weather events, viral and bacterial infections, parasitism, disease, and starvation.³ Alternatively, because of humans, wild marine mammals are harmed by ingesting foreign objects, entanglement in debris, vessel strikes, habitat destruction, noise pollution, oil spills, and exposure to artificial toxins.⁴ Moreover, natural harms can be exacerbated by human activity. For example, the frequency and severity of algal blooms has increased due to climate change.⁵

Each year, thousands of marine mammals “strand” and require rehabilitation because of these natural and anthropogenic threats. A marine mammal is considered “stranded” when it is found dead on land or in the water, or when it needs medical attention.⁶ Unfortunately, not all stranded animals are found alive, nor are capable of rehabilitation due to the severity of their injuries. In 2017, 5,764 pinnipeds and cetaceans were stranded across the United States.⁷ In 2018, 7,320 marine mammals were stranded in the United States—a 27 percent increase from the previous year.⁸ Notably,

A%20Fisheries%20protect%3Fbears%20under%20the%20same%20act (last visited Apr. 3, 2023) [<https://perma.cc/X9S4-BJVZ>].

³ *Understanding Marine Wildlife Stranding and Response*, NOAA FISHERIES, <https://www.fisheries.noaa.gov/insight/understanding-marine-wildlife-stranding-and-responses#why-do-animals-strand?> (last visited Nov. 20, 2022) [<https://perma.cc/P275-KNJD>].

⁴ *Marine Mammal Threats*, WOODS HOLE SEA GRANT, <https://seagrant.whoi.edu/k-12/coast/marine-mammal-threats/> (last visited Nov. 9, 2022) [<https://perma.cc/244M-4CA9>]; *Marine Life in Distress*, NOAA FISHERIES, <https://www.fisheries.noaa.gov/topic/marine-life-distress> (last visited Nov. 9, 2022) [<https://perma.cc/5PYQ-6RC7>]; *Various Reasons for Stranding*, SEAWORLD PARKS & ENT., <https://seaworld.org/animals/all-about/rescue-and-rehab/reasons-for-stranding/> (last visited Nov. 9, 2022) [<https://perma.cc/C4BT-DUJ4>].

⁵ OFF. OF WATER, U.S. ENV’T PROTECTION AGENCY, EPA 820-S-13-001, IMPACTS OF CLIMATE CHANGE ON THE OCCURRENCE OF HARMFUL ALGAL BLOOMS (May 2013); *Climate Change Indicators: Weather and Climate*, U.S. ENV’T PROTECTION AGENCY (Aug. 1, 2022), <https://www.epa.gov/climate-indicators/weather-climate#:~:text=Rising%20global%20average%20temperature%20is,with%20human%2Dinduced%20climate%20change> [<https://perma.cc/329G-FNWA>].

⁶ *Understanding Marine Wildlife Stranding and Response*, *supra* note 3.

⁷ OFF. OF PROTECTED RES., NOAA FISHERIES, 2017 NATIONAL REPORT OF MARINE MAMMAL STRANDINGS IN THE UNITED STATES 3 (2021).

⁸ OFF. OF PROTECTED RES., NOAA FISHERIES, 2018 REPORT OF MARINE MAMMAL STRANDINGS IN THE UNITED STATES 1 (2022).

between 1994 and 2004, an average of only 1,413 pinnipeds and 23 cetaceans were stranded and admitted for rehabilitation across the continental United States and Hawaii.⁹

The goal of rehabilitation is to nurse the marine mammal back to health so it can be released back into its natural habitat.¹⁰ Unfortunately, even when rehabilitation is successful, not all marine mammals return to the ocean. Data from 1995 to 2004 indicates that only 52 percent of rescued pinnipeds deemed releasable were actually released.¹¹ An even lower proportion of cetaceans, 17 percent, were released after successful rehabilitation.¹² This disparity exists because the Marine Mammal Protection Act (MMPA) provides for “take” permits to retain marine mammals for public display. Consequently, zoos and aquariums, or similar facilities, can apply to keep rehabilitated marine mammals that could have been released.

I. CURRENT LEGAL FRAMEWORK: THE MARINE MAMMAL PROTECTION ACT

The MMPA was created in part as a response to increasing anthropogenic threats to marine mammals.¹³ Scientists and the public were concerned that humans would drive marine mammal species to extinction.¹⁴ To prevent this fate, the MMPA was enacted in 1972, establishing a national policy to protect marine mammal species by preventing population stocks from decreasing below a functioning level and restoring diminished stocks to their optimum sustainable populations.¹⁵

⁹ Michael Moore et al., *Rehabilitation and Release of Marine Mammals in the United States: Risks and Benefits*, 23 *MARINE MAMMAL SCI.* 731, 737 (Oct. 2007).

¹⁰ LAURIE GAGE, NAT’L OCEANIC AND ATMOSPHERIC ADMIN., *POLICIES AND BEST PRACTICES FOR MARINE MAMMAL STRANDING RESPONSE, REHABILITATION, AND RELEASE: STANDARDS FOR REHABILITATION FACILITIES* iv (Janet E. Whaley ed., Feb. 2009).

¹¹ Moore et al., *supra* note 9, at 735.

¹² *Id.*

¹³ *Marine Mammal Protection Act*, MARINE MAMMAL COMM’N, <https://www.mmc.gov/about-the-commission/our-mission/marine-mammal-protection-act/> (last visited Nov. 20, 2022) [<https://perma.cc/Z2JC-TW29>].

¹⁴ *Id.*

¹⁵ See Marine Mammal Protection Act, 16 U.S.C. §§ 1361-1423 (2018); *Marine Mammal Protection Act Policies, Guidance, and Regulations*, NOAA FISHERIES (May 26, 2022), [https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-protection-act-policies-guidance-and-regulations#:~:text=The%20Marine%20Mammal%20Protection%20Act%20\(MMPA\)%20was%20enacted%20on%20October,which%20they%20are%20a%20part](https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-protection-act-policies-guidance-and-regulations#:~:text=The%20Marine%20Mammal%20Protection%20Act%20(MMPA)%20was%20enacted%20on%20October,which%20they%20are%20a%20part) [<https://perma.cc/B94V-89ZF>].

This section will discuss various provisions of the MMPA that are relevant to this topic. First, part (a) explains the history of wild capture and marine mammal captivity, and how these practices changed due to the MMPA's enactment. Part (b) discusses Title IV of the MMPA, the Marine Mammal Health and Stranding Response Act, which created specific stranding response procedures. Next, part (c) explains how the MMPA's "take" permit provisions function. Finally, part (d) states the legal standards that marine mammal display facilities must meet under Section 104 of the MMPA.

A. *History of Marine Mammal Capture and Captivity*

Human capture was one major cause of the concerning decline of wild marine mammal populations. Before the MMPA's enactment, wild marine mammal capture was unregulated.¹⁶ For centuries, zoos and aquariums could capture animals as often as was necessary to maintain inventory for display and profit.¹⁷ The first marine mammals were kept in captivity as early as 1060,¹⁸ however, records of these early instances are scarce. Most sources assert that walrus were first held captive as early as 1608, followed by pinnipeds and cetaceans in the late 1800s.¹⁹

Today, at least 2,360 cetaceans live in captivity across the globe,²⁰ and the number of pinnipeds in captivity is unknown.²¹ As a result of the MMPA's prohibition on marine mammal capture in 1972, most captive marine mammals in the United States today were not wild caught, but rather were born in captivity through breeding programs or were kept in captivity after they were rescued.

¹⁶ See *Frontline Online: A Whale of a Business: Historical Chronology*, PBS, <https://www.pbs.org/wgbh/pages/frontline/shows/whales/man/mancron.html> (last visited Nov. 22, 2022) [<https://perma.cc/4MSB-ATHA>].

¹⁷ *Id.*

¹⁸ Todd R. Robeck et al., *Captive Breeding in* THE ENCYCLOPEDIA OF MARINE MAMMALS 178 (William J. Perrin et al. eds., 2nd ed. 2009 (noting that the first polar bear may have been held in captivity in 1060, followed by harbor porpoises in the 1400s).

¹⁹ *Id.*; *Pinnipeds in Captivity*, SEAL CONSERVATION SOC'Y, <https://www.pinnipeds.org/seal-information/rehabilitation-and-captivity/pinnipeds-in-captivity> (last visited Oct. 6, 2022) [<https://perma.cc/DQB5-PHBX>]; Frontline, *supra* note 16.

²⁰ *CFAF's Work for Whales and Dolphins in Captivity*, CHANGE FOR ANIMALS FOUND., <https://www.changeformanimals.org/whales-and-dolphins-in-captivity#:~:text=There%20are%20currently%20at%20least,in%20captivity%20since%20the%201950s> (last visited Oct. 6, 2022) [<https://perma.cc/2U3H-BLBW>].

²¹ *Id.*

B. Marine Mammal Health and Stranding Response Act

Another threat to marine mammal survival was, and continues to be, injuries caused by human activity. In 1992, Title IV, the Marine Mammal Health and Stranding Response Act, amended the MMPA to address this problem.²² Title IV mandates emergency responses to sick, injured, distressed, or dead pinnipeds and cetaceans.²³ The 1992 amendments also established the Marine Mammal Health and Stranding Response Program (MMHSRP) to coordinate emergency responses.²⁴ More than 100 volunteer organizations and local, tribal, state, and federal government agencies work with the MMHSRP to ensure all rescues are performed with human responder and animal safety in mind.²⁵

Under Title IV, there are three goals for stranding responses: (1) welfare of individual animals, (2) protection of human health and welfare, and (3) collection of scientific information.²⁶ Section 109(h) of the MMPA mandates that, whenever feasible,²⁷ steps shall be taken to return a stranded marine mammal to its natural habitat.²⁸ Despite this legal obligation, many releasable rehabilitated marine mammals never return to their natural habitats because of “take” permits.

²² *Laws & Policies: Marine Mammal Protection Act*, NOAA FISHERIES, <https://www.fisheries.noaa.gov/topic/laws-policies/marine-mammal-protection-act> (last visited Nov. 28, 2022) [<https://perma.cc/4QNQ-D6XF>].

²³ *Marine Mammal Health and Stranding Response Program*, NOAA FISHERIES, <https://www.fisheries.noaa.gov/national/marine-life-distress/marine-mammal-health-and-stranding-response-program> (last visited Nov. 9, 2022) [<https://perma.cc/4HQX-ZE9T>].

²⁴ *Id.*

²⁵ *Id.*; OFF. OF PROTECTED RES., NOAA FISHERIES, *supra* note 7, at 5.

²⁶ There is no established prioritization of these goals, this is just how they are ordered in the statute. 16 U.S.C. § 1421; Moore et al., *supra* note 9, at 733.

²⁷ According to NMFS guidance, feasibility is determined by the animal’s capability for successful life in the wild, as determined by the attending veterinarian. If the veterinarian determines that (1) release of the rehabilitated animal could adversely affect the wild populations, and/or (2) release will likely not be successful because of the animal’s physical condition and behavior, the animal will be deemed non-releasable. Subsequently, it will be placed in a permanent facility by NMFS Office of Protected Resources. Off. of Protected Res., National Marine Fisheries Service Procedure 02-308-02, at 1 (Mar. 14, 2012), https://media.fisheries.noaa.gov/2021-11/02-308-02%20renewal_signed.pdf [<https://perma.cc/Q8PU-S3MR>].

²⁸ Marine Mammal Protection Act § 109(h), 16 U.S.C. § 1379.

C. “Take” Permits

Sections 101 and 104 of the MMPA authorize the Secretary²⁹ to issue permits for the “taking” or importation of marine mammals for the purpose of public display, among other purposes.³⁰ Under the MMPA, “take” means to “harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal.”³¹ The Secretary delegated the permitting authority to the National Marine Fisheries Service (NMFS), a body within the National Oceanic and Atmospheric Administration (NOAA). Accordingly, NMFS created “issuance criteria” for granting take permits.³² Under the issuance criteria, applicants must show that the proposed activity is humane, does not present unnecessary risks to the health and welfare of marine mammals, and is unlikely to have an adverse impact on the species or stock.³³

Prior to 2018, NMFS distinguished applications for wild capture permits from applications for permits to keep releasable rehabilitated marine mammals.³⁴ However, in 2018, NMFS altered its internal procedures; and now, applicants seeking to keep a releasable animal just file a standard take application.³⁵ If the permit is granted, the NMFS Office of Protected Resources Office Director may authorize the retention of a releasable specimen in lieu of a wild capture.³⁶

D. Legal Standards for Marine Mammal Display Facilities

In addition to meeting NMFS’s take permit issuance criteria, the applicant facility itself must also meet certain criteria. Section 104(c)(2)(A)(i) of the MMPA stipulates that permits for public display will only be granted to facilities that provide education and conservation

²⁹ Refers to the Secretary of the department in which the National Oceanic and Atmospheric Administration is operating. Marine Mammal Protection Act § 3(12)(A)(i), 16 U.S.C. § 1362. Refers to the Secretary of the department in which the National Oceanic and Atmospheric Administration is operating. *Id.* § 1362(12)(A)(i).

³⁰ Marine Mammal Protection Act § 104, 16 U.S.C. § 1374.

³¹ Marine Mammal Protection Act § 3, 16 U.S.C. § 1362(13).

³² See 50 C.F.R. § 216.34(a)(1), (4) (2017).

³³ *Id.*

³⁴ Off. of Protected Res., National Marine Fisheries Service Procedure 02-308-03, at 1 (May 1, 2018), <https://media.fisheries.noaa.gov/dam-migration/02-308-03.pdf> [<https://perma.cc/FY3G-UVWH>].

³⁵ *Id.*

³⁶ *Id.*

programs for visitors³⁷ that meet professionally recognized standards.³⁸ Generally, the Association of Zoos and Aquariums (AZA) standards are upheld as the national standard and are used by federal agencies to evaluate institutions.³⁹

II. PROBLEMS WITH MARINE MAMMAL CAPTIVITY

Arguably, there is a moral dilemma in subjecting wild animals that are harmed by humans to a life as human entertainment in captivity. Notwithstanding morality, whether zoos and aquariums that retain releasable marine mammals meet their legal education and conservation obligations is questionable. Furthermore, research has shown that marine mammals may not be suited for captivity.⁴⁰ Especially in cases when rehabilitated marine mammals could be released back to the wild, a zoo or aquarium is not a commensurate alternative.

A. *Public Display Facilities Fail to Meet Education and Conservation Requirements*

Many facilities tout the educational value of publicly displaying wild animals; however, numerous surveys of zoo and aquarium visitors illustrate that the educational value of captivity may be negligible.⁴¹ A study conducted near a captive dolphin exhibit found that visitors tended to remember “tricks” rather than educational information about the species.⁴²

³⁷ Marine Mammal Protection Act § 104(C)(2)(A)(i), 16 U.S.C. § 1374.

³⁸ *Id.*; Stephanie Dodson Dougherty, *The Marine Mammal Protection Act: Fostering Unjust Captivity Practices Since 1972*, 28 J. OF LAND USE 337, 338 (2013).

³⁹ *About AZA Accreditation*, ASS’N OF ZOOS AND AQUARIUMS, <https://www.aza.org/what-is-accreditation?locale=en> (last visited Nov. 10, 2022) [<https://perma.cc/V8AA-XN8D>].

⁴⁰ See generally Lori Marino et al., *The Harmful Effects of Captivity and Chronic Stress on the Well-being of Orcas (*Orcinus orca*)*, 35 J. VETERINARY BEHAV. 69 (2020) (discussing why captive orcas suffer from greater stress than wild orcas and how chronic stress leads to negative health consequences); Laurie J. Gage, *Captive Pinniped Eye Problems, We Can do Better!*, 4 J. MARINE ANIMALS AND THEIR ECOLOGY 25 (2011) (identifying ocular diseases in pinnipeds caused by captivity and proffering solutions to mitigate the diseases); Karli R. Chudeau et al., *Enrichment Reduces Stereotypical Behaviors and Improves Foraging Development in Rehabilitating Eastern Pacific Harbor Seals (*Phoca vitulina richardii*)*, 219 APPLIED ANIMAL BEHAV. SCI. (2019) (assessing how enrichment can be used to reduce, but not eliminate negative stereotypical behaviors in Eastern Pacific harbor seals).

⁴¹ See Conservation Education, Ass’n of Zoos & Aquariums, <https://www.aza.org/conservation-education?locale=en> (last visited Nov. 12, 2022) [<https://perma.cc/3KW3-PWGW>].

⁴² Jessica Sickler et al., *Social Narratives Surrounding Dolphins: Q Method Study*, 14 SOC’Y & ANIMALS 351, 370 (2006) [<https://perma.cc/EZJ2-25R6>].

Another survey of guests at three United States zoos discovered that guests visit to enjoy themselves, not to learn.⁴³ Researchers also observed that only 27 percent of visitors read the educational signage outside animal exhibits.⁴⁴ Moreover, a different study found that only 10 percent of guests increased their conservation-related knowledge by visiting public display facilities.⁴⁵

Additionally, to comply with the MMPA, public display facilities must promote conservation.⁴⁶ AZA-accredited zoos and aquariums must join the AZA's "Saving Animals From Extinction" (SAFE) program to meet this standard.⁴⁷ Still, other facilities can also meet this conservation standard by establishing their own rescue and rehabilitation programs to satisfy the requirement.⁴⁸ Despite the conservation mandate, only five to ten percent of zoos and aquariums are involved in substantial conservation programs.⁴⁹ Furthermore, fewer than half of all visitors believe that zoos and aquariums play an important role in conservation education and animal care.⁵⁰

These studies illustrate that public display facilities may not satisfy the education and conservation standards legally required by the MMPA. Moreover, even if guests do learn more about animals by visiting these facilities, they do not appear to use this information in a meaningful way, nor promote conservation efforts after they leave.⁵¹ Nonetheless, NMFS

⁴³ Susan Clayton et al., *Zoo Experiences: Conversations, Connections, and Concern for Animals*, 28 *ZOO BIOLOGY* 377, 393–94 (2009) (The survey asked visitors at the Bronx, Brookfield, and Cleveland Metroparks Zoos their primary purpose for attending the zoo.).

⁴⁴ *Id.* at 389.

⁴⁵ JOHN H. FALK ET AL., *WHY ZOOS & AQUARIUMS MATTER: ASSESSING THE IMPACT OF A VISIT TO A ZOO OR AQUARIUM* 9 (Nora L. Deans ed., 2007) [<https://perma.cc/SWP9-UJBS>].

⁴⁶ Marine Mammal Protection Act of 1972 § 104(C)(2)(A)(i), 16 U.S.C. § 1374.

⁴⁷ Emma Marris, *Modern Zoos are Not Worth the Moral Cost*, *N.Y. TIMES* (June 11, 2021); Kayla J. Ripple et al., *Increasing AZA-Accredited Zoo and Aquarium Engagement in Conservation*, 9 *FRONTIERS IN ENV'T SCI.* 1, 2 (2021).

⁴⁸ *See Animal Rescue Program*, MYSTIC AQUARIUM, <https://www.mysticaquarium.org/research-and-conservation/aquatic-animal-health/animal-rescue-program/> (last visited Apr. 3, 2023) [<https://perma.cc/EVC9-NSNA>]; *Rescue, Rehab, Release*, CLEARWATER MARINE AQUARIUM, <https://mission.cmaqarium.org/what-we-do/rescue-rehab-release/> (last visited Apr. 3, 2023) [<https://perma.cc/3XQ3-Y6AS>].

⁴⁹ NAOMI A. ROSE & E.C.M. PARSONS, *ANIMAL WELFARE INS.*, *THE CASE AGAINST MARINE MAMMALS IN CAPTIVITY* 15 (5th ed., 2019), <https://awionline.org/sites/default/files/uploads/documents/AWI-ML-CAMMIC-5th-edition.pdf> [<https://perma.cc/EXY6-NXJU>].

⁵⁰ FALK ET AL., *supra* note 45, at 10.

⁵¹ Marc Bekoff, *It's Not Happening at the Zoo: There's no Evidence Zoos Educate in a Meaningful Way*, *THE HUFFINGTON POST* (Dec. 12, 2014, 5:39PM, updated Feb. 11, 2015), https://www.huffpost.com/entry/its-not-happening-at-the-zoo_b_6315614 [<https://perma.cc/BS7M-J6LK>].

continues to grant take permits to zoos and aquariums. Consequently, many releasable and rehabilitated marine mammals spend their lives in captivity instead of the ocean.

B. Captivity Threatens Marine Mammals' Health and Welfare

Unfortunately, research shows that captivity can be unhealthy for marine mammals. Captive animals exhibit stereotypies or abnormal repetitive behaviors (ARBs),⁵² which are behaviors that are unnatural and unobserved in their wild counterparts.⁵³ Researchers often use stereotypies to assess animal welfare because they indicate stress and discomfort.⁵⁴ Stereotypies displayed by marine mammals include head bobbing, habitually rubbing on pool walls, flipper chewing, logging (remaining at the pool surface for long periods of time), and regurgitation.⁵⁵ Zoos and aquariums have tried to minimize these behaviors using enrichment and other stimulating exercises with little success.⁵⁶

Furthermore, federal documents spanning more than 30 years report that over 3,850 marine mammals have died under human care.⁵⁷ Of the deaths with a recorded cause, one in five resulted from avoidable human hazards.⁵⁸ Moreover, a 2010 NMFS report listed numerous stress-related disorders caused by captivity as the cause of death for many marine

⁵² Joseph P. Garner, *Stereotypies and Other Abnormal Repetitive Behaviors: Potential Impact on Validity, Reliability, and Replicability of Scientific Outcomes*, 46 INST. FOR LAB. ANIMAL RSCH. J. 106, 106 (2005).

⁵³ See G.J. Mason & N.R. Latham, *Can't Stop, Won't Stop: Is Stereotypy a Reliable Animal Welfare Indicator?*, 13 ANIMAL WELFARE (SUPPL.) 57, 57 (2004) (discussing and categorizing unique behaviors exhibited by captive animals but not seen in wild specimens).

⁵⁴ *Id.*

⁵⁵ Chudeau et al., *supra* note 40, at 3; *Pinnipeds in Captivity*, *supra* note 19; *Pinnipeds in Captivity*, CETACEAN INSPIRATION (Aug. 15, 2012), <https://cetaceaninspiration.wordpress.com/2012/08/15/pinnipeds-in-captivity/> [<https://perma.cc/BY7K-LCRY>]; Eve Copeland, *Cognitive Enrichment Intervention for Captive Orcas*, BARD DIGIT. COMMONS 14 (2015), <https://www.sciencedirect.com/science/article/abs/pii/S0168159118306300?via%3Dihub> [<https://perma.cc/ZRP3-TD77>].

⁵⁶ G.J. Mason et al., *Why and How Should We Use Environmental Enrichment to Tackle Stereotypic Behaviour?*, 102 APPLIED ANIMAL BEHAV. SCI. 163, 163 (2007) [<https://perma.cc/79HN-RWX2>].

⁵⁷ Sally Kestin, *Sea Show Industry's Record Spotty, Probe Finds*, CHI. TRIB. (May 16, 2004, 12:00 AM),

<https://www.chicagotribune.com/news/ct-xpm-2004-05-16-0405160422-story.html> [<https://perma.cc/7JE9-T9HY>].

⁵⁸ *Id.*

mammals, namely ulcerative gastritis, perforating ulcers, cardiogenic shock, and psychogenic shock.⁵⁹

Additionally, some marine mammal species have shortened lifespans and high mortality rates in captivity.⁶⁰ Even species with extended lifespans in captivity face adversities and require medical intervention that is unnecessary in the wild. For example, captive pinnipeds, such as seals and sea lions, suffer from ocular diseases due to overexposure to UV light caused by the reflective paint of pools and improper water conditions.⁶¹

Further, captive diets lack the nutritional value of wild diets.⁶² As a result, nearly all marine mammals must consume artificial supplements that their wild counterparts would not need.⁶³ Insufficient nourishment from captive diets has been linked to kidney stones, hemochromatosis, and other unnatural causes of death in captive marine mammals.⁶⁴

These health problems illustrate that captivity is not the healthy alternative to life in the wild that applicant facilities present it to be. In fact, releasable marine mammals are typically worse off in captivity than if they had been released back to the wild. This paradox is problematic because one reason for enacting the MMPA was to protect marine mammals from human harm. Nevertheless, by allowing facilities to retain releasable rehabilitated marine mammals, the MMPA enables humans to continue harming individual animals.

III. PROPOSED SOLUTIONS

Due to both the legal issues and health problems associated with marine mammals in captivity, the option to keep releasable marine mammals for display purposes should be revoked. Rescued marine mammals should be, as the MMPA states, released back to the wild upon

⁵⁹ Lori Marino & Toni Frohoff, *Towards a New Paradigm of Non-Captive Research on Cetacean Cognition*, 6 PUB. LIBR. OF SCI. ONE, 1, 3 (Sept. 2011); NAT'L MARINE FISHERIES SERV., U.S. MARINE MAMMAL INVENTORY REP. (2010).

⁶⁰ Orcas have higher mortality rates in captivity than in the wild, whereas pinnipeds tend to live at least as long as their wild counterparts. Survivorship for bottlenose dolphins is similar between wild and captive populations. Insufficient information is available to compare populations of other species. See Lorna C. Scribner, *The Debate on Marine Mammals in Captivity* (DEC. 15, 2012) (Honors Thesis, Coastal Carolina University) (DIGIT. COMMONS) [<https://perma.cc/KH5E-UTH4>].

⁶¹ *Pinnipeds in Captivity*, *supra* note 55.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ ROSE & PARSONS, *supra* note 49, at 51.

their successful rehabilitation whenever feasible. To achieve this end, the MMPA or NMFS's application process should be amended to prohibit take permits to retain otherwise releasable marine mammals. This outcome would be morally sound, in the best interest of the animal's welfare, and would align with Congress' explicit directive in Section 109(h) of the MMPA. The following parts of this section will discuss the two proposed solutions, then analyze the benefits and consequences of each.

A. Amending the MMPA

To prohibit the issuance of take permits for the display of marine mammals, Congress would need to change two sections of the MMPA:

- (1) Section 101(a)(1) currently reads, “[c]onsistent with the provisions of section 104, permits may be issued by the Secretary for taking, and importation for purposes of scientific research, public display, photography for educational purposes....”⁶⁵
- (2) Section 104(c) stipulates that for “[a]ny permit issued by the Secretary which authorizes the taking or importation of a marine mammal for purposes of scientific research, public display, or enhancing the survival or recovery of a species or stock shall specify [certain requirements]”⁶⁶

In each section, the underlined phrase, “public display,” would need to be removed. In fact, the requirements for public display facilities in Section 104(c) could also be deleted due to irrelevance. The updated MMPA language would require facilities to release fully rehabilitated marine mammals whenever feasible. More generally, the amendment would prohibit granting take permits via any method if the purpose was to publicly display the animal.

Amending the MMPA in this way would impact NMFS's permitting process by eliminating the availability of permits to “take” marine mammals for the purpose of public display. This change would decrease the number of permits NMFS receives; and therefore, no additional resources—human or monetary—would need to be allocated to the Agency. Otherwise, NMFS's current process would remain unchanged: applications

⁶⁵ Marine Mammal Protection Act § 101(a)(1), 16 U.S.C. § 1371 (emphasis added).

⁶⁶ Marine Mammal Protection Act § 104(c), 16 U.S.C. § 1374 (emphasis added).

for permits would still be submitted, evaluated, and approved by NMFS and the Secretary. Whereas with the amendment, any permits for public display purposes would be automatically denied without consideration, in turn potentially saving NMFS money and resources.

B. Changing NMFS's Permitting Procedure

Even if the MMPA is not amended, NMFS could change its internal permitting procedures by publishing a new “Procedural Directive” in the NOAA Fisheries Policy Directive System.⁶⁷ Currently, facilities seeking to retain a releasable rehabilitated marine mammal must submit a standard take permit application.⁶⁸ If the permit is granted, the Office of Protected Resources Director may then authorize retention of the rehabilitated animal instead of “taking” a wild one.⁶⁹

This procedural change would still allow NMFS to grant take permits for public display but would no longer allow grant take permits for releasable marine mammals. Like amending the MMPA, this change would not require additional resources. Rather, the procedural directive would likely decrease NMFS's workload, as well as decrease the number of permit applications it receives.

C. Amending the MMPA Provides Additional Protection from Importation

Either amending the MMPA or changing the NMFS's internal procedures would prevent zoos and aquariums from retaining releasable rehabilitated marine mammals for public display. Altering NMFS's permitting procedures could prevent the retention of releasable marine mammals for any purpose—public display, research, photography, or educational purposes—if the Agency wanted it to. Conversely, because of the MMPA's language, removing “public display” from Sections 101 and 104 would prohibit both retaining releasable marine mammals for that

⁶⁷ The NOAA Policy Directive System is the repository for NOAA Fisheries policy directives. A procedural policy directive “provide[s] guidance for how to apply the direction and objectives stated in policies.” *Policy Directive System*, NOAA FISHERIES, <https://www.fisheries.noaa.gov/national/laws-and-policies/policy-directive-system> (last visited Nov. 28, 2022) [<https://perma.cc/87CZ-DQTW>].

⁶⁸ NMFS Directive 02-308-03, NMFS Process for Permit Application to Retain Releasable Rehabilitated Marine Mammals for Public Display (NOAA 2018), https://media.fisheries.noaa.gov/2021-11/02-308-03%20renewal_signed.pdf [<https://perma.cc/KH2V-RCH4>].

⁶⁹ *Id.*

purpose and importing marine mammals. But, changing the MMPA in this way would still allow the retention of releasable rehabilitated individuals for research, photography, and educational purposes.

The timeline for amending and implementation would likely vary significantly between these two options. Amending the MMPA would likely take longer than changing NMFS's internal procedure because to amend a statute, both chambers of Congress and the President must support the change. In contrast, NMFS could review and change its own procedure without additional approval, so long as the changes are not unconstitutional nor outside of its statutory authority. Despite these differences, either solution would address the issue of releasable marine mammals being kept in captivity for public display. Moreover, current social, judicial, and legislative trends indicate that either option would likely have significant support.

IV. OVERCOMING OBSTACLES TO IMPLEMENTATION

Undoubtedly, obstacles would need to be overcome to amend the MMPA or NMFS's permitting procedures and subsequently implement those changes. Zoos and aquariums that house captive marine mammals would likely oppose these changes because it would mean facilities could only increase their marine mammal inventory through captive breeding. There is, however, strong public support against marine mammal captivity, which is evident in social movements and attendance trends at public display facilities across the country. In addition, recent judicial and legislative decisions at both the state and federal levels appear to disfavor continuing marine mammal captivity.

A. Social Movements and Trends

Zoos and aquariums rely on public attendance as a source of profit to maintain their businesses. Thus, people can significantly impact the success of public display facilities. Organizations such as People for the Ethical Treatment of Animals (PETA), the Humane Society, the International Marine Mammal Project, and Whale & Dolphin Conservation have opposed marine mammal captivity for decades.⁷⁰ Yet, the most

⁷⁰ See *Aquariums and Marine Parks*, PETA, <https://www.peta.org/issues/animals-in-entertainment/zoos-pseudo-sanctuaries/aquariums-marine-parks/> (last visited Apr. 4, 2023) [<https://perma.cc/Q5ZQ-XWJ6>]; *Marine Mammals in Captivity*, HUMANE SOC'Y, <https://www.humanesociety.org/resources/marine-mammals-captivity> (last visited Apr. 4,

palpable shift in public perception came after the release of *Blackfish* in 2013.⁷¹

Prior to *Blackfish*, public interest in the controversy of marine mammal captivity was minimal.⁷² But after the documentary, every animal death, trainer injury, and negative incident at captive facilities received public attention.⁷³ Though the documentary focused on the plight of captive orca whales, it sparked outrage over the captivity of other marine mammals as well. As people realized that most marine mammal species are not suited for life in captivity,⁷⁴ they began protesting across the country.⁷⁵ While SeaWorld faced the brunt of the backlash, as the backdrop of the documentary, zoos and aquariums worldwide saw attendance and profits drop.⁷⁶

This so-called “*Blackfish* effect” proves that people can influence the welfare of captive marine mammals without legal action. Furthermore, if Congress or NMFS were to take legal action, such action would have public support. The downward trend in zoo and aquarium attendance and increased public scrutiny faced by those facilities show that many people oppose marine mammal captivity. Therefore, the public would similarly support banning permits to keep releasable rehabilitated marine mammals for the purpose of public display in zoos and aquariums.

2023) [<https://perma.cc/482Q-USYS>]; *About – Overview*, INT’L MARINE MAMMAL PROJECT, <https://savedolphins.eii.org/about> (last visited Apr. 4, 2023) [<https://perma.cc/6EET-JZ2G>]; *End Captivity*, WHALE AND DOLPHIN CONSERVATION, <https://us.whales.org/our-4-goals/end-captivity/> (last visited Apr. 4, 2023) [<https://perma.cc/G79V-NQFB>].

⁷¹ *Blackfish* is a documentary that illuminated the numerous marine mammal trainer injuries and casualties caused by captive orca whales that were historically swept under the rug. ROSE & PARSONS, *supra* note 49, at 84.

⁷² *See id.*

⁷³ *Id.* at 85.

⁷⁴ *Just Like Orcas, Pinnipeds are Prisoners at SeaWorld*, SEAWORLD OF HURT (Dec. 17, 2018), <https://www.seaworldofhurt.com/features/problems-with-imprisoning-pinnipeds/> (discussing the reasons why pinnipeds, like orcas, are not suitable for life in captivity) [<https://perma.cc/GFZ6-DHL2>].

⁷⁵ *See* Jonathon Kendall, *Animal Rights Activists Protest Proposed Miami Megamall’s Sea Lion Show*, MIA. NEW TIMES (Mar. 24, 2015), <https://www.miaminewtimes.com/news/animal-rights-activists-protest-proposed-miami-megamalls-sea-lion-show-7549277> (reporting about protests against traveling sea lion entertainment shows) [<https://perma.cc/KD9J-3QCT>].

⁷⁶ Kelly Wallace, *After SeaWorld, a ‘Blackfish Effect’ on Circuses and Zoos?*, WGNO (Mar. 19, 2016), <https://wgno.com/news/after-seaworld-a-blackfish-effect-on-circuses-and-zoos/> [<https://perma.cc/7LML-R3VB>].

B. Judicial Decisions

Despite the prevalence of take permits, NMFS has denied permit requests for displaying marine mammals. Consequently, after exhausting their administrative remedies, denied applicants have sought relief in the courts. Many of these denied applicants were large, notorious facilities like the Georgia Aquarium, Shedd Aquarium, and numerous SeaWorld Parks. In most cases, the permit denial is upheld by the court. This unwillingness of NMFS and federal courts to acquiesce to these entities illustrates that captivity proponents are a surmountable obstacle.

In 2013, NMFS denied an application from the Georgia Aquarium and four other facilities to import beluga whales for public display from a research station on Russia's Black Sea Coast.⁷⁷ The Aquarium's stated goal in obtaining the permit was to "enhance the North American beluga breeding cooperative;" "promot[ing] conservation and education" was listed as a secondary goal.⁷⁸ When NMFS denied the permit, Georgia Aquarium sought review in federal court.⁷⁹ The United States District Court for the Northern District of Georgia upheld the permit denial.⁸⁰

In its opinion, the court found:

The primary purpose of the MMPA is to protect marine mammals; the Act was not intended as a 'balancing act' between the interests of industry and the animals. The interests of the marine mammals come first under the statutory scheme, and the interests of the industry, important as they are, must be served only after protection of the animals is assured.⁸¹

⁷⁷ Matt Potter, *Feds Deny Import Permits for Beluga Whales for SeaWorld*, SAN DIEGO READER (Aug. 7, 2013), <https://www.sandiegoreader.com/weblogs/news-ticker/2013/aug/07/feds-deny-import-permits-for-beluga-whales-for-sea> [<https://perma.cc/R86W-K4VP>].

⁷⁸ *Ga. Aquarium, Inc. v. Pritzker*, 135 F. Supp. 3d 1280, 1286 (N.D. Ga. 2015) (quoting Permit Application, AR 8927).

⁷⁹ *Id.*

⁸⁰ *Id.* at 1340. Georgia Aquarium later announced it would not appeal the decision. See Carla Caldwell, *Georgia Aquarium Will Not Appeal Decision to Block Import of Beluga Whales*, Atlanta Bus. Chron. (Nov. 18, 2015), https://www.bizjournals.com/atlanta/morning_call/2015/11/georgia-aquarium-will-not-appeal-decision-to-block.html [<https://perma.cc/ZS3Q-L5XW>].

⁸¹ *Ga. Aquarium, Inc.*, 135 F. Supp. 3d at 1292 (quoting *Fed'n of Japan Salmon Fisheries Co-op. Ass'n v. Baldrige*, 679 F. Supp. 37, 46 (D.D.C. 1987)).

Following the court's interpretation of the statutory scheme and considering the negative impacts of captivity, such as stereotypies and premature deaths, it would be nearly impossible to find that captive life is in the marine mammals' best interest. Granting a permit in such a situation, to retain a releasable and rehabilitated marine mammal for public display and human entertainment, places the industry's interests above the animal's best interest—precisely what the District Court in Georgia said must be avoided when evaluating permits. The court's holding indicates that changing current laws or agency procedures to prohibit permits for the retention of releasable rehabilitated marine mammals would be consistent with federal judicial trends.

C. Legislative Decisions

To date, no legislation specifically regarding releasable rehabilitated marine mammals has been introduced. Nevertheless, Congress and state legislatures have introduced legislation prohibiting marine mammal captivity generally. The following examples show that the public display of marine mammals is a contemporary issue and that banning permits to publicly display releasable marine mammals would have widespread support.

At the federal level, the Strengthening Welfare in Marine Settings (SWIMS) Act was introduced in the House of Representatives on July 26, 2022, and in the Senate on August 2, 2022.⁸² The SWIMS Act would amend the MMPA to prohibit the breeding, taking, and importation of orcas, beluga whales, pilot whales, and false killer whales.⁸³ The bill was most recently referred to the House Subcommittee on Livestock and Foreign Agriculture

⁸² The Strengthening Welfare in Marine Settings Act of 2022 (SWIMS Act) was introduced by Senator Dianne Feinstein and Representatives Adam Schiff, Jared Huffman, and Suzan DelBene. Margie Fishman, *Legislation to Phase Out Public Displays of Captive Whales Introduced in Congress*, Animal Welfare Institute (July 26, 2022), <https://awionline.org/press-releases/legislation-phase-out-public-display-captive-whales-introduced-congress> [<https://perma.cc/RQ7F-G4D5>].

See Strengthening Welfare in Marine Settings Act of 2022, H.R. 8514, 117th Cong. (2022); Strengthening Welfare in Marine Settings Act of 2022, S. 4740, 117th Cong. (2022).

⁸³ H.R. 8514; S. 4740.

and the Senate Committee on Commerce, Science, and Transportation.⁸⁴ The bill has gained 28 cosponsors since its introduction.⁸⁵

While federal action is still pending, many states have successfully passed laws banning marine mammals in captivity. Most recently, in 2016, California passed the Orca Protection Act.⁸⁶ The California law bans holding orca whales in captivity for entertainment or performance purposes.⁸⁷ Additionally, the Orca Protection Act ended captive breeding programs, along with the import and export of orcas and their genetic material in and out of California.⁸⁸

State marine mammal captivity laws are not a new concept though. For example, South Carolina's ban on captive marine mammal display has been in place in some form since 1992.⁸⁹ The original law prohibited "the display of dolphins and porpoises."⁹⁰ In 2000, the law was expanded to prohibit display of all marine mammals.⁹¹ However, in 2011, the law was narrowed to prohibit only the display of cetaceans.⁹² Regardless of this back and forth, South Carolina maintaining the law in some form shows that it is another state against marine mammal captivity.

While not all passed, marine mammal protection bills have been introduced coast to coast in the United States. Washington and New York introduced bills in their Senates to ban the breeding, import, and export of orcas for entertainment purposes, but neither state successfully passed a

⁸⁴ *H.R. 8514 – SWIMS Act of 2022*, CONGRESS.GOV, <https://www.congress.gov/bill/117th-congress/house-bill/8514/all-actions-without-amendments?s=1&r=9> (last visited Nov. 30, 2022) [<https://perma.cc/AE7K-YM69>]; *S. 4740 – SWIMS Act of 2022*, CONGRESS.GOV, <https://www.congress.gov/bill/117th-congress/senate-bill/4740/all-actions-without-amendments> (last visited Nov. 30, 2022) [<https://perma.cc/W7LV-USGZ>].

⁸⁵ *H.R. 8514 – SWIMS Act of 2022*, CONGRESS.GOV, [https://www.congress.gov/bill/117th-congress/house-bill/8514?s=1&r=9#:~:text=Introduced%20in%20House%20\(07%2F26%2F2022\)&text=This%20bill%20establishes%20prohibitions%20on,the%20purpose%20of%20public%20display](https://www.congress.gov/bill/117th-congress/house-bill/8514?s=1&r=9#:~:text=Introduced%20in%20House%20(07%2F26%2F2022)&text=This%20bill%20establishes%20prohibitions%20on,the%20purpose%20of%20public%20display) (last visited Nov. 30, 2022) [<https://perma.cc/8MNQ-J94X>].

⁸⁶ California Orca Protection Act, CAL. FISH & GAME CODE § 4502.5 (2016).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Cetacean Anti-Captivity Legislation and Laws*, ANIMAL WELFARE INST., <https://awionline.org/content/cetacean-anti-captivity-legislation> (last visited Nov. 12, 2022) [<https://perma.cc/J8DZ-24EB>].

⁹⁰ S.C. CODE ANN. § 50-17-105 (1992).

⁹¹ S.C. CODE ANN. § 50-5-2310 (2000).

⁹² S.C. CODE ANN. § 50-5-2310 (2011).

law.⁹³ Hawaii also introduced legislation urging facilities holding cetaceans for entertainment purposes to discontinue their breeding programs and phase out captivity,⁹⁴ but this resolution would not result in binding law.⁹⁵ Likewise, Florida introduced the Florida Orca Protection Act in 2018, but it died in the Natural Resources & Public Lands Subcommittee.⁹⁶

Although few states have successfully enacted legislation to prohibit marine mammal captivity, the fact that legislation has been consistently introduced reiterates that this is an important issue with national support. Further, the introduction of bills at the federal level indicates that elected representatives are listening to their constituents and taking a stance on this issue.

CONCLUSION

Keeping rehabilitated marine mammals that are deemed releasable in captivity for public display should be prohibited. Not only do zoos and aquariums fail to meet their legal obligations for education and conservation programs as required by the MMPA, but research has also shown that captivity negatively impacts marine mammals' health. Furthermore, the MMPA mandates that stranded marine mammals be released back to the ocean following rehabilitation whenever feasible.

To protect rehabilitated marine mammals, either the MMPA or NMFS's permitting procedures should be amended. Though there may be opposition to these changes, the vast public and political support apparent in current social, judicial, and legislative trends would outweigh any opposition. Wild marine mammals that require rehabilitation, most commonly because of human actions, deserve to return to the wild once they are healthy and capable. These animals should not suffer, nor serve as entertainment to the people who originally caused injury.

⁹³ S.B. 5666, 64th Leg., 2015 Reg. Sess. (Wash. 2015); S.B. S6613A, 2013-2014 Leg. Sess. (N.Y. 2014).

⁹⁴ H.R. 136, 2017 Leg., 29th Sess. (Haw. 2017).

⁹⁵ *Id.*

⁹⁶ H.B. 1305, Reg. Sess. 2018 (Fla. 2018).