



1-1-2016

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Recommended Citation

Katherine M. Davis, *Promise Despite Overreach in Marshall Islands v. United States*, 30 Emory Int'l L. Rev. Recent Dev. 2063 (2016).

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PROMISE DESPITE OVERREACH IN MARSHALL ISLANDS V. UNITED STATES

*Katherine Maddox Davis**

ABSTRACT

When it comes to accountability for treaty obligations, the International Court of Justice has not proved as impactful as its founders hoped. Given that shortcoming, domestic courts' role in determining treaty obligations is critical. This Essay contends that treaty parties may have hope in federal court for declaratory relief regarding American treaty obligations. The inspiration comes from Marshall Islands v. United States, currently before the Ninth Circuit. The Marshall Islands sued the United States for breach of the Nuclear Nonproliferation Treaty Article VI, requesting declaratory and injunctive relief. This Essay deconstructs the Marshall Islands' strategy, pronounces its impending demise, and reimagines how the strategy could succeed if limited to declaratory relief. When a treaty party sufficiently pleads injury-in-fact in a proper venue, the Essay posits that redress, political question, and non-self-executing treaty status may not bar a declaratory judgment.

INTRODUCTION

While it is novel for a foreign sovereign to consent to the jurisdiction of U.S. federal courts over a treaty dispute, it is in no way novel for the U.S. federal courts to interpret a treaty and/or to find a treaty violation. Indeed, in the first fifty years of U.S. constitutional history, between 1789 and 1838, the Supreme Court decided nineteen cases in which the U.S. government was a party, at least one party raised a claim or defense on the basis of a treaty, and the Court decided the merits of that claim or defense.

–Marshall Islands Complaint for Breach of the Nuclear Non-Proliferation Treaty¹

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The United States (U.S.) is subject to robust criticism for exceptionalism in public international law.² When it comes to accountability in treaty obligations, whether for the United States or other major powers, the International Court of Justice (ICJ) has not proven as impactful as its founders hoped.³ Given that shortcoming, domestic courts' role in determining treaty obligations is all the more critical.⁴

This Essay contends that treaty parties may have hope in federal court for declaratory relief regarding American treaty obligations. The inspiration for this Essay is taken from a case currently before the Ninth Circuit, *Marshall Islands v. United States*.⁵ The Marshall Islands filed a complaint against the United States for breach of the Nuclear Non-Proliferation Treaty (NPT) Article VI, requesting both declaratory and injunctive relief.⁶ As quoted above, the Marshall Islands points out that this strategy is far from novel in American jurisprudence and only need be dusted from a few centuries' dormancy.⁷ This Essay deconstructs *Marshall Islands*, pronounces its impending demise, and reimagines how the legal strategy could succeed if limited to declaratory relief. Where a treaty party can sufficiently plead injury in fact, this Essay posits that

¹ Complaint at 1–2, Republic of the Marshall Islands v. United States, 79 F. Supp. 3d 1068 (N.D. Cal. 2015) (No. 3:14-CV-01885-JSW).

² Katherine M. Davis, *I, Too, Sing America: Customary International Law for American State and Federal Courts' Post-Kiobel Jurisprudence, Guided by Australian and Indian Experiences*, 29 EMORY INT'L L. REV. 119, 123 (2014) [hereinafter Davis, *I, Too, Sing America*]. By contrast, matters of private international law seem to be ushered into federal courts with more grace. See, e.g., BG Group plc v. Republic of Argentina, 134 S. Ct. 1198 (2014).

³ Katherine Maddox Davis, *Hurting More than Helping: How the Marshall Islands' Seeming Bravery Against Major Powers Only Stands to Maim the Legitimacy of the World Court*, 25 MINN. J. INT'L L. 79, 98–100 (2016) [hereinafter Davis, *Hurting More than Helping*]; see also A. MARK WEISBURD, FAILINGS OF THE INTERNATIONAL COURT OF JUSTICE 3 (2015) (“[A] contradiction between the significance for international law accorded to the I.C.J.’s decisions by tribunals and scholars and the formal authority accorded to the Court in its Statute.”); *infra* Part I.B.

⁴ See Davis, *Hurting More than Helping*, *supra* note 3, at 88; Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469, 469 (2005) (“[D]omestic enforcement mechanisms are a crucial force pushing countries to comply with international treaties . . .”). There is also a growing awareness of the broader interplay between federal courts and the international community. See, e.g., CURTIS A. BRADLEY, INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM, at xi (2d ed. 2015); STEPHEN BREYER, THE COURT AND THE WORLD 197 (2015).

⁵ See Plaintiff’s Notice of Appeal at 1–2, Republic of the Marshall Islands v. United States, 79 F. Supp. 3d 1068 (N.D. Cal. 2015) (No. 14-CV-01885-JSW).

⁶ See Complaint, *supra* note 1, at 27; *infra* Part II.

⁷ See Complaint, *supra* note 1, at 1–2; see also Oona A. Hathaway et al., *International Law at Home: Enforcing Treaties in U.S. Courts*, 37 YALE J. INT’L L. 51, 88–89 (2012) (citing *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243 (1984)).

redress, political question, and non-self-executing treaty status may not bar a declaratory judgment.

In April 2014, the Republic of the Marshall Islands sued each of the nine nuclear weapons states at the ICJ for failure to comply with Article VI of the NPT.⁸ Article VI requires the pursuit of good faith negotiations toward proliferation cessation and further negotiations toward disarmament.⁹ The Marshall Islands brought an additional suit against the United States in the U.S. District Court for the Northern District of California.¹⁰ The case was dismissed and appealed.¹¹

The Marshall Islands' ICJ actions garnered little attention; interested parties realize that a decision is likely years away.¹² Meager attention is equally attributable to the suits' potential. Only three nuclear weapons states submit to the compulsory jurisdiction of the ICJ.¹³ Of those three, only one is party to the NPT.¹⁴ The legal grounds against the other two countries are based on an attenuated argument of customary international law that is unlikely to

⁸ James Conca, *The Nuclear Weapons States—Who Has Them and How Many*, FORBES (Sept. 25, 2014, 10:54 AM), <http://www.forbes.com/sites/jamesconca/2014/09/25/the-nuclear-weapons-states-who-has-them-and-how-many/>. The nuclear states are the United States, the United Kingdom, France, China, Russia, India, Pakistan, Israel, and North Korea. *Id.*

⁹ See Treaty on the Non-Proliferation of Nuclear Weapons art. VI, July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161.

¹⁰ See Complaint, *supra* note 1, at 1. In its Complaint, the Marshall Islands named the United States, President Barack Obama, the Department of Defense, Secretary of Defense Charles Hagel, the Department of Energy, Secretary of Energy Ernest Moniz, and the National Nuclear Security Administration. See *id.* The U.S. Department of Justice Civil Division, Federal Programs Section and Appellate Section filed on behalf of the collective government defendants before the district and appellate courts, respectively. This Essay refers to the defendants collectively as “the Government” and “the United States.” See Press Release, Int’l Court of Justice, The Republic of the Marshall Islands Files Applications Against Nine States for Their Alleged Failure to Fulfill Their Obligations with Respect to the Cessation of the Nuclear Arms Race at an Early Date and to Nuclear Disarmament, Press Release No. 2014/18 (Apr. 25, 2014), <http://www.icj-cij.org/presscom/files/0/18300.pdf> [hereinafter Press Release No. 2014/18]. See generally Republic of the Marshall Islands v. United States, 79 F. Supp. 3d 1068 (N.D. Cal. 2015); Brief of Appellee, Republic of the Marshall Islands v. United States, 79 F. Supp. 3d 1068 (N.D. Cal. 2015 Oct. 28, 2015) (No. 4:14-CV-01885-JSW).

¹¹ *Republic of the Marshall Islands*, 79 F. Supp. 3d 1068; Plaintiff’s Notice of Appeal at 1–2, Republic of the Marshall Islands v. United States, 79 F. Supp. 3d 1068 (N.D. Cal. 2015 Apr. 2, 2015) (No. 4:14-CV-01885-JSW).

¹² Indeed, the ICJ gave India a year to respond, and the Marshall Islands six months to respond on whether the ICJ’s jurisdiction in the matter is proper. See Davis, *Hurting More than Helping*, *supra* note 3, at 85.

¹³ See Press Release No. 2014/18, *supra* note 10.

¹⁴ See *id.*

gain traction.¹⁵ While the Marshall Islands' complaint in federal court received sparse attention, the American case merits exploration.

Regardless of the Marshall Islands' near-certain failure, the broader legal strategy has the potential to reinvigorate a trend of treaty parties seeking declaratory judgments from federal courts.¹⁶ Such judgments could mark a meaningful step toward American accountability by defining U.S. treaty obligations and determining compliance. Nations seeking to press for American treaty compliance can extract a roadmap of valuable lessons from *Marshall Islands v. United States*.

This Essay proceeds in four parts. Part I provides a background to the NPT and dispenses of the Marshall Islands' cases before the ICJ, explaining their futility and the resulting value of efforts to seek U.S. treaty compliance through American courts. Part II explores the Marshall Islands' suit in American federal court, highlighting redress, political question doctrine, and non-self-executing treaty status as sticking points barring declaratory relief. Part III posits that when only declaratory relief is sought, those three sticking points are not clear bars to other sovereigns seeking to have a U.S. court interpret American treaty obligations. Concluding remarks reiterate the need for good faith efforts to quell American exceptionalism in public international law. This Essay will not address the value of nuclear weapons arsenals themselves, though acknowledging the great weight of that matter—particularly as the United States updates its nuclear arsenal.¹⁷ Likewise, venue will not be addressed: the matter will generally be as simple as filing in the U.S. District Court for the District of Columbia.¹⁸ While the Marshall Islands are unlikely to see victory in the case at bar, the litigation stands to crack open a long-buried method of American treaty accountability.

I. THE ICJ AND NPT WERE BORN OF FOREIGN RELATIONS COMPROMISES THAT LEFT THEM WEAK TO ENFORCE AND BE ENFORCED, RAISING THE VALUE OF DOMESTIC PROCEEDINGS

In 1968, some twenty-three years after the world's first nuclear weapons were tested in New Mexico, the five then-existing nuclear weapons states and a

¹⁵ See Davis, *Hurting More than Helping*, *supra* note 3, at 83.

¹⁶ See Complaint, *supra* note 1, at 1–2.

¹⁷ See William J. Broad & David E. Sanger, *As U.S. Modernizes Nuclear Weapons, 'Smaller' Leaves Some Uneasy*, N.Y. TIMES, Jan. 12, 2016, at A1.

¹⁸ See *infra* Part III.

bounty of non-weapons states recognized the NPT.¹⁹ The treaty came into force in 1970.²⁰ The NPT reflected a worldwide agreement to cease building new nuclear weaponry and begin exploring avenues toward creating a new treaty for strict disarmament.²¹ At the time of the NPT, five victors of World War II had tested and possessed nuclear weapons.²² Over time, India, Israel, Pakistan, and the Democratic People's Republic of Korea developed and tested nuclear weapons, though the NPT made no allowances for other nations to be officially deemed nuclear weapons states.²³

As the NPT drafters knew, one does not simply end an arms race. The long-suffering language of Article VI called for the parties to “undertake[] to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date.”²⁴ Further complicating matters not fully appreciated at the time of the NPT's drafting, disarming nuclear weapons can be more expensive and time-intensive than developing them.²⁵ Given the sheer overwhelming cost of nuclear disarmament, the demands of Article VI are

¹⁹ REBECCA JOHNSON, UNFINISHED BUSINESS: THE NEGOTIATION OF THE CTBT AND THE END OF NUCLEAR TESTING 1 (2009). As of 1968, the five nuclear weapons states were China, France, Russia, the United Kingdom, and the United States. *Id.* at 2.

²⁰ *Id.*

²¹ Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 9, art. VI (“Each of the Parties to the Treaty undertakes to pursue negotiations in good faith . . . on a treaty on general and complete disarmament under strict and effective international control.”).

²² See *id.*; Nobuyasu Abe, *The Current Problems of the NPT: How to Strengthen the Non-Proliferation Regime*, in THE NUCLEAR NONPROLIFERATION TREATY AND INDIA 38 (Rajiv Nayan ed., 2012).

²³ Conca, *supra* note 8. Because the NPT restricts the title of “nuclear weapons state” to those states who tested weapons prior to January 1, 1967, none of the four latecomers were able to join the NPT as weapons states. Most have chosen not to join as non-weapons states. Abe, *supra* note 22, at 38. Notably, India pushed firmly against the delineation between nuclear weapons haves and have nots, now holding a peculiar space as an American-embraced nuclear state not recognized by the NPT. See KATE SULLIVAN, S. RAJARATNAM SCH. OF INT'L STUDIES, POLICY REPORT: IS INDIA A RESPONSIBLE NUCLEAR POWER? 1 (2014), <http://oxford.academia.edu/KateSullivan>.

²⁴ Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 9, art. VI.

²⁵ Walter Pincus, *The Explosive Cost of Disposing of Nuclear Weapons*, WASH. POST (July 3, 2013), http://www.washingtonpost.com/world/national-security/the-explosive-cost-of-disposing-of-nuclear-weapons/2013/07/03/64f896e0-e287-11e2-80eb-3145e2994a55_story.html. In current value, four atomic bombs developed by the World War II Manhattan Project cost \$24.1 billion to develop and six years to build. Those bombs were “the Trinity plutonium implosion device tested in the New Mexico desert; the Little Boy uranium bomb dropped on Hiroshima; the Fat Man plutonium bomb that hit Nagasaki, and an unused uranium bomb.” *Id.* By contrast, the U.S. government's proposed allocation for blending the leftover 37.5 tons of plutonium, to render it unusable in further nuclear weaponry, is \$24.2 billion. *Id.* The blending process is estimated to take more than two decades. *Id.*

rightfully tempered.²⁶ Even so, most nuclear weapons states may well argue that they are in compliance with the spirit and letter of Article VI.²⁷

A. Worldwide Compliance with the Broad Language of NPT Article VI is Arguable, and the Marshall Islands Hardly Made Waves at NPT Meetings in 2014 and 2015

The Marshall Islands contends that Article VI has received insufficient attention since the NPT came into force.²⁸ To whatever degree discussing the matter is “pursuing negotiations,” compliance by most NPT parties is arguable.²⁹ Since 1975, in accordance with the NPT provisions, NPT Review Conferences are held every five years to assess compliance and look toward potential future action.³⁰ Three Preparatory Committee meetings are held between conferences.³¹ The most recent Preparatory Committee meeting occurred in New York City from April 28 through May 9, 2014, one week after the Marshall Islands filed its suits.³² While some opined that the timing of the lawsuit was a possible attempt to “put the question of the legality of nuclear arsenals on the agenda at the Preparatory Committee meetings,”³³ and a blog post by civil society leaders noted that the Marshall Islands Prime Minister received an “unprecedented outburst of resounding applause” at the Preparatory Committee plenary, the records of the 2014 meetings contain no mention of the suits.³⁴ Curiously, no national report appears to have been

²⁶ See ERIC A. POSNER, *THE TWILIGHT OF HUMAN RIGHTS LAW* 86 (2014) (regarding treaties generally, “the problem is not so much that states violate treaty terms but that the treaties do not create any meaningful obligations”).

²⁷ In a realistic (if cynical) perspective, “when legal rules are vague, one can easily argue that one complied with them even when one’s conduct does not seem to advance the underlying purpose of the rules . . .” *Id.*

²⁸ See generally Complaint, *supra* note 1.

²⁹ Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 9, art. VI.

³⁰ For a record of past Review Conferences and Preparatory committees, see *NPT Review Conferences and Preparatory Committees*, www.un.org/disarmament/WMD/Nuclear/NPT_Review_Conferences.shtml (last visited Mar. 13, 2016).

³¹ See *id.*

³² *Id.*

³³ Avner Cohen & Lily Vaccaro, *The Import of the Marshall Islands Nuclear Lawsuit*, BULL. ATOMIC SCIENTISTS (May 6, 2014, 11:42 AM), <http://thebulletin.org/import-marshall-islands-nuclear-lawsuit7143>.

³⁴ *Open Letter in Support of the Marshall Islands’ Nuclear Zero Lawsuits*, NUCLEAR AGE PEACE FOUND. (Nov. 4, 2014), www.wagingpeace.org/rmi-open-letter/; Cohen & Vaccaro, *supra* note 33 (“While a number of nongovernmental organizations have been vocal about the lawsuit, especially at NPT Preparatory Committee side events, the delegations participating in the conference have remained all but silent on the subject.”); see also Preparatory Comm. for the 2015 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Summary Record of the 3rd Meeting, UN Doc. NPT/CONF.2015/PC.111/Sr.3 (Apr. 29, 2014) (not mentioning the Marshall Islands at all, let alone the Marshall Islands participating in debate);

submitted by the Marshall Islands.³⁵ The 2015 Review Conference was contentious; leaders left without agreeing to so much as a final culminating document.³⁶

Whether correlated to the Review Conferences, or actualized in a spirit of compliance with the NPT, the total quantity of nuclear weapons possessed by the nine nuclear weapons states is ninety percent lower today than it was during the Cold War.³⁷ This reality detracts from the Marshall Islands' contention that Article VI compliance is inadequate.³⁸

B. The Marshall Islands' ICJ Proceedings are Futile at Best, and May Damage the Court's Legitimacy.

When it comes to encouraging further American implementation of the NPT, the value of the proceedings in American courts is enhanced by the low likelihood of any productivity before the ICJ.³⁹ Because the United States does not submit to the compulsory jurisdiction of the ICJ, the filing against America is essentially dead on arrival.⁴⁰

Preparatory Comm. for the 2015 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Recommendations by the Chair to the 2015 NPT Review Conference, UN Doc NPT/CONF.2015/PC.111/WP.46 (May 8, 2014) (not mentioning the Marshall Islands).

³⁵ While plenty of nations filed reports that are now available on the U.N. website, no such report is available from the Marshall Islands. For a list of the current reports, see *2015 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT)*, UNITED NATIONS www.un.org/disarmament/WMD/Nuclear/NPT2015/PrepCom2014/documents.shtml (last visited Feb. 16, 2016) [hereinafter *2015 Review Conference*].

³⁶ *2015 Review Conference*, *supra* note 35 (“At the 2015 NPT Review Conference, States parties examined the implementation of the Treaty’s provisions since 2010. Despite intensive consultations, the Conference was not able to reach agreement on the substantive part of the draft Final Document.”).

³⁷ Conca, *supra* note 8 (“Presently, there are nine nuclear weapons states with about 10,000 weapons, down dramatically from the 100,000 at the height of the Cold War: Russia: 5,000; U.S.: 4,400; France: 290; China: 240; U.K.: 195; Israel: 80; Pakistan: 200; India: 150; DPRK: ~ 6.”).

³⁸ A further case for American compliance with NPT Article VI—prior to the Clinton administration, the NPT was periodically renewed at each Review Conference. See Miles A. Pomper, *Previewing the 2010 Nuclear Non-Proliferation Treaty Review Conference*, in *THE NUCLEAR NON-PROLIFERATION TREATY AND INDIA* 51–52 (Rajiv Nayan ed., 2012). The NPT was renewed indefinitely as a result of the Clinton administration’s leadership. *Id.*

³⁹ See Davis, *Hurting More than Helping*, *supra* note 3, at 88.

⁴⁰ See Press Release No. 2014/18, *supra* note 10.

In accordance with Article 38, paragraph 5, of the Rules of Court, the Applications of the Republic of the Marshall Islands have been transmitted to the six Governments concerned [China, the Democratic People’s Republic of Korea, France, Israel, the Russian Federation and the United States]. Unless and until consent is given to the Court’s jurisdiction, there is no case to be entered in the General List.

Historically, seeking to hold the United States accountable before the ICJ for its failure to implement international law has been a game of whack-a-mole.⁴¹ When the ICJ ruled against the United States in *Nicaragua v. United States* in 1986, the United States withdrew its submission to the ICJ's compulsory jurisdiction.⁴² And after the ICJ ruled against the United States in *Avena and Other Mexican Nationals* in 2004, the United States withdrew from the Vienna Convention's Optional Protocol submitting to ICJ jurisdiction for consular disputes.⁴³ Many consider this posture itself as an American failure to implement international law.⁴⁴ Whatever company is worth, the United States has some.

Of the nine nuclear weapons states, only the United Kingdom, India, and Pakistan still submit to the ICJ's compulsory jurisdiction.⁴⁵ France withdrew its submission before the ICJ had a chance to rule in *New Zealand v. France*, a decade prior to the withdrawal of the United States.⁴⁶ China withdrew as well, and Russia never submitted to begin with.⁴⁷ Neither North Korea nor Israel currently submits.⁴⁸

Id.

⁴¹ See Davis, *Hurting More than Helping*, *supra* note 3, at 106–07.

⁴² See *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. Rep. 14, ¶ 292 (June 27); JOHAN D. VAN DER VYVER, IMPLEMENTATION OF INTERNATIONAL LAW IN THE UNITED STATES 133–34 (2010).

⁴³ See *Optional Protocol Concerning the Compulsory Settlement of Disputes*, Apr. 24, 1963, 21 U.S.T. 324, 596 U.N.T.S. 487; *Avena and Other Mexican Nationals (Mexico v. U.S.)*, Judgment, 2004 I.C.J. Rep. 128, ¶ 153 (Mar. 31); Letter from Condoleezza Rice, U.S. Secretary of State, to Kofi Annan, U.N. Secretary General (Mar. 7, 2005), <http://www.state.gov/documents/organization/87288.pdf>.

⁴⁴ See VAN DER VYVER, *supra* note 42, at 129–30.

⁴⁵ See Press Release No. 2014/18, *supra* note 10.

⁴⁶ The French Minister of Foreign Affairs submitted a letter to the United Nations Secretary-General on January 10, 1974, withdrawing French acceptance of the ICJ's compulsory jurisdiction. See *Nuclear Tests (N.Z. v. Fr.)*, Memorial of France, at 2 (Dec. 22, 1974), http://www.un.org/final/03/ICJ_France_Memorial.pdf.

⁴⁷ See *Texts Governing the Jurisdiction of the Court*, 1946–1947 I.C.J. Y.B. No. 1, at 218 n.1 (noting that China submitted to the ICJ's jurisdiction for a period of five years but did not renew at the end of the period); STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 676 (Andreas Zimmerman et al. eds., 2d ed. 2012) (noting that Russia never submitted to the compulsory jurisdiction of the ICJ and noting incorrectly that China never accepted the ICJ's jurisdiction); see also Davis, *Hurting More than Helping*, *supra* note 3, at 104 (detailing China's acceptance and withdrawal of the Optional Clause).

⁴⁸ See *Declarations Recognizing the Jurisdiction of the Court as Compulsory*, INT'L CT. JUST., <http://www.icj-cij.org/jurisdiction/?p1=5&p2=1&p3=3> (last visited Jan. 25, 2016) (not listing North Korea and Israel as countries recognizing the ICJ's compulsory jurisdiction).

The United Kingdom is currently the only permanent member of the U.N. Security Council to submit to the ICJ's compulsory jurisdiction.⁴⁹ The United Kingdom may withdraw its submission to the ICJ's compulsory jurisdiction if treated harshly by the court in the Marshall Islands' case, as may India.⁵⁰ Per the Marshall Islands' other cases, even a positive ICJ ruling against the only NPT party submitting to the ICJ's compulsory jurisdiction would likely not be enforced and may damage the ICJ's legitimacy if it prompted the United Kingdom to withdraw from compulsory jurisdiction.⁵¹ Losing this sliver of legitimacy would not benefit the court.⁵²

Even in the Marshall Islands' only feasible victorious action among its nine attempts, the net result would likely prove toothless when the United Kingdom withdrew, and the ICJ would simultaneously lose one more modicum of legitimacy.⁵³ Ironically, of all the nuclear weapons states, the only nation the Marshall Islands would have the chance to hold accountable in some fashion is the United States—perhaps the nation most notorious for avoiding implementation of international law.⁵⁴ And, at least in this matter, the only place in which the United States may have been held accountable is in federal court.

II. THE MARSHALL ISLANDS IS UNLIKELY TO WIN BEFORE THE NINTH CIRCUIT, BUT MAY LEAVE A NEGLECTED DOOR AJAR FOR OTHERS

While the Marshall Islands filed a complaint in a domestic court of the United States under much fanfare, that domestic strategy did not extend to the courts of any other nuclear weapons state.⁵⁵ That the Marshall Islands saw an open window only in America tells a peripheral story about the special availability of American courts for such matters—historically anyhow.⁵⁶

⁴⁹ Stanimir A. Alexandrov, *The Compulsory Jurisdiction of the International Court of Justice: How Compulsory Is It?*, 5 CHINESE J. INT'L L. 29, 31 (2006).

⁵⁰ See Davis, *Hurting More than Helping*, *supra* note 3, at 115.

⁵¹ See *id.* at 115–16.

⁵² *Id.* at 82.

⁵³ See *id.* at 80–81, 115–16.

⁵⁴ See VAN DER VYVER, *supra* note 42, at 11–30 (discussing instances in which the United States declined or refused to implement international law).

⁵⁵ See *In the Courts*, NUCLEAR ZERO, <http://www.nuclearzero.org/in-the-courts> (last visited Jan. 31, 2016) (only mentioning filings before the ICJ and U.S. federal court); Lucy Westcott, *Marshall Islands Nuclear Lawsuit Reopens Old Wounds*, NEWSWEEK (Aug. 1, 2014, 10:01 AM), <http://www.newsweek.com/marshall-islands-nuclear-lawsuit-reopens-old-wounds-262491>.

⁵⁶ See generally Complaint, *supra* note 1.

The Marshall Islands' pursuit of declaratory relief may have had potential if brought apart from the shroud of overreach.⁵⁷ The injunctive relief was a pipe dream: not only is the political question doctrine strongest where parties want to tell a court to force the executive to lead international negotiations, but this treaty is about multilateral engagement.⁵⁸ What is more, the Marshall Islands is pursuing enforcement of a particularly vague provision within an already vague treaty.⁵⁹

This Part demonstrates that the Marshall Islands is unlikely to win before the Ninth Circuit, but may leave a door ajar for future treaty parties to seek declaratory relief in federal court. So long as the U.S. Supreme Court does not grant any writ of certiorari sought after the Ninth Circuit ruling, the door will surely still be cracked for cases in which venue lies outside the Ninth Circuit, and even inside the Ninth Circuit if the court's opinion is unpublished.⁶⁰ At the least, the declaratory relief method may have potential for future cases.

A. N.D. Cal. Proceedings Throw Out Injunctive Relief, Highlight Roadblocks to Declaratory Relief

Ultimately, the district court litigation shot down the prospect of injunctive relief and drew out two stumbling blocks to potential declaratory relief—standing and political question.⁶¹ Potential declaratory relief may exist for other treaty parties in the future if standing and political questions inherent in the Marshall Islands litigation are fact-specific to this case. As demonstrated herein, the Marshall Islands' standing and political question issues do indeed seem fact-specific, leaving hope for others to seek declaratory relief under clearer treaties.

⁵⁷ See *infra* Part II.B.3 (noting that the Marshall Islands finally proposes the prospect of being granted only declaratory relief).

⁵⁸ See *infra* Part II.B.

⁵⁹ See POSNER, *supra* note 26, at 86 (noting that modern treaties are notably vague, and therefore difficult to enforce with any specificity).

⁶⁰ 9TH CIR. R. 36-3(a) (“Unpublished dispositions and orders of this Court are not precedent, except when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion.”).

⁶¹ See generally *Republic of the Marshall Islands v. United States*, 79 F. Supp. 3d 1068 (N.D. Cal. 2015).

1. *Complaint: Dramatic Overreach Seeking Injunctive Relief*

The Marshall Islands' federal complaint presented an "underlying claim"—“that the U.S., including by and through its agencies, breached and continues to breach certain obligations under the [NPT].”⁶² The complaint sought:

- (i) a declaratory judgment pursuant to 28 U.S.C. § 2201 with respect to (a) the interpretation of the Treaty, and (b) whether the United States is in breach of the Treaty; and
- (ii) an injunction directing the U.S. take all steps necessary to comply with its obligations under Article VI of the Treaty within one year of the Judgment, including by calling for and convening negotiations for nuclear disarmament in all its aspects.⁶³

2. *Motion to Dismiss: A Strategy Primer for Future Cases*

The United States filed a motion to dismiss which the court granted.⁶⁴ The motion highlighted matters that state parties to other treaties will need to address in future complaints seeking articulation of American treaty obligations.⁶⁵ The United States argued that the Marshall Islands presented no concrete inquiry, violated the political question doctrine, argued based on a non-self-executing treaty, filed in an improper venue, and the statute of limitations barred the suit.⁶⁶

3. *Opposition: Distinguishing “Political Overtones” from Nonjusticiable Political Questions*

The Marshall Islands' opposition asserted, “*Medellín* does not bar this case, where Article VI is an unqualified Executive obligation, and the U.S. has never claimed that it, or any NPT party, retains the option of noncompliance with Article VI.”⁶⁷ Where the United States argued that the entire matter was barred by the political question doctrine under *Earth Island Inst. v. Christopher*,⁶⁸ a

⁶² Complaint, *supra* note 1, at 1.

⁶³ *Id.* at 6.

⁶⁴ See generally *Republic of the Marshall Islands*, 79 F. Supp. 3d 1068.

⁶⁵ See *infra* Part III.

⁶⁶ Notice of Motion to Dismiss at ii, *Republic of the Marshall Islands v. United States*, 79 F. Supp. 3d 1068 (N.D. Cal. July 21, 2014) (No. 14-CV-01885-JSW).

⁶⁷ Opposition to Motion to Dismiss at 12, *Republic of the Marshall Islands v. United States*, 79 F. Supp. 3d 1068 (N.D. Cal. Aug. 21, 2014) (No. 14-CV-01885-JSW).

⁶⁸ Reply Memorandum in Support of Motion to Dismiss at 6–7, *Republic of the Marshall Islands v. United States*, 79 F. Supp. 3d 1068 (N.D. Cal. Sept. 8, 2014) (No. 14-CV-01885-JSW). The Ninth Circuit held

1993 Ninth Circuit case concerning statutory provisions protecting sea turtles, the Marshall Islands retorted that *Earth Island* was both off point in its focus on constitutionality (the Marshall Islands made no constitutional challenges to the treaty), and in its timing.⁶⁹ *Earth Island* preceded *Zivotofsky v. Clinton*, which held that federal court enforcement of a statute requiring specific action by the Secretary of State was justiciable because it did not raise a political question.⁷⁰ From the Marshall Islands' perspective, *Earth Island* was overturned in any manner pertinent to the present proceedings.⁷¹ The state argued that political question was no bar because the court maintained responsibility to interpret legal obligations, even when "significant political overtones" are eminent, citing *Japan Whaling Ass'n v. American Cetacean Society*.⁷² In *Japan Whaling*, the U.S. Supreme Court held in part that "[t]he Judiciary's constitutional responsibility to interpret statutes cannot be shirked simply because a decision may have significant political overtones."⁷³

The Marshall Islands also asserted that venue was sufficiently pled because all defendants were deemed to reside in the venue and "U.S. nuclear vertical proliferation occurs" in the Northern District of California, pursuant to 28 U.S.C. § 1391.⁷⁴

4. Reply: New Territory Highlighted by Non-Binding Citations

The United States filed its Reply Memorandum in Support of Motion to Dismiss in September 2014.⁷⁵ The memorandum's language was dismissive, observing that the Marshall Islands' "opposition brief does nothing to dispel

that one pertinent statute was within the exclusive jurisdiction of the U.S. Court of International Trade, and that the circuit court could not enforce a statute that would require the court to "compel the Secretary of State to initiate negotiations with foreign nations on the protection of sea turtles [] [b]ecause 'the Constitution plainly grants the President the initiative in matters directly involved in the conduct of diplomatic affairs.'" *Earth Island Inst. v. Christopher*, 6 F.3d 648, 653 (9th Cir. 1993).

⁶⁹ Opposition to Motion to Dismiss, *supra* note 67, at viii, 8.

⁷⁰ *Zivotofsky ex rel Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012). Specifically, the federal statute at issue required the Secretary of State to note American citizens' birthplaces on passports and Consular Reports of Birth Abroad. *Id.* at 1423.

⁷¹ Opposition to Motion to Dismiss, *supra* note 67, at viii, 4–8.

⁷² *Id.* (citing *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986)).

⁷³ *Japan Whaling*, 478 U.S. at 222.

⁷⁴ Opposition to Motion to Dismiss, *supra* note 67, at viii, 13–14. The Marshall Islands asserted that the United States did not meet its burden to prove that the suit was untimely. *Id.* at 14–15.

⁷⁵ See Reply Memorandum in Support of Motion to Dismiss, *supra* note 68.

the extraordinary justiciability concerns presented by the Complaint.”⁷⁶ The United States again made five arguments.⁷⁷

The first three arguments carry broad applicability and will be discussed at length in Part III. First, the United States argued that the Marshall Islands’ filings failed to allege any “injury in fact sufficient to confer standing,” noting that any “meaningful relief” for the injuries alleged would hinge on actions of other nations not party to the case that could hardly be predicted, let alone controlled.⁷⁸ Second, standing aside, it argued that the political question doctrine still barred judicial review.⁷⁹ Third, it argued that the Marshall Islands failed to state a claim for relief because their argument was based on a non-self-executing treaty.⁸⁰

The latter two arguments are fact-specific to the case at hand. As such, they are not as threatening to future treaty parties seeking declaratory relief in federal courts. Fourth, the United States argued that any judicially enforceable rights were pursued in an untimely manner;⁸¹ and fifth, that the Marshall Islands failed to demonstrate a proper venue in the Northern District of California.⁸² These factors will not be as thoroughly analyzed as standing and political question because a party to another treaty could foreseeably present a timely claim in a proper venue regarding a self-executing treaty. The parties made additional filings, and some of the Marshall Islands’ supporters filed amicus briefs.⁸³

The Marshall Islands’ counsel may have believed they had a decent shot at surviving the motion to dismiss, given the lack of binding precedent on the matter. The lack of jurisdiction-specific precedent was evidenced by both

⁷⁶ *Id.* at 1.

⁷⁷ *Id.*

⁷⁸ *Id.* at 1–2.

⁷⁹ *Id.* at 1, 5–6.

⁸⁰ *Id.* at 1, 10.

⁸¹ Reply Memorandum in Support of Motion to Dismiss, *supra* note 68, at 1, 14.

⁸² *Id.* at 1, 13.

⁸³ See Opposition to Motion to Dismiss, *supra* note 67; Reply Memorandum in Support of Motion to Dismiss, *supra* note 68; Brief for Tri-Valley CAREs as Amicus Curiae in Support of Venue in the Northern District, Republic of the Marshall Islands v. United States 79 F. Supp. 3d 1068 (N.D. Cal. Oct. 8, 2014) (No. 14-CV-01885-JSW); Brief for Nuclear Watch New Mexico in Support of Plaintiff and in Opposition to Defendants’ Motion to Dismiss, Republic of the Marshall Islands v. United States, 79 F. Supp. 3d 1068 (N.D. Cal. Oct. 6, 2014) (No. 14-CV-01885-JSW).

parties' near-entire reliance on decisions from other district courts not binding on the district in which the complaint was filed.⁸⁴

5. *Ruling: Redress by Injunctive Relief Not Tenable*

In January 2015, Judge White expressed a heightened interest in the case.⁸⁵ Two days before the hearing on the motion to dismiss, he tentatively granted the motion and expressed that the matter would be decided on the papers.⁸⁶ Still, the court invited the parties to each present twenty minutes of oral arguments on five questions issued along with the tentative ruling.⁸⁷ Not long after, the court issued a final order granting the motion to dismiss and entering judgment for the United States.⁸⁸

Judge White ruled that the Marshall Islands was without standing because its "injury in fact" was questionable at best, and even if present, could not be redressed by the injunctive relief requested; and the complaint otherwise concerned a nonjusticiable political question.⁸⁹ The court did not reach the right of action, venue, or timeliness, and declined to articulate the United States' obligations under the NPT.⁹⁰ The Marshall Islands filed notice of appeal in April 2015.⁹¹

⁸⁴ See *Republic of the Marshall Islands v. United States*, 79 F. Supp. 3d 1068 (N.D. Cal. 2015); *Opposition to Motion to Dismiss*, *supra* note 67; *Reply Memorandum in Support of Motion to Dismiss* *supra* note 68.

⁸⁵ See *Notice of Tentative Ruling and Questions at 1*, *Republic of the Marshall Islands v. United States*, 79 F. Supp. 3d 1068 (N.D. Cal. 2015) (No. 14-CV-01885-JSW).

⁸⁶ *Id.* at 1–2.

⁸⁷ *Id.* at 2.

⁸⁸ See *Republic of the Marshall Islands*, 79 F. Supp. 3d 1068.

⁸⁹ *Id.* at 1072.

⁹⁰ While making no pronouncement, the court quoted the U.S. Senate report that accompanied the advice and consent ratification. See *id.* at 1070. That report articulated the core purpose of the treaty as slowing, not stopping, the spread of nuclear weapons, doing so through prohibiting weapon states from transferring weapons and prohibiting non-weapon states from any path of obtaining nuclear weapons. *Id.* If this part of the order were construed as a full articulation of American NPT obligations, the Marshall Islands' current arguments would be negated.

⁹¹ See *Republic of the Marshall Islands v. United States*, 79 F. Supp. 3d 1068 (N.D. Cal. 2015) (No. 14-CV-01885-JSW), *appeal docketed*, No. 15-15636 (9th Cir. Apr. 2, 2015).

B. Ninth Circuit Filings Focus Questions on Standing, Political Question Doctrine, and Non-Self-Executing Treaty Status Hurdles to Declaratory Relief

The Marshall Islands filed its appellant brief in July 2015, and the United States responded in late October, and the Marshall Islands replied in December.⁹² As the appellate matters came into focus, three crucial sets of legal factors were drawn out—those of *Lujan*, *Baker*, and *Medellín*.⁹³

The *Lujan* factors establish “the irreducible constitutional minimum of standing contains three elements.”⁹⁴ They are:

injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical,

causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court; and

it must be likely, as opposed to merely speculative, that the injury will be “redressed by a favorable decision.”⁹⁵

The *Baker* factors identify “any case held to involve a political question.” Notably, *Baker* made clear that not every case involving a political question was nonjusticiable.⁹⁶ The factors for identifying cases involving political questions are:

a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due

⁹² Brief of Appellant, Republic of the Marshall Islands v. United States, No. 1:15-cv-15363 (9th Cir. July 13, 2015); Brief of Appellee, Republic of the Marshall Islands v. United States, No. 1:15-cv-15363 (9th Cir. Oct. 28, 2015); Reply Brief of Appellant, Republic of the Marshall Islands v. United States, No. 1:15-cv-15363 (9th Cir. Dec. 15, 2015).

⁹³ See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992); *Baker v. Carr*, 369 U.S. 186, 217 (1962). See generally *Medellín v. Texas*, 552 U.S. 491 (2008).

⁹⁴ *Lujan*, 504 U.S. at 560.

⁹⁵ *Id.* at 560–61 (internal citation and quotation marks omitted).

⁹⁶ *Baker*, 369 U.S. at 211 (“[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.”).

coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.⁹⁷

Medellín, still debated in meaning and scope, stated at the least that non-self-executing treaties are not automatically enforceable domestic law.⁹⁸ This section imagines that none of these factors would have barred the Marshall Islands' claim for declaratory relief if it was sought without a prayer for injunctive relief, and if injury in fact was met.

1. *Appeal: Finally Raising the Prospect of Only Declaratory Relief*

The Marshall Islands' appeal presented two questions on the political question doctrine, two questions on standing, and a question of declaratory relief.⁹⁹ The latter is central to this analysis, boiling down to declaratory relief: “[s]eparate from injunctive relief, does a court have jurisdiction to interpret the NPT and determine whether the Executive has breached it?”¹⁰⁰ The Ninth Circuit ruling promises interest, as does whether the court publishes its opinion to establish binding precedent within its jurisdiction.¹⁰¹ Still, given venue matters, few future complaints for declaratory relief regarding treaty obligations would be brought in the Ninth Circuit; thus, even a binding, published opinion would likely have narrow impact.¹⁰²

The pertinent *Baker* questions concern “textual commitment” and “judicially discoverable and manageable standards.”¹⁰³ They are: “[d]oes the Executive power to make treaties override the judicial mandate to determine cases arising under such treaties, so as to deprive the Court of jurisdiction in this case arising under the NPT?” and “[i]s there even one judicially

⁹⁷ *Id.* at 217.

⁹⁸ See BRADLEY, *supra* note 4, at 48 (“The Court appeared to reject the argument that . . . a non-self-executing treaty merely fails to provide a right of action. . . . On the other hand, the opinion also contains statements that equate non-self-execution simply with lack of judicial enforceability, and the Court’s test for self-execution appears to focus on whether a treaty is a ‘directive to domestic courts,’ not whether it has the status of domestic law.”). *Contra* VAN DER VYVER, *supra* note 42, at 146 (“The judgment of the U.S. Supreme Court in *Medellín v. Texas* (and in *Sanchez-Llamas*) will not go down in history as the acme of judicial excellence.”).

⁹⁹ Brief of Appellant, *supra* note 92, at 1–3.

¹⁰⁰ *Id.* at 3 (emphasis added).

¹⁰¹ 9TH CIR. R. 36-3 (“Unpublished dispositions and orders of this Court are not precedent, except when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion.”).

¹⁰² See *Republic of the Marshall Islands v. United States*, 79 F. Supp. 3d 1068 (N.D. Cal. 2015).

¹⁰³ Brief of Appellant, *supra* note 92, at 1–2.

manageable standard to determine whether the Executive has breached NPT Article VI?”¹⁰⁴

Regarding standing, the Marshall Islands presented a two-part question on injury in fact, and a series of alternative questions on redressability. The injury in fact questions are peripheral to this Essay because they are fact-specific to the case at bar.¹⁰⁵ The redressability question is prime ground for exploring future application: “Would compelling the Executive to participate in NPT Article VI negotiations redress the first injury the Marshall Islands pleaded, which is the denial of its right to Executive participation in such negotiations?”¹⁰⁶

2. *Reply: Focusing on Injunctive Relief as a Bridge Too Far*

The United States’ reply addressed standing, political question doctrine, the non-self-executing nature of NPT Article VI, and declaratory relief.

Per standing, the United States retorted that the Marshall Islands failed to meet the *Lujan* requirements.¹⁰⁷ Most attention was given to the argument that mere fear of future nuclear weapons use is not a “certainly impending” “concrete and particularized injury,” and that any existing injury is beyond the federal courts’ redress.¹⁰⁸ The Government allowed federal courts to maintain an “indisputably critical role in adjudicating” extradition treaties, and distinguished those treaties on grounds of their self-executing nature.¹⁰⁹ The

¹⁰⁴ *Id.* (internal citation omitted).

¹⁰⁵ See *supra* Part II.A.4. The Marshall Islands’ injury in fact questions were: “a. Is denial of the Marshall Islands’ entitlement to the Executive’s participation in disarmament negotiations a sufficient injury-in-fact for Article III standing? b. Is a measurable increase in current risk from nuclear weapons vertical proliferation a sufficient injury-in-fact for Article III standing?” Brief of Appellant, *supra* note 92, at 2–3 (internal citation omitted).

¹⁰⁶ Brief of Appellant, *supra* note 92, at 2–3 (internal citation omitted). The alternative questions were:

b. [W]ould compelling the Executive to participate in NPT Article VI negotiations provide a sufficient incremental step to redress the second injury the Marshall Islands pleaded, which is the grave, real, and increased risk from vertical nuclear proliferation? c. Do absent parties preclude incremental relief to the Marshall Islands, where the Executive has never named an essential, absent party and the Marshall Islands disputes that there are absent, essential parties for the claims it pleaded? d. If the NPT is valid, does a court possess the authority to order Executive compliance with Article VI?

Id.

¹⁰⁷ See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

¹⁰⁸ Brief of Appellee, *supra* note 92, at 12–29 (citing *Lujan*, 504 U.S. at 560).

¹⁰⁹ *Id.* at 54–57.

role of federal courts in treaty interpretation would be raised within the Marshall Islands' political question doctrine questions as well.

As for the political question doctrine, the Government raised two *Baker* factors—that the matter is “textually committed to the political branches,” and that “no manageable standards exist for resolving [the Marshall Islands'] claims”—and argued that the other four factors generally weighed against adjudication.¹¹⁰

The Government did not imply the political question doctrine makes a blanket bar that federal courts can never interpret treaties. To the contrary, when positing “whether the federal courts can interpret treaties that bear on civil disputes between private parties, or on criminal appeals,” the Government answered itself: “[o]f course they can.”¹¹¹ The Government distinguished the Marshall Islands' approach as an attempt to use federal courts to force the United States into action on grounds of a right granted to the Marshall Islands by the NPT.¹¹²

Leaving further room for the promise of other states parties to other treaties to bring claims in federal court, the Government's final arguments were NPT-specific, both directed toward the fifth *Baker* factor (“an unusual need for unquestioning adherence to a political decision already made”) and the non-self-executing status of the treaty.¹¹³ The United States presented a strong case that the NPT is non-binding in terms of domestic obligation, regardless of applicable international obligation. Recalling *Medellin v. Texas*, the Government regaled the NPT's ratification history to highlight a lack of congressional intent for domestic obligation.¹¹⁴

The United States disposed of the Marshall Islands' declaratory relief claim in a mere five paragraphs.¹¹⁵ The Government argued that the Declaratory Judgment Act maintains the Article III case or controversy requirement, and that the Marshall Islands still lacked such standing. Again, the Government

¹¹⁰ *Id.* at 29–30, 40, 44 (citing *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

¹¹¹ *Id.* at 37.

¹¹² *Id.* at 38.

¹¹³ *Id.* at 29–30 (quoting *Baker*, 369 U.S. at 217).

¹¹⁴ *Id.* at 48.

¹¹⁵ *Id.* at 54–57.

denied the Marshall Islands' standing both for lack of case or controversy, and the bar of the political question doctrine.¹¹⁶

3. *Response: Tacitly Admitting the Lost Cause of Injunctive Relief*

The Marshall Islands responded only to the matter of the political question doctrine.¹¹⁷ As the Marshall Islands sees it, “[n]o law elevates the President’s authority to make treaties above the judiciary’s power to decide disputes arising under treaties that remain the law of the land.”¹¹⁸ The Marshall Islands’ response highlights both its overreach and its potential success had it merely aimed for a more realistic sole goal of declaratory relief. Asserting that “the NPT is multilateral cannot preclude a claim against the United States to determine the NPT’s legal meaning and address the United States’ own conduct,” the Marshall Islands is arguably correct on the former, but still wrong on the latter.¹¹⁹ In a further fact-specific wrinkle that need not rule out potential declaratory relief for other treaty parties, the treaty language that the Marshall Islands sought to enforce was vague: “undertake[] to pursue negotiations in good faith” mandates no formal endgame.¹²⁰ Moreover, that provision called for multilateral action such that even an unprecedented mandate of injunctive relief against the United States could not bring any other sovereign to the negotiation table, leaving the matter unresolved.¹²¹

The end of the Marshall Islands’ response brief asserted, “declaratory relief can redress a legal dispute ‘whether or not further relief is or could be sought.’”¹²² Here, the Marshall Islands finally seemed to tacitly acknowledge a legal truth that should have directed their strategy all along: injunctive relief was never available, even if declaratory relief may have been available if standing was established.¹²³ By grabbing for both forms of relief, the Marshall Islands alienated its case from serious consideration by the lower court.

¹¹⁶ *Id.* at 56 (“[P]laintiff’s claims are nonjusticiable because plaintiff lacks Article III standing and its claims present a political question.”).

¹¹⁷ See generally Reply Brief of Appellee, *supra* note 92.

¹¹⁸ *Id.* at 2.

¹¹⁹ *Id.* at 3.

¹²⁰ See Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 9, art. VI (“Each of the Parties to the Treaty undertakes to pursue negotiations in good faith . . . on a treaty on general and complete disarmament under strict and effective international control.”); Davis, *Hurting More than Helping*, *supra* note 3, at 84 (“The fuzzy language of Article VI, however, creates an uphill battle delineating compliance and non-compliance.”).

¹²¹ See Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 9, art. VI.

¹²² Reply Brief of Appellant, *supra* note 92, at 23 (quoting 28 U.S.C. § 2201).

¹²³ *Id.*

In the case at hand, standing probably does bar declaratory relief because there is no case or controversy, because there is seemingly no available relief (for fact-specific reasons: the asserted treaty obligation is multilateral and there is arguably no breach). Injunctive relief was barred not just by political question, but because even if the judiciary forced the executive to comply, American compliance would be meaningless: this multilateral treaty's provision in controversy requires a number of nations to come to the table, and a U.S. court has no power to send foreign sovereigns to the negotiation table over nuclear weapons.¹²⁴ The district court decided that the NPT did not create a bilateral obligation between the United States and the Marshall Islands.¹²⁵ But what if another treaty did? Setting aside the lost cause of injunctive relief, and admitting that for lack of standing the Marshall Islands' case is likely doomed entirely, the next Part will explore the potential for declaratory relief where treaty parties may have higher hopes for standing.

III. REDRESS, POLITICAL QUESTION, AND NON-SELF-EXECUTING TREATY STATUS MAY NOT BE CLEAR BARS WHEN ONLY DECLARATORY RELIEF IS SOUGHT

While injunctive relief appears squarely within the reach of the political question doctrine, declaratory relief is not so clearly barred. Part II established that the Marshall Islands' appeal will likely still fail for lack of standing regarding injury in fact, and that the pursuit of injunctive relief was an unfounded exercise in overreach. That said, while the United States wrote its filings as though the matter was a procedurally open-and-shut case, the cases the Government cited betrayed its tone. The law is not so settled.¹²⁶

Part III posits that political question and redressability would not have barred declaratory relief. What, then, if a treaty party established injury in fact and only sought declaratory relief? This Part explores the prospect of future declaratory relief where injury in fact is established. Standing is addressed first, arguing that declaratory relief establishes sufficient redress to satisfy *Lujan*. Political question is assessed next, positing that the *Baker* factors are not so broad as to call for abstention from pure declaratory relief. Finally,

¹²⁴ See Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 9, art. VI.

¹²⁵ Republic of the Marshall Islands v. United States, 79 F. Supp. 3d 1068, 1072 (N.D. Cal. 2015).

¹²⁶ Reply Memorandum in Support of Motion to Dismiss, *supra* note 68, at 7 (citing cases regarding political question from the D.C. Circuit, the Eastern District of Pennsylvania, and the District Court for the District of Columbia, and citing a single non-binding district case denying an actionable claim under the Declaratory Judgment Act).

given the conflation of issues in the district court filings, this Part interprets *Medellín v. Texas* as not barring mere interpretation of treaties when enforcement is not at issue.

The legal strategy that the Marshall Islands attempted to bring out of dormancy may have high hopes for other states party to treaties for which they would have standing if the United States is in breach.¹²⁷ Here, though, the Marshall Islands' argument for merely prospective injury in fact could hardly surmount the *Lujan* standard. Redressability is difficult to imagine because the American obligation under the NPT is multilateral: a district court could hardly issue an ex-parte directive to all the NPT parties.¹²⁸

Notably, any published, binding Ninth Circuit precedent in this case may have limited impact and would not foreclose declaration of treaty obligations in other federal jurisdictions.¹²⁹ The U.S. District Court for the District of Columbia would most likely be the appropriate venue for future treaty parties seeking a judicial declaration of the United States' treaty obligations, and Ninth Circuit precedent would not bind the District Court for the District of Columbia.¹³⁰

A. *Standing: Declaratory Relief is Sufficient Redress When Injury in Fact is Established*

Of all the *Lujan* factors—*injury in fact*, *traceable injury*, and *likely redress*—*Marshall Islands v. United States* demonstrates that *injury in fact* and *redressability* are most crucial for future treaty parties that may seek declaratory relief concerning American treaty obligations.¹³¹ Leaving *injury in fact* to be established by a treaty party on a fact-specific basis, this section dispenses of the *redress* factor as a bar to declaratory relief.

The Declaratory Judgment Act, codified as 28 U.S.C. § 2201, prescribes declaratory judgment as sufficient redress.

¹²⁷ Complaint, *supra* note 1, at 1–2 (“[I]t is in no way novel for the U.S. federal courts to interpret a treaty and/or to find a treaty violation.”).

¹²⁸ See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992); *Republic of the Marshall Islands*, 79 F. Supp. 3d 1068.

¹²⁹ That is, short of a subsequent U.S. Supreme Court appeal, grant of writ, and opinion in the case at hand.

¹³⁰ See Notice of Motion to Dismiss, *supra* note 66. Notably, Judge White did not address venue in his order granting the motion. See generally *Republic of the Marshall Islands*, 79 F. Supp. 3d 1068.

¹³¹ *Lujan*, 504 U.S. at 560–61. *Traceable injury* is presumed, given that an established treaty would always be in play.

In a case of actual controversy within its jurisdiction, [tax and trade exceptions] . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, *whether or not further relief is or could be sought*. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.¹³²

As this statute conveys, when Article III case and controversy requirements are met, pure declaratory relief is a final judgment itself regardless of the availability of other relief.¹³³ Tellingly, the Government's motion to dismiss cited a single case to assert that "[t]he Declaratory Judgment Act provides neither a substantive basis for relief nor a cause of action"—a nonbinding district court case at that.¹³⁴ Notably, as the U.S. Supreme Court explained in *MedImmune, Inc. v. Genentech, Inc.*, the Declaratory Judgment Act contains permissive rather than mandatory language for granting declaratory relief, acknowledging that district courts may provide declaratory relief to treaty parties but not implying that courts must in every instance.¹³⁵ Case-by-case analysis is maintained by the language of 28 U.S.C. § 2201.¹³⁶ This legal strategy need not inspire a parade of horrors.

The Northern District of California found that the Marshall Islands "fail[ed] to account for the fact that the Court cannot mandate specific performance as a remedy *or grant redress* for its alleged injury."¹³⁷ To be sure, granting the Marshall Islands' request for specific performance would be far beyond the scope of the court's jurisdiction.¹³⁸ If the Marshall Islands only sought declaratory relief, however, the court would have been hard pressed to state that it could not grant redress for a well-pled injury in fact.

¹³² 28 U.S.C. § 2201 (emphasis added).

¹³³ *Id.*

¹³⁴ Reply Memorandum Supporting Motion to Dismiss, *supra* note 68, at 10 n.3 (citing *Bisson v. Bank of Am.*, 919 F. Supp. 2d 1130, 1139 (W.D. Wash. 2013)).

¹³⁵ *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 136 (2007).

The Declaratory Judgment Act provides that a court "*may* declare the rights and other legal relations of any interested party," 28 U.S.C. § 2201(a) (emphasis added), not that it *must* do so. This text has long been understood to confer on federal courts unique and substantial discretion in deciding whether to declare the rights of litigants.

Id.

¹³⁶ *Id.*

¹³⁷ *Republic of the Marshall Islands v. United States*, 79 F. Supp. 3d 1068, 1072 (N.D. Cal. 2015) (emphasis added).

¹³⁸ *See infra* Part III.B.

B. Political Question Factors Do Not Bar Declaratory Relief

The district court's dismissal order leaned on *Baker*'s political question standard to disclaim that it "lack[ed] the standards necessary to fashion the type of *injunctive relief*" sought.¹³⁹ Narrowed to declaratory relief, however, a court would hardly lack a necessary standard.¹⁴⁰ *Baker* contemplates cases that present nonjusticiable political questions.¹⁴¹ But *Baker* did not intend to bar all political questions from federal courts, as the Supreme Court noted: "[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."¹⁴² To be sure, there is ample precedent in which federal courts felt comfortable interpreting treaties outside the reach of *Baker*.¹⁴³ Even in decisions where the Supreme Court did not implement a treaty, or found that the treaty could not be implemented, interpretation still occurred.¹⁴⁴ Treaty interpretation is not inherently nonjusticiable.¹⁴⁵

Cabining off injunctive relief, declaratory relief is little more than treaty interpretation. Historically, and surely recently, federal courts hardly have trouble viewing treaty interpretation as justiciable—if a political question at all.¹⁴⁶ Some scholars laud the broader practice of "interpretive enforcement" of international law, with particular attention to that of treaties.¹⁴⁷ *Medellín v. Texas* is a prime example of treaty interpretation.¹⁴⁸ The Government is beyond reproach in maintaining that a district court could not require the executive branch to engage in multilateral negotiations over nuclear weapons, as the Marshall Islands asked in its lethal overreach.¹⁴⁹ That concern need not

¹³⁹ See *Republic of the Marshall Islands*, 79 F. Supp. 3d at 1074 (emphasis added).

¹⁴⁰ *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2012).

¹⁴¹ See generally *Baker v. Carr*, 369 U.S. 186 (1962).

¹⁴² *Id.* at 211.

¹⁴³ See, e.g., *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006); *Medellín v. Texas*, 552 U.S. 491 (2008).

¹⁴⁴ See, e.g., *Sanchez-Llamas*, 548 U.S. 331; *Medellín*, 552 U.S. 491.

¹⁴⁵ Hathaway et al., *supra* note 7, at 87–89 (recalling the history of interpretive enforcement of international law in federal courts). In the case at hand, it is worth acknowledging the Government's argument that, specific to this nuclear-scale case, judicial involvement may be dangerous:

[D]etermining whether the United States is currently in breach of its treaty obligations would require a court to question the propriety of long-term negotiation strategies and choices that have already been made and may take time to bear fruit. Judicial intervention into these sensitive political decisions could have unanticipated consequences for ongoing negotiations of which plaintiff and the court are necessarily unaware.

Brief for Appellee, *supra* note 92, at 45–46.

¹⁴⁶ See, e.g., *Sanchez-Llamas*, 548 U.S. 331; *Medellín*, 552 U.S. 491.

¹⁴⁷ Hathaway et al., *supra* note 7, at 87–89.

¹⁴⁸ See *infra* Part III.C.

¹⁴⁹ Brief for Appellee, *supra* note 92, at 29–46.

be rehashed. Whether the political question doctrine bars any declaratory relief, however, is a separate matter.

Recently, in *Zitovosky v. Clinton*, the Supreme Court narrowed the scope of the political question doctrine.¹⁵⁰ The Supreme Court offered a reminder that the political question doctrine is meant to be a “narrow exception” to justiciability.¹⁵¹ The Supreme Court reiterated that appropriate cases must be decided even when judges “would gladly avoid” them.¹⁵² The Supreme Court reiterated its definition of political question in *Zivotofsky*: “a controversy involves a political question . . . where there is a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.”¹⁵³

Zivotofsky distinguished federal courts’ enforcing statutory rights from “supplant[ing] a foreign policy decision of the political branches with the courts’ own unmoored determination.”¹⁵⁴ Where would treaty interpretation fall along that scale? Admittedly, statutory interpretation is not exactly treaty interpretation. But perhaps the two are close. If a treaty is signed, the policy decision and even the legal obligation are already established.¹⁵⁵ A federal court’s interpretation of a treaty is moored by the executive’s decision to sign it, and where applicable, the legislature’s decision to ratify it.¹⁵⁶ Treaty interpretation is a declaration of pre-existing American obligations—a “familiar judicial exercise” not unlike statutory interpretation in *Zivotofsky*.¹⁵⁷ As for subsequent foreign policy decisions, whether or how the executive branch chooses to abide by the obligation is its own concern. Again, this Essay affirms that injunctive relief is clear and understandable territory for nonjusticiable political question; declaratory relief, though, could be separate.¹⁵⁸

On a second hearing three years later, the Supreme Court decided that the ultimate issue in *Zivotofsky*—recognizing a foreign nation—was committed to

¹⁵⁰ JARED P. COLE, CONGRESSIONAL RESEARCH SERVICE, R43834, THE POLITICAL QUESTION DOCTRINE: JUSTICIABILITY AND THE SEPARATION OF POWERS 2 (2014), <https://www.fas.org/sgp/crs/misc/R43834.pdf>.

¹⁵¹ *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2012).

¹⁵² *Id.* (quoting *Cohens v. Virginia*, 6 Wheat. 264, 404 (1821)).

¹⁵³ *Id.* (quoting *Nixon v. United States*, 506 U.S. 224, 228 (1993)) (internal quotation marks omitted).

¹⁵⁴ *Id.*

¹⁵⁵ *Medellín v. Texas*, 552 U.S. 491, 509 (2008).

¹⁵⁶ See BRADLEY, *supra* note 4, at 46–48.

¹⁵⁷ *Zivotofsky*, 132 S. Ct. at 1427.

¹⁵⁸ See *supra* Part II.

presidential authority.¹⁵⁹ The Court arrived at that delineation because “[t]he weight of historical evidence indicates Congress has accepted that the power to recognize foreign states and governments and their territorial bounds is exclusive to the Presidency.”¹⁶⁰ The weight of historical evidence does not so strongly favor reserving treaty interpretation from federal courts.¹⁶¹ If nothing else, a party could seek declaratory relief as to whether a treaty is self-executing.

C. Medellín Articulated an “Obligation to Interpret” and Arguably Limits the Self-Executing/Non-Self-Executing Test to Treaty Enforcement

While both parties’ filings made much ado over the self-executing or non-self-executing status of the NPT, that distinction may not matter when only declaratory relief is sought.¹⁶² There is a difference in treaty enforcement and treaty interpretation such that *Medellín* and even *Baker* could bar injunctive relief without barring declaratory relief. *Medellín* may be interpreted as cabining off only enforcement of non-self-executing treaties.¹⁶³ *Medellín* is further distinct for addressing private actions of individual citizens rather than the government, as the district court acknowledged.¹⁶⁴ The pertinent distinction may be between treaty interpretation and enforcement.

In *Marshall Islands*, the Northern District of California dismissed any self-executing treaty doctrine in a single footnote within its political question section.¹⁶⁵ The court found that “the issue of whether the [NPT] is self-executing or provides a private right of action is *irrelevant to the enforcement* by a state-party that is a signatory to the Treaty.”¹⁶⁶ That analysis is mostly correct and raises a notable flag. The private right of action matter is surely

¹⁵⁹ Zivotofsky *ex rel.* Zivotofsky v. Kerry, 135 S. Ct. 2076, 2094 (2015).

¹⁶⁰ *Id.*

¹⁶¹ See BRADLEY, *supra* note 4, at 46–48.

¹⁶² See Opposition to the Motion to Dismiss, *supra* note 67, at viii, 8–12; Reply Memorandum in Support of Motion to Dismiss, *supra* note 68, at 10; Hathaway et al., *supra* note 7, at 89 (“Interpretive enforcement may extend to non-self-executing treaties as well as self-executing treaties.”).

¹⁶³ See William J. Carter, Jr., *Treaties as Law and the Rule of Law: The Judicial Power to Compel Domestic Treaty Implementation*, 69 MD. L. REV. 344, 346 (2010). Carter takes the matter beyond interpretation, reaching non-self-executing treaty enforcement: “even non-self-executing treaties are amenable to domestic judicial enforcement in a manner consistent with both separation of powers principles and the rule of law.” *Id.*

¹⁶⁴ See Republic of the Marshall Islands v. United States, 79 F. Supp. 3d 1068, 1078 n.2 (N.D. Cal. 2015) (“[A] private right of action is irrelevant.”).

¹⁶⁵ See *id.*

¹⁶⁶ See *id.* (emphasis added).

moot for a treaty party. The self-executing nature of the treaty, however, is probably pertinent only to whether the treaty may be enforced. This section contends that *Medellín*'s distinction applies only to treaty enforcement. Because the pursuit of pure declaratory relief seeks not enforcement—only interpretation—the *Medellín* distinction need not apply.

Medellín not only interpreted U.S. obligations under a treaty, but Chief Justice Roberts' majority opinion characterized the exercise as an "obligation to interpret treaty provisions to determine whether they are self-executing."¹⁶⁷ In an admittedly multifaceted case, but one that ultimately focused largely on interpreting the Vienna Convention, the phrase "political question" appears in neither the opinion, concurrence, or dissent; nor is *Baker* cited anywhere.¹⁶⁸

Medellín highlighted the distinction between self-executing and non-self-executing treaties.¹⁶⁹ The opinion defined "self-executing" in a footnote:

The label "self-executing" has on occasion been used to convey different meanings. What we mean by "self-executing" is that the treaty has automatic domestic effect as federal law upon ratification. Conversely, a "non-self-executing" treaty does not by itself give rise to *domestically enforceable* federal law. Whether such a treaty has domestic effect depends upon implementing legislation passed by Congress.¹⁷⁰

Notably, the opinion's engagement of "self-executing" matters continually referenced the distinction relative to enforcement—something greater than mere interpretation.¹⁷¹

Similarly, in 2009, the Ninth Circuit leaned on a non-self-executing treaty to guide statutory interpretation.¹⁷² Not enforcement, but interpretation. Given

¹⁶⁷ *Medellín v. Texas*, 552 U.S. 491, 514 (2008).

¹⁶⁸ See generally *id.* (Roberts, C.J., for the majority; Stevens, J., concurring in judgment; Breyer, J., with Souter, J., and Ginsburg, J., dissenting).

¹⁶⁹ *Medellín* did not create the self-executing distinction, only brought it back to the forefront of jurists' minds. See *id.* at 504–05. Chief Justice Roberts' opinion cited decisions as old as 1829 that made similar distinctions. *Id.* (citing *Foster v. Neilson*, 2 Pet. 253, 315 (1829), *United States v. Percheman*, 7 Pet. 51 (1833), *Whitney v. Robertson*, 124 U.S. 190, 194 (1888)).

¹⁷⁰ *Id.* at 505 n.2 (emphasis added).

¹⁷¹ "But not all international law obligations automatically constitute binding federal law *enforceable* in United States courts." *Id.* at 504 (emphasis added). "When, in contrast, [treaty] stipulations are not self-executing they can only be *enforced* pursuant to legislation to carry them into effect." *Id.* at 505 (quoting *Whitney*, 124 U.S. at 194) (emphasis added).

¹⁷² Hathaway et al., *supra* note 7, at 89 (citing *Khan v. Holder*, 584 F.3d 773, 783 (9th Cir. 2009)).

this precedent, granting declaratory relief for self-executing and non-self-executing treaties is hardly a stretch.

Those quick to throw out other treaties alongside the Vienna Convention in the style of *Medellín* should also recall that *Medellín* was partially hung on the private nature of the right sought to be enforced. The Roberts majority noted: “Even when treaties are self-executing in the sense that they create federal law, the background presumption is that international agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts.”¹⁷³ To be sure, no unenumerated private rights are created by self-executing treaties; but the matter of sovereign treaty parties seeking declaratory relief is distinguishable.¹⁷⁴

Despite the general futility of the Marshall Islands’ litigation, the campaign still offers a glimmer of hope for others’ future action in federal court.

CONCLUSION: EVEN IF THESE SUGGESTIONS PROVE UNTENABLE, SOME NEW
PATH FOR TREATY ACCOUNTABILITY SHOULD BE FORGED

Looking to the prospect of treaty parties seeking declaratory relief in federal court, the Marshall Islands’ fifth appellate question is most provocative: “Separate from injunctive relief, does a court have jurisdiction to interpret the NPT and determine whether the Executive has breached it?”¹⁷⁵ In the immediate case, the answer is most likely, “yes, a court does have such jurisdiction, when standing is established; otherwise, absent an Article III case or controversy, the court’s judgement would be an advisory opinion.”¹⁷⁶ Injury in fact may be a bridge too far for Article VI of the NPT and its vague call to multilateral action. But there is hope for action regarding an alleged breach of another provision of a separate treaty, in which injury in fact could be readily established.

¹⁷³ *Medellín*, 552 U.S. at 506 n.3 (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 907, cmt. a (1986)).

¹⁷⁴ *See id.*

¹⁷⁵ Brief of Appellant, *supra* note 92, at 3.

¹⁷⁶ *See MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 126–27 (2007). “The federal Declaratory Judgment Act was signed into law the following year, and we upheld its constitutionality in *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227 (1937). Our opinion explained that the phrase ‘case of actual controversy’ in the Act refers to the type of ‘Cases’ and ‘Controversies’ that are justiciable under Article III.” *Id.* (internal citations omitted).

Having dealt with the redressability matter of standing, and distinguished injunctive relief from declaratory relief for both political question and self-execution doctrine purposes, a treaty party that could establish injury in fact may have a hope of declaratory relief in federal court. Again, if *Medellín* is more broadly interpreted, this promise may be limited to self-executing treaties; even then, *Medellín* itself pronounced an obligation of federal courts to assess whether treaties are self-executing.¹⁷⁷ That in itself is some modicum of declaratory relief.

Given the broad record of American noncompliance with treaties, and the futile outcomes of *Nicaragua* and *Avena*, this route may be a worthwhile option for engaging the American government in discussions on treaty obligations—and a fruitful first resort for seeking American treaty compliance.¹⁷⁸

To be fair, in the case of some major powers—the United States included—some of what is deemed exceptionalism is a genuine function of federalism rather than any malicious elitism, and is not likely to change anytime soon.¹⁷⁹ That natural limitation on major powers' public international law engagement presents all the more reason for good faith engagement wherever possible.¹⁸⁰ Even if the theories and methods presented in this Essay are ultimately unfeasible, some new method must be found. This endeavor is part of what should be a good faith effort to comply with international legal obligations that the United States chose to take on itself. In a different vein, perhaps treaties are not the wave of the future. Some academics present strong indictments against the efficacy of treaties, while others posit circumventing the Treaty Clause entirely, given the trouble in American procedure.¹⁸¹ Still, for now, there

¹⁷⁷ *Medellín*, 552 U.S. at 514 (“Given our obligation to interpret treaty provisions to determine whether they are self-executing.”).

¹⁷⁸ See BRADLEY, *supra* note 4, at 44–49; *supra* Part I.B. Ironically, this strategy is being tested for modern utility on one hot-button issue of international law where the United States is in as much compliance as anyone could realistically expect. See *supra* Part I.A.

¹⁷⁹ See Davis, *I, Too, Sing America*, *supra* note 2, at 123 (highlighting seeming exceptionalism as a benign function of federalism); see also BRADLEY, *supra* note 4, at 58–62. Making insular matters worse, American scholars hardly even engage in comparative analysis. See Davis, *I, Too, Sing America*, *supra* note 2, at 123 n.7. For an applicable sentiment broader than public international law, see Anne-Marie Slaughter, *Unexceptionalism*, ATLANTIC (Nov. 2007), <http://www.theatlantic.com/magazine/archive/2007/11/unexceptionalism/306306/>.

¹⁸⁰ One jurist observed a “broad popular sentiment that the land of Jefferson and Lincoln has nothing to learn about rights from any other country.” Anne-Marie Slaughter, *A Brave New Judicial World*, in AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 277 (Michael Ignatieff ed., 2005).

¹⁸¹ See generally POSNER, *supra* note 26 (discussing the efficacy of treaties); Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J.

should be a clearer path forward for dealing with treaties currently on the books. As the Marshall Islands' present litigation illustrates, one potential avenue for meeting others halfway may be permitting treaty parties to seek declaratory relief in federal courts for interpretation of American obligations under a treaty.

1236 (2008) (describing ending the treaty process as “charting a course toward ending the Treaty Clause for all but a handful of international agreements”).