

THE AUSTRALIA-TUVALU FALEPILI UNION TREATY: STATEHOOD AND SECURITY IN THE FACE
OF ANTHROPOGENIC CLIMATE CHANGE

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ABSTRACT: The Australia-Tuvalu Falepili Union Treaty sets an important legal precedent for Small Island States threatened by rising sea levels, addressing both State continuity and climate resettlement. Its significance, therefore, extends beyond the signatories' bilateral relationship. It challenges some commentators' scepticism about continuity of statehood for States at risk of oceanic submergence and the willingness of wealthy countries to accept climate refugees. Nonetheless, the security clause in Article 4(4) of the treaty, providing Australia with an effective veto over a wide domain of Tuvalu's foreign relations, has proven controversial. This has led to accusations of it undermining Tuvalu's formal sovereignty or substantive independence. This essay reviews the treaty in context, criticisms of it, and efforts by the signatories to allay those concerns. It compares the treaty to treaties of protection and free association and concludes that it does not fundamentally alter Tuvalu's status as an independent State.

I. INTRODUCTION

On November 9, 2023, Prime Minister Albanese of Australia and then Prime Minister Natano of Tuvalu signed the Australia-Tuvalu Falepili Union Treaty in Rarotonga ('Falepili Union Treaty' or 'the Treaty').¹ The preamble explains that 'the concept of *Falepili* ... connotes the traditional values of good neighbourliness, duty of care and mutual respect'. It

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¹ Department of Foreign Affairs and Trade (Australia), National Interest Analysis [2024] ATNIA 5 with attachment on consultation: Australia–Tuvalu Falepili Union, para. 1 (visited September 10, 2024) at https://www.apf.gov.au/-/media/02_Parliamentary_Business/24_Committees/244_Joint_Committees/JSCT/2024/Falepili_Union/NIA_Falepili_Union.pdf. For the treaty text see: Australia-Tuvalu Falepili Union Treaty [hereinafter Falepili Union Treaty], Nov. 9, 2023, [2024] Australian Treaties Not in Force 8, at <https://www.dfat.gov.au/geo/tuvalu/australia-tuvalu-falepili-union-treaty>.

sets a groundbreaking precedent for Small Island States threatened by rising sea-levels, addressing both State continuity and climate resettlement. Nonetheless, it has not been without controversy in Tuvalu and, to a lesser extent, Australia due to provisions seen by some as substantially infringing Tuvalu's independence in foreign relations or even its sovereignty.

In this paper, we consider the context, text, and implications of the Treaty, paying special attention to its impact upon the sovereignty and independence of Tuvalu. In particular, we analyse the consequences of Article 2(2)(b) for the existential continuity of that State notwithstanding anthropogenic sea-level rise and critique the view that the security clause in Article 4(4) threatens in some manner to downgrade Tuvalu's international legal status as an independent or sovereign State. This security clause, under which Tuvalu 'shall mutually agree with Australia any partnership, arrangement or engagement with any other State or entity on security and defence-related matters', appears designed to accommodate Australian concern at the increasing security presence of the People's Republic of China in the Pacific.² Otherwise, the most important operative provisions of the short Treaty text concern a 'mobility with dignity' pathway enabling the citizens of Tuvalu to 'live, study and work in Australia' (Articles 1 and 3). For its part, Tuvalu is one of only 12 states that diplomatically recognise the Republic of China (Taiwan),³ and has received overtures from Beijing about changing its position.

The Falepili Union Treaty has been controversial in Tuvalu. The Tuvaluan Foreign Minister at the time criticized the Treaty for providing extensive 'access to ... immigration, passport, citizenship, and border control data' and as 'compromising Tuvalu's sovereignty'.⁴ A cause of widespread scepticism has been the perceived lack of 'sufficient public consultation' with 'Tuvaluan communities' during the Treaty's development.⁵ Further concerns have included: whether the 'special mobility pathway' provides for residence in

² Euan Graham and Bec Shrimpton, *The defence and security implications of the Australia–Tuvalu treaty*, THE STRATEGIST (Nov. 23, 2023), at <https://www.aspistrategist.org.au/the-defence-and-security-implications-of-the-australia-tuvalu-treaty/>.

³ *Diplomatic Allies*, MINISTRY OF FOREIGN AFFAIRS REPUBLIC OF CHINA (TAIWAN) (visited September 10, 2024), at <https://en.mofa.gov.tw/AlliesIndex.aspx?n=1294&sms=1007>.

⁴ Jess Marinaccio, *Tuvalu's parliament debates the Falepili Union*, DEVPOLICYBLOG (Nov. 29, 2023), at <https://devpolicy.org/tuvalu-parliament-debates-the-falepili-union-20231129/>.

⁵ Jon Barnett et al., *Migration to Australia Under the Falepili Union Treaty: Advancing Climate Change Adaptation*, JOINT STANDING COMMITTEE ON TREATIES, 5 (Apr. 16, 2024) at https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/Australia.

Australia or a pathway to citizenship⁶ (and its implications for Tuvaluan citizenship);⁷ the extent to which Tuvaluans could access Australian healthcare, education and other public services;⁸ the extent to which ‘Article 4(3) requires Tuvalu to grant Australia access to its territory ... without prior approval’;⁹ that adding 280 visa places for Tuvaluans to Australia, in addition to the 150 places available in New Zealand, could lead to an unsustainable loss of 3.8% of the population annually;¹⁰ and that it risks signalling that the Tuvaluan government has ‘given up’ on climate change.¹¹

Two major issues in the January 2024 Tuvaluan general election were thus the Treaty and whether Tuvalu should cease to recognise Taiwan to strengthen ties with China. Opposition leader Enele Sopoaga, when speaking of the Treaty, promised to ‘scrap the deal if elected’,¹² and the controversy may have cost Prime Minister Kausea Natano his seat as a legislator. Indeed, one Australian parliamentarian characterised the results of the 2024 Tuvaluan election as a referendum on the Treaty, one in which the verdict was: ‘Bugger that. We don’t want to be colonised by Australia.’¹³

It has nonetheless been the consistent position of both Australian and Tuvaluan officials that the Treaty was initiated by Tuvalu. A joint statement by both Prime Ministers in

⁶ Donald Rothwell and Sarah Krause, *2023 Australia-Tuvalu Falepili Union*, JOINT STANDING COMMITTEE ON TREATIES, para 15 (visited September 10, 2024) at https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/Australia-TuvaluAgreemen/Submissions.

⁷ Jane McAdam, *Submission on the Australia-Tuvalu Falepili Union*, JOINT STANDING COMMITTEE ON TREATIES, 5 (Apr. 16, 2024) at https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/Australia.

⁸ *Id.*, 6.

⁹ Rothwell and Krause, *supra* note 6.

¹⁰ Barnett et al, *supra* note 5, 8.

¹¹ *Id.*, 12. Many Tuvaluans would expect migration between Australia and Tuvalu to be circular, not permanent: McAdam, *supra* note 7, 2-3.

¹² Prianka Srinivasan, *Tuvalu Election: What’s Happening, and What Could It Mean for Taiwan, China and the Pacific?* GUARDIAN (Jan. 25, 2024) at <https://www.theguardian.com/world/2024/jan/25/tuvalu-general-election-2024-impact-china-taiwan-pacific-relations-prime-minister-kausea-natano-seve-paeniu>.

¹³ *Finance and Public Administration Legislation Committee*, PARLIAMENT OF AUSTRALIA (Feb. 12, 2024) per Senator David Shoebridge, at https://www.aph.gov.au/Parliamentary_Business/Hansard/Hansard_Display?bid=committees/estimate/27701/&sid=0008.

November 2023 stated that, in light of climate challenges, a group of ‘eminent Tuvaluans’ was commissioned:

to undertake a comprehensive examination of partnership options to protect and promote its interests and ensure its continued sovereignty. Following this examination, the Tuvalu Government formally requested Australia consider elevating our bilateral partnership, through transformational and durable arrangements, to safeguard the future of Tuvalu’s people, identity and culture.¹⁴

While much of the Treaty clearly reflects the interests and priorities of Tuvalu, it is admittedly hard not to see the extensive powers Australia gains under Article 4(4) as reflecting Australia’s desired *quid pro quo*. Nonetheless, this may represent a further example that ‘far from lacking savvy, Australia’s [smaller] neighbours can take Australia’s strategic anxiety about China’s regional influence and ... leverage it to their advantage.’¹⁵

This essay begins by establishing the legal and political context to the Falepili Union Treaty (section II) before examining the full text and several key substantive issues arising therefrom (section III). It concludes with an analysis of the implications for Tuvaluan independence, on the assumption that ratification shall soon follow (section IV).

II. POLITICS AND CONTEXT

A. Tuvalu

Independent from the United Kingdom since 1978, Tuvalu is a constitutional monarchy with a Westminster-style parliamentary democracy. As a low-lying Pacific Island State with 11,639 citizens and a land area of just 26 square kilometres is among both the

¹⁴ *Joint statement on the Falepili Union between Tuvalu and Australia*, PRIME MINISTER OF AUSTRALIA (Nov. 10, 2023) at <https://www.pm.gov.au/media/joint-statement-falepili-union-between-tuvalu-and-australia>. See also the statement of the Prime Minister of Tuvalu, Feleti Teo, ‘This treaty came about because Tuvalu Government requested Australia, not the other way around, as some critics of the treaty attempt to misinform the public. It was entirely an initiative of the Tuvalu Government’ in: *Press conference, Tuvalu*, MINISTER FOR FOREIGN AFFAIRS (AUSTRALIA) (May 9, 2024), at <https://www.foreignminister.gov.au/minister/penny-wong/transcript/press-conference-tuvalu>.

¹⁵ JOANNE WALLIS AND REBECCA STRATING, *GIRT BY SEA: RE-IMAGINING AUSTRALIA'S SECURITY* 57 (2024).

world's smallest States and those most threatened by anthropogenic climate change.¹⁶ With a mean elevation of less than 2 metres above sea level¹⁷ it faces significant threats from sea-level rise. The United Nations Development Program estimates that by 2050 'half the capital, Fongafale, will be flooded' with 95% of Tuvalu's land projected to be regularly submerged by 2100.¹⁸

Tuvalu has engaged in a vigorous campaign of diplomacy and legal statecraft to secure its future.¹⁹ It has taken an active role in climate diplomacy, particularly through the Pacific Islands Forum, the Alliance of Small Island States, and the International Conference on Small Island Developing States.²⁰ It co-founded with Antigua and Barbuda the Commission of Small Island States on Climate Change and International Law (COSIS), which sought an advisory opinion from the International Tribunal on the Law of the Sea²¹ regarding the duties of parties to the United Nations Convention on the Law of the Sea (UNCLOS)²² in relation to climate change. In a significant victory for COSIS, that advisory opinion held that UNCLOS parties: 'have the specific obligations to take *all necessary measures* to prevent, reduce and control marine pollution from anthropogenic [greenhouse gas] emissions' and that '[s]uch measures should be determined objectively, taking into

¹⁶ *Tuvalu*, THE WORLD FACTBOOK (July 3, 2024) at <https://www.cia.gov/the-world-factbook/countries/tuvalu/> [hereinafter, *Tuvalu*].

¹⁷ *Id.*

¹⁸ Arthur Web et al., Notes from Tuvalu: Leading the way in adapting to sea-level rise, UN DEVELOPMENT PROGRAM (July 19, 2023) at <https://www.undp.org/blog/notes-tuvalu-leading-way-adapting-sea-level-rise>.

¹⁹ By 'legal statecraft' we mean the use of international law as a tool to achieve a state's strategic ends. See generally: Douglas Guilfoyle, *Litigation as Statecraft: Small States and the Law of the Sea*, BRITISH YEARBOOK OF INTERNATIONAL LAW (2023). On Tuvalu's legal statecraft see also: Douglas Guilfoyle, *Small States, Legal Statecraft and Opening Submissions in the ITLOS Climate Change Advisory Proceedings*, EJIL:TALK! (Sept. 18, 2023), at <https://www.ejiltalk.org/small-states-legal-statecraft-and-opening-submissions-in-the-itlos-climate-change-advisory-proceedings/>.

²⁰ General Assembly, Draft outcome document of the 4th International Conference on Small Island Developing States, UN Doc. A/CONF.223/2024/4 (Apr. 12, 2024).

²¹ Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law, Advisory Opinion, 2024 ITLOS Case No. 31 (May 21), at <https://www.itlos.org/en/main/cases/list-of-cases/request-for-an-advisory-opinion-submitted-by-the-commission-of-small-island-states-on-climate-change-and-international-law-request-for-advisory-opinion-submitted-to-the-tribunal/>.

²² UN Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 UNTS 397.

account, inter alia, *the best available science* and relevant international rules and standards'.²³ In 2023 Tuvalu revised its constitution to provide that Tuvalu's statehood continues 'notwithstanding the impacts of climate change or other causes resulting in loss to the physical territory of Tuvalu', and to permanently fix its maritime zone boundaries.²⁴

Tuvalu is a Member of the United Nations, and many of its specialized agencies but has had relatively few bilateral treaty relationships. Prior to the Falepili Union Treaty, its major bilateral treaty was the 1979 Treaty of Friendship Between the United States of America and Tuvalu.²⁵ This renounced U.S. claims to sovereignty over four Tuvaluan islands and established cooperation on matters such as fishing.²⁶ Formal bilateral treaties with Australia and New Zealand (Aotearoa) have been limited,²⁷ although Tuvalu has long participated in Australia's Pacific labour mobility scheme.

Tuvalu is governed by a unicameral legislature with 16 seats.²⁸ Following elections, a new Tuvaluan government was formed in February 2024.²⁹ The new Prime Minister, a close friend of Taiwan,³⁰ reiterated his support for the 'principles and objectives' of the Treaty but acknowledged the lack of 'transparency and [public] consultation' regarding 'such an

²³ Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law, Advisory Opinion, 2024 ITLOS Case No. 31, at ¶441 (May 21) (emphasis added).

²⁴ TUVALU CONST. 2023, §2, at https://tuvalu-legislation.tv/cms/images/LEGISLATION/PRINCIPAL/1986/1986-0001/ConstitutionofTuvalu_2.pdf.

²⁵ Feb. 7, 1979, 35 UST 2087, TIAS 10776, 2011 UNTS 79.

²⁶ *Id.*, Art. 1 and Art. 4.

²⁷ The authors have located: Agreement between the British Solomon Islands Protectorate and the Gilbert and Ellice Islands Protectorate and the Commonwealth of Australia concerning the Exchange of Money Orders, *opened for signature* Sept. 9, 1913, [1914] ATS 4 (terminated in 1981); Agreement between the Government of New Zealand and the Government of the Independent State of Tuvalu concerning the Temporary Stay of Members of the New Zealand Armed Forces on the Territory of the Independent State of Tuvalu, *opened for signature* June 26, 2010, [2010] NZTS 18; and Exchange of Letters between the Government of New Zealand and the Government of Tuvalu constituting an Agreement on the Waiver of Visas, *opened for signature* Nov. 24, 1986, [1987] NZTS 9.

²⁸ *Tuvalu*, *supra* note 6.

²⁹ Kirsty Needham, *Taiwan ally Tuvalu names Feleti Teo as new prime minister*, REUTERS (Feb. 26, 2024), at <https://www.reuters.com/world/asia-pacific/tuvalu-name-new-prime-minister-monday-2024-02-25/>.

³⁰ *Id.*

important and groundbreaking initiative'.³¹ The new government pledged to 'address those process issues', and work with Australia to ensure 'a workable arrangement ... safeguarding, the integrity of the sovereignty of Tuvalu'.³²

It was reported in March 2024 that 'Tuvalu's new government has formally agreed to begin ratifying' the Treaty without seeking 'changes to the existing text'.³³ The circumstances leading to that outcome are discussed below. Ratification in Tuvalu requires parliamentary approval.³⁴

B. Australia

Australia, with a population of 26.7 million and a land area of 7,741,220 sq km, dwarfs Tuvalu in size and capabilities. Australia is also a parliamentary democracy and constitutional monarchy. Its federal government holds treaty-making competence, and the federal parliament exclusive power to enact international treaty commitments.³⁵

In Australia, signed treaties are 'tabled in both Houses of Parliament for consideration by the Joint Standing Committee on Treaties' (JSCOT) for 15 or 20 sitting days.³⁶ JSCOT is to 'review and report on all [proposed] treaty actions' before Australia becomes bound.³⁷ JSCOT calls for public submissions and may hold oral hearings, before issuing a report to

³¹ *Statement of Priorities for the New Government of Tuvalu after the National General Election on 26 January 2024*, X (Feb. 28, 2024), at https://twitter.com/Simon_Kofe/status/1762659820459769899/photo/1.

³² *Id.*

³³ Stephen Dziedzic, *Australia and Tuvalu deal back on track, as Falepili Union gets ratification green light*, ABC NEWS (Mar. 26, 2024), at <https://www.abc.net.au/pacific/tuvalu-agrees-to-ratify-falepili-union/103636122>.

³⁴ Senate Finance and Public Administration Legislation Committee, Commonwealth of Australia, 37 (Feb. 15, 2024) (Ms Elizabeth Peak, Department of Foreign Affairs and Trade), at https://parlinfo.aph.gov.au/parlInfo/download/committees/estimate/27716/toc_pdf/Foreign%20Affairs,%20Defence%20and%20Trade%20Legislation%20Committee_2024_02_15.pdf;fileType=application%2Fpdf.

³⁵ WILLIAM PITT COBBETT, *THE CONSTITUTION AND GOVERNMENT OF AUSTRALIA, 1788 TO 1919*, 273 (Anne Twomey ed., 2019).

³⁶ *Australia's Treaty-Making Process*, DEPARTMENT OF FOREIGN AFFAIRS AND TRADE (visited September 10, 2024), at <https://www.dfat.gov.au/international-relations/treaties/treaty-making-process>.

³⁷ Joint Standing Committee on Treaties, *Role of the Committee*, PARLIAMENT OF AUSTRALIA (visited September 10, 2024), at https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/Role_of_the_Committee.

parliament. While there is no formal role for parliament in treaty ratification or accession, Australia will not usually bring treaty commitments into force until ‘any legislative changes required to implement the treaty domestically must have passed both Houses of Parliament’.³⁸

Australian elites have long seen themselves as ‘masters of the Pacific’, and believed in the early twentieth century in Australia’s ‘Pacific Ocean destiny’ as a sub-imperial power within the British Empire.³⁹ This was partially fulfilled through Australian ‘acquisition of extensive territory in Papua and later New Guinea, in the destructive exploitation of resources and labour in Nauru’ (discussed below), and in claims to Antarctica and Southern Ocean islands.⁴⁰

After World War II, Australia’s strategic outlook centred on having ‘dominant political influence’ in the western Pacific and maintaining ‘Australian security behind a peripheral screen of islands’.⁴¹ While these territorial gains were largely unwound by decolonisation,⁴² Australia has retained its longstanding antipathy to any potentially ‘hostile power’ gaining ‘access to military bases’ (or potential dual use facilities) in the nearer islands of the Indian and South Pacific Oceans.⁴³

While the Treaty’s preamble emphasises ‘*Falepili*’ or ‘good neighbourliness ... and mutual respect’, Australia has been an inconsistent friend to its Pacific neighbours. Historically, Australia has prioritised its ‘extractive tendencies’ and ‘its own material and commercial interests’ over smaller States’ ‘legitimate rights to self-determination’ and control

³⁸ *Id.* See also *Australia’s Treaty-Making Process*, *supra* note 36.

³⁹ Miranda Johnson and Cait Storr, *Australia as Empire*, in *CAMBRIDGE LEGAL HISTORY OF AUSTRALIA* 261-262 and 266 (Peter Cane et al. eds., Cambridge University Press, 2024).

⁴⁰ *Id.*, 259.

⁴¹ David Goldsworthy, *British Territories and Australian Mini-imperialism in the 1950s*, 41 *AUSTRALIAN JOURNAL OF POLITICS AND HISTORY* 356, 356 (1995). See also: Australian-New Zealand Agreement, Art. 13, *opened for signature* Jan. 21, 1944, 1944 ATS 2: ‘The two Governments agree that, within the framework of a general system of world security, a regional zone of defence comprising the South West and South Pacific areas shall be established and that this zone should be based on Australia and New Zealand, stretching through the arc of islands North and North East of Australia, to Western Samoa and the Cook Islands.’

⁴² Johnson and Storr, *supra* note 39, 272.

⁴³ WALLIS AND STRATING, *supra* note 15, 40 and 137-138. See also: Johnson and Storr, *supra* note 39, 258, 262 and 268.

of their natural resources.⁴⁴ Australia administered the island territories of Nauru and Papua New Guinea as ‘C Mandates’ under the League of Nations and United Nations trusteeship system, principally for its own economic advantage, and resisted granting them independence until 1968 and 1975 respectively.⁴⁵ Australia - with the UK and New Zealand - mined pre-independence Nauru for phosphate, leaving much of its territory barren.⁴⁶ Australia later used Nauru as the site of a detention facility for maritime asylum seekers.⁴⁷ In pre-independence Papua New Guinea Australia authorised ‘the massive Panguna gold and copper mine ... in which Australian company Rio Tinto was a major shareholder.’⁴⁸ The mine had substantial environmental impacts, and fuelled a decade-long conflict (1988-1998) which killed 20,000 people.⁴⁹

Australia’s relationship with Timor Leste has been similarly complex. Following Indonesia’s illegal annexation of Timor Leste in 1975, Australia concluded a maritime boundary with Indonesia to secure access to oil and gas in the Timor Sea.⁵⁰ In 1999 independent Timor-Leste denounced this treaty as illegal,⁵¹ and a series of complex (and criticised)⁵² provisional maritime arrangements between Australia and Timor Leste followed across 2002-2006.⁵³ These were further tainted by allegations Australia’s foreign intelligence

⁴⁴ WALLIS AND STRATING, *supra* note 15, 43.

⁴⁵ Johnson and Storr, *supra* note 39, 268-9 and 278.

⁴⁶ *See generally*, CAIT STORR, INTERNATIONAL STATUS IN THE SHADOW OF EMPIRE: NAURU AND THE HISTORIES OF INTERNATIONAL LAW (2022). This was also the subject of litigation in: *Certain Phosphate Lands in Nauru (Nauru v. Austl.)*, Preliminary Objections, 1992 ICJ REP. 240 (Jun. 26).

⁴⁷ Azadeh Dastyari, *Detention of Australia's Asylum Seekers in Nauru: Is Deprivation of Liberty by Any Other Name Just as Unlawful?* 38 UNIVERSITY OF NEW SOUTH WALES LAW JOURNAL 669.

⁴⁸ WALLIS AND STRATING, *supra* note 15, 43.

⁴⁹ *Id.*

⁵⁰ Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia, *opened for signature* Dec. 11, 1989, 1991 ATS 9.

⁵¹ *Final Report of the Inquiry into East Timor*; SENATE STANDING COMMITTEE ON FOREIGN AFFAIRS, DEFENCE AND TRADE (AUSTRALIA) (Dec. 7, 2000), 69, at https://www.aph.gov.au/~media/wopapub/senate/committee/fadt_ctte/completed_inquiries/1999_02/east_timor/report/report_pdf.ashx.

⁵² *See generally*, Madeleine Smith, *Australian Claims to the Timor Sea's Petroleum Resources: Clever, Cunning or Criminal?* 37(3) MONASH UNIVERSITY LAW REVIEW 42 (2011).

⁵³ *See*, Timor Sea Treaty, *opened for signature* May 20, 2002, 2003 ATS 13 (terminated Aug. 30, 2019); Agreement Between the Government of Australia and the Government of the

service had spied upon the Timorese government during negotiations.⁵⁴ A final maritime boundary was only concluded in 2018, following a compulsory UNCLOS conciliation.⁵⁵ At its best, however, Australia has supported its Pacific and nearer neighbours in times of State fragility, such as leading the multinational International Force East Timor (INTERFET) (1999-2000)⁵⁶ and the Regional Assistance Mission to the Solomon Islands (2003-2017).⁵⁷

Nonetheless, Australia's history of treating poorer, smaller neighbours as security concerns or sites for resource extraction continues to colour its regional relations, and reinforce the view that it remains a 'sub-imperial power'.⁵⁸ The current Australian government has thus prioritised the restoration of good regional ties, with the Foreign Minister visiting all twelve Pacific Island Forum States in a year.⁵⁹ Tensions over climate change, however, have also strained regional relations.⁶⁰

Australia itself faces climate change impacts including drought, bushfires and significant coastal erosion. The climate-related bushfires of 2019-2020 were exceptionally

Democratic Republic of Timor-Leste Relating to the Unitisation of the Sunrise and Troubadour Fields, *opened for signature* June 3, 2003, 2003 ATNIF 6; Certain Maritime Arrangements in the Timor Sea Treaty, *opened for signature* Jan. 12, 2006, 2007 ATS 12 (terminated 10 April 2017).

⁵⁴ CLINTON FERNANDES, ISLAND OFF THE COAST OF ASIA: INSTRUMENTS OF STATECRAFT IN AUSTRALIAN FOREIGN POLICY (2022) 124; Ben Doherty, *Timor-Leste Drops Espionage Claims Against Australia in Maritime Border Dispute*, THE GUARDIAN (Jan. 24, 2017), at <https://www.theguardian.com/world/2017/jan/24/timor-leste-drops-espionage-claims-against-australia-in-maritime-border-dispute>.

⁵⁵ *Australia's Maritime Arrangements with Timor-Leste*, DEPARTMENT OF FOREIGN AFFAIRS AND TRADE (AUSTRALIA) (visited September 10, 2024), at <https://www.dfat.gov.au/geo/timor-leste/australias-maritime-arrangements-with-timor-leste>.

⁵⁶ See generally: CRAIG AJ STOCKINGS, BORN OF FIRE AND ASH: AUSTRALIAN OPERATIONS IN RESPONSE TO THE EAST TIMOR CRISIS 1999-2000 (2022).

⁵⁷ *Solomon Islands Country Brief*, DEPARTMENT OF FOREIGN AFFAIRS AND TRADE (AUSTRALIA) (visited September 10, 2024), at <https://www.dfat.gov.au/geo/solomon-islands/solomon-islands-country-brief>.

⁵⁸ CLINTON FERNANDES, SUBIMPERIAL POWER: AUSTRALIA IN THE INTERNATIONAL ARENA, 19-21 (2018); Antony Anghie, *Race, Self-Determination and Australian Empire*, 19(2) MELBOURNE JOURNAL OF INTERNATIONAL LAW 423 (2018).

⁵⁹ *Delivering for a Peaceful, Prosperous and Resilient Pacific*, MINISTER FOR FOREIGN AFFAIRS (May. 9, 2023), at <https://www.foreignminister.gov.au/minister/penny-wong/media-release/delivering-peaceful-prosperous-and-resilient-pacific>.

⁶⁰ *Dutton Quips About Pacific Islands Facing Climate Change*, ABC NEWS (Sep. 11, 2015), at <https://www.youtube.com/watch?v=rGMrGIAHUq0>.

severe.⁶¹ Despite these threats, Australian climate policy has been inconsistent at best. This partly results from dependence on fossil fuel exports,⁶² and the mining industry's influence on major political parties.⁶³ Australia's refusal to ratify the Kyoto Protocol between 1997 and 2007 delayed the creation of a national emissions trading scheme until 2011 and a carbon price until 2012.⁶⁴ A conservative government reversed these policies across 2013-2022. During this period of political 'climate wars'⁶⁵ Australia was widely regarded as a 'climate pariah'.⁶⁶ A new government was able to announce 'Australia is back' at the 2022 COP27 negotiations, but set only modest new national targets, and made no 'new commitments on climate finance' or to a loss and damage fund.⁶⁷

The Treaty's advantages for Australia are thus straightforward. The Treaty would allow 280 Tuvaluans annually to reside, work, and be educated in Australia; a trivial addition to its annual immigration program of 190,000 new permanent migrants.⁶⁸ More pertinently, the Treaty hedges against Tuvalu entering any security agreement with China, as Solomon

⁶¹ *Interim Observations*, ROYAL COMMISSION INTO NATURAL DISASTER ARRANGEMENTS (Aug. 3, 2020), at <https://www.royalcommission.gov.au/system/files/2021-08/interim-observations-renda.pdf> at 5.

⁶² Coal and petroleum gas accounted for more than 40% of Australian exports by value in 2022: Observatory of Economic Complexity, *Australia: Historical Data* (visited September 10, 2024), at <https://oec.world/en/profile/country/aus>.

⁶³ See for example: LINDY EDWARDS, *CORPORATE POWER IN AUSTRALIA: DO THE 1% RULE?* (2020) Chapter 2.

⁶⁴ Elizabeth Smith and Stephen McMaugh, *Australia's Climate Change Policy to 2021: A Chronology*, PARLIAMENTARY LIBRARY (AUSTRALIA) (May 15, 2023), at https://www.aph.gov.au/About_Parliament/Parliamentary_departments/Parliamentary_Library/pubs/rp/rp2223/Chronologies/climatechange2021.

⁶⁵ Kate Crowley, *Climate Wars, Carbon Taxes and Toppled Leaders: The 30-Year History of Australia's Climate Response, in Brief*, THE CONVERSATION (Oct. 15, 2021), at <https://theconversation.com/climate-wars-carbon-taxes-and-toppled-leaders-the-30-year-history-of-australias-climate-response-in-brief-169545>.

⁶⁶ Karl Mathiesen, *In from the Coal: Australia Sheds Climate Pariah Status to Make up with Europe*, POLITICO (Feb. 1, 2023) <https://www.politico.eu/article/coal-australia-climate-pariah-europe-eu-brussels-energy/>.

⁶⁷ Adam Morton, *Australia's New Approach Was a Rare Positive at Cop27 – But Now the Need for Action Is All the More Acute*, THE GUARDIAN (Nov. 21, 2022), at <https://www.theguardian.com/environment/2022/nov/21/australia-cop27-climate-summit>.

⁶⁸ For the 280 Tuvaluans annually figure, see, *Press conference - Rarotonga, Cook Islands: Transcript*, OFFICE OF THE PRIME MINISTER OF AUSTRALIA (Nov. 10, 2023), at <https://www.pm.gov.au/media/press-conference-rarotonga-cook-islands>. For Australia's present migration rates, see, *Migration Program planning levels*, DEPARTMENT OF HOME AFFAIRS (Feb. 29, 2024), at <https://immi.homeaffairs.gov.au/what-we-do/migration-program-planning-levels>.

Islands did in 2022⁶⁹ to considerable Australian alarm.⁷⁰ The Treaty thus reflects Australia's ongoing efforts to remain the development assistance partner of choice in the Pacific, as also seen in its 2018-2019 construction of the Coral Sea Cable System linking Papua New Guinea and Solomon Islands to Australia before China could provide such critical cyber-infrastructure.⁷¹ Revelations in February 2024 of Chinese involvement in community policing and police database development in Kiribati (under unclear legal arrangements) have heightened concerns about a regional contest for influence.⁷²

C. Towards Ratification

Several steps have been taken to allay Tuvaluan concerns and move towards ratifying the Treaty without amendments. This is despite concern in Tuvalu, particularly regarding the Article 4 security guarantees, which, as we establish in the following section, effectively grant Australia a veto power in relation to broad swaths of Tuvaluan foreign policy. Notably, May 2024 saw a significant increase in Australia's aid to Tuvalu, a ministerial joint statement, and a Treaty explanatory memorandum (discussed in Part III) announced. On May 9, Tuvalu's Prime Minister and Australia's Foreign Minister reaffirmed the Treaty's underlying commitments and expressed an intention for it to enter into force in 2024.⁷³ The joint

⁶⁹ Tarcisius Kabutaulaka, *China-Solomon Islands Security Agreement and Competition for Influence in Oceania*, GEORGETOWN JOURNAL OF INTERNATIONAL AFFAIRS (Dec. 2, 2022), at <https://gjia.georgetown.edu/2022/12/02/china-solomon-islands-security-agreement-and-competition-for-influence-in-oceania/>.

⁷⁰ Daniel Hurst, *Australia's Foreign Minister Denounces China's 'Secret' Security Deal with Solomon Islands*, GUARDIAN (Apr. 28, 2022), at <https://www.theguardian.com/world/2022/apr/28/australias-foreign-minister-denounces-chinas-secret-security-deal-with-solomon-islands>; Tiffanie Turnbull, *Australia Defends Solomon Islands Ties as Row Over China Escalates*, BBC NEWS (May 5, 2022), at <https://www.bbc.com/news/world-australia-61329518>.

⁷¹ Jonathan Barrett, *Pacific Island Turns to Australia for Undersea Cable After Spurning China*, REUTERS (Jun. 24, 2021), at <https://www.reuters.com/world/asia-pacific/exclusive-pacific-island-turns-australia-undersea-cable-after-spurning-china-2021-06-24/>; Amanda Watson, *Coral Sea Cable System Undersea Internet Cables Connect Pacific Islands to the World. But Geopolitical Tension is Tugging at the Wires*, THE CONVERSATION (Sep. 20, 2021), at <https://theconversation.com/undersea-internet-cables-connect-pacific-islands-to-the-world-but-geopolitical-tension-is-tugging-at-the-wires-167968>.

⁷² Kirsty Needham, *Exclusive: Chinese Police Work in Kiribati, Hawaii's Pacific Neighbour*, REUTERS (Feb. 23, 2024), at <https://www.reuters.com/world/china/chinese-police-work-kiribati-hawaiis-pacific-neighbour-2024-02-23/>.

⁷³ *Joint Statement on commitment to the Falepili Union*, DEPARTMENT OF FOREIGN AFFAIRS AND TRADE (AUSTRALIA) (May 9, 2024), at <https://www.dfat.gov.au/countries/tuvalu/joint-statement-commitment-falepili-union>.

statement also recognises that the Tuvaluan people ‘deserve the choice to live, study and work elsewhere, as climate change impacts intensify at home’.⁷⁴ Notably, the Prime Minister and Foreign Minister ‘concur that the treaty would not limit Tuvalu’s liberty to enter into diplomatic relations with other States’.⁷⁵ Australia also committed to a substantial increase in development assistance: ‘\$86.7 million in 2024-25’ compared to ‘\$17.1 million in 2023-24’.⁷⁶ The Australian Foreign Minister itemised this as going towards: direct budget support; coastal adaptation measures; Tuvalu’s ‘first under-sea telecommunications cable’; and a new disaster response coordination centre.⁷⁷

This significant increase in aid, along with other undertakings, likely reflects Australian concessions to avoid reopening negotiations. Australia’s ratification process continues. The JSCOT inquiry has not yet reported but received only six public submissions. Many of the substantive concerns raised in those submissions have, in substance, been answered by the joint statement (discussed above) and the explanatory memorandum (below). Tuvalu’s ratification will only follow after further public consultation.⁷⁸

III. SUBSTANTIVE ISSUES

Before turning to substantive issues arising under the Treaty, it is worth emphasising that the Falepili Union Treaty is not, formally speaking, a ‘treaty of union’ in the sense of existential union: it is limited to matters of climate change, human mobility, and security. Moreover, part of the Parties’ process of reaffirming their intention to ratify the Treaty involved releasing, on May 8, 2024, an explanatory memorandum regarding the Treaty (‘the memorandum’).⁷⁹ While the memorandum states it is ‘not legally binding’,⁸⁰ both governments nonetheless ‘commit to implement the Falepili Union in line with this

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Press Conference, Tuvalu*, MINISTER FOR FOREIGN AFFAIRS (AUSTRALIA) (May 9, 2024), <https://www.foreignminister.gov.au/minister/penny-wong/transcript/press-conference-tuvalu>.

⁷⁸ *Id.*

⁷⁹ *Explanatory Memorandum - Falepili Union between Tuvalu and Australia*, DEPARTMENT OF FOREIGN AFFAIRS AND TRADE (AUSTRALIA) (May 8, 2024), at <https://www.dfat.gov.au/countries/tuvalu/explanatory-memorandum-falepili-union-between-tuvalu-and-australia> (hereinafter, ‘*Explanatory Memorandum*’).

⁸⁰ *Ibid*, 1.

document, including where relevant in interpretation of the Treaty'.⁸¹ In this sense, it forms part of the interpretative context for the Treaty being an instrument made in connection with its conclusion, in the sense of Article 31(2)(b) of the Vienna Convention on the Law of Treaties.⁸² The words of the Treaty, therefore, should be interpreted in light of the memorandum and the intentions it expresses. The memorandum addresses three matters, implicitly signalling core areas of textual concern: sovereignty (including the fundamental question of climate change and state continuity), the 'mobility with dignity' resettlement pathway, and the Article 4 security guarantees. In what follows, we address these three issues in that order. First, however, we outline the formal structure and content of the Treaty.

The Treaty text itself consists of a preamble and just eight articles. The preamble: reaffirms 'the Parties' sovereignty, territorial integrity, and political independence'; and refers to their 'shared interest in each other's prosperity, stability and security, including by responding to ... climate change'.⁸³ Article 1 sets out the Treaty's purposes as being to provide 'mobility with dignity' for the citizens of Tuvalu to Australia, and to 'protect and promote ... collective security'. Article 2 expresses a commitment to 'work together in the face of the existential threat posed by climate change', including through adaptation measures. Its provisions on the continuity of statehood are returned to below. Article 3 requires Australia to 'establish a special human mobility pathway for citizens of Tuvalu' enabling them to 'live, study and work in Australia' and access Australian public education and healthcare. To support this, Tuvalu is required to 'ensure that its immigration, passport, citizenship and border controls ... meet international [security] standards', and make these systems 'accessible to Australia'.

Article 4 provides reciprocal security guarantees. Australia undertakes, following a request from Tuvalu, to assist in response to 'a major natural disaster', 'a public health emergency of international concern' or military aggression. As noted, under Article 4(4) Tuvalu 'shall mutually agree with Australia' any agreement 'on security and defence-related matters' with other partners. This is discussed further below.

Article 5 establishes a 'Joint Committee' consultation mechanism on implementing the Treaty. Article 6 deals with settlement of disputes through 'consultation or negotiation'. It provides that 'disputes relating to the interpretation, application or implementation of this

⁸¹ *Id.*, 4.

⁸² May 23, 1969, 1155 UNTS 331, 8 ILM 679 (1969).

⁸³ Falepili Union Treaty, *supra* note 1, preamble.

agreement’ shall be resolved by the Joint Committee, though on written notice a party may ‘suspend compliance ... pending resolution of a dispute’. The composition of the Committee is not, however, specified.⁸⁴ Notably, any dispute arising under the Treaty ‘shall not be referred to any national or international tribunal or court or any other third party for resolution’. (Australia had previously inserted such a clause in treaty dealings with Timor-Leste, though this failed to prevent a compulsory conciliation process under UNCLOS.⁸⁵) Article 7 provides that the treaty may be amended in writing by mutual consent. Article 8 provides that the treaty will come into force through an exchange of diplomatic notes. It also provides that that parties may terminate the treaty by mutual consent at any time, or it may be terminated unilaterally on 12 months’ notice.

A. Climate Change, State Continuity, and Sovereignty

As a matter of regional practice on climate change, the Treaty consolidates and develops the extant position. Articles 2(1) and 4 address the shared risk that climate change poses to ‘stability, security, prosperity and resilience’, confirming earlier framings within the Security Council.⁸⁶ Article 2(2)(a) emphasises ‘the desire of Tuvalu’s people to continue to live in their territory where possible and Tuvalu’s deep, ancestral connections to land and sea’, which continues Tuvalu’s long-established policy.⁸⁷ This is further concretised in Article 2(3), which commits both Parties to ‘help the citizens of Tuvalu to stay in their homes with

⁸⁴ Contrast this with the defined role given in other Australian bilateral treaties to a ‘Dispute Resolution Committee’ in Treaty between Australia and the Democratic Republic of Timor-Leste Establishing Their Maritime Boundaries in the Timor Sea, Art.8, *opened for signature* Mar. 6, 2018, 2019 ATS 16; or the ‘Joint Commission’ and ‘Ministerial Council’ in Timor Sea Treaty, *supra* note 53, Art. 6.

⁸⁵ Certain Maritime Arrangements in the Timor Sea Treaty, *supra* note 53, Art. 4. See further: Tommy Koh, *The Conciliation Commission’s Decision on Competence*, in THE TIMOR-LESTE/AUSTRALIA CONCILIATION: A VICTORY FOR UNCLOS AND PEACEFUL SETTLEMENT OF DISPUTES (Hao Duy Phan, Robert C. Beckman and Tara Davenport eds., 2019) 85-94.

⁸⁶ Douglas Guilfoyle and Alex Green, *The Australia-Tuvalu Falepili Union Treaty: Security in the face of climate change ... and China?*, EJIL:TALK! (2023), at <https://www.ejiltalk.org/the-australia-tuvalu-falepili-union-treaty-security-in-the-face-of-climate-change-and-china/>; *Security Council Seventy-eighth year 9345th meeting*, UN Doc. S/PV.9345 (Jun. 13, 2023), at https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_pv_9345.pdf.

⁸⁷ Carol Farbotko, *No Retreat: Climate Change and Voluntary Immobility in the Pacific Islands*, MIGRATION POLICY INSTITUTE (Jun. 13, 2018), at <https://www.migrationpolicy.org/article/no-retreat-climate-change-and-voluntary-immobility-pacific-islands>.

safety and dignity, including by promoting Tuvalu’s adaptation interests to other countries, including through regional and international forums’.

Perhaps more radically, Article 2(2)(b) acknowledges that ‘the statehood and sovereignty of Tuvalu will continue, and the rights and duties inherent thereto will be maintained, notwithstanding the impact of climate change-related sea-level rise’. This open-ended commitment to Tuvalu’s existential resilience represents the first publicly binding rejection by any State of the traditional view that inhabitable land is necessary for State continuity.⁸⁸ The implication of Article 2(2)(b) is that, were Tuvalu to become entirely uninhabitable, its statehood would nonetheless be secured relative to Australia, forming what Rowan Nicholson has called a ‘state-in-context’.⁸⁹ This is an entity that either: counts as a State only *vis-à-vis* the political communities extending formal recognition to it; or must be treated as a State even by non-recognising entities, but only for specific purposes, such as

⁸⁸ For scholarly endorsements of this ‘austere’ view, *see*, JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 671 (2007); CAROLIN KÖNIG, *SMALL ISLAND STATES AND INTERNATIONAL LAW: THE CHALLENGE OF RISING SEAS* 33-35 (2022); KRYSZYNA MAREK, *IDENTITY AND CONTINUITY OF STATES IN PUBLIC INTERNATIONAL LAW* 7 (2nd ed. 1968); LASSA OPPENHEIM, *INTERNATIONAL LAW* 451 vol 1 (H. Lauterpacht ed. 8th ed. 1955); Ori Sharon, *To Be or Not to Be: State Extinction through Climate Change*, 51(4) *ENVTL. L.*, 1041-1065 (2021); Jenny Stoutenburg, *When Do States Disappear? Thresholds of Effective Statehood and the Continued Recognition of “Deterritorialized” Island States*, in *THREATENED ISLAND NATIONS LEGAL IMPLICATIONS OF RISING SEAS AND A CHANGING CLIMATE* (Michael B. Gerrard and Gregory E. Wannier eds. 2013); JENNY STOUTENBURG, *DISAPPEARING ISLAND STATES IN INTERNATIONAL LAW* 249-274 (2015). For apparent endorsements within State practice, and international legal practice more generally, *see*, *Report of the International Law Commission on the Work of Its Seventy-third Session (18 April – 3 June and 4 July – 5 August 2022)* 332-341, UN Doc A/77/10 (Aug. 12, 2022); *Second Issues Paper on Sea-level Rise in Relation to International Law (18 April – 3 June and 4 July – 5 August 2022)* 48-56, UN Doc. A/CN.4/752; *Sea-level Rise in Relation to International Law: Submission of the United Kingdom of Great Britain and Northern Ireland* 2, (Jun. 30, 2023), at https://legal.un.org/ilc/sessions/75/pdfs/english/slr_uk.pdf; *Sea-level Rise in Relation to International law: German Submission to the International Law Commission in Preparation of Its 75th Session (2023)—Answer to Questions Posed in the Commission’s Report of the 73rd Session (2022), Chapter III* 3, (Jun. 30, 2023), at https://legal.un.org/ilc/sessions/75/pdfs/english/slr_germany.pdf; *Security Council official records, 3rd year: 383rd meeting, 2 December 1948, Palais de Chaillot, Paris* 11, (Dec. 2, 1948) at <https://digitallibrary.un.org/record/637527?v=pdf>; International Relations and Defence Committee, *UNCLOS: The Law of the Sea in the 21st Century*, HOUSE OF LORDS, 34 paragraphs 117–126, (Mar. 1, 2022) at <https://committees.parliament.uk/publications/9005/documents/159002/default/>.

⁸⁹ ROWAN NICHOLSON, *STATEHOOD AND THE STATE-LIKE IN INTERNATIONAL LAW* 131-145 (2019).

participation within the United Nations General Assembly.⁹⁰ Naturally, one should not assume statehood is *only* a relative status. It is certainly arguable that statehood *can* be created without recognition and maintained with universal opposability, notwithstanding the total loss of inhabitable land due to sea-level rise.⁹¹ Nonetheless, the relative opposability of statehood has geopolitical significance. As Nicholson argues, ‘[i]f a lawyer is called on to establish that two entities are states relative to each other – say, before an international court – then it may be much easier [in practice] to show that the entities recognize each other than ... to conduct a detailed analysis of the effectiveness criteria.’⁹² Since Article 2(2)(b) not only establishes the ongoing recognition of Tuvalu by Australia but also an obligation to continue to extend recognition of this kind, its implications for international and diplomatic relations between these two States are significant. Moreover, beyond binding Australia bilaterally, the Treaty confirms the ongoing lack of appetite on the part of States affected by sea-level rise for ‘solutions’ that envision merger with larger political communities.⁹³ Whether this will be taken as a model for further bilateral climate agreements, or may otherwise catalyse a trend in state practice supporting the idea that state continuity can be secured by such recognition, remains to be seen. Nonetheless, it sets a significant precedent.

⁹⁰ *Id.*

⁹¹ Alex Green, *Three Reconstructions of ‘Effectiveness’: Some Implications for State Continuity and Sea-Level Rise*, OXFORD JOURNAL OF LEGAL STUDIES (2024); Alex Green, *Towards an Impossible Polis: Legal Imagination and State Continuity*, in *SCIENCE FICTION AS LEGAL IMAGINARY* (Alex Green, Mitchell Travis & Kieran Tranter eds., 2024); *See also*, Maxine Burkett, *The Nation Ex-Situ: On climate change, deterritorialized nationhood and the post-climate era* 2 CLIMATE LAW 345, 355-363 (2011); ALEX GREEN, STATEHOOD AS POLITICAL COMMUNITY: INTERNATIONAL LAW AND THE EMERGENCE OF NEW STATES 104 (2024); Jane McAdam, “Disappearing States”, *Statelessness and the Boundaries of International Law*, in CLIMATE CHANGE AND DISPLACEMENT: MULTIDISCIPLINARY PERSPECTIVES (Jane McAdam ed. 2010); Rosemary Rayfuse, *International Law and Disappearing States: Maritime Zones and the Criteria for Statehood* 41 ENVIRONMENTAL POLICY AND LAW 281, 284-286 (2011).

⁹² NICHOLSON 143, *supra* note 89.

⁹³ Guilfoyle and Green, *supra* note 86; *See discussion in: International Law Commission, Sea-level rise in relation to international law: Second issues paper*, UN Doc. A/CN.4/752 (Apr. 19, 2022) 49-56, at <https://documents.un.org/doc/undoc/gen/n22/276/29/pdf/n2227629.pdf?token=Y5G3VWAVdShH1rNYQ5&fe=true>. No discernible enthusiasm for such options was expressed by the Pacific Islands Forum, *see, 2023 Declaration on the Continuity of Statehood and the Protection of Persons in the Face of Climate Change-related Sea-level Rise*, PACIFIC ISLANDS FORUM (Nov. 9, 2023) at <http://twitter.com/BalYKama/status/1723957600461717940>.

In respect of the connected question of sovereignty, the memorandum underscores: the increased Australian support for ‘development cooperation to support Tuvalu’s priorities and the long-term prosperity of its people’; that the preamble to the Treaty reaffirms Tuvalu’s ‘sovereignty, territorial integrity and political independence’; that the main purposes of the agreement include protecting ‘the parties’ collective security and sovereignty’; and that Article 2(2)(b) recognizes ‘for the first time in a legally binding treaty Tuvalu’s continuing statehood in the face of climate change’.⁹⁴ The memorandum also stresses that ‘[u]ltimately, if either party is concerned [that] expectations [under the Treaty] are unreasonable, they can suspend obligations (Article 6 (3)) and even terminate the treaty (Article 8) by mutual agreement or unilaterally.’⁹⁵ This means that, in textual terms at least, the sovereignty of Tuvalu is buttressed at both the formal and procedural levels. We return to the implications of this textual position when considering Tuvalu’s formal independence in comparative terms.

B. Human Mobility

The Treaty provides for a ‘human mobility’ pathway ‘which shall enable citizens of Tuvalu to: (a) live, study and work in Australia; (b) access Australian education, health, and key income and family support on arrival’ (Article 3). According to statements made at the 2023 joint press conference first announcing the Treaty, while every Tuvaluan citizen would be eligible for resettlement, no more than 280 annually will be allowed to migrate to avoid a ‘brain drain’.⁹⁶ As regards these ‘mobility with dignity’ provisions, the memorandum clarifies the range of benefits ‘[g]enuine Tuvaluan citizens’ would enjoy under the pathway including access to education, educational loans, government-funded healthcare, family and disability welfare schemes, and the right to apply for Australian citizenship without renouncing Tuvaluan nationality.⁹⁷ Australia’s concerns about ‘genuine citizens’ are given context by statements that the ‘pathway cannot open until appropriate integrity and security standards are met’ regarding immigration, passport, citizenship and border controls, and that Tuvalu has

⁹⁴ *Explanatory Memorandum, supra* note 79, 1.

⁹⁵ *Id.*, 3.

⁹⁶ *Press Conference - Rarotonga, Cook Islands: Transcript*, OFFICE OF THE PRIME MINISTER OF AUSTRALIA (Nov. 10, 2023), at <https://www.pm.gov.au/media/press-conference-rarotonga-cook-islands>.

⁹⁷ *Id.*, 2.

obligations under Article 3(2) of the Treaty to ensure that in this regard its systems ‘meet international standards’ and are ‘compatible with Australia’s [own] controls’.⁹⁸

C. *The Australian Veto on Security and Defence Partnerships*

However, as noted above, ‘this Australian neighbourliness does not occur in a vacuum’.⁹⁹ The significant *quid pro quo* lies in Article 4(4):

Tuvalu shall mutually agree with Australia any partnership, arrangement or engagement with any other State or entity on security and defence-related matters. Such matters include but are not limited to defence, policing, border protection, cyber security and critical infrastructure, including ports, telecommunications and energy infrastructure [hereafter, ‘the covered subject matters’].

On its face, this provides Australia with a veto over a wide range of issues in Tuvalu’s foreign relations.¹⁰⁰ Indeed, the covered subject matters clearly reflect current Australian security priorities. The memorandum goes at least some way to address such concerns, emphasising that the Treaty arrangements are designed to provide ‘Australia with *insight* into Tuvalu’s defence and security related engagement with third parties’ on the covered subject matters [emphasis added].¹⁰¹ Significantly, although this is said to reflect ‘the depth of the security guarantee’,¹⁰² the memorandum spells out unequivocally that:

Tuvalu does not need permission from Australia before it starts to talk with other partners. Unlike some integrated partnership models, Australia does not have unqualified rights of access to Tuvalu’s territory or airspace, nor the right to establish military areas in Tuvalu. Article 4(4) does not diminish Tuvalu’s standing in global fora. It will not preclude other partners supporting Tuvalu’s economic and development interests such as education, health, waste, climate adaptation, gender, disability, trade or granting fishing licences.¹⁰³

⁹⁸ *Id.*, 2.

⁹⁹ Guilfoyle and Green, *supra* note 86.

¹⁰⁰ *Id.*

¹⁰¹ *Press Conference*, *supra* note 77, 3.

¹⁰² *Id.*, 3.

¹⁰³ *Id.*, 3.

The memorandum also stipulates that ‘cooperation with Pacific Islands Forum members would not be of concern’.¹⁰⁴ It notes, moreover, that under ‘Article 4(1), Australia shall provide assistance at Tuvalu’s request in response to a major natural disaster, a public health emergency ... or military aggression’, although operationalizing this requires the parties to agree a separate ‘instrument to establish the conditions for Australian personnel operating in Tuvalu’s territory’.¹⁰⁵

The memorandum, however, does not completely dispense with concerns regarding the extent to which Australia will be able to intrude into a wide range of Tuvaluan decisions regarding foreign relations. Not only is the open-ended list of ‘security and defence-related matters’ very broad, but the potential of Australia using Article 4(4) as a veto remains. Nonetheless, the memorandum provides at least an assurance that this framework does not preclude Tuvalu opening discussions on such matters with third states, and clarifies that there is no automatic right of Australian military presence in Tuvalu. There is also a clear statement purporting to leave untouched Tuvalu’s freedom to pursue international agreements related to its ‘economic and development interests’. This must be taken with a grain of salt, however, since agreements regarding ‘critical infrastructure, including ports, telecommunications and energy infrastructure’ would still be subject to the Article 4(4) veto.

IV. TREATIES OF PROTECTION AND FREE ASSOCIATION

This section compares the Falepili Union Treaty with analogous instruments to ascertain more precisely its impact upon Tuvalu’s independence. *Prima facie*, there remains a tension between Articles 1(c) and 2(2)(b) on the one hand, which guarantee Tuvalu’s sovereignty, and Article 4(4) on the other. However, this is perhaps less unusual than one might think, particularly in the Pacific, where several smaller States have historically relied upon voluntary associations with more powerful partners regarding defence and security. Tuvalu’s own Treaty of Friendship with the United States already requires it to consult with that State before permitting its territory to be used for military purposes by third parties.¹⁰⁶ At a textual level, the position is clear: both the Treaty and the memorandum guarantee Tuvalu’s

¹⁰⁴ *Id.*, 3.

¹⁰⁵ *Id.*, 3.

¹⁰⁶ Treaty of Friendship Between the United States of America and Tuvalu, *signed* Feb. 7, 1979, *entered into force* Sep. 23, 1983, 2011 UNTS 79.

ongoing and complete sovereignty notwithstanding Article 4(4). We believe that this textual gloss reflects legal reality; however, it pays to illustrate precisely why.

The concern we ultimately seek to allay – that an Australian veto over Tuvaluan foreign policy would precipitate a fundamental shift in the international legal status of Tuvalu – has a relatively simple basis. To emerge as a State, political communities require a sufficient degree of governmental independence.¹⁰⁷ Similarly, to maintain statehood, a sufficient (albeit more minimal) degree of independence must persist in at least some form:¹⁰⁸ whether via a recognised government in exile,¹⁰⁹ or simply because any formal or *de facto* dependence lacks a legal basis, for example because it results from unlawful occupation.¹¹⁰ In the case of the Falepili Union Treaty, the apparent source of concern is that Article 4(4) grants Australia such broad powers over Tuvaluan foreign policy that, were the Treaty to be ratified, it would become impossible to conclude that Tuvalu remains truly independent, and therefore either fully sovereign or a State. There might be something to be said for the view that Article 4(4) is ‘neocolonial’ in political terms;¹¹¹ however, any doubts of this sort at the formal level of doctrinal international law seem to us utterly unfounded, as we explain below.

Three points should be noted at the outset. First, labels used to describe dependent territorial entities – whether the now outmoded ‘protectorates’¹¹² or the more contemporary ‘associated States’¹¹³ – are far less important than the precise terms of the agreements determining the extent of their dependency.¹¹⁴ The degree to which treaties of protection or free association affect independence turns on the extent to which they establish ‘inter-governmental domination’: the exercise of legal authority from abroad to the exclusion of

¹⁰⁷ GREEN, *supra* note 91, 85-7.

¹⁰⁸ Alex Green, *Three Reconstructions of ‘Effectiveness’: Some Implications for State Continuity and Sea-Level Rise*, OXFORD JOURNAL OF LEGAL STUDIES (2024), 206-7.

¹⁰⁹ *Id.*, 226-7.

¹¹⁰ GREEN, *supra* note 91, 122-6.

¹¹¹ John Braddock, *Australia strikes neo-colonial “security” pact with Tuvalu to counter China in Pacific*, WORLD SOCIALIST WEB SITE (Nov. 13, 2023), at <https://www.wsws.org/en/articles/2023/11/13/vouf-n13.html> (last visited Feb. 23, 2024).

¹¹² Following Judge Huber in *Island of Palmas* (1928) 2 RIAA 829, 858, we distinguish genuine protectorates from those which were colonies in all but name. Only the former concern us here (see also: CRAWFORD, *supra* note 88, 287).

¹¹³ CRAWFORD, *supra* note 88, 625.

¹¹⁴ *Nationality Decrees in Tunis and Morocco* PCIJ ser B no 4 (1923), 27; CRAWFORD, *supra* note 88, 284, 632.

local rule.¹¹⁵ Ultimately, if they amount to ‘[t]ruly endemic assertions of foreign authority...[they] must be taken to suggest a relationship of dominance at the formal level’ which is antithetical to sovereign statehood.¹¹⁶

Second, and for this reason, there is a bottom-line distinction between entities lacking statehood by virtue of their dependence and *States* that nonetheless exist within dependent relationships.¹¹⁷ This matters because although non-state entities can possess some degree of international legal personality, where statehood is either established or retained, sovereignty must also be assumed. While the term ‘State’ admits some flexibility,¹¹⁸ statehood as an international legal status denotes a discrete normative positionality within the international legal order from which no derogation should be presumed.¹¹⁹

Third, when applying these first two considerations, it is useful to separate out entities created *within* dependent arrangements from established States entering such arrangements. This is apposite when comparing Tuvalu, which declared independence in 1978, to entities such as Cook Islands or Niue, which have existed in free association with New Zealand since their separation from that State.¹²⁰ (Indeed, no entity currently in free association with another State possessed full independence prior to gaining associated status.) In short, a strong presumption exists that already established States will retain that status notwithstanding any delegation of their rights not amounting to formal merger or incorporation.¹²¹ This goes with the grain of international law in general and the law of statehood in particular. As to the former, it maintains the distinction between the conditions for the creation of rights and those for their continued existence.¹²² As to the latter, it mirrors the more demanding criteria for State creation when compared to the more permissive principles of State continuity.¹²³

¹¹⁵ GREEN, *supra* note 91, 90.

¹¹⁶ *Id.*, 95-6.

¹¹⁷ CRAWFORD, *supra* note 88, 287.

¹¹⁸ JURE VIDMAR, TERRITORIAL STATUS IN INTERNATIONAL LAW 145-90 (2024).

¹¹⁹ CRAWFORD, *supra* note 88, 40-1; GREEN, *supra* note 91, 233.

¹²⁰ Cook Islands Constitution Act 1964, Public Act 1964 No 69 (New Zealand); Niue Constitution Act 1974, Public Act 1974 No 42 (New Zealand).

¹²¹ CRAWFORD, *supra* note 88, 296.

¹²² KATE PURCELL, GEOGRAPHICAL CHANGE AND THE LAW OF THE SEA 218-20, 228-55 (2019).

¹²³ CRAWFORD, *supra* note 88, 62-3, 89; GREEN, *supra* note 91, 144.

The starting point for comparative analysis should thus be that as an independent State— and one which enjoys both United Nations Membership¹²⁴ and substantial international recognition¹²⁵ – Tuvalu’s basic status must be presumed unaltered notwithstanding Article 4(4). When viewed alongside treaties of protection, the obligation to agree any partnerships, arrangements, and engagements related to security and defence places Tuvalu somewhere between historical protectorates such as the Kingdom of Bhutan, which under a now defunct Treaty of Friendship agreed merely to be ‘guided by the advice of the Government of India ... [in] its external relations’,¹²⁶ and those such as the Kingdom of Tonga, which by a similarly defunct Treaty of Amity, delegated conduct of its foreign affairs entirely to Great Britain.¹²⁷ The statehood of neither was called into question by these arrangements;¹²⁸ something readily explicable by the fact that ‘the powers connected with sovereignty need not necessarily be united in one hand’.¹²⁹

As such, the existence of an Australian veto, though no doubt restrictive of Tuvaluan foreign affairs, need have no impact upon the fundamental status of that State. This position, as well of those of historical Bhutan and Tonga, can be usefully contrasted with cases such as pre-1948 Kelantan, ‘where an Agreement of 1910 required the Sultan’ to cede control of international relations entirely to the ‘British government and, with the exception of issues relating to Islam and Malay custom, to comply wholly with the advice of their British

¹²⁴ This places it similarly to the Republic of the Marshall Islands (UN General Assembly Resolution, UNGA Res 46/3 (1991) UN Doc. A/RES/46/3), the Federated States of Micronesia (UN General Assembly Resolution, UNGA Res 46/2 (1991) UN Doc. A/RES/46/2), and the Republic of Palau (UN General Assembly Resolution, UNGA Res 49/63 (1994) UN Doc. A/RES/49/63), each of which exist within Compacts of Free Association signed with United States, see: Compact of Free Association (United States and Micronesia), *signed* Oct. 1, 1982, KAV 4538; Compact of Free Association (United States and Marshall Islands), *signed* Jun. 25, 1983, KAV 4575; Compact of Free Association (United States and Palau), *signed* Jan. 10, 1986, KAV 4303.

¹²⁵ This places Tuvalu in a similar situation to Cook Islands, Marshall Islands, and Micronesia, and places it in a stronger position *vis-à-vis* statehood than both Niue and Palau, given the shorter list of third states maintaining diplomatic relations with those entities.

¹²⁶ Treaty of Friendship (Bhutan and India), *signed and entered into force* August 8, 1949, 157 BFSP 214.

¹²⁷ Treaty of Amity (Tonga and Great Britain), *signed and entered into force* May 18, 1900, 107 BFSP 521.

¹²⁸ CRAWFORD, *supra* note 88, 289-90.

¹²⁹ LASSA OPPENHEIM, INTERNATIONAL LAW, §66, Vol 1 (H. Lauterpacht ed. 5th ed. 1937).

adviser'.¹³⁰ The extent of such formal restrictions, particularly as regards internal affairs, made it 'difficult to see that the Government of Kelantan had any real power at all',¹³¹ rendering it 'akin to a colony'.¹³² Even though the substantive constraints created by Article 4(4) are described by some as '[neo]colonial' in spirit,¹³³ there can be no serious suggestion that the Falepili Union Treaty amounts to colonisation at the level of fundamental status.

Associated States are formally distinct from protected States, existing within a tradition of United Nations practice expressed within resolution 1541(XV).¹³⁴ Nonetheless, some authors have treated the former as the contemporary equivalent of the latter.¹³⁵ Crawford's characterisation of free association provides a useful gloss:

First, the association arrangement is freely accepted by the inhabitants of the territory. Secondly, the terms of association are clearly set down in a form binding on the parties. Thirdly, the associated territory has substantial powers of internal self-government. Fourthly, the reserved powers of the 'metropolitan' State do not involve substantial discretions to intervene in the reserved or internal affairs of the Associated State. Fifthly, there is a procedure for termination of the association ... [capable of being] regarded as a continued expression of the right to self-determination of the people of the Associated State.¹³⁶

¹³⁰ GREEN, *supra* note 91, 90, citing: Agreement respecting the Administration of Kelantan (Great Britain and Kelantan), *signed and entered into force* Oct. 22, 1910, 103 BFSP 518.

¹³¹ CRAWFORD, *supra* note 88, 77. See also Crawford's analysis of Brunei Darussalam (*Id.*, 297-8), holding that '[t]he decisive change ... came in 1906, when the Sultan agreed to the appointment of a British resident whose "advice must be taken and acted upon on all questions in Brunei, other than those affecting the Mohammedan religion..."', citing Supplementary Agreement, *signed and entered into force* Jan. 2, 1906, 25 HERTSLET 32; and Protectorate Agreement (Brunei and Great Britain), *signed and entered into force* Sept. 17, 1888, 79 BFSP 240.

¹³² GREEN, *supra* note 91, 94.

¹³³ John Braddock, *Australia strikes neo-colonial "security" pact with Tuvalu to counter China in Pacific*, WORLD SOCIALIST WEB SITE (Nov. 13, 2023), at <https://www.wsws.org/en/articles/2023/11/13/vouf-n13.html> (last visited Feb. 23, 2024).

¹³⁴ UN General Assembly Resolution, UNGA Res 1541(XV) (1960) UN Doc. A/RES/1541(XV), principle VII.

¹³⁵ NICHOLSON, *supra* note 89, 98.

¹³⁶ CRAWFORD, *supra* note 88, 632-3.

The Falepili Union Treaty is not formally a treaty of association in this sense, although it may be characterised as such in functional terms. It is thus instructive to consider two comparators by way of confirming Tuvalu's status notwithstanding Article 4(4).

The first is Cook Islands, which has been in free association with New Zealand since 1965. Although executive power is formally vested in the King in right of New Zealand,¹³⁷ such power is employed only on the advice of the Cook Islands Executive Council.¹³⁸ Moreover, although New Zealand retains responsibility for external relations and defence, these responsibilities can only be discharged after consultation with the Premier of the Cook Islands.¹³⁹ Crucially, the Islands possess full internal governmental competence,¹⁴⁰ with their Legislative Assembly enjoying the power to amend their Constitution, including those provisions maintaining association with New Zealand.¹⁴¹ Considerations such as these lead Crawford to conclude that 'for most purposes the Cook Islands can be considered as independent'.¹⁴² Indeed, notwithstanding its associated status, it is eminently plausible that Cook Islands possesses full statehood. In a Joint Centenary Declaration, New Zealand explicitly recognised that in 'the conduct of its foreign affairs, the Cook Islands interacts with the international community as a sovereign and independent State'¹⁴³ and that the relationship established in the 1964 Constitution is 'not a qualification of Cook Islands' Statehood'.¹⁴⁴ Moreover, New Zealand accepts that Cook Islands is responsible at the international level for 'the exercise of its international rights and fulfilment of its international obligations'¹⁴⁵ and that organs of the Cook Islands are entitled to foreign State immunity.¹⁴⁶

¹³⁷ Constitution Act 1964, *supra* note 126, Schedule, section 2.

¹³⁸ *Id.*, Schedule, sections 4, 7.

¹³⁹ *Id.*, Act, section 5.

¹⁴⁰ *Id.*, Act, section 3.

¹⁴¹ *Id.*, Schedule, section 41.

¹⁴² CRAWFORD, *supra* note 88, 630; STANLEY LAUGHLIN, THE LAW OF UNITED STATES TERRITORIES AND AFFILIATED JURISDICTIONS 339-74 (1995).

¹⁴³ Joint Centenary Declaration of the Principles of the Relationship between Cook Islands and New Zealand, *signed and entered into force* June 11, 2001, clause 4(1). For a recent statement confirming these commitments, see, Aotearoa New Zealand – Kuki 'Āirani The Cook Islands, Waka Hourua/Vaka Purua 2022-2025, *signed and entered into force* Oct. 13, 2022, preamble. See also: UN General Assembly Resolution, UNGA Res 2064(XX) (1965) UN Doc. A/RES/2064(XX).

¹⁴⁴ Joint Centenary Declaration, *supra* note 143, clause 4(2). See also: DONALD ROTHWELL, ISLANDS IN INTERNATIONAL LAW 89 (2022).

¹⁴⁵ Joint Centenary Declaration, *supra* note 143, clause 4(1).

¹⁴⁶ *KPMG Peat Marwick v Davison* (1996) 104 ILR 526 (NZCA).

The second is Puerto Rico, which since ceasing to be a territory of the United States in 1952 has been held by the former to be entitled to full independence, should it so wish.¹⁴⁷ For instance, the 1966 report of the United States–Puerto Rican Commission on the Status of Puerto Rico held that the ‘relationship between the United States and Puerto Rico is ... based on the principles of mutual consent and self-determination’.¹⁴⁸ Nonetheless, Puerto Rico has only ‘vestigial’ international competence and restricted internal autonomy,¹⁴⁹ with acts of the U.S. Congress applying automatically within its territory unless specifying otherwise.¹⁵⁰ In June 2024 the United Nations Committee of Twenty-four adopted without vote a draft resolution calling upon the United States to ‘enable the Puerto Rican people to fully exercise their inalienable right to self-determination and independence’,¹⁵¹ having noted with concern that ‘Puerto Rico and the United States have failed to set in motion a decolonization process that begins in Puerto Rico’.¹⁵² Indeed, such are the circumstances that some have doubted whether the ‘Commonwealth status’ it possesses can truly be characterised as free association.¹⁵³ In our view, Puerto Rico almost certainly lacks legal statehood.

If formal independence within free association were conceived as spectrum, with Cook Islands at one end and Puerto Rico at the other, then any comparison with Tuvalu must place it closer to the former, notwithstanding Article 4(4). Crucially, as regards internal matters, both States have complete self-government. Indeed, Tuvalu arguably remains more independent than Cook Islands in several respects, even if one were to discount that the Falepili Union Treaty makes specific provision for Tuvaluan statehood and sovereignty.

¹⁴⁷ *United States v Quinones*, 58 F 2d 40, 42 (1st Cir 1985).

¹⁴⁸ José Cabranes, *The Status of Puerto Rico*, INT’L AND COMPAR LQ 536-9 (1967).

¹⁴⁹ CRAWFORD, *supra* note 99, 627.

¹⁵⁰ *United States v Vargas*, 370 F Supp 908 (1974); *Caribtan Corp v OSHRC*, 493 F 2d 1064 (1974); *Hodgson v UESP*, 371 F Supp 56 (1974).

¹⁵¹ *Decision of the Special Committee of 22 June 2023 concerning Puerto Rico*, Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples (Jun. 19, 2024) UN Doc. A/AC.109/2024/L.7, para 2.

¹⁵² *Id.*, 1. Puerto Rico voted in favour of the status quo in referendums in 1967, 1993, and 1998 (CRAWFORD, *supra* note 99, 628). However, votes in 2012 and 2020 returned majorities rejecting the status quo and in favour of US statehood, see: Coral Marcos, *Puerto Rico Will Include Status Plebiscite in November’s General Elections*, APB NEWS, at <https://apnews.com/article/puerto-rico-status-plebiscite-election-e763c4d11e10a42fb557bd1bbd722614>.

¹⁵³ ROTHWELL, *supra* note 144, 88. See also: MASAHIRO IGARASHI, ASSOCIATED STATEHOOD IN INTERNATIONAL LAW 44-62, 212-15 (2002).

Unlike Cook Islands, its constitutional monarchy operates unmediated by its new partner, with the Governor-General acting on the exclusive advice of the national government.¹⁵⁴ Moreover, whereas New Zealand must consult with Cook Islands before discharging its responsibilities for the external relations and defence of the latter, its competence in that regard is plenary, while the Australian veto over Tuvaluan foreign policy is restricted to matters of defence and security. Ultimately, the conclusion must be that although Article 4(4) remains a contentious provision, this must be for reasons of political substance rather than due to any subversion of Tuvalu's international legal status.

V. CONCLUSION

The Australia-Tuvalu Falepili Union Treaty represents a significant precedent for Small Island States facing the existential threat of rising sea-levels. It expressly addresses critical issues of State continuity and climate resettlement through a 'mobility with dignity' pathway, albeit within a security framework that shows substantial deference to Australia's priorities in a wider contest for influence in the Pacific. Thus, while the Treaty buttresses Tuvalu's statehood, it simultaneously grants Australia considerable influence over matters of security and defense in Tuvalu's foreign relations. Unsurprisingly, this has sparked political debate and disagreement, particularly within Tuvalu. Nonetheless, this may be less a case of Australia imposing its preferences than a situation in which a smaller State has been able to leverage broader regional dynamics in navigating its partnership with a more powerful neighbour. Indeed, the controversy within Tuvalu appears to have enabled the new government there to extract a significant increase in aid and funding for climate adaptation programs from Australia. Further, at least at a doctrinal level, the 'security veto' vested in Australia under Article 4(4) of the Treaty does not compromise Tuvalu's sovereignty. In terms of the substantive inroads it may make into Tuvalu's ability to conduct independent foreign relations, to the extent the Treaty is compared to treaties of protection or free association, it is more akin to the latter. And even within the range of treaties of free association, it appears among the least intrusive. It is also notable that the Treaty is not on its face a plan for the eventual physical abandonment of Tuvalu or the assimilation of its population into Australia. Even while contemplating the possible de-territorialisation of the country, it envisages the

¹⁵⁴ TUVALU CONST. 2023, §§51-52.

free movement and circular migration of Tuvaluans between the two countries, and a continued commitment to climate adaptation and mitigation measures.