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Loss and Damage

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Abstract

This article explores so-called ‘loss and damage’ as well as the emerging legal infrastructure that seeks to address it. The article concludes by identifying some of the deep points of contention in the international discourse on loss and damage, particularly regarding compensation, and considerations for a successful resolution of the impasse that loss and damage has produced.

Keywords

loss and damage

After the mitigation and adaptation infrastructure has done its best work, irreparable loss will still occur. Accelerating climate change, and related events such as ocean acidification, will produce new and unprecedented shifts in temperature extremes, precipitation, sea-level rise, and the severity and duration of natural disasters. Disasters generally are events that produce widespread damage and cause severe alterations in ‘the normal functioning of communities and societies.’¹ Climate change amplifies existing disasters and renders previously quite manageable weather events into devastating occurrences. Further, researchers have documented or modeled the disproportionate impact that climate change generally—and its worst impacts

1 IPCC, ‘Summary for Policymakers’, in *Managing the Risks of Extreme Events and Disasters to Advance Climate Change Adaptation: A Special Report of Working Groups I and II of the Intergovernmental Panel on Climate Change*, edited by C. B. Field et al. (Cambridge, UK and New York, NY: Cambridge University Press, 2012), at 1–19 (hereinafter IPCC, 2012: Summary for Policymakers).

specifically—will continue to mete out on the developing world, which suffers from less resilient economies and greater dependence on natural capital.² This article explores so-called ‘loss and damage’—‘the actual and/or potential manifestation of impacts associated with climate change in developing countries that negatively affect human and natural systems’³—as well as the emerging legal infrastructure that seeks to address it. The article concludes by identifying some of the deep points of contention in the international discourse on loss and damage, particularly regarding compensation, and considerations for a successful resolution of the impasse that loss and damage has produced.

1 Defining Terms

While the presence of damage and irreparable loss is evident in current and projected climate change impacts,⁴ there is no consensus on how to define the destruction that these impacts produce. There are, however, recurrent themes. Loss refers to climate-related impacts for which restoration is not possible. The total destruction of coastal infrastructure due to sea-level rise, or the total collapse of a fishery due to lower ocean pH, would constitute a loss. The inability of communities to restore or repair that which is impacted characterizes climate-related loss. The loss can be economic (loss of geological freshwater resulting from glacier melt) or non-economic (loss of heritage when territories become inhabitable).⁵ The latter is perhaps most compelling and confounding from both the socio-economic and legal perspectives. Climate-induced displacement, loss of productive or sovereign territory due to slow-onset processes such as desertification and sea-level rise, and disruptions to society

² Ibid.

³ UNFCCC Subsidiary Body for Implementation, ‘A literature review on the topics in the context of thematic area 2 of the work programme on loss and damage: A range of approaches to address loss and damage associated with the adverse effects of climate change’, FCCC/SBI/2012/INF.14 (2012), at 3–4, <unfccc.int/resource/docs/2012/sbi/eng/inf14.pdf> (hereinafter UNFCCC SBI Literature Review) (‘Loss and damage includes the effects of the full range of climate change related impacts, from increasing (in number and intensity) extreme weather events to slow onset events and combinations of the two’).

⁴ Ibid., at 5.

⁵ Laura Schäfer and Sönke Kreft, ‘Loss and Damage: Roadmap to Relevance for the Warsaw International Mechanism’, Germanwatch (March 2014), at 5, <<http://germanwatch.org/en/download/9002.pdf>>.

from permanent emergency situations,⁶ are among the most difficult to resolve. Further, these losses often undermine one's ability to withstand future stressors, increasing one's vulnerability.⁷

Damage refers to negative impacts for which restoration is possible. Damage to a coastal mangrove forest due to a storm surge would fall under this category.⁸ Presumably, appropriate adaptation efforts or disaster-risk management could mitigate or avoid impacts suffered as a result. Together, loss and damage describe 'the actual and/or potential manifestation of impacts associated with climate change in developing countries that negatively affect human and natural systems.'⁹ Both interact with human systems,¹⁰ exacerbating their pre-existing socio-economic vulnerability. Both can halt or reverse development and 'reinforce cycles of poverty',¹¹ with particularly dire consequences for the least developed.¹²

As a management matter, the failure of sufficient mitigation and the inefficacy of adaptation efforts—assuming communities have had the capacity and political will to apply them—requires a legal and decision-making infrastructure that can address the resulting 'residual risks', when possible, to secure against loss and damage.¹³ There is evidence that the 'countries with the highest levels of residual risk are those that will be the least able to manage loss and damage in the future. They are also the countries that may be in need of the greatest support to manage loss and damage.'¹⁴ For example, whereas small

6 ActionAid, et al., 'Tackling the climate reality: a framework for establishing an international mechanism to address loss and damage at COP19' (Nov. 2013), <http://www.actionaidusa.org/sites/files/actionaid/tackling_the_climate_reality.pdf>.

7 See Koko Warner et al., 'Pushed to the Limit: Evidence of Climate Change-Related Loss and Damage When People Face Constraints and Limits to Adaptation' (Nov. 2013), <<http://ehs.unu.edu/file/get/11480.pdf>> (citing James Morrissey and Anthony Oliver-Smith, Perspectives on Non-Economic Loss and Damage: Understanding values at risk from climate change (Sept. 2013), <<http://www.lossanddamage.net/download/7213.pdf>>).

8 UNFCCC SBI Literature Review, *supra* note 3, at 3. The major difference between damage and loss is the possibility of repair or rebuilding, which is feasible when damage occurs.

9 See *ibid.*

10 *Ibid.*, at 5 (explaining that, for example, sea-level rise and glacial melt result from climate change stimuli, and these shifts in natural systems in turn result in loss and damage in human systems, such as loss of habitable land or freshwater).

11 *Ibid.*

12 *Ibid.*

13 *Ibid.* at 24 ('The countries with the highest levels of residual risk are those that will be the least able to manage loss and damage in the future. They are also the countries that may be in need of the greatest support to manage loss and damage (Warner et al., 2010)').

14 *Ibid.*

islands are experiencing early, and devastating climate impacts today,¹⁵ the prospect of future, increasing loss and damage are especially concerning,¹⁶ particularly as the world pushes beyond the worst assumptions regarding emissions and exposure variables. Nevertheless, these impacts fall through the gaps in the climate governance regimes, particularly those governing adaptation.

2 The Limits of Adaptation

Adaptation has both constraints and limits to its efficacy and relevance. ‘Adaptation constraints’ are factors or circumstances that impede the planning and implementation of effective adaptation measures.¹⁷ Some of the climate-related loss and damage occurs and will continue to occur because there is inadequate support for adaptation. At the individual or household level, these constraints might include lack of information, skills, or resources. At the national or international level, inappropriate governance structures may impede action,¹⁸ and in conjunction with a lack of financial resources present insurmountable hurdles.

The limits of adaptation, however, inhere in the function and purpose of adaptation. Adaptation assumes that the impact is one to which individuals and communities can adapt—that one can accommodate the disturbance.¹⁹ Some disturbances, like desertification, will be too great for even the best-laid adaptation infrastructure. So, while there is no consensus regarding the definitions of loss and damage, there is a shared sense that impacts will occur beyond those that adaptation can address.

The confluence of limits and constraints predominate. In small-island developing states (SIDS), for example, the civil-engineering plans typical of adaptation projects funded by the undercapitalized Adaptation and Green

15 See, e.g., Warner, *supra* note 7, at 73 (explaining that the four case studies presented ‘provide new evidence that people in vulnerable regions are already experiencing loss and damage ... Their livelihood, food security, housing, social capital and cultural values are affected because limits to coping and adaptive capacity are already being surpassed.’).

16 *Ibid.*, at 26 (‘Future loss and damage is potentially of inconceivable magnitude—especially considering non-economic values and the interconnectivity leading to cascading, transnational effects’).

17 See generally Warner, *supra* note 7.

18 *Ibid.*, at 74.

19 *Ibid.*, at 75 (defining adaptation limits as ‘when the magnitude, frequency and scale of climate stressors is beyond the actors’ capacity to deal with them adequately’).

Climate Funds will not suffice.²⁰ At some point, the sea walls of the Maldives and Tuvalu will fail so consistently and completely that communities and countries will need compensation for rehabilitation from losses incurred. Further, for SIDS, the cascading effect of disrupted customary institutions and subsistence lifestyles, which have aided resilience to climate variability in the past, could mean the loss of whole cultures.²¹

Case studies looking specifically at the adequacy of adaptation measures, which communities have effectively executed, have found early signals of these limits.²² A study of the island of Kosrae in the Federated States of Micronesia found that while adaptation measures in response to coastal erosion, such as building sea walls and planting trees at the shoreline, reduced some adverse impacts, these measures were insufficient. Indeed, ninety-two per cent of those who implemented these measures reported that not only were they insufficient, in some cases they resulted in negative side effects.²³ This does not augur well for other island states and vulnerable countries, as Kosrae has higher levels of human economic development than other sites studied.

For the present and forecast climate impacts, the response regime is deeply flawed and will soon become wholly inadequate. Presently, SIDS rely on ad hoc requests for disaster aid when a devastating event occurs.²⁴ These ad hoc

20 See generally Maxine Burkett, 'Climate Reparations', 10 *Melbourne Journal of International Law* 509 (2009).

21 Erika J. Techera, 'Climate Change, Legal Governance and the Pacific Islands: An Overview', in *Climate Change and Indigenous Peoples: The Search for Legal Remedies*, edited by Randall S. Abate and Elizabeth Ann Kronk (Edward Elgar 2013), at 347 (citing the IPCC's acknowledgement of cultural impacts having deeper effects than first appears through the damaging of culturally informed flexibility and resilience).

22 See generally Warner, *supra* note 7.

23 *Ibid.*, at 69. Negative side effects include the very cultural and heritage impacts that loss and damage seeks to effect. 'For example, large rocks from ancient ruins have been used to build seawalls, resulting in severe damage to the cultural heritage of the island.' *Ibid.* These high limits of adaptation were also apparent in Ethiopia (96 per cent) and 'for the other three case studies, the proportion of households experiencing residual loss and damage was lower (69–78 per cent), but still a majority' *Ibid.*, at 73.

24 See Ilona Millar, Catherine Gascoigne, and Elizabeth Caldwell, 'Making Good the Loss: an assessment of the loss and damage mechanism under the UNFCCC process', in *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate*, edited by Michael B. Gerrard and Gregory E. Wannier (Cambridge, UK: Cambridge University Press, 2013), at 438 (explaining that owing to the lack of risk transfer and sharing, developing countries are reliant on financial assistance from donor countries to respond to extreme events); see, e.g., Paul Brown, 'Simultaneous Disasters Batter Pacific Islands',

measures are often slow to arrive. They increase the likelihood of funders and communities introducing maladaptive measures in the wake of disaster recovery. As explained by the IPCC, 'An emphasis on rapidly rebuilding houses, reconstructing infrastructure, and rehabilitating livelihoods often leads to recovering in ways that recreate or even increase existing vulnerabilities, and that preclude longer-term planning and policy changes for enhancing resilience and sustainable development.'²⁵ Loss and damage also falls beyond the purview of other, related UNFCCC institutions.²⁶ The current institutions, such as the Adaptation Committee or the Green Climate Fund,²⁷ neither have a broad-enough mandate nor sufficient resources to manage an expanded mandate. Further, the Green Climate Fund is not an appropriate venue for compensation for losses, which is a possible component of a loss-and-damage regime.²⁸

For all of these reasons, the Alliance of Small Island States (AOSIS) has concluded that the absence of a comprehensive loss-and-damage mechanism for the most vulnerable is a 'gaping hole' in the Framework Convention process.²⁹

Climate Central, 5 July 2013, <www.climatecentral.org/news/simultaneous-disasters-batter-pacific-islands-16171>.

25 IPCC, 2012: Summary for Policymakers, supra note 1, at 10.

26 See Alliance of Small Island States (AOSIS), 'Informal Dialogue on Loss and Damage', Montego Bay, Jamaica (10–12 March 2013), at 6 (on file with author) (citing existing UNFCCC institutions which were seen as having responsibilities that were relevant to loss and damage, including the Conference of Parties, the Adaptation Committee, and the National Adaptation Planning Process).

27 The main adaptation institutions under the Framework Convention also include: the Least Developed Country Expert Group, the National Adaptation Plans, and the Nairobi Work Programme.

28 See 'Green Climate Fund' <www.gcfund.net> (The 'Fund will promote the paradigm shift towards low-emission and climate-resilient development pathways by providing support to developing countries to limit or reduce their greenhouse gas emissions and to adapt to the impacts of climate change, taking into account the needs of those developing countries particularly vulnerable to the adverse effects of climate change.'). As discussed briefly in the next section, a compensation mechanism as part of a loss-and-damage regime, for example, could respond to phenomenon to which communities cannot adapt. In that sense, a loss-and-damage mechanism would operate in tandem with these adaptation-oriented entities.

29 Subsidiary Body on Implementation, Submission of Nauru on behalf of the Alliance of Small Island States, *Views and information on elements to be included in the recommendations on loss and damage in accordance with decision 1/CP.16* (28 September 2012), at 1 (hereinafter UNSBI Nauru Submission). This hole has existed in spite of consistent attempts to fill it. For a full chronology of attempts to advance AOSIS' loss-and-damage

3 Approaches to Loss and Damage

It is becoming clear that beyond the efforts to mitigate and adapt, efforts to insure against disaster risks and compensate for unavoidable impacts³⁰ may also be necessary.³¹ Support for regional or global risk-transfer mechanisms and catastrophe funds have grown more vocal. Risk transfer would allow a country or entity to pay a fee to an insurer or another pool of countries that would then pay for an amount of climate-related loss and damage.³² Diverse stakeholders deem these kinds of insurance mechanism to be essential components of an international loss-and-damage mechanism. They would help rapidly disburse funds after the climate stressor to affected areas—areas that usually suffer greater impacts due to the absence or delay of financial resources for rebuilding or rehabilitating livelihoods.

Risk transfer, however, is not sufficient to address all climate-related loss and damage. Losses from long-term foreseeable risks or residual risks, such as sea-level rise and desertification, will require ‘the accumulation of resources’, according to the United Nations.³³ Those resources ‘may be dealt with using a combination of institutional and governance approaches, management and financial tools’.³⁴ More specifically, many in the developing world have called for a compensation or rehabilitation mechanism that collects and distributes funds to address residual risks. Further, there is a strong sense that the developed world, in particular, has a legal and moral obligation to help rehabilitate and compensate communities for climate-related losses that are unavoidable despite adaptation, or not avoided because of inadequate mitigation. Notwithstanding the controversy regarding obligations, calls for

proposal at the UNFCCC, see AOSIS, Expert Meeting on Loss and Damage (17 May 2013) (on file with author); AOSIS, Informal Dialogue on Loss and Damage, *supra* note 26; AOSIS, Loss and Damage Briefing (2012) (on file with author); AOSIS, Proposal to the AWG-LCA, ‘Multi-Window Mechanism to Address Loss and Damage from Climate Change Impacts’ (2008); Decision 3/CP.18, FCCC/CP/2012/8/Add.1.

30 This latter point is quite controversial. See discussion *infra*.

31 For a way to understand the progression of impacts and residual risks and the appropriate response, see Richard S. J. Tol and Roda Verheyen, ‘State responsibility and compensation for climate change damages—a legal and economic assessment,’ 32 *Energy Policy* (2004), at 1109–1130.

32 UNSBI Nauru Submission, *supra* note 29, at 18–19. The most prominent example is the Caribbean Catastrophe Risk Insurance Facility. See The Caribbean Catastrophe Risk Insurance Facility, <www.ccrif.org> (last visited July 23, 2013).

33 *Ibid.*, at 23.

34 *Ibid.*

these insurance and compensation components persist, and the adaptation infrastructure cannot develop and implement them.

In sum, insurance and compensation, as part of the loss-and-damage discourse, seek to respond to the absence of an established infrastructure to manage the impacts and coordinate an optimal response.

Efforts to elaborate on an appropriate mechanism have gained traction. The next section details significant advances in development of a loss-and-damage mechanism.

4 Historical Development of Loss and Damage under the UNFCCC

Since 1991, loss and damage has been a priority for the Alliance of Small Island States, the forty-four state coalition of small-island and low-lying coastal countries that share environmental and development concerns, particularly about their vulnerability to climate change. A 1991 proposal by AOSIS, referenced in the Framework Convention process and widely supported by developing countries with growing developed-country support,³⁵ conceived of an international mechanism building on early calls for an insurance mechanism for vulnerable island states, through which they can access funds immediately after a disaster. That initial insurance proposal evolved by 2008 into a multi-pronged mechanism that also includes provisions for disaster-risk management and—for climate impacts that are unavoidable and irreversible—compensation and rehabilitation.³⁶

35 See Kim Chipman and Alex Morales, 'Islands Seek Funds for Climate Damage at UN Discussions', Bloomberg.com, 4 December 2012, <www.bloomberg.com/news/2012-12-03/islands-seek-funds-for-climate-damage-at-un-talks.html> (citing EU Climate Commissioner Connie Hedegaard's statement that the twenty-seven member bloc has been supportive of the concept, though there are some reservations on how to proceed). Hedegaard explained, 'We think that it's not really mature enough yet to say this is exactly how we do it. We need some more work on that, but we have signaled very clearly to them that we are open to find a solution on loss and damage.' Ibid. See also Malia Talakai, 'Climate Conversations – Small island states need action on climate loss and damage', Thomson Reuters Foundation, 30 August 2012, <www.trust.org/item/?map=small-island-states-need-action-on-climate-loss-and-damage/>. Given staunch opposition to the proposal in the past, the fact that loss and damage took a central role in the Doha climate negotiations took many by surprise. M. Crocker, 'Loss and Damage Reflects New Era of the Climate Talks', Alliance of Small Island States, 15 April 2013, <<http://aosis.org/loss-and-damage-reflects-new-era-of-the-climate-talks/>>.

36 See Alliance of Small Island States, Proposal to the AWG-LCA, 'Multi-Window Mechanism to Address Loss and Damage from Climate Change Impacts' (2008) (hereinafter AOSIS Multi-Window Mechanism).

Though the well-being of small islands has been a stated concern since the UNFCCC's inception, opposition to mechanisms that might suggest developed-world liability and developing-world access to compensation stalled meaningful negotiation on loss and damage. Indeed, attention to loss and damage at the UNFCCC did not begin in earnest until 2007 with the Bali Action Plan.³⁷ The Plan called for enhanced adaptation efforts, including strategies and means to address loss and damage in developing countries, particularly for those most vulnerable.³⁸ The call reflected the sense behind Article 4.8 of the UNFCCC, which referred to insurance as a tool to meet the specific needs and concerns of developing countries.

In 2010, the Cancun Adaptation Framework noted that approaches to address loss and damage should consider impacts, including sea-level rise, increasing temperatures, and ocean acidification.³⁹ It further recognized the 'need to strengthen international cooperation and expertise in order to understand and reduce loss and damage associated with the adverse effects of climate change, including impacts related to extreme weather events and slow-onset events.'⁴⁰ Decision 1/CP.16 launched, among other things, the Work Programme on Loss and Damage to 'consider including through workshops and expert meetings, as appropriate, approaches to address loss and damage associated with climate change impacts in developing countries that are particularly vulnerable to the adverse effects of climate change.'⁴¹ COP 17 in Durban elaborated on the work programme's goals and its role in the Framework Convention.

Decision 3/CP.18 emerged from the COP 18 meetings in Doha and represented a significant advance in the loss-and-damage discussion. It recognized the importance of the work on loss and damage, including the need to build 'comprehensive climate risk management approaches.'⁴² It also called for advanced understanding of non-economic loss and damage, patterns of migration and displacement, and identification and development of approaches to rehabilitation following climate-related loss and damage.⁴³ Further, the so-called Doha Gateway mandated the formation of 'institutional

37 Decision 1/CP.13.

38 Decision 1/CP.13 1(c)(iii). See also 1(c)(i), 1(c)(ii), 1(c)(iii) and 1(c)(v) on adaptation, as well as paragraphs 1(e)(i), 1(e)(ii), 1(e)(iii), 1(e)(iv), 1(e)(v), and 1(e)(vi) on finance and investment (cited in AOSIS Multi-Window Mechanism, *supra* note 36).

39 Decision 1/CP.16; see also UNFCCC SBI Literature Review, *supra* note 3, at 23.

40 Decision 1/CP.16, at para. 25.

41 *Ibid.*, at para. 26.

42 Decision 3/CP.18, FCCC/CP/2012/8/Add.1

43 *Ibid.*

arrangements, such as an international mechanism, including its functions and modalities' for the next COP.⁴⁴ Given the staunch opposition that the loss-and-damage proposal received in years prior, that it assumed a central role in the Doha climate negotiations took many by surprise.⁴⁵ Although the proposal suffered setbacks, it remained firmly on the Framework Convention's agenda.

Actions during COP 19 in Warsaw institutionalized loss and damage within the international climate-governance regime. COP 19 established the Warsaw International Mechanism (WIM) for Loss and Damage under the Cancun Adaptation Framework.⁴⁶

This occurred amidst rancorous meetings during the two-week conference. Indeed, the discussion was so polarizing that the developing country G-77 bloc walked out of discussions during the second week of meetings. Bilateral discussions later in the week resuscitated the talks, achieving a compromise that resulted in the new mechanism. Importantly, while the decision legitimized the exploration of responses beyond mitigation and adaptation, the mechanism does not promise compensation for climate-related loss and damage—a key feature for developing countries but a 'red line' for developed countries, particularly the United States.

The WIM consists of a more measured, if rather conservative, approach to developing a loss-and-damage infrastructure. Specifically, to address loss and damage from both weather extremes and slow-onset events, the WIM, under the direction of the Executive Committee of the WIM, will undertake the following functions:

- (a) Enhancing knowledge and understanding of comprehensive risk management approaches to address loss and damage associated with the adverse effects of climate change, including slow onset impacts ...
- (b) Strengthening dialogues, coordination, coherence, and synergies among relevant stake-holders [and] (c) Enhancing action and support, including finance, technology and capacity building to address loss and damage.

44 Ibid. Although this mandate suffered setbacks in subsequent international meetings in Bonn, a loss-and-damage mechanism remains a key deliverable. See Laurie Goering, 'Africa: Vulnerable States Decry Slow Progress at Bonn Climate Talks', *allAfrica*, 17 June 2013, <<http://allafrica.com/stories/201306181411.html>>.

45 M. Crocker, *supra* note 35.

46 Decision 2/CP.19.

5 The Climate Compensation Conundrum and Other Nagging Concerns

The robust, if contentious, loss-and-damage debate, and the institutional progress it has made, reflect the acknowledgment and acceptance of two critical themes: the constraints and limits of adaptation and the indispensable push for more aggressive mitigation, which will stave off or avoid some of the worst extreme and slow-onset climate-related events. The debate has not, however, resolved the more troublesome issue of compensation.

While the parties generally fall into two camps, crudely defined by developing world ‘demands’ versus developed world ‘obstinacy’, the positions are more nuanced. As Saleemul Huq explains, ‘Developed countries hear that phrase, “loss and damage,” and they think of an international fund for compensation and liability—taboo subjects for them. There’s strong push back. The US has said there is no way they are going to do it.’⁴⁷ The US approach contrasts, however, with other more balanced developed-country responses. UK Energy Secretary Ed Davey has stated, ‘We should be cautious about saying we are strictly liable for some particular event or some particular change. That does not mean we should not work with others to help some of the very poorest adapt to the impacts of climate change.’⁴⁸ Similarly, on the part of developing countries, participants in the COP 19 negotiations decried the reduction of the loss-and-damage discussion to a ‘determin[ation] of liability’ and a pursuit of ‘financial compensation.’⁴⁹ This complaint was in response to the both developed-world parties that would not engage on the issue and developing-world voices that decried the WIM, which they viewed as incomplete, absent a compensation component.

While liability and compensation are critical components of loss and damage, overemphasis on compensation often trivializes the complexity of the loss-and-damage discussion and diminishes the advances made in other elements of the negotiations, according to developing world negotiators. Framing loss and damage exclusively around compensation also distracts from

47 Chipman and Morales, *supra* note 35 (quoting Saleemul Huq, a Bangladeshi scientist based at London’s International Institute for Environment and Development).

48 *Ibid.* Though Davey uses ‘adaptation’ here, in the context of the exchange, loss and damage is more appropriate.

49 Juan P. Hoffmaister et al., ‘Warsaw International Mechanism for loss and damage: Moving from polarizing discussions towards addressing the emerging challenges faced by developing countries’, *Loss and Damage in Vulnerable Countries Initiative*, 6 January 2014, <www.lossanddamage.net/4950>.

the very real and novel legal and governance challenges of, for example, loss of statehood and the associated challenges with migration and displacement, among other concerns.⁵⁰ Money, in short, may not address the ‘actual underlying needs’ of vulnerable communities and developing countries.⁵¹

That said, it is difficult to conceive of an adequate resolution of the ‘loss’ element of loss and damage without financial mechanisms for compensation. Of course, sound management regimes are essential—especially if distribution of compensation is involved. There are, however, models for effectively disbursing these funds⁵² to facilitate effective responses to residual, and disproportionately distributed, risks. The mechanics of this scheme are not insurmountable—at least in theory.

Confounding questions remain. Given the political and economic climate, how would the international community fund compensation? How would the WIM fairly and sensibly delimit the recipients of compensation? How would it respond to circumstances in which a country or community has contributed to its heightened vulnerability through poor decision-making, for example? These questions are not limited to the compensation question. Indeed, they animate current discussions around adaptation funding as well as the emerging, yet underdeveloped, risk-transfer infrastructure. These are the issues that inhere in the climate circumstances in which the global community finds itself—hence, the turbulent nature of the international negotiations. Through these negotiations, and the development of loss and damage, it is apparent that the devil resides not only in the details, but in the climate crisis itself.

50 Ibid.

51 Ibid.

52 See Maxine Burkett, ‘Rehabilitation: A Proposal for a Climate Compensation Mechanism for Small Island States’, *Santa Clara Journal of International Law* (forthcoming 2014).