READING BETWEEN THE RED LINES:
LOSS AND DAMAGE AND THE PARIS OUTCOME

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For the least developed countries and small island states, excluding a stand-alone provision for loss and damage in the Paris Agreement constituted a red line, one that the negotiating groups refused to cross. For the developed world—and the United States in particular—any possible pathway to liability and compensation a loss and damage provision might introduce was an equally bright and impassable red line. In the end, negotiators remained steadfast. Both lines appeared more or less unscathed and compromise language emerged from the Paris Outcome.1 This article describes the process leading up to the Outcome, the language included in the loss and damage provision and its implications, and identifies lingering questions that remain. In particular, the absence of a clear funding stream, the treatment of climate-related displacement, and the outstanding questions regarding compensation for climate impacts are not completely resolved. These are, perhaps, the most compelling, confounding, and impactful elements of the loss and damage debate thus far. Based on the conclusion of the Paris COP, they might continue to animate the loss and damage discussion for the foreseeable future.

Keywords: loss and damage, migration, climate finance

1. The Multi-Decade Road to Paris - in Brief

1.1 Understanding Loss and Damage

Loss and damage proposals become more imperative as our multi-decade attempts to reduce emissions and support adaptation continue to founder. Though the UNFCCC does not identify a settled definition of the compound term, ‘negative effects of climate variability and climate change that people have not been able to cope with or adapt to’ serves as a working definition.2 Loss and damage proposals attempt to address the impacts of climate change that are not avoided or unavoidable.3 In sum, it describes the impacts of slow-onset events (such as ocean acidification, desertification, and sea level rise) and non-economic losses (such as the loss of cultural heritage and displacement), among other things. Limited funding, technology, and/or institutional capacity may also result in loss and damage, as those impacts are not avoided through adaptation efforts that might be available to wealthier, better-equipped, or better insured communities.4 Further, the losses and damages experienced by the most vulnerable countries constitute

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1 The Paris Outcome describes the COP Decision Text and its Annex, the draft Paris Agreement, which countries are expected to ratify on April 22, 2016.


3 For a general discussion of varying definitions of ‘loss and damage’ and the limits of adaptation, see Maxine Burkett, ‘Loss and Damage’, 4 Climate Law 119 (2014).

significant percentages of their GDP and introduce significant setbacks in development.\textsuperscript{5} Loss and damage is, in short, evidence of the collateral effects of inadequate or failed mitigation and the limits of adaptation.

Core to appeals for loss and damage are recognition of ethical and legal obligations that elements of a mechanism would help to advance. As I have explained elsewhere, loss and damage, and particularly its reparative function, would assist vulnerable countries to cope with disasters for which they are least responsible.\textsuperscript{6} While loss and damage provisions regarding risk management and risk transfer could address disaster prevention and the need for rapid disbursement of funds, the appeals for compensation and rehabilitation reflect a strong sense among those most vulnerable that emerging economies and the developed world has a legal and moral obligation to assist in their survival. Arguments regarding ethical obligations flow from their disproportionately low current and historical contribution to the crisis—particularly relative to the small handful that constitute the majority of current and historical emissions. Arguments regarding legal obligations stem from provisions within the Framework Convention and follow-on protocols\textsuperscript{7} as well as existing international law principles such as polluter pays and common but differentiated responsibilities and respective capabilities.\textsuperscript{8}

Because of their unique vulnerability to climate change and their limited wealth and adaptive capacity, countries like the small island developing states have been particularly vocal advocates for a strong and coherent loss and damage mechanism under the Framework Convention.\textsuperscript{9} Specifically, the Alliance of Small Island States (AOSIS) emerged as the negotiating group to introduce early versions of a loss and damage regime as many as 25 years ago. Initially a proposal seeking insurance-related action, the AOSIS proposal evolved into a three-part mechanism seeking: (i) an insurance component to help vulnerable countries share and transfer risk from increasingly severe weather events; (ii) a rehabilitation and compensatory component to address progressive negative impacts of climate change for which measurable loss and damage is unavoidable, including slow-onset events and unprecedented phenomena like climate-induced migration; and, (iii) a risk management component to promote risk assessment and management, as well as


\textsuperscript{7} Ilona Millar, Catherine Gascoigne, and Elizabeth Caldwell, ‘Making Good the Loss,’ in Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate, edited by Michael B. Gerrard and Gregory Wannier (Cambridge, UK: Cambridge University Press, 2013) at 438 (citing UNFCCC, Art. 4(8), Kyoto Protocol, Art. 3(14)).

\textsuperscript{8} Other guiding principles include principles of equity and intergenerational equity and international solidarity, among others. See Alliance of Small Island States, Proposal to the AWG-LCA, ‘Multi-Window Mechanism to Address Loss and Damage from Climate Change Impacts’ (2008) (on file with author). For further discussion of international law principles relevant to the compensation component, see discussion infra __.

\textsuperscript{9} See Maxine Burkett, ‘Climate Reparations’, 10 Melbourne J. Int’l L. 509 (2009) (noting that at the 1992 UN Conference on Environment and Development, Small Island Developing States (‘SIDS’) were recognised as a special case for both environment and development. Their ‘small size, limited resources, geographic dispersion, and isolation from [international] markets’ make them vulnerable relative to current development markers).
facilitate and inform the other components of proposal. AOSIS understood the three components to play ‘different and complementary roles’ and they comprised an ‘integrated’ and ‘interdependent approach’ to effective loss and damage governance.

AOSIS initially viewed its calls of loss and damage as a kind of adaptation assistance, which adaptation-related funding might sensibly support. Over time, however, the inadequacy of adaptation—in theory and in practice—to support loss and damage-related impacts and proposals became clear. The desire to distinguish definitively loss and damage from the adaptation regime was a key negotiating matter for the Paris COP and its lead up.

1.2 The Warsaw International Mechanism and the COP21 Buildup

AOSIS’s appeals for loss and damage continued unabated with notable advances in the last five years. The 2010 Cancun Adaptation Framework built on important language in the Bali Action Plan regarding enhanced adaptation efforts, including strategies and means to address loss and damage. Cancun’s Decision 1/CP.16 launched the Work Programme on Loss and Damage, on which the Durban COP elaborated. The Doha Decision 3/CP.18 was a significant advance as it recognized the need to build on ‘comprehensive climate risk management approaches and called for advanced understanding of non-economic loss and damage, patterns of migration and displacement, and identification and development of approaches to rehabilitation.’ The Doha decision mandated the formation of an institutional arrangement to conduct the above. From that mandate, the Warsaw International Mechanism emerged one year later.

Until the Warsaw International Mechanism (WIM), loss and damage fell beyond the purview of UNFCCC institutions and funding mechanisms. The WIM Decision 2/CP.19 laid out an approach to developing a loss and damage infrastructure. It charged the WIM Executive Committee with enhancing knowledge and understanding of comprehensive risk management approaches to address loss and damage; strengthening dialogues, coordination, coherence, and synergies among relevant stakeholders relative to loss and damage; and, enhancing action and support. A two-year workplan to implement the WIM’s mandate was approved at the COP20 in 2014 and, of note, included an action area on migration, displacement, and mobility. To be sure, the Warsaw International Mechanism (WIM) was an interim measure. It did not have any long-term institutional grounding; in other words, it was a mechanism with a confined period of operation, with the possibility of renewal. Further, it did not identify a clear funding stream. Also noteworthy, despite efforts to have the loss and damage provision reflect the ‘beyond adaptation’ impacts it is meant to address, the WIM was not created as a stand alone mechanism, but rather a mechanism under the Cancun Adaptation Framework.

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11 Alliance of Small Island States, Proposal to the AWG-LCA, ‘Multi-Window Mechanism to Address Loss and Damage from Climate Change Impacts’ (2008) (on file with author).
12 Alliance of Small Island States, Proposal to the AWG-LCA, ‘Multi-Window Mechanism to Address Loss and Damage from Climate Change Impacts’ (2008) (on file with author).
15 UNFCCC, Decision 2/CP.20, ‘Warsaw International Mechanism for Loss and Damage associated’, FCCC/CP/2014/10/Add.2.
It was, however, deemed a qualified victory for its proponents. Concerns regarding the rehabilitation and compensation component of the proposed multi-window mechanisms reflected ongoing and strident opposition to the possibility that proponents might weave liability for climate impacts into the Framework Convention. While the EU espoused more nuanced approaches to loss and damage, remaining open to its exclusion yet mindful of its implications for liability, the United States remained ardently opposed to the inclusion of loss and damage wholesale. These postures portended the deep conflicts in the lead up to the Paris negotiations, particularly regarding liability and compensation. The United States’ position grew more nuanced; though, like the Warsaw meetings, the Paris meetings would see late progress on loss and damage with key components left on the cutting room floor.

2. The Paris Outcome – Article 8 & the Decision Text

On the road to Paris the most vulnerable nations, the small island developing states, in particular, identified a handful of issues that the agreement in Paris must resolve—chief among them was inclusion of a stand-alone loss and damage mechanism, distinct from adaptation. In fact, its inclusion served as a ‘red line’ for AOSIS—without which the negotiating group would not accede to the Agreement. Liability and compensation was a red line for developed country parties as well. Fear of unlimited liability as part and parcel of a stand-alone agreement represented one of the thorniest issues negotiators faced, rendering loss and damage among the disputes with the greatest potential to dash hopes for a meaningful and binding agreement in Paris.

It is difficult to overstare the degree to which loss and damage remained a wedge issue leading up to and over the course of the two-week negotiations at Le Bourget. Loss and Damage ‘Die-Ins’ provided a counter-balance to the sometimes sympathetic yet steadfast rhetoric of the Obama Administration—which noted the President’s own island roots yet objected to potential legal remedies and, earlier in the negotiations, related demands to keep temperature increases to below 1.5°C. The latter, incidentally, would

19 See Meinhard Doelle, ‘The Paris Agreement: Historic Breakthrough or High Stakes Experiment?’, Forthcoming, Special Issue: 6(1-2) Climate Law (2016) (noting that the U.S and Australia sought keep loss and damage out of the agreement altogether, or at least confining it to the narrow WIM mandate).
20 See e.g., John Upton, ‘Paris Pact May Hinge on “Loss and Damage” Dispute’, Climate Central, Nov. 11, 2015, at http://www.climatecentral.org/news/dispute-threatens-paris-climate-agreement-19666 (last visited 20 January 2016). As Upton notes, this fear dissipated some as a published draft Agreement included more conciliatory language, including language that would explicitly limit liability claims under the Paris Agreement.
inversely and positively impact the severity of climate-related loss and damage if achieved.\(^{23}\)

The preceding negotiating drafts reflected this schizophrenia in the negotiations.\(^{24}\) Though earlier drafts included options to make no reference to loss and damage at all, during the COP21 negotiations the United States indicated its openness to including it in the Agreement, clearing a path for its inclusion—as long as it did not expose wealthy countries to compensation claims.\(^{25}\) Loss and damage advocates, and island negotiators in particular, were mindful of wealthy country concerns regarding liability and measured compromise language to address it.\(^{26}\) Article 8 of the draft Paris Agreement and paragraphs 48 to 52 of the accompanying Decision text—altogether—are the product of that compromise.

Under the Agreement, the Conference of Parties, which can enhance and strengthen the WIM in order to address the adverse effects of loss and damage, will guide and exercise authority over the mechanism. The Decision text includes important and additional clarifying language. With respect to migration, notably, the Executive Committee will establish a task force to ‘complement, draw upon the work of and involve, as appropriate existing bodies and expert groups … to develop recommendations for integrated approaches to avert, minimize and address displacement related to the adverse impacts of climate change.’\(^{27}\) This provision sharply contrasts earlier drafts of the proposed Agreement that vacillated between a more fully articulated proposal for a climate change displacement facility and no mention of climate-related displacement at all. With regard to the contentious issue of liability and compensation, the Decision Text Paragraph 52 states concisely: ‘Article 8 of the Agreement [on Loss and Damage] does not involve or provide a basis for any liability or compensation.’\(^{28}\) This language—as well as what the Outcome does not include—met the needs for negotiators eager to pass a consensus agreement. It leaves, however, a number of key issues unresolved.

3. Lingering Questions
3.1 The Cutting Room Floor
The loss and damage provisions are notable in that they affirm the Parties’ commitment to loss and damage and recognize adaptation’s constraints and the failures of mitigation

\(^{23}\) It ultimately was achieved. See UNFCCC, ‘Draft Paris Agreement’, Draft decision /CP.21 FCCC/CP/2015/L.9, at Art. 2, available at <http://unfccc.int/resource/docs/2015/cop21/eng/l09.pdf>. Whether or not this is even feasible given the current state of the climate remains unclear. Indeed, if optimally successful, the loss and damage mechanism might incite the largest emitters to redouble their efforts on mitigation as well as finance—which in combination will, in small part, reduce the need for more extensive loss and damage responses.

\(^{24}\) See e.g., http://unfccc.int/files/bodies/awg/application/pdf/adp2-10_e_04sep2015t1900_wds.pdf; UNFCCC, ‘Draft Paris Agreement’, Draft decision /CP.21 FCCC/CP/2015/L.9;


efforts to date. Further, they are now outside of the adaptation infrastructure, ostensibly allowing for discrete management and financing. Loss and damage requires further elaboration, however, to be successful. Among the key details that the Paris Outcome does not resolve is the funding for loss and damage, in addition to the displacement and liability concerns discussed in greater detail below.

With regard to funding, Article 8 does not include any language on how the Conference of Parties will finance the cooperative and facilitative actions outlined. Further, loss and damage is not included in Article 9, which provides financial resources to assist developing countries with mitigation and adaption only. Earlier drafts included this undoubtedly controversial statement of financial support. The December 5th draft, for example, still included support through a Financial Mechanism of the Convention in its loss and damage article. The article on finance, and related draft Decision text, also mentioned the provision of adequate support for loss and damage, with explicit reference to supporting the development and implementation of loss and damage strategies. Of course, this was bracketed language, indicating that, at best, it was ripe for negotiation.

Like adaptation, loss and damage will require a redoubled effort to buoy the institutional advances it made in the negotiations and the final text of the COP Decision and draft Agreement.

3.2 The Task Force for Climate Change Displacement

Over the year leading up to the Paris meetings, climate-related displacement was prominent in draft texts, with the most detailed management approach laid out under the UNFCCC to-date. Earlier drafts of the Paris Agreement included first-time elaboration of a ‘climate change displacement coordination facility’ under the proposed loss and damage provisions. The facility would assist with coordinated efforts to address the needs of those displaced by climate-related extreme events and plan for organized relocation. Australia opposed this facility, decrying it as a less effective and efficient way to advance meaningful international action vis-à-vis migration and displacement. Other formidable parties—including the U.S., the U.K., and France—were open to its inclusion, which is, perhaps, why it reemerged as a clear component of the December 10th draft Agreement after a brief absence from the immediately preceding drafts.

Ultimately, only a task force on climate change displacement resides in the paragraph 50 of the Decision Text, indicating displacement’s relegation from the priorities the Agreement does include. It also indicates, perhaps, an additional kind of compromise—this time between developed world parties in opposition. This may portend future disagreement on optimal global management of climate-related migration.

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32 [discuss alternate terms used for ccrm]
33 See e.g., UNFCCC, Draft Paris Agreement, FCCC/ADP/2015/L.6, 5 December 2015.
displacement, and mobility. If tackled in earnest, however, the task force’s efforts may activate critically important work that was already a stated action area for the WIM\(^{35}\) but has been, on balance, advanced further by other UN agencies and NGOs thus far.\(^{36}\) There is a core coordination role the task force could play. Further, among the many issues that the task force could advance—and, perhaps, resolve—are how best to organize migration and planned relocation, how to fund the planning for and movement of individuals and communities, how to generate and distribute those funds over time, and how to do all of the above in a principled manner.\(^{37}\)

### 3.3 The Liability and Compensation Row – Death or Redux

Compensation has been the wildly contentious ‘C’ word since the heated negotiations leading up to the COP19 Warsaw meetings. It was similarly contentious, and potentially derailing, at the Paris meetings as the most vulnerable pressed for inclusion of loss and damage in the Agreement.\(^{38}\) While compensation is just one of the three components of the AOSIS loss and damage proposal, it has outsized significance because of concerns that it could lead to developed world liability for the impacts of current and historic emissions. Proponents of loss and damage were not uniform in their insistence on compensation. With best-case emissions scenarios and the extreme weather events already experienced and further forecast, however, many loss and damage proponents do not wish to foreclose their options to pursue compensation for unavoidable and uninsurable climate change impacts.\(^{39}\) Yet, to advance the inclusion of a loss and damage provision in the Agreement, the Decision Text explicitly excludes liability and compensation claims based on Article 8.

The final language on liability claims results from earlier—and telling—iterations on the nature of that exclusion. For example, the December 10\(^{th}\) draft of the Agreement contained an option to include loss and damage but ‘in a manner that does not involve or provide a basis for liability or compensation nor prejudice existing rights under international law.’\(^{40}\) The exclusion is now firmly placed in Paragraph 52 of the Decision

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Text, though absent the language regarding existing rights. This move and modification may, on balance, signal a win for loss and damage advocates.41

More than any other element of the Decision Text, however, this paragraph begs the question of the COP Decisions’ legal significance. The relative weight of the Decision Text, its relationship to the Agreement, and the binding nature of the Agreement itself is relevant to a whole host of issues raised during the negotiations. This was of particular concern for the COP21, as delegates, consistent with the Durban mandate, sought to produce a binding agreement in Paris. The legally binding nature of the Agreement is outside of the scope of this article;42 however, to understand the reach of Paragraph 52, noting the function of the Decision Text seems imperative.43 In short, COP decisions are not legally binding unless there is a ‘hook’ in the Framework Convention that gives it legal force.44 There is no identifiable provision in the UNFCCC that would lend legal force to the prohibition of claims for compensation based on Article 8 of the Agreement.

Further, regardless of nature of the Decision text, many commentators and delegates note that there are existing avenues for liability and compensation under international law that Paragraph 52 cannot foreclose.45 The no-harm and polluter pays principles, for example, are cornerstones of international environmental law, as are prohibitions against and compensation for transboundary harm.46 All of these principles,

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43 See Daniel Bodansky, ‘Legally binding versus non-legally binding instruments’, in Towards a Workable and Effective Climate Regime, edited by Scott Barrett Carlo Carraro and Jaime de Melo, (London: CEPR Press and Ferdi, 2015). Explaining that an agreement in legally binding terms signals stronger commitment, according to Daniel Bodansky, though political agreements can have greater influence on country behavior.
46 See UNFCCC, UNFCCC Preamble, FCCC/INFORMAL/84; see also Report of the International Law Commission, 53rd Session, ‘Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with Commentary, 2001, A/56/10; Christopher Schwarte and Will Frank, ‘The International Law Association’s Legal Principles on Climate Change and Climate Liability Under Public International
and others proposed, are relevant to the circumstances of global climate change. Nonetheless, some developing country delegates made their concerns regarding the spirit and text of Paragraph 52 clear. Nicaragua and Bolivia, in particular, bemoaned the presence of language attempting to delimit rights to compensation and access to ‘climate justice.’ Nicaragua’s dissenting view was not given at the final plenary, suggesting that this and related issues might reemerge in the near term.

Based on the above, the ability for Parties to pursue liability claims through other avenues or by revisiting the COP21 Decision does not appear to be at stake. What is at stake, however, is the trust and solidarity-building between negotiating blocs that the loss and damage compromises may have inaugurated. Article 8 and accompanying paragraphs were the product of hard-fought conciliation between the highest emitters and the most vulnerable, with least developed countries and small island states deferring complete satisfaction with the text for global consensus in Paris. While there is nothing that is legally foreclosing future discussions of liability and compensation, there may be substantial political ramifications that can impede follow-on decision-making.

4. Conclusion

With COP21 negotiations well in the rearview, the enormity of the task at hand is abundantly clear. The extreme events facing the most exposed and least equipped to manage them dwarf the notable successes in Paris. Achieving a stand-alone loss and damage provision was one of those successes, to be sure, though it was just a foothold. The future action it enables will determine its actual significance. In the meantime, there are real housekeeping details to larger definitional challenges that the WIM will need to tackle now with its broadened and weightier mandate—a mandate that came on the heels of noted concern with its limited progress on implementation of the two-year workplan. The definitional challenges involve the very attribution of an extreme weather event to past anthropogenic emissions, a foundational determination for loss and damage.

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50 See Friederike Otto, Rachel James, and Myles Allen, ‘The science of attributing extreme weather events and its potential contribution to assessing loss and damage associated with climate change impacts,’ Environmental Change Institute, <https://www.eci.ox.ac.uk>; Christina Huggel, Dáithí Stone, Maximilian Auffhammer and Gerrit Hansen, ‘Loss and damage attribution,’ 3 Nature Climate Change 694 (2013), at 696 (noting that despite the level of uncertainty in future climatic conditions, a risk attribution framework...
The small island states are clear-eyed about the work needed to advance loss and damage and the WIM. They also justifiably paused to celebrate the fortitude, coupled with diplomacy, that resulted in an ‘historic agreement.’ Indeed, moving forward, the issues unresolved—those that continue to occupy the space between the two red lines—will require a similar mix of fortitude and diplomacy.

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