

CLIMATE CHANGE LOSS AND DAMAGE LITIGATION: INFEASIBLE OR A USEFUL SHADOW?

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INTRODUCTION

Climate change is a heated issue. For some, it is *the* domestic policy issue of a generation. For others, it is a hoax, overblown, or just one factor among many affecting domestic policy. Internationally, climate change is a complex annual negotiation between virtually every nation. Some nations already face the impacts of climate change. Others contend with enormous economic and fiscal barriers in adapting infrastructure necessary to mitigate climate change. Decades of negotiations have produced effectively zero substantive change. Nations already affected by climate change have failed in negotiating for substantive relief. Meanwhile, developed nations have succeeded in protecting themselves from any existential economic or fiscal burden. No international climate

change treaty enforces any binding burden to reduce emissions or provide relief to nations already affected by climate change. Perhaps international litigation is necessary to incentivize developed nations to mitigate climate change. The threat of international litigation and the resulting political fallout of an unfavorable disposition from the International Court of Justice may be the catalyst for substantive climate change mitigation and relief measures.

To understand the potential consequences of international climate change litigation, a brief history of international climate change negotiations is necessary. This history will highlight the key players: developed nations and vulnerable nations—the United States and the Association of Small Island Nations, respectively. Further, it will highlight the Paris Agreement and the Warsaw International Mechanism, which compose the current framework addressing climate change loss and damage.

In analyzing the potential merits of international climate change litigation, it is necessary to understand the nature of climate change related loss and damage. Specifically, one should understand how loss and damage in a traditional sense differs from climate change related loss and damage. To supplement this difference, one should understand the current international environmentally related loss and damage laws. Analysis on the viability of international litigation concludes with a discussion about the potential role of the International Court of Justice. This paper concludes by discussing the merits of pursuing international litigation in the context of annual climate change negotiations.

I. BACKGROUND

Despite yearly conferences on climate change mitigation and relief between virtually all nations, there has been little substantive progress in making binding and effective regulations. The same substantive concerns discussed today have remained largely unchanged since serious negotiations began in 1992 at the United Nations Framework Convention on Climate Change (UNFCCC).¹ Malta first introduced climate change concerns to the U.N. General Assembly in 1988.² The

¹ United Nations Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc. No. 102-38, 1771 U.N.T.S. 107. [Hereinafter UNFCCC].

² Daniel Bodansky, *The United Nations Framework Convention on Climate Change: A Commentary*, 18 YALE J. INT'L L. 451, 465 (1993).

Maltese framed the issue as a “common heritage of mankind” like the moon; however, most nations disapproved and instead climate change is referred to as the “common concern of mankind.”³ The international squabble over “heritage” versus “concern” foreshadows the following decades of international climate change negotiations. Negotiations truly began with the creation of the Intergovernmental Panel on Climate Change (IPCC),⁴ which urged nations to give climate change focus.⁵

As the IPCC continued to meet, differences in perspective and disposition increasingly emerged.⁶ One difference was the North-South divide where developed countries, the “North,” were concerned about climate change while developing countries, the “South,” were concerned about poverty and economic development.⁷ Additionally, oil states argued for a slow approach to climate change mitigation and questioned climate science.⁸ Small Island nations formed the Alliance of Small Island Nations (AOSIS) and argued for an aggressive response to climate change.⁹ Nations also differed on the scope of international discussions. Some nations called for a broad “law of the atmosphere.”¹⁰ The creation of a binding law of the atmosphere might be ripe for international litigation. However, this broad conception was rejected, and instead nations limited the scope to focus on mitigating climate change.¹¹ The decades of negotiations that followed failed to produce any binding mitigation requirements.

A. THE UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE

The IPCC created the United Nations Framework Convention on Climate Change (UNFCCC). Competing special interests between nations plagued the IPCC. For example, developing nations refused to mitigate climate change until developed nations provided economic aid.¹² Thus, the

³ *Id.*

⁴ *Id.* at 464.

⁵ *Id.* at 465.

⁶ *See id.* at 466–74.

⁷ *Id.* at 463.

⁸ *Id.* at 471.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 473–74.

¹² *See id.* at 499.

UNFCCC effectively offered a substantively weak “framework” without binding mitigation obligations like reducing greenhouse gas emissions.¹³

Therefore, the goal of the UNFCCC is unclear. “Words were debated and selected as much for their political as for their legal significance. Indeed, proposed formulations often took on a talismanic quality, only distantly connected to the actual meaning of the words.”¹⁴ Compromise rather than substance was necessary to create the new framework. “Many of the [UNFCCC’s] provisions do not attempt to resolve differences so much as paper them over, either through formulations . . . that were deliberately ambiguous, or that deferred issues. . . .”¹⁵ The name of the UNFCCC itself reveals that substance was not the goal. “The debate between the framework and substantive approaches persisted right up to the end . . . [and] was ultimately agreed [as] the U. N. *Framework* Convention on Climate Change.”¹⁶

Ultimately, the UNFCCC did not require any enforceable emissions standards,¹⁷ but it did create commitments for providing scientific reporting and reviews of greenhouse gas levels with financial and technical support to aid implementation.¹⁸ Any binding mitigation requirement was substituted for a commitment to not “defeat the stabilization objective,”¹⁹ or in other words, to promise to not make climate change worse. Further, the United States “successfully pressed for several changes . . . to reduce its potential legal implications.”²⁰ However, the UNFCCC did provide for regular negotiations between all parties called the Conference of the Parties (COPs). COPs have occurred essentially annually since the adoption of the UNFCCC. The Kyoto Protocol was the result of a COP in Kyoto and was the next big step in international climate change negotiations.²¹ The Kyoto Protocol was more aggressive than the original UNFCCC agreement and uncharacteristically required nations to meet emissions reduction targets over a five-year

¹³ See *id.* at 499–517.

¹⁴ *Id.* at 492.

¹⁵ *Id.* at 493.

¹⁶ *Id.* at 496 (emphasis in original).

¹⁷ *Id.* at 516.

¹⁸ *Id.* at 517.

¹⁹ *Id.* at 500.

²⁰ *Id.* at 502.

²¹ See Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 2303 U.N.T.S. 162.

period.²² However, many nations were uneasy or unwilling to accept this approach. The United States never ratified the treaty and Canada seemed “unwilling to continue down the Kyoto path.”²³ The nations willing to accept these targets represented less than 30 percent of global greenhouse gas emissions.²⁴ After Kyoto, in COPs like Copenhagen²⁵ and Cancun²⁶ a permissive approach formed allowing countries to set their own emissions reduction goals.²⁷

B. THE WORLD VERSUS AOSIS

The Alliance of Small Island Nations (AOSIS) formed in 1990 at the Second World Climate Conference (SWCC).²⁸ AOSIS was established in response to other nations negotiating for economic development rather than for climate change mitigation.²⁹ The Alliance is comprised of thirty-seven nations.³⁰ Their primary concern is rising sea levels and other adverse climate change effects.³¹ They argue for both substantive climate change mitigation from all nations and for economic relief to vulnerable nations.³² Such relief may comprise of adaptation costs, which fund new infrastructure for vulnerable nations, or comprise of compensation for any climate change related loss and damage.

During the original UNFCCC agreement negotiations, AOSIS advocated for strong climate stabilization targets and other institutional mechanisms.³³ While the AOSIS nations were a stronger political force together, they lacked the necessary political influence to achieve their

²² Compare *id.* art. 3(2) with *id.* art. 12(10).

²³ Daniel Bodansky, *A Tale of Two Architectures: The Once and Future U.N. Climate Change Regime*, 43 ARIZ. ST. L.J. 697, 697 (2011).

²⁴ *Id.* at 703.

²⁵ Conference of the Parties of the United Nations Framework Convention on Climate Change, *Rep. of the Conference of the Parties on Its Fifteenth Session, Held in Copenhagen from 7 to 19 December 2009*, U.N. Doc. FCCC/CP/2009/11/Add.1 (Mar. 30, 2010).

²⁶ See Conference of the Parties of the United Nations Framework Convention on Climate Change, *Sixteenth Session, Cancun, Mexico, Nov. 29-Dec. 10, 2010*, U.N. Doc. FCCC/CP/2010/7.

²⁷ Bodansky, *supra* note 23, at 705.

²⁸ Bodansky, *supra* note 2, at 469–71.

²⁹ *Id.* at 469, 481.

³⁰ *Id.* at 471.

³¹ *Id.*

³² *Id.* at 482.

³³ *Id.* at 481.

goals.³⁴ The original UNFCCC agreement ultimately divided nations according to levels of economic development despite AOSIS lobbying for an additional category for nations with special vulnerabilities.³⁵

AOSIS also lobbied for the creation of an insurance fund which would cover damages related to rising sea levels.³⁶ While the original UNFCCC agreement discusses an insurance fund, developed nations negotiated away any substantive force.³⁷ The UNFCCC text reads “In the implementation of the commitments in this Article, the Parties shall give full consideration to what actions are necessary under the Convention, including actions related to . . . insurance . . . to meet the specific needs and concerns of . . . (a) Small island countries; (b) Countries with low-lying coastal area”³⁸ Despite the inclusion of the term “insurance” in Article 4(8), the insurance plan proposed by AOSIS was declined.³⁹ AOSIS proposed an insurance fund specifically related to the level the sea rose, and a condition that it would only be established once the sea rose to an agreed upon level.⁴⁰ Under that proposed plan, developed nations would contribute to the fund as a percentage of their GDP.⁴¹ While the inclusion of insurance in the UNFCCC is an AOSIS victory, Article 4(8) only established that countries should give consideration of the idea of insurance and failed to implement any insurance fund or mechanism.

AOSIS also requested adaptation costs to cover the costs of adapting their infrastructure. The original UNFCCC agreement included a clause stating, “[t]he developed country Parties . . . shall also assist the developing country Parties that are particularly vulnerable to the adverse effects of climate change in meeting costs of adaptation to those effects.”⁴² The inclusion of the word “shall” and the recognition of vulnerable nations is an AOSIS victory. However, the Article does not provide any necessary mechanism to enforce it. Future COPs debated the question of enforcement.

³⁴ *Id.*

³⁵ *Id.* at 506–07.

³⁶ *Id.* at 528.

³⁷ *Id.*

³⁸ UNFCCC, *supra* note 1, art. 4(8).

³⁹ Bodansky, *supra* note 2, at 542–43.

⁴⁰ Bodansky, *supra* note 2, at 542.

⁴¹ *Id.*

⁴² UNFCCC, *supra* note 1, art. 4(4).

While Article 11 does provide for financial mechanisms,⁴³ the United States blocked an AOSIS provision which would have covered adaptation costs.⁴⁴ Article 11 does not “specify the purposes for which financial resources may be provided.”⁴⁵ The Article 11 financial mechanisms would not apply to AOSIS, rather, “Article 4(4) transfers [would] be made through bilateral, regional, or other multilateral channels.”⁴⁶ In other words, developed nations would fund adaptation costs only if they felt generous. However, AOSIS considered the inclusion of insurance for loss and damage and adaptation mechanisms a major victory despite the lack of any substantive forces or mechanisms.⁴⁷ The fact that the mere mention of an idea is a victory reveals the strained and ineffective nature of the UNFCCC. Ideas are powerful, but only binding substantive law will mitigate climate change and provide relief for vulnerable nations. The UNFCCC continues to be a battleground for ideas, not substance. AOSIS may need to consider an alternative to the UNFCCC.

C. THE WARSAW INTERNATIONAL MECHANISM

The next “major victory” for AOSIS was the creation of the Warsaw International Mechanism [WIM] for loss and damages in 2013.⁴⁸ “Crucially, this Framework acknowledges that adaptation and risk management strategies address loss and damage associated with climate change impacts but that those losses cannot be reduced by adaptation.”⁴⁹ While adaptation costs have been acknowledged since the original UNFCCC agreement, loss and damage costs are scarcely referenced. Thus, the creation of a mechanism to address the costs of loss and damage is a major victory for AOSIS. Unfortunately, the WIM faces a lack of financial

⁴³ *Id.* at art. 11.

⁴⁴ Bodansky, *supra* note 2, at 541.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 528.

⁴⁸ Conference of the Parties of the United Nations Framework Convention on Climate Change, *Rep. of the Conference of the Parties on its Nineteenth Session, Held in Warsaw from 11 to 23 November 2013*, U.N. Doc. FCCC/CP/2013/10/Add.1 (Jan. 31, 2014).

⁴⁹ Rosemary Lyster, *A Fossil Fuel-Funded Climate Disaster Response Fund Under the Warsaw International Mechanism for Loss and Damage Associated with Climate Change Impacts*, 4 *TRANSNAT'L ENV'T. L.* 125, 129 (2015).

resources.⁵⁰ One reason is that “most developed countries have resisted any discussion of liability and compensation.”⁵¹ The same tale of acknowledging an idea but failing to implement any substantive policy is a UNFCCC constant. The main purpose of the WIM is to collect information,⁵² which is reminiscent of the original UNFCCC agreement only requiring the collection of scientific data.

The Bali Action Plan in 2007 first officially mentioned loss and damage.⁵³ AOSIS made progress in the Cancun Agreements,⁵⁴ which considered the risk, range of approaches, and the role of parties in addressing loss and damage.⁵⁵ Later, “in 2012, parties agreed on the role of the Convention in addressing loss and damage and decided that ‘institutional arrangements, such as an international mechanism’ to address loss and damage would be established”⁵⁶ A year later, the WIM was created.⁵⁷

Later, during the negotiations for the Paris Agreement, AOSIS “proposed either establishing a new international mechanism to address loss and damage . . . or extending the mandate of the WIM to deliver new, substantive support”⁵⁸ Developed nations were not supportive of these measures.⁵⁹ The developed nations were under the impression that loss and damage would not be addressed at the Paris negotiations because the WIM was scheduled for a review a year later.⁶⁰ Further, the United States feared that too broad of a mandate would create a legal remedy for loss and damage which was not likely to pass the United States Senate.⁶¹ The result was a stand-alone article in the Paris Agreement and a broadened mandate for the WIM.⁶² However, to reach a compromise, the

⁵⁰ Veera Pekkarinen et al., *Loss and Damage After Paris: Moving Beyond Rhetoric*, 12 CARBON & CLIMATE L. REV. 31, 31–32 (2019).

⁵¹ *Id.* at 32.

⁵² *Id.* at 36–37.

⁵³ Bali Action Plan, ¶ 1(c)(iii), U.N. Doc. FCCC/CP/2007/6/Add.1 (Mar. 14, 2008).

⁵⁴ The Cancun Agreements: Outcome of the Work of the Ad Hoc Working Group on Long-Term Cooperative Action Under the Convention, U.N. Doc. FCCC/CP/2010/7/Add.1 (Mar. 15, 2011).

⁵⁵ Pekkarinen et al., *supra* note 50, at 33.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

Article explicitly excluded any form of liability and compensation under the Paris Agreement.⁶³

D. THE PARIS AGREEMENT

The Paris Agreement is the most recent significant UNFCCC treaty. This agreement established a bottom-up approach allowing nations to set and determine how to meet their own reduction standards.⁶⁴ The agreement requires nations to be transparent about their goals and progress.⁶⁵ The premise is that transparency will create accountability through peer-pressure.⁶⁶ Just like the original UNFCCC treaty, there is no legally binding obligation to meet mitigation goals—only peer pressure.⁶⁷

The Paris Agreement includes an article on loss and damage for which AOSIS lobbied. For AOSIS, “going home without a stand-alone provision for loss and damage was a red line they were not prepared to cross.”⁶⁸ AOSIS can count the creation of the stand-alone article as a “victory” considering developed nations wanted it tucked away into the existing adaptation article.⁶⁹ However, the Paris Agreement is only a political rather than a substantive victory for AOSIS. Article 8 on loss and damage merely requires that parties “*recognize* the importance of averting, minimizing and addressing loss and damage”⁷⁰ The Article also extends the mandate of the WIM, stating parties “*should* enhance understanding, action and support, including through the Warsaw International Mechanism”⁷¹ Unfortunately, “[t]he Paris Agreement does not indicate how ‘understanding, action, and support’ for loss and damage should be ‘enhanced.’”⁷² Under the WIM, past practice shows that “enhancing understanding, action and support of loss and damage

⁶³ Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104 [hereinafter Paris Agreement].

⁶⁴ Daniel Bodansky, *The Paris Climate Change Agreement: A New Hope?*, 110 AM. J. INT’L L. 288, 289 (2016).

⁶⁵ *Id.* at 291.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Pekkarinen et al., *supra* note 50, at 33.

⁶⁹ *Id.*

⁷⁰ Paris Agreement, *supra* note 63, art. 8(1) (emphasis added).

⁷¹ *Id.* art. 8(3) (emphasis added).

⁷² Pekkarinen et al., *supra* note 50, at 34.

involved engaging different stakeholders to *consider* approaches to address loss and damage”⁷³

The Paris Agreement is not the panacea the media pretends it is. It is representative of a stalled process. Decades of annual negotiations have produced no binding commitments to mitigate climate change or provide relief to vulnerable nations. AOSIS considers mere recognition of ideas in the official treaties as victories. This reveals the strained and ineffective nature of these negotiations. AOSIS may hope that recognition will one day lead to substantive obligation; however, decades later the Paris Agreement and the original UNFCCC agreement are effectively identical. Perhaps it is time for AOSIS to abandon banging their head on the wall which is the UNFCCC and pursue alternatives.

II. ANALYSIS

The clearest alternative for vulnerable nations is international litigation, specifically, international litigation for compensation of climate change related loss and damage. Many have written about liability and loss and damage under the UNFCCC and the Paris Agreement. The consensus is that legal liability arising from loss and damage under the Paris Agreement is unlikely but there may be hope in future agreements. Many have also discussed the possibility of litigation outside of the UNFCCC in international courts. The prognosis is typically grim, stating that litigation in international courts is infeasible. While these two discussions are typically discrete, they may actually be linked in a close relationship.

As previously discussed, international negotiations under the UNFCCC have too many competing interests and barriers to list. But negotiations regarding liability and loss and damage are conducted under the shadow of international litigation. In general, as the likelihood of liability increases, the willingness to negotiate also increases. The reverse is true as well. In the context of climate change negotiations, the question becomes: is international litigation simply infeasible or can it be a useful shadow? In other words, if international liability for climate change-related loss and damage is possible, that should prompt more substantive negotiations. Why would a developed nation risk publicly losing to a vulnerable nation in court when they can mollify the vulnerable nation with more substantive treaties?

⁷³ *Id.* (emphasis added).

A. THE LEGAL THEORIES OF INTERNATIONAL CLIMATE CHANGE
LITIGATION

The no-harm principle is at first glance a promising place to start. Arising from a 1941 case involving a polluting Canadian smelter and Washington State, “no state has the right to use . . . its territory in such a manner as to cause injury by fumes in or to the territory of another.”⁷⁴ This principle has been reaffirmed in multiple international decisions.⁷⁵ Importantly, the International Court of Justice, in an advisory opinion, stated “the general obligations of States to ensure that activities within their jurisdiction and control respect the environment of other States . . . is now part of the corpus of international law relating to the environment.”⁷⁶

However, the no-harm rule might not be as useful as it initially appears for establishing climate change-related liability. As will be discussed below, there is an important difference between discrete events causing pollution and a more general contribution to climate change. Further, as will be discussed below, scientifically establishing a link between climate change contributions and harm is difficult. However, separate from those concerns, the no-harm rule might not apply because “the no-harm principle is an obligation of conduct, not of result. Thus, a state is not responsible for harm that occurs despite its reasonable efforts to prevent it or—in case that it is not possible—to minimize the risk.”⁷⁷ Further, it is doubtful that “ordinary activities” which cause pollution such as cattle ranching, driving a vehicle, and energy production are the sort of conduct that the no-harm rule governs. In other words, there is a distinction between a normally operating coal power plant emitting a normal amount of pollutants and a coal power plant conducting itself in an unordinary and harmful manner. Thus, at the moment, the prospect for the no-harm rule being a viable avenue for creating climate change-related liability is low.

Climate change litigation is fairly new and unique. As time marches forward, the prevailing assumption is that the negative effects of climate change will continue to grow, becoming more apparent and requiring a solution. As demand for a court-created solution grows, courts create new law or adapt old law. Thus, the no-harm rule is not without

⁷⁴ Trail Smelter Case (U.S. v. Can.), 3 R.I.A.A. 1907, 1965 (1941).

⁷⁵ FLORENTINA SIMLINGER & BENOIT MAYER, LOSS AND DAMAGE FROM CLIMATE CHANGE, CONCEPTS METHODS AND POLICY OPTIONS 187 (Reinhard Mechler et al. eds. 2018).

⁷⁶ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 29 (July 8).

⁷⁷ SIMLINGER & MAYER, *supra* note 75.

hope for relevance in climate change litigation. A forward-thinking court may see the impending need and adapt the law to include climate change contributions. However, there are more considerations which create difficulty for adapting the no-harm rule.

One devastating argument against the no-harm principle is the concept of necessity. One may “argue that the emissions stemming from a certain level of industrialization are also ‘necessary,’ if not to human life, at least to human development.”⁷⁸ Developed nations will use this argument to avoid liability by citing the advances industrialization has made in the human condition: freer movement, medicinal advancement, agricultural supply, and heating and air conditioning. One possible counter to the necessity argument is differentiating between “subsistence emissions” and “luxury emissions.”⁷⁹ However, “setting an objective threshold between subsistence and luxury is eminently delicate.”⁸⁰ In other words, even if international litigation can be successfully started on the theory of the no-harm principle, holding a developed country responsible for some but not all of their adverse climate change emissions is fraught with scientific challenges and long lasting policy decisions.

The other glaring argument against the no-harm principle is that climate change-related damage is probabilistic rather than the traditional but-for causation of previous no-harm cases.⁸¹ “Climate change does not ‘cause’ any specific weather event, although it makes some extreme weather events more likely.”⁸² Further, the extent of the damages suffered by a climate event are not dependent solely on the event but “depend on a multitude of political, social and economic proxy factors.”⁸³

Lastly, climate change is not caused by discrete events within a state’s borders, which they can control, but instead from the combination of many states’ independent conduct.⁸⁴ Unlike the *Trail Smelter Case*, the probabilistic cause of a climate change event is not the responsibility of one state’s actions, but a combination of many states all contributing to the

⁷⁸ Benoit Mayer, *State Responsibility and Climate Change Governance: A Light Through the Storm*, 13 CHINESE J. INT’L L. 539, 554 (2014).

⁷⁹ *Id.* at 555 (citing Henry Shue, *Subsistence Emissions and Luxury Emissions*, 15 L. & POL’Y 39 (1993)).

⁸⁰ *Id.*

⁸¹ *See id.* at 552.

⁸² *Id.*

⁸³ *Id.* (citing Mike Hulme, *Attributing Weather Extremes to “Climate Change”: A Review*, 38 PROGRESS IN PHYSICAL GEOGRAPHY 499–511 (2014)).

⁸⁴ *Id.* at 556.

changing climate.⁸⁵ One might think that joint and several liability may be an easy remedy to this issue, however, “[i]t is important not to assume that internal law concepts and rules in this field can be applied directly to international law.”⁸⁶ The International Law Commission (ILC) goes on to say, “the general principle in the case of a plurality of responsible States is that each State is separately responsible for conduct attributable to it . . . in the absence of agreement to the contrary.”⁸⁷

Thus, the burden that potential litigants face under the no-harm principle is to show causation of damages from a climate change event scientifically beyond the probabilistic nature of such event, delineate between actions under the control and jurisdiction of a state that are luxurious rather than necessary, and target individual states separately for their causation of damages rather than holding them jointly and severally liable. Barring new international common law or scientific advancements in climate change event causation, the no-harm principle bears too high of a burden for litigants.

B. THE NATURE OF CLIMATE CHANGE LOSS AND DAMAGE

Our current legal frameworks are simply not capable of addressing the new and unique challenges of climate change litigation. This does not mean litigation is impossible, but absent an explicit international treaty outlining causes of action and liability, the courts will need to adapt to contend with climate change. Doing so requires a comprehensive understanding of the nature of loss and damage and liability in the climate change context.

One such problem is the “slow onset” nature of climate change loss and damage. “The experience of loss and damage is not exclusively tied to disasters . . . but rather they occur slowly over the course of time.”⁸⁸ Further, these damages are not the typical, apparent, and discrete environmental damages in the form of temporary property or resource destruction. “In such cases, the loss of livelihoods is damage, [which] may

⁸⁵ Int’l Law Comm’n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, at 64, U.N. Doc. A/56/10 (2001) (“[I]nternationally wrongful conduct often results from the collaboration of several States rather than one State acting alone.”).

⁸⁶ *Id.* at 124.

⁸⁷ *Id.*

⁸⁸ David Wrathall et al., *Conceptual and Operational Problems for Loss and Damage 5* (Working Paper, Oct. 2013).

contribute to further losses.”⁸⁹ The problem with “slow onset” loss and damages are that they frequently “do not qualify as disaster, and in fact, are barely observable if not explicitly considered.”⁹⁰

Fortunately, “slow onset” loss and damages have been recognized under the UNFCCC framework as “adaptation” needs.⁹¹ In fact, for many years, adaptation was the only issue addressed under the UNFCCC while loss and damages was ignored until the Paris Agreement.⁹² However, many states “have long felt that adaptation has been a poor relation of mitigation in the climate change regime.”⁹³ They argue that “loss and damage . . . is distinct from adaptation, since adaptation focuses prospectively on limiting the impacts of climate change, whereas loss and damage is retrospective and concerns harms that have already occurred.”⁹⁴

Unfortunately, this argument and mindset hinders potential litigants in international courts. A changing environment which permanently alters the livelihoods of individuals in a state creates enormous loss and damage, ranging from costs to start other industries to migration away from the state.⁹⁵ Under the current UNFCCC regime, adaptation is framed as helping prevent these problems, and loss and damage is framed as compensating or rebuilding after environmental disasters.

However, in the context of international litigation, the “slow onset” damages could represent significant compensation. First, they are damages, not something merely to which states should adapt. Second, unlike the uncertain probabilistic nature of a discrete climate change event, “slow onset” events are more directly tied to climate change. The huge sums of potential compensation and the more direct link to climate change should make potential litigants consider “slow onset” events as loss and damages rather than adaptation. Unfortunately, for litigants in the International Court of Justice (ICJ), while “the ICJ’s decisions are binding, the chronic lack of enforcement safeguards means that the respondent state might simply choose not to comply with the ruling or revoke the court’s

⁸⁹ *Id.*

⁹⁰ *Id.* at 5–6.

⁹¹ Paris Agreement, *supra* note 63, art. 7(4).

⁹² See Bodansky, *supra* note 64, at 309; Paris Agreement, *supra* note 63, art. 8.

⁹³ Bodansky, *supra* note 64, at 308.

⁹⁴ *Id.* at 309.

⁹⁵ See Wrathall et al., *supra* note 88, at 5–6 (“One example presents the case of ocean acidification, which results in a thinning of clam shells, and a reduction in the clam population . . . in turn, threatens the livelihoods . . . of the coastal population in south western Jamaica.”).

jurisdiction.”⁹⁶ Given the vast sums of compensation which may be required for an upheaval in livelihood from a “slow onset” event, many states may be unwilling to comply with an adverse ruling from the ICJ.

This has led to comments that “[international] litigation is likely to play, in practice, only a supporting role in addressing climate change.”⁹⁷ However, even if potential litigants are not compensated because the respondent state chooses not to comply with the ruling, there is a lot which will be won. First, political fallout will occur for the respondent state for not complying with the hypothetical ICJ ruling. Second, more media attention and awareness will be raised about the conditions in the affected state. Both of these consequences will pressure the respondent state and others in similar situations to pursue more compromises in favor of the affected state in international treaties, which may be cheaper and more practical to implement. In other words, international litigation gives vulnerable states more leverage at negotiations under the UNFCCC. Further, forward-looking developed states, if they feel the threat of litigation is possible, will be under similar constraints at the negotiating table.

However, one potential defense developed states have against “slow onset” event litigation is adverse concurrent environmental practices conducted by the aggrieved state. “Impacts cannot be precisely separated from concurrent environmental degradation.”⁹⁸ Further, “impacts often manifest because of local environmental practices, as in the case of deforestation.”⁹⁹ In other words, respondent parties can potentially obfuscate and limit liability due to either adverse practices conducted under the control of the aggrieved state or through adverse naturally occurring environmental degradation for which no party is specifically liable.¹⁰⁰ As with the no-harm principle discussed above, scientifically determining who is responsible and how responsible they are is expensive and difficult to determine, let alone litigate. This is another problem unique in its scale to climate change litigation. The current traditional rules and laws are not well suited to attributing liability in climate change litigation.

⁹⁶ Pekkarinen et al., *supra* note 50, at 40.

⁹⁷ Daniel Bodansky, *The Role of the International Court of Justice in Addressing Climate Change: Some Preliminary Reflections*, 49 ARIZ. ST. L.J. 689, 705 (2017).

⁹⁸ Wrathall et al., *supra* note 88, at 6.

⁹⁹ *Id.*

¹⁰⁰ *See id.* (“For example, climate models of Central America predict a future characterized by increased frequency and intensity of tropical rainfall . . .”).

However, rather than asking litigants to constrain themselves to a legal system which is ill-suited for the task, litigants should ask the ICJ to consider and update their system to account for this unique challenge.

One reason for requesting a new approach in this regard is explained by David Wrathall and his coauthors: “double exposure raises a more significant point: since damage and loss is concerned with restor[ation] . . . it is deeply problematic to reconstitute dysfunctional, inequitable structures that produce vulnerability to begin with.”¹⁰¹ Merely restoring the status quo can have the ill effect of recreating the original sources which caused the “slow onset” event. This is why many have “noted the need to combat slow onset events by convening multilateral funding agencies to develop different, new and innovative financial measures.”¹⁰²

The wisdom of a multilateral approach aside, the logic that direct compensation through loss and damage should be avoided because it is concerned with restoration should be scrutinized. Specifically, to be scrutinized is the assumption that upon receiving direct compensation for a slow onset event either through litigation or insurance, states will simply rebuild their problematic infrastructure. If heavily litigated in the adversarial process, it is likely that aggrieved states will be made aware of how their practices contribute to “slow onset” events because the respondent state will use those practices as a means to mitigate their own liability. It is possible that a state may not heed these warnings. However, it seems more likely that a state would rebuild and restore in a more sustainable way.

C. LITIGATION V. NEGOTIATION

It is clear now that potential litigants for adverse climate change events face a significant hurdle in the current international law regime. The prevailing wisdom thus far has been to focus efforts on international treaties under the UNFCCC. This wisdom is most likely correct, as an agreement between parties is more productive in the international sphere than a proceeding in the adversarial international court system. However, vulnerable countries, specifically AOSIS, face considerable problems

¹⁰¹ *Id.*

¹⁰² Maryan Al-Dabbagh, *Towards a Middle Path: Loss & Damage in the 2015 Paris Agreement*, GEO. ENV'T L. REV. ONLINE 1, 2 (Apr. 4, 2016) (citing Doreen Stabinsky & Juan P. Hoffmaister, *Establishing Institutional Arrangements on Loss and Damage Under the UNFCCC: the Warsaw International Mechanism for Loss and Damage*, 8 INT'L J. GLOBAL WARMING, 295 (2015)).

achieving effective international agreements. This is apparent from the lack of any effective means to help them face climate change loss and damages under the UNFCCC. It took AOSIS over twenty years of negotiations to have loss and damages appear as its own article in an international agreement. And that article is void of any substantive aid; it is essentially lip service to vulnerable countries by developed countries.

It is clear vulnerable countries need more leverage during these negotiations. In the United States legal system, settlements and plea deals are reached because of the fear of trial. This fear helps give leverage to both parties. In the climate change context, if international litigation was feasible, vulnerable countries would have more leverage to achieve substantive and effective aid on loss and damages during negotiations under the UNFCCC. Unfortunately, international litigation for climate-related loss and damage is not feasible at the moment. This is why vulnerable states should lobby the ICJ to recognize the problems the current international law regime has with regards to climate change loss and damage and encourage them to update rules and laws to account for its uniqueness. If this is achieved, the specter of litigation will give vulnerable countries more leverage in UNFCCC negotiations.

However, litigation rather than negotiation may come with many political problems. Ultimately, the ICJ is fifteen individuals who are not elected spokespeople for any one nation. In other words, their decisions are not democratic and thus lack a certain legitimacy when it comes to political issues. Climate change, unfortunately, is a political issue.

One possible conclusion from this is that “adjudication should start from the Hippocratic principle, do no harm. To the extent that litigation would hinder the negotiating process, it should not be pursued.”¹⁰³ Wading into the politics of the UNFCCC is certainly something with which any domestic or international court would be concerned. A judicial ruling which is too broad may lead to backlash from negatively affected parties. Further, the victorious parties may behave stubbornly at negotiations and be unwilling to compromise because “the law is on their side.”

However, negotiations under the UNFCCC are slow, with no real substantive obligations set in place after twenty years of negotiations. “In the United States, common law adjudication of public nuisances was necessary a century ago, before federal legislative power had expanded to

¹⁰³ Bodansky, *supra* note 97, at 693.

encompass environmental harms.”¹⁰⁴ Similarly, there is no expansive and powerful international law-making body capable of regulating climate change. The best the world has is the UNFCCC. In the same way that courts have stepped up in the past to address transboundary issues when a federal government was not yet capable, it may be the duty of the ICJ to step up and adjudicate transboundary climate change issues while the world is still not yet capable.

D. THE INTERNATIONAL COURT OF JUSTICE

1. Potential Legal Issues

How does the International Court of Justice balance the duty to act while doing “no harm” to the UNFCCC negotiation process? Daniel Bodansky, a prolific climate change legal scholar, argues that the ICJ should expend its capital “on issues not addressed directly in the negotiations—issues that are more abstract in nature and hence don’t have immediate implications for particular states.”¹⁰⁵ In other words, Bodansky argues that the ICJ should not be setting specific guidelines about emissions, stating that the Court would be “well-advised to formulate any opinion in a manner that clearly leaves states in control both to determine the content of their own [emissions] and to evaluate the [emissions] of others.”¹⁰⁶

It seems obvious to state that a court would not be creating international law regulating greenhouse gas emissions. In reality, courts face factually specific scenarios and determine if the law has already spoken on the topic, or if the scenario is a new situation requiring the adaptation of law to address it. Given the nature of climate change related loss and damage and the fact that previous international cases do not address such damage, new laws and principles are needed, laws and principles the UNFCCC is failing to enact.

Pointing out the inadequacy of the UNFCCC or requesting the court to step in is not necessarily enough for the ICJ to adjudicate climate change loss and damages claims. First, standing is necessary for a case to

¹⁰⁴ *Id.* at 702 (citing *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907)).

¹⁰⁵ *Id.* at 708.

¹⁰⁶ *Id.* at 710.

be heard by the Court.¹⁰⁷ Given ongoing yearly negotiations through the UNFCCC, many nations may be hesitant to bring suit against another nation out of fear of creating hostilities during negotiations. Instead, it would be useful for NGOs to bring forth suits as proxies. However, “before the ICJ . . . no NGO would have such a standing to initiate proceedings.”¹⁰⁸ Unfortunately, “a contentious case would have to be brought by one State against another.”¹⁰⁹ Thus, before the ICJ can entertain a climate change case, a vulnerable nation will need to jeopardize its negotiating position at the UNFCCC. Further, there may be peer pressure from other vulnerable nations to not bring suit. If a large and powerful country is angered by the suit of one vulnerable nation, that will likely affect their disposition towards all vulnerable nations at the negotiations. Thus, standing may actually be a significant political hurdle for vulnerable nations in international climate change litigation. It may be best that a general consensus among vulnerable nations be reached before litigation is pursued.

Assuming the political issue of standing is resolved, the ICJ will need to make a determination of facts before it can decide how international law applies to those facts. Throughout most climate change law literature, facts about climate change have been taken for granted from the existence of manmade climate change to the nature of climate change damages. However, while obvious to most, these facts will need to be litigated and determined by the International Court.¹¹⁰ “One of the most important things an international court could do . . . is to settle the scientific dispute. A finding of fact . . . would be significant and authoritative and . . . dispositive on a range of future actions, including negotiations.”¹¹¹ Thus, litigating an ultimately losing case can still provide value for vulnerable nations.

The ICJ has a recent history of finding politically charged facts. Recently, a judgment “was given in the face of sharply differing opinions in the Scientific Committee of the International Whaling Commission” in a decision declaring that Japan’s whaling operations could not be

¹⁰⁷ Philippe Sands, *Climate Change and the Rule of Law: Adjudicating the Future in International Law*, 28 J. ENV'T L. 19, 27 (2016).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *See id.* at 29.

¹¹¹ *Id.*

considered “scientific whaling.”¹¹² That this finding of fact was reached despite differing political and scientific opinions gives hope for a positive finding of fact for climate change as “a less robust court might have concluded that there was no settled view on the matter, and it was not for the court to take a view.”¹¹³ Notably, this was the first time the ICJ allowed scientific experts to be witnesses rather than counselors not subject to cross-examination.¹¹⁴

The ICJ making a finding of fact that climate change is real and that it is causing loss and damage, especially to vulnerable nations, may feel like a hollow victory. Those who are fighting for substantive climate change relief already believe these facts and consider the issue not to be factual consensus, but rather consensus on substantive solutions. However, an international court making a finding of fact after all parties have had the ability to bring their expert witnesses and cross-examine them may have an important effect on society’s willingness to bring about substantive change. For example, after the ICJ’s ruling on Japanese whaling, the Japanese company Rakuten asked merchants to halt the sale of whale meat.¹¹⁵ This ruling substantively influenced change in a private company.

After the facts are determined, the ICJ will need to decide how international law applies to those facts. If the Court does not adapt international law, the decision will be that liability is impossible to determine. This is because causation in climate change damages is next to impossible to find. If the Court does adapt international law, “there are so many different variations of what is possible that it hardly seems useful to speculate as to possibilities.”¹¹⁶ Not only are the possible adaptations of international law legion, the specific facts and legal issues a vulnerable nation may bring are also extremely variable. Unusually strong and frequent storms causing loss and damage will likely have a different legal analysis than rising sea levels destroying modes of employment. The first may address reconstruction damages while the other may address consequential damages.

¹¹² *Id.* at 29; *see also* Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014 (Mar. 31, 2014).

¹¹³ Sands, *supra* note 107, at 29.

¹¹⁴ *Id.* at 29–30.

¹¹⁵ *Id.* at 26.

¹¹⁶ *Id.*

Another obstacle in the legal analysis for the ICJ is the relationship between general international law and treaties under the UNFCCC.¹¹⁷ “The interrelationship between different sources of legal obligation is not necessarily straightforward or, settled.”¹¹⁸ Similar to a court declining to make a finding of fact because there is a lack of scientific consensus, the ICJ may decline to adapt general international law and instead default to the UNFCCC. An argument for this course is that the UNFCCC is the only international law that is addressing climate change in detail through negotiations and agreements between nations across the world. Simply put, it might be considered inappropriate and bold of the ICJ to ignore the UNFCCC and create their own international law.

This shows the inherent political problem that climate change poses. When one country allows the pollution of a river upstream, the country downstream has a clear and identifiable claim. This is political in a sense, but it is also largely legal. There is one clear victim, one clear perpetrator, and one clear cause of damage. The solution is for the upstream country to stop allowing the pollution of the river. Climate change is not as easy. In a hypothetical river pollution example only a few industries using the river are being affected. In contrast, decreasing emissions which contribute to climate change requires massive change in all industries and the overall infrastructure of a nation. Legal solutions simply do not require a nation to change its entire infrastructure and industry.

Thus, if the legal issue brought before the ICJ was whether nations must prevent climate change by reducing the emissions of all greenhouse gases, the Court would likely not find any legal obligation. Greenhouse gases broadly are not the same as the specific ozone-depleting chlorofluorocarbons. If it were as simple as banning or limiting the emission of a certain non-essential chemical, then the legal and moral obligations of nations would be clear for the ICJ to rule on.

Thus, the focus of the Court should not be on climate change law or the prevention of climate change, but rather on loss and damages. “The principle for liability based on extraterritorial harm is drawn from the most basic legal precept that arbiters should hold legal actors responsible for the harm they do to others.”¹¹⁹ The new concerns facing this Court are the

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ Maxine Burkett, *A Justice Paradox: On Climate Change, Small Island Developing States, and the Quest for Effective Legal Remedy*, 35 U. HAW. L. REV. 633, 657 (2013).

nature of climate change as a cause of environmental damage, and the special nature of damages caused by climate change.

This is not to say that it is legally impossible for the ICJ to find that nations have a substantive international legal obligation to prevent climate change. However, any substantive international legal obligation would have to be tempered by the realities of cost-effectiveness. This issue was explicitly addressed in the Kyoto Protocol, which stated that nations may postpone climate change prevention measures which are not cost effective and any industrialized nation “would likely defend its actions by pointing to the economic hazards of substantial emissions reduction.”¹²⁰ Thus, the International Court of Justice should limit its substantive law to remedying damages resulting from climate change.

2. *The Adversarial Option*

To win an adversarial suit against a developed nation, a vulnerable nation would first need to show that greenhouse gas emissions are unlawful.¹²¹ There are “two general principles of customary international environmental law: (1) sovereign equality—a state’s sovereign right over its own natural resources, and (2) state liability for any activities that harm another state.”¹²² If climate change is affecting a nation’s ability to access its own natural resources, then the main contributors of climate change have been acting in an unequal sovereign manner. At the outset, both nations were able to use their natural resources, but the industrialized nation’s sovereign usage of its natural resources has had a harmful effect on the vulnerable nation’s sovereign ability to access its own. That, at least, would be one potential argument.

However, the ICJ would need to carefully balance finding liability related to climate change damages. If the Court goes too far in its ruling, many countries may believe that contributing to climate change is illegal under international law. As discussed, such a legal conclusion would likely be ignored by the industrialized nations as impractical and degrade the authority of the ICJ, not to mention hinder the negotiation process at the UNFCCC. The Court would need to make clear that nations are only liable for damages caused, not actions taken.

¹²⁰ Rebecca Elizabeth Jacobs, *Treading Deep Waters: Substantive Law Issues in Tuvalu’s Threat to Sue the United States in the International Court of Justice*, PAC. RIM L. & POL’Y J. 103, 112 (2005).

¹²¹ *Id.* at 119.

¹²² *Id.*

However, ruling on compensation for damages also comes with political costs. “For example, the provision of financial resources to developing countries under the UNFCCC has been possible for the past twenty-five years because the Convention is silent on whether financial transfers represent compensation or assistance.”¹²³ In other words, there is a political reason why this has not been addressed over twenty-five years. “If the I.C.J. were to decide that international law requires compensation, maintaining this studied silence might become more difficult. Here, as elsewhere, there can be costs as well as benefits to legal clarity.”¹²⁴

3. *The Advisory Opinion Option*

The previous analysis assumes that an adversarial claim has been brought before the International Court of Justice. The Court’s issuance of an advisory opinion is also possible and may be politically preferable. An advisory opinion would apply generally and not solely to the parties in an adversarial case.¹²⁵ “All states could have their voices heard, in contrast to contentious cases, which are limited to the parties to the dispute and states permitted to intervene.”¹²⁶ Further, such an opinion would have a “relatively high level of generality” which leaves “the specifics to be worked out through negotiations.”¹²⁷ Considering that nations would likely not comply with an adversarial ruling from the ICJ and that the adversarial process would negatively affect negotiations, “an advisory opinion would allow the I.C.J. to perform its more important role relating to climate change, namely to clarify and elaborate the relevant norms of general international law.”¹²⁸

However, an advisory opinion may ultimately be substantively and politically empty. Hypothetically, if the ICJ were to rule that industrialized nations are responsible for remedying climate change related loss and damages in an advisory opinion, what would the practical effects be? To begin, there is no actual case, so there would be no actual call for a nation to compensate another. But more importantly, the effects on the negotiations would be largely negative. Industrialized nations would seek to avoid liability for past, present, and future climate change

¹²³ Bodansky, *supra* note 97, at 711.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 711–12.

damages. Negotiations would become mired not in greenhouse gas reduction but liability reduction. Further, vulnerable nations would be unlikely to ever agree on abandoning loss and damage compensation.

In contrast, an adversarial case has the advantage of political impetus. Hypothetically, if the ICJ ruled that the United States owed compensation to a vulnerable nation for climate change related loss and damage, there would be internal and external political pressure for the United States to uphold that judgment. It is assumed that an industrialized nation like the United States would not actually follow that ruling. However, that political pressure would weaken the United States' position at the negotiating table.

First, an advisory opinion does not have the same political awareness as an adversarial ruling. The difference in the headlines between an advisory opinion and an adversarial ruling would be drastically in favor of the adversarial ruling for newsworthiness and reach. In the United States, the opposition party would find a way to spin the adversarial ruling in its favor and blast the party in power for either not winning the case or for failing to pay the compensation.

Second, at the negotiation table, a fixation on liability reduction by the United States in this hypothetical would not be seen as a natural political interest but rather as a way to subvert international law and international courts. This subtle difference in optics would make the negotiations newsworthy and further contribute to both internal and external political pressure for industrialized nations.

Third, an adversarial ruling would politically empower vulnerable nations. After an industrialized nation chooses to ignore the ICJ's ruling, vulnerable nations would be seen as victims. Unfortunately, rising sea levels and increasingly strong and frequent storms do not garner much media attention for small vulnerable nations that the average person could not place on a map. But a large, industrialized nation not paying what it owes to a vulnerable nation is precisely the type of political news that will draw viewers and readers. This newfound sympathy for vulnerable nations in the political consciousness of the public in industrialized nations could have an effect at the negotiation table.

Ultimately, both paths have pros and cons. Vulnerable nations should caucus and come to a consensus about which path they will want to pursue—an adversarial ruling or an advisory opinion. Further, vulnerable nations will need to come to a consensus about which facts and legal topics they want answered by the ICJ. A finding of fact that manmade climate change is real and that it causes loss and damage is important.

Also, a legal opinion that large, industrialized nations, which contribute the most to climate change, are liable for loss and damage to vulnerable nations is important. Less important is a legal ruling that nations must prevent climate change. Such a ruling would either be extremely specific, such as only allowing a certain amount of emissions, or wastefully vague. If it is too specific, nations will ignore the ICJ's ruling in favor of continued negotiations. If it is too general or vague, then it is useless. Every nation is already meeting once a year to negotiate climate change reduction. There is no point to a court ruling stating that nations must seek to reduce climate change.

III. CONCLUSION

Right now, it is unlikely that international climate change litigation will be viable. However, climate change litigation represents an important tool for vulnerable nations and a motivating force for change in industrialized nations. Negotiations are more effective if an undesirable alternative exists, motivating both parties to come to an agreement. As it stands, vulnerable nations only have the good will of industrial nations to bargain with, and this good will is clearly insufficient. Increasing the viability of climate change litigation may be an important step in solving this global crisis.