

# LOSS AND DAMAGE:

An Introduction to Paragraph 51  
and Compensation



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## Introduction

Climate impacts are unjust and force many of our countries into spirals of emergency and reconstruction. Loss and damage continually harms the development of our peoples and is an existential threat. It is important to recognize that, despite climate action, mitigation or adaptation implemented or promised so far, it is not feasible to avoid or minimize all impacts of climate change and therefore, our societies are currently experiencing these losses and damages.<sup>1</sup> The Intergovernmental Panel on Climate Change (IPCC) has mentioned that “residual damage caused by climate change can be expected to occur, despite adaptation and mitigation actions”.<sup>2</sup>

Loss and damage disproportionately affects people living in vulnerable conditions, indigenous peoples, women, children, and people with disabilities.<sup>3</sup> People who are socially, economically, culturally, politically, institutionally or otherwise marginalized are especially vulnerable to climate change.<sup>4</sup>

The adverse impacts of climate change affect the enjoyment of human rights, including the right to food, water, sanitation, health, adequate housing and life.<sup>5</sup> The most vulnerable people are forced to assume the loss and damage caused by climate change on their own while they bear the least responsibility for causing this crisis.

The climate impacts suffered by the “Global South” as a result of climate change have their cause in the historical enjoyment of carbon emissions made by the countries of the Northern Hemisphere for their development. The negative impact generated by climate change on human and ecosystemic well-being is exponential and, to this day, the data relevant to emissions reduction does not allow us to ensure a decent future for the Global South.

The call for a fair and responsible response to loss and damage has been present since the creation of the United Nations Framework Convention on Climate Change (UNFCCC). However, there has also been, from the beginning, a continuous and systematic opposition from countries of the “Global North” to proposals that seek to establish mechanisms based on accountability and fairness that guarantee financing and compensation/rehabilitation to those who are most affected.

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<sup>1</sup>Toussaint P and Martínez Blanco A, 2019. ‘A Human Rights-Based Approach to Loss and Damage under the Climate Change Regime’ Climate Policy 1 <<https://doi.org/10.1080/14693062.2019.1630354>>

<sup>2</sup> Klein, R. J. T. et al., 2014. “Adaptation Opportunities, Constraints, and Limits” in Chris B Field et al. (eds), Climate Change: Impacts, Adaptation, and Vulnerability. Part A: Global and Sectoral Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change” (Cambridge University Press) 899, p. 903.

<sup>3</sup> IPCC, 2014 “Cambio climático 2014: Informe de síntesis. Contribución de los Grupos de trabajo I, II y III al Quinto Informe de Evaluación del Grupo Intergubernamental de Expertos sobre el Cambio Climático” [Equipo principal de redacción, R.K. Pachauri y L.A. Meyer (eds.)]. IPCC, Ginebra, Suiza, p. 5; Auz J and others, 2020 “Cambio Climático y Los Derechos de Mujeres, Pueblos Indígenas y Comunidades Rurales En Las Américas” (Florian Huber and Ángela Valenzuela eds, Fundación, Fundación Heinrich Böll <[https://larutadelclima.org/wp-content/uploads/2019/10/hbs\\_Cambio\\_climatico-en-las-Américas\\_web.pdf](https://larutadelclima.org/wp-content/uploads/2019/10/hbs_Cambio_climatico-en-las-Américas_web.pdf)>; RC. 2018b.

“Summary of the panel discussion on human rights, climate change, migrants and persons displaced across international borders” ONU Doc A/HRC/37/35. <https://undocs.org/en/A/HRC/37/35> <https://sv.boell.org/sites/default/files/2021-04/MOVILIDAD%20HUMANA.pdf>

<sup>4</sup> IPCC, 2014. “Summary for policymakers. In: Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part A: Global and Sectoral Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change” [Field, C.B., V.R. Barros, D.J. Dokken, K.J. Mach, M.D. Mastrandrea, T.E. Bilir, M. Chatterjee, K.L. Ebi, Y.O. Estrada, R.C. Genova, B. Girma, E.S. Kissel, A.N. Levy, S. MacCracken, P.R. Mastrandrea, and L.L.White (eds.)]. Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA, pp. 1-3

<sup>5</sup> RC. 2018b. Summary of the panel discussion on human rights, climate change, migrants and persons displaced across international borders A/HRC/37/35. <https://undocs.org/en/A/HRC/37/35> <https://sv.boell.org/sites/default/files/2021-04/MOVILIDAD%20HUMANA.pdf> para 7

The lack of an effective response to address loss and damage is not due to the complexity or novelty of the problem. In fact, the most vulnerable countries have been proposing financing mechanisms and action plans for three decades, but they have not received a response from the international community. The current gap in terms of a response to address loss and damage is a symptom of the irresponsible policies that countries such as the United States have adopted for decades in the international negotiation process on climate change.

## Loss and damage

The concept of loss and damage has been commonly used in international climate policy since 2007, but has no formal definition within the UNFCCC.<sup>6</sup> “However, it is well understood that this phrase relates to the desire of vulnerable countries, and especially SIDS, to secure formal recognition from the international community that there are adverse impacts of human-induced climate change that cannot be avoided by mitigation or adaptation, or that will not be avoided in the future by adaptation due to insufficient resources, and that must be addressed at the international level under the climate regime due to the equities involved.”<sup>7</sup>

The literature defines loss and damage as impacts that people cannot cope with or adapt to, that cause irreparable damage or irreversible loss.<sup>8</sup> These climate impacts that affect people and their territory can result in the loss of economic and non-economic elements such as culture, traditions, languages and forced displacement.<sup>9</sup> In economic terms, there are various estimates of the economic damage to developing countries. These costs range from \$428 billion per year by 2030, and up to \$1.67 trillion per year by 2050 at 3°C of warming.<sup>10</sup> It is important to consider that what is determined as loss and damage is dependent on the context in which it occurs and usually requires a inquiry into what a community values and considers important to protect.<sup>11</sup>

One detail that must be clear is that the difference between a loss and a damage in the context of the UNFCCC:

- a. Damage is considered to be “reversible through risk reduction, repair or restoration initiatives”
- b. A loss is considered “irreversible, in the sense that reparation or restoration is not possible.”<sup>12</sup>

<sup>6</sup>La Ruta del Clima, 2019. “Response to Call for Inputs: Climate Change and Human Rights: a Safe Climate Submission on Loss and Damage and Human Rights” Recuperado de <https://www.ohchr.org/Documents/Issues/Environment/SREnvironment/SafeClimate/NonState/Climate4Change.docx>; Vanhala, L. and C. Hestbaek, 2016: Framing climate change Loss and Damage in UNFCCC negotiations. *Global Environmental Politics*, 16(4), 111-129, doi:10.1162/glep\_a\_00379.

<sup>7</sup>Mace MJ and Verheyen R, 2016. ‘Loss, Damage and Responsibility after COP21: All Options Open for the Paris Agreement’ 25 *Review of European, Comparative and International Environmental Law* 197

<sup>8</sup>Warner, K., Van der Geest, K., Huq, S., Harmeling, S., Kusters, K., de Sherbinin, A., & Kreft, S. (2012). Evidence from the frontlines of climate change: Loss and damage to communities despite coping and adaptation. *UNU-EHS Report*. UNU- EHS, p. 20.

<sup>9</sup>Serdeczny, O. 2019. “Non-economic loss and damage and the Warsaw international mechanism. In *Loss and Damage from Climate Change*” (pp. 205-220). Springer, Cham. Online <[https://link.springer.com/chapter/10.1007/978-3-319-72026-5\\_8](https://link.springer.com/chapter/10.1007/978-3-319-72026-5_8)>.

<sup>10</sup>Richards, J and Schalatek, L, 2017 . “Financing Loss and Damage: A Look at Governance and Implementation Options” [https://www.boell.de/sites/default/files/loss\\_and\\_damage\\_finance\\_paper\\_update\\_16\\_may\\_2017.pdf](https://www.boell.de/sites/default/files/loss_and_damage_finance_paper_update_16_may_2017.pdf); CAN, 2016. “Submission to the Executive Committee of the Warsaw International Mechanism on Loss and Damage” [https://unfccc.int/files/adaptation/groups\\_committees/loss\\_and\\_damage\\_executive\\_committee/application/pdf/can\\_submission\\_to\\_the\\_excom\\_of\\_the\\_wim\\_on\\_loss\\_and\\_damage\\_finance.pdf](https://unfccc.int/files/adaptation/groups_committees/loss_and_damage_executive_committee/application/pdf/can_submission_to_the_excom_of_the_wim_on_loss_and_damage_finance.pdf); Schäfer, L and Künzel, V, “Steps towards closing the Loss&Damage finance gap” 2019 [https://www.germanwatch.org/sites/default/files/Policy%20Briefing\\_Steps%20towards%20closing%20the%20Loss%26Damage%20finance%20gap\\_0.pdf](https://www.germanwatch.org/sites/default/files/Policy%20Briefing_Steps%20towards%20closing%20the%20Loss%26Damage%20finance%20gap_0.pdf)

<sup>11</sup> Barnett, J., P. Tschakert, L. Head, and W.N. Adger, 2016: A science of loss. *Nature Climate Change*, 6, 976-978, doi:10.1038/nclimate3140; Tschakert, P. et al., 2017: Climate change and loss, as if people mattered: Values, places, and experiences. *Wiley Interdisciplinary Reviews: Climate Change*, 8(5), e476, doi:10.1002/wcc.476.

<sup>12</sup> Tschakert, Petra, Barnett, J., Ellis, N., Lawrence, C., Tuana, N., New, M., Elrick-Barr, C., Pandit, R., & Pannell, D., 2017. Climate change and loss, as if people mattered: values, places, and experiences. *Wiley Interdisciplinary Reviews: Climate Change*, 8(5), 1-19. <https://doi.org/10.1002/wcc.476>

The severity, intensity and frequency with which these losses and damages materialize in the lives of the most vulnerable communities is testimony to the limits of adaptation to climate change, the lack of funding to address the loss and damage and the absence of a fair and effective structural response from the international community to deal with the results of residual risk. Adaptation is a “process of adjustment to actual or expected climate and its effects” that seeks to reduce potential damages and/or take advantage of opportunities that may arise.<sup>13</sup> Adaptation has limits that create a threshold beyond which adaptation actions cannot take place and that is where loss and damage are generated.<sup>14</sup> Adaptation has two types of limits that generate intolerable risks to people or their systems: a) hard limit: a situation where it is not possible to take any action to avoid the intolerable risk; b) soft limit: feasible adaptation actions to avoid the intolerable risk are not available at that time.<sup>15</sup> Consequently, when this residual risk is not managed through adaptation measures as a result of the aforementioned limits, loss and damage are generated and suffered by our communities.

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<sup>13</sup> IPCC, 2014c. “Glosario GW2 AR5. In Climate Change 2014: Impacts, Adaptation, and Vulnerability. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change”; Martinez Blanco, A; Gutierrez, H, 2020. “Movilidad Humana: Derechos Humanos y Justicia Climática” Ediciones Böll Recuperado de <https://larutadelclima.org/wpcontent/uploads/2019/10/MOVILIDAD-HUMANA.pdf>

<sup>14</sup> Warner, K., van der Geest, K., Kreft, S., Huq, S., Harmeling, S., Kusters, K., & de Sherbinin, A. 2012. “Evidence from the frontlines of climate change: Loss and Damage to communities despite coping and adaptation.” [http://lib.riskreductionafrica.org/bitstream/handle/123456789/716/evidence from the frontlines of climate change.pdf?sequence=1](http://lib.riskreductionafrica.org/bitstream/handle/123456789/716/evidence%20from%20the%20frontlines%20of%20climate%20change.pdf?sequence=1)

<sup>15</sup> IPCC, 2018 “Anexo I: Glosario [Matthews J.B.R. (ed.)]. En: Calentamiento global de 1,5 °C, Informe especial del IPCC sobre los impactos del calentamiento global de 1,5 °C con respecto a los niveles preindustriales y las trayectorias correspondientes que deberían seguir las emisiones mundiales de gases de efecto invernadero, en el contexto del reforzamiento de la respuesta mundial a la amenaza del cambio climático, el desarrollo sostenible y los esfuerzos por erradicar la pobreza” [Masson-Delmotte V., P. Zhai, H.-O. Pörtner, D. Roberts, J. Skea, P.R. Shukla, A. Pirani, W. Moufouma-Okia, C. Péan, R. Pidcock, S. Connors, J.B.R. Matthews, Y. Chen, X. Zhou, M.I. Gomis, E. Lonnoy, T. Maycock, M. Tignor y T. Waterfield (eds.)].

## Paris Agreement: Article 8

The Paris Agreement has come to position loss and damage as the third pillar of climate action. Article 8 of this Agreement expressly mentions loss and damage in relation to the adverse effects of climate change. This article, in its first paragraph, establishes the importance of (a) avoiding and reducing, and (b) addressing loss and damage related to the adverse effects of climate change. It is also important to note that Article 8.1 mentions the importance of addressing loss and damage, expressly contemplating “extreme weather events and slow onset events, and the contribution of sustainable development to reducing the risk of loss and damage”.<sup>16</sup>

*“Parties recognize the importance of averting minimizing and addressing loss and damage associated with the adverse effects of climate change, including extreme weather events and slow onset events, and the role of sustainable development in reducing the risk of loss and damage.”<sup>17</sup>*

**Article 8.1, Paris Agreement .**

It is important to emphasize the importance of the word “cope” with loss and damage, since it refers to the direct impact of residual risk on people and territories. This claim is usually understood as being related to the actions to be taken by the international community and by countries at the national level to respond to the danger and suffering to which communities affected by the impacts of climate change are subjected. The terms “avoid and reduce” are related, on the one hand, to the causes of climate change and mitigation efforts, and on the other hand, to risk management through adaptation to climate change. In this sense, the causal and interdependent relationship between the three pillars of climate action established by the Paris Agreement is emphasized.

Article 8.2 mentions the Warsaw International Mechanism for Loss and Damage (WIM), a body already established by the Conference of the Parties of the UNFCCC in Decision 2/CP.19. The WIM is intended “to address loss and damage associated with impacts of climate change, including extreme events and slow onset events, in developing countries that are particularly vulnerable to the adverse effects of climate change(…)”<sup>18</sup> Additionally, Article 8.5 of the Paris Agreement mentions that the WIM should collaborate with existing bodies and expert groups related to this Agreement or with organizations and experts operating in other fields.

<sup>16</sup> CMNUCC, 2015. “Acuerdo de París” Art. 8.1 Recuperado de [https://unfccc.int/sites/default/files/spanish\\_paris\\_agreement.pdf](https://unfccc.int/sites/default/files/spanish_paris_agreement.pdf)

<sup>17</sup> ibid

<sup>18</sup> CMNUCC, 2018. “Decisión 2/CP.19 Mecanismo internacional de Varsovia para las pérdidas y los daños relacionados con las repercusiones del cambio climático” Recuperado de <https://unfccc.int/sites/default/files/resource/docs/2013/cop19/spa/10a01s.pdf>

Article 8.3 mentions the duty of country Parties to enhance “understanding, action and support, including through the Warsaw International Mechanism, as appropriate, on a cooperative and facilitative basis with respect to loss and damage associated with the adverse effects of climate change.” According to Article 8.4, cooperative and facilitative action to enhance understanding, measures and support may be carried out through:

- Early warning systems ;
- Emergency preparedness;
- Slow onset events ;
- Events that may involve permanent and irreversible loss and damage;
- Comprehensive risk assessment and management;
- Risk insurance facilities, climate risk pooling and other insurance solutions;
- Non-economic losses;
- Resilience of communities, livelihoods and ecosystems.

## Origin of loss and damage

The international climate governance conversation about loss and damage began in 1991 during the negotiation process of the United Nations Framework Convention on Climate Change. The Alliance of Small Island States (AOSIS) made a proposal during the fourth meeting of the Intergovernmental Negotiating Committee for the UNFCCC (INC 4), where it introduced both the concept of climate damage and the political call for an international fund to compensate when it is not possible to have insurance for damages caused by climate change.

*“A fund to compensate developing countries (i) in situations where selecting the least climate-sensitive development option entails incurring additional costs, and(ii) When insurance is not available for damages caused by climate change.”<sup>19</sup>*

At INC 4, AOSIS proposed to include within the UNFCCC structure an international climate fund as a separate supplementary financial mechanism to assist developing and vulnerable countries affected by the impacts of climate change.<sup>20</sup> An international climate fund was proposed to finance measures to counteract the adverse consequences of climate change and an “International Insurance Fund” to provide insurance against the consequences of rising sea levels.

The International Insurance Fund would have resources from mandatory contributions from developed countries and would be under the supervision of the Conference of the Parties. The resources of this Fund would be used to compensate small island and low-lying coastal countries for loss and damage caused by sea level rise.<sup>21</sup>

Contributions to this fund were modeled on the Paris Convention on Third Party Liability of 29 July 1960 regarding civil liability in the field of nuclear energy, and the Brussels Supplementary Convention of 31 January 1963. Contributions would be calculated as follows:

- 50% based on the ratio between the gross national product (GNP) of each industrialized country and the total GNP of all industrialized countries in the year prior to when the contribution was collected, and 50% based on the ratio between the total CO<sub>2</sub> emissions of each industrialized country and the CO<sub>2</sub> emissions of all industrialized countries in the year prior to the collection period.

<sup>19</sup> Intergovernmental Negotiating Committee (INC), 1991. “Report of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change on the Work of its Fourth Session, held at Geneva from 9 to 20 December 1991” (UN Doc. A/ AC.237/15, 29 January 1992) Recuperado de <https://undocs.org/en/a/ac.237/misc.1/add.3>

<sup>20</sup> INC, 1991. “Report of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change on the Work of its Fourth Session, held at Geneva from 9 to 20 December 1991” (UN Doc. A/ AC.237/15, 29 January 1992), en pg. 20, 21, 46, 80, 126–130 (Anexo V Insurance Mechanism). Recuperado de [https://unfccc.int/resource/docs/a/15\\_2.pdf](https://unfccc.int/resource/docs/a/15_2.pdf)

<sup>21</sup> Intergovernmental Negotiating Committee (INC), 1991. “Report of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change on the Work of its Fourth Session, held at Geneva from 9 to 20 December 1991” (UN Doc. A/ AC.237/15, 29 January 1992) Recuperado de <https://undocs.org/en/a/ac.237/misc.1/add.3>

- Ten years after the entry into force of the Convention, if the rate of global sea level rise had reached an agreed figure, industrialized nations would contribute the agreed percentage of their GNP to the fund. If this had not been achieved, this review process would take place every 5 years and the obligation to contribute would come into effect the year after the agreed sea level rise figure was confirmed.

The AOSIS proposal was not included in the UNFCCC text and the concept of “loss and damage” or compensation was not included, but their claims did leave their mark.<sup>22</sup> The UNFCCC mentions that developed countries have a commitment based on their common but differentiated responsibilities and the specific nature of their national and regional development priorities, objectives and circumstances: to assist “developing country Parties that are particularly vulnerable to the adverse effects of climate change in meeting costs of adaptation to the adverse effects.”<sup>23</sup>

In addition, Article 4.8 of the UNFCCC states that the Parties shall consider measures necessary to fulfill their commitments, including financing, insurance and technology transfer measures “to address the specific needs and concerns of developing country Parties arising from the adverse effects of climate change or the impact of the implementation of response measures, in particular the following countries: a) Small island countries; b) Countries with low-lying coastal areas; c) Countries with arid and semi-arid areas, forested areas and areas liable to forest decay; d) Countries with areas prone to natural disasters; e) Countries with areas liable to drought and desertification; f) Countries with areas of high urban atmospheric pollution; g) Countries with areas with fragile ecosystems, including mountainous ecosystems; h) Countries whose economies are highly dependent on income generated from the production, processing and export, and/or consumption of fossil fuels and associated energy-intensive products, or on their consumption; i) Landlocked countries and transit countries. In addition, the Conference of the Parties may take appropriate action in relation to this paragraph.”<sup>24</sup>

Although the parties did not include the claim for compensation for loss and damage, nor the specific mechanism to address this need of the most vulnerable countries, there is a substantial basis for pursuing and acting on the claim through a systemic response to the adverse impacts suffered by the people in their territories.

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<sup>22</sup> Mace MJ and Verheyen R, 2016. ‘Loss, Damage and Responsibility after COP21: All Options Open for the Paris Agreement’ 25 Review of European, Comparative and International Environmental Law 197

<sup>23</sup> CMNUCC, 1992. “Convención Marco de Naciones Unidas sobre el Cambio Climático”. Artículo 4.4 Recuperado de [https://unfccc.int/files/essential\\_background/background\\_publications\\_htmlpdf/application/pdf/convsp.pdf](https://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/convsp.pdf)

<sup>24</sup> UN Treaties, 1992. “Convención Marco de Naciones Unidas sobre el Cambio Climático” Recuperado de [https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg\\_no=XXVII-7&chapter=27&Temp=mtdsg3&clang=en](https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXVII-7&chapter=27&Temp=mtdsg3&clang=en)

It is a fact that the Paris Agreement completed the constitution of loss and damage as the third pillar of climate action and finally validated its importance. However, the need to have a systemic response from the climate regime to loss and damage has been a continuous claim since the conception of the UNFCCC. Similarly, the claim for due compensation for loss and damage on the part of developed countries is not a new concept, but part of the historical struggle of countries and peoples vulnerable to the adverse impacts of climate change. The failure to include compensation for loss and damage in the Paris Agreement was met with a formal response from many insular countries, who left a formal declaration attached to their signature of the UNFCCC.<sup>25</sup>

*““The Government of Fiji declares its understanding that signature of the Convention shall, in no way, constitute a renunciation of any rights under international law concerning state responsibility for the adverse effects of climate change, and that no provisions in the Convention can be interpreted as a derogating from the principles of general international law.”<sup>26</sup>*

In essence, AOSIS member countries, aware that their proposal to have compensation for loss and damage recognized under the UNFCCC was rejected, safeguarded their rights by agreeing to become a party to the UNFCCC but, with the addition of a note when signing the Convention. They formally reiterated that they did not waive any right to claim liability on the part of States for the adverse effects of climate change, and that no provision of the Convention can be interpreted as a derogation of the principles of general international law. This statement was reiterated by several other countries when signing the Kyoto Protocol and the Paris Agreement. From the start of the UNFCCC until today, there has been continued historical opposition from developed countries, such as the United States, on the issues of loss and damage and compensation.

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<sup>25</sup> Wewerinke-Singh M and Salili DH, 2019. 'Between Negotiations and Litigation: Vanuatu's Perspective on Loss and Damage from Climate Change' O Climate Policy 1 <<https://doi.org/10.1080/14693062.2019.1623166>>

<sup>26</sup> UN Treaties, 1992. "Convención Marco de Naciones Unidas sobre el Cambio Climático" Recuperado de [https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg\\_no=XXVII-7&chapter=27&Temp=mtdsg3&clang=\\_en](https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXVII-7&chapter=27&Temp=mtdsg3&clang=_en)

## The Bali roadmap 2007

At the COP13 climate summit, about 15 years after the first reference to “loss and damage” this issue regained importance and emerged in Decision 1/CP.13, which created the Bali Action Plan. In this Plan it was decided to undertake a global cooperative process to implement the UNFCCC in the long term and, within the agreement, there is a call for intensified work on adaptation, including, among other things, the review of:

*“Disaster reduction strategies and means to address **loss and damage** associated with climate change impacts in developing countries that are particularly vulnerable to the adverse effects of climate change”<sup>27</sup>*

The Bali Action Plan established the Ad Hoc Working Group for Long-term Cooperative Action under the Convention (AWG-LCA) that would have the objective of proposing a global agreement at COP15 in Copenhagen.<sup>28</sup> AWG-LCA organized a workshop on “Risk management and risk reduction strategies, including risk sharing and transfer mechanisms such as insurance” prior to COP14.<sup>29</sup>

At this workshop, the proposal for an “International Insurance Mechanism” for loss and damage was again introduced, but more broadly, focusing on extreme events and including microinsurance.<sup>30</sup> AOSIS mentioned that such an insurance mechanism could function as a pool of resources to help SIDS address the financial risk of increasingly frequent and severe extreme weather events. Furthermore, this proposal assumes that the most vulnerable countries cannot afford insurance to cope with the impacts on their national economies. This is why, once again, the subsidy was proposed to maintain and create this fund as a form of compensation for the inevitable impacts of climate change.

Also, the Least Developed Countries (LDCs) proposed the establishment of compensation to climate victims and refugees through:<sup>31</sup>

- A mechanism to assess loss and damage.
- A financial mechanism to address what is owed to climate victims.

During COP14, AOSIS formalized its proposal by detailing how to create a “multi-window mechanism to address loss and damage from climate change impacts”.<sup>32</sup> In addition, it was proposed that this mechanism should be governed by the UNFCCC and a Board of Directors and a Technical and Financial Advisory Service.

<sup>27</sup> UNFCCC, 2007, “Decisión 1/CP.13 Plan de Acción de Bali” (Doc. ONU FCCC/CP/2007/6/Add.1 ) Recuperado de: <https://unfccc.int/sites/default/files/resource/docs/2007/cop13/spa/06a01s.pdf>

<sup>28</sup> Mace MJ and Verheyen R, 2016 ‘Loss, Damage and Responsibility after COP21: All Options Open for the Paris Agreement’ 25 Review of European, Comparative and International Environmental Law 197

<sup>29</sup> *ibid*

<sup>30</sup> UNFCCC, 2008. “Report of the AWG-LCA on its first session” (Doc. ONU. FCCC/AWGLCA/2008/3, 16 May 2008),

<sup>31</sup> Bangladesh, nd. “Advancing Adaptation through Finance Advancing Adaptation through Finance and Technology, including National and Technology, including National Adaptation Programmes of Actions Adaptation Programmes of Actions (NAPAs)” Recuperado de [https://unfccc.int/files/adaptation/application/pdf/bangladesh\\_awgcla2\\_adaptation\\_workshop.pdf](https://unfccc.int/files/adaptation/application/pdf/bangladesh_awgcla2_adaptation_workshop.pdf)

<sup>32</sup> UNFCCC, 2008. “Ideas and proposals on the elements contained in paragraph 1 of the Bali Action Plan” (Doc. ONU FCCC/AWGLCA/2008/Misc.5/Add.2 Part I) Recuperado de <https://unfccc.int/resource/docs/2008/awglca4/eng/misc05a02p01.pdf>

This mechanism would have 3 components:

Insurance	Rehabilitation/ Compensation:	Risk Management
SIDS and other developing countries are particularly vulnerable to extreme events. Many countries are unable to access or pay for commercial insurance for climate impacts on their economies and require assistance to cope with increasing climate risk.	It is recognized that, even with risk reduction financing, loss and damage will occur. This is why rehabilitation and compensation actions are required to address the progressive and negative impacts of climate change, as they are unavoidable.	Support and promotion of risk analysis and risk management tools is required to facilitate and inform the other two components.

This proposal initiated an important discussion within the climate governance process and an important reflection is the WWF’s “Beyond Adaptation” document.<sup>33</sup> This document explores in depth the legal implications of compensation and legal liability for climate damage. The objective was that these inputs would help to further develop the climate regime so that it could adequately address loss and damage.

For COP15, with a view to a possible new global agreement, AOSIS proposed the “Copenhagen Protocol to Enhance the Implementation of the United Nations Framework Convention on Climate Change”.<sup>34</sup> Among the adaptation actions to be strengthened for the implementation of the UNFCCC, the proposed protocol expressly included loss and damage. It called for support to be given to the creation and strengthening of national bodies for adaptation and to include risk management planning. The protocol also proposed the creation of an international mechanism to address loss and damage.

The purpose of this mechanism was to support developing countries, especially those particularly vulnerable to the following:

- Compensation and rehabilitation for loss and damage due to slow onset events, including sea level rise, temperature rise and acidification.
- Build resilience by addressing risks associated with extreme climate events.

It also mentioned support for the planning and implementation of adaptation actions to address loss and damage in developing countries through a multilateral climate change fund.

<sup>33</sup> WWF, 2008. “BEYOND ADAPTATION The legal duty to pay compensation for climate change damage” Recuperado de [https://assets.wwf.org.uk/downloads/beyond\\_adaptation\\_lowres.pdf](https://assets.wwf.org.uk/downloads/beyond_adaptation_lowres.pdf)

<sup>34</sup> UNFCCC, 2009. “Protocolo de Copenhague para Mejorar la Aplicación del Convenio Marco de las Naciones Unidas sobre el Cambio Climático” (Doc. ONU FCCC/AWGLCA/2009/MISC.8) Recuperado de <https://unfccc.int/resource/docs/2009/awglca8/eng/misc08.pdf>

The Copenhagen Accord that resulted from COP15 did not include any mention of loss and damage; due to opposition from developed countries, especially on the issue of compensation.<sup>35</sup> The Copenhagen Accord was very weak and in itself was not successful, resulting in a moment of crisis for international climate governance. At COP16, the pressure was on to keep the multilateral process on track, so Decision 1/CP.16 tried to capture all the main points of concern of all parties.<sup>36</sup>

Decision 1/CP.16 “Recognizes 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 climate events and slow onset events”.<sup>37</sup> In addition, it initiated a work program to examine approaches to address loss and damage associated to the impacts of climate change in developing countries that are particularly vulnerable to its adverse effects. This work program contemplates a weather risk insurance facility to address the effects associated with severe climate events and other issues. However, compensation is not expressly mentioned in this decision.

In the years that followed, various technical inputs were received and expert meetings and negotiations were held.<sup>38</sup> In these discussions and documents, the need to address compensation for loss and damage was reiterated by different negotiating groups and developing countries such as AOSIS, LDCs, Ghana, Bolivia, Ecuador, China, El Salvador, Guatemala, Thailand, Philippines, and Nicaragua.

AOSIS mentioned that it was appropriate to recommend that COP18 adopts an international mechanism to address loss and damage that has the 3 components that were previously found in the AWG-LCA and in other instances: insurance, rehabilitation/compensation and risk management. In this proposal AOSIS recounted the repeated efforts to create this mechanism with its compensation component and the funding rationale for its approval.

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<sup>35</sup> PNUD, 2010. “The outcomes of Copenhagen The Negotiations & The Accord” Recuperado de [https://www.undp.org/content/dam/aplaws/publication/en/publications/environment-energy/www-ee-library/climate-change/the-outcomes-of-copenhagenthe-negotiations-and-the-accord/UNDP\\_BRM\\_CopenhagenHR24\\_3.pdf](https://www.undp.org/content/dam/aplaws/publication/en/publications/environment-energy/www-ee-library/climate-change/the-outcomes-of-copenhagenthe-negotiations-and-the-accord/UNDP_BRM_CopenhagenHR24_3.pdf)

<sup>36</sup> Mace MJ and Verheyen R, 2016. “Loss, Damage and Responsibility after COP21: All Options Open for the Paris Agreement” 25 Review of European, Comparative and International Environmental Law 197

<sup>37</sup> UNFCCC, 2010. “Decisión 1/CP.16 Acuerdos de Cancún: resultado de la labor del Grupo de Trabajo Especial sobre la cooperación a largo plazo en el marco de la Convención” (Doc. ONU FCCC/CP/2010/7/Add.1) Recuperado de <https://undocs.org/es/FCCC/CP/2010/7/Add.1>

<sup>38</sup> UNFCCC, 2012. “Views and information from Parties and relevant organizations on the possible elements to be included in the recommendations on loss and damage in accordance with decision 1/CP.16 Parte 1” (Doc. UN FCCC/SBI/2012/MISC.14) Recuperado de <https://unfccc.int/sites/default/files/resource/docs/2012/sbi/eng/misc14.pdf>; UNFCCC, 2012 “Views and information from Parties and relevant organizations on the possible elements to be included in the recommendations on loss and damage in accordance with decision 1/CP.16 Parte 2” (Doc. UN FCCC/SBI/2012/MISC.14/Add.1) Recuperado de <https://unfccc.int/sites/default/files/resource/docs/2012/sbi/eng/misc14a01.pdf>

*“Loss and damage to small island developing states from the adverse effects of human-induced climate change is now inevitable...It is the proper role of the Convention to minimise and address unavoidable loss and damage from the impacts of anthropogenic climate change. Accordingly, the time has come for the establishment of an international mechanism to address loss and damage from the adverse effects of climate change. Anything less than the establishment of such a mechanism in Doha will represent a failure of the international community to respond to what are now well-recognized needs of SIDS, LDCs and other particularly vulnerable developing countries.”*<sup>39</sup> **AOSIS, 2012.**

The proposal of Bolivia, Ecuador, China, El Salvador, Guatemala, Thailand, the Philippines and Nicaragua has particular facets, but it is noteworthy that, for the first time, Latin American countries were talking about loss and damage.<sup>40</sup> This group of countries proposed that funding mechanisms, including the Green Climate Fund, should take actions such as: the establishment of a “Solidarity Fund” that would provide compensation for loss and damage caused by slow onset events; support for rehabilitation to address loss and damage; and ways to address and provide alternatives or compensation for lost development opportunities. These countries claimed the need for reparations for loss and damage through compensation and rehabilitation mechanisms. Although the importance of coordination and support through technical assistance is mentioned, these were not the main focus.

Another interesting point in this proposal was the mention of gaps to be addressed by the UNFCCC, including:

- More certainty for longer-term planning and variability management with insurance-like tools.
- Non-economic loss.
- Slow onset events.
- Migration.
- Identification of inflection points.

On the other hand, the LDCs, referring to the structure that a mechanism under the UNFCCC should have to address loss and damage, also emphasized the need to provide reparation, rehabilitation and a compensation mechanism for individuals from developing countries. Finally, Ghana proposed its integration into the International Mechanism for Loss and Damage, a compensation and rehabilitation fund as a reparation measure.

<sup>39</sup> UNFCCC, 2012. “Views and information from Parties and relevant organizations on the possible elements to be included in the recommendations on loss and damage in accordance with decision 1/CP.16 Parte 1” (Doc. UN FCCC/SBI/2012/MISC.14) Recuperado de <https://unfccc.int/sites/default/files/resource/docs/2012/sbi/eng/misc14.pdf>

<sup>40</sup> UNFCCC, 2012 ““Views and information from Parties and relevant organizations on the possible elements to be included in the recommendations on loss and damage in accordance with decision 1/CP.16 Parte 2” (Doc. UN FCCC/SBI/2012/MISC.14/Add.1) Recuperado de <https://unfccc.int/sites/default/files/resource/docs/2012/sbi/eng/misc14a01.pdf>

The opposition to compensation by the United States was explicit in the technical contributions submitted by them during the negotiation process, arguing the following:

- An international mechanism with an international insurance fund and a compensation and rehabilitation pillar would inhibit a country-driven approach to adaptation. The argument was that making use of the resources of the fund, either for insurance premiums or to be saved for rehabilitation, would prevent those resources from being used for adaptation actions.
- It would be technically impossible to establish an insurance mechanism that paid out an amount that could be demonstrated to be equivalent to the damages directly attributable to climate change because of the limits of attribution science.<sup>41</sup>
- Some countries would be at a disproportionate disadvantage due to lack of capacity of their staff to utilize the fund.
- A monetary value would be placed on the lives, livelihoods and assets of the most vulnerable countries and populations.
- It would reduce the availability of insurance tools by displacing private insurance providers.
- It would incentivize maladaptation and increase the risk to communities.
- It would not have the required speed to make quick payments due to bureaucratic delays.

This view of the United States is based on the assumption that, at the time, this nation did not endorse the International Mechanism for Loss and Damage, and because they felt strongly “that opportunities for adaptation are far from exhausted. There is still significant room for increasing adaptive capacity and, as a result, considerable opportunity to reduce the risk of loss and damage.”<sup>42</sup>

At COP18, through Decision 3/CP.18, countries reaffirmed the need to take precautionary measures in accordance with the principles of UNFCCC to anticipate, prevent and minimize the causes of climate change and mitigate adverse effects. They further stressed that lack of full scientific certainty was not a reason to postpone action. In this regard, parties agreed that the role of UNFCCC in promoting means to address loss and damage includes:

<sup>41</sup> Esto se refiere al estado de la ciencia de atribución sobre los impactos climáticos vigente en el 2012.

<sup>42</sup> UNFCCC, 2012 “Views and information from Parties and relevant organizations on the possible elements to be included in the recommendations on loss and damage in accordance with decision 1/CP.16 Parte 2” (Doc. UN FCCC/SBI/2012/MISC.14/Add.1) Recuperado de <https://unfccc.int/sites/default/files/resource/docs/2012/sbi/eng/misc14a01.pdf>

- 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, by facilitating and promoting:
- Strengthening dialogue, coordination, coherence and synergies among relevant stakeholders;
- Enhancing action and support, including finance, technology and capacity-building, to address loss and damage associated with the adverse effects of climate change.

Other commitments made by all countries in this decision, in accordance with the principle of common but differentiated responsibilities and respective capacities, were to execute the following actions:

- Assessing the risk of loss and damage associated with the adverse effects of climate change, including slow onset impacts;
- Identifying options and designing and implementing country-driven risk management strategies and approaches, including risk reduction, and risk transfer and risk sharing mechanisms;
- The systematic observation of, and data collection on, the impacts of climate change, in particular slow onset event impacts, and accounting for losses, as appropriate;
- Implementing comprehensive climate risk management approaches, including scaling up and replicating good practices and pilot initiatives;
- Promoting an enabling environment that would encourage investment and involvement of relevant stakeholders in climate risk management;
- Involving vulnerable communities and populations, and civil society, the private sector and other relevant stakeholders in the assessment of and response to loss and damage;
- Enhancing access to, sharing and use of data at regional, national and subnational levels, such as hydrometeorological data and metadata, on a voluntary basis, to facilitate the assessment and management of climate-related risk.<sup>43</sup>

Decision 3/CP.18 also decided that an international mechanism for loss and damage should be established to address loss and damage in accordance with UNFCCC obligations.

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<sup>43</sup> UNFCCC, 2012. "Decision 3/CP.18 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 to enhance adaptive capacity" ONU Doc FCCC/CP/2012/8/Add.1

## The Warsaw Mechanism

The Warsaw International Mechanism for Loss and Damage related to Climate Change Impacts (WIM) was established at COP19 by Decision 2/CP.19.<sup>44</sup> This mechanism seems to consolidate, after 20 years, the AOSIS claim and arguably began to consolidate the three pillars of climate action: mitigation, adaptation and loss and damage.<sup>45</sup> The primary function of WIM is to promote the implementation of approaches to address loss and damage related to the adverse effects of climate change. WIM also has other more specific functions:

1. 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, by facilitating and promoting.
2. Strengthening dialogue, coordination, coherence and synergies among relevant stakeholders by.
3. Enhancing action and support, including finance, technology and capacity-building, to address loss and damage associated with the adverse effects of climate change.

It is interesting to note that some of the duties of the WIM are to increase support to funding and provide information and recommendations on how to deal with loss and damage to the entities in charge of the operation of the financial mechanism of the Convention. In this sense, this mechanism has the potential to concretize the establishment of an international financing mechanism to address loss and damage, a claim that has been at the center of the historical struggle of the most vulnerable countries. Unfortunately, the establishment of WIM and its Executive Committee (ExCom) was not accompanied by a decision to provide funding for its work and its action is guided by work plans agreed upon by the countries.<sup>46</sup>

At COP25, Decision 2/CMA.2 was adopted, approving the review of WIM, which seeks greater coordination with UNFCCC bodies and other organizations.<sup>47</sup> This decision also created the Santiago Network, whose overall objective is “to catalyze the technical assistance of relevant organizations, bodies, networks and experts, for the implementation of relevant approaches for averting, minimize and addressing L&D at the local, national and regional level, in developing countries that are particularly vulnerable to the adverse effects of climate change”. However, details regarding the work of the Santiago Network remain to be defined and structured at COP26.

<sup>44</sup> UNFCCC, 2019 “Decisión 2/CP.19 Mecanismo internacional de Varsovia para las pérdidas y los daños relacionados con las repercusiones del cambio climático” ONU Doc FCCC/CP/2013/10/Add.1

<sup>45</sup> Mace MJ and Verheyen R, ‘Loss, Damage and Responsibility after COP21: All Options Open for the Paris Agreement’ (2016) 25 Review of European, Comparative and International Environmental Law 197

<sup>46</sup> ibid

<sup>47</sup> UNFCCC, 2019. “Decisión 2/CMA.2 Mecanismo Internacional de Varsovia para las Pérdidas y los Daños relacionados con las Repercusiones del Cambio Climático y examen de 2019 del Mecanismo” UN Doc FCCC/PA/CMA/2019/6/Add.1 [https://unfccc.int/sites/default/files/resource/cma2019\\_06a01E.pdf](https://unfccc.int/sites/default/files/resource/cma2019_06a01E.pdf)

One of the main discussions during the WIM negotiations at COP25 was, again, the demand to create a funding mechanism for loss and damage that would be self-funded and supplemental to existing funding commitments.<sup>48</sup> However, this claim was unsuccessful due to strong opposition from developed countries.<sup>49</sup> During this negotiation, the United States wanted to introduce text into Decision 2/CMA.2 to extend the restrictions of Paragraph 51, Decision 1/COP21 relevant to the Paris Agreement to the entire UNFCCC process.

Paragraph 51 is an article within the decision adopted by the Paris Agreement, Decision 1/CP21, which gives an interpretation of Article 8 of the Paris Agreement. It states that Article 8 does not imply or give room for discussion of any form of legal liability or compensation with respect to loss and damage caused by climate change. An element that is in total contradiction with the historical interests of the most vulnerable countries.

Finally, with regards to financing, Decision 2/CMA.2 requests the ExCom to issue recommendations and information to the entities in charge of the operation of the Convention's Financial Mechanism and the Paris Agreement, and to work with the Green Climate Fund to clarify how countries can access funding to implement the work plan activities. This result is still far from the claims existing during COP25 and, in general, from the objective that the most vulnerable countries have historically pursued.

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<sup>48</sup> Sustentabilidad Sin Fronteras, 2020. "Informe de Cambio Climático 2020". Recuperado de [https://drive.google.com/file/d/17B\\_WnRYROlvXDYT3NwBFnEbl4nGTI-m02/view](https://drive.google.com/file/d/17B_WnRYROlvXDYT3NwBFnEbl4nGTI-m02/view)

<sup>49</sup> La Ruta del Clima, 2019. "Nations Square Off on Loss and Damage at COP25" Recuperado de <https://larutadelclima.org/nationssquare-off-on-loss-and-damage-at-cop25/>

## Paragraph 51 1/COP21

*“We’re not against it. We’re in favor of framing it in a way that doesn’t create a legal remedy, because Congress will never buy into an agreement that has something like that, after witnessing what happened in Kyoto. If you really want to get something done, don’t go down that road. Not rebelling against it in terms of whether we have some responsibility or not – the impact of it would be to kill the deal. And we don’t want to do that.”<sup>50</sup> John Kerry.*

During the negotiations that created the Paris Agreement, many of the political claims regarding loss and damage that have existed since the creation of UNFCCC gained momentum. This is one of the possible reasons why a specific article on loss and damage was included in the Paris Agreement. However, opposition from developed countries was consistent and there is no clearer example than the inclusion of paragraph 51 in Decision 1/CP21 adopted in the Paris Agreement.

*“51. Agrees that Article 8 of the Agreement does not involve or provide a basis for any liability or compensation;” Paragraph 51 Decision 1/CP21<sup>51</sup>*

With this paragraph, developed countries intended to avoid being called to face their responsibilities for loss and damage suffered by developing countries. The opposition to compensation and legal liability by delegates such as John Kerry in 2015 was based on the need to create a voluntary governance structure without enforceable obligations to enable the United States to become a party to the Paris Agreement. In fact, the United States was the country that proposed paragraph 51 in a much broader version, with the purpose of making it part, not of a decision, but of an obligation recognized within the Paris Agreement itself. The purpose of this was to exclude compensation and legal liability from the entire Agreement.

The US proposed the following text for the Paris Agreement:

*“Parties shall enhance action and support, on a cooperative and facilitative basis, for addressing loss and damage associated with the adverse effects of climate change, and in a manner that does not involve or provide a basis for liability or compensation nor prejudice existing rights under international law.”<sup>52</sup>*

Had they succeeded in including this text, it would imply that compensation and legal liability for loss and damage could only be readmitted to the UNFCCC governance process through a reform of the Paris Agreement, but fortunately, they failed to do so.<sup>53</sup> However, the level of ambition of the US to restrict access to justice and compensation for the most vulnerable populations from the adverse impacts of climate change was evident.

<sup>50</sup> Rolling Stones, 2015. “John Kerry on Climate Change: The Fight of Our Time” Recuperado de <https://www.rollingstone.com/culture/culture-news/john-kerry-on-climate-change-the-fight-of-our-time-50220/>

<sup>51</sup> UNFCCC, 2015. “Decisión 1/CP21” ONU Doc FCCC/CP/2015/10/Add.1 Recuperado de <https://unfccc.int/resource/docs/2015/cop21/spa/10a01s.pdf>; Sustentabilidad Sin Fronteras, 2020. “Informe de Cambio Climático 2020”. Recuperado de <https://drive.google.com/file/d/17BWnRYROlvXDYT3NwBFnEbl4nGTI-m02/view>

<sup>52</sup> UNFCCC. (2015). “Draft Paris outcome: Proposal by the president. Draft Text on COP21 agenda item 4(b), Durban Platform for Enhanced Action (decision 1/CP.17) Adoption of a Protocol, Another Legal Instrument, or an Agreed Outcome with Legal Force under the Convention Applicable to All Parties, Version 2 of 10 December 2015 at 21:00”

<sup>53</sup> Wewerinke-Singh M and Salili DH, 2019. “Between Negotiations and Litigation: Vanuatu’s Perspective on Loss and Damage from Climate Change” Climate Policy <<https://doi.org/10.1080/14693062.2019.1623166>>

The inclusion of paragraph 51 in Decision 1/CP 21 represents one of the most negative moments in climate diplomacy for the populations most vulnerable to climate impacts. Paragraph 51 was discussed in the last moments of negotiation of the Paris Agreement, the US confronted Pacific countries to insert this text. As US interests prevailed and paragraph 51 was included, this caused countries such as Vanuatu, Solomon Islands, Tuvalu, Cook Islands, Marshall Islands, Nauru, Niue and the Philippines to make a note in the ratification document of the Paris Agreement. This note mentions that the signing of the treaty or interpretative clauses does not imply a waiver of their rights regarding the responsibility of countries for the adverse effects of climate change or to claim their right to compensation under international law.<sup>54</sup> With this note, those countries reiterated their right to claim compensation through legal channels outside the climate regime.

Years later during COP25, opposition to legal liability and compensation surfaced again as a permanent policy of the US delegation with respect to loss and damage, as they again sought to include statements such as paragraph 51 in WIM negotiating texts.<sup>55</sup>

It is important to clarify that decisions made in the framework of the Conference of the Parties to the UNFCCC or the Paris Agreement are of a questionable legal nature and it is argued that their function demonstrates a temporary consensus on how to interpret legal instruments. In this sense, paragraph 51 of Decision 1/CP21 can be revoked or reinterpreted with a new decision of the Conference of the Parties to the Paris Agreement.<sup>56</sup>

On the other hand, the text of paragraph 51 was not discussed with precision in order to establish what the words “does not involve” or “legal liability or compensation” imply in itself.<sup>57</sup> Another interesting argument about the weakness of paragraph 51 is that it was adopted by the Conference of the Parties to the UNFCCC and not the Paris Agreement, so it may formally lack interpretative validity as it was adopted by the wrong body and by a different group of countries.<sup>58</sup>

Another interesting detail is that paragraph 51 is limited only to Article 8 of the Paris Agreement, so the possibility of addressing the issue of legal liability and compensation for compliance with the other obligations of the Agreement, such as those that may arise from Article 4 regarding nationally determined contributions (NDCs), has not been eliminated.<sup>59</sup> Furthermore, paragraph 51 cannot be considered as an alteration or limitation of the general rules of customary international law, therefore, legal action is always an avenue. It is important to consider the complications, costs and limitations of litigation as an alternative to a problem of global scale, such as loss and damage, considering that a judicial resolution can provide justice and compensation with respect to a specific case. A systemic response such as the one needed for loss and damage, requires a multilateral governance space such as the UNFCCC.

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54 UN Treaties, 2015, “Acuerdo de Paris” Recuperado de [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=XXVII-7-d&chapter=27&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-7-d&chapter=27&clang=en)

55 Sustentabilidad Sin Fronteras, 2020. “Informe de Cambio Climático 2020”. Recuperado de <https://drive.google.com/file/d/17B WnRYROlvXDYT3NwBFnEbl4nGTI-m02/view>

56 MJ Mace and R Verheyen, 2016 ‘Loss, Damage and Responsibility after COP21: All Options Open for the Paris Agreement’ 25 Review of European, Comparative and International Environmental Law 197 (2016) 205;

57 ibid

58 ibid

59 ibid

The purpose of paragraph 51 is to create a barrier within international climate governance to address the claim for compensation and liability for loss and damage. In other words, it seeks to prevent formal negotiations through the Paris Agreement that would facilitate a compensation mechanism or discuss countries' legal liability for loss and damage. This is a significant impediment as it hinders a structural response to compensate people adversely affected by the impacts of climate change, which is, in short, what the most vulnerable countries have been seeking for more than three decades.

## Conclusion

The most important message of this report is to recognize the historical struggle involved in the demands of vulnerable countries for compensation and recognition of the legal responsibility of large polluters. The invalidation and obstruction of solutions put forward by vulnerable countries responds to a structural issue of the international climate governance process that is causing harm to people's rights. From the outset of the UNFCCC, the most vulnerable countries have made clear the need for a structural response that would benefit the rights of those who are disproportionately affected, and whose responsibility for causing climate change is significantly less.

However, developed countries, such as the United States, have been continuously and proactively opposing the establishment of international mechanisms that respond to the needs of those most impacted by climate change. The lack of an adequate response to cope with loss and damage is not the result of a formal proposal on how to address this issue. To the contrary, vulnerable countries have been designing international mechanisms for solidary support through financing and actions to help manage climate risk for decades.

It is of utmost importance to address the issue of loss and damage from this historical context and based on the technical proposals of the most vulnerable countries on how to obtain compensation and establish responsibilities. Keeping this historical contribution in mind and refraining from approaching the issue of loss and damage as a new issue is essential for effective climate activism based on climate justice.