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*The Third Pillar of International Climate Change Policy: On ‘Loss and Damage’ after the Paris Agreement*, edited by Morten Broberg and Beatriz Martinez Romera  
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To the extent that there was still any doubt, the climate-related disasters of 2020 and 2021 – including historical wildfires, unprecedented heatwaves, massive flooding, extended droughts, and rapid melting of ice sheets<sup>1</sup> – unequivocally demonstrate that it is too late to avoid some consequences associated with climate change. While it remains essential to pursue ambitious climate mitigation and adaptation, we can neither prevent nor adapt to some forms of climate-related harm. Developing countries, many of which bear only minimal responsibility for emitting greenhouse gases, are likely to suffer the greatest losses and have the least ability to recover without assistance. Recognizing this injustice, the Association of Small-Island States (AOSIS) and developing countries have long advocated the inclusion of a loss-and-damage mechanism in international climate policy. In 1991, during the negotiations for the United Nations Framework Convention on Climate Change (UNFCCC),<sup>2</sup> AOSIS proposed that developed countries create and finance a global insurance policy to cover climate-related loss and damage.<sup>3</sup> After decades of advocacy, loss and damage were finally incorporated into the international climate regime, firstly, through the establishment of the Warsaw International Mechanism for Loss and Damage (WIM)<sup>4</sup> in 2013 and then through Article 8 of the Paris Agreement,<sup>5</sup> a dedicated loss-and-damage provision that emphasizes ‘the importance of averting, minimizing and addressing loss and damage associated with the adverse effects of climate change’.<sup>6</sup> Only a year after adopting

<sup>1</sup> See D. Pierson, A. Su & M. Hennessey-Fiske, ‘Summer of Disaster: Extreme Weather Wreaks Havoc Worldwide as Climate Change Bears Down’, *Los Angeles Times*, 21 July 2021, available at: <https://www.latimes.com/world-nation/story/2021-07-21/extreme-weather-worldwide-climate-change-disasters>.

<sup>2</sup> New York, NY (United States (US)), 9 May 1992, in force 21 Mar. 1994, available at: <https://unfccc.int/resource/docs/convkp/conveng.pdf>.

<sup>3</sup> International Negotiation Committee for a Framework Convention on Climate Change Working Group II, ‘Vanuatu: Draft Annex relating to Article 23 (Insurance) for Inclusion in the Revised Single Text on Elements related to Mechanism (A/AC.237/WG.II/Misc.13) submitted by the Co-Chairmen of Working Group II’, 17 Dec. 1991, UN Doc. A/AC.237/WG.II/CRP.8, available at: <https://unfccc.int/sites/default/files/resource/docs/a/wg2crp08.pdf>.

<sup>4</sup> Decision 2/CP.19, ‘Warsaw International Mechanism [WIM] for Loss and Damage Associated with Climate Change Impacts’, 31 Jan. 2014, UN Doc. FCCC/CP/2014/L.2, Recital 5 (‘loss and damage ... includes, and in some cases involves more than that which can be reduced by adaptation’), available at: <http://unfccc.int/resource/docs/2013/cop19/eng/10a01.pdf>.

<sup>5</sup> Paris (France), 12 Dec. 2015, in force 4 Nov. 2016, available at: [http://unfccc.int/paris\\_agreement/items/9485.php](http://unfccc.int/paris_agreement/items/9485.php).

<sup>6</sup> *Ibid.*, Art. 8.1.

the Paris Agreement, however, the parties released a decision stating that ‘Article 8 ... does not involve or provide a legal basis for any liability or compensation’.<sup>7</sup> So, what does ‘loss and damage’ actually cover; who is obligated to compensate for incurred losses and damage; and how can developing countries ensure their loss and damage will be remedied in a just manner?

*The Third Pillar of International Climate Change Policy: On ‘Loss and Damage’ after the Paris Agreement*, edited by Morten Broberg and Beatriz Martinez Romera, explores these questions, with an emphasis on how loss and damage could be addressed effectively and equitably. Through an informative introduction and nine chapters<sup>8</sup> the book examines the role of insurance to compensate for loss and damage; the need to account for non-economic loss and slow-onset events; whether and how domestic and international law might provide compensation for loss and damage; and how loss and damage relates to international law more broadly. The chapters collectively paint a cohesive picture of the challenges in and opportunities for addressing loss and damage. *The Third Pillar of International Climate Change Policy* is an excellent compilation of scholarship and a useful resource for anyone seeking to understand the treatment of loss and damage within and beyond the international climate regime.

To understand the many issues surrounding loss and damage, it helps to understand what these terms mean. The Paris Agreement does not define the terms ‘loss’ or ‘damage’ but, as Meinhard Doelle and Sara Seck explain in Chapter 5, ‘loss’ is often associated with permanent harm, while ‘damage’ involves permanent or recoverable harm. Those descriptions, however, do not fully explain which types of harm are included in loss and damage. As several chapters note, many legal tools to address loss and damage account only for economic harm associated with acute disasters, such as hurricanes and floods. Indeed, in Chapter 4, Kees van der Geest and Koko Warner use the results of a text-mining analysis of the Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change (IPCC)<sup>9</sup> to demonstrate how loss and damage are treated by the IPCC. Their analysis shows that terms related to loss and damage are associated primarily with sudden-onset disasters and economic costs and, surprisingly, are mentioned far more often in association with developed countries than with developing ones. They recommend that the IPCC pay more attention to non-economic costs and slow-onset events and include more experts from developing countries in future Working

<sup>7</sup> Decision 1/CP.21, ‘Adoption of the Paris Agreement’, 13 Dec. 2015, UN Doc. FCCC/CP/2015/10/Add.1, para. 52.

<sup>8</sup> Most of the chapters were published initially in a symposium issue of the journal *Climate Policy*, on the theme of ‘Loss and Damage after the Paris Agreement’, with Broberg and Romera as guest editors; see (2020) 20(6) *Climate Policy*, pp. 661–771. Chapter 7 was previously published as M. Broberg, ‘Interpreting the UNFCCC’s Provisions on “Mitigation” and “Adaptation” in Light of the Paris Agreement’s Provision on “Loss and Damage”’ (2020) 20(5) *Climate Policy*, pp. 527–33.

<sup>9</sup> C.B. Field et al. (eds), *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* (Cambridge University Press, 2015); V.R. Barros et al. (eds), *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part B: Regional Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2015).

Groups to ensure that impacts in developing countries receive more attention. To illustrate why such changes matter, Adelle Thomas and Lisa Benjamin describe in Chapter 3 the harmful impacts of narrowly defining loss and damage through a case study from the Caribbean. They recount how the Bahamian government initially refused, for economic reasons, to support the return of hurricane-displaced peoples to their home island. When the islanders returned regardless, out of a desire to restore their community and culture, the government was forced to fund some rebuilding, but the island remained without critical infrastructure. Thomas and Benjamin argue that similar scenarios are likely to be replicated in other places unless national governments develop relocation plans that consider more than the economic costs of disaster response.

Even if a broader definition of loss and damage is accepted, that does not mean it will be easy to develop remedies to address harm that results from climate change. Chapters 1 and 2 focus specifically on the inadequacy of existing insurance schemes to provide compensation for loss and damage. In Chapter 1, after a succinct and informative description of various insurance schemes and compensation structures, Linnéa Nordlander, Melanie Pill and Martinez Romera catalogue several shortcomings of current insurance schemes in addressing most climate change-related forms of loss and damage. These include the failure to compensate for predictable events, slow-onset events, and non-economic loss and damage, as well as the lack of consideration of inter-generational equity, economic inequality, and the principle of common but differentiated responsibilities. In Chapter 2, Broberg dives deeper into the design of insurance schemes by examining the use of parametric insurance, which compensates for losses based on specific pre-determined parameters, such as the category of a hurricane or extent of a drought. While parametric schemes theoretically enable quicker pay-outs and facilitate greater risk pooling, Broberg shows that parametric schemes often fail to cover the actual losses incurred and may actually lead to no compensation if the pre-determined parameters are too rigid and incapable of modification or tailoring. Combined, Chapters 1 and 2 make it clear that the insurance system is not yet equipped to address climate-related loss and damage.

Chapters 5 to 7 then broaden the inquiry of loss and damage to consider whether other legal tools can provide meaningful remedies for those who are harmed by climate change. In Chapter 5, Doelle and Seck provide a thorough and informative survey of these potential legal tools, including litigation. Chapter 6, by Margaretha Wewerinke-Singh and Diana Hinge Salili, provides another case study that recounts the decades-long efforts of Vanuatu to secure remedies for its existing and future loss and damage.<sup>10</sup> Conveying a clear sense of frustration with the rate of progress, the authors argue that litigation, even though it presents numerous challenges, may give small islands leverage they do not otherwise have in the climate treaty negotiations. Broberg paints a more optimistic picture regarding litigation in Chapter 7, arguing

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<sup>10</sup> Cf. R. Lyster, 'A Fossil Fuel-Funded Climate Disaster Response Fund under the Warsaw International Mechanism for Loss and Damage Associated with Climate Change Impacts' (2015) 4(1) *Transnational Environmental Law*, pp. 125–51.

that the addition of the loss-and-damage mechanism in the Paris Agreement should, pursuant to the 1969 Vienna Convention on the Law of Treaties,<sup>11</sup> necessitate a reinterpretation of the climate treaties. This reinterpretation, according to Broberg, should support common law legal claims seeking compensation for climate change-related loss and damage. While a cynic may question the practical viability of this strategy, Chapter 7 rounds out a thorough and innovative inquiry into how injured parties may receive compensation for loss and damage.

Finally, Chapters 8 and 9 offer broader perspectives on loss and damage. In Chapter 8, Patrick Toussaint and Adrian Martínez Blanco propose that a human rights-based approach could strengthen the response to loss and damage under the international climate change regime. Erin Roberts and Mark Pelling, in Chapter 9, contend that loss and damage associated with climate change could prompt a transformation in international climate law and global governance more broadly. Underlying the two chapters is the belief that, as climate change worsens, societies around the world will have to change the status quo. Rather than pursuing incremental reforms that are unlikely either to mitigate climate change or justly address its consequences, the authors advocate more systemic, ambitious, and just transformation. Although their proposals may seem quixotic in the light of the decades of thwarted efforts to adequately address loss and damage, their arguments are nonetheless compelling.

As a whole, *The Third Pillar of International Climate Change Policy* is well worth reading. The chapters are informative, engaging, and often innovative. The chapters are also structured in a logical order (from narrow to broad), although it might have made sense to place the chapter by Doelle and Seck at the beginning of the collection, as the chapter lays a particularly good foundation for anyone seeking to develop a broad understand of loss and damage. Otherwise, the editors have successfully curated a collection of scholarship that offers a robust picture of the ongoing efforts to operationalize loss and damage. I highly recommend this book.

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<sup>11</sup> Vienna (Austria), 23 May 1969, in force 27 Jan. 1980, available at: [https://legal.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf).