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Loss and damage

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CHAPTER 8

ARTICLE 8: LOSS AND DAMAGE

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This chapter provides a commentary of Article 8 of the Paris Agreement focusing on loss and damage associated with climate change impacts.

Keywords: Paris Agreement, Article 8, Loss and Damage, Warsaw International Mechanism, Transparency Framework, Global Stocktake, Liability and Compensation

1. **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.**
2. **The Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts shall be subject to the authority and guidance of the Conference of the Parties serving as the meeting of the Parties to this Agreement and may be enhanced and strengthened, as determined by the Conference of the Parties serving as the meeting of the Parties to this Agreement.**
3. **Parties should 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.**
4. **Accordingly, areas of cooperation and facilitation to enhance understanding, action and support may include:**
    a) **Early warning systems;**
    b) **Emergency preparedness;**

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c) **Slow onset events;**
d) **Events that may involve irreversible and permanent loss and damage;**
e) **Comprehensive risk assessment and management;**
f) **Risk insurance facilities, climate risk pooling and other insurance solutions;**
g) **Non-economic losses; and**
h) **Resilience of communities, livelihoods and ecosystems.**

5. **The Warsaw International Mechanism shall collaborate with existing bodies and expert groups under the Agreement, as well as relevant organizations and expert bodies outside the Agreement**

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COMMENTARY

A. Historical overview of Loss and Damage milestones in Climate Negotiations

08.01 The Alliance of Small Island States (AOSIS) brought Loss & Damage (L&D) to the attention of the international community during the very drafting of the UNFCCC. In a 1991 proposal to the Intergovernmental Negotiating Committee (INC), Vanuatu on behalf of AOSIS urged the establishment of an International Insurance Pool '*to compensate the most vulnerable small islands and low lying coastal developing countries for loss and damage resulting from sea level rise*'.[5] The Pool was to be funded by mandatory contributions from industrialized Parties on the basis of their Gross National Product (GNP) and relative annual GHG emissions, as modelled upon the formula used in the 1963 Brussels Supplementary Convention on Third Party Liability in the Field of Nuclear Energy.

08.02 The AOSIS proposal did not make it into the final agreement, yet reference to the discussion can be found in Article 4.8, which mentions insurance among the actions 'to meet

[5] INC, '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.' 55 <https://unfccc.int/resource/docs/a/15_2.pdf>.

the specific needs and concerns of developing countries Parties', including Small Island Developing States (SIDS) and countries with low-lying coastal areas.[6] The first Conference of the Parties (COP) in 1995 further specified that insurance, as an adaptation measure to assist 'particularly vulnerable developing countries', should be supported by developed Parties in line with their financial commitments under the Convention. Discussions on insurance continued through a set of expert workshops convened in 2003 and 2007 on the basis of COP decisions 5/CP 7 and 1/CP 10.[7]

08.03 In the context of the 'Dialogue on long-term cooperative action to address climate change by enhancing implementation of the convention' (2007), AOSIS called for considering the way 'vulnerable countries will be compensated for loss and damage associated with climate change impacts that is not avoided by adaptation funding under the Convention' (AOSIS, 2007). This point was expanded a year later in the submission to the 'Ad Hoc Working Group on Long-term Cooperative Action under the Convention' (AWG-LCA), established under Decision 1/CP. 13 (the *Bali Action Plan).*[8] It is worth noting here that the Bali Action Plan is the first COP decision to mention L&D, and it does so in the context of enhanced action on adaptation. AOSIS' submission to the AWG-LCA proposed the establishment of a Multi-Window Mechanism to holistically address the needs of vulnerable developing countries by bringing together 'tools to address adaptation, financial risk management and risk transfer, and loss and damage'.[9] The mechanism consisted of: i) an insurance component to manage financial risk from extremes; ii) a rehabilitation/compensatory component to address negative impacts from Slow Onset Events (SOE); iii) a risk management component to facilitate and inform the former two. This idea was further reiterated in the 2009 AOSIS proposal for a Copenhagen Protocol.[10]

08.04 Formal activities on L&D were initiated by the 2010 *Cancun Adaptation Framework*[11] with the establishment of an ad hoc work programme. The work programme, whose content was agreed at COP 17 (2011), advanced technical work on L&D during the course of 2011 and 2012 on three thematic areas: i) assessing the risk of L&D and the current knowledge on the same; ii) a range of approaches to address L&D from both extreme and slow onset events, taking into consideration experience at all levels; iii) the role of the Convention in enhancing the implementation of approaches to address L&D. In the context of thematic area 2, regional workshops were held in Addis Ababa, Mexico City, Bangkok and Bridgetown. This arguably contributed to make developing countries, other than Small Island Developing States (SIDS), receptive to the issue and advocating for cross-regional approaches to address L&D. Discussions within the work programme also touched upon broader (and more contested) issues related to the conceptual distinction between adaptation and L&D. Developing countries began to consistently refer to L&D as impacts 'beyond adaptation'[12], whereas in their

[6] Joanne Linnerooth-Bayer, MJ Mace and Roda Verheyen, 'Insurance-Related Actions and Risk Assessment in the Context of the UNFCCC' (UNFCCC 2003).

[7] MJ Mace and Roda Verheyen, 'Loss , Damage and Responsibility after COP21: All Options Open for the Paris Agreement' (2016) 25 Review of European Community & International Environmental Law 197.

[8] UNFCCC, 'Report of the Conference of the Parties on Its Thirteenth Session, Held in Bali from 3 to 15 December 2007' (2008).

[9] AOSIS, 'Proposal to the AWG-LCA Multi-Window Mechanism to Address Loss and Damage from Climate Change Impacts' (2008) <https://unfccc.int/resource/docs/2008/awglca4/eng/misc05a02p01.pdf>.

[10] AOSIS, 'Proposal by the Alliance of Small Island States (AOSIS) for the Survival of the Kyoto Protocol and a Copenhagen Protocol to Enhance the Implementation of the United Framework Convention on Climate Change' (2009) <https://unfccc.int/sites/default/files/resource/docs/2009/awglca8/eng/misc08.pdf>.

[11] UNFCCC, 'Report of the Conference of the Parties on Its Sixteenth Session, Held in Cancun from 29 November to 10 December 2010 Addendum' (2011).

[12] Gambia, 'Gambia on Behalf of the Least Developed Countries' (2011) <https://unfccc.int/sites/default/files/resource/docs/2011/sbi/eng/misc08.pdf>; Philippines and Nicaragua Bolivia

submissions developed countries would clearly situate it within adaptation and disaster risk management approaches.[13]

08.05 As part of the Doha Climate Gateway (2012), Parties decided to establish institutional arrangements to address L&D at COP 19. This resulted in the creation of the Warsaw International Mechanism (WIM), aiming to advance knowledge gathering, coordination and support to address L&D associated with the adverse effects of climate change, including extreme and slow onset events, in particularly vulnerable developing countries (see Section 2).[14] The establishment of the WIM came as something of a surprise to outside observers. It was seen as an important victory for developing nations that are especially vulnerable to climate change impacts and their civil society allies that had been campaigning on the issue.

08.06 In the lead up to COP 21, it became clear that L&D was one of the most contentious issues for both developing and developed countries. The SIDS and Least Developed Countries (LDCs) identified a handful of issues that the agreement in Paris would have to resolve. Critical among them was the recognition of loss and damage as distinct from adaptation, and the inclusion in the agreement of a body that would address L&D in an operational way. The preferred option was to strengthen the WIM, rather than creating of a new body under the Paris Agreement. For developed countries, the preference was for L&D to be referenced within the context of adaptation efforts instead, and they considered the current configuration of the WIM adequate enough to deal with L&D. Moreover, notions of liability and compensation were a red line for developed countries, and the United States in particular. The result was a compromise in the form of Article 8 and paragraphs 47 to 51 of the accompanying Decision text which provides clarifying language.

08.07 Article 8 recognizes '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".[15] The article also calls Parties to work "on a cooperative and facilitative basis" to "enhance understanding, action and support" in areas including early warning systems, comprehensive risk assessment and management, risk insurance facilities, climate risk pooling, and non-economic losses.[16] Together with language in the accompanying decision 1/CP.21, Article 8 sanctioned the permanence of the WIM in the post-2020 climate regime. As for the compensation/liability issue, paragraph 51 of decision 1/CP.21 was included

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(Plurinational State of), Ecuador, China, El Salvador, Guatemala, Thailand, 'Theme III – The Role of the Convention in Enhancing the Implementation of Approaches to Address Loss and Damage Associated with the Adverse Effects of Climate Change' (2012) <https://unfccc.int/sites/default/files/resource/docs/2012/sbi/eng/misc14a01.pdf>; Ghana, 'Theme III - Role of the Convention on Loss and Damage from the Adverse Effects of Climate Change' (2012) <https://unfccc.int/sites/default/files/resource/docs/2012/sbi/eng/misc14a01.pdf>.

[13] Norway, 'Norwegian Submission on Climate Change Adaptation' (2011) <https://unfccc.int/sites/default/files/resource/docs/2011/sbi/eng/misc01.pdf>; Canada, 'Elements for a Work Programme to Consider Approaches to Address Loss and Damage Associated with Climate Change Impacts, Including Impacts Related to Extreme Weather Events and Slow Onset Events' (2011) <https://unfccc.int/sites/default/files/resource/docs/2011/sbi/eng/misc01.pdf>; EU, 'Work Programme on Loss and Damage (SBI): Views and Information Taking into Account the Outcomes of the Implementation of the Work Programme on Loss and Damage Prior to the Submission on the Possible Elements to Be Included in the Recommendations on Loss A' (2012) <https://unfccc.int/sites/default/files/resource/docs/2012/sbi/eng/misc14a01.pdf>.

[14] UNFCCC, 'Report of the Conference of the Parties on Its Nineteenth Session, Held in Warsaw from 11 to 23 November 2013' (2014).

[15] UN, 'Paris Agreement' <https://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf>.

[16] ibid.

to meet developed countries' concern by stating that the Agreement's provisions would not provide a basis for any liability or compensation claims (see section 5).

08.08 At COP 22 in 2016 the first review of the WIM took place, as mandated by decision 2/CP 19. It was decided that the WIM should be periodically reviewed, with the first review to be held in 2019 and subsequent ones to take place no more than five years apart.[17] Reviews should consider progress on the implementation of the ExCom's work plan but also adopt a long-term vision to reflect on how the WIM may be enhanced and strengthened. As an input to the 2019 review, decision 4/CP.22 called for a "technical paper (to) be prepared by the secretariat elaborating the sources of financial support". At COP 23 it was agreed that the latter should be informed by an expert dialogue (the so-called "Suva Expert Dialogue") that took place in May 2018, in order "to explore a wide range of information, inputs and views on ways for facilitating the mobilisation and securing of expertise, and enhancement of support, including finance, technology and capacity-building, for averting, minimising and addressing loss and damage".[18]

08.09 The second review of the WIM took place at COP 25. Developing countries' requests focused on strengthening the WIM to facilitate action and support in developing countries, and on the provision of scaled up, additional finance for addressing L&D. While the response to the latter remained elusive, the WIM was institutionally enhanced through the establishment of: i) an expert group on action and support under the ExCom; and ii) the establishment of the "Santiago network" to provide technical support directly to developing countries.[19] One remaining issue concerning WIM governance – i.e. whether the WIM should continue to be governed by both the UNFCCC and the Paris Agreement, or by the latter only- could not be resolved and discussions were postponed to COP 26.[20]

B. The Paris outcome on Loss and Damage

08.10 In the following sections we discuss each of the five paragraphs constituting Article 8, together with paragraphs 47 to 51 of the accompanying Decision 1/CP.21[21] which provide clarifying language. The Paris outcomes on L&D are discussed in conjunction with other relevant decisions under the UNFCCC, and in particular Decisions 1/CP.16 (*Cancun Adaptation Framework*); 7/CP.17 (*Work programme on loss and damage*); 3/CP.18 (*Approaches to address loss and damage associated with climate change impacts*); 2/CP.19 (*Warsaw International Mechanism for Loss and Damage*); 2/CP.20 (*Warsaw International Mechanism for Loss and Damage*); 2/CP.21 (*Warsaw International Mechanism for Loss and Damage*); 4/CP.22 (*Review of the Warsaw International Mechanism for Loss and Damage*); 5/CP.23 (*Warsaw International Mechanism for Loss and Damage*); 10/CP.24 (*Warsaw International Mechanism for Loss and Damage*); and Draft decisions -/CP.25 and -/CMA.2 (*Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts and its 2019 review*).

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[17] UNFCCC, 'FCCC/CP/2016/10/Add.1 Report of the Conference of the Parties on Its Twenty-Second Session, Held in Marrakech from 7 to 18 November 2016, Part Two' 1.

[18] SBI and SBSTA, Report of the Executive Committee of the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts 2017.

[19] UNFCCC, 'Draft Decision -/CMA.2. Warsaw International Mechanism for Loss and Damage Associated with Climate Change Impacts and Its 2019 Review' <https://unfccc.int/resource/cop25/cma2_auv_6_WIM.pdf>.

[20] UNFCCC, 'Draft Decision -/CP.25. Warsaw International Mechanism for Loss and Damage Associated with Climate Change Impacts and Its 2019 Review' <https://unfccc.int/resource/cop25/cop25_auv_7_WIM.pdf>.

[21] UNFCCC, 'Decision 1/CP.21 Adoption of the Paris Agreement' (2015) <https://unfccc.int/sites/default/files/resource/docs/2015/cop21/eng/10a01.pdf>.

1. ‘averting, minimising and addressing Loss and Damage’

08.11 Through paragraph 8.1, 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’. The phrasing suggests that parties did not intend to create legally binding obligations vis-à-vis L&D, when giving the term “recognize” its ordinary, hortatory, meaning.[22] This phrasing, coupled with the liability and compensation clause (further discussed in section 5), has left the legal consequences of article 8 unclear. Operating in isolation from other international legal regimes, it appears that article 8.1 creates no legally binding obligation for the state parties to the PA. Accordingly, the article can likely not be used as a basis to claim entitlement to compensation or assistance by an actor who has incurred climate-related harm. Nevertheless, the article may have touching points with obligations in other international legal regimes and may serve to strengthen claims made thereunder by illustrating state recognition of the need to avert, minimise and address L&D. Such complementarity and its implications would need to be examined on an individual basis, depending on the other legal regime and obligation in question. The wording “averting, minimising and addressing” refers to the type of responses that can be deployed to tackle L&D. Some losses and damages can be avoided via adaptive or preventive measures, while other can only be minimised as they are impossible to fully avert because of the existence of limits to adaptation.[23] The resulting residual L&D can be addressed through a number of measures, including risk transfer, risk retention, response, recovery and reconstruction.[24] It is worth noting that before Paris only the verb “address” was used in conjunction with L&D (see Decisions 6/CP.17, 3/CP.18, 2/CP.19), while the triad “averting, minimising and addressing” has become common language in decision texts after COP21. This might signal a shift towards emphasising both ex ante (averting and minimising) and ex-post (addressing) responses to L&D, and therefore an explicit recognition of L&D as an issue of both risk and remedy. Indeed, the original iteration of the concept identified a remedial approach exclusively, whereby a category of developing countries would receive compensation.

08.12 No definition of L&D is provided in the paragraph, nor in the whole article or the accompanying decision text. This is consistent with Parties’ “agreement to disagree” on a stringent definition of the concept, given their irreconcilable positions on the relationship between L&D and adaptation. Recent research has shown how such constructive ambiguity was helpful in institutionalizing L&D under the UNFCCC,[25] by allowing for every Party having its own meaning reflected in Decision 2/19, and later in Article 8. As a result of this polarised conceptual debate, only a working definition is currently available under the UNFCCC. The 2012 SBI literature review[26] refers to L&D as ‘the actual and/or potential manifestation of impacts associated with climate change in developing countries that

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[22] Article 31(1) Vienna Convention on the Law of Treaties 1969.

[23] Kees Van Der Geest and Markus Schindler, ‘Handbook for Assessing Loss and Damage in Vulnerable Communities’ (2017) <http://collections.unu.edu/eserv/UNU:6032/Online_No_21_Handbook_180430.pdf> accessed 23 May 2019.

[24] Erin Roberts and Mark Pelling, ‘Climate Change-Related Loss and Damage: Translating the Global Policy Agenda for National Policy Processes’ (2018) 10 Climate and Development 4 <https://www.tandfonline.com/doi/full/10.1080/17565529.2016.1184608> accessed 10 May 2019.

[25] Elisa Calliari, ‘Loss and Damage: A Critical Discourse Analysis of Parties’ Positions in Climate Change Negotiations’ [2016] Journal of Risk Research 1; Lisa Vanhala and Cecilie Hestbaek, ‘Framing Climate Change Loss and Damage in UNFCCC Negotiations’ (2016) 16 Global Environmental Politics 111; Olivia Serdeczny, ‘What Does It Mean to Address Displacement under the UNFCCC? An Analysis of the Negotiations Process and the Role of Research’ (2017) 12/2017 <http://www.die-gdi.de>.

[26] UNFCCC, ‘A Literature Review on the Topics in the Context of Thematic Area 2 of the Work Programme on Loss and Damage : A Range of Approaches to Address Loss and Damage Associated with the Adverse Effects of Climate Change Note by the Secretariat’ (2012).

negatively affect human and natural systems'. The definition distinguishes losses from damages on the basis of the 'irreversibility' of the negative impacts, where the former are those for which restoration is impossible and the latter those that can instead be repaired. Emphasis is also placed on the difficulties in evaluating L&D from an economic point of view, given the challenges in attaching monetary values to important factors such as life, culture, livelihood, territory and statehood, among others.

08.13 The SBI working definition shows a number of differences with respect to the 1991 AOSIS' framing. This interestingly provides an indication of how the conceptual boundaries of L&D both expanded and blurred over time. First, while the focus on impacts experienced by developing countries has remained, the SBI Literature Review makes no reference to compensation as a critical component of the L&D notion. Second, the SBI definition does not refer to vulnerability, nor does it limit the applicability of L&D to "small island and low-lying coastal developing countries" as the 1991 proposal does. Thus, the SBI definition seems broader in scope in terms of where L&D can take place, and consequently where any response should be targeted. Third, what can be considered to cause L&D appears to have changed. While the 1991 AOSIS proposal limited L&D to sea level rise, the SBI definition widens the scope to any impact associated with climate change. This reflects language employed in the Cancun Adaptation Framework,[27] which mentions several slow onset events other than sea level rise, as well as extreme weather events. At the same time, however, the language may constrict the types of impacts that qualify as L&D, by requiring that they must be *associated* with climate change. This seems to mark a departure from the approach in the AOSIS proposal, which imposed no clear requirement that L&D must stem from climate change as such. The SBI approach therefore appears to indicate an increased emphasis on the relationship that must exist between climate change and incurred L&D and thus requiring a causal link between them. Nevertheless, the shift in emphasis may not impose a particularly stringent requirement, depending on whether "association" demands correlation, causality, or attribution, or something else entirely. Finally, the SBI definition introduces the idea that L&D may not be an entirely anthropocentric notion, by including reference to "human and natural systems". The phrasing suggests that harm caused to natural systems with no clear subsequent or related impact on humans or human systems, may still amount to L&D. The AOSIS proposal gave no indication of what types of harms may or may not qualify as L&D and as such the SBI approach may not be a change to the concept of L&D, but rather a clarification of the diversity of harms that ought to be remedied by any given response measure.

2. 'The Warsaw International Mechanism for Loss and Damage' and its governance

08.14 The WIM provides for three types of functions pursuant to decision 3/CP.18 and further elaborated in decision 2/CP.19,: i) enhancing knowledge and understanding of comprehensive risk management approaches; ii) strengthening dialogue, coordination, coherence, and synergies among relevant stakeholders; and iii) enhancing action and support so as to enable countries to take action to address loss and damage.

08.15 Institutionally, the implementation of the functions of the WIM is guided by an Executive Committee (Excom) that has met in person two to three times a year since 2014 and undertakes much of its work in the inter-sessional periods. It is comprised of an equal number of developed and developing country representatives and takes decision by consensus.[28] The ExCom may

[27] UNFCCC, 'Report of the Conference of the Parties on Its Sixteenth Session, Held in Cancun from 29 November to 10 December 2010 Addendum' (n 7).

[28] Members from non-Annex I Parties include 2 members from each of the African, the Asia-Pacific, and the Latin American and Caribbean States, 1 member from SIDS, 1 member from the LDC Parties, and 2 additional members

establish expert groups, subcommittees, panels, thematic advisory groups or task-focused ad hoc working groups to help execute its advisory role. An interim ExCom was established in 2014 and developed a two-year initial work plan, drawing on inputs submitted on behalf of governments and non-state organisations. The ambitious workplan included 9 action areas covering the following issues: i) enhancing understanding of how loss and damage affects particularly vulnerable developing countries; ii) understanding and promoting comprehensive risk management approaches; iii) enhancing knowledge of the risks of slow onset events and their impacts; iv) enhancing knowledge of non-economic losses associated with the adverse effects of climate change; v) enhancing the understanding of the capacity and coordination needs to build resilience; vi) enhancing expertise on how the impacts of climate change are affecting patterns of migration; vii) encouraging comprehensive risk management by the diffusion of information related to financial instruments and tools; viii) engagement with existing bodies and expert groups both within and outside the Convention; and, ix) development of a five year rolling workplan for consideration at COP22, when the WIM's 'structure, mandate and effectiveness' was due to be reviewed by the COP for the first time. In paragraph 5 of Decision 2/CP.21 the COP "Notes with concern the limited progress made in the implementation of the initial two-year workplan of the Executive Committee owing to the late nomination of members…'. This delay was due to disagreement around regional representativeness within non-Annex I Parties, and resulted in the first meeting of the ExCom to be convened only in September 2015.

08.16 COP 22 in Marrakesh approved the indicative framework for the five-year rolling work plan which included what was seen to be a more manageable five strategic workstreams. These workstreams are: (a) enhanced cooperation and facilitation in relation to slow onset events; (b) enhanced cooperation and facilitation in relation to non-economic losses; (c) Comprehensive risk management approaches (including assessment, reduction, transfer, retention), to address and build long term resilience; (d) enhanced cooperation and facilitation in relation to human mobility, including migration, displacement and planned relocation; and, (e) enhanced cooperation and facilitation in relation to action and support, including finance, technology and capacity-building, to address loss and damage.

08.17 Regarding the WIM two important issues were raised in the negotiations in Paris. First, developing countries wanted a body that would go beyond simply enhancing understanding and sharing information. They sought to develop a mechanism that would *address* L&D and did not want to start over with a completely new mechanism but instead wanted to build on the existing WIM.[29] Second, there were concerns about the possible loss of the WIM with the review of the WIM being mandated for the following year. On the first point, the Paris Agreement maintained the WIM, and article 8.2 opened the door for it to 'be enhanced and strengthened' in the future. On the second one, paragraph 47 decided 'the continuation of the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts, following the review in 2016'.

08.18 Article 8.2 also touches upon the governance of the WIM, by stating that it "shall be subject to the authority and guidance of the Conference of the Parties serving as the meeting of the Parties to this Agreement". The WIM was created by COP decision, and the Excom was only accountable to the COP until the entry into force of the Paris Agreement. With its entry into force it became unclear what the relationship between the COP and CMA should be with respect to WIM-related issues. As Mace and Verheyen note, the governance discussion has a

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from non-Annex I Parties. The balanced representation among Parties is also reflected in the Chairmanship, with the two Co-chairs being elected from Annex 1 and non-Annex 1 respectively to serve for 1 year.

[29] Mace and Verheyen (n 3).

number of important implications. Can both the COP and the CMA provide guidance to the WIM? Do they need to agree on guidance? Which body ultimately signs off on the work plan? What happens to members of the WIM ExCom that are not parties to the Paris Agreement? Since the announcement of the plans for the withdrawal of the United States from the Paris Agreement these questions have become even more pertinent. At the time of writing, no agreement has been reached on this matter, and discussions have been postponed to COP 26. Positions remain conflicting, with developing countries pushing for work on L&D to be governed by both the COP and CMA, and developed countries preferring it to be dealt with under the PA only.

3. 'Areas of cooperation and facilitation to enhance understanding, action and support' on Loss and Damage

08.19 Paragraph 3 of the PA emphasizes the cooperative and facilitative nature of Parties' engagement on L&D, thus emphasising the exclusion of any legal responsibility and financial obligation on the matter –as made clear by paragraph 51 of decision 1/CP.21.[30]

08.20 Paragraph 4 lays out a non-exhaustive list of activities to be carried out in this space. The list largely echoes the themes included in the two-year work plan, with the exception of the issue of climate-related migration which is dealt with separately in paragraph 49 of Decision 1/CP.21. It is worth noting here that several areas of cooperation and facilitation conceptually overlap with those mentioned in Article 7 on Adaptation (e.g. Early warning systems; resilience of communities, livelihoods and ecosystems) and, more in general, with language included in the Cancun Adaptation Framework (e.g. Risk assessment, risk sharing and transfer, including insurance).[31]

08.21 Paragraph 49 of Decision 1/CP.21 mandates the establishment of a task force on displacement 'to develop recommendations for integrated approaches to avert, minimize and address displacement related to the adverse impacts of climate change.' This was the result of a compromise between those developing countries advocating for a more fully developed proposal for a climate change displacement facility, also featuring 'compensation measures for people displaced by climate change',[32] and those who preferred no mention of climate-related displacement.

08.22 The Task Force has now provided its report and the recommendations to the ExCom which was subsequently forwarded to and approved by parties at COP24. The report notes how the UN "currently lacks a system-wide lead, coordination mechanism, or strategy on disaster displacement, including related to climate change" and called for better data collection and analysis on climate migration trends, and finance to help those hit hardest.[33] The Task Force submitted a work plan for 2019-2021[34] in October 2019 which was approved by the WIM Excom at its 10th meeting. While the plan covers aspects of knowledge enhancement and

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[30] Climate Focus, 'Loss and Damage in the Paris Agreement' (2016) <https://climatefocus.com/sites/default/files/20160214 Loss and Damage Paris_FIN.pdf>.

[31] UNFCCC, 'Report of the Conference of the Parties on Its Sixteenth Session, Held in Cancun from 29 November to 10 December 2010 Addendum' (n 7).

[32] Jessica Wentz and Michael Burger, 'Designing a Climate Change Displacement Coordination Facility : Key Issues for COP 21' (2015).

[33] UNFCCC, 'Report of the Task Force on Displacement' (2017) <https://unfccc.int/sites/default/files/resource/2018_TFD_report_17_Sep.pdf>.

[34] UNFCCC, 'Plan of Action of the Task Force on Displacement – 2019 – 2021' (2019) <https://unfccc.int/sites/default/files/resource/Draft PoA TFD.pdf>.

sharing and awareness raising, some observers have noted a lack of consideration around finance-related aspects.[35]

08.23 Decision 1/CP.21, in its paragraph 48, also mandated for the establishment of a clearing house for risk transfer "that serves as a repository for information (…) to facilitate the efforts of Parties to develop and implement comprehensive risk management strategies". It is now named Fiji Clearing House for Risk Transfer, after its launch at COP 23 under the Fijian Presidency. The final set up as a website to crowd-source information about climate insurance only partially meets LDC requests for a tool with a broader financial function to provide support for rehabilitation.

08.24 While there is value in scaling up risk transfer options, owing to the fact that vulnerable groups often cannot afford premiums, insurance options may provide a false sense of protection and deter further resilience-building actions. Insurance also leaves the onus on the developing countries to pay insurance premiums rather than holding the polluters accountable. Furthermore, risk transfer options are typically focused on sudden onset events as opposed to slow onset events. Those premiums will also increase as risks of climatic impacts rise. While the clearinghouse might become a useful tool for developing countries to identify where and how insurance might benefit them, developing country parties and civil societies have argued that it must not cover up for the reluctance of rich countries to raise additional resources (Singh et al. 2017).

4. 'The Warsaw International Mechanism shall collaborate with existing bodies and expert groups'

08.25 Together with paragraph 2, paragraph 5 contains the only language understood as binding in the Article. It mandates that the WIM "*shall* collaborate with existing bodies and expert groups" within and beyond the Paris Agreement. Some commentators have suggested that this language might have been employed to avoid that the WIM duplicates or infringes on the mandate of existing bodies that are better equipped to address L&D-related matters (e.g. Human mobility).[36]

08.26 Yet, this might also signal a more profound tension that is also exhibited within the discussions of the WIM ExCom, with developed country members tending to argue that the role of the Excom is to catalyse action by other organisations, whereas developing country members argue for more ownership by the Excom of the work that they believe needs to be undertaken within the confines of the UNFCCC.

5. Compensation and liability

08.27 Paragraph 51 of Decision 1/CP.21 explicitly states that '*Article 8 … does not involve or provide a basis for any liability or compensation*'. As mentioned in Section A, claims of liability for climate change and associated calls for compensation have historically been a significant source of discord between developed and developing countries but increasingly within developing country groupings as well. While the idea of compensation was the cornerstone of AOSIS' requests since the 1991 proposal[37] and up to COP 21, developed countries tenaciously opposed this legalistic framing. In particular, they sought to keep the concept of L&D firmly within the sphere of adaptation activities and emphasized the overlap

[35] Kartik Chandramouli, 'Climate Emergency: How Will Countries Deal with Forced Migration?' (*Mongabay*, 2019) <https://india.mongabay.com/2019/12/cop-25-climate-emergency-climate-conference-madrid-migration/> accessed 20 January 2020.
[36] Climate Focus (n 26).
[37] INC, Vanuatu: Draft annex relating to Article 23 (Insurance) for inclusion in the revised single text on elements relating to mechanisms (A/AC.237/WG.II/Misc.13) submitted by the Co-Chairmen of Working Group II. 1991.

between L&D with the less contested (and binding) DRR and humanitarian spheres. Opposition was such that the US Secretary of State Kerry famously stated that any reference to liability and compensation in the PA would have "kill[ed] the deal".[38]

08.28 A political compromise was eventually found between the USA, LDCs and AOSIS, to explicitly exclude liability claims under the climate regime through paragraph 51 of the decision accompanying the Paris Agreement. Yet, the door was left open for the remedy to be pursued through other legal channels. As stressed by Bolivia, the Philippines, Nauru, Marshall Islands, Cook Islands, Solomon Islands and Tuvalu in their interpretative declaration to the instruments of ratification, the application of the PA 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 provision can derogate from principles of general international law or any claims or rights concerning compensation due to the impacts of climate change.[39]

C. L&D in the PA architecture

08.29 In this section we analyse Article 8 in the wider architecture of the Paris Agreement. We draw particular attention to its connection to Article 9 on finance, and Article 13 and 14 on the Transparency framework and the Global Stocktake respectively.

1. Finance

08.30 Article 9 of the Paris Agreement and the accompanying decisions discuss the specifics of financing climate actions. Article 9.1 states, through binding language, that *"developed country Parties shall provide financial resources to assist developing country Parties with respect to both mitigation and adaptation..."*. No reference is made to L&D, leaving the linkage with finance unclear.[40] However, Roberts and co-authors argue that article 9.4 of the agreement could potentially be relevant for prioritising funding for actions related to L&D as it implicitly 'singles out' the developing country parties with the greatest L&D burden, albeit, without any mention of how it will be paid or who will pay for it.[41]

08.31 Given the current practice of situating the WIM under the Cancun Adaptation Framework, resources for L&D activities could be accessed via existing adaptation funding – assuming that adequate resources are mobilised by developed countries, which is currently not the case.[42] This would apply, for instance, to some of the activities mentioned in article 8.4 like early warning systems, emergency preparedness, and resilience of communities, livelihoods and ecosystems. Yet, other funding needs, like those related to non-economic losses, permanent losses and impacts from slow-onset events, would remain unmet.[43]

08.32 By mentioning 'support' among the aspects for cooperation and facilitation, Article 8.3 sends an implicit signal that developing countries would require finance to address climate change induced L&D. This echoes language in decision2/CP.19, which mentions 'enhanc[ing] action and support, including finance (…)' as a key function of the WIM. However, rather than requiring developed countries to provide developing countries with financial support, the decision softly "requests" it. This highlights a persistent problem in the implementation of the

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[38] Jeff Goodell, 'John Kerry on Climate Change: The Fight of Our Time' (*RollingStone*, 2015).

[39] UNTC, 'Paris Agreement' <https://treaties.un.org/doc/Publication/MTDSG/Volume II/Chapter XXVII/XXVII-7-d.en.pdf> accessed 22 February 2019.

[40] Mace and Verheyen (n 3).

[41] J Timmons Roberts and others, 'How Will We Pay for Loss and Damage?' (2017) 20 Ethics, Policy and Environment 208 <http://doi.org/10.1080/21550085.2017.1342963>.

[42] UNEP, 'The Adaptation Finance Gap Report' (2016).

[43] Julia Taub and others, 'From Paris to Marrakech: Global Politics around Loss and Damage' (2016) 72 India Quarterly 317.

WIM: the lack of financial support both for the WIM itself but also more generally in terms of support provided to developing countries navigating the adverse impacts of climate change.

08.33 The 2018 Suva Expert Dialogue, which was meant to *"explore a wide range of information, inputs and views on ways for facilitating the mobilization and securing of expertise, and enhancement of support, including finance…for averting, minimizing and addressing loss and damage"*, did not make any substantial progress in regard to L&D finance.[44] The process informed the preparation by the Secretariat of a technical paper on 'Elaboration of the Sources and Modalities for Accessing Financial Support for Addressing Loss and Damage', which fed into the review of the WIM at COP25. The Madrid conference brought some encouraging advances on finance-related issues for developing countries. While the G77 + China request for "urgent, scaled up, new and additional finance" by developed countries did not make it into the review, several paragraphs on finance were included in the decision. Importantly, there was a decision to strengthen the link between the WIM and the Standing Committee on Finance (SCF) and to initiate work with the Green Climate Fund to explicitly include L&D in its funding activities.[45]

2. The Transparency framework and the Global Stocktake

08.34 Reporting on L&D under the Paris Agreement's "enhanced transparency framework for action and support" (Article 13) is voluntary, and the guidance available concerning the types of issues on which parties might want to report is limited: it simply refers to "impacts", "responses" and the "institutional arrangements" that facilitate the implementation of those responses.[46] With regard to the Paris Agreement's "global stocktake" (Article 14), L&D has a comparatively higher status, in that it will be an integral part of it.[47] Notwithstanding, the specific mechanisms through which the "global stocktake" will be conducted, and the prominence that L&D might have in it, remain to be determined.

08.35 In this section, we explore what Articles 13 and 14 might mean for L&D. First, we sketch the type of issues that a party to the Convention choosing to report on L&D under Article 13 might want to consider. Second, we identify key issues of relevance to L&D in the context of the global stocktake. Chapters 13 and 14 in the book provide more ample information on, respectively, the transparency framework and the global stocktake.

a. Loss and damage in the transparency framework

08.36 Experience with reporting on climate change-induced L&D is limited: a handful of national-level assessments has been conducted,[48] and community-level methodological guidance has been developed.[49] In addition, a summary of the literature has been prepared,

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[44] Thomas Hirsh, 'Climate Finance for Addressing Loss and Damage. How to Mobilize Support for Developing Countries to Tackle Loss and Damage' (2019).

[45] UNFCCC, 'Draft Decision -/CMA.2. Warsaw International Mechanism for Loss and Damage Associated with Climate Change Impacts and Its 2019 Review' (n 15).

[46] UNFCCC, 'Modalities, Procedures and Guidelines for the Transparency Framework for Action and Support Referred to in Article 13 of the Paris Agreement; Decision 18/CMA.1' (2018) <https://unfccc.int/sites/default/files/resource/CMA2018_03a02E.pdf>.

[47] UNFCCC, 'Decision 1/CP.21 Adoption of the Paris Agreement' (n 17).

[48] The national-level studies for Kiribati, Samoa and Vanuatu, commission by the Secretariat of the Pacific Regional Environment Programme, are early examples of national-level studies. Subsequently, calls have been made for the Convention to sponsor assessments of needs in non-Annex I countries.

[49] Van Der Geest and Schindler (n 19). This guidance, prepared by the United Nations University's Institute for Environment and Human Security, builds on empirical on-the-ground work in nine low-income countries.

which identifies four main areas of relevance with regard to reporting on L&D:[50] costs, finance, measurements and policies. Each of these four areas is sketched below.

08.37 Estimates of the costs (i) associated with (a given occurrence of) L&D are subject to data shortcomings and methodological challenges. With regard to the latter, two aspects deserve consideration. First, in addition to infrastructure costs, the costs associated with policy planning and implementation may be large, notably in the context of non-economic losses. Second, foregone opportunities, as funding for disaster relief crowds out other needs in the national budget, may have negative long-term impacts on the populations affected.

08.38 Tracking finance (ii) – domestic or international, public or private – directed to L&D is challenging, mainly because there is no commonly agreed definition of what constitutes L&D, and how it is different from "adaptation" or "development". Nonetheless, reporting on finance flows channelled through insurance-based mechanisms, such as catastrophe-risk insurance and catastrophe bonds, among others, ought to be feasible. In addition, governments may want to report on any efforts made to align domestic practices with international fiduciary standards.

08.39 In terms of measurements (iii), while most governments have experience monitoring extreme-weather events, practice with slow-onset events is lagging significantly behind. With regard to the former, existing disaster-risk management databases can be used in the context of L&D, as long as loss metrics and hazard classifications are broadened. Similarly, the methods used to assess climate-related risks, adaptive capacities and exposure can be adapted to L&D. Notwithstanding, additional data collection, through questionnaires and interviews, for example, is likely to be indispensable.

08.40 Given the relatively recent institutionalisation of the issue, policy measures (iv) directed explicitly to L&D are rare. Nonetheless, measures targeting adaptation and disaster-risk reduction are relevant to L&D, as are migration policies (notably in the context of low-lying island states), and agriculture and water management policies, among others. Conversely, when it comes to non-economic L&D, and to the L&D associated with slow-onset events, policies are likely to be rare or absent altogether.

b. Loss and damage in the global stocktake

08.41 The stakes for L&D in the global stocktake will concern its three main aspects: i) information collection and preparation; ii) technical assessment; iii) consideration of outputs.[51]

08.42 The information collection and preparation phase will run through 2022 to gather all data of relevance to the global stocktake. From the point of view of L&D, two aspects will have a strong influence on the outputs of this phase:[52] the scope of the data collection effort, and the extent to which the executive committee of the WIM will be called upon to provide input, complementing input provided by the parties to the Convention.[53] Given the limited data that

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[50] Daniel Puig and others, 'Loss and Damage in the Paris Agreement's Transparency Framework' (2019) <https://unepdtu.org/wp-content/uploads/2019/07/loss-and-damage-in-the-paris-agreements-transparency-framework-final.pdf>.

[51] UNFCCC, 'Matters Relating to Article 14 of the Paris Agreement and Paragraphs 99–101 of Decision 1/CP.21. Decision 19/CMA.1.' (2018) <https://unfccc.int/sites/default/files/resource/cma2018_3_add2 final_advance.pdf%0Ahttps://unfccc.int/sites/default/files/resource/cma2018_3_add2 final_advance.pdf#page=59>.

[52] BM Dambacher, O Serdeczny and M Kunzang, 'Loss and Damage in the Paris Agreement's Global Stocktake' (2019).

[53] The executive committee of the Warsaw international mechanism for loss and damage is one of several bodies to the Convention. It is guided by, and accountable to, the conference of the parties to the Convention (UNFCCC, 2014, p. 6).

is available, and the lack of commonly agreed definitions of L&D, a clear articulation of the scope of this phase is arguably indispensable.[54]

08.43 The second phase of technical assessment, which will also run through 2022, will entail a multi-stakeholder review of the data collected. The review will be structured around themes, including "adaptation", "mitigation" and "means of implementation and support". L&D may be treated as an independent theme, or considered alongside a range of other issues. African and small-island states have advocated for the former option. Given the lack of dedicated global loss-and-damage assessments, not least in the context of the Intergovernmental Panel on Climate Change, and in light of the data and definition challenges referred to above, the case for a separate report on L&D seems clear.[55]

08.44 The last phase on the consideration of outputs, which will run through 2023, is intended to assess progress with the implementation of the Paris Agreement, and identify areas in which additional efforts are needed. Recommendations are to be grounded on equity considerations. How this premise is operationalised might make a great difference with regard to the relative weight afforded to L&D.

08.45 The outputs of the global stocktake are expected to be "referenced in a decision [...] and/or a declaration",[56] and are intended to inform the update of parties' Nationally Determined Contributions. A declaration would carry less political weight, compared to a decision. Stated differently, a decision based on a process in which L&D has had a comprehensive and prominent treatment may spur a much greater coverage of L&D in future Nationally Determined Contributions. Conversely, a declaration emanating from a process in which L&D has been treated alongside other issues would be unlikely to have such catalytic effect.

D. Addressing L&D beyond the climate regime

08.46 In this concluding section, we explore opportunities and emerging practices for dealing with L&D in other domains of international law.

1. Customary law

08.47 While the possibility to claim liability or responsibility for L&D is limited in the climate change regime,[57] international law may offer other avenues of recourse for such claims. States are typically held accountable for their internationally wrongful acts under the law of state responsibility.[58] Verheyen and Roderick have argued that causing harm to a state that stems from anthropogenic climate change may in fact be the result of a violation of the no-harm rule under customary international law by developed countries,[59] as there has been an opportunity to act, the harm is generally foreseeable, and that without clear reductions in GHG emissions or legitimate justifications for failing to undertake such action, states have not taken proportionate measures to prevent or minimise the risk of the harm occurring.[60] The violation of the no-harm rule can in turn trigger entitlements to reparation in the form of restitution, compensation, and/or satisfaction, should the harm be attributable to a given state and its

[54] "Guiding questions" have been suggested (Rai, 2018, p. 2). Arguably, more detailed guidance will be needed.

[55] Dambacher, Serdeczny and Kunzang (n 48).

[56] UNFCCC, 'Matters Relating to Article 14 of the Paris Agreement and Paragraphs 99–101 of Decision 1/CP.21. Decision 19/CMA.1.' (n 47).

[57] Paragraph 51 of Decision 1/CP.21.

[58] Article 1 ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001).

[59] *Corfu Channel Case (UK v Alabia)* ICJ Reports 1949 4 22, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996 226 19-20.

[60] Verheyen Roda and Roderick Peter (WWF-UK), Beyond Adaptation: The legal duty to pay compensation for climate change damage (2008) WWF-UK Climate Change Programme.

activities.[61] The law on state responsibility may therefore open up an avenue for impacted states to get compensation for incurred L&D outside of the climate change regime itself. While paragraph 51 of Decision 1/CP.21 limits the use of article 8 as a basis for liability and compensation, there appears to be no indication that it is also intended to displace the application of the law on state responsibility. In fact, as mentioned above, a number of small island states have emphasised the continued application of international law on state responsibility alongside the PA.[62] The declaration coupled with the language of paragraph 51 indicates that there is no intention among the parties to the PA to modify the application of the law of state responsibility to any or all climate-related harm, but rather seemingly to clarify that an internationally wrongful act cannot stem from article 8. Accordingly, it appears that states maintain the right to reparation should they incur climate-related harm that can be found to violate the no-harm rule, or any other internationally legally binding obligation for that matter, if the requirements of state responsibility are satisfied.

2. Human rights law

08.48 International human rights bodies began to grapple with climate change in the late 2000s and, in recent years, have begun to explore how human rights should be considered in international law and policy governing L&D.[63] The UNHRC issued a resolution on the issue of human rights, climate change and displaced persons in 2017. The former Special Rapporteur on Human Rights and the Environment John Knox asserted that the need to respond to climate change does not relieve a state from complying with its human rights obligations and that it should take additional measures to protect the rights of those most vulnerable to environmental harm. Philip Alston, UN special rapporteur on extreme poverty and human rights, implicitly suggested that human rights themselves may fall into the category of L&D in his report to the UN Human Rights Council in June 2019 when he stated that "human rights might not survive the coming upheaval".

08.49 In the absence of a liability and compensation framework for L&D under the climate change regime, some commentators have suggested that international human rights law has the potential to provide legal recourse.[64] This fits in with broader arguments about human rights law providing an important normative framework for states in implementing climate policies.[65] A growing number of climate change legal cases relying on human rights arguments across different jurisdictions also suggest that human rights adjudication at the domestic level may in the future provide channels through which L&D can be addressed outside of the climate change regime.

3. The Law of the Sea

08.50 Another path in international law through which States could advance action on L&D is provided by the United Nations Convention on the Law of the Sea (UNCLOS). As sea level continues to rise, countries will lose their land and, as a result, their exclusive economic zone (EEZ) will shrink. EEZ can go out as far as 200 nautical miles from the baseline, which is

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[61] Articles 34-37 ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001).

[62] Similar declarations were also made at the signature of the UNFCCC and the Kyoto Protocol. For more on this see Verheyen Roda and Roderick Peter (WWF-UK), Beyond Adaptation: The legal duty to pay compensation for climate change damage (2008) WWF-UK Climate Change Programme 17.

[63] Patrick Toussaint and Adrian Martínez Blanco, 'A Human Rights-Based Approach to Loss and Damage under the Climate Change Regime' (2019) 0 Climate Policy 1 <https://doi.org/10.1080/14693062.2019.1630354>.

[64] Sébastien Duyck, Sébastien Jodoin and Alyssa Johl, *Routledge Handbook of Human Rights and Climate Governance* (2018).

[65] Maxine Burkett, 'Climate Reparations' (2009) 10 Melbourne Journal of International Law 509.

defined as "the line of intersection of the sea and the coast at low tide"[66]. In order to protect their EEZ and associated income, regional initiatives are emerging within the Pacific region. In March 2018, the leaders of The Federated States of Micronesia, Republic of Kiribati, Republic of the Marshall Islands, Republic of Nauru, Republic of Palau, Independent State of Papua New Guinea, Solomon Islands and Tuvalu signed 'The Delap Commitment on Securing Our Common Wealth of Oceans – reshaping the future to take control of the fisheries', in the context of the second Leaders' Summit of the Parties to the Nauru Agreement (PNA).[67] Recognising the 'threat to the integrity of maritime boundaries and the existential impacts due to sea level rise', they agreed to 'pursue legal recognition of the defined baselines established under the United Nations Convention on the Law of the Sea to remain in perpetuity irrespective of the impacts of sea'[68].

[66] Article 5 of the 1982 United Nations Convention on the Law of the Sea, UN Doc. A/CONF.62/122; available at <www.un.org/ Depts/los>

[67] ILA, 'International Law and Sea Level Rise : Report of the International Law Association Committee on International Law and Sea Level Rise INTERNATIONAL LAW ASSOCIATION SYDNEY CONFERENCE (2018)' in Davor Vidas, David Freestone and Jane McAdam (eds), *International Law and Sea Level Rise* (2018).

[68] PNA Leaders, 'Delap Commitment' (2018) <http://www.pnatuna.com/sites/default/files/Delap Commitment_2nd PNA Leaders Summit.pdf>.