International Affairs and Global Strategy
ISSN 2224-574X (Paper) ISSN 2224-8951 (Online)
Vol.40, 2016

International Liability Schemes and Claims in Climate Change Litigation

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Abstract
Sources of claims in climate change litigation may easily be identified under substantive public international law. However, when it comes to following procedure that should result in realising such a claim, the process is a frustrating one for potential litigants. The issue of state responsibility in public international law has to be balanced against the sovereign right of a state to conduct itself in any way it pleases within its own territory. This is added to the fact that the current structure of international law is replete with a number of obstacles that may prevent victims of climate change impact from obtaining justice against greenhouse gas emitters. Thus, the current structure of international law makes it unlikely for victims of climate change to find justice through international dimensions. International dimensions in this paper denote all procedures designed to help victims of climate change impact challenge greenhouse gas emitters, regardless of whether the proceedings will produce a legally binding decision or not. Striking the right balance would require litigants to be able to make claims before an international tribunal that possesses the jurisdiction to entertain claims against states and other non-state entities. This article identifies such forums and analyzes its effectiveness in litigating claims against states that fail to comply with policies and measures that seek to mitigate climate change, such as reducing greenhouse gas emission. While such mechanisms exist, their effectiveness in dealing with violators may be unsuccessful, thus the need to set out an international liability scheme for claims in climate change litigation where claims for loss and damage are in issue.

Key words: climate change litigation; claims under climate change; public international law; international liability scheme; loss and damage.

1.0. Introduction

Public international law is traditionally known as a system of rules and principles that govern the relationship between States and other subjects of international law. The complexity of international law and the necessity to preserve an effective and progressive international society has warranted the acknowledgement of other entities as possessing some degree of international personality provided they are able to enter into legal relation and exercise some rights in the international arena. To this end, Verma[1] expresses that States, international organizations and other non-State entities, together with individuals in certain situations, are the subjects of the international legal system. Nonetheless, the State remains the dominant actor in international climate change law and the principal architect of federal policies.

The issue of climate change and the liability schemes arising thereto belong to the realms of international environmental law. International environmental law is a relatively new area of international law. It flows from the basic concept of good neighbourliness and on the notion that nations have a duty to cooperate with each other as enshrined in Article 1 (3) of the Charter of the United Nations Organisation (UNO), 1945 (as amended). Even Principle 24 of the Stockholm Declaration on Human Environment, 1972, (the Stockholm Declaration) supports the idea that international matters concerning the protection and improvement of the environment should be handled in a co-operative spirit by all countries, big or small, on an equal footing. One of the most basic prescriptive rules and the backbone of international environmental law is the principle that States have an

[1] S. K. Verma: *An Introduction to Public International Law* (New Delhi: PHI Learning Pvt Ltd, 2004), 69.

obligation not to cause or allow environmental harm outside their borders. It is based on the time-honoured common law principle of *sic utere tuo ut alienum non laedas.*[1] According to Nanda and Pring,[2] this is a deeply rooted principle in the world's cultures, from the Christian "Golden Rule" (Do for others what you want them to do for you")[3] to the Confucian Principle of *Shu* ("Do not impose upon others what you do not want for yourself").[4]

It should be noted that the State-centred nature of the modern world exacerbates our environmental problems and is the major reason for the inadequacy of international environmental law and institutions. Since the end of the Second World War and the establishment of newly independent States, the development of international law has been governed by the principle that all States recognised under international law are regarded as both sovereign and equal in their relations with each other. It is based on this premise that David Hunter expressed that "there is a fundamental tension between a State's interest in protecting its independence (i.e. its sovereignty) and the recognition that regional and global environmental problems require international cooperation."[5] This is more pronounced in such matters such as carbon emission reduction in the face of rampaging impacts of climate change.

The implementation of the main thrusts[6] of the Kyoto Protocol (the Protocol) in 1997 demonstrates the difficulty of organizing an effective international response to mitigate climate change impacts. The events leading up to the Protocol began at the World Conference on Environment and Development.[7] The Conference was held in Rio de Janeiro, Brazil, in 1992 where States signed the United Nations Framework Convention on Climate Change (the Convention).[8] But the Convention was not legally binding as it did set mandatory limits on greenhouse gas emission for individual countries, neither did it contain any enforcement mechanisms. In 1997, the Protocol to the Convention was adopted in Kyoto, Japan. The Protocol imposed concrete obligations on States to reduce their greenhouse gas emissions during the first commitment period, 2008-2012.[9] However, the worst emitters are either not signatories to the Protocol or do not have an obligation to reduce emissions.[10] Since the Protocol's emissions-reduction standards were too lax to effectively combat climate change, Small Island States also made declarations that the ratification of the Protocol shall in no way constitute a renunciation of any rights under international law concerning State responsibility for the adverse effects of climate change.[11] With this, the Small Island States made it clear that they did not believe that the emissions reductions in the Protocol were sufficient to prevent the dangerous interference of activities within States with the climate system.

The main thesis of this paper is that the current structure of international law makes it unlikely for claims for loss and damage due to climate change impact to find justice through international dimensions. The reason being that current structure of international law is replete with a number of obstacles on the way to victims obtaining justice against greenhouse gas emitters. As a way out we are of the view that establishing an international liability scheme on climate change will help the victims obtain justice that they desired.

2.0. Potential Liability Schemes for Climate Change Litigation

General international law provides some opportunities for advancing climate change litigation. The problem however is whether greenhouse gas emitting nations or companies can be held liable for the impacts generated by their own emissions, given that nearly every person on earth contributes in some way or the other to emission

[1] One should use one's own property so as not to injure another.
[2] V. P. Nanda and G. Pring: *International Environmental Law & Policy for the 21st Century* (New York: Transnational Publishers, Inc., 2003), 20.
[3] Matthew 7: 12; Luke 6: 31, The Good News Bible with Deuterocanonical Books.
[4] T. R. Reid: "Confucius Lives Next Door: What living in the East Teaches Us about Living in the West" 112 (1999) in V. Nanda and G. Pring, *ibid*, 18.
[5] David Hunter et al, "International Environmental Law and Policy" 326 (1998) in Nanda and Pring, *ibid*, 18
[6] Such as carbon emission reduction , clean development and joint implementation mechanisms
[7] Timo Koivurova**, "**International Legal Avenues to Address the Plight of Victims of Climate Change: Problems and Prospects" *Journal of Environmental Law & Litigation* Vol. 22, 2007, 267-299], 272
[8] An International Multi-lateral Environmental Agreement setting forth general obligations on nation-states to climate change mitigation and adaptation to its consequences.
[9] United Nations Framework Convention on Climate Change, *ibid*
[10] For instance, the United States of America (USA), a high emitter of greenhouse gases, has not signed the Protocol. Again, China and India who are presently among the highest emitters of greenhouse gases have no reduction commitments as they are not included as Annex 1 countries in the Protocol. See P. Kingsnorth, "The Four Degrees," available at http://www.lrb.co.uk/v36/n20/paul-kingsnorth/the-four-degrees (last assessed on April 23, 2015).
[11] Timo Koivurova, *ibid,* 274

of greenhouse gases. This is worsened by the fact that total anthropogenic greenhouse gas emissions have continued to increase despite a growing number of climate change mitigation policies.[1]

According to the Synthesis report (Fifth Assessment Report) of the Intergovernmental Panel on Climate Change (IPCC),[2] "warming of the climate system is unequivocal. The atmosphere and ocean have warmed, the amount of snow and ice have diminished, and sea level has risen." The report further stated that continued emission of greenhouse gases will cause further warming and long-lasting changes in all components of the climate system, increasing the likelihood of severe, pervasive and irreversible impacts for people and ecosystems.[3] A recent report of the Nature Conservancy states that one-fourth of the Earth's species could be headed for extinction by 2050.[4] The IPCC Report also projected that coastal systems and low-lying areas are at risk from sea level rise which will continue for centuries even if the global mean temperature is stabilized.[5]

As a result of the attendant effects of climate change, and the difficulties in arriving at a consensus by the international community in loss and damage the question is: what are the potential liability schemes for climate change litigation under international environmental law?

1. A potential international liability scheme may be established under the Principle of State Responsibility or No-Harm Rule, a principle of customary international law. State liability under this principle is premised that a breach of an international obligation derived from international treaty or customary law by a State, committed through an act or omission, may lead to liability by that State. This can be also be applied in relation to liabilities arising from a climate change induced litigation. But how can this principle be applied?

Under the principle, a State is duty-bound to prevent, reduce and control the risk of environmental harm to other States.[6] Such a State shall so be held liable in the event of occurrence of any environmental harm to individuals within the State or to others outside the State, if the harm occurs extra territorially. The position has been confirmed by different decisions of international courts and tribunals. The legal precedent usually cited in this connection is the case of *Trail Smelter Arbitration*[7] which concerns a Canadian smelter whose sulphur dioxide emissions had caused air pollution damages across the border in the United States of America (USA). The arbitral tribunal in that case determined that the government of Canada had to pay the USA compensation for damage that the smelter had caused primarily to land along the Columbia River valley in the USA. The tribunal concluded that there is an international principle that "no State has the right to use or permit the use of its territory in such a manner as to cause injury in or harm to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury established by clear and convincing evidence."

In another situation, the International Court of Justice in 1996, in the *Nuclear Weapons Advisory Opinion*[8] stated that the court recognises that the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. It went on to state that there is an obligation on States to ensure that activities within its jurisdiction and control respect the environment of other States. The court a year later in the *Gabcikovo-Nagymaros Dam* case[9] affirmed this decision and added that safeguarding the ecological balance has come to be considered an essential interest of all States. In the *Island of Palmas case,*[10] the sole Arbitrator, Huber, who was the president of the Permanent Court of International Justice stated that, "territorial sovereignty involves the exclusive right to display the activities of a state. This right has as corollary duty; the obligation to protect within the territory the rights of other States."

This obligation by a State to protect within its territory the rights of other States has found support in climate

[1] Intergovernmental Panel on Climate Change, "Climate Change 2014 Synthesis Report, Summary for Policymakers" available at http://www.ipcc.ch/pdf/assessment-report/ar5/syr/AR5_SYR_FINAL_SPM.pdf (last assessed June 20, 2015)
[2] Intergovernmental Panel on Climate Change, *ibid*, 3
[3] Intergovernmental Panel on Climate Change, *op cit*, 8
[4] The Nature Conservancy, "Climate Change Threats and Impacts", (n.d.) available at http://www.nature.org/ourinitiatives/urgentissues/global-warming-climate-change/threats-impacts/, assessed on June 20, 2015
[5] Intergovernmental Panel on Climate Change, *op cit* , 13
[6] P. Birnie, A. Boyle and C. Redgwell: *International Law and the Environment,* 3rd edn., (Oxford: Oxford University Press, 2009), 143
[7] *Trail Smelter Arbitration: United States v Canada* (1931–1941) 3 UNRIAA, vol. III
[8] Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, (July 8, 1996), 29, U.N. Doc. A/51/218, 35 I.L.M. 809 91996)
[9] Case concerning the Gabcikovo-Nagymaros Project (*Hungary v. Slovakia*) September 25, 1997, 1997 I.C.J. 7, 53
[10] *Island of Palmas case (United States v. The Netherlands), 2 RIAA (1949)*

change litigation in the case of *Urgenda Foundation c. s. v The Kingdom of the Netherlands.*[1] The main demand of Urgenda is that the Dutch state is acting unlawfully by not contributing its proportional share to preventing a global warming of more than 2 degrees Celsius. They sought a declaration from the court that global warming of more than 2 degrees Celsius will lead to a violation of fundamental human rights worldwide. They also sought from the court, an order that the Dutch State drastically, and no later than 2020, reduce carbon dioxide (CO_2) emissions coming from within the boundaries of the Netherlands, to the level that has been determined by scientists to be in line with less than 2 degrees Celsius of global warming. This will involve a reduction of CO_2 emissions by 40% by 2020 below 1990 levels with the aim of preventing the risk of dangerous climate change, or at least of reducing this risk.

The court in its judgement ordered the Dutch state to limit annual greenhouse gas emissions from the country to 25% below 1990 levels by 2020. The government had pledged a 17% reduction, but the court found that insufficient. The court undertook a detailed examination of reports of the Intergovernmental Panel on Climate Change, the United Nations Environment Programme, and various Dutch Institutions, and concluded that the mandated 25% reduction was the level needed to meet the country's fair contribution toward the UN goal of keeping global temperature increases within 2 degrees Celsius of pre-industrial conditions. It further held that due to the severity of the consequences of climate change and the great risk of hazardous climate change occurring, the State has a duty of care to take mitigation measures. The court in reaching at its decision cited, without directly applying, a number of legal documents, *viz*: Article 21 of the Dutch Constitution,[2] the emissions reduction targets of the European Union, principles under the European Convention on Human Rights, the "no harm" principle of international law, the doctrine of hazardous negligence, the principle of fairness, the precautionary principle generally, and the sustainability principle embedded in the UN Framework Convention on Climate Change, and the principle of a high protection level, the precautionary principle, and the prevention principle embedded in the European climate policy.

This is the first decision by any court in the world ordering states to limit greenhouse gas emissions for reasons other than statutory mandates.[3] The Urgenda case was also the first attempt outside the United States to bring these theories before a court in the climate change context. In another contest, on April 29, 2015, the United Kingdom Supreme Court handed down judgement in favour of the Appellants in *R (o.a.o. Client Earth) v Secretary of State for the Environment, Food and Rural Affairs*,[4] bringing to an end the sequence of proceedings that arose out of 'the admitted and continuing' failure of the United Kingdom since 2010 to secure compliance in certain zones with the limits for nitrogen dioxide levels set by European Union law.[5] Whereas, the UK case was a judicial review of the actions in implementing the Directive, the Urgenda case was a judicial review of the State's obligations to its citizens in relation to the impact of global warming.

The acceptance of the principle in preventing, reducing and controlling the risk of environmental harm to other States has also found expression and incorporated in a number of international treaties and policy documents. For instance, Principle 21 of the Stockholm Declaration, 1972, provides as follows:

> States have in accordance with the charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that the activities within their jurisdiction or the control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.

Similarly, the principle has been codified in Principle 2 of the Rio Declaration on Environment and Development, 1992 (Rio Declaration).

[1] *Urgenda Foundation c. s*. v. *The Kingdom of the Netherlands and Ministry of Infrastructure and the Environment* [2015] Case C/09/456689/HA ZA 13-1396, decided on June 24, 2015.
[2] The Article provides as follows: "It shall be the concern of the authorities to keep the country habitable and to protect and improve the environment."
[3] Such as the Clean Air Act of USA, 1990.
[4] [2015] UKSC, 281
[5] Under Directive 2008/50/EC

In analysing the import of the provisions of these legal documents, Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration, we are in total agreement with Nanda and Pring.[1] According to them, the first clause[2] pays deference to the State sovereignty doctrine while the second clause[3] creates a large exception to the clause, proclaiming that sovereignty does not shield States from responsibility for the adverse effects of their actions on environments outside their territory. Thus, even though a state has the sovereign right to use and exploit all resources on its territory, the right to pollute is however not without boundaries. These boundaries flow from the principle that no state has the right to use (or have used) the resources on its territory in a way that causes damages to other states as applied in the *Island of Palma's case*,[4] where the court stated that "territorial sovereignty, as has already been said, involves the exclusive right to display the activities of a State. This right has as corollary a duty: the obligation to protect within the territory the rights of other States."

It is devastating to note that the IPCC projected that even if anthropogenic emissions of greenhouse gases are stopped, many aspects of climate change and associated impacts will continue for centuries, and that the risk of abrupt or irreversible changes increases as the magnitude of the warming increases.[5] The parties negotiating the Convention on Climate Change knew that climate change would continue despite the general measures laid out in it. Early in the negotiations, the Alliance of Small Island States (AOSIS) attempted to include an article in the Convention that would have implemented a specific standard of state responsibility.[6] Even though the question of state responsibility was still an issue during the fifth negotiating round in New York, it was fully deleted from the final Convention text due to objections from industrialised countries. Many Small Island States responded to this omission by making official declarations to the Convention. For example, Tuvalu, alongside Papua New Guinea, Fiji, the Solomon Islands, and Kiribati (who made similar declaration) stated upon its signing of the Convention that:

> The Government of Tuvalu 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 derogating from the principles of general international law.[7]

All four states, but particularly Tuvalu, are frequently cited as the first victims, and among the most viable plaintiffs, of climate change. For example, Tuvalu is quickly becoming uninhabitable, as much of its infrastructure has been destroyed by rising seas, coastal erosion, and unusually strong storms. Emigration may soon be the only viable option for the island's inhabitants.[8] Thus, as a result of climate change many countries may already be able to show a certain degree of harm. However, the actual occurrence of harm is not a precondition for a violation of the no-harm rule. It is sufficient for a victim to show that a State's conduct will cause significant damage for its responsibility to be engaged. Therefore, the no-harm rule is not only a general obligation to prevent significant trans-boundary harm, but also to minimise the risk of such harm.[9]

2. Beside the No harm rule, liability scheme may be based on recognised international law theory of due diligence. The theory of due diligence requires states to ensure that they cause no damage to the environment of other states. At one stage of the United Nations International Law Commission's (ILC) project on state responsibility, an argument for the inclusion of state responsibility was made. Draft Article 19, paragraph 3, provides that:

> Subject to paragraph 2, and on the basis of the rules of international law in force, an international crime may result, *inter alia,* from . . . *(d)* a serious breach of an international obligation of

[1] V. Nanda and G. Pring, *op cit,* 18
[2] The sovereign right to exploit their own resources pursuant to their own environmental policies
[3] The responsibility to ensure that the activities within their jurisdiction or the control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction
[4] (1928), II UNRIAA 829, at 839.
[5] *Op cit*, 16
[6] Timo Koivurova, *ibid*, 274
[7] *Ibid.*
[8] R. S. Tol & R. Verheyen, "Liability and Compensation for Climate Change Damages – A Legal and Economic Assessment," 32 *ENERGY POLICY* 1109 (2004)
[9] *Trail Smelter Arbitration: United States v Canada* (1931–1941) 3 UNRIAA, vol. III

> essential importance for the safeguarding and preservation of the human environment, such as those *prohibiting massive pollution of the atmosphere or of the seas*.[1]

3. In addition, we take the view that state responsibility under the liability scheme may be anchored on the 'principle of preventive action.' This principle seeks to minimize environmental damage as an objective in itself. It prohibits activity which causes or may cause damage to the environment in violation of the standards established under the rules of international law. It has been described by Kramer[2] as being

> of overriding importance in every effective environmental policy, since it allows action to be taken to protect the environment at an earlier stage. It is no longer primarily a question of repairing damage after it has occurred.

Under the principle, a state should be under an obligation to prevent damage to the environment within its own jurisdiction, including by means of appropriate regulatory, administrative and other measures. This requires states to action an early stage and, if possible, before damage has actually occurred. For instance in the *Gabcikovo-Nagymaros* case,[3] the ICJ noted that;

> it was mindful that, in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage.[4]

It should be noted that this principle has also been endorsed, directly or indirectly by some Multilateral Environmental Agreements.[5] As also found a place in the Rio Declaration on Environment and Development. For example, Principle 11, which requires states to enact "effective environmental legislation;" Principle 14 calls on states "to prevent the relocation and transfer to other states of hazardous activities or substances" and Principle 15 that specifically provides for precautionary approach by states in environmental matters.

Furthermore, the principle has been endorsed by a large number of international environmental treaties, aiming to prevent, *inter alia*: the spread of occupational disease, including radioactive contamination of workers;[6] pollution of the seas by oil,[7] hazardous waste and substances,[8] from land-based sources or from any source;[9] radioactive pollution of the atmosphere;[10] hostile environmental modification; adverse effects of activities that prevent the migration of species;[11] air pollution;[12] modification of the ozone layer;[13] degradation of the natural environment; significant adverse environmental impacts and trans-boundary impacts generally;[14] dangerous anthropogenic interference with the climate system;[15] loss of fisheries[16] and other biodiversity,[17] including as a result of the release of genetically modified organisms;[18] and damage to health and the environment from

[1] *Draft Articles on State Responsibility*, 2 Y.B. Int'l L. Comm'n 30, U.N. Doc. A/CN.4/SER.A/1980/Add.l (Part 2)
[2] L. Kramer, *EEC Treaty and Environmental Protection* (1990).www.eu.org/env, accessed on September 10, 2014.
[3] *Hungary v. Slovakia* (1997) ICJ Reports 7
[4] (1997) ICJ Reports 7 at 78, paragraph 140.
[5] For instance, Principles 6, 7, 15, 18 and 24, Stockholm Declaration, 1972, Principle 1UNEP Draft Principles, 1978 and the World Charter for Nature, 1982
[6] Article 3(1) Ionising Radiation Convention, 1960.
[7] Preamble to the Oil Pollution Prevention Convention, 1969
[8] Article 1 (1) MARPOL 73/78
[9] Article 194 (1) UNCLOS, 1982
[10] Article 1(1) Atmospheric Test Ban Treaty, 1963.
[11] Article 111 (4) (b) Bonn Convention, 1979
[12] Article 2 Long Range Trans-boundary Air Pollution (LRTAP), 1979
[13] Article 2(2) (b) Vienna Convention, 1985
[14] Preamble to the Espoo Convention, 1991
[15] Article 2 Climate Change Convention, 1992
[16] Straddling Stocks Agreement, 1995
[17] Preamble and article 1 Biodiversity Convention, 1992.
[18] Article 1 Biosafety Protocol to the Biodiversity Convention, 2000

chemicals and persistent organic pollutants.[1] More significantly for the development of precautionary principle as an international legal principle is the fact that it has been relied upon in dealing with activities affecting environmental media and in relation to trans-boundary resources by the awards in the *Trial Smelter*[2] case and *Lac Lanoux Arbitration.*[3]

Arising from all the positions stated above, where a State[4] in the course of exercising its sovereign right to exploit its own resources pursuant to its own environmental policies, neglects due diligence or failed to apply the principle of preventive action, such a State has the responsibility to ensure that the activities within its jurisdiction or under its control do not cause damage to the environment of other states or of areas beyond the limits of its national jurisdiction. If any harm occurs outside its jurisdiction that State should be held responsible for such harm. To this end, a State's liability to victims of climate change may arise where a state's deliberate unwillingness to reduce its considerable greenhouse gas emissions would seem to qualify as massive pollution of the atmosphere, especially because the effects of climate change are both substantial and longstanding.

The essence of this preposition is that humanity is called to recognize the need for changes of lifestyle, production and consumption habits, in order to combat global warming and climate change or at least the human causes which produce or aggravate them. This is premised on the assumption that where a State allows its territorial to be used in creating or producing or operating potentially dangerous substances that are capable of causing or have caused irreversible environmental damage resulting to loss and/or damage to life and property, such State should owe the victims an absolute and non-delegable duty with the highest standards of safety to ensure that no harm results to anyone on account of these actions. If any harm results the State should be strictly liable to bear for the loss or damage arising thereto, irrespective of the jurisdiction of impact or harm.

3.0. Where Can a Victim Ventilate his Claims?

The damages caused by climate change concern virtually every aspect of life. Greenhouse gas emitters may damage the marine environment, the biodiversity of nature, or international trade, all of which are protected by international rules and regulations. The international avenues available for climate change litigation are the means by which climate change claims can be brought forward. In this context, it involves both the relevant treaties[5] upon which the claims can be brought and the forum[6] in which they are entertained.

The United Nations Framework Convention on Climate Change (UNFCCC)[7] and its Protocol, the Kyoto Protocol, form the foundation for the international climate change regime. The preamble of the UNFCCC emphasises that the no-harm rule forms part of the international law surrounding climate change, and continues to govern the relationship between parties to the Convention.[8] Article 2 of the UNFCCC provides that the ultimate objective of the Convention (and any related legal instruments that the Conference of Parties may adopt) is:

> to achieve… stabilization of greenhouse gas concentrations in the atmosphere at a level that will prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time frame sufficient to allow ecosystems to

[1] Article 1 Persistent Organic Pollutant Convention 2001
[2] *Supra*
[3] 12 RIAA 285, *(Spain v. France).* Here the arbitral tribunal affirmed that a state has an obligation not to exercise its rights to the extent of ignoring the rights of another.
[4] For our purpose, State in this context means not only a country or nation with its own sovereign independent government, but also refers to the country's government and those government-controlled institutions that are responsible for its internal administration and its relationships with other countries. It also, by implication, includes all entities that operate within it, such as state-owned companies or any other company, which is registered under its Laws for the time being in force in that State.

[5] For instance, United Nations Framework Convention on Climate Change (UNFCCC) and the Kyoto Protocol, the United Nations Convention on the Law of the Sea (UNCLOS) and the Straddling Fish Stocks Agreement.
[6] Such as the International Court of Justice (ICJ), International Tribunal on Law of the Sea (ITLOS), the World Trade Organization (WTO)
[7] United Nations Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc. No. 102-38, 1771 U.N.T.S. 107
[8] UNFCCC, Preamble, recital 8

> adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.

This provision, according to Kilinski,[1] represents the purpose of the UNFCCC particularly in the realm of customary international law. Moreover, in accordance with the Vienna Convention on Treaties, a signatory State which fails to ratify a convention is still under an obligation not to frustrate the object and purpose of a treaty to which it is not a signatory. Thus, it could be argued that those countries that failed in their domestic policy to refrain from frustrating the purposes outlined in the text of the UNFCCC are open to liability. This, of course, is highly contentious as most view this section as non-binding and aspirational in nature.[2]

Again, Article 4 (2) of the UNFCCC requires industrial nations to commit to lowering, by the year 2000, greenhouse gases within their borders to the level emitted in 1990. The question becomes whether these sections are sufficient enough to maintain an action in liability for those countries that are parties to the UNFCCC.[3] Although these provisions appear to be too vague, Kilinski, however opines that it may be different in situations where a country commits to both the UNFCCC and the Kyoto Protocol,[4] as the latter provides very specific requirements for reducing greenhouse gases, with quantifiable measurements on certain dates.[5] This is because the Protocol in its Article 3(1) mandates Annex I countries to, individually or jointly, meet their assigned emissions criteria, and thus, where there is a clear obligation, failure to comply could be seen as a breach of an express treaty obligation.

Also, Article 14 (5) of the UNFCCC provides procedures for a conciliation which would permit a state to "legally" investigate whether a causal link existed between climate change harms in their state and the climate policy implemented in another country, and then, based on the undertaken investigation, request issuance of a non-binding recommendation by the Compliance Committee.[6] The Committee handles breaches of obligations set forth in the Protocol.

Although the Compliance Committee has extensive authority, particularly in its enforcement division, it is unlikely that victims of climate change would present to it their legal demands. This assertion is based on two reasons. First, the worst greenhouse emitters remain outside the Protocol to reduce their emissions. Second, the Compliance Committee only investigates whether parties to the Kyoto Protocol are observing their obligations. The Committee has no authority generally to investigate claims for compensation for damages due to impact of climate change or indeed impose sanctions against countries that fail to fulfil their obligations under the Convention.

Apart from the above obstacle, it is well known that the differences between developed and developing countries create some tension when climate change issues are being discussed. A fundamental aspect of the UNFCCC and the Kyoto Protocol is the principle of 'common but differentiated responsibilities' among industrialised and developing countries**.** Principle 7 of the Rio Declaration on Environment and Development has provisions on this principle in these words:

> States shall co-operate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, states have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies

[1] J. Kilinski: "International Climate Change Liability: A Myth or a Reality?" *Journal of Transnational Law & Policy* [Vol. 18], 2009, 389

[2] D. Bodansky: "The United Nations Framework Convention on Climate Change: A Commentary", *18 Yale Journal of International Law,* 451, 516 (1993); P. Sands: *Principles of International Environmental Law* (2nd edn.) (New York: Cambridge University Press, 2007), 361-365

[3] J. Kilinski, *op cit,* 389

[4] The Kyoto Protocol is the current apogee of international efforts to address global climate change and a significant milestone in the evolution of international environmental law.

[5] J. Kilinski, *op cit,* 389

[6] It should be noted that Article 14 of the UNFCCC generally addresses various dispute settlement opportunities, including negotiation, arbitration, conciliation or submission to the International Court of Justice.

> place on the global environmental and of the technologies and financial resources they command.[1]

In practical terms, the application of the principle of common but differentiated responsibility has at least two consequences. First, it entitles, or many require, all concerned states to participate in international response measures aimed at addressing environmental problems. Secondly, it leads to environmental standards which impose differing obligations on states. The principle has two elements. The first concerns the common responsibility of states for the protection of the environment, or parts of it, at the national, regional and global levels. The second concerns the need to take account of differing circumstances, particularly in relation to each state's contribution to the creation of a particular environmental problem and its ability to prevent, reduce and control the threat.

Inspite of these tenets of the principle, when it comes to establishing meaningful mitigating targets for emission reductions, the UN Climate Change Summits have not been as successful as it would have been hoped given that countries such as India, China, and the United States refused legally binding targets at the 2011 meeting in Durban, South Africa (where the Kyoto Protocol was extended for another five years at least). The outcome of such refusal is that other countries would not in the future be unwilling to accept any targets being placed on them.

Thus, international action under the UNFCCC must be guided by the best available science. Increasingly frequent and progressively more severe impacts of climate change make the need for urgent action abundantly clear. This is underscored by a growing number of reports,[2] which have also provided options and solutions for the world to act effectively now to prevent much more serious climate change in the future.

Another avenue that can be explored by the victims is the International Court of Justice (ICJ) in The Hague. The Court Justice is the principal judicial organ of the United Nations and has been described as the guardian of the international legal community as a whole.[3] It may hear contentious disputes concerning an alleged breach of an international obligation if (and to the extent) the States concerned have accepted its jurisdiction. Given the widely accepted principles of State sovereignty, jurisdiction is ultimately based on State consent.[4] A State may accept the ICJ's jurisdiction in three different ways.[5]

First, under acceptance by a unilateral declaration, Article 36(2) of the Statute of the ICJ provides that a state may elect prospectively to accept ICJ compulsory jurisdiction. The problem with this option is that few major emitters accepted compulsory jurisdiction. For example, the United States withdrew its acceptance after the ICJ ruled against it in a case brought by Nicaragua in the 1980s.[6] Secondly, the ICJ can attain jurisdiction if the involved states mutually consent to the Court's authority.[7] The likelihood that a potential defendant under climate change litigation would submit to the ICJ is however, slim to none. It is hard, according to Kilinski,[8] to imagine a scenario where the United States, China, India, or some other nations would voluntarily subject themselves to an international court system's determination of liability on such a contentious issue. However, the most likely avenue for the ICJ to obtain jurisdiction is through Article 36(1) of the ICJ Statute.[9] It requires the parties to specifically agree through treaty provisions to submit to the ICJ for dispute resolution.[10]

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[1] Similar language exists in Article 3 (1) Climate Change Convention, 1992, which provides that the parties should act to protect the climate system "on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities."

[2] Such reports include: the World Bank's Turn Down the Heat: Why a 4°C Warmer World Must Be Avoided, UNEP's Emissions Gap Report 2012, the World Economic Forum's Global Risks 2013 report, released early in 2013, the Intergovernmental Panel on Climate Change (IPCC) Fifth Assessment Report (AR5) released in 2013 and 2014.

[3] Article 92, Charter of the United Nations, 1945; Separate Opinion of Judge Lachs in Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (*Libyan Arab Jamahiriya v United Kingdom*), Provisional Measures, Order of 14 April 1992, ICJ Reports 1992 p. 26.

[4] See Mark L. Movsesian, "Judging International Judgments", 48 VA. J. INT'L L. 65, 73-75 (2007)

[5] Article 36, Statute of the International Court of Justice, 59 Stat. 1031, 1060, T.S. No. 993 (1945)

[6] Military and Paramilitary Activities (*Nicaragua. v. U.S.*) 1986 I.C.J. 14 (June 27)

[7] Article 36(1) of the ICJ Statute

[8] J. Kilinski, *op cit,* 392.

[9] *Op cit*

[10] Article 14 of the UNFCCC generally addresses various dispute settlement opportunities, including submission to the International Court of Justice.

Several limitations exist when bringing a claim against the major GHG emitters through the ICJ. First, jurisdiction must be acquired over the case through one of the mentioned mechanisms as States tend to refuse the ICJ's jurisdiction in cases that reflects significant interest.[1] Also, the causes of action must be well pleaded and the plaintiff must also obtain standing.[2]

As a result of all these difficulties, one may be tempted to ask: what options may be available to victims of climate change impacts. As a way out of this potential logjam, victims of climate change impact may "bypass" the ICJ's jurisdictional consent requirement by attempting to obtain an advisory opinion from the ICJ. This approach involves convincing the United Nations (UN) bodies to ask the ICJ to issue an advisory opinion in order to clarify state responsibility regarding climate change.[3] The ICJ is authorized to give an advisory opinion on almost any legal problem, provided that the request is made in accordance with Article 96 of the UN Charter. The request has to be made by the UN General Assembly, Security Council, or other UN organizations. Hence, an individual State cannot request an advisory opinion.

However, a State's proposal to ask for an advisory opinion must obtain a simple or two-thirds majority in the General Assembly depending on the importance of the decision.[4] UN organizations can also request advisory opinions.[5] The United Nations Environmental Program (UNEP) would qualify as an organization under whose mandate climate change issues belong. However, UNEP has not been granted general authorization by the General Assembly to request an advisory opinion. The governing council of UNEP would therefore need to ask the General Assembly to make this request on its behalf or obtain the General Assembly's authorization to make the request itself.[6]

An Advisory opinion from the ICJ would provide much needed direction that would shape current international approach on climate change. It would most likely define state obligations and responsibilities for greenhouse gas emissions and would carry significant weight coming from the ICJ and most likely increase the international awareness for climate change issues.[7]

Another avenue that may be available to victims of climate change impacts to seek redress is through the instrumentalities of the United Nations Convention on the Law of the Sea (UNCLOS), 1982[8] and the United Nations Fish Stocks Agreement (UNFSA).[9] These are dispute resolution mechanisms and a means to liability. Here, the agreements address the rights and duties of States in protection of the marine environment. Article 287(5) of UNCLOS in particular establishes a comprehensive framework for protecting and preserving the marine environment and redress violations of its provisions. That article provides for four options for settling disputes over its provisions: (1) the International Tribunal for Law of the Sea; (2) the ICJ; (3) an arbitral tribunal; or (4) a special arbitral tribunal.[10]

Furthermore, the viability of using these agreements rests on the fact that climate change impacts greatly on the oceans. These impacts according to Burns[11] range from rising sea level, warming water temperatures to changes in ocean pH level.

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[1] M. L. Movsesian, *ibid*, 73
[2] TImo Koivurova, *op cit*, 280
[3] For example the Western Sahara, Advisory Opinion, 1975 I.C.J. 12 (Oct. 16) (when Morocco failed to persuade Spain to submit the Western Sahara dispute to the ICJ, it passed a resolution at the UN General Assembly through which the ICJ was asked to give an advisory opinion)
[4] Article 18 of the UN Charter
[5] Article 96 (2) U.N. Charter
[6] TImo Koivurova, *op cit,* 277

[7]Aaron Korman and Giselle Barcia: *Rethinking Climate Change: Towards An International Court Of Justice Advisory Opinion* (2012)
[8] United Nations Convention on the Law of the Sea, December 10, 1982, 1833 U.N.T.S. 243 [hereinafter UNCLOS]
[9] Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, August. 4, 1995, 2167 U.N.T.S 3 [hereinafter UNFSA].
[10] States may choose their forum, but in instances where no choice is made or parties differ on forum selection, the only option available is binding arbitration.
[11] W. G. Burns: "Potential Causes of Action for Climate Change Damages in International Fora: The Law of the Sea Convention", 2 *INT'L J. SUSTAINABLE DEV'L L. & POL'Y* 27 (2006)

While UNCLOS recognizes the sovereign right of States to exploit their natural resources, this must be done in accordance with "their duty to protect and preserve the marine environment" which is enshrined in Articles 192 and 193 of the UNCLOS. Under the Convention, State parties are required "to prevent, reduce and control pollution of the marine environment from any source,"[1] including "the release of toxic, harmful or noxious substances, especially those that are persistent[2] from land-based sources, [or] from or through the atmosphere."[3] Even Article 212 of the Convention mandates States to adopt laws and regulations to prevent, reduce and control pollution of the marine environment from or through the atmosphere. States are also required to take "all measures necessary" to ensure that activities under their jurisdiction are conducted in a manner that does not cause pollution damage to other States and their environment.[4] This includes measures to protect and preserve "rare or fragile ecosystems" and the habitat of depleted or endangered species and other forms of marine life.[5]

State responsibility, and in the same vein likelihood of liability, may therefore be triggered when a State fails to fulfil any of or all of the above responsibilities under the Convention. This is so because "States are responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment and shall be liable in accordance with international law."[6] Thus, one could connect greenhouse gas emissions, scientifically linked to rising sea levels, increased water temperatures, and changes in ocean pH level, and general impairments of the oceans, to increased absorption by oceans of carbon dioxide emitted into the atmosphere by the State in question.

In this regard a potential litigant from Small Island nations or coastal States may invoke the provisions of Article 197 of UNCLOS[7] to compel UNFCCC[8] to institute an action against GHG emitters whose activities might have impaired the oceans. This premise is predicated on the facts that:

a. The UNFCCC should clearly be construed as the "competent organization" to address climate change under Article 197 of UNCLOS.
b. UNFCCC has been ratified by 189 nations, including all of the world's major greenhouse gas emitting States.[9]
c. The obligations under UNFCCC should be recognized as "international mechanisms to control pollution" under Article 212 of UNCLOS. The reason being that the overarching purpose of UNFCCC is to control greenhouse gas emissions so as to "prevent dangerous anthropogenic interference with the climate system."[10]
d. Under Article 235 of UNCLOS, the UNFCCC (as a Convention) is clearly an international obligation that can contribute to the protection and preservation of the marine environment by reducing greenhouse gas emissions.

Using UNCLOS may have its limitations. An immediate limitation is the United States' failure to ratify it. Thus, a suit against the USA may not necessarily succeed if brought under the Convention.[11] However, according to Kilinski, the environmental provisions arguably already bind the United States, as many aspects of the UNCLOS are codifications of customary international law despite its lack of signatory status.[12] In fact, the U.S. Federal court in the case of *Sarei v. Rio Tinto Plc*[13] held that UNCLOS is customary international law, due to its nearly universal ratification. Although, some of the means for mandatory arbitration may not be viable against the United States *per se*, they may be utilized against any of the other State parties to the UNCLOS.

[1] Article 194 (1), UNCLOS
[2] Article 194 (3), *supra*
[3] Article 194(3)(a), *supra*
[4] Article 194 (2), *supra*
[5] Article 194 (5), *supra*
[6] Article 235, *supra*
[7] The Article provides that an enforcement of the provisions of the Convention may be undertaken by a "competent organization"
[8] It should be noted that UNFCCC is now both a Multi-lateral Environmental Agreement as well as an organ of the UN for the implementation of policies on climate change mitigation and adaptation.
[9] *Ibid.*
[10] Article 2, UNFCCC.
[11] J. Kilinski, *op cit,* 398
[12] *Ibid.*
[13] 221 F. Supp. 2d 1116 (C.D. Cal. 2002)

The United Nations Fishing Stock Agreement (UNFSA) on the other hand presents an additional avenue for finding liability. This agreement contains a binding dispute resolution procedure,[1] but unlike the UNCLOS, the United States largely follows it.[2] Though it does not make an explicit reference to pollution or emissions, one plausible argument is that the commercial fisheries' sectors are adversely impacted by climate change and these impacts fall upon many of the fish stocks directly regulated under the UNFSA.[3]

4.0. What Proofs are required to sustain a Claim?

Where a State[4] in the course of exercising its sovereign right to exploit its own resources pursuant to its own environmental policies, neglects due diligence or failed to apply the principle of preventive action, such a State, as we had stated earlier, has the responsibility to ensure that the activities within its jurisdiction or under its control do not cause damage to the environment of other states or of areas beyond the limits of its national jurisdiction. If any harm occurs outside its jurisdiction that State should be held responsible for such harm. The question is; how can a victim claiming for loss and/or damage, a resultant consequence of such harm, pursue such claim against the State?

Due to the rigorous routes available to a potential litigant, a way out of the logjam may be for the claimant to hold that the State that caused the emission of greenhouse gas (GHG), or under whose watch permitted the emission of GHG emission "caused" and/or "knowingly permitted" the emission of the substances that caused global warming and the resultant climate change that led to the loss and/or damage.

The word 'cause' lays down an offence of strict liability. This is because the word is not conditioned by any requirement of knowledge. In applying this in prosecuting emission of GHG what the litigant needed to establish is that the State carried out series of activities that gave rise to climate change and the loss and/or damage being complained of. Once it can be shown that the emission was not regulated or that emission is regulated but the emitter failed to apply due diligence, all that is necessary to prove liability is to establish a link between the defendant's activities and the emission of GHG, for example that the defendant uses fossil fuel. The test therefore is that 'causing' must involve some active operation or chain of operations involving the defendant resulting in the emission and the harm complained off. This test was applied in the case of *Alphacell Ltd v Woodward***.**[5] In that case the defendant, a paper manufacturing company, was charged with causing the escape of polluting matters into a river. Settling tanks in the paper factory overflowed, when vegetation clogged up the pumps which maintained the level of effluent in the tanks. The tanks filled up and overflowed causing polluting matter to enter the river. An overflow channel led directly from the tanks to the river. The defendant claimed it did not cause polluting matter to enter the river rather presence of vegetation in the settling tank was the real cause of the incident. The court held that the act of constructing and operating the effluent tank was a positive and deliberate act which led to the overflow which caused the pollution. According to Lord Wilberforce,

> …the appellants abstract water, pass it through their works where it becomes polluted, conduct it to a settling tank communicating directly with the stream, into which the polluted will inevitably flow if the level rises over the flowing point.

Under this situation, the scope of liability of the defendant was his involvement in the operations or chain of events. Thus, in the case of *CPC (UK) Ltd v National Rivers Authority*,[6] a factory operator was held to have caused polluting matter to enter a stream when a pipe carrying cleaning fluid fractured, allowing the fluid to flow into a river via a storm drain. Though the cause of the fracture was a defective work carried out by subcontractors for the previous owner, which was not exposed by environmental audit. The court still held the current owners liable.

There are however limits to the applicability of the concept of causing pollution. Where it can be shown that the defendant had no active involvement in the chain of events that led to the polluting incident, he will not be liable.

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[1] Article 30, UNFSA

[2] A. L. Strauss, "The Legal Option: Suing the United States in International Forums for Global Warming Emissions," 33 *Environmental Law Report.* 10 (2003)185

[3] W. G. Burns, *ibid,* 60

[4] See foot note 58, *ante*

[5] (1972) AC, 824. Same as in the case of *FJH Wrothwell v Yorkshire Water Authority* [1984] Criminal Law Report, 43

[6] [1995] *Environmental Law Report*, 131

That is, he had been passive.[1] In the case of *Price v Cromack,*[2] a farmer had a contract permitting an animal firm to discharge waste into lagoons on his land. One lagoon wall failed and the resulting escape severely polluted a river. The farmer was charged with polluting the river. He was acquitted on the grounds that he only permitted the accumulation and had not caused the pollution. Again, in the case of *Wychavon District Council v National Rivers Authority*[3] raw sewage escaped from a sewer under the control of appellant Council acting as agent of the water company in maintaining and repairing the sewerage system. The immediate cause of the escape was a blockage in the sewer. The court held that the Council was not guilty of causing the pollution since it had mainly remained inactive.

While 'cause' imports element of strict liability, 'knowingly permit' on the other hand involves knowledge requirement. It has two arms: 'knowingly' and 'permitting.' The essence of the 'knowingly permit' is designed to catch the offender who knows that emission of GHG is occurring, has the power to do something about it, for example, complying with emission reduction requirements, and yet does nothing. In other words, the defendant must be aware of the emission incident. This is because a party must know about a problem before it can be guilty of failing to take reasonable steps to correct it.

The case of *Price v Cromack*[4] provides a useful illustration of the difference between the 'causing' offence and the offence of 'knowingly permit.' In that case a farmer was charged with 'causing' pollution when a lagoon on his land failed and waste animal products were released into a river. The farmer had a contract with an animal product firm which allowed the firm to discharge animal waste products into the lagoons on the farmer's land. The farmer was acquitted of 'causing' charge on the basis that he had not caused the pollution. Whilst he had permitted the accumulation of the waste on his land, he could not be said to have caused the pollution. Had he been charged with 'knowingly' permitting pollution, then the verdict would probably have been different. The basis for this being that he had knowingly permitted the accumulation of the waste on his land and should be aware that such accumulation is capable of causing harm if it escapes.

In the case of 'permitting,' its meaning depends upon the context under which it is being considered. It could be confined to mean 'allow,' or 'authorise' or it could carry the wider meaning of failure to take reasonable steps to prevent the occurrence of that which should not be permitted.[5] In the case of *Berton v Alliance Economic Investment Co. Ltd,*[6] it was held that 'permitting' may mean either giving leave for an act which, without that leave, could not legally be done, or to abstain from taking reasonable steps to prevent an act, where it is within a person's power to do so.

The bottom line however, is that for a defendant to be liable for permitting a polluting incident such a defendant must be in control. Such a defendant may not be a director or a senior manager. What is needed is that such a person can be said to constitute the mind of the company. To this end, we hold that knowledge of the emission or emitting activity need not be by the director or a senior manager, or of such a standing, provided the person is of such a standing or had acquired some knowledge about the emission and has some power to make relevant decisions. The case of *Shanks & McEwan (Teeside) Ltd v. Environment Agency*[7] is supportive. In that case in a prosecution for an illegal deposit of waste, the court held a company in the business of accepting waste to have corporate knowledge in respect of a specific illegal deposit when it was accepted by a site supervisor in the absence of the site manager.

5.0. Conclusion

Once a victim can convincingly show that a State is responsible for the violation of a primary international legal obligation, having caused or knowingly permitted the emission of GHG which caused him loss and/or damage. This position is corollary to the CoP18.[8]

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[1] Stuart Bell and Donald McGilliviray: *Environmental Law, 6th edn*. (Oxford: Oxford University Press, 2008), 607

[2] [1975] 1WLR, 988.

[3] [1993] 1WLR, 125. See also the case of *National Rivers Authority v. Welsh Development Agency* [1993] *Environmental Law Report*, 407

[4] *Supra*

[5] Justine Thornton and Silas Beckwith: *Environmental Law*, 2nd edn (London: Sweet and Maxwell Ltd, 2004), 234.

[6] [1992] 1 K.B.724 at 759

[7] [1997] E L R, 629

[8] 18th Conference of Parties to the Kyoto Protocol held in Doha in November/December, 2012

At the Conference, it was established for the first time that rich nations should move towards compensating poor nations for losses due to climate change.[1] This was contained in the proposed Loss and Damage mechanism. This mechanism was placed under an existing process in which the US promised to mobilise $100bn a year for poor nations to adapt to climate change. Before now developed nations have agreed to help developing countries financially to get clean energy and adapt to climate change, but they have stopped short of accepting responsibility for damage caused by climate change elsewhere. But in Doha that broad principle was agreed upon. Developing nations hailed it as a breakthrough, but condemned the gulf between the science of climate change and political attempts to tackle it. The Island States accepted the agreement because for them it is better than nothing.[2] "What helped swing it, according to Roger Harrabin,[3] was US President Barack Obama asking Congress for $60bn for the damage caused by Hurricane Sandy."

However, this agreement did not go without some politicking where national interests prevailed over collective global interest. For instance, the UK Climate Secretary, Ed Davey, posited; "we haven't agreed to set up a new institution - and there's no blank cheque, but there is clearly an issue if, say, an island state is lost underwater."[4] Reacting to this assertion by UK Climate Secretary, the spokesman of Alliance of Small Island States (AOSIS), Ronald Jumeau from Seychelles, condemned wealthy countries for their lack of urgency. He said that there would be no need for talk about compensation if the rich had cut their emissions in previous meetings. He posited further at a joint news conference in Doha:

> The Doha caravan seems to be lost in the sand. As far as ambition is concerned, we are lost. We're past the mitigation (emissions cuts) and adaptation eras. We're now right into the era of loss and damage. What's next after that? Destruction? Disappearance of some of our islands? We're already into the era of re-location. But after loss and damage there will be mass re-locations if we continue with this loss of ambition.[5]

Arising from the position of AOSIS, and the urgency involved in mitigating climate change, we are of the opinion that the best way to fast track emission reduction, and thereby abating climate change, is through litigating loss and damage.

[1] This is an indirect admission of liability by the developed nations who are the greatest emitters of GHGs
[2] Martin Khor of the South Centre - an association of 52 developing nations
[3] Roger Harrabin: "UN climate talks extend Kyoto Protocol, promise compensation," www.bbc.co.uk/news/science-environment/2012/23/12, accessed on December 28, 2012
[4] Roger Harrabin, *ibid*
[5] Roger Harrabin: "Climate Compensation Row at Doha," www.bbc.co.uk/news/correspondent/2012/08/11, accessed on December 28, 2012