

CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

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In this section:

- The United States Agrees to Loss and Damage Fund at COP27
- The Treasury Department Implements Security Council Resolution Establishing a Humanitarian Carveout for UN Sanctions
- President Biden Issues Executive Order on Ensuring Robust Consideration of Evolving National Security Risks by the Committee on Foreign Investment in the United States
- The United States and the European Union Begin Implementation of the European Union-U.S. Data Privacy Framework
- The Department of Defense Issues Civilian Harm Mitigation and Response Action Plan
- The Justice for Victims of War Crimes Act

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OCEANS, ENVIRONMENT, AND SCIENCES

The United States Agrees to Loss and Damage Fund at COP27

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At the conclusion of the twenty-seventh Conference of the Parties (COP27) of the UN Framework Convention on Climate Change (UNFCCC) in Sharm el-Sheikh, the United States agreed to “[f]unding arrangements for responding to loss and damage associated with the adverse effects of climate change.”¹ The arrangements include “establish[ing] a fund for responding to loss and damage”² that will “assist[] developing countries that are particularly vulnerable to the adverse effects of climate change.”³ No specific commitments were made regarding the amounts or sources of funding, and there were no links established between the fund’s authorization and any liability of, or compensation due from, developed countries. Details were left for future negotiations.⁴ U.S. Special Presidential Envoy for Climate John Kerry remarked in his closing statement at the conference on November 20, 2022, that the United States was “pleased to join vulnerable countries in one of the major outcomes here in Sharm—a decision to establish funding arrangements related to loss and damage, including a fund as part of what many are calling a ‘mosaic’ of responses.”⁵

The push to develop a loss and damage fund began more than thirty years ago.⁶ In 1991, Vanuatu, on behalf of the Alliance of Small Island States (AOSIS), submitted a proposal to the conference negotiating the UNFCCC for the inclusion of an “International Insurance Pool to provide against the consequences of sea level rise.”⁷ The proposal specified that the “financial burden of loss and damage suffered by the most vulnerable small island and low-lying developing countries . . . as a result of sea level rise shall be distributed in an equitable manner amongst the industrialized developed countries.”⁸ Developed countries rejected the proposal, and the treaty stipulated only that “the Parties shall give full consideration to what actions are necessary under the Convention, including actions related to funding, insurance and the transfer of technology, to meet the specific needs and concerns of developing country

¹ Sharm el-Sheikh Implementation Plan, para. 24, Decision -/CP.27 (Nov. 20, 2022) (advance unedited version), at https://unfccc.int/sites/default/files/resource/cop27_auv_2_cover%20decision.pdf [<https://perma.cc/WT5A-FPKL>].

² See Funding Arrangements for Responding to Loss and Damage Associated with the Adverse Effects of Climate Change, Including a Focus on Addressing Loss and Damage, para. 3, Decision -/CP.27 -/CMA.4 (Nov. 20, 2022) (advance unedited version), at https://unfccc.int/sites/default/files/resource/cma4_auv_8f.pdf [<https://perma.cc/ZNY9-EFJG>] [hereinafter Funding Arrangements]. No decision has been taken as to whether the loss and damage funding arrangements operate under the UNCCC (and its Conference of the Parties or COP) or the Paris Agreement (and its Conference of the Parties Serving as the Meeting of the Parties or CMA) or both. The meetings occur concurrently. For simplicity, however, I refer in the text only to the COP.

³ *Id.*, para. 2.

⁴ See *id.*, paras. 5–6, 9, 14, Annex.

⁵ U.S. Embassy in Egypt Press Release, U.S. Special Presidential Envoy for Climate John Kerry – COP27 Closing Statement (Nov. 20, 2022), at <https://eg.usembassy.gov/u-s-special-presidential-envoy-for-climate-john-kerry-cop27-closing-statement> [<https://perma.cc/2NNF-TG8Y>] [hereinafter U.S. Embassy Press Release].

⁶ See AOSIS Press Release, Historic Loss and Damage Fund Established at COP27 in Sharm El-Sheikh (Nov. 20, 2022), at <https://www.aosis.org/historic-loss-and-damage-fund-established-at-cop27-in-sharm-el-sheikh> [<https://perma.cc/6XEE-DNPJ>].

⁷ Insurance Mechanism, Annex, para. 1(1), UN Doc. A/AC.237/WG.II/CRP.8 (Dec. 17, 1991), at <https://unfccc.int/sites/default/files/resource/docs/a/wg2crp08.pdf> [<https://perma.cc/5QP3-EJ9E>].

⁸ *Id.*, para. 3(1).

Parties arising from the adverse effects of climate change and/or the impact of the implementation of response measures.”⁹ The parties at COP13 in 2007 adopted the Bali Action Plan, including a decision that a “comprehensive process” to implement the UNFCCC should address “[e]nhanced action on adaptation, including, inter alia, consideration of . . . means to address loss and damage associated with climate change impacts in developing countries that are particularly vulnerable to the adverse effects of climate change.”¹⁰ At COP19, the parties established the Warsaw International Mechanism for Loss and Damage Associated with Climate Change Impacts (WIM) to “promot[e] the implementation of approaches to address loss and damage associated with the adverse effects of climate change.”¹¹ WIM, however, did not include a loss and damage fund. Two years later, the Paris Agreement “recognize[d] the importance of averting, minimizing and addressing loss and damage associated with the adverse effects of climate change,” but COP21, which drafted the agreement, clarified that it did not “involve or provide a basis for any liability or compensation.”¹² At COP25, the parties established the Santiago Network for Averting, Minimizing and Addressing Loss and Damage Associated with the Adverse Effects of Climate Change “to catalyse the technical assistance . . . for the implementation of relevant approaches at the local, national and regional level in developing countries that are particularly vulnerable to the adverse effects of climate change.”¹³ At COP26, in 2021, the G77 and China proposed a loss and damage financing facility, but the United States, the European Union, and others opposed the plan, and only a “dialogue” to “discuss the arrangements for the funding of activities to avert, minimize and address loss and damage associated with the adverse impacts of climate change” was agreed upon.¹⁴

The first phase of that dialogue was to last for two years, but the G77 and China pushed for loss and damage to be included on the agenda for COP27, a year ahead of schedule.¹⁵ A significant hurdle was the link made by developing countries between a loss and damage fund and legal responsibility. “[T]he U.S. and many other countries will not establish some sort of a

⁹ UN Framework Convention on Climate Change, Art. 4(8), 1771 UNTS 707 (May 9, 1992), at <https://treaties.un.org/doc/publication/unts/volume%201771/v1771.pdf>.

¹⁰ Bali Action Plan, Decision 1/CP.13, para. 1(c)(iii), *in* Conference of the Parties, Report of the Conference of the Parties on its Thirteenth Session, Held in Bali from 3 to 15 December 2007, UN Doc. FCCC/CP/2007/6/Add.1, at <https://unfccc.int/resource/docs/2007/cop13/eng/06a01.pdf> [<https://perma.cc/YNG7-YAVZ>].

¹¹ Warsaw International Mechanism for Loss and Damage Associated with Climate Change Impacts, Art. 5, Decision 2/CP.19, *in* Report of the Conference of the Parties on Its Nineteenth Session, Held in Warsaw from 11 to 23 November 2013, UN Doc. FCCC/CP/2013/10/Add.1, at <https://unfccc.int/resource/docs/2013/cop19/eng/10a01.pdf> [<https://perma.cc/GY5E-CBQR>].

¹² Paris Agreement, Art. 8(1) & Decision 1/CP.21, para. 51, *in* Report of the Conference of the Parties on Its Twenty-First Session, Held in Paris from 30 November to 13 December 2015, UN Doc. FCCC/CP/2015/10/Add.1 (2015), at <https://unfccc.int/resource/docs/2015/cop21/eng/10a01.pdf> [<https://perma.cc/3VMS-2JN6>].

¹³ Warsaw International Mechanism for Loss and Damage Associated with Climate Change Impacts and Its 2019 Review, para. 43, Decision 2/CMA.2, *in* Report of the Conference of the Parties Serving as the Meeting of the Parties to the Paris Agreement on Its Second Session, Held in Madrid from 2 to 15 December 2019, UN Doc. FCCC/PA/CMA/2019/6/Add.1, at https://unfccc.int/sites/default/files/resource/cma2019_06_add.01_.pdf [<https://perma.cc/9KHT-WHZ5>].

¹⁴ Glasgow Climate Pact, para. 73, Decision 1/CMA.3, *in* Report of the Conference of the Parties Serving as the Meeting of the Parties to the Paris Agreement on Its Third Session, Held in Glasgow from 31 October to 13 November 2021, UN Doc. FCCC/PA/CMA/2021/10/Add.1 (2021), at https://unfccc.int/sites/default/files/resource/cma2021_10a01E.pdf [<https://perma.cc/5MFG-8LQB>].

¹⁵ See Provisional Agenda and Annotations: Note by the Executive Secretary, para. 70, UN Doc. FCCC/CP/2022/1 (2022).

legal structure that is tied to compensation or liability. That’s just not happening,” said Kerry before the conference.¹⁶ To facilitate its inclusion, COP27 President Sameh Shoukry stated that “the outcomes of this agenda item . . . do not involve liability or compensation,” and that “the agenda item will launch a process with a view to adopting a conclusive decision no later than 2024.”¹⁷ Despite some resistance, loss and damage was thus added to a COP agenda for the first time as a matter relating to finance, and vulnerable countries called for an outcome.¹⁸

Even with the caveat that a fund would not implicate the liability of, or compensation obligations for, historically polluting nations, the United States and other developed countries were still reluctant to agree to its creation, preferring instead the use of existing institutions.¹⁹ President Joseph R. Biden, Jr. did not address loss and damage in his remarks to the conference.²⁰ And when White House National Climate Adviser Ali Zaidi was asked about the topic at a news conference, he avoided the question and responded that Biden was committed to “partnership and solidarity.”²¹ But pressure to create a loss and damage fund mounted as the conference neared its conclusion, and the European Union agreed to its establishment on the condition that the fund’s recipients be limited to the most vulnerable countries and that the fund be part of a broader set of loss and damage funding arrangements.²² At the last minute, the United States signed on as well.²³

The conference concluded with the COP’s adoption of its cover decision, the Sharm el-Sheikh Implementation Plan. In its loss and damage section, the Plan noted the “growing gravity, scope and frequency in all regions of loss and damage associated with the adverse effects of climate change, resulting in devastating economic and non-economic losses” and the “significant financial cost associated with loss and damage for developing countries, resulting in a growing debt burden and impairing the realization of the Sustainable Development Goals.”²⁴ The plan also welcomed the approval of the decision to establish funding arrangements and the

¹⁶ Saeed Shah & Matthew Dalton, *COP27 Talks Weigh Who Should Pay for Climate Damage to Poor Countries*, WALL ST. J. (Nov. 16, 2022), at <https://www.wsj.com/articles/cop27-talks-weigh-who-should-pay-for-climate-damage-to-poor-countries-11668598218>.

¹⁷ Kate Raffety, Hyacinthe Niyitegeka, Teo Ormond-Skeaping, Eva Peace Mukayiranga & Erin Roberts, *What Happened at COP 27 on Loss and Damage and What Comes Next?*, LOSS & DAMAGE COLLAB., at 5 (Nov. 20, 2022), at <https://www.lossanddamagecollaboration.org/publication/what-happened-at-cop-27-on-loss-and-damage-and-what-comes-next> [<https://perma.cc/GYP7-ZG89>].

¹⁸ See *id.*

¹⁹ See Shah & Dalton, *supra* note 16.

²⁰ See White House Press Release, Remarks by President Biden at the 27th Conference of the Parties to the Framework Convention on Climate Change (COP27) (Nov. 11, 2022), at <https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/11/11/remarks-by-president-biden-at-the-27th-conference-of-the-parties-to-the-framework-convention-on-climate-change-cop27-sharm-el-sheikh-egypt> [<https://perma.cc/GD4K-5RCH>].

²¹ Matt Viser, Timothy Puko & Sarah Kaplan, “Everyone Has to Act,” *Biden Tells COP27, as Developing Nations Salm U.S.*, WASH. POST (Nov. 11, 2022), at <https://www.washingtonpost.com/climate-environment/2022/11/11/biden-climate-change-egypt-summit>.

²² See Matthew Dalton & Stacy Meichtry, *Europe, Canada Willing to Back Climate Damage Fund—But Only if China Helps Pay*, WALL ST. J. (Nov. 18, 2022), at <https://www.wsj.com/articles/europe-canada-willing-to-back-climate-damage-fund-but-only-if-china-helps-pay-11668775685>; Matthew Dalton, Stacy Meichtry & Summer Said, *COP27 Strikes Deal on Fund for Poorer Countries Vulnerable to Climate Change*, WALL ST. J. (Nov. 19, 2022), at <https://www.wsj.com/articles/cop27-agrees-on-loss-and-damage-fund-for-vulnerable-countries-officials-say-11668866219>; Brad Plumer, Max Bearak, Lisa Friedman & Jenny Gross, *U.N. Climate Talks End with a Deal to Pay Poor Nations for Damage*, N.Y. TIMES (Nov. 20, 2022), at <https://www.nytimes.com/2022/11/20/climate/un-climate-cop27-loss-damage.html>.

²³ See Plumer, Bearak, Friedman & Gross, *supra* note 22.

²⁴ Sharm el-Sheikh Implementation Plan, *supra* note 1, paras. 22–23.

decision to operationalize the Santiago Network by adopting its terms of reference and establishing its institutional structure, including a secretariat and advisory board.²⁵

The agreement to establish the loss and damage fund was made alongside financial pledges from many developed countries prior to and during the conference, including Austria, Belgium, Canada, Denmark, France, Germany, New Zealand, and Scotland.²⁶ European nations have pledged more than \$300 million, mostly going toward a new insurance program to help countries recover from disasters.²⁷ Kerry said that “to help countries manage loss and damage, [the United States] contributed \$24 million to the Global Shield Against Climate Risks, and an additional \$20 million to two UN funds that provide humanitarian relief and help protect migrants, with a particular focus on climate change.”²⁸

The loss and damage fund’s creation was widely celebrated by advocates for climate change and developing nations. The UN Climate Change executive secretary, Simon Stiell, welcomed the action, saying the outcome is “a way forward on a decades-long conversation on funding for loss and damage—deliberating how we address the impacts on communities whose lives and livelihoods have been ruined by the very worst impact of climate change.”²⁹ Following the negotiations, Foreign Minister of Pakistan Bilawal Bhutto Zardari wrote that “while the agreement does not establish the legal responsibility of those who have contributed the most to climate change and global warming, it does confirm the central principle of climate justice.”³⁰

Even with its creation, the fund’s future is uncertain. The COP established “a transitional committee” to, among other things, “[e]stablish[] institutional arrangements, modalities, structure, governance and terms of reference for the fund” and “[i]dentify and expand[] sources of funding.”³¹ Contentious issues will need to be confronted and resolved: (1) Who will contribute to the fund? Only developed countries or others such as non-state actors and developing countries, like China? The decision to create the fund mentions abstractly the “need for support from a wide variety of sources, including innovative sources.”³² (2) Do developed states have an obligation to contribute to the fund due to their historical responsibility? Or will their contributions be made on a voluntary basis? The COP president’s announcement at the beginning of the conference severed liability and compensation from

²⁵ See *id.*, paras. 24–25; see also Santiago Network for Averting, Minimizing and Addressing Loss and Damage Under the Warsaw International Mechanism for Loss and Damage Associated with Climate Change Impacts, Decision -/CMA.4 (Nov. 20, 2022), at https://unfccc.int/sites/default/files/resource/cma4_auv_7_WIM.pdf [<https://perma.cc/7UZ5-Q8RC>].

²⁶ See Historic Climate Deal Sealed at COP27 as Climate Conference Takes a Leap to Save Lives and Livelihoods, at <https://cop27.eg/#/news/259/Historic%20Climate%20Deal%20Sealed%20a> [<https://perma.cc/6P6W-P4A6>].

²⁷ See Pradeep Kurukulasuriya, Ronald Jackson, Srilata Kammila, Babatunde Abidoye, Sanny Jegillos & Keti Chachibaia, *What the New “Loss and Damage” Fund Needs for Success*, UN DEV. PROGRAMME (Nov. 22, 2022), at <https://www.undp.org/blog/what-new-loss-and-damage-fund-needs-success> [<https://perma.cc/F9W4-RXTW>].

²⁸ U.S. Embassy Press Release, *supra* note 5.

²⁹ UN Climate Press Release, COP27 Reaches Breakthrough Agreement on New “Loss and Damage” Fund for Vulnerable Countries (Nov. 20, 2022), at <https://unfccc.int/news/cop27-reaches-breakthrough-agreement-on-new-loss-and-damage-fund-for-vulnerable-countries> [<https://perma.cc/A9RS-AMBX>].

³⁰ Bilawal Bhutto Zardari, *The Loss and Damage Facility: A Step Towards Climate Justice*, UN CHRON. (Dec. 9, 2022), at <https://www.un.org/en/un-chronicle/loss-and-damage-facility-step-towards-climate-justice> [<https://perma.cc/MTE8-YAZZ>].

³¹ Funding Arrangements, *supra* note 2, para. 4.

³² *Id.*, para. 6(e).

the decision to adopt the agenda item, but that statement was not explicitly incorporated into the COP's decision.³³ (3) Who will receive the assistance from the fund? All developing countries or only those that are "particularly vulnerable to the adverse effects of climate change"? The decision seems to suggest the latter. (4) What can the funds be used for? The decision refers generally to "responding to economic and non-economic loss and damage associated with the adverse effects of climate change, including extreme weather events and slow onset events, especially in the context of ongoing and ex post (including rehabilitation, recovery and reconstruction) action."³⁴ (5) How are the amounts to be calculated? How is loss and damage to be assessed?³⁵ (6) How will payments be made and monitored?³⁶

COP27 President Shoukry ended the conference by saying that its accomplishments were a "testament to our collective will . . . that multilateral diplomacy still works."³⁷ But aside from the successful adoption of the loss and damage fund, COP27 was criticized for not adopting proposals to phase out all fossil fuels and to make more ambitious commitments for reducing emissions.³⁸ COP27 did, however, prevent backsliding, including, importantly, on "the long-term global goal to hold the increase in the global average temperature" by reiterating COP26's decision (which moved slightly beyond the wording of the Paris Agreement) to "resolve[] to pursue efforts to limit the temperature increase to 1.5 °C" above pre-industrial levels.³⁹

INTERNATIONAL ECONOMIC LAW

The Treasury Department Implements Security Council Resolution Establishing a Humanitarian Carveout for UN Sanctions

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The U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) has issued two rules implementing UN Security Council Resolution 2664's humanitarian carveout from the asset freeze provisions of UN sanctions.¹ Acting on December 20, 2022, eleven

³³ See text at note 17 *supra*.

³⁴ Funding Arrangements, *supra* note 2, para. 1.

³⁵ See Kurukulasuriya, Jackson, Kammila, Abidoye, Jegillos & Chachibaia, *supra* note 27.

³⁶ See *id.*

³⁷ UN Climate Press Release, *supra* note 29.

³⁸ See Sarah Kaplan, *COP27 Leaves World on Dangerous Warming Path Despite Historic Climate Fund*, WASH. POST (Nov. 20, 2022), at <https://www.washingtonpost.com/climate-environment/2022/11/20/cop27-climate-conference-deal-fund/>; Evan Halper, Timothy Puko & Sarah Kaplan, *U.N. Negotiators Reach Deal to Help Vulnerable Nations with Climate Disasters*, WASH. POST (Nov. 20, 2022), at <https://www.washingtonpost.com/climate-environment/2022/11/19/cop27-climate-conference-summit-deal/>.

³⁹ Paris Agreement, *supra* note 12, Art. 2(1)(a); Decision 1/CP.26, para. 16, in Report of the Conference of the Parties on Its Twenty-Sixth Session, Held in Glasgow from 31 October to 13 November 2021, UN Doc. FCCC/CP/2021/12/Add.1 (2021), at https://unfccc.int/sites/default/files/resource/cp2021_12_add1E.pdf [<https://perma.cc/U48M-UQPS>]; Sharm el-Sheikh Implementation Plan, *supra* note 1, para. 4; see also Brad Plumer, David Gelles & Lisa Friedman, *A Clash Over Degrees: How Hot Should Nations Allow the Earth to Get?*, N.Y. TIMES (Nov. 16, 2022), at <https://www.nytimes.com/2022/11/16/climate/cop27-global-warming-1-5-celsius.html>.

¹ See U.S. Dep't of the Treasury Press Release, *Treasury Implements Historic Humanitarian Sanctions Exceptions* (Dec. 20, 2022), at <https://home.treasury.gov/news/press-releases/jy1175> [<https://perma.cc/WQ48->