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## ATWAIL Perspective on Loss and Damage from Climate Change: Reflections from Indira Gandhi's Speech at Stockholm

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### Abstract

There seem to be no answers to resolve the deadlock between the Global North and the Global South on liability and compensation for loss and damage from climate change. Revisiting the original story of international environmental law from the Stockholm Conference of 1972 may help us address these historical tensions. In doing so, this article unveils the genesis of Third World Approaches to International Law (TWAIL) from the Stockholm Conference as an alternative consciousness centred around the aspirations of the Global South. Indira Gandhi's plenary address at Stockholm outlined the Global South's position on environmental issues, which greatly influenced early TWAIL scholarship in the 1980s. Locating TWAIL's origins at Stockholm allows us to: (1) chart the environmental concerns of the Global South till date; (2) infer its evolved view on the "development versus environment" debate; and (3) understand the role of future TWAIL scholarship in challenging the enduring and structural limitations of international environmental law, especially in future deliberations on loss and damage.

**Keywords:** Environmental law; loss and damage; Global North-South relations; climate change

The concept of "loss and damage" from climate change is comparable to an uninvited houseguest. He comes unannounced, stays longer than expected, and refuses to leave. The host wonders about ways to deal with him, asking friends and neighbours for help to end this disruption, and dreams of her once quiet and peaceful home. Although generally understood as a gradual process, climate change trickles down as a series of catastrophic events that leave behind residual risks or loss and damage in the affected region.

Loss and damage is understood as economic losses or damage to human societies and infrastructure from anthropogenic and natural climate variability, or as non-economic losses from significant damage to crops, homes, and infrastructure, such as harm to human health, mobility, loss of access to territory, cultural heritage, indigenous knowledge, and damage to biodiversity and habitats.<sup>1</sup> For instance, when a village is flooded and water seeps into farmlands, the surrounding communities suffer loss and damage associated with the flood. This is in the nature of crops being destroyed and/or the

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<sup>1</sup> London School of Economics and Political Science, "What is Climate Change 'Loss and Damage'?" (13 January 2021), online: LSE <<https://www.lse.ac.uk/granthaminstitute/explainers/what-is-climate-change-loss-and-damage/>>.

need for the rural population to be rehabilitated occupationally or physically. Some of these risks can be prevented through better adaptive and preventive measures such as installing rainfall monitoring and warning systems for predicting flash floods or by training people for carrying out evacuations.<sup>2</sup> However, some risks cannot be adapted to and/or inevitably result in risks despite taking preventative measures. This is because they are simply unaffordable or because of the unforeseeable intensity of the event.<sup>3</sup> Such intolerable or unavoidable risks are loosely characterized as loss and damage.

What follows is an emergent need for the concerned country to manage the catastrophe while also coping with potentially long-lasting residual impacts on the environment and its people. How can countries address such loss and damage? What is the nature and extent of international cooperation necessary to address loss and damage? International law's answer to these questions is the Warsaw International Mechanism for Loss and Damage Associated with Climate Change Impacts (WIM) established by the Conference of Parties (COP) at their nineteenth meeting in 2013. But, is WIM in its current form the most effective answer to address loss and damage? Or is it a well-executed compromise to balance the clashing demands of the Global South and the Global North?<sup>4</sup> This

<sup>2</sup> United Nations Framework Convention on Climate Change (UNFCCC), "Flood Forecasting and Warning Systems as Climate Change Adaptation Measures through Flood Risk Preparedness—Indonesia", online: UNFCCC <<https://unfccc.int/climate-action/momentum-for-change/activity-database/flood-forecasting-and-warning-systems-as-climate-change-adaptation-measures-through-flood-risk-preparedness>>.

<sup>3</sup> LSE, *supra* note 1.

<sup>4</sup> The reference to "Global South" in this article encompasses the countries that are particularly vulnerable to the adverse impacts of climate change, including a focus on vulnerable populations and the ecosystems that they depend on as well. This follows the language of the UNFCCC in linking the concept of loss and damage to vulnerability (see *Decision 5/CP.23 Warsaw International Mechanism for Loss and Damage Associated with Climate Change Impacts*, Report of the Conference of the Parties on its twenty-third session, held in Bonn from 6 to 18 November 2017, Addendum, Part Two: Action taken by the Conference of the Parties, UN Doc. FCCC/CP/2017/11/Add.1 (2018), online: UNFCCC <<https://unfccc.int/sites/default/files/resource/docs/2017/cop23/eng/11a01.pdf>>, at 20). The notion of vulnerable countries has sometimes been used to refer to some Small Island Developing Nations (SIDS), Least Developed Countries (LDCs) and other countries that are exposed to climate risks. Vulnerability has also been attached to specific populations and groups such as men and women, young and old, the poor, remote and indigenous communities, pastoral communities, migrants, etc. Among other social and economic conditions, groups are considered to be vulnerable if they are persistently exposed to climate stressors and have a limited ability to cope with them. Vulnerable ecosystems are understood as fragile ecosystems such as mountains, low-lying coastal areas and delta areas, the degradation of which can diminish their provisioning of ecosystem services or pose natural hazards to communities in the area. For instance, low-lying coastal areas in Kiribati or Vanuatu, the Ganges-Brahmaputra-Meghna Delta, covering most of Bangladesh and West Bengal in India, or the Niger and Volta deltas in West Africa, and the Orange and Limpopo basins in South Africa are understood as vulnerable ecosystems. Thus, the notion of vulnerability is flexible and adaptable to a wide range of climate impacts that are not limited to specific categories of countries and/or areas (see United Nations Least Developed Countries Expert Group, "Considerations Regarding Vulnerable Groups, Communities and Ecosystems in the Context of the National Adaptation Plans" (December 2018), online: UNFCCC <<https://unfccc.int/sites/default/files/resource/Considerations%20regarding%20vulnerable.pdf>>). At the same time, it is appropriate to refer to these diverse groupings of countries, groups, and communities as the Global South on account of the potential of TWAIL to describe this extremely heterogeneous section of the world characterized by evolving geopolitical inequalities due to climate change. Therefore, the evolving reconfigurations of the Global South and the Global North for issues of loss and damage is grounded on the differential vulnerability and exposure of vulnerable countries, groups, and ecosystems to climate change (see e.g., Luis ESLAVA, *TWAIL Coordinates* (English, Spanish, Portuguese and Arabic) (2019) *Critical Legal Thinking*; Karin MICKELSON, *Rhetoric and Rage: Third World Voices in International Legal Discourse* (1997) 16(2) *Wisconsin International Law Journal* 353; Karin MICKELSON, *South, North, International Environmental Law, and International Environmental Lawyers* (2000) 11(1) *Yearbook of International Environmental Law* 52; Luis ESLAVA and Sundhya PAHUJA, *The State and International Law: A Reading from the Global South* (2020) 11(1) *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 118.) The reference to Global South in the present context is seen as an "aggregation of a diverse set of countries" affected by climate change (see B.S. CHIMNI, *Third World Approaches*

article embarks upon discovering the contesting positions of the Global South and Global North by revisiting the origin-story of international environmental law at the United Nations Conference of Human Environment at Stockholm in 1972 (the “Stockholm Conference”) and reflects on ways to make progress on the loss and damage initiative.<sup>5</sup>

The protagonists of the article are particularly vulnerable developing countries affected by the impacts of climate change, and also other vulnerable populations and vulnerable ecosystems that populations all over the world depend on.<sup>6</sup> The stage is set at the United Nations Framework Convention on Climate Change (UNFCCC) negotiations on loss and damage debating the implementation of WIM. But the drama unfolds from decades earlier, in the beautiful city of Stockholm in 1972, to be precise.

The article backtracks to the Stockholm Conference, the first international conference to consider environmental issues as having international ramifications. The Stockholm Conference charted the responsibilities of countries to collectively protect the environment.<sup>7</sup> More specifically, the article focuses on the plenary address of the then Prime Minister of India, Indira Gandhi. As the symbolic event of the Conference, the address has been widely known for its ceremonial utility and for introducing the “development versus environment” narrative. However, there is more to learn from the speech; Indira Gandhi’s speech makes a prescient treatment of several environmental issues through a perceptive observation of the challenges confronting the Global South at the time, some of which are endured in the current loss and damage negotiations as well. It is fruitful to examine loss and damage negotiations with the philosophical motivations of Indira Gandhi’s speech.

Additionally, the article extracts significant assertions from the speech that play a key role in the genesis of international environmental law. The article notes that such assertions are mirrored in the core propositions of the early TWAIL movement in international environmental law that evolved in the late 1980s,<sup>8</sup> which sought to ensure that international law considers the needs and aspirations of the newly-independent third world states.<sup>9</sup> In general, while early TWAIL scholarship in the 1960s and 1970s was organized around asserting sovereignty, sharing, and non-intervention over natural resources, very few traces of such scholarship addressed international environmental law.<sup>10</sup> This is partly attributed to the genesis of the formal framework of international environmental law only in 1972; therefore an infant area for early TWAIL scholarship. Moreover, TWAIL’s engagement with international environmental law in the 1990s and 2000s has been sporadic,<sup>11</sup> lacking a

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to *International Law: A Manifesto* (2006) 8 *International Community Law Review* 3 at 5). The notion of Global South as a “diverse set of countries” also encompasses its grouping as the “third world” that was united by a homogenous political object to resist the ideological and military dominance of the “first world” (see B.S. CHIMNI, *Third World Approaches to International Law: A Manifesto* (2006) 8 *International Community Law Review* 3 at 4).

<sup>5</sup> *Report of the United Nations Conference on the Human Environment, Stockholm*, UN Doc. A/CONF.48/14/Rev.1 (1972), online: UN Digital Library <<https://digitallibrary.un.org/record/523249?ln=en>> [Stockholm Declaration].

<sup>6</sup> Report of the Conference of the Parties, *supra* note 4.

<sup>7</sup> Karin MICKELSON, “The Stockholm Conference and the Creation of the South-North Divide in International Environmental Law and Policy” in Shawkat ALAM, Sumudu ATAPATTU, Carmen G. GONZALEZ, and Jona RAZZAQUE, eds., *International Environmental Law and the Global South* (New York: Cambridge University Press, 2015), 109 at 115.

<sup>8</sup> The early TWAIL movement comprising of scholarship from the 1960s, 1970s, and 1980s is also referred to as TWAIL I. For an understanding of the evolution of the TWAIL movement, see Antony ANGHIE and B.S. CHIMNI, “Third World Approaches to International Law and Individual Responsibility in Internal Conflicts” (2003) 2(1) *Chinese Journal of International Law* 77.

<sup>9</sup> Usha NATARAJAN, “TWAIL and the Environment: The State of Nature, the Nature of the State, and the Arab Spring” (2012) 14(1) *Oregon Review of International Law* 177 at 182.

<sup>10</sup> *Ibid.*, at 177.

<sup>11</sup> Later TWAIL scholarship from 1990 is also referred to as TWAIL II, see Anghie and Chimni, *supra* note 8.

concerted TWAIL narrative.<sup>12</sup> The previous decade has seen a re-emergence of TWAIL scholarship of sorts, with increasing consciousness about the implications of international environmental law on the Global South.<sup>13</sup>

This contrasts TWAIL's trajectory of engagement with international law in general. The TWAIL movement has seen a transformation from its engagement during early TWAIL from the 1960s to the 1980s, to later TWAIL in the 1990s and 2000s. In early TWAIL, scholarship was focused on the preservation of sovereign equality and non-intervention of the Global North in the development needs of the newly independent Global South countries. In the later TWAIL movement, there was a transition to a more critical inquiry of reforming international law's colonial structure and addressing the enduring injustices to the Global South.<sup>14</sup> For instance, the efforts of the early TWAIL scholarship led to the "initiation of a number of resolutions in the United Nations which sought to advance the principles of sovereign equality and non-intervention".<sup>15</sup> The later TWAIL movement critiqued the tenets of early TWAIL and questioned if these principles even benefitted the Global South. They did so by developing critiques of "the Third World nation-state, of the processes of its formation and its resort to violence and authoritarianism".<sup>16</sup> On account of TWAIL's limited engagement with international environmental law in the 1990s and 2000s, early TWAIL's contributions to formative principles such as sustainable development and common but differentiated responsibility are yet to garner sufficient momentum,<sup>17</sup> and there has not been sufficient critique on the structure of international environmental law.

A reflection of Indira Gandhi's speech "re-establishes this unbroken link" between TWAIL and international environmental law.<sup>18</sup> It informs current scholarship of the foundational resistance of the Global South in international environmental law and of its persistent appeal for greater participation from the Global North that have spilled-over to the loss and damage negotiations and created an impasse. Particularly, as the article analysed, the need for greater financial accountability for supporting the environmental issues of developing countries was raised in the run up to the Stockholm Conference. From this, one can gather lessons for the current TWAIL project for the protection of interests of the Global South in loss and damage negotiations, through the recognition and revival of TWAIL contributions from the Stockholm speech. As will be seen in the article, while the formative idea for financial liability was visible during Indira Gandhi's time, the vacuum in scholarship in the later years has hampered any progress on the issue. This leaves TWAIL scholars with the task of inquiring into the structural limitations of international environmental law that have prevented the realization of loss and damage to protect the interests of the Global South. Maybe, TWAIL scholarship needs to critique WIM itself, rather than finding ways to make WIM work in its advantage?

The article makes three arguments: (a) the fundamental tenets derived from Indira Gandhi's speech at Stockholm are mirrored in the early TWAIL propositions on environmental law, sowing the seeds for the emergence of the TWAIL movement on

<sup>12</sup> Later TWAIL engagement with international environmental law has been largely shaped by the contributions of Karin Mickelson, see Mickelson, *infra* note 59. See also Natarajan, *supra* note 9 at 186.

<sup>13</sup> Natarajan, *supra* note 9 at 187.

<sup>14</sup> See Anghie and Chimni, *supra* note 8.

<sup>15</sup> *Ibid.*, at 81.

<sup>16</sup> *Ibid.*, at 83.

<sup>17</sup> Usha NATARAJAN, "Third World Approaches to International Law (TWAIL) and the Environment" in Andreas PHILIPPOPOULOS-MIHALOPOULOS and Victoria BROOKS, eds., *Research Methods in Environmental Law: A Handbook* (Cheltenham, UK; Massachusetts, USA: Edward Elgar Publishing, 2017), 207 at 228.

<sup>18</sup> This statement is influenced by Indira Gandhi's concluding words in her speech—" [M]odern man must re-establish an unbroken link with nature and with life".

environmental issues; (b) the current motivations of the Global South in the loss and damage negotiations are traceable to Indira Gandhi's speech at Stockholm, albeit some nuances in the Global South's position on the "development versus environment" debate; and (c) the enduring relevance of the speech presents an emergent need for current TWAIL scholarship to propose structural reforms to WIM, that go beyond a critique of financial accountability from the Global North.

Part I discusses the background of WIM. Part II identifies traces of the main motivations of the early TWAIL movement in international environmental law from Indira Gandhi's speech. Part III shows the Global South invoking a similar, yet nuanced and evolved set of motivations to advance its concerns and position on loss and damage. Part IV concludes by recommending ways to understand contemporary environmental problems through a necessary reminder of the legacy of TWAIL in international environmental law, as rooted in Indira Gandhi's speech.

## I. Background of WIM

To nobody's surprise, the disproportionate impacts of climate change are felt by vulnerable developing countries, vulnerable populations, and ecosystems in the Global South. The Paris Agreement opens with a recognition of the specific needs and circumstances of developing countries,<sup>19</sup> especially those that are most vulnerable to the adverse effects of climate change.<sup>20</sup> The concept of loss and damage originates from this realization. In the ecosystem of progressive international environmental instruments to address climate impacts, WIM occupies a distinct position. WIM opens the gates of the international climate regime to recognize the existence of climate impacts beyond the traditions of mitigation and adaptation. More importantly, as part of the Paris Agreement's vision, it is a culmination of efforts that specifically responded to the needs and concerns of developing countries.<sup>21</sup> The momentum of dialogue resulting in the establishment of WIM has seen its origins in a proposal by Vanuatu in 1991 for the creation of an insurance pool on the lines of "the polluter pays" principle<sup>22</sup> that could compensate the most vulnerable small islands and low-lying coastal developing countries for loss and damage resulting from sea level rise.<sup>23</sup> From this isolated beginning, the dialogue has significantly evolved to a concerted institutional arrangement in WIM, currently endorsed by Article 8 of the Paris Agreement.<sup>24</sup>

<sup>19</sup> The article refers to the terms "developing countries" and "developed countries" interchangeably with Global South and Global North respectively, in consonance with the language of several instruments and documents cited in the article, which have used the terms to indicate the differences among countries. For instance, the Paris Agreement of 2015, WIM of 2013, Founex Report of 1971, Stockholm Declaration of 1972, and Indira Gandhi's speech. Such terms must be read with the context and purpose of the concerned instrument or document.

<sup>20</sup> *Paris Agreement to the United Nations Framework Convention on Climate Change*, 12 December 2015, UN Doc. FCCC/CP/2015/10/Add.1 (entered into force 4 November 2016), online: UN <[https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/FCCC\\_CP\\_2015\\_10\\_Add.1.pdf](https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/FCCC_CP_2015_10_Add.1.pdf)>, at 21 [Paris Agreement].

<sup>21</sup> *Ibid.*, at 27. Art. 8(1) states: "[p]arties recognize the importance of averting, minimizing and addressing loss and damage associated with the adverse effects of climate change, including extreme weather events and slow onset events, and the role of sustainable development in reducing the risk of loss and damage".

<sup>22</sup> *Negotiation of a Framework on Climate Change*, Intergovernmental Negotiating Committee for a Framework Convention on Climate Change Working Group II, Fourth Session, UN Doc. A/AC.237/WG.II/CRP.8 (1991), online: UNFCCC <<https://unfccc.int/sites/default/files/resource/docs/a/wg2crp08.pdf>>.

<sup>23</sup> *Ibid.*, at 2.

<sup>24</sup> Paris Agreement, *supra* note 20, Art. 8. The role of WIM is to "address loss and damage associated with the impacts of climate change in developing countries that are particularly vulnerable to the adverse effects of climate change" (see United Nations Framework Convention on Climate Change. "Examples of Existing Institutional

Although undefined in the UNFCCC system, loss and damage operates in the realms of early warning systems, emergency preparedness, slow onset events, events that may involve irreversible and permanent loss and damage, risk assessment and management, insurance solutions such as risk insurance and climate risk pooling, non-economic losses, the resilience of communities, livelihoods, and ecosystems<sup>25</sup> to cope with “the negative effects of climate variability and climate change that people have not been able to cope with or adapt to”.<sup>26</sup>

WIM formulates approaches for loss and damage associated with the support of its Executive Committee (ExCom). The ExCom is entrusted with the role of engineering solutions for loss and damage by enhancing knowledge; strengthening dialogue; and action and support, including finance, technology, and capacity-building.<sup>27</sup> The ExCom has developed initiatives such as the Fiji Clearing House for Risk Transfer and the Task Force on Displacement as mandated by COP21, to coordinate developments in two work streams.<sup>28</sup> In doing so, WIM situates loss and damage as an imminent outcome of the global climate crisis requiring collaborative action spearheaded by developed countries and invites a critical inquiry into the historical, ethical, and political undertones of climate governance.

Unfortunately, the development of loss and damage from the Vanuatu proposal in 1991 to WIM in 2013 has been an arduous journey for the Global South.<sup>29</sup> Loss and damage negotiations have been subjected to a two-decade long narrative of resistance from the Global North that restricted the negotiations from accomplishing an equitable solution, as proposed by the Global South. In fact, it was only at the COP25 in Madrid in 2019 that the UNFCCC recognized the need for allocating financial resources “for activities relevant to averting, minimizing and addressing loss and damage in developing country Parties”<sup>30</sup> through the Green Climate Fund (GCF). The crucial cause of disagreement between the two camps has been on the question of framing the concept, and on the differential allocation of liability and compensation. The US, Australia, Canada, and EU negotiators have consistently blocked the proposals of developing countries that intended to crystalize protections through liability and compensation under WIM.<sup>31</sup> As a result, two contesting frames to demarcate the scope of loss and damage have emerged. On one hand, the Global South, is trying to push for compensatory measures from the Global North countries to address loss and damage and has framed the concept as independent

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Arrangements and Measures in Addressing Loss and Damage Associated with Climate Change Impacts”, online: UNFCCC <<https://unfccc.int/topics/resilience/resources/loss--damage-inputs-on-institutional-arrangements>>).

<sup>25</sup> *Ibid.*, Art. 8(4)(a)–(h).

<sup>26</sup> Alexander FEKETE and Patrick SAKDAPOLRAK, “Loss and Damage as an Alternative to Resilience and Vulnerability? Preliminary Reflections on an Emerging Climate Change Adaptation Discourse” (2014) 5 *International Journal of Disaster Risk Science* 88 at 89, online: Springer <<https://link.springer.com/content/pdf/10.1007/s13753-014-0012-7.pdf>>.

<sup>27</sup> *Decision 2/CP.19 Warsaw International Mechanism for Loss and Damage Associated with Climate Change Impacts*, Report of the Conference of the Parties on its nineteenth session, held in Warsaw from 11 to 23 November 2013, Addendum, Part Two: Action taken by the Conference of the Parties, UN Doc. FCCC/CP/2013/10/Add.1 (2014), online: UNFCCC <<https://unfccc.int/sites/default/files/resource/docs/2013/cop19/eng/10a01.pdf>>, at 6.

<sup>28</sup> *Decision 5/CP.23*, *supra* note 4 at 20.

<sup>29</sup> For a history of loss and damage negotiations, see Julia KREIENKAMP and Lisa VANHALA, “Climate Change Loss and Damage”, Global Governance Institute, University College London, Policy Brief, 29 March 2017, online: UCL <<https://www.ucl.ac.uk/global-governance/sites/global-governance/files/policy-brief-loss-and-damage.pdf>>.

<sup>30</sup> *Decision 12/CP.25 Report of the Green Climate Fund to the Conference of the Parties and Guidance to the Green Climate Fund*, Report of the Conference of the Parties on its twenty-fifth session, held in Madrid from 2 to 15 December 2019, Addendum, Part Two: Action taken by the Conference of the Parties, UN Doc. FCCC/CP/2019/13/Add.2 (2020), online: UNFCCC <[https://unfccc.int/sites/default/files/resource/cp2019\\_13\\_a02E.pdf](https://unfccc.int/sites/default/files/resource/cp2019_13_a02E.pdf)>, at 14, para. 21.

<sup>31</sup> Sebastian OBERTHÜR and Lisanne GROEN, “EU Performance in the International Climate Negotiations in 2013: Scope for Improvement”, Institute for European Studies, Vrije Universiteit Brussel, Policy Brief Issue 2014/01, January 2014, online: CORE <<https://core.ac.uk/download/pdf/76803315.pdf>>.

from mitigation and adaptation to climate change.<sup>32</sup> On the other hand, the Global North has denied any acknowledgement of compensation and accountability, resorting to addressing loss and damage as part of adaptation measures,<sup>33</sup> essentially exclusive of any financial liability. Such tensions reappear in the work streams on risk transfer and displacement as well.

The loss and damage debate unpacks a range of questions on the dynamics between countries at the international climate negotiations – on interpretations surrounding the meaning of loss and damage as it exists in WIM, on livelihood concerns of vulnerable populations in developing countries amidst progressively negative projections of climate change, on the fair distribution of responsibilities among countries to address loss and damage, and on the growing need for international solutions to protect countries disproportionately affected by climate change. Broadly, it casts a shadow on the construction of international environmental law and the motivations leading to the development of international environmental law as it stands today, including WIM.

## II. The Stockholm Speech and TWAIL Beginnings

Rewinding from the early TWAIL engagement on international environmental law in the late 1980s and uncovering its beginnings from the Stockholm Conference of 1972 requires an appraisal of the context of environmental crises confronting the world at the time. The push for a global collaborative dialogue on environmental issues is encapsulated in the words of Maurice F. Strong, the Secretary-General of the Conference, to Mahbub ul Haq, a Pakistani economist, as “redefining the environmental challenge to determine whether it could serve as a new basis for South-North co-operation”.<sup>34</sup> This sentiment reveals two interesting aspects about the state of affairs in the run-up to the Conference: (a) that there were conflicting views on what the “environmental challenge” at the time was, and (b) that these tensions arose from differences between the Global South and Global North camps that needed reconciliation at an international level.

In the run-up to the Stockholm Conference, the popular sentiment that defined the formation of international environmental law was the notion of environmental conservation interfering with the efforts of development and economic growth in the Global South. The Founex Conference in Geneva, from 4 to 12 June 1971, attracted twenty-seven experts from around the world to debate this issue.<sup>35</sup> The Founex Report, as an outcome of the Conference, “noted that while concerns about the environment sprang from the production and consumption patterns of the industrialized world, many of the environmental problems on the planet were a result of underdevelopment and poverty”.<sup>36</sup> Therefore, environmental problems, although varying, were seen to be of equal concern to both developed and developing countries. Similarly, in the United Nations General Assembly Resolution titled “Development and Environment” (1971), there was an understanding of a symbiotic nexus between development and environment, where development was

<sup>32</sup> Kreienkamp and Vanhala, *supra* note 29 at 4. See also Lisa VANHALA and Cecile HESTBAEK, “Framing Climate Change Loss and Damage in UNFCCC Negotiations” (2016) 16(4) *Global Environmental Politics* 111.

<sup>33</sup> Vanhala and Hestbaek, *ibid.*, at 112, para. 4.

<sup>34</sup> Mickelson, *supra* note 7 at 112.

<sup>35</sup> Michael W. MANULAK, “Developing World Environmental Cooperation: The Founex Seminar and the Stockholm Conference” in Wolfram KAISER and Jan-Henrik MEYER, eds., *International Organizations and Environmental Protection: Conservation and Globalization in the Twentieth Century* (New York; Oxford: Berghahn Books, 2017), 103 at 108.

<sup>36</sup> Geneva Environment Network, “Environment in Geneva: History”, online: Geneva Environment Network <<https://www.genevaenvironmentnetwork.org/environment-geneva/history/>>.

both the problem and solution to achieve adequate environmental conditions.<sup>37</sup> The core message of the Founex Report was echoed in the Stockholm Conference and in Indira Gandhi's speech.

The Stockholm agenda in the following year, in terms of issues of concern, was set towards arriving at a nuanced understanding of sovereignty, new codes of international law, and new means of managing the oceans and the atmosphere for the benefit of humanity, against the reality of growing environmental demands.<sup>38</sup> The focus was on economic growth and industrialization as causing an increase in levels of pollution, depletion of irreplaceable natural resources, and disturbance in the ecological balance.<sup>39</sup> Furthermore, significant events in the 1950s and 1960s also fueled the momentum for discussing "common efforts for the preservation and improvement of the human environment, for the benefit of all the people and for their posterity"<sup>40</sup> at Stockholm. Among many others, the Minamata disaster in Japan; the excessive hunting of the blue whale in Britain, the U.S.S.R., and Norway; atomic testing by France, the U.S., the U.S.S.R.; and the release of Rachel Carson's book *Silent Spring* in the U.S. led to the growing realization that anthropogenic activities were deteriorating the quality of our environment.<sup>41</sup>

Put differently, the developments leading up to Stockholm revealed the complex relationship between development in the Global North and the thrust for inclusion of the Global South to resolve the damage caused by the development of the Global North. The Global North's ability to unilaterally access and utilize the benefits of industrialization and cause environmental problems such as Minamata disease, blue whale endangerment, radioactive waste, or even the effects of DDT and other pesticides on the environment were received with criticism from the Global South. Conversely, the Global South was dealing with a crisis of another kind – population explosion, poverty, and the lack of fulfilment of basic human rights – predominantly on account of under-development in the Global South.<sup>42</sup> Added to this is the reality of disproportionate climate impacts on the Global South that were scientifically traced to the historical environmental exploitation by the Global North. Why, then, was there a need for the Global South's participation to address the solution to the environmental crisis when it had a limited role in causing the crisis? Herein lies the core of North-South tensions as demonstrated in Stockholm. The positioning of the Global South was to highlight the responsibility of the developed countries in creating the problem and requiring them to resolve it as well.

Although well attended, at the end it is difficult to miss the reluctance of developing countries at the Conference that were initially planning to boycott it altogether. Brazil, for instance, was one such opponent of the Conference.<sup>43</sup> In fact, Brazil was an active supporter of the 1971 Resolution and fiercely campaigned to protect the development needs of developing countries from the impacts of environmental policies.<sup>44</sup> Similarly, several developing countries registered their resistance. Zooming out, such resistance is indicative of the Global South's general stance on other international legal developments

<sup>37</sup> *Development and Environment*, United Nations General Assembly Resolution, UN Doc. A/RES/2849 (1971), online: UNHCR Refworld <<https://www.refworld.org/docid/3b00f1cc28.html>>.

<sup>38</sup> Thomas E. SULLIVAN, "The Stockholm Conference: A Step Toward Global Environmental Cooperation and Involvement" (1972) 6 *The Indiana Law Review* 267 at 269.

<sup>39</sup> *Stockholm Declaration*, *supra* note 5 at 70.

<sup>40</sup> *Ibid.*, at 4.

<sup>41</sup> See Robert FALKNER, *Environmentalism and Global International Society* (Cambridge: Cambridge University Press, 2021) at 111–7.

<sup>42</sup> The Founex Report on Development and Environment (1971) at 1, online: Maurice Strong <[https://www.mauricestrong.net/index.php?option=com\\_content&view=article&id=149&Itemid=75](https://www.mauricestrong.net/index.php?option=com_content&view=article&id=149&Itemid=75)> [The *Founex Report*].

<sup>43</sup> Mickelson, *supra* note 7 at 117.

<sup>44</sup> *Development and Environment*, *supra* note 37.

at the time, notably in the creation of the United Nations Conference on Trade and Development (UNCTAD) in 1962, where the Global South advocated for trade preferences for developing countries.<sup>45</sup> In the end, apart from the Swedish Prime Minister, Olaf Palme, Indira Gandhi was the only head of state to be present at the Conference.<sup>46</sup> In a way, Gandhi's presence reassured the sentiment of the Global South, coloured with apprehension and criticism. With the caveat of individual differences in the perception of the Conference by some developing countries, it is stated with sufficient confidence that Gandhi's speech resonated with the majority of the Global South.<sup>47</sup>

### A. TWAIL Ideas from Indira Gandhi's Address

In hindsight, a reflection by Karl Mathiesen in 2014, a journalist for *The Guardian*, captures the enduring legacy of Stockholm for the Global South from Gandhi's speech.<sup>48</sup>

to couple the destiny of the poor with that of the environment and bind nations to a communal endeavour. But it was susceptible to the hubris and politics that continue to bedevil its progeny.

A lesser-known aspect of the speech is the ideation of several environmental concerns of the Global South with extraordinary foresight and balance. So, in addition to the articulation of Global South's position in the speech, Gandhi also raised concerns and anticipated problems that the Global South would face that continue to challenge the resolution of contemporary environmental issues. Following the Stockholm Conference, Norman Borlaug, an American agronomist and Nobel Laureate remarked to Indira Gandhi on the effect of the ban of DDT in the U.S. on developing countries:<sup>49</sup>

I urge you as leader of India and also effective spokesman for the developing nations to continue to demand the right to use these and other chemicals and technology which are needed to increase production, to alleviate human suffering and misery and bring a higher standard of living to all people... I assure you that in this battle against the eco-maniacs you have my whole-hearted support and I am confident I speak also for thousands of scientists who have been muffled by the hysterical campaign of the environmentalists.

Building on her speech at Stockholm, Indira Gandhi's response to this remark summarizes her views on ways to deal with issues that uproot the balance between development and environment in the midst of a deepening divide between the Global North and Global South:<sup>50</sup>

It is naturally important for all of us who live in the developing countries that concern for ecology and conservation should aim at improving the lives of the people.

<sup>45</sup> See David P. FIDLER, "Revolt Against or From Within the West?: TWAIL, the Developing World, and the Future Direction of International Law" (2003) 2 Chinese Journal of International Law 29; B.S. CHIMNI, *supra* note 4 at 5.

<sup>46</sup> Mickelson, *supra* note 7 at 115.

<sup>47</sup> *Ibid.*, at 117.

<sup>48</sup> Karl MATHIESEN, "Climate Change and Poverty: Why Indira Gandhi's Speech Matters" *The Guardian* (6 May 2014), online: <https://www.theguardian.com/global-development-professionals-network/2014/may/06/indira-gandhi-india-climate-change>.

<sup>49</sup> Jairam RAMESH, *Indira Gandhi: A Life in Nature* (India: Simon & Schuster, 2017) at 277–8.

<sup>50</sup> *Ibid.*, at 279–80.

We do acknowledge the beneficial impact of fertilisers, insecticides and weed-killers on our agricultural and public health programmes. The Green Revolution, taking place in many parts of the Indian countryside, depends in no small measure on the increased use of chemical fertilisers and timely plant protection measures for its success. Malaria, once a scourge in large tracts of India, has been greatly controlled by the use of D.D.T. However, in recent years there has also been evidence of certain adverse side effects and long-term disadvantages of the indiscriminate use of some of these chemicals. We are interested in the world debate on the use of persistent pesticides like D.D.T. [...] Our policy decisions on the use of these compounds should be based on well-established scientific facts keeping in view the needs of the economy and taking into account the economic gains as also the social costs. We are deeply concerned at the erosion of natural resources and the encroachment on natural beauty that is taking place at such a tremendous rate all over the world. However, accentuated economic growth cannot lose sight of ecological considerations ... I hope the scientific community, of which you are a leader, will develop integrated methods combining biological and agronomic controls with the judicious use of chemicals to raise crop yields and fight insect and pest menaces with minimum damage to nature's balance. The aim must surely be to act and maintain a higher environmental quality along with decent material standards of living.

Gandhi's plenary address, popularly referred to as "Man and Environment", is centred on the self-reflective potential of humanity to adapt to the changing environment through an adjustment of its conduct.<sup>51</sup> Gandhi passionately narrates a story of the ancient Indian tradition during King Ashoka's time of the preservation of animal life and forest trees. With this example, Gandhi forges a conscious severance between India and the developed world. The notion that India is conscious of environmental commitments in its infant stage of development was a powerful assertion that developing countries were fully equipped to deal with protecting the environment and avoid the mistakes of the Global North. It is evident that Gandhi speaks to the Global North's conduct in her expression of concern for the human being in "poverty threatened by malnutrition and disease, in weakness by war, in richness by the pollution brought about by his own prosperity". Gandhi's "human being" is indicative of two groups of people sharing common traits, but in very different worlds of poverty and prosperity.

Gandhi proceeds to situate the Global North in a position of arrogance, calling on them to acknowledge humility for their heavy reliance on nature for existence. She records her criticism for the ruthless exploitation of natural resources by affluent countries through the systematic "domination of other races and countries". The "power of the big stick", as Gandhi refers to sentiments of superiority in the Global North, is such that it is antagonistic to fair play and an excuse to "assume the right to interfere in the affairs of others". Gandhi's famous phrase on the "poverty of pollution" finds its origins in this discussion as she presents the injustice in asking developing countries to curb their development from a paternalistic state after having attained progress. This statement introduces the need for development of the Global South, but also highlights how the genuine need for development limit the focus of environmental conservation in the Global South.

This aspect is crucial to understanding the relevance of the speech and for theorizing the concept of loss and damage. The link between poverty and pollution represents the

<sup>51</sup> The following paragraphs in the section will refer to various quotes from Indira Gandhi's speech at Stockholm. For the full speech, see "Indira Gandhi's Speech at the Stockholm Conference in 1972: Man and Environment" (14 June 1972), online: LASU-LAWS Environmental Blog <<http://lasulawsenvironmental.blogspot.com/2012/07/indira-gandhis-speech-at-stockholm.html>>.

conditions of the Global South in requiring economic resources to overcome poverty, which in turn, would equip the Global South to better deal with environmental issues. This sentiment seems to also capture the need for finance to preserve the environment and overcome underdevelopment. By uncovering such a sentiment from the motivations of the Global South in the Founex Report 1971, one can see a similar view of “poverty afflicts the environment of the majority of mankind”.<sup>52</sup> In view of this, a significant recommendation of the Founex discussions, however unsuccessful eventually, was to establish a Special Fund or a suitable financial mechanism in the future to uplift the environmental conditions in the Global South.<sup>53</sup>

Gandhi’s exploration of hypocrisy in the Global North’s understanding of international law is extremely relevant. Gandhi mentions the Global North’s indulgence in “abstract theories of freedom, equality and justice” and the benevolent demands for ensuring “political rights of citizens, and economic rights” coming from a sense of privilege. Nonetheless, Gandhi acknowledges accountability to the norms of “charters of international organizations” and to “millions of politically awakened citizens in our countries”.

On the ways forward for environmental conservation, Gandhi’s address reveals two important aspects in the realm of international negotiations. First, is a necessary boost to technological and innovative advancement in the Global South? Gandhi opens with a plea that environmental problems in developing countries result from an inadequacy of development. To this extent, Gandhi expresses optimism in the potential of technological advancement in developing countries to promote the sharing of knowledge and tools of innovation and reassure them of developmental impacts from conservation. Gandhi’s example of the “design for living” programme proposed by the Indian delegation at the Fourteenth General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO) complements her aspiration to integrate scientific progress into conservation as a sustainable approach to development in the Global South.

Second, Gandhi’s address leaves us with a blueprint for a cooperative approach in international environmental law. Gandhi questions if:

the growing awareness of ‘one earth’ and ‘one environment’ guide us to the concept of ‘one humanity’? Will there be a more equitable sharing of environmental costs and greater international interest in the accelerated progress of the less developed world? Or, will it [the growing awareness] remain confined to a narrow concern, based on exclusive self-sufficiency?

Gandhi’s calls for a collective approach to address the environmental crisis, but one that treads on the realization of the global dynamics of power and historical domination. It is interesting to note that Gandhi recognizes the weakness, lack of unity, and differences among developing countries in putting forward a concerted resistance to the Global North.

Gandhi’s speech, therefore, broadly introduces five fundamental tenets that have influenced early TWAAIL engagement in international environmental law: (a) the potential of humanity to be self-reflective of its conduct and reinvent itself to meet pressing environmental concerns, (b) development for the Global South comes at an unjust cost because of the dominant actions of exploitation of the Global North, and the added responsibility of the Global South to balance environmental degradation and meet development concerns, (c) international law, including international environmental law, is framed from the unilateral lens of the Global North, (d) technological, scientific and innovative advancement

<sup>52</sup> The Founex Report, *supra* note 42 at 2.

<sup>53</sup> *Ibid.*, at 18–19.

is integral to address environmental concerns, and (e) the distribution of responsibilities in environmental conservation must be founded on equitable and cooperative considerations.

In the years following Gandhi's speech, there were very few traces of early TWAIL engagement in challenging dominant narratives of environmental law in a similar respect. In 1987, R.P. Anand summarized the concerns of the Global South with the western notions of environmental conservation.<sup>54</sup> Anand spoke of the implications of a divided world society on the industrial progress of developing countries and on the need for "wealth-producing instruments" of science and technology to lift their economies to meet the basic needs of its peoples.<sup>55</sup> Anand also exclaimed that the global environmental doom was a result of the exploitation of the same wealth-producing instruments of the rich countries.<sup>56</sup> Quoting from Indira Gandhi's speech, Anand identifies the "pollution of poverty" or "pollution of affluence" as a destitute condition of the developing world and its helplessness in requiring to develop.<sup>57</sup> With the same caution as that of Gandhi, Anand recognized the need for developing countries to limit environmental pollution and cooperate with the Global North to overcome the eco-crisis. As Natarajan notes, Anand "articulates the disciplinary problem (of TWAIL) with customary astuteness".<sup>58</sup> Over the years, this position of TWAIL has been reproduced and deliberated upon by several scholars such as Mickelson,<sup>59</sup> Natarajan,<sup>60</sup> Khoday,<sup>61</sup> Alam, Atapattu, Gonzalez and Razzaque,<sup>62</sup> Argyrou,<sup>63</sup> Hassan,<sup>64</sup> and can be considered as the foundation of the TWAIL approach on environmental law.

The contributions of TWAIL scholars in driving environmental law towards protecting the interests of the Global South are seen in key developments such as the right to self-determination and permanent sovereignty over natural resources; the right to development among a range of other social, economic, and cultural rights; concepts such as sustainable development and peaceful and friendly relations among states; and principles of environmental law such as co-operation, common heritage of mankind, and more

<sup>54</sup> R.P. ANAND, "Valedictory Address" in R.P. ANAND, Rahmatullah KHAN, and S. BHATT, eds., *Law, Science and Environment* (New Delhi: Lancer, 1987), 264.

<sup>55</sup> *Ibid.*, at 266–7.

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid.*, at 267.

<sup>58</sup> Natarajan, *supra* note 17, at 227–8.

<sup>59</sup> Mickelson, "Rhetoric and Rage: Third World Voices in International Legal Discourse", *supra* note 4; Mickelson, "South, North, International Environmental Law, and International Environmental Lawyers", *supra* note 4; Mickelson, *supra* note 7; Karin MICKELSON, "Beyond a Politics of the Possible? South-North Relations and Climate Justice" (2009) 10(2) *Melbourne Journal of International Law* 411; Karin MICKELSON, "Competing Narratives of Justice in North-South Environmental Relations: The Case of the Ozone Layer Depletion" in Jonas EBBESSON and Phoebe OKOWA, eds., *Environmental Law and Justice in Context* (New York: Cambridge University Press, 2009), 297.

<sup>60</sup> Natarajan, *supra* note 9 at 182; Natarajan, *supra* note 17 at 228; Usha NATARAJAN, "Climate, Conflict, and International Law in the Middle East and Beyond" (2020) 114 *Proceedings of the ASIL Annual Meeting* 160.

<sup>61</sup> Kishan KHODAY and Usha NATARAJAN, "Fairness and International Environmental Law from Below: Social Movements and Legal Transformation in India" (2012) 25(2) *Leiden Journal of International Law* 415; Kishan KHODAY and Usha NATARAJAN, "Locating Nature: Making and Unmaking International Law" (2014) 27(3) *Leiden Journal of International Law* 573.

<sup>62</sup> Shawkat ALAM, Sumudu ATAPATTU, Carmen G. GONZALEZ, and Jona RAZZAQUE, eds., *International Environmental Law and the Global South* (New York: Cambridge University Press, 2015).

<sup>63</sup> Vassos ARGYROU, *The Logic of Environmentalism: Anthropology, Ecology and Postcoloniality* (New York, US: Berghahn Books, 2005).

<sup>64</sup> Parvez HASSAN, "Role of the South in the Development of International Environmental Law" (2017) 1 *Chinese Journal of International Law* 133.

recently, common but differentiated responsibility.<sup>65</sup> The main motivations behind these TWAIL pursuits resonate with the foundational assertions in Gandhi's speech in the expressed sentiments of control, domination, exploitation, economic disparities, and the unfair burden of sharing responsibilities, stemming from the structure of international law prejudiced against the empowerment of the Global South. As will be seen in the next section, the TWAIL tenets in Gandhi's speech are mirrored in the Global South concerns on loss and damage as well, but with nuances in the Global South position on loss and damage.

### III. The Global South Motivations in Loss and Damage Negotiations

Fast forward to the twenty-first century, the issue of climate change has invaded the international discourse on environmental conservation. The increase in average global temperatures has led to many concerns, including weather disruptions, tropical storms, heatwaves, species extinction, flooding, food and water scarcity, and loss of arable land.<sup>66</sup> The impacts of climatic variations on people have led to a variety of challenges such as the spread of infectious and other diseases, disruption of livelihoods, and even forced migration. Cognizant of the growing need to combat climate change, the UNFCCC facilitated intergovernmental negotiations for a global response to climate change, the outcome of which materialized in the celebrated Paris Agreement of 2015. Currently, the main components of the global response to climate change include mitigation, adaptation, and the contentious issue of loss and damage.

The controversy surrounding the loss and damage framework in the UNFCCC originates from a difference in the expectations of the Global North and Global South from the role of WIM. As mentioned earlier, states pledged to address loss and damage in COP19 through WIM. The Paris Agreement of 2015 has institutionalized WIM in Article 8 as an outcome of COP21. However, two challenges play out in understanding the scope of the loss and damage framework in the UNFCCC: (a) that the UNFCCC, as such, does not define loss and damage, and (b) there is a lack of clarity in guiding us about the ways in which loss and damage can be addressed under the UNFCCC, particularly on the issue of finance. Both these challenges find themselves at the centre stage of friction at the loss and damage negotiations.

The absence of a definition of "loss and damage" by the UNFCCC has left the concept considerably open to speculation in contrasting and contested framings by the Global North and Global South. Conversely, it can also be argued that the existence of historically opposing frames for the concept of loss and damage resulted in the omission of a definition that could resolve the conflict in the UNFCCC negotiations. The Global South has long pushed for loss and damage to translate into compensatory measures that highlight the relevance of historical accountability of the Global North.<sup>67</sup> The Global South's framing of the issue is therefore focused on recognizing loss and damage as an independent component of the global response to address climate change, and one requiring the formation of a financial mechanism to assist the Global South based on an explicit recognition of the Global North's role in causing climate change.<sup>68</sup> The Global North, on the other hand, has defended the importance of adaptation to climate change, swaying the

<sup>65</sup> Natarajan, *supra* note 9 at 183.

<sup>66</sup> For more information on the impacts of climate change, see the UNFCCC website, online: UNFCCC <<https://unfccc.int/>>.

<sup>67</sup> Kreienkamp and Vanhala, *supra* note 29.

<sup>68</sup> *Ibid.*

discourse away from discussing liability and compensation, towards risk reduction and insurance.<sup>69</sup>

Similarly, the issue of finance as a tool to address loss and damage is one of omission. Article 8 of the Paris Agreement provides a broad indication for addressing loss and damage through measures relating to “finance, technology and capacity-building”. However, the article omits a necessary and obvious acknowledgement of the role of the Green Climate Fund, the UNFCCC’s main financial mechanism, in addressing loss and damage.<sup>70</sup> This leaves us without clarity on how loss and damage can be financed without utilizing the Green Climate Fund. In this regard, Article 9 of the Agreement prescribes a duty for developed countries to provide financial resources to assist developing countries; however, only for adaptation and mitigation efforts.<sup>71</sup> Furthermore, paragraph 52 of the decision accompanying the Paris Agreement states that “Article 8 of the Agreement does not involve or provide a basis for any liability and compensation”,<sup>72</sup> undermining the efforts to integrate an equitable framework in the UNFCCC to compensate the disproportionate impacts of climate change in the Global South.

Subsequent COP decisions have not resolved the tensions between the Global South and Global North and continue to sustain such a compromise. COP22 in Marrakech made procedural progress on the ways in which WIM can be reviewed, but the issue of including greater financial resources in WIM was postponed.<sup>73</sup> COP23 in Bonn promised a thorough discussion on loss and damage but restricted itself to “encouraging state parties to make available sufficient resources” in the outcome decision.<sup>74</sup> The outcome of COP24 in Katowice enabled countries to report on loss and damage suffered and ways in which they coped with it as part of including loss and damage in the transparency framework in Article 13 of the Paris Agreement.<sup>75</sup> However, it did not have any impact on the increase in financial liability. Amidst growing momentum for including additional sources of financing for loss and damage at COP25 in Madrid, it was decided that the already under-resourced GCF will be extended to loss and damage as well, without any recognition of additional finance.<sup>76</sup> COP25 also established the Santiago Network to provide technical assistance for loss and damage, which is yet to be developed.<sup>77</sup> To date, the UNFCCC framework has not directly addressed the demands of financing for loss and damage by the Global South.

In the midst of bargaining for the scope of loss and damage by the two camps, it is important to reacquaint ourselves with the intended purpose of the loss and damage framework itself. As the loss and damage negotiations unfold, it seems as though the conflict is positioned by players with equal bargaining power. However, the basic purpose of inserting a loss and damage framework in the UNFCCC regime was to address the particular needs of developing countries that are most vulnerable to and disproportionately

<sup>69</sup> *Ibid.*

<sup>70</sup> Margaretha WEWERINKE-SINGH and Diana H. SALILI, “Between Negotiations and Litigation: Vanuatu’s Perspective on Loss and Damage from Climate Change” (2020) 20(6) *Climate Policy* 681 at 684.

<sup>71</sup> See Paris Agreement, *supra* note 20, Art. 9.

<sup>72</sup> Wewerinke-Singh and Salili, *supra* note 70 at 684.

<sup>73</sup> Kreienkamp and Vanhala, *supra* note 29 at 9.

<sup>74</sup> Lisa BENJAMIN, Adelle THOMAS, and Rueanna HAYNES, “An ‘Islands’ COP? Loss and Damage at COP23” (2018) 23 *Review of European, Comparative & International Environmental Law* 332 at 339.

<sup>75</sup> Charlotte STRECK, Moritz von UNGER, and Nicole KRAMER, “From Paris to Katowice: COP-24 Tackles the Paris Rulebook” (2019) 16 *Journal for European Environmental & Planning Law* 165 at 170.

<sup>76</sup> Dawn PIERRE-NATHONIEL, Linda SIEGELE, Le-Anne ROPER, and Inga MENKE, “Loss and Damage at COP25 – A Hard Fought Step in the Right Direction” *Climate Analytics Blog* (20 December 2019), online: Climate Analytics <<https://climateanalytics.org/blog/2019/loss-and-damage-at-cop25-a-hard-fought-step-in-the-right-direction/>>.

<sup>77</sup> *Ibid.*

affected by the adverse impacts of climate change. Somewhere along the various negotiations, this purpose has been discounted to accommodate the interests of the Global North. Reality speaks of a disadvantaged footing of the Global South to begin with, complemented by the added suppression of its claims for compensation for loss and damage by the Global North. It is with this realization that the section begs a revisit to the motivations of the Global South on the issue.

### A. Climate-related Displacement

For better substantiation, let us turn to the example of climate-related displacement, which highlights the Global South motivations on the push for loss and damage. One of the major contemporary impacts of climate change on human beings is their displacement, internally or beyond the territories of their countries. Climate change influences a range of social, political, and economic drivers that affects migration of people:<sup>78</sup>

towards places that are vulnerable to environmental change (e.g. to slums in large cities located within vulnerable coastal zones) as they are to involve movement away from vulnerable places (e.g. from rural areas in which ecosystem services and/or agricultural productivity is under threat).

Such patterns of movement require a comprehensive global response of facilitating better migration pathways, or increasing the resilience of vulnerable areas to adapt and cope with the adverse impacts of climate change.<sup>79</sup> Countries will need to increasingly prioritize policies focused on monetary funding such flood control, water management, forecasting systems, social protections, and infrastructure to ensure vulnerable countries and populations withstand climate impacts.<sup>80</sup> Climate-related displacement as a critical problem of the Global South is also recognized in WIM. As an outcome of COP24 in 2018, WIM extended its mandate to the Taskforce on Displacement (TfD) to formulate approaches, policy recommendations, and provide tools to manage displacement in developing countries due to the adverse impacts of climate change.<sup>81</sup> Much like the rest of the loss and damage framework, the TfD is focused on “[f]acilitat[ing] action and support, including finance, technology and capacity-building, for developing country Parties”<sup>82</sup> and “mobiliz[ing] financial resources”,<sup>83</sup> but avoids a reference to integrating climate finance based on liability or compensation in any way.

To situate the significance of climate finance for mitigating displacement, we can turn to another example of a low-lying country in the Global North that has successfully managed to withstand sea-level rise for centuries, the Netherlands. The Netherlands has been a pioneer in water management and coastal engineering with a history of over 1,000 years in fighting the flooding of its land. Surrounded by the Rhine, the Meuse, and the Scheldt rivers, the Netherlands has developed a range of infrastructure and technologies such as

<sup>78</sup> Government Office for Science, “Foresight: Migration and Global Environmental Change” (2011), online: GOV.UK <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/287717/11-1116-migration-and-global-environmental-change.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/287717/11-1116-migration-and-global-environmental-change.pdf)>.

<sup>79</sup> *Ibid.*, at 190.

<sup>80</sup> *Ibid.*, at 192–4.

<sup>81</sup> See UNFCCC Executive Committee of the Warsaw International Mechanism for Loss and Damage, “Terms of Reference of the Task Force on Displacement” (2020), online: UNFCCC <[https://unfccc.int/sites/default/files/resource/TFD\\_ToR.pdf](https://unfccc.int/sites/default/files/resource/TFD_ToR.pdf)>.

<sup>82</sup> *Ibid.*, at Annex I.

<sup>83</sup> *Ibid.*

dykes, barriers, pound windmills, and walls.<sup>84</sup> Apart from this, the Dutch have invested in major infrastructure projects to mitigate the impacts of flooding. The first is an enormous flood-controlling system known as the Delta Works, which has been protecting the Dutch for decades.<sup>85</sup> It consists of nine dams and four storm barriers that have closed off estuaries and substantially reduced the Dutch coastline by about 700 kilometres. The second is a massive infrastructure project called “Room for the River”, consisting of forty different infrastructure projects along Dutch rivers and waterways and costing over \$3 billion.<sup>86</sup> The third is a project in Nijmegen where a dike was moved back and a new bypass channel was dug for the river Waal, costing around \$500 million.<sup>87</sup> These are just some examples. In addition, the Dutch have experimented with many anti-flooding techniques such as a floating dairy farm in Rotterdam Harbor, a sand-engine, and a floating forest even.<sup>88</sup> The Dutch experience shows the importance of technologically strategizing to address global sea rise. However, it also shows us how expensive it is to do so. Water management in the Netherlands is a \$5.5 billion industry annually.<sup>89</sup> While the Netherlands has been keen on exporting expertise and technology, it all comes down to affordability. Moreover, despite having sophisticated infrastructure, the Netherlands has suffered several catastrophes beyond its capability and has had to evacuate and relocate populations within the country.<sup>90</sup> Given these residual hardships in the Netherlands, it is unimaginable for vulnerable countries in the Global South to even achieve a portion of infrastructure self-sufficiency.

From the perspective of vulnerable countries in the Global South, the Tfd follows the tradition of excluding financial liability from its functional purview. Over the years, the position of civil society organizations in the UNFCCC negotiations have highlighted several gaps in the financial component of Tfd – what is the scope of utilizing existing funding mechanisms such as GCF, the Adaptation Fund, or the Least Developed Countries Fund to fund displacement-related approaches? Or how can the Tfd fill potential financial gaps in displacement-related approaches through options of raising finance from countries that most contribute to climate change.<sup>91</sup>

As it stands today, vulnerable developing countries such as Kiribati, Vanuatu, Tuvalu, Bangladesh, Philippines, Indonesia, Brazil, and many others facing severe climate-related displacements are doing so in Gandhi’s ecosystem of the concerns of the Global South. It is also amplified by developmental concerns in the Global South, with vulnerable countries lacking the means to effectively advance technological solutions and upgrade infrastructure to meet the growing needs of adaptation. Moreover, a viable recommendation of incorporating financial resources to assist with loss and damage in international law has been rejected, with the support of international provisions framed from the lens of the Global North. Inadvertently, efforts to promote greater responsibility of the Global North are conveniently buried in the ambiguity of legal protections to vulnerable countries.

<sup>84</sup> Tracy MCVEIGH, “The Dutch Solution to Floods: Live with Water, Don’t Fight It” *The Guardian* (16 February 2014), online: [The Guardian <https://www.theguardian.com/environment/2014/feb/16/flooding-netherlands>](https://www.theguardian.com/environment/2014/feb/16/flooding-netherlands).

<sup>85</sup> Chris IOVENKO, “Dutch Masters: The Netherlands Exports Flood-Control Expertise”, in *Earth: The Science Behind the Headlines* (31 August 2018), online: [Earth Magazine <https://www.earthmagazine.org/article/dutch-masters-netherlands-exports-flood-control-expertise/>](https://www.earthmagazine.org/article/dutch-masters-netherlands-exports-flood-control-expertise/).

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid.*

<sup>90</sup> *Ibid.*

<sup>91</sup> For example, over 300 civil society organisations sent an open letter to COP26 President Alok Sharma and world leaders to urgently address finance for loss and damage on 26 October 2021: see “Hundreds of Civil Society Organisations Worldwide Demand COP26 Deliver Finance for Climate Damages” *Climate Action Network International* (26 October 2021), online: [Climate Network <https://climatenetwork.org/2021/10/26/hundreds-of-civil-society-organisations-worldwide-demand-cop26-deliver-finance-for-climate-damages/>](https://climatenetwork.org/2021/10/26/hundreds-of-civil-society-organisations-worldwide-demand-cop26-deliver-finance-for-climate-damages/).

With loss and damage negotiations currently locked in an impasse, much of our understanding of what the framework could potentially address through finance can be derived from the claims made by countries suffering from climate change loss and damage, and rightly so. In 2018, Vanuatu made a submission to the ExCom for reconsidering the role of finance in Article 8.<sup>92</sup> Based on an appraisal of its struggle with loss and damage, Vanuatu proposed several pathways to integrate a stronger financial push for loss and damage measures. First, loss and damage finance should be based on the polluter pays principle, a form of common but differentiated responsibility and respective capability, and approaches of precaution, predictability, and country ownership.<sup>93</sup> Second, loss and damage finance should utilize best practices such as taxes from fossil fuel production, Financial Transaction Tax etc., and from existing financial instruments.<sup>94</sup> Third, compensation under loss and damage finance can address economic and non-economic losses such as:<sup>95</sup>

- Sea level rise induced relocation costs for coastal communities (domestic and cross-border where necessary);
- Reconstruction costs after extreme events to help “build back better”;
- Social and gender protection measures/livelihood safety net programs for the most vulnerable;
- Livelihood transformation programs (e.g., from fishing to agriculture systems, or production to service industry);
- Pro-poor micro-insurance, crop insurance and/or insurance premium subsidies at various levels;
- National/local level emergency finance reserves or contingency funds;
- Loss and damage contingency planning/comprehensive risk management particularly at the local level;
- Loss and damage capacity/institution building at all levels; and
- Technology cooperation and technology transfer (e.g., loss and damage assessment tools).

### **B. The Global South Position: Then and Now**

While such claims are yet to see the light of day, the section’s analysis reveals that the Global South concerns on loss and damage are largely a continuation of those expressed by the TWAAIL movement in international environmental law, beginning at the Stockholm Conference. In terms of vulnerability of the Global South to environmental problems, there is an enduring similarity in the impacts felt on the Global South. In the face of a progressively deteriorating environment, it comes as no surprise that the nature of the identified environmental problem, its framing in international law, and the creation of solutions within a system engrained with structural prejudices are all aligned with the challenges that Gandhi warned us about decades ago. Similarly, the discussions in the Founex Conference leading up to the Founex Report, and reiterated in spirit in Indira Gandhi’s speech expose the deliberations of the Global South in pushing for a Special Fund or a financial mechanism of some form to be established in the future. While Gandhi did not speak of climate change specifically, one can note that she considered

<sup>92</sup> See “Submission by the Republic of Vanuatu to the Executive Committee of the Warsaw International Mechanism for Loss and Damage of the UNFCCC” (29 January 2018), online: UNFCCC <[https://unfccc.int/files/adaptation/workstreams/loss\\_and\\_damage/application/pdf/vanuatu\\_submission.pdf](https://unfccc.int/files/adaptation/workstreams/loss_and_damage/application/pdf/vanuatu_submission.pdf)>.

<sup>93</sup> *Ibid.*, at 5.

<sup>94</sup> *Ibid.*

<sup>95</sup> *Ibid.*, at 4–5; see also, Wewerinke-Singh and Salili, *supra* note 70 at 682.

environmental issues as essentially global problems that will need a co-operative solution. This view is also observed in Anand's address in 1987. It may as well be believable for us to hear Gandhi's main assertions from Stockholm at the current UNFCCC negotiations on loss and damage.

Having derived the similarity in environmental concerns of the past and present, it is important to note the departure in the position of the Global South today from that of Gandhi's time. The 1972 position was characterized by suspicion, reluctance, and the need to prioritize development concerns over environmental protection. As Mickelson notes, "one could argue that Indira Gandhi's statement appears to have been a more accurate reflection of the stance of the South at the Conference; guarded and somewhat sceptical, but at least willing to enter into dialogue".<sup>96</sup> In contrast, the current position of the Global South cannot afford to unilaterally prioritize development over environment. The Global South position is increasingly characterized by desperation and hopelessness, and a greater willingness to cooperate in efforts to reduce the disproportionate impacts of climate change. It is also characterized by the emergent need for survival of populations in the Global South. This sentiment is reflective of an evolved view of the "development versus environment" debate, largely owing to the destruction of natural ecosystems at a faster pace than before. It is one that understands that development in the Global South is a necessity to combat climate change, but one that needs to prioritize environmental protection over other considerations.

Over the last few decades, the rapid economic growth of developing countries has contributed to the declining rates of poverty worldwide.<sup>97</sup> The need for prioritizing development in the Global South during Indira Gandhi's era has considerably resulted in uplifting millions of families in the developing world from poverty. However, climate change presents a major roadblock to the unfettered development of the Global South, posing risks to economic growth itself. This is because most vulnerable developing countries and communities in vulnerable ecosystems depend on agriculture, and climate-sensitive natural resources that are necessary for their sustenance.<sup>98</sup> Added to the threat to their livelihoods is the lack of financial or technical capacity to adapt to climate change, in the midst of rapid destruction of natural ecosystems.<sup>99</sup> This points us to an important and enduring conclusion that supports the Global South's position on loss and damage – the growing need for financial flows from the Global North to the Global South to ensure its equitable development while ensuring the protection of the environment. But is this enough?

#### IV. Conclusion: Reconciling TWAIL Archives with the Contemporary

The battle over financial accountability and compensation in the loss and damage initiative has been central to the Global South project since the time of the Stockholm Conference in 1972. The loss and damage framework was proposed to rectify the adverse residual impacts of climate change on vulnerable countries, with an acknowledgement that the financial capacities of the Global South have to be supported. Despite such acknowledgement, the UNFCCC lives up to the reputation of international law in sustaining the balance in favour of the Global North, by effectively diluting the need for financial support to rhetoric in WIM.

<sup>96</sup> Mickelson, *supra* note 7 at 117.

<sup>97</sup> Emmanuel SKOUFIAS, Mariano RABASSA, Sergio OLIVIERI, and Milan BRAHMBHATT, "The Poverty Impacts of Climate Change" (2011) 51 Economic Premise, online: World Bank <<https://openknowledge.worldbank.org/bitstream/handle/10986/10102/600730BRI0EP511v40BOX358307B001PUBLIC1.pdf?sequence=1&isAllowed=y>>.

<sup>98</sup> *Ibid.*, at 1.

<sup>99</sup> *Ibid.*

As these dynamics play out for the world to see, the article shows that the concerns of the Global South continue to be suppressed in international environmental negotiations, such as WIM. The reasons for this, as the article highlights, are situated in the enduring relevance of the fundamental tenets of the early TWAIL movement, influenced by Indira Gandhi's speech at the Stockholm Conference in 1972. Moreover, the article also highlights the aggravating hopelessness of the Global South at the negotiations owing to the disproportionate loss and damage suffered. This reveals the arduous way forward for overcoming the structural limitations of international environmental law in ensuring that the Global South is adequately and financially compensated for the disproportionate impacts of climate change. The current position of the Global South also shows us the nuanced relationship between development and environment, previously viewed in the binary during Indira Gandhi's time. Given the vicious cycle of development overcoming poverty, while also contributing to climate change, in turn leading to increasing instances of poverty in the Global South, the article presents a greater need for financial support to sustain vulnerable countries' economies while preparing to withstand climate change.

The article aims to leave TWAIL scholars with an afterthought of structural reimagination of international environmental law – the struggle for securing finance has been crucial to the Global South project in the UNFCCC negotiations since its genesis. The walk back to Stockholm has revealed the importance of relying on demands of financial accountability from the Global North, but also from the unsatisfactory outcomes in addressing such concerns. The motivations of the Global South in the current loss and damage negotiations are a continuation of the demands at Stockholm, carried forward by early TWAIL scholarship. It is my opinion that for future UNFCCC negotiations to yield a different outcome, the research agenda of the current TWAIL scholarship has to transcend the demand for financial accountability by dismantling the structural limitations that prevent international environmental law to protect the interests of the Global South. It goes without saying that TWAIL scholarship should deepen its engagement with international environmental law.

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