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Proposal for a Climate Compensation Mechanism for Small Island States: Response to Maxine Burkett

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Abstract

In the article titled Rehabilitation: A Proposal for a Climate Compensation Mechanism for Small Island States, Professor Maxine Burkett exhaustively unpacks some of the most fundamental climate-induced slow-onset events and concerns facing the Alliance of Small Island States (AOSIS). Burkett proposes a compensation and rehabilitation mechanism to address damage and loss to small island states due to slow-onset events. Using Caribbean AOSIS states as primary examples, Burkett's insightful paper provides a thorough and sustained argument on the rationale for a compensation and rehabilitation mechanism as well as a framework for implementing such mechanism at the international level.

This response paper examines the potential and paradoxes of the compensation and rehabilitation proposal, with a focus on some practical questions that a Compensation and Rehabilitation Commission (CRC) may face along the way. It starts by providing further statistics on the dual vulnerabilities of AOSIS states in Africa that lend credence to Burkett's arguments that the vulnerabilities of many AOSIS states call for global responses that go beyond disaster risk reduction and management and risk transfer, to focus more on providing a robust package of compensation and rehabilitation through a CRC. It then discusses four key practical questions that must be further examined to fine-tune the CRC proposal. They are epistemic questions, floodgate question, institutional proliferation, and accountability questions.

I. Introduction

With emerging signs of temperature change all over the world, it is now widely accepted that climate change is real—that human emissions of greenhouse gases are a cause; that if left unchecked, climate change may lead to extreme weather events such as droughts and flooding; that it may threaten food security; and that it may lead to ill health and economic decline in nations of the world.¹ Climate change, however, poses even more serious economic, social, and environmental threats to small island states—arguably, more so than any other group in the world. Apart from the unique geographical vulnerabilities of small island states which contribute to their low adaptive

1. James Hansen, *Defusing the Global Warming Time Bomb*, 3 SCI. AM. 68, 68-77 (2004). See also Margot Wallström, *Meeting the Long Term Challenge of Global Warming: A European Perspective*, in CLIMATE POLICY FOR THE 21ST CENTURY: MEETING THE LONG-TERM CHALLENGE OF GLOBAL WARMING 17, 17-25 (David Michel ed., Ctr. for Transatlantic Rel. 2003); Geoffrey Lean, *Why Antarctica Will Soon Be the Only Place to Live—Literally*, THE INDEP., May 2, 2004, available at <http://www.independent.co.uk/environment/why-antarctica-will-soon-be-the-only-place-to-live-literally-58574.html>.

capacity, AOSIS includes African Islands such as Cape Verde, Guinea-Bissau, and Mauritius, countries that have dual vulnerability to climate change—both as arid countries in the Sahel region and as impoverished small island states.²

For example, even without climate change, Sahelian islands are currently subjected to tough arid conditions, which typically make farming and agriculture difficult and near impossible.³ A region is classified as arid if it is characterized by a severe lack of available water, to the extent of hindering or preventing the growth and development of plant and animal life.⁴ Such climate change would only escalate these pre-existing conditions, thereby intensifying the cycle of food shortage, water scarcity, and the spread of diseases in Sahelian African States.⁵

Secondly, the underwhelming economic and social conditions typical of many AOSIS states are even more severe in Africa, where some of the world's poorest people live; arguably, more severe than the Caribbean countries which Professor Burkett discussed. Cape Verde, for example, reveals statistics and figures that are even more alarming than those adduced by Burkett, and which further reinforce the importance of a compensation and rehabilitation process for the highly vulnerable residents of small island states. Cape Verde is a tiny island 350 miles off the coast of Senegal in West Africa with a population of 491,875—essentially, tiny when compared to the State of California alone (which has 38 million people) or when compared to the United State of America's 313 million people. Eighty percent of Cape Verde's population lives in the coastal zone.⁶

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2. The name "Sahel" is derived from the Arabic word *sahil*, which means "border of the desert." The Sahel region covers nine countries: Mauritania, Senegal, the Gambia, Guinea-Bissau, Mali, Burkina Faso, Niger, Chad, and Cape Verde. It has a total area of 5.4 million km² and a population of almost 60 million. See Keffing Sissoko et al., *Agriculture, Livelihoods & Climate Change in the West African Sahel*, 11 REGIONAL ENV'T'L CHANGE S119, S119-25 (Supp. 2010); Adrian Chappell & Clive T. Agnew, *Modelling Climate Change in West African Sahel Rainfall (1931-90) as an Artifact of Changing Station Locations*, 24 INT'L J. CLIMATOLOGY 547, 547-54 (2004).
 3. A. Ben Mohamed, N. van Duivenbooden & S. Abdoussallam, *Impact of Climate Change on Agricultural Production in the Sahel—Part 1. Methodological Approach and Case Study for Millet in Niger*, 54 CLIMATIC CHANGE 327, 327-48 (2002).
 4. Water is a scarce resource in all Sahel countries. Besides erratic rainfall patterns, poor soils and unfavourable socioeconomic conditions are key constraints to agricultural development in Sahelian states. See H. P. Bailey, *Semi-Arid Climates: Their Definition and Distribution*, in AGRICULTURE IN SEMIARID ENVIRONMENTS 73, 73-97 (Anthony E. Hall, Glenn H. Cannel & Harry W. Lawton eds., 1979); A.J. Dietz, R. Ruben & Jan Verhagen, *The Impact of Climate Change on Drylands With a Focus on West Africa*, 39 ENV'T & POL'Y 465 (2001), available at http://www.researchgate.net/publication/40143328_Impact_of_climate_change_on_drylands_with_a_focus_on_West_Africa.
 5. Chris Huntingford et al., *Aspects of Climate Change Prediction Relevant to Crop Productivity*, 360 PHIL. TRANSACTIONS OF THE ROYAL SOC'Y BIO. SCI. 1999, 2000-01 (2005).
 6. *The World Factbook: Cabo Verde*, CENTRAL INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/cv.html> (last visited Sept. 9, 2014); GOV'T OF CAPE VERDE,

Many houses are constructed with non-resistant wood materials that are vulnerable to coastal hazards and sea-level rise, while about 75% of food must be imported. Cape Verde annually runs a high trade deficit, financed by foreign aid and remittances from emigrants, where remittances constitute a supplement to the Gross Domestic Product (GDP) of more than 20%. At present, nearly half of the population lacks access to a public water supply and over half lacks access in rural areas. With a 30% unemployment rate (compared to the United States' 6%) and a GDP per capita of \$3,900 (compared to the United States' \$52,000), Cape Verde is currently in dire economic conditions.

The service sector has been the main engine of growth in Cape Verde, accounting for over 70% of GDP, with over 21% of GDP (and over 80% of foreign direct investment) from tourism alone.⁷ Tourist facilities are concentrated in the coastal zone of low-lying islands, such as Sal and Boavista, and are vulnerable to sea-level rise and coastal hazards. Beaches—on which the industry depends—are threatened by sea-level rise and sand extraction. Increased climatic pressure and flooding from climate change may affect tourist facilities in Cape Verde's coastal zones, consequently shutting down Cape Verde's principal source of revenue.

Due to both vulnerabilities, Cape Verde has been ranked the eighth most endangered nation on earth as a result of flooding from climate change.⁸ An additional strain on Cape Verde—due to climate change—may literally shut down the entire country. With more scientific and technical expositions of the unique vulnerabilities of climate change in countries such as Cape Verde, there seems to be an emerging consensus that the negative effects of slow-onset events are already affecting AOSIS states, and there is a need for appropriate, sustainable financial instruments for addressing loss and damage associated with slow-onset events. Despite this growing awareness and consensus, the question of 'how' has yet to attain the desired level of scholarly agreement and articulation. That is, what is the appropriate legal and policy framework through which sustainable financial instruments appropriate for addressing loss and damage associated with slow-onset events may be provided for AOSIS states?

CLIMATE CHANGE VULNERABILITY ASSESSMENT OF CAPE VERDE—SUMMARY FOR POLICY MAKERS 9, 11 (2012), available at <http://www.unep.org/dewa/Portals/67/pdf/SPM-CAPE-VERDE.pdf>.

7. GOV'T OF CAPE VERDE, *supra* note 6, at 11.

8. See Sven HARMELING & DAVID ECKSTEIN, GERMANWATCH, GLOBAL CLIMATE RISK INDEX 2013, 19, 24 (2013), available at <http://germanwatch.org/fr/download/7170.pdf>; BRIGIDA ROCHA BRITO ET AL., TURISMO EM MEIO INSULAR AFRICANO: POTENCIALIDADES, CONSTRANGIMENTOS E IMPACTOS (2010).

Many of the previous policy prescriptions focus only on one aspect of AOSIS' original proposal to the United Nations Framework Convention on Climate Change (UNFCCC)—an insurance mechanism, through which they can access funds immediately after a disaster.⁹ Furthermore, while AOSIS's proposal also contained the two-pronged aspects of disaster risk management and compensation and rehabilitation, the disaster risk management aspect has received more favorable articulation than the compensation and rehabilitation component. Burkett rightly adduces this to the prevailing attitude of pessimism, lack of political will, and explicit rejection of any measure that might vaguely resemble climate-related reparations. Through her paper, Burkett has made one of the strongest arguments for the need for attitudinal change and reconsideration.

The current reality in small island states such as Cape Verde lends credence to Burkett's views that there is a need to establish a compensation and rehabilitation commission (CRC) under the UNFCCC, through which small island states can be adequately compensated and rehabilitated for slow-onset events. The key aim of the CRC would be to disburse monies from a global pool to rehabilitate individuals, communities, and countries affected by slow-onset events, such as sea level rise, increasing temperatures, ocean acidification, glacial retreat and related impacts, salinization, land and forest degradation, and loss of biodiversity and desertification.¹⁰ Burkett's proposal on how the compensation and rehabilitation mechanism may be structured is undoubtedly thorough and convincing.

However, considering the level of scrutiny and review such a proposal would have to go through at the international level, certain questions arise from Burkett's proposal that call for more thoughts. To provoke attitudinal change in this area, practical questions that may stifle the workability of the CRC must be anticipated and thoroughly addressed to ensure that the proposal is not stripped of its radical promise. Adopting McGovern's framework on the eight initial variables that must be considered in designing a claims resolution process, the four key issues discussed here fall under organization and implementation, damage methodology, and compensation.¹¹

9. Alliance of Small Island States (AOSIS), *Proposal to the AWG-LCA: Multi-Window Mechanism to Address Loss and Damage from Climate Change Impacts* (2008), available at http://unfccc.int/files/kyoto_protocol/application/pdf/aosisinsurance061208.pdf.

10. U. N. Framework Convention on Climate Change, Cancun, Mex., Nov. 29-Dec.10, 2010, *Report of the Conference of the Parties on its Sixteenth Session*, ¶ 25, U.N. Doc. FCCC/CP/2010/7/Add.1 (Mar. 15, 2011).

11. See Francis E. McGovern, *The What and Why of Claims Resolution Facilities*, 57 STAN. L. REV. 1361 (2005).

II. Strengthening the CRC: Some Thoughts

Despite the promise of the CRC as a holistic framework for addressing loss and damage by rehabilitating individuals, communities, and countries affected by slow-onset events, there are a number of concerns on the practicality of implementing the CRC framework. They include epistemic questions, floodgate question, institutional proliferation, and accountability questions.

A. Epistemic Questions

Epistemic concerns include questions on whether climate change administrators within the UNFCCC system have the requisite capacity to implement such a compensatory mechanism. An epistemic community has been defined as a network of professionals with recognized expertise in a particular domain and an authoritative claim to knowledge within that domain. They have a shared set of normative and causal beliefs, shared notions of validity, and a common policy enterprise.¹² The United Nations Development Programme (UNDP) defines capacity as the ability of individuals, institutions, and societies to perform functions, solve problems, and set and achieve objectives in a sustainable manner.¹³ Adopting this definition, the question is whether the UNFCCC has the capacity and resources to support the quasi-judicial functions, particularly the technical fact-finding aspect of the work, of a CRC. There have been increased arguments that the interpretation and application of international obligations should be concentrated in bodies whose primary function is claim adjudication, and that it is dangerous to place the function of interpreting claims in the hands of professional administrators.¹⁴

Determining the appropriate level of compensation and rehabilitation and monies to disburse to a country based on its filed claims undoubtedly requires some degree of fact finding—ascertaining the claims and providing a final funding decision based on the appraisal of the claims—that is typical of the role of a common law judge or arbiter in determining the quantum of compensatory

12. Jorge Daniel Taillant, Founder, Ctr. for Hum. Rts. and Env't (CEDHA), Presentation at the U.N. Hum. Rts. Council Seminar to Address the Adverse Impacts of Climate Change on the Full Enjoyment of Hum. Rts., Session 3: Forging Stronger Cooperation Between Human Rights and Climate Change Communities (Feb. 2012), *available at* <http://www.ohchr.org/Documents/Issues/ClimateChange/Seminar2012/DanielTaillant24Feb2012.pdf>; Christopher McCrudden, *Mainstreaming Equality in Northern Ireland 1998-2004: A Review of Issues Concerning the Operation of the Equality Duty in Sec. 75 of the Northern Ireland Act 1998*, in 2 SECTION 75 EQUALITY DUTY: AN OPERATIONAL REVIEW 52-76 (Eithne McLaughlin & Neil Faris eds., 2004).

13. CARLOS LOPES & THOMAS THEISOHN, OWNERSHIP, LEADERSHIP & TRANSFORMATION: CAN WE DO BETTER FOR CAPACITY DEVELOPMENT? 1 (2003).

14. *See generally* McCrudden, *supra* note 12.

damages sufficient in amount to indemnify the injured person for the loss suffered. Ascribing a monetary amount to the climate change loss a country has suffered—whether this loss is due to direct impacts of slow-onset events, a loss of revenue, loss of culture and tradition, emotional loss or the loss of a financial opportunity—can never be a straightforward exercise. Failure to get it right may result in insufficient compensation or in a windfall, both of which will be detrimental to the ultimate goals of the CRC.

This difficulty in getting it right is often exacerbated when, as is often the case with climate change, the line between causation and damages is unclear. As Vaughan Williams L.J. advised in the seminal case of *Chaplin v. Hicks*, “The fact that damages cannot be assessed with certainty does not relieve the wrongdoer of the necessity of paying damages.”¹⁵ However, in such situations the highest level of skill and experience is required to ensure that the correct test is applied for each element of the inquiry. As noted in the English case of *Allied Maples Grp. v. Simmons & Simmons*, it is necessary to establish “where causation ends and quantification of damage begins.”¹⁶

The nature of claims associated with climate-induced losses will require a great deal of skill and competence to establish a clear link between climate change and damages resulting from slow-onset events. Some of the damages adduced to slow-onset events may in fact be attributed to other causes not covered by the UNFCCC framework.¹⁷ The question, therefore, is whether professional administrators within the UNFCCC have the required epistemic expertise to consider such questions that may arise with respect to causation and damage quantification.

More importantly, where the loss is contingent on uncertain future events, the CRC would be faced with a challenge that requires a real exercise of its discretion and skill. Assessing damages may be further complicated if there is uncertainty as to whether a future event that will cause loss to the claimant will materialize at all. For example, if a small island state is claiming damages for the possibility of losing its revenue from tourism due to climate change,—there is only a chance of this occurring, as it is a future occurrence the certainty of which cannot be ascertained—providing compensatory damages for such claims would require a high-level consideration of this contingency and its likely

15. *Chaplain v. Hicks*, [1911] A.C. 788 (Eng.).

16. *Allied Maples Grp. Ltd. v. Simmons & Simmons*, [1999] A.C. 1602 (Eng.).

17. For example, some of the critics of the science on slow-onset events and climate change attribute some of the problems to natural causes. See, e.g., Bob Ellis & Syun Akasogu, *Climate Change: Science Manipulated - Natural Causes of Global Warming are Much More Significant than Man-Made Changes*, CLIMATE REALISTS (June 3, 2009, 5:46 AM), <http://climaterrealists.com/index.php?id=3524>.

impacts. Traditionally, courts deal with such situations by factoring in a contingency allowance. This contingency is incorporated into the damages calculations by means of a percentage figure that represents the percentage chance of the event materializing. As held by Lord Diplock in *Mallett v. McMonagle*, the court must make an estimate as to the chances that the particular thing will or would have happened and reflect those chances, and whether they are more or less than even in the amount of damages which it awards.¹⁸ Thus, factors such as life expectancy, likelihood of earnings and revenue, the likelihood of a disease developing, or the possibility of future infrastructural collapse are accounted for in percentage terms estimated by the court. The question, however, is how effective this approach is in reality. As is often pointed out by experts testifying before the court as to the quantification of damages, in science and medicine an event either materializes or it does not. Accordingly, a plaintiff may develop a terminal disease and die, or a plaintiff may live ailment-free to a venerable age. Awarding damages on a percentage contingency basis seems to under-compensate the plaintiff in the former instance and unfairly reward the plaintiff for a loss it never incurred in the latter scenario. Without the gift of prophetic foresight, the CRC would have no way of knowing for a certainty that a future climatic event, which is the subject of a compensatory claim will or will not materialize. Typically, a court may address the case of uncertainty by providing a claimant with the most equitable measure of damages it is able to derive from the facts before it. This undoubtedly requires a level of skill and competence to be able to determine the most equitable compensation based on the circumstances surrounding each and every claim. This also goes to the question of whether a CRC composed of professional administrators would have the required level of skill to determine the equitable compensation for claims based on future events.

The CRC proposal must therefore be re-examined to determine whether *outsiders* to the workings of international law adjudication have the capacity and skills to fully implement such compensatory mechanisms. The question to ask is whether climate change administrators possess the requisite skill, training, competence, and experience to appraise technical claims for compensation due to climate change impacts, some of which touch on several international law treaties.

18. *Mallett v. McMonagle*, [1970] H.L. 166 (N.I.).

B. Floodgate Question

This question goes directly to the donor fatigue issue raised by Burkett. However, it looks at the issue from a slightly different angle. Here, we ask whether establishing a separate compensation and rehabilitation mechanism for AOSIS states will open a floodgate of similar claims from other non-AOSIS developing countries, particularly African states, which also have strong claims based on the negative social, environmental, and economic impacts of climate change in their regions. Many followers of the climate change negotiations will agree, for example, that Africa's climate change diplomacy is strongly underpinned by a notion of entitlement to compensation, funding, technology transfer, and adaptation assistance from industrialized countries that bear historical responsibilities for the cause of climate change. For example, during the negotiations of the Kyoto Protocol, African countries pushed for a "fair deal," which included the recognition of climate change as a problem created by industrialized countries, and which can and should only be resolved by the same industrialized countries, who have the capacity and resources to do so. Thus, the crux of the African proposal centered on common but differentiated responsibilities, technology transfer, financial assistance, special circumstance, and poverty recognition through flexible mechanisms. This perception remains the same today. As such, if a CRC for AOSIS states were to be approved to disburse monies from a global pool to rehabilitate individuals, communities, and countries affected by slow-onset events, there are real chances that African countries and other non-AOSIS states may push for such recognition through a separate fund or a CRC for African states. An argument may be made that the claims of AOSIS, though unique, are not more troubling than the fears, concerns, and realities in African countries, such as Sudan (threatened by drought and flood) or Nigeria's Niger Delta region, which is typically a coastal zone increasingly facing climate-induced threats and forced migration patterns. If an international climate change regime were to establish such additional funds, donors to these global pools may feel overwhelmed by the number of requests to provide funding support for climate change compensation and rehabilitation. In other words, this could further heighten the donor fatigue concern highlighted in current international climate change efforts. One way of navigating this concern is to suggest that the CRC proposed by Professor Burkett should not be limited to AOSIS states alone. This, however, raises the question of whether there is sufficient global funding to support such a global pool of compensation for all countries facing slow-onset events and climate threats, and whether the CRC would have the institutional capacity to accommodate claims from all climate change affected regions of the world.

C. Institutional Proliferation (Too Many Institutions)

Closely intertwined with the question of how to address compensation and rehabilitation claims from non-AOSIS states is the question of whether establishing the CRC would result in the duplication of roles currently played by a number of climate change institutions, and whether it would bring about institutional proliferation, which has been identified as a chief cause of the lack of systemic integration, coherence, and harmony in international law.¹⁹ Creating new institutions comes with high costs and administrative requirements—for example, the expansion of current institutions or the cost of staffing, training, and program funding. This is why the United Nations advocates an approach that builds on existing capacities and resources as opposed to the proliferation of new institutions.²⁰

This raises the question of why a new stand-alone CRC should be established, and whether, for example, the enforcement branch of the Kyoto Compliance Mechanism is not able to perform these functions. The Compliance Committee is made up of two branches: a facilitative branch and an enforcement branch.²¹ The facilitative branch provides advice and assistance to parties to promote their compliance and implementation of the Protocol. The enforcement branch is responsible for determining the consequences for parties not meeting their commitments.²² The enforcement branch is responsible for determining whether a party included in Annex I (an “Annex I Party”) is not in compliance with its emissions targets, the methodological and reporting requirements for

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19. For the debate on fragmentation of international law regimes and institutions, see Joel P. Trachtman, *Fragmentation, Coherence and Synergy in International Law*, 2 *TRANSNAT'L LEGAL THEORY* 505, 505-36 (2011). As Outi Korhonen puts it, it is a question on “how a synthetic order, which is both common enough to produce cohesion and pluralistic enough not to reduce the various cultural differences, can be achieved without succumbing to either hegemony or unmanageable fragmentation.” OUTI KORHONEN, *INTERNATIONAL LAW SITUATED: AN ANALYSIS OF THE LAWYER'S STANCE TOWARDS CULTURE, HISTORY AND COMMUNITY* 42 (2000). See also Dirk Pulkowski, *Narratives of Fragmentation International Law between Unity and Multiplicity*, *EUR. SOC'Y INT'L L.* 1 (2005) (presented at the ESIL Founding Conference in Florence), available at http://www.esil-sedi.eu/sites/default/files/Pulkowski_0.PDF; Rep. of the Int'l Law Comm'n, 58th Sess., May 1-June 9, July 3-Aug. 11, 2006, U.N. Doc. A/CN.4/L.682 (Apr. 13 2006).
20. *The Human Rights Based Approach to Development Cooperation Towards a Common Understanding Among UN Agencies*, UNITED NATIONS DEV. GROUP (2003), http://www.undg.org/archive_docs/6959-The_Human_Rights_Based_Approach_to_Development_Cooperation_Towards_a_Common_Understanding_among_UN.pdf.
21. *An Introduction to the Kyoto Protocol Compliance Mechanism*, U. N. FRAMEWORK CONVENTION ON CLIMATE CHANGE, http://unfccc.int/kyoto_protocol/compliance/items/3024.php (last visited Jan. 3, 2015).
22. Both branches are composed of 10 members, including one representative from each of the five official UN regions (Africa, Asia, Latin America and the Caribbean, Central and Eastern Europe, and Western Europe and Others), one from the small island developing States, and two each from Annex I and non-Annex I Parties. *Id.*

greenhouse gas inventories, and the eligibility requirements under the mechanism. It is simply the “watch dog” for non-compliance. Unlike the Aarhus Convention, the Kyoto Protocol does not currently have any formal compliance mechanism for private individuals and NGOs, whose interests or rights are violated under the UNFCCC.²³ Consequently, instead of establishing a CRC, a slight institutional adjustment could be made by establishing a third branch, the *Public Complaints Branch*, that can holistically address compensation and rehabilitation claims such as this from all regions. This arguably avoids the exorbitant costs in terms of structure and resources for creating a single CRC for AOSIS states. It also builds on existing capacities and resources.

Similarly, Professor Maxine's proposal places the fact-finding functions of the CRC in the hands of Commissioners, who she notes, will be saddled with investigating claims and complaints. An argument can also be made that the fact-finding functions can be placed within the mandate of the current Expert Review Teams (ERTs) of the UNFCCC, an international team of experts that review emission reduction inventories, reports, and methodologies submitted to Parties to ensure accuracy. Arguably, the mandate and constitution of ERTs may be expanded to serve as the fact-finding and expert review team of the UNFCCC, including for reviewing claims for compensation. Reformed ERTs could be at the forefront of examining claims from AOSIS communities, thereby keeping the entire UNFCCC structure more compact, coherent, and less fragmented.

D. Accountability in the Claim Process

Professor Burkett's proposal that under the CRC framework, governments of small island states will file consolidated claims on their citizens' behalf before the CRC raises complex accountability concerns. This is the question whether national governments can be trusted to ensure transparency and accountability with respect to collating and presenting climate change claims. Generally, accountability has been described as the obligation to demonstrate that a project has been conducted in accordance with agreed rules and standards and to report fairly and accurately on performance results vis-à-vis mandated roles or plans.²⁴ Here, we define accountability in terms of openness and fairness in the process of accessing international compensation bodies for damages and reparations

23. See Charlotte Streck & Jolene Lin, *Making Markets Work: A Review of CDM Performance and the Need for Reform*, 19 EUR. J. INT'L L. 409, 409-42 (2008).

24. ORG. FOR ECON. CO-OPERATION & DEV. [OECD], PUBLIC SECTOR TRANSPARENCY AND ACCOUNTABILITY: MAKING IT HAPPEN 7 (2002).

resulting from climate-induced slow-onset events.²⁵ It encompasses the structural conditions, the processes, and the indicators and outcomes, through which the CRC reviews and monitors the practical impacts of climate change on the public. As such, an accountable organization would provide an adequate structure to ensure a transparent review, measurement, and monitoring of the process leading to the filing of claims before it. The UN General Assembly, for instance, has adopted Resolution 60/260 on Accountability.²⁶ This resolution emphasized the importance of strengthened accountability within the United Nations and the need for all UN agencies to ensure greater accountability within their spheres of operation for the effective and efficient implementation of legislative mandates and the best use of human and financial resources.

Many international treaties have increasingly taken the approach of establishing individual complaint procedures that allow private citizens to bring an action at an international forum for claims. Other international organizations have also established the Office of the Compliance Advisor or an Ombudsperson to receive complaints and comments directly from the public.²⁷ For example, the World Bank Inspection Panel (WBIP or the “Panel”) receives direct claims from private individuals.

One critique of the current Kyoto Compliance Mechanism and the Clean Development Mechanism (CDM) Executive Board (EB) example cited by Burkett is that private individuals or members of the public do not have access to request a review or submit a question of implementation under the current Compliance Rules.²⁸ The CDM EB is undergoing reforms to address a plenitude of accountability and transparency concerns; for example, under the CDM, only national authorities may request a project review—a situation that has resulted in allegations that many national governments only present project review requests that they consider compatible with national interests. This is quite restrictive compared to Aarhus, under which a complaint before the Compliance

25. See MICHAEL HAMMER ET AL., ONE WORLD TRUST, PATHWAYS TO ACCOUNTABILITY II: THE 2011 REVISED GLOBAL ACCOUNTABILITY FRAMEWORK (2011), available at http://oneworldtrust.org/publications/doc_download/470-pathways-to-accountability-ii.

26. Investing in the United Nations: For a Stronger Organization Worldwide, G.A. Res. 60/260, at art. 1, U.N. Doc. A/RES/60/260 (May 8, 2006).

27. For example, the International Finance Corporation’s Compliance Advisor Ombudsman (CAO) is an independent recourse mechanism for projects supported by the International Finance Corporation (IFC) and Multilateral Investment Guarantee Agency (MIGA), the private sector lending arms of the World Bank Group. The CAO was established in 1999 to address the concerns of individuals or communities affected by IFC/MIGA-funded projects, to enhance the social and environmental outcomes of IFC/MIGA projects, and to foster greater public accountability of IFC and MIGA. See COMPLIANCE ADVISOR OMBUDSMAN, <http://www.cao-ombudsman.org> (last visited Apr. 23, 2013).

28. *Id.*

Review Mechanism can be triggered by one or more members of the public concerning any Party's compliance with the Convention.²⁹ As of August 2013, the Convention's Compliance Committee has received over 40 communications from the public—mostly from non-governmental organizations.

The accountability of a CRC could be measured in terms of its structural conditions, processes, and outcomes.³⁰ *Structural conditions* measure the availability of relevant legal and institutional frameworks that make it possible to attain the goals of the institution, in this case the CRC. It would include the availability of rules and safeguards that prevent governmental secrecy and unfairness, as well as the establishment of relevant institutions to monitor and enforce such rules. At the international level, this speaks to the need to ensure that reparations and claims are not influenced by governmental interests or pressure. *Process* measures how established regimes and structures are functioning in practice, whether they merely exist on paper or actually possess the tools and capacity to ensure goal attainment. As such, it is not enough to establish a CRC—its processes of admitting claims must be pragmatically designed to ensure that it achieves its ultimate aims and goals. While establishing such review structures, part of the task is to ensure their accessibility and independence. Filing claims through intermediaries and agents, such as governments and national authorities, would reduce accessibility and independence. This aside, such review teams must be equipped with the resources to perform spot assessments, fact findings, and investigations, such that they could gather first-hand information on the true impacts of climate change on the public. Despite debates on its perceived weaknesses, the Panel provides a good example in this regard.³¹ WBIP adopts a

29. [C]ommunications may be brought before the Committee by one or more members of the public concerning any Party's compliance with the Convention, unless that Party has notified the Depositary in writing by the end of the applicable period that it is unable to accept, for a period of not more than four years, the consideration of such communications by the Committee.

Rep. of the 1st Mtg. of the Parties to the Convention on Access to Info., Public Participation in Decision-Making and Access to Justice in Env'tl Matters, ¶¶ 18-24, U.N. Doc. ECE/MP.PP/2/Add.8 (Apr. 2, 2004).

30. The UN Special Rapporteur on the right to health, Paul Hunt, has provided a framework, which though not legally binding, could serve as a normative guide on how institutional accountability can be measured. He argues that accountability should be measured in terms of structural conditions, processes, and outcomes. U.N. Comm'n on Hum. Rts., *Interim Report of the Special Rapporteur of the Commission on Human Rights on the Right of Everyone to Enjoy the Highest Attainable Standard of Physical and Mental Health, Mr Paul Hunt*, ¶¶ 14-29, U.N. Doc. A/58/427 (Oct. 10, 2003).

31. See Richard E. Bissell, *Recent Practice of the Inspection Panel of the World Bank*, 91 AM. J. INT'L L. 741 (1997); David D. Bradlow, *The World Bank, the IMF, and Human Rights*, 6 TRANSNAT'L L. & CONTEMP. PROBS. 47, 47-90 (1996); Dana L. Clark, *The Rise and Fall of Accountability*, 6

procedure that allows any community or group of individuals affected by a project, including NGOs, to approach it for investigations. The process of investigation is triggered by the submission of a request for inspection. According to the WBIP Operating Procedures, two or more affected people may submit a request. Similarly, a local organization or other duly appointed representative on behalf of the affected people, a foreign organization in exceptional circumstances if no local representative is available, or an executive director of the World Bank may submit a review request. A request may be submitted in any language and in any format, including by a mere letter, except that it must be in writing, dated and signed by the requesters.³² The Panel also respects the confidentiality of requesters who ask that their names not be published. According to the Panel's procedures, a request would be registered for further processing unless the Chairperson determines that it is "without doubt manifestly outside the Panel's mandate."³³ The Panel also maintains a publicly accessible register of registered requests that is available on its website.³⁴ The process established by the WBIP allows members of the public to directly file review requests, thereby facilitating accessibility and independence.

Outcome, the last element, tests whether the structural conditions and processes are actually bringing about results in providing compensation and reparations for the victims of climate-induced stress. While the outcome may tell us whether human rights are enforced, structural conditions and processes tell us how they are enforced.

When viewed through the lens of structural conditions, processes, and outcome, the current frame proposed by Burkett calls for a rethinking if transparency and accountability are to be guaranteed in the process of seeking compensation and rehabilitation before the CRC. There is a need to ensure the accessibility and independence of the CRC by making it open to private individuals and non-governmental organizations that have suffered direct impacts of slow-onset events without having to go through national governments.

WATERSHED no. 3, 52, 52-55 (2001); Richard E. Bissell, *Institutional and Procedural Aspects of the Inspection Panel*, in *THE INSPECTION PANEL OF THE WORLD BANK: A DIFFERENT COMPLAINTS PROCEDURE* 107 (Gudmundur Alfredsson & Rolf Ring eds., 2001).

32. *Operating Procedure – English*, THE INSPECTION PANEL, ¶¶ 6-15, <http://web.worldbank.org/WBSITE/EXTERNAL/EXTINSPECTIONPANEL/0,,contentMDK:20175161~menuPK:64129254~pagePK:64129751~piPK:64128378~theSitePK:380794,00.html#Subject> (last visited Nov. 30, 2014).

33. *Id.* at ¶ 22.

34. *See* THE INSPECTION PANEL, <http://ewebapps.worldbank.org/apps/ip/Pages/Home.aspx> (last visited Jan. 3, 2015).

III. Conclusion

As Professor Burkett rightly reckons, the practical questions and hurdles that a CRC may face along the way are enormous. This paper has identified and discussed four more of these. The hurdles, however, do not call for intellectual surrender. The proposals for a CRC represent an ingenious approach aimed at tackling the impacts of slow-onset events in AOSIS states through a framework that indemnifies, compensates, and rehabilitates the injured person for the loss suffered. Through this framework, financial assistance will be provided for the most vulnerable victims of slow-onset events to reclaim their futures. Every framework will generally attract its own measure of pessimism and optimism. As such, considering the strategic importance of this CRC framework to address the question of how sustainable financial instruments may be designed to appropriately address loss and damage associated with slow-onset events and may be provided for AOSIS states, a forward-looking approach is needed to continue to fine-tune the CRC framework to ensure practical questions and paradoxes are significantly addressed.

There is also a need to continue to raise awareness at all levels about why this proposal is important to the future of AOSIS states and to global actions on climate change. If the process of international climate change negotiations is anything to go by, one key way of ensuring international acceptance of a proposal is through sustained awareness at the national level of the need for action. Considering the nature of problems generated by slow-onset events, particularly loss of lives, loss of subsistence, and the dislocation of people from ancestral lands and homes, it is important to raise awareness on why reforms to extant approval processes are not only important, but required. International diplomacy has been largely influenced by the ability of NGOs and environmental interest groups to raise awareness and to put pressure on national governments to effect change or reform at the international level.³⁵ As

35. Although NGOs are formally only observers at a number of United Nations conferences, including climate change conferences (without voting rights and with restricted access to the corridors), plenary sessions, and some contact groups, nonetheless, many scholars agree that NGOs still make a great difference in global environmental politics. NGOs and interest groups have played active roles in putting pressure on international gatekeepers to support environmental negotiation processes. One frequently cited example is how Environmental NGOs (ENGOs) contributed to drafting the UNFCCC at the Rio Earth Summit in 1992 by participating in government delegations, lobbying, building public pressure, and contributing to the content and structure of the negotiation text. The influence and role of NGOs in international lawmaking therefore cannot be sidelined. NGOs such as Green Peace International, Amnesty International, Down to Earth Group, Earth Right, and Earth Justice can play extensive roles in creating international awareness of the need to address the human rights' impacts of climate change on small island and low-lying coastal countries. For

Sterk rightly notes, international politics do not happen in a vacuum—the positions countries take internationally are determined mainly by their domestic political situations.³⁶ As such, progress in reforming current international climate negotiations to include compensations and rehabilitations would be enhanced if pro-climate advocacy coalitions can be brought together in key countries and across borders to demand change. The fear of possible backlash from the press or environmental NGOs could elevate the need for negotiators to push for reforms. With an intensive awareness driven by NGOs and interest groups, particularly NGOs in developed countries, there could be increased pressure on negotiators, policy makers, and international gatekeepers to support amendments aimed at addressing the impacts of climate change in AOSIS states. Such awareness drives have enormous potential to culminate in the eventual reform and amendment of key provisions of the UNFCCC to recognize the unique vulnerabilities of AOSIS states. They might also succeed

example, Green Peace International and Down to Earth Group have already launched a series of projects that highlight these concerns. If stakeholders or government in an AOSIS country—say, Cape Verde—can develop a detailed amendment proposal based on some of the ideas discussed in this paper and seek support from these NGOs on the importance of compensating and rehabilitating victims of climate change in small island and low-lying coastal countries, a coordinated awareness drive would be generated that could result in widespread call for countries to support the establishment of a compensation and rehabilitation mechanism as part of the global regime on climate. *See generally* BAS ARTS, *THE POLITICAL INFLUENCE OF GLOBAL NGOS: CASE STUDIES ON THE CLIMATE AND BIODIVERSITY CONVENTIONS* (Annemarie Weitsel ed., 1998); SEBASTIAN OBERTHUR ET AL., *PARTICIPATION OF NON-GOVERNMENTAL ORGANISATIONS IN INTERNATIONAL ENVIRONMENTAL GOVERNANCE: LEGAL BASIS AND PRACTICAL EXPERIENCE* (2002); Steinar Andresen & Lars H. Gulbrandsen, *The Role of Green NGOs in Promoting Climate Compliance*, in *IMPLEMENTING THE CLIMATE REGIME: INTERNATIONAL COMPLIANCE* 169, 169 (Jon Hovi, Olav Stokke & Geir Ulfstein eds., 2005); Michele Betsill, *Environmental NGOs and the Kyoto Protocol Negotiations: 1995 to 1997*, in *NGO DIPLOMACY: THE INFLUENCE OF NONGOVERNMENTAL ORGANIZATIONS IN INTERNATIONAL ENVIRONMENTAL NEGOTIATIONS* 43, 43-66 (Michele Betsill & Elisabeth Corell eds., 2008); Michele Betsill & Elisabeth Corell, *A Comparative Look at NGO Influence in International Environmental Negotiations: Desertification and Climate Change*, 1 *GLOBAL ENVTL. POL.* 86 (2001); Michele Betsill & Elisabeth Corell, *NGO Influence in International Environmental Negotiations: A Framework for Analysis*, 1 *GLOBAL ENVTL. POL.* 65 (2001); Chad Carpenter, *Businesses, Green Groups and the Media: The Role of Non-governmental Organizations in the Climate Change Debate*, 77 *INTL. AFF.* 313, 313-28 (2001); Kal Raustiala, *Nonstate Actors in the Global Climate Regime*, in *INT'L REL. & GLOBAL CLIMATE CHANGE REGIME* 95 (Urs Luterbacher & Detlef Sprinz eds., 2001); Katharina Rietig, *Public Pressure versus Lobbying – How do Environmental NGOs Matter Most in Climate Negotiations?* (Ctr. for Climate Change Economics and Policy, Working Paper No. 79, 2011).

36. See Wolfgang Sterk, *House Cleaning in Doha: UN Climate Summit Delivers Second Life for Kyoto but no Deal to Revive Carbon Market*, 1 *CARBON MECHANISMS REV.* 7 (Jan.–Mar. 2013). The author argues that international negotiations can rarely make decisions that have not been previously prepared nationally, and that in the current situation, most key countries have no appetite to undergo fundamental economic and ecologic transformations under current climate change regimes. *Id.*

in creating more information and re-wakening on the need for more funding support for AOSIS states.

