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SYMPOSIUM ON GLOBAL PLASTIC POLLUTION

LIABILITY AND COMPENSATION FOR MARINE PLASTIC POLLUTION: CONCEPTUAL ISSUES AND POSSIBLE WAYS FORWARD

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The UN General Assembly and the UN Environment Assembly (UNEA) have expressed concerns about the pollution of the sea by plastics, which adversely impacts ecosystems, some economic activities (e.g., tourism and fishing), and possibly public health (e.g., consumption of contaminated fish).[1] In December 2017, the UNEA decided to establish the Ad Hoc Open-Ended Expert Group on Marine Litter and Microplastics to examine ways to combat marine plastic pollution.[2] The group met three times in 2018 and 2019, and at least two more meetings are planned. Among potential responses to the issue of marine pollution, the group briefly considered—but eventually dismissed—the possibility of creating a liability or compensation regime. This essay evaluates the prospects for such a regime. As the essay will show, *compensation* faces significant conceptual problems, not the least of which is the absence of an obvious recipient. However, some form of *liability* could be imposed on corporations that produce plastic, or on states that fail to regulate them. Such a liability regime, even without financial compensation, could foster the prevention of further marine plastic pollution.

The Idea of Liability and Compensation for Marine Plastic Pollution

The initial meeting of the UNEA's expert group was informed by a 2018 discussion paper in which the UNEA Secretariat identified different ways marine plastic pollution could be addressed. While noting the possibility of maintaining the status quo or developing existing frameworks incrementally, the discussion paper also explored the possible contents of "a new global architecture with a multi-layered governance approach."[3] The latter option could include, the Secretariat suggested, "mechanisms for liability and compensation, funding and information sharing."[4] These mechanisms could involve "new taxes and costs" for the plastic industry and its consumers

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[1] *See* The Future We Want, G.A. Res. 66/288 para. 163 (July 27, 2012); UN Env't Assembly Res. 1/6, UN Doc. UNEP/EA.4/Res.6, Preamble (June 27, 2014).

[2] UN Env't Assembly Res. 3/7, UN Doc. UNEP/EA.3/Res.7 para. 10 (Dec. 6, 2017).

[3] UN Env't Assembly, Discussion Paper on Environmental, Social and Economic Costs and Benefits of Different Response Options, UN Doc. UNEP/AHEG/2018/1/4 para. 5 (May 8, 2018).

[4] *Id.* at 10.

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or establish "liability and compensation schemes for those that are most affected."[5] A subsequent background paper by the Secretariat noted the existing "limited use of legal instruments or incentives" against marine plastic pollution and the absence of "any form of global liability and compensation mechanism."[6]

However, despite the Secretariat's suggestions, the UNEA's expert group showed little interest in a liability regime. At their first meeting in 2018, the experts concluded that such a regime was "not a priority at this stage."[7] In their second and third meetings, neither compensation nor liability appear to have been discussed. Yet, the need for financial support attracted some attention. In its second meeting, in 2018, the expert group noted the need to "encourage new, and enhance existing, forms of financing and technical support to developing countries and small island developing States."[8] In response, the UNEA requested that the group "identify . . . financial resources or mechanisms for supporting countries in addressing" marine plastic pollution.[9] At its third meeting, in 2019, the group decided that it should further "examine new opportunities through innovative financing, including public-private partnerships, blended finance, and other approaches," acknowledging that "some participants noted approaches at the national and regional levels, such as extended producer responsibility and the 'polluter pays' principle."[10]

Conceptual Issues in Liability and Compensation for Marine Plastic Pollution

The expert group's unsettled views to date reflect serious conceptual difficulties in the design of an appropriate liability and compensation regime in relation to plastic pollution. In particular, there are vexing questions about who would be liable, on what ground, and for whose benefit.

Marine plastic pollution arises from many land-based and ocean-based sources.[11] These sources are scattered across the jurisdictions of many states, although a few Asian developing states represent the largest share.[12] While liability could be assumed by states, it could also be imposed on corporations that produce plastics, on those who provide it to consumers, on consumers themselves, or even on those who dispose of plastic waste in the environment. Each approach would have different justice implications in a globalized economy where plastic may be produced in one country, used in another, and discharged in the environment in a third.

The way liability is imposed on states, corporations, or consumers would imply a vision of *what*, precisely, should be blamed: the production of plastics per se, its wasteful use, or its discharge into the environment. Various equity arguments favor different approaches—a deontological rule against the use of plastic in products would suggest

[5] *Id.* at 8, 10.

[6] UN Env't Assembly, Consolidated Background Paper on the Discussion Papers Presented at the First Meeting of the Ad Hoc Open-Ended Expert Group on Marine Litter and Microplastics, Held in Nairobi from 29 to 31 May 2018, UN Doc. UNEP/AHEG/2018/2/2, Annex, at 15 (Nov. 8, 2018).

[7] UN Env't Assembly, Report of the First Meeting of the Ad Hoc Open-Ended Expert Group on Marine Litter and Microplastics, UN Doc. UNEP/AHEG/2018/1/6, para. 88 (June 19, 2018).

[8] UN Env't Assembly, Report of the Second Meeting of the Ad Hoc Open-Ended Expert Group on Marine Litter and Microplastics, UN Doc. UNEP/AHEG/2018/2/5, Annex, at 7, para. 11(c) (Feb. 21, 2019).

[9] UN Env't Assembly Res. 4/6, UN Doc. UNEP/EA.4/Res. 6, para. 7(b) (Mar. 15, 2019).

[10] UN Env't Assembly, Report of the Third Meeting of the Ad Hoc Open-Ended Expert Group on Marine Litter and Microplastics, UN Doc. UNEP/AHEG/2019/3/6, Annex, at 20, para. 6 & n.1 (Dec. 23, 2019).

[11] *See generally* W.C. Li et al., *Plastic Waste in the Marine Environment: A Review of Sources, Occurrence and Effects*, 566-67 Sci. Total Env't 333 (2016).

[12] *See generally* John H. Tibbetts, *Managing Marine Plastic Pollution: Policy Initiatives to Address Wayward Waste*, 123 Envtl. Health Perspectives A90 (2015); Laurent C.M. Lebreton et al., *River Plastic Emissions to the World's Oceans*, 8 Nature Comm. 15611 (2017).

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that producers bear at least some of the blame, whereas a utilitarian approach would, rather, condemn wasteful use. The principle of "common but differentiated responsibilities and respective capabilities,"[13] which states have recognized in relation to global environmental degradation, would be insufficient for assigning responsibility if states do not agree on the grounds for differentiation, as protracted negotiations on climate change mitigation have demonstrated.

Overall, it is also far from obvious who should receive compensation for marine plastic pollution. The most evident impact of marine plastic pollution is ecological.[14] Often, it is only through ecological impacts that economic sectors and public health are adversely impacted.[15] By contrast to climate change, which has a disproportionate effect on some states and populations (for instance, low-lying countries and regions affected by sea-level rise), the impact of marine plastic pollution appears far more diffuse, affecting coastal states but also landlocked ones where people rely upon the ocean as a food source. Marine plastic pollution may not easily amount to a direct or proximate "injury" to a state or its nationals, as the harm it causes is global and diffuse, even though some states may be specially affected.

Insights from the Law of State Responsibility

Marine plastic pollution may result from breaches of international law obligations attributable to states. The UN Convention on the Law of the Sea and other treaties require states to prevent, reduce, and control the discharge of pollutants into the marine environment,[16] including plastics.[17] This reflects a broader, customary obligation for states "to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."[18] States must also adopt "appropriate rules and measures" and exercise "a certain level of vigilance in their enforcement."[19] This obligation applies whether the environmental harm takes place within the territorial sea or on the high seas.[20]

As noted above, no state is likely to be individually injured as a result of marine plastic pollution. But, at least in theory, this should not prevent the application of the law of state responsibility. The existence of an injury to another state is not a necessary condition for the existence of a state's responsibility.[21] The obligation to protect

[13] UN Conference on Env't & Dev., Rio de Janeiro, Braz., June 3-14, 1992, Rio Declaration on Environment and Development Principle 7, UN Doc. A/CONF.151/26/Rev.1(Vol.1), Annex I (Aug. 12, 1992) [hereinafter Rio Declaration on Environment and Development].

[14] Li et al., *supra* note 11, at 338-44.

[15] Nicola J. Beaumont et al., *Global Ecological, Social and Economic Impacts of Marine Plastic*, 142 Marine Pollution Bull. 189 (May 2019).

[16] *See* UN Convention on the Law of the Sea arts. 207, 210, 211, Dec. 10, 1982, 1933 UNTS 397; Convention for the Protection of the Marine Environment of the North-East Atlantic art. 2(1)(a), Sept. 22, 1992, 2354 UNTS 67.

[17] *See, e.g.*, Protocol for the Protection of the Mediterranean Sea Against Pollution Resulting from Exploration and Exploitation of the Continental Shelf and the Seabed and its Subsoil art. 12(1), Oct. 14. 1994, 2742 UNTS 77.

[18] Rio Declaration on Environment and Development, *supra* note 13, Principle 2. *See, e.g.*, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ Rep. 226, 242 para. 29 (July 8).

[19] Pulp Mills on the River Uruguay (Arg. v. Uru.), 2010 ICJ Rep. 14, 69 para. 197 (Apr. 20).

[20] *See* Responsibilities and Obligations of States with Respect to Activities in the Area, Case No. 17, Advisory Opinion of Feb. 1, 2011, 2011 ITLOS Rep. 10, 41, para. 110; South China Sea (Phil. v. China), PCA Case No. 2013-19, Award, para. 940 (UNCLOS Annex VII Arb. Trib. July 12, 2016).

[21] Draft Articles on the Responsibility of States for Internationally Wrongful Acts, *in* Report of the International Law Commission on the Work of its Fifty-third Session, UN G.A.O.R., 56th Sess., Supp. No. 10, 31, at 34, art. 2, UN Doc. A/56/10 (2001).

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the marine environment beyond the limits of national jurisdiction has been recognized as an *erga omnes* obligation,[22] whose performance can be claimed by any state,[23] in particular those specially affected.[24]

By contrast, it is unclear whether a state that is not injured or specially affected would be entitled to claim reparation—or what form this reparation would take. The International Law Commission's Articles on State Responsibility suggest that a state may claim "performance of the obligation of reparation . . . in the interest . . . of the beneficiaries of the obligation breached."[25] But who are the beneficiaries of the obligation to protect the global commons? And what would reparation entail, when restitution would be technically challenging and perhaps even "materially impossible"?[26] The Seabed Dispute Chamber of the International Tribunal on the Law of the Sea hinted at a possible answer when holding that any state could claim "compensation" for the failure of another state to preserve the environment of the high seas, but it did not clarify who would be granted compensation or on what basis.[27]

Insights from Other Liability Regimes

States have long recognized the need to develop national and international laws regarding liability and compensation for environmental harm,[28] in particular to the marine environment.[29] By contrast to state responsibility, liability requires compensation on the basis of risk rather than fault.[30] International liability regimes frequently direct states to impose strict liability on corporations within their jurisdiction, although states may also sometimes be liable themselves. These regimes often involve the creation of compensation funds financed by corporations and states in situations where a person's loss cannot readily be attributed to another person's conduct but rather to the conduct of a hazardous activity by an entire industry.[31]

Liability regimes "serve a variety of purposes."[32] Some of the most prominent international liability regimes seek to ensure appropriate compensation by pooling risks, when an activity (e.g., transportation of oil by sea or generation of nuclear energy) creates a small risk of a large disaster for which a single operator would be unable to provide appropriate compensation. More generally, liability regimes are concerned with the internalization of negative externalities in application of the so-called "polluter-pays principle": when an activity affects society at large, it

[22] Responsibilities and Obligations of States with Respect to Activities in the Area, *supra* note 20, at 59, para. 180.

[23] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gam. v. Myan.), Order of Jan. 23, 2020, at 13, para. 41.

[24] *See id.*; Draft Articles on the Responsibility of States for Internationally Wrongful Acts, *supra* note 21, at 126, art. 48(2)(a).

[25] *Id.*, art. 48(2)(b).

[26] *Id.*, art. 35(a).

[27] Responsibilities and Obligations of States with Respect to Activities in the Area, *supra* note 20, at 59, para. 180.

[28] UN Conference on the Human Env't, Stockholm, Sweden, June 5-16, 1972, Stockholm Declaration on the Human Environment, Principle 22, UN Doc. A/CONF.48/14 (1972); Rio Declaration on Environment and Development, *supra* note 13, Principle 13; Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities, *in* Report of the International Law Commission on the Work of Its Fifty-Eighth Session, Principle 7, UN Doc. A/61/10, 59, at 89 (2006).

[29] UN Convention on the Law of the Sea, *supra* note 16, art. 235.

[30] Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities, *supra* note 28, Principle 4(2).

[31] *See, e.g.*, International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, December 18, 1971, 1110 UNTS 1-17146; Vienna Convention on Civil Liability for Nuclear Damage, May 21, 1963, 1063 UNTS I-16197.

[32] Philippe Sands et al., Principles of International Environmental Law 736 (4th ed. 2016).

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is only fair for this "cost" to be assumed by the one benefitting from the activity. As such, liability may involve not only compensation (i.e., financial indemnification), but also a range of other forms of legal redress, such as measures of reinstatement.[33] Some of these alternative forms of redress could be more relevant than compensation in situations, like marine plastic pollution, where the consequences of environmental harm are too diffuse for compensation.

An interesting analogy can be drawn to the Warsaw International Mechanism (WIM), which was established under the UN Framework Convention on Climate Change and the Paris Agreement, and which seeks to avert, minimize, and address loss and damage associated with climate change.[34] The WIM, as endorsed in the Paris Agreement, "does not involve or provide a basis for any liability or compensation."[35] Yet the mechanism aims at enhancing knowledge and coordination, as well as "action and support, including finance, technology and capacity-building, to address loss and damage associated with the adverse effects of climate change" (even if it still lacks adequate resources).[36] Likewise, an agreement on marine plastic pollution could require the states under whose jurisdiction most plastic is produced, used, or released in the environment to cooperate on efforts to alleviate marine plastic pollution, including through research and support, in particular to the benefit of those states most affected.

A Way Forward

A liability regime focused on the provision of compensation would not be an appropriate solution to marine plastic pollution because it is far from clear who should receive compensation. Yet, alternative forms of redress are possible and should be contemplated in ongoing negotiations over the regulation of marine plastic pollution. The WIM provides an interesting analogy from which responses to marine plastic pollution could draw, but an international liability regime on plastics would also benefit from the creation of a new international fund. The regime should internalize the negative externality of plastic pollution by imposing a cost on polluters or users, or possibly on states that fail to prevent the release of plastics into the environment. Differences in regulatory and enforcement capacity between developed and developing states could be taken into account by allowing delayed implementation in developing states.[37] The proceeds of this regime could be dedicated to programs aimed not at compensating anyone, but rather at mitigating marine plastic pollution, whether by supporting research and development for technological and governance solutions to marine plastic pollution, by assisting some of the most resource-constrained developing countries in reducing their discharge of plastic into the ocean, or by removing floating plastics from the oceans.

Finally, whether or not an international liability regime is established, the recent emergence of climate litigation could inspire "plastic litigation," at least at the domestic level. For example, a California environmental group recently filed a lawsuit in California state court, claiming that eleven food, beverage, and consumer goods companies caused a public nuisance by producing plastic containers and misleading consumers about their recyclabil-

[33] *See* Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, June 21, 1993, E.T.S. 159, 32 I.L.M. 1228 (not yet entered into force).

[34] *See* Paris Agreement art. 8, Dec. 12, 2015, 55 I.L.M. 743 (2016); UN Framework Convention on Climate Change, Dec. 2/CP.19, Nov. 23, 2013, UN Doc. FCCC/CP/2013/10/Add.1, at 6, para. 1 (2014).

[35] UN Framework Convention on Climate Change, Dec. 1/CP.21, Dec. 12, 2015, UN Doc. FCCC/CP/2015/10/Add.1, at 2, para. 51 (2016).

[36] UN Framework Convention on Climate Change, *supra* note 34, at para. 5(c).

[37] *Cf.* Montreal Protocol on Substances that Deplete the Ozone Layer art. 5, Sept. 16, 1987, 1522 UNTS 3.

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ity.[38] The case—reminiscent of class actions against large oil, tobacco, and drug companies—was presented as "the first in a tide of lawsuits by other organizations, as well as cities and states, to hold Big Plastic responsible for global plastic pollution, and force major actors to rethink their business practices."[39] Rather than leaving this to domestic courts, we believe that negotiators should devise an effective international mechanism to hold those responsible for marine plastic pollution to account.

[38] *See* James Rainey, *Group Sues to Hold Coca-Cola, Pepsi and Others Liable for Plastics Fouling California Waters*, L.A. TIMES (Feb. 26, 2020); Erin McCormick, *Coke and Pepsi Sued for Creating a Plastic Pollution 'Nuisance'* ,THE GUARDIAN (Feb. 27, 2020).

[39] Earth Island Inst., *Earth Island Sues 10 Companies, Including Coke, Pepsi, and Nestle, over Plastic Use*, WATER ONLINE (Feb. 26, 2020).

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