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Loss and Damage in the UN Climate Regime: Prospects for Paris

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Abstract

This paper provides an overview of the birth of the Warsaw Mechanism on Loss and Damage under the UNFCCC. Specifically, the gradual emergence of the issue in the climate negotiations is tracked, leading to the creation of the Warsaw Loss and Damage Mechanism in 2013. The Chapter considers the current state of the issue in the regime, and the prospects for loss and damage in the post 2020 climate regime.

Keywords: loss and damage, non-economic loss, slow-onset climate change, extreme events

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1. Introduction

Loss and damage in the context of climate change is generally understood to refer to the results of climate change impacts that are not avoided either through mitigation or adaptation. The issue of responsibility and liability for loss and damage is gradually gaining prominence in the UN climate regime as it is becoming clear that global

mitigation and adaptation efforts are unlikely to be adequate to prevent significant harm to human and natural systems.

In short, the UN climate regime is in the midst of a transition toward the recognition of loss and damage as a pillar of the UN climate regime along with mitigation and adaptation. This follows an earlier transition from a focus on mitigation to the gradual acceptance of adaptation as equally important. The raised profile of adaptation was enabled in part by the recognition that mitigation efforts would likely be inadequate to prevent harmful effects of human induced climate change. The emergence of loss and damage has similarly been enabled by the recognition that mitigation and adaptation efforts will likely be inadequate in avoiding serious loss and damage, most notably perhaps in vulnerable developing countries that have contributed little to the accumulation of greenhouse gases in the atmosphere.

Loss and damage has only recently been accepted as a formal agenda item in the UN climate negotiations, and its place in the regime is still tenuous. It has, however, been an issue in the background of the negotiations since the development of the UNFCCC. Some of the general principles in the UNFCCC, such as the reference in Article 3 to the need for developed countries to take the lead in combatting the adverse effects of climate change and the recognition of the vulnerability of some developing countries, are sufficiently broad to encompass some responsibility to deal with loss and damage. Commitments in Article 4 with respect to funding, insurance, and technology to help with climate change impacts are similarly broad to include loss and damage.¹ However, the focus of the formal negotiations did not turn to these issues until around 2008, when three technical papers were commissioned.²

¹ See Detlef F. Sprinz and Setffen Von Bunau, 'The Compensation Fund for Climate Impacts' (2013) 5 *Weather, Climate and Society*, 210.

² UNFCCC 'Physical and socio-economic trends in climate-related risks and extreme events, and their implications for sustainable development. Technical Paper.' (20 November 2008) FCCC/TP/2008/3; UNFCCC 'Integrating practices, tools and systems for climate risk assessment and management and disaster risk reduction strategies into national policies and programmes. Technical Paper.' (21 November

Progress since 2008 has been slow. Full recognition of the issue is still a work in progress. As a result of decisions taken by the Conference of the Parties in 2013 in Warsaw, a loss and damage mechanism has now been established, and has begun to function on an interim basis while the nominations process for the formal appointment of the Executive Committee is concluded. While the mechanism is becoming operational, its ultimate purpose and scope is far from clear or agreed to. After years of pressure from a growing number of developing countries, the question of what is to be done about the climate impacts that are not avoided through mitigation and adaptation efforts is, however, squarely before negotiators.³ This does not necessarily mean that the issues of responsibility and liability for loss and damage will be resolved within the UN climate regime, but it does mean that Parties have agreed to start discussing what should be done about impacts that are not avoided through mitigation and adaptation. This issue of loss and damage, of course, has grown in significance as it has become increasingly likely that global mitigation and that adaptation efforts will not be sufficient to prevent serious loss and damage in many parts of the world.

2. What is Loss and Damage?

The general concept of loss and damage is reasonably straightforward. It refers to the impact of human induced climate change that is not avoided through mitigation and adaptation. Damage is generally recognized to focus on harm that can be quantified in monetary terms, whereas loss is broader to include non-monetary harm. While the general concern is well understood, it is not currently defined in within the UN climate regime, and it does raise a number of technical challenges, such as:

- How to relate loss and damage to efforts and expectations on mitigation and

2008) FCCC/TP/2008/4; UNFCCC ‘Mechanisms to manage financial risks from direct impacts of climate change in developing countries. Technical Paper.’ (21 November 2008) FCCC/TP/2008/9.

³ UNFCCC ‘Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts’ Dec -/CP.20 (2014)

<http://unfccc.int/files/meetings/lima_dec_2014/decisions/application/pdf/auv_cop20_lossanddamage.pdf> accessed 27 January 2015.

adaptation.

- How to fairly address loss and damage from both extreme weather events and slow onset climate change.
- With respect to loss and damage from extreme weather events, how to separate loss and damage induced by human influence on the climate system from other loss and damage and deal with the uncertainty associated with any attribution.
- With respect to loss and damage from slow onset impacts such as sea level rise and changes in temperature or annual precipitation, how to track and quantify impacts such as salinization, coastal erosion, food production and loss of ecosystem and species resilience and diversity resulting from human induced climate change.
- How to deal with the complexity of natural and human systems affected by climate change.
- How to ensure adequate quantification of loss and damage, including the inclusion of indirect as well as direct losses, or tangible and intangible losses.⁴
- How to develop appropriate methods for assessing the risk of loss and damage.
- How to deal with both loss and damage that has occurred and that is predicted to occur in the future.
- How to identify, track and address non-economic loss and risk, including the major types that need to be considered (impacts on individuals, societies, and the natural environment), and whether and how they can be quantified.⁵

In short, the scope and appropriate response to loss and damage is far from being fully developed, even from a technical perspective. Key questions include how to separate loss and damage attributable to human induced climate change from other loss and damage,

⁴ This issue is explored in: UNFCCC ‘Current knowledge on relevant methodologies and data requirements as well as lessons learned and gaps identified at different levels, in assessing the risk of loss and damage associated with the adverse effects of climate change. Technical Paper.’ (10 May 2012) FCCC/TP/2012/1, Table 1.

⁵ This issue is explored in: UNFCCC ‘Non-economic losses in the context of the work programme on loss and damage. Technical Paper.’ (9 October 2013) FCCC/TP/2013/2.

how to attribute responsibility for loss and damage, and how to ensure adequate funding and other support will be available for loss and damage, particularly for the most vulnerable countries. In the following sections, the emergence of loss and damage within the UN climate regime is briefly explored. The chapter then returns to the consideration of options to determine and allocate responsibility to respond to loss and damage.

3. The Birth of the Warsaw Loss and Damage Mechanism

Loss and damage, while indirectly and implicitly recognized in the UNFCCC itself, has only been formally part of the UN climate negotiations since 2010. At the Cancun session, the Conference of the Parties (COP) agreed to establish a work program on loss and damage under the guidance of the Subsidiary Body for Implementation (SBI), and to invite Parties to submit their views on what should be included in the work program. Since then, loss and damage has remained on the agendas of both the SBI and the COP. The SBI initially focused on defining and implementing the work program. It identified three areas of focus:

- (a) Assessing the risk of loss and damage associated with the adverse effects of climate change and the current knowledge on the same;*
 - (b) A range of approaches to address loss and damage associated with the adverse effects of climate change, including impacts related to extreme weather events and slow onset events, taking into consideration experience at all levels;*
 - (c) The role of the Convention in enhancing the implementation of approaches to address loss and damage associated with the adverse effects of climate change.*
- (FCCC/SBI/2011/7, at Par 109)*

These themes were formally endorsed at COP 17 in Durban.⁶ In addition, the COP directed the SBI and the UNFCCC secretariat to continue their work, including through consultations with Parties, the convening of expert meetings, and the development of

⁶ UNFCCC 'Report of the Conference of the Parties on its seventeenth session, held in Durban from 28 November to 11 December 2011. Addendum. Part two: Action taken by the Conference of the Parties at its seventeenth session.' (15 March 2012) FCCC/CP/2011/9/Add.2, 5-7.

technical papers.⁷ Since then, the COP has broadened its focus from supporting and overseeing the implementation of the work program to also identifying the need for new institutional arrangements for loss and damage within the UN climate regime. COP 18 in Doha established loss and damage as a negotiating issue for the ongoing negotiations toward a new climate change regime under the UNFCCC.⁸ At COP 19 in Warsaw, Poland, Parties agreed to establish the “Warsaw International Mechanism on Loss and Damage”. The mechanism is initially set up under the Cancun Adaptation Framework, however, the mandate, structure and effectiveness of the Warsaw Mechanism, including this institutional arrangement, is subject to review by 2016, after the scheduled completion of the post 2020 climate negotiations.⁹ The timing of the review has created uncertainty about the place of the Warsaw Mechanism in the current negotiations due to be completed in 2015.

The Warsaw decision established an executive committee of the mechanism, to be accountable to the COP. The executive committee is to report annually to the COP through the subsidiary bodies. It is expected to enhance action and support on loss and damage, including finance, technology and capacity-building. The short-term aims are to facilitate support of actions to address loss and damage, improve coordination of the relevant work under existing Convention bodies, convene meetings of relevant experts and stakeholders, promote the development and dissemination of information, provide technical guidance and support, and make recommendations on how to enhance

⁷ See M. Doelle, ‘The Birth of the Warsaw Loss & Damage Mechanism: Planting a Seed to Grow Ambition?’ (2014) 8 *Carbon & Climate Law Review* 35.

⁸ See UNFCCC ‘Action taken by the Conference of the Parties at its eighteenth session’, (28 February 2013) FCCC/CP/2012/8/Add.1, 21-24. For an assessment of the emerging loss and damage mechanism under the UN regime, see Ilona Millar, Catherine Gascoigne, and Elizabeth Caldwell, ‘Making good the loss: An Assessment of the Loss and Damage Mechanism under the UNFCCC Process’, in M. Gerrard and others, eds, *Threatened Island Nations: An Assessment of the Loss and Damage Mechanism under the UNFCCC Process* (Cambridge, Cambridge University Press, 2013).

⁹ UNFCCC ‘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 at its nineteenth session’ (31 January 2014) FCCC/CP/2013/10/Add.1 [Warsaw Mechanism].

engagement, actions and coherence under and outside the Convention.¹⁰

During the course of 2014, an interim executive committee developed a two-year workplan for the consideration of the COP at its 20th meeting in Lima, Peru. The workplan was approved by the COP in Lima. It identifies the following action areas:

- Enhance the understanding of the effect of loss and damage on vulnerable countries and vulnerable segments of affected populations, and what can be done to address these effects.
- Enhance the understanding of and promote comprehensive risk management approaches to improve resilience, including through the encouragement of financial instruments.
- Enhance understanding of slow onset events and their impacts, and ways to address them.
- Enhance understanding of non-economic loss and ways to reduce risk and address such losses.
- Enhance understanding of capacity and coordination needs.
- Enhance understanding of impact on migration, displacement and human mobility.

In addition, the executive committee plans to develop a 5 year workplan by 2016 for approval of the COP building on the results of its current work. The nature and scope of the action items in the workplan and the COP decision establishing the Warsaw Mechanism do little to clarify either the meaning of loss and damage within the UN climate regime, or the scope of the Warsaw Mechanism.

4. Loss and Damage and the Post 2020 Climate Regime

On the surface, the Lima decisions on loss and damage may seem uncontroversial. The

¹⁰ *ibid.*

COP adopted the interim executive committee's 2 year workplan and took steps to ensure the transition to a properly constituted executive committee.¹¹ The COP reached agreement on the composition of the executive committee and some basic elements of its operation, such as consensus based decision making, minimum number of meetings per year, annual reporting to the COP, and transparency of its work through public access to meetings and decisions. This work is recognized in the preamble of the Lima Call For Climate Action, which makes specific reference to the Warsaw Mechanism and acknowledges the progress that has been made toward its implementation.¹²

A closer look, however, suggests there is good reason to question the future of loss and damage in the 2015 climate agreement. Article 2 of the Lima Call For Climate Action decides that the 2015 agreement shall address mitigation, adaptation, finance, technology development and transfer, and capacity-building, and transparency of action and support in a balanced manner.¹³ It makes no reference to loss and damage. The decision does leave open the possibility of including other items, but it is striking that loss and damage is not included in the list of issues to be addressed in a "balanced manner".

The draft negotiating text attached as an Annex to the Lima Call for Climate Action is not the final negotiating text for the Paris agreement, as the Lima Call for Climate Action explicitly left open the possibility of Parties adding to or amending the current negotiating text leading up to Paris. Having said this, the current text offers little detail on the future of loss and damage, but it does include a range of basic options, ranging from no reference to the issue in the Paris agreement to full recognition and possible enhancement of the Warsaw Mechanism to address loss and damage, including through

¹¹ UNFCCC 'Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts' Dec -/CP.20 (2014)
<http://unfccc.int/files/meetings/lima_dec_2014/decisions/application/pdf/auv_cop20_lossanddamage.pdf>
accessed 27 January 2015.

¹² UNFCCC 'Lima Call for Climate Action' Dec -/CP.20 (2014)
<http://unfccc.int/files/meetings/lima_dec_2014/application/pdf/auv_cop20_lima_call_for_climate_action.pdf> accessed 27 January 2015.

¹³ *ibid*, art 2.

compensation.¹⁴ In short, the state of the Warsaw Mechanism in the current negotiations toward the post 2020 climate regime is very much uncertain in light of the COP decisions in Lima. One possible scenario clearly favoured by many developed countries is a mechanism that has no powers beyond investigating the issues identified in its current two-year workplan. At the other end of the spectrum would be the formal inclusion in the Paris agreement of a stand-alone mechanism on loss and damage that includes provision for compensation for loss and damage. It seems clear that many developed countries see the loss and damage mechanism as a threat, and are aggressively fighting against the inclusion of it as a separate pillar in the Paris agreement.¹⁵ It is less clear, whether developing countries who have contributed significantly to climate change, such as OPEC, China, and Brazil, see the emergence of the loss and damage issue in the climate negotiations similarly as a treat, or whether they will support efforts by the most vulnerable countries to ensure they receive adequate help and compensation for loss and damage.

5. Considering Responsibility, Liability and Compensation for Loss and Damage

With the creation of the Warsaw Mechanism, the door is clearly open on loss and damage within the UN climate regime, but the discussions are still some distance from taking a serious look at the full range of issues, particularly the issues of responsibility, liability, and compensation for unmitigated climate change.¹⁶ There are, of course, good reasons

¹⁴ *ibid*, Annex, para 32-33.

¹⁵ Tuvalu, for the LDCs, stated their understanding that reference to the Warsaw Mechanism for Loss and Damage in the Lima Call For Climate Action represents “a clear intention” that the Paris agreement will “properly, effectively and progressively address loss and damage.” See Earth Negotiations Bulletin ‘Lima Climate Change Conference – December 2014’ (Vol. 12 No. 619, Lima, Peru, 16 December 2014), <<http://www.iisd.ca/climate/cop20/enb/>>, accessed 27 January 2015.

¹⁶ It is, of course, not surprising that there is reluctance to engage with the issue of liability. For an overview of liability regimes in an environmental context, see Juntta Brunnée, ‘Of Sense And Sensibility: Reflections On International Liability Regimes As Tools For Environmental Protection’ (2004) 53 *International and Comparative Law Quarterly* 351. See also Allan Ingelson, Anne Kleffner, and Norma

for this reluctance. The issue of liability for unmitigated climate change is complex and controversial, and has long lingered in the background of the UN climate negotiations. Among the complexities are the state of international law with respect to state responsibility and liability for transboundary harm, the scientific foundation, difficulties in establishing causation, a complex relationship between state and private actors, and difficult questions about the standard against which the actions of potentially liable actors would be measured.¹⁷

At the same time, there is a growing understanding that the global cost of unmitigated loss and damage will be much higher than the cost of readily available mitigation and adaptation measures that are far from being fully utilized.¹⁸ There is undoubtedly a complex set of reasons why many States still are not putting in place the necessary laws and policies to implement cost effective mitigation and adaptation measures. It would be reasonable to conclude that ambiguities with respect to liability for loss and damage is among these factors.¹⁹

With the emergence of loss and damage, there has been growing interest in mechanisms to ensure compensation is available to those who are harmed by climate change. Funding mechanisms to ensure compensation have been created in other international contexts. A prominent example is the international oil pollution compensation fund (the 1971 Fund,

Nielson, 'Long-term Liability for Carbon Capture and Storage in Depleted North American Oil and Gas Reservoirs – A Comparative Analysis' (2010) 31 *Energy Law Journal* 431.

¹⁷ See A.E. Boyle, 'Globalising Environmental Liability: The Interplay of National and International Law' (2005) 17 *Journal of Environmental Law* 3; See also Michael G. Faure and Andre Nollkaemper, 'International Liability as an Instrument to Prevent and Compensate for Climate Change' (2007) 26A *Stanford Environmental Law Journal* 123.

¹⁸ Nicholas Stern, *The Economics of Climate Change: The Stern Review* (London, HM Treasury, 2006). See also William Nordhaus and Joseph Boyer, *Warming the World: Economic Models of Global Warming* (Cambridge, The MIT Press, 2003).

¹⁹ For a discussion of the expectation that parties to the climate negotiations act rationally, see Elisabeth Gsottbauer and Jeroen C. J. M. van den Bergh, 'Bounded rationality and social interaction in negotiating a climate agreement' [2013] *International Environmental Agreements: Politics, Law & Economics* 225.

the 1992 Fund and the Supplementary Fund), which provides compensation for oil spills from tankers. Other mechanisms for compensation exist in a variety of international regimes.²⁰

A specific proposal by Sprinz in 2013 offers a useful architecture for the consideration of approaches to compensation. In the context of proposing a voluntary fund, Sprinz suggests considering the ultimate goal against which to determine access to compensation, independent adjudication of individual claims for compensation, contribution to the fund in proportion with responsibility for climate change, an institutional home for the fund, and clear rules on what will be funded.²¹

A concrete proposal for a funding mechanism for loss and damage has been put forward jointly by the Climate Justice Program and the Heinrich Boll Foundation in a 2014 report entitled *Carbon Majors Funding Loss and Damage*.²² The basic concept put forward is to require private actors who contribute significantly to greenhouse gas emissions to contribute to a global loss and damage fund in proportion to the emissions they are responsible for.

Based on the Stern report and the most recent assessment report of the IPCC among others, it seems clear that globally, the cheapest and most sensible response to climate change would be to maximize mitigation efforts, as they are considerably cheaper and

²⁰ See, for example, International Convention on Civil Liability for Oil Pollution Damage (1969), Convention on Liability of Operators of Nuclear Ships (1962), International Convention for the Prevention of Pollution from Ships (MARPOL) (1973), Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal, the International Convention on Liability and Compensation for Damage in connection with the Carriage of Hazardous and Noxious Substances by Sea, the International Convention on Civil Liability for Bunker Oil Pollution Damage, and the Nagoya–Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety.

²¹ Sprinz (n 1).

²² Julie-Anne Richards and Keerly Boom, ‘Carbon Majors Funding Loss and Damage’ in Heinrich Böll Foundation (ed), *Publication Series Ecology* (Discussion Paper, volume 39, 2nd edn, 2014).

lower risk than unmitigated climate change.²³ Individual Parties, however, generally do not appear to have factored liability for impacts into cost benefit assessments of mitigation efforts, particularly liability for impacts outside their own jurisdiction.

If Parties are in fact considering the cost of mitigation in developing their climate policy without also considering the cost of loss and damage from unmitigated climate change, this creates a significant barrier to adequate mitigation efforts. This barrier to effective mitigation is, of course, compounded by the fact that the effect of GHG emissions from any one Party spreads globally, thereby distributing the cost of loss and damage.

In the end, if the ultimate liability for loss and damage can be resolved, this can create an incentive to undertake cost effective mitigation and now. It could essentially serve to bring “no regrets” actions at the individual Party level in line with “no regrets” actions at a global level, or to create an incentive for individual States to take mitigation action that is in the long term best interest of the global community.²⁴

The current UN Climate Regime has sought to create this individual incentive in a

²³ Stern (n 19). See also ICF International, ‘Improving the Assessment and Valuation of Climate Change Impacts for Policy and Regulatory Analysis’ (June 2011) <[http://yosemite.epa.gov/ee/epa/erm.nsf/vwAN/EE-0566-51.pdf/\\$file/EE-0566-51.pdf](http://yosemite.epa.gov/ee/epa/erm.nsf/vwAN/EE-0566-51.pdf/$file/EE-0566-51.pdf)> accessed 27 January, 2015; Environmental Protection Agency, ‘The Social Cost of Carbon: Overview’ (November 2013) <<http://www.epa.gov/climatechange/Downloads/EPAactivities/scc-fact-sheet.pdf>> accessed 27 January 2015, and Interagency Working Group on Social Cost of Carbon, United States Government, ‘Technical Support Document: Social Cost of Carbon for Regulatory Impact Analysis - Under Executive Order 12866’ (February 2010) <<http://www.epa.gov/otaq/climate/regulations/scc-tds.pdf>> accessed 27 January 2015. Potsdam Institute for Climate Impact Research and Climate Analytics, ‘Turn Down the Heat: Why a 4°C Warmer World Must be Avoided’ (Washington, World Bank, November 2012) <<http://www.worldbank.org/en/topic/climatechange>> accessed 27 January 2015. See also Hans Joachim Schellnhuber and others, ‘Turn Down the Heat: Climate Extremes, Regional Impacts, and the Case for Resilience’ (Washington DC, World Bank, June 2013) <<http://www.worldbank.org/en/topic/climatechange>> accessed 27 January 2015.

²⁴ “No regrets” in this context means action that a Party would be motivated to take on its own, without the need for any external motivation, such as through a UN climate treaty.

different way. The assumption underlying the current climate regime is that the way to motivate individual States to mitigate is to link mitigation of individual countries to a coordinated global mitigation effort. In other words, the current approach is based on the assumption that individual Parties will accept a fair share of the mitigation obligation as long as they know other Parties will do their share.²⁵ After two decades of negotiations, this approach has yet to yield an agreement on a global mitigation effort in line with the state of the science on climate change.²⁶

6. Conclusion

Many of the challenges in establishing a loss and damage mechanism remain unresolved. Parties will need to work out what constitutes loss and damage resulting from climate change (both for extreme weather events and for slow onset climate change), and when, who, and under what circumstances would be eligible for help with loss and damage. Issues such as who would have access to compensation for loss and damage will have to be resolved for the mechanism to play a constructive role in the long-term regime. Will compensation be limited to Parties, or be accessible to sub-national state actors, or to non-state actors? Finally, parties are still far from working out how to ensure that mitigation, adaptation, technology, finance, and loss and damage efforts are fairly distributed.

Assuming the Stern Report was correct in its conclusion that mitigation is cheaper than paying for adaptation and loss and damage, and the reason for inadequate mitigation continues to be that Parties do not include the liability for loss and damage into their decision-making on mitigation, a loss and damage compensation mechanism that is

²⁵ A key element of such an approach would be a strong compliance regime to ensure all parties do their share. The work done under the Kyoto Protocol to develop a strong compliance system has recently fallen out of favour in the climate regime. See Jutta Brunnée, Meinhard Doelle and Lavanya Rajamani, *Promoting Compliance in an Evolving Climate Change Regime*, (Cambridge, Cambridge University Press, 2012).

²⁶ See M. Doelle, 'The Legacy of the Climate Talks in Copenhagen: Hopenhagen or Brokenhagen?' (2010) 4 *Carbon & Climate Law Review* 86.

funded by those most responsible for emissions has the potential to offer a cost effective path toward adequacy. The more the cost of inaction can be quantified over time, and the associated liability distributed among Parties, the better chance the global community has of motivating individual Parties to avoid that cost by mitigating. Whether loss and damage will start to play this role in the UN climate regime remains to be seen.

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