



Loss and Damage

In the Paris Agreement

Climate Focus Client Brief on the Paris Agreement IV

Loss and Damage in the Paris Agreement

Art.8 of the Paris Agreement:

Provides a legal basis for long-term action on loss and damage and anchors the Warsaw International Mechanism to the Agreement;

Clarifies that action on loss and damage shall be cooperative and facilitative and be undertaken in coordination with competent bodies inside and outside of the UNFCCC structure;

Outlines possible fields of cooperation in a non-exhaustive list.

Decision 1/CP21:

Clarifies that the Warsaw International Mechanism will continue in operation beyond 2016;

Requests the Executive Committee of the Warsaw International Mechanism :

to establish a clearinghouse for risk transfer that serves as a repository for information on insurance and risk transfer, in order to facilitate the efforts of Parties to develop and implement comprehensive risk management strategies;

to develop recommendations for integrated approaches to avert, minimize and address climate-related displacement;

Clarifies that the inclusion of loss and damage in the Paris Agreement does not provide any basis for liability.

developed countries) pushed strongly for the Paris Agreement to recognize loss and damage as a separate pillar of climate action – in addition to mitigation and adaptation – and create appropriate institutional and financial arrangement and provide consistent financing. In turn, developed countries were reluctant to include any reference to loss and damage in the Paris Agreement, arguing the discussion should be put on hold until 2016, when the review of the Warsaw International Mechanism for Loss and Damage – established two years prior – would be due.¹

This briefing note examines what was agreed in light of the history of negotiations on loss and damage under the UNFCCC and considers what the Paris Agreement means for action on loss and damage going forward.

What is loss and damage?

Sudden and slow-onset events of climate change – such as floods, hurricanes, sea level rise and desertification – cause harm in developed and developing countries alike. Conceptually, loss and damage arises when the adverse effects are not avoided through mitigation and adaptation (e.g. the impacts exceed adaptive capacities).² In the UNFCCC context, loss and damage involves the development of approaches to address the effects of such events on the most vulnerable developing countries, who are recognized as bearing disproportionate costs from climate change, having both contributed the least to the problem and the least capacity to manage its negative impacts.

Introduction

Loss and damage constituted one of the most debated topics at the Paris climate talks, and its inclusion in the final text remained controversial until the very last hours of negotiations. Developing countries particularly vulnerable to the adverse effects of climate change (in particular small island developing states and least

¹ See: Article 5 of the draft negotiating text (as of 5th December 2015), available at: http://unfccc.int/files/bodies/awg/application/pdf/draft_paris_outcome_rev_5dec_15.pdf

² UNFCCC (2013), 'Non-economic losses in the context of the work programme on loss and damage: technical paper', FCCC/TP/2013/2, pp. 8-9.

A brief history of the loss and damage negotiations

Proposals to address the effects of climate events through the climate change regime have existed since the negotiation on the adoption of the UNFCCC itself, when the Alliance of Small Island States (AOSIS) proposed the establishment of an insurance pool for vulnerable countries that would be funded by mandatory contributions from developed countries. The proposal was not successful, however, and the issue subsequently fell off the negotiation agenda, only briefly reappearing in 2001, when the COP agreed to consider insurance-related actions at its next session, but ultimately did not follow up.

It was not until 2007, when the Bali Action Plan called for action on *'disaster risk reduction strategies and other means to address loss and damage in particularly vulnerable countries'*, that the term loss and damage was coined and the issue firmly entered the UNFCCC negotiation agenda. This coincided with the release of the Fourth Assessment Report of the Intergovernmental Panel on Climate Change (IPCC), which made clear that historic greenhouse gas emissions had already made certain amount of loss and damage unavoidable.³ Under the Bali Action Plan, loss and damage was housed within the adaptation pillar, and was understood to comprise facilitative approaches, including disaster risk reduction strategies and risk transfer and management tools such as insurance.

Discussions on the exact role the UNFCCC should play in addressing loss and damage continued in the years after Bali, culminating in the adoption of a work programme on loss and damage at COP-16 in Cancun in 2010. The work programme raised the profile of loss and damage and ensured it more attention in the negotiations. At the same time, Parties remained deeply divided over what loss and damage under the UNFCCC should address, while some debated whether the issue should be addressed under the UNFCCC at all.

Discussions following Cancun sought to identify concrete areas of action, but initial areas identified remained very broadly framed, referring to *'range of approaches'* and *'the role of the Convention in enhancing the implementation of approaches'* to address loss and damage⁴

It was not until two years later at COP-18 in Doha that Parties could agree on a more defined scope for loss and damage, determining that the role of the UNFCCC should focus on three areas:

1. Enhancing knowledge and understanding of risk management approaches;
2. Strengthening dialogue, coordination, coherence and synergies among relevant stakeholders;
3. Enhancing action and support on loss and damage, including finance, technology and capacity building.

The COP also decided to create dedicated institutional arrangements that would serve to further these agreed roles of the Convention. This agreement to define the scope of loss and damage and establish institutional arrangements represented an important step, moving beyond conceptual discussions of a still broad concept into more concrete, action-oriented negotiations.

The following year in Warsaw, the COP established these institutional arrangements in the form of the Warsaw International Mechanism for Loss and Damage Associated with Climate Change Impacts, to be housed under the Cancun Adaptation Framework.⁵ The mechanism had an initial lifetime up to 2016 (when it would be subject to review) and was to be managed by an interim Executive Committee comprising representatives from existing UNFCCC bodies. The Committee was tasked to develop and carry out an initial two-year work plan.

The work plan developed by the Executive Committee set out nine priority *'action areas'* for work on loss and damage.⁶ The action areas seek to address potential gaps in the architecture of the climate regime, i.e. issues insufficiently addressed by current mitigation and adaptation policies. Many are focused on enhancing data and understanding of risks and response capacities, though others seek to address risk management mechanisms such as disaster risk insurance, which is often lacking in vulnerable countries. Moreover, they included the development of a five-year work plan that could be adopted by COP-22 and provide the basis for the mechanism's continuation beyond 2016.

Up until Paris the Executive Committee took initial steps to operationalize its work plan, focusing on establishing connections with other entities – both inside and outside the UNFCCC – working on issues around loss and

³ Intergovernmental Panel on Climate Change (2007), 'Climate Change 2007, Fourth Assessment Report - Report of the International Working Group II Report "Impacts, Adaptation and Vulnerability"', p. 736.

⁴ UNFCCC, Report of the Subsidiary Body for Implementation on its Thirty-Fourth Session, Bonn, 6–17 June 2011, FCCC/SBI/2011/7.

⁵ UNFCCC, Decision 2/CP.19.

⁶ UNFCCC (2014), 'Report of the Executive Committee of the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts', FCCC/SBI/2014/4, Annex II.

damage. It also launched work on awareness raising and established an information hub. At the same time, the work was limited by a shortage of sufficient financial and human resources, a matter the Committee requested the COP to address in Paris.⁷

Why is loss and damage contentious?

Loss and damage has been highly controversial ever since the initial proposal of AOSIS in 1991 to require mandatory payments from developed countries to compensate losses suffered by vulnerable countries. The core of the controversy arises from the fear among developed countries that the concept could be used to hold them liable for damage caused by climate change.

Under customary international law states are required to avoid activities under their jurisdiction or control causing damage to the environment of other States. However, state responsibility and liability becomes problematic to apply in the context of climate change, in particular due to the high number of actors involved and the difficulty in linking damage to any given actor.⁸ This proposal put forward by AOSIS – which was rooted in the law of state responsibility for transboundary harm and proposed to base payments on the share of contribution to climate change – risked creating a way to overcome these barriers and set a precedent for invoking liability.

Developed countries felt deeply uncomfortable with the notion of liability and have consistently refused to negotiate any legal responsibility under the Convention. This has heavily shaped the loss and damage negotiations, both in making many developed countries wary of progress and in ensuring that all progress was explicitly focused on facilitative – rather than punitive – approaches.

A related area of concern for developed countries is the possibility that the creation of an additional pillar under the UNFCCC would reopen discussions on financial support in another forum, which they pledged to mobilize for furthering mitigation and adaptation in developing countries. AOSIS and the Least Developed Countries (LDCs) have pushed for the establishment of

financial mechanisms to cover rehabilitation, insurance and risk management for loss and damage.⁹

Finally, several Parties voiced concerns that addressing loss and damage under the UNFCCC would duplicate or conflict with on-going initiatives outside the UNFCCC. For instance, the Hyogo Framework for Action (now Sendai Framework) already sets out a relatively comprehensive framework on disaster risk reduction,¹⁰ while the UN Refugee Agency has the international mandate to deal with international displacement, including that caused by climate change.

What was agreed in Paris

The final text adopted by Parties represents what can be considered an “ambitious compromise” on loss and damage.¹¹ Although the specific claims of developing countries did not survive the final round of negotiations, the Paris Agreement gives effect to their most important demand, namely integrating loss and damage as an independent third pillar of the climate regime. It does so through dedicating a full article (Article 8) to loss and damage and integrating the Warsaw International Mechanism into the long-term cooperative structure of the climate regime, cementing its role beyond 2016 and linking it to the institutional architecture of the Paris Agreement. The Agreement further provides that the Warsaw Mechanism may be further enhanced and strengthened by the COP (in its incarnation as the meeting of the parties to the Paris Agreement – COP/MPA), creating a dynamic hook that enables loss and damage to continue to evolve in years to come.

The prominent placement of loss and damage in the Paris framework is balanced by the overtly “soft” approach that the text enshrines. Article 8.3 of the Paris Agreement clarifies that the Parties’ obligations are of cooperative and facilitative character – reiterating the approach adopted in the Bali Action Plan and the Warsaw International Mechanism, while excluding any trace of the proposals on legal responsibility and financial obligations. The accompanying COP decision

⁹ Submission of Nauru on behalf of the Alliance of Small Island States (2012), ‘Views and information on elements to be included in the recommendations on loss and damage in accordance with decision 1/CP.16’, available at: https://unfccc.int/files/documentation/submissions_from_parties/application/pdf/aosis_submission_on_loss_and_damage_submission_2_october_2012.pdf; Submission by the Gambia on behalf of the Least Developed Countries Group on Loss and Damage (2012), available at: http://unfccc.int/files/adaptation/application/pdf/submission_by_the_gambia_on_behalf_of_the_least_developed_countries_on_loss_and_damage.pdf

¹⁰ The Hyogo Framework for Action (2005-2015) was a UN-led programme that outlined priority action areas, principles and means to increase disaster resilience. In 2015 the Sendai Framework for Disaster Risk Reduction succeeded the programme.

¹¹ Phrase used by Laurent Fabius, Minister of Foreign Affairs and International Development, President of the Paris Climate Conference, during his speech, at the opening of the pre-COP meeting, 8 November 2015.

⁷ UNFCCC (2015), Report of the Executive Committee of the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts; FCCC/SB/2015/3.

⁸ See: C. Voigt (2008), ‘State Responsibility for Climate Change Damages’, Nordic Journal of International Law 77 (1-2) (2008), pp. 1-22.

confirms this, explicitly excluding the possibility of liability or compensation under loss and damage.¹²

Instead, the Agreement sets out a number of potential areas of cooperation that Parties may pursue. The list includes areas such as early warning systems, risk management strategies, insurance facilities and non-economic loss, and echoes the two-year work plan of the Warsaw International Mechanism. The accompanying COP decision places particular emphasis on two action areas for the period of 2015-2020, namely insurance and risk transfer schemes, and integrated approaches to avert, minimize and address climate-related displacement, and requests the Executive Committee of the Warsaw Mechanism to take steps to operationalize these actions.¹³ Notably absent is the Climate Change Displacement Coordination Facility advocated by vulnerable states, with Parties deciding to leave open the question of what action will be taken to address displacement.

The language of the Paris Agreement is also carefully crafted to avoid that the effective creation of a separate pillar beyond mitigation and adaptation leads to additional financial commitments on the part of developed countries. While the text does refer to *'enhancing action and support'*, the language is non-binding (*'should'*) and uses the more general language of *'support'* rather than explicitly refer to finance. Perhaps more importantly, the finance provisions of the Agreement (Article 9) clarify finance is to be balanced between adaptation and mitigation, excluding any reference to loss and damage and avoiding the creation of a dedicated financing stream. Moreover, neither the Agreement nor the accompanying COP decision provides a mandate for the Green Climate Fund – the Paris Agreement's chief financial mechanism – to provide finance for loss and damage. These omissions indicate that, while finance will continue to flow to *'loss and damage'* initiatives both inside and outside of the UNFCCC,¹⁴ in the UNFCCC context at least this will remain under the umbrella of adaptation finance and is not likely to result in additional financial commitments.

Perhaps tellingly, the strongest language in the article on loss and damage in the Paris Agreement relates to the imperative to coordinate all action with other relevant bodies. Article 8.5 affirms that The Warsaw International Mechanism *'shall collaborate'* with existing bodies both inside and outside of the UNFCCC

framework in carrying out its mandate. This provision appears to try to avoid that the Warsaw Mechanism duplicates or infringes on the mandates of existing bodies who are arguably much better equipped to address certain areas, such as the UN Refugee Agency in the case of climate-induced displacement.

Conclusions

Although the concept of climate-related loss and damage first appeared at the inception of the climate regime, Parties launched cooperative action in this area only relatively recently. Its inclusion within the climate negotiation agenda in 2007 marked an important advance by recognizing it as a distinct concept, but subsequent negotiations saw slow progress in translating this concept a tangible area of cooperative action. Discussions were characterized by deep disagreements over the concept's scope, and resulting language left it broad and open.

Nonetheless, decisions in Cancun, Doha and Warsaw saw the COP gradually move toward the creation of a cooperative framework and the identification of (at least potential) concrete areas of action. Successive language also appeared to clarify that action on loss and damage under the UNFCCC would be facilitative in nature, leaving little room for the liability approach advocated by vulnerable countries. Despite this, those countries continued to advocate this approach right up until the final days of Paris, and the inclusion of loss and damage in the final text remained in doubt until the final hours.

In this context, the text adopted in Paris goes a long way to resolving this debate and providing a framework within which cooperation on loss and damage can proceed in a more focused, and less contentious, manner. The explicit adoption of a facilitative approach that excludes liability significantly circumscribes the mechanism's scope and is likely to disappoint many vulnerable countries who had pushed for stronger action to address the immense harm many are likely to suffer from climate change. At the same time, by removing the spectre of liability that for so long made developed countries reluctant to cooperate on loss and damage, it "sets the stage for more focused international dialogue on what constitutes loss and damage, what the appropriate responses are, and who bears responsibility to act."¹⁵

¹² UNFCCC, Decision 1/CP.21, paras 49-50.

¹³ *Ibid.*, paras. 49-51.

¹⁴ Perhaps the most significant initiative to address loss and damage is taking place outside the UNFCCC: in May 2015 the G-7 committed to increase the number of people in vulnerable developing countries with access to climate-related risk insurance by up to 400 million. See http://www.bmz.de/g7/en/Entwicklungspolitische_Schwerpunkte/Klimawandel/index.html.

¹⁵ Kathleen Mogelgaard and Heather McGray, *When Adaptation Is Not Enough: Paris Agreement Recognizes "Loss and Damage"*, World Resources Institute, December 24, 2015.

This outcome is equally supported by the full and long-term integration of loss and damage within the climate change regime. The Paris Agreement establishes a flexible framework for long-term cooperative action, with Article 8 conferring a broad mandate on the COP/MPA to extend the list of subject matters covered by loss and damage (Article 8.4), and enhance the institutional set-up of the Warsaw International Mechanism.

Equally, the adoption of priority action areas represents an important step forward in achieving tangible action on loss and damage, represents the first time the issues of insurance and displacement have been addressed under the UNFCCC and may represent an important first step in linking UNFCCC actions with those in other areas. The explicit linking of efforts under the UNFCCC with those in other bodies also helps ensure that actions are coordinated and supports the identification of areas where UNFCCC action can be genuinely useful and complementary.

Looking forward, the challenge facing Parties is to build on this mandate and continue to define the scope of the Warsaw Mechanism and the boundaries of how loss and damage will be addressed. The implementation by the Executive Committee of the Warsaw Mechanism of the actions mandated by the COP on displacement and risk insurance and the stocktaking in COP 22 in November on the mandate, structure and effectiveness of the Warsaw International Mechanism, represent important next steps. The outcome of these events will be a telling guide as to how the broad framework created by Paris is likely to translate into action in the years to come.

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