



Loss and Damage in the Climate Regime

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+ Overview



- Evolution of the loss and damage discussions in the climate regime - milestones
- Issues under consideration
- Issues relating to loss and damage in the Geneva Negotiating Text, 2015
- Addressing loss and damage outside the climate regime



Evolution of the Loss and Damage Discussions



- Loss and damage has underpinned climate negotiations from its inception
 - AOSIS proposal in 1991 for an ‘insurance mechanism’ to compensate nations for loss and damage resulting from sea level rise
- FCCC recognizes specific needs and concerns of Parties arising from adverse effects of climate change, and requires Parties to take actions to meet these needs (Art 4.8)
- Climate Regime – trajectory of negotiations: mitigation – adaptation – loss and damage

+ Milestones

- Bali Action Plan, 2007 – first appearance of the term ‘loss and damage’
- Cancun, 2010 – Parties launch a work program on loss and damage
- Doha, 2012 – Parties agreed to establish institutional arrangements for loss and damage
- Warsaw, 2013 – Parties established the Warsaw International Mechanism on Loss and Damage
 - ‘under the Cancun Adaptation Framework’ but subject to review in 2016 – part of adaptation or a distinct issue area?
- Lima, 2014 – Work Plan for the Executive Committee of the Warsaw International Mechanism

+ Issues under Consideration

- Impacts of loss and damage on particularly vulnerable developing countries, populations and communities
- Comprehensive risk management approaches in building resilience
- Approaches to address slow onset events, with particular focus on potential impacts
- Reducing the risk of and addressing non-economic losses
- Capacity and coordination needs in relation to slow onset and extreme events
- Migration, displacement and human mobility as a result of climate impacts
- Financial instruments and tools to address the risks of loss and damage



Loss and Damage in the 2015 Negotiations



- Should loss and damage be addressed in the new instrument at all?

- Lima Call to Climate Action
 - Reference in preamble to WIM
 - Para 2 – 2015 agreement ‘shall address in a balanced manner, inter alia, mitigation, adaptation, finance, technology development and transfer and capacity building, and transparency of action and support.’
 - However:
 - ‘Inter alia’
 - LDCs: term ‘inter alia’ as well as the reference to loss and damage in the preamble indicate that the 2015 agreement ‘will properly, effectively and progressively address loss and damage’



Issues in the Geneva Negotiating Text



- Should loss and damage be addressed as part of adaptation or separately?
- Institutional arrangements:
 - Is the Warsaw International Mechanism sufficient?
 - Does it need to be strengthened through the 2015 agreement?
 - Is a new international mechanism to address loss and damage under 2015 agreement necessary?
 - How can these institutional arrangements play a more effective 'catalytic role' in mobilizing international, regional and national processes and institutions?
- Should the provisions on loss and damage in the 2015 agreement include a compensation regime?
 - Linked to issues of state responsibility and liability
 - Red line for some
 - Adversarial framing
 - Solidarity and collective responsibility?
 - Enables a 'funding and support' framing



Issues in the Geneva Negotiating Text



- How can the 2015 agreement ensure availability of adequate funding and support to address loss and damage in vulnerable developing countries?
 - Who should benefit from such funding and support?
 - all developing countries?
 - developing countries, particularly LDCs, small island developing countries and countries in Africa?
 - Who should provide funding and support?
 - all countries?
 - developed countries and other Parties in a position to do so?
 - only developed countries?
 - What should funding and support address - slow onset events and/or extreme events?
 - How can the loss and damage attributable to human induced climate change be separated out from that which cannot be so attributed?
 - How, if at all, can 'loss and damage' be quantified
 - direct and indirect
 - tangible and intangible
 - economic and non-economic
 - current and future



Addressing Loss and Damage outside the FCCC



- A state can bring a claim against another for state responsibility
 - obligation – breach – causal link between breach and damage => cessation and reparation

- Impediments:
 - finding a forum with jurisdiction
 - establishing standing
 - establishing the existence of clear and binding obligations
 - establishing breach of such obligations
 - demonstrating causality between the GHG emissions of the defendant state, current and historic, and impacts suffered by the plaintiff state
 - establishing damage

- No case yet; Palau - ICJ Advisory Opinion



Addressing Loss and Damage outside the FCCC



- Private parties can bring claims against their own state or another state for climate-related loss and damage, if internationally protected human rights are implicated
 - But few fora hear claims from private parties
 - Prone to similar limitations as inter-state claims (causation etc)
 - Inuit Case – IACHR

- Private parties can bring claims against their own state or other private parties in domestic courts
 - Public and private law remedies
 - Extensive climate litigation in some jurisdictions

+ Looking Forward



- Range of options within and outside the climate regime to address loss and damage
- Loss and Damage within the FCCC: is unlikely to extend to 'compensation and liability'
- Loss and Damage outside the FCCC: Although valuable for their 'story telling' or narrative potential, and for building momentum and catalyzing legislative/policy change, there are serious impediments to addressing loss and damage through climate liability. In addition:
 - Case by case rather than holistic approach
 - Reactive rather than preventive or supportive
 - Can play a complementary role to the multilateral regime
- Funding and support for loss and damage is likely best addressed through the multilateral climate regime