



APCEL Climate Change Adaptation Platform

Moving Forward on Loss and Damage: Post Paris

by

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One of the most innovative outcomes of the Paris Agreement is Article 8 relating to “loss and damage”.¹ The Article, comprising five clauses, has significant implications for future work on loss and damage.² It establishes loss and damage as a legally binding process and is likely to be the key driver for new and innovative work.³ Of particular note are the provisions relating to: development of the Warsaw Mechanism on Loss and Damage, addressing permanent and irreversible losses; developing a clearinghouse on risk transfer; and establishing a task force to address displacement and cooperation with other institutions. This paper will explore how these elements may evolve.

The issue of loss and damage has only recently been incorporated into the work of the UN Framework Convention on Climate Change (UNFCCC), although a call for an insurance arrangement under the UNFCCC goes back to 1991. Vanuatu on behalf of the Alliance of Small Island States had proposed an “International Insurance Pool” to provide financial insurance against the consequences of sea level rise during the formulation of the UNFCCC.⁴ It was not until the 13th Conference of Parties (COP) delivered the Bali Action Plan in 2007 that a reference to loss and damage was first made.⁵

¹ Paris Agreement as contained as an annex to UNFCCC Decision 1/CP.21, FCCC/CP.2015/L.9/Rev.1.

² Article 8 provides:

1. Parties recognize the importance of averting, minimizing and addressing loss and damage associated with the adverse effects of climate change, including extreme weather events and slow onset events, and the role of sustainable development in reducing the risk of loss and damage.

2. The Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts shall be subject to the authority and guidance of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement and may be enhanced and strengthened, as determined by the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement.

3. Parties should enhance understanding, action and support, including through the Warsaw International Mechanism, as appropriate, on a cooperative and facilitative basis with respect to loss and damage associated with the adverse effects of climate change.

4. Accordingly, areas of cooperation and facilitation to enhance understanding, action and support may include:

(a) Early warning systems;

(b) Emergency preparedness;

(c) Slow onset events;

(d) Events that may involve irreversible and permanent loss and damage;

(e) Comprehensive risk assessment and management;

(f) Risk insurance facilities, climate risk pooling and other insurance solutions;

(g) Non-economic losses;

(h) Resilience of communities, livelihoods and ecosystems.

5. The Warsaw International Mechanism shall collaborate with existing bodies and expert groups under the Agreement, as well as relevant organizations and expert bodies outside the Agreement.

³ See UNFCCC Decision 1/CP.21, at 1 above, paragraphs 48 to 52.

⁴ See Intergovernmental Negotiating Committee for a Framework Convention on Climate Change: Working Group II, *Vanuatu: Draft Annex Relating to Article 23 (Insurance) for Inclusion in the Revised Single Text on Elements Relating to Mechanisms (A/AC.237/WG.II/Misc.13) Submitted by the Co-Chairmen of Working Group II*, 4th sess, Agenda Item 2(b), UN Doc A/AC.237/WG.II/CRP.8 (17 December 1991) (*‘Vanuatu Draft Annex’*).

⁵ See UNFCCC Decision 1/CP.13, Bali Action Plan, FCCC/CP/2007/6/Add.1, paragraph 1(c)(iii).

The proposal was only taken up at the 18th COP in 2012. The Parties to UNFCCC then began considering approaches to address loss and damage.⁶ This was followed by COP establishing the Warsaw International Mechanism on Loss and Damage in 2013.⁷

It is interesting to note that the COP has not defined loss and damage. This can be due to a variety of reasons. Perhaps the most pertinent can be attributed to the fact that certain Parties did not want the concept to be fully defined as it has implications relating to compensation and liability. At a workshop on slow onset events in 2014, the representative from the United States stated that loss and damage was a rightful concept that the UNFCCC should be addressing.⁸ Various authors have suggested definitional concepts of loss and damage, including those relating to where the impacts of climate change go beyond adaptation, or where the adverse effects are not avoided through mitigation and adaptation, or the residual impacts beyond mitigation and adaptation, or the impacts that people have not been able to cope with or adapt to.⁹ These attempts at definitions tend to place loss and damage within a context of climate change but do not actually define the concept or processes associated with loss and damage. Others define activities that give rise to loss and damage such as: sea-level rise, increasing temperatures, ocean acidification, glacial retreat and related impacts, salinization, land and forest degradation, loss of biodiversity, and desertification.¹⁰ For the purpose of this discussion paper, loss and damage can be defined as:

The processes and actions employed by countries and communities to address the immediate and slow onset impacts of climate change through various means such as risk prevention, risk management and risk transfer, as well as measures to prevent and respond to people displaced internally and externally by the impacts of climate change, and legal and financial approaches associated with compensation and rehabilitation for those affected by climate change.

This definition may not sit well with some people, particularly in the context of compensation. Nevertheless, the broadest consideration of this process is necessary irrespective of the political sensitivities that may be breached.

⁶ See Decision 3/CP.18 Approaches to address loss and damage associated with climate change impacts in developing countries that are particularly vulnerable to the adverse effects of climate change to enhance adaptive capacity, FCCC/CP/2012/8/Add.1, 28 February 2013.

⁷ See Decision 2/CP.19 Warsaw international mechanism for loss and damage associated with climate change impacts, FCCC/CP/2013/10/Add.1, 31 January 2014.

⁸ At an Expert meeting to consider future needs, including capacity needs associated with possible approaches to address slow onset events in Nadi, Fiji, 2014, the representative from the United States claimed that the “UNFCCC does not do loss and damage”. Personal observation.

⁹ See, M. Hafijul Islam Khan, 2016, The Warsaw International Mechanism: Exploring the Structures and Functions to Address Loss and Damage Associated with Climate Change Impacts, in: Kheng-Lian Koh, Ian Kelman, Robert Kibugi, Rose-Liza Eisma Osorio (eds) Adaptation to Climate Change: ASEAN and Comparative Experiences, World Scientific, pp505, at p166. Darragh Conway, Loss and Damage In the Paris Agreement, Climate Focus Client Brief on the Paris Agreement IV, December 2015, at p1. Hannah R. Parker, Emily Boyd, Rosalind J. Cornforth, Rachel James, Friederike E. L. Otto & Myles R. Allen (2016): Stakeholder perceptions of event attribution in the loss and damage debate, Climate Policy, URL: <http://dx.doi.org/10.1080/14693062.2015.1124750>, at p2. Erin Roberts, Kees van der Geest, Koko Warner and Stephanie Andrei, Loss and Damage: When adaptation is not enough, April (2014) UNEP Global Environmental Alert Service, URL: http://na.unep.net/geas/getUNEPPageWithArticleIDScript.php?article_id=111, at p1.

¹⁰ See, Maxine Burket, Rehabilitation: A Proposal for a Climate Compensation Mechanism for Small Island State, Santa Clara Journal of International Law, (2015), 13:1, 81-124, at p111.

The Paris Agreement steps around the broader context of the definition provided in this paper. Nevertheless, as will be discussed later, there is still room for a broader context to be considered.

It is noted that Article 8 is the continuation of the Warsaw International Mechanism on Loss and Damage (WIM). The Agreement states that the WIM will operate under the authority of the Conference of Parties serving as the meeting of the Parties to the Paris Agreement. Both Small Island Developing States and the Least Developed Countries had hoped that the Paris Agreement would create a new mechanism on loss and damage.¹¹ This is due to the perception that WIM has a limited mandate. This is evidenced by the fact that much of the initial work of WIM is focused on “enhancing knowledge and understanding”, and “strengthening dialogue”.¹² Only the last part of the decision that establishes WIM refers to “enhancing action and support”. This is further emphasised in the following COP where work of WIM was defined primarily as “collection and sharing of data”, and the “provision of overviews of best practices”.¹³ Facilitating action on the ground to help countries address the impacts of climate change appears to be substantially missing from the mandate of WIM. This observation was acknowledged by Burkett, where she noted that WIM consists of “a more measured, if rather conservative, approach to developing a loss-and-damage infrastructure”.¹⁴ The Report of WIM in 2014 establishes seven action areas. Six of these refer to work to enhance “the understanding of...” Only the seventh action area refers to encouraging comprehensive risk management.¹⁵ For those wanting a more focused program on delivering outcomes rather than being a repository of knowledge, the continuation of WIM was not the preferred option. Needless to say, the Parties less interested in outcomes on loss and damage, notably the United States and the European Union, were more than happy to continue the work of WIM.¹⁶ Inevitably, WIM will evolve to be more responsive to the needs of vulnerable developing countries. Once it comes under the direct guidance of COP serving as the meeting of Parties, there may be greater opportunities to become more focused and outcome oriented.

Negotiations on how to address permanent and irreversible loss within the Paris Agreement turned out to be controversial. The United States employed a three-layered approach to keep this issue tightly controlled. First, they suggested that the Paris Agreement should not contain any text on loss and damage, suggesting instead that the accompanying decision should be location for any further mandate on this issue. Then, when this did not garner sufficient support, the United States proposed that loss and damage be incorporated in the Paris Agreement under the umbrella of adaptation. Presumably they were of the view that presenting loss and damage in the adaptation component would create significant and sufficient ambiguity over its context. As such it would tend to direct discussions more towards risk avoidance rather than risk transfer or addressing permanent and irreversible losses and potential claims for compensation for such losses. The final layer of their negotiation tactic, when the previous two had proved unsuccessful, was to insist that the Paris Agreement include a clause explicitly excluding any consideration of liability or

¹¹ Personal observation.

¹² See Decision 3/CP.18, at 6 above, paragraph 5.

¹³ See Decision 2/CP.19, at 7 above, paragraph 5.

¹⁴ See, Maxine Burkett, *Loss and Damage*, *Climate Law*, 4 (2014), 119-130, p 128.

¹⁵ See, UNFCCC, *Report of the Executive Committee of the Warsaw International Mechanism on Loss and Damage associated with Climate Change Impacts*, (2014), FCCC/SB/2014/4, pp7-12.

¹⁶ Personal observation.

compensation. The US Secretary of State, Senator John Kerry and the Prime Minister of Tuvalu, H.E. Enele Sopoaga, held two bilateral meetings in the last few nights of the Paris COP to work out how this could be resolved.¹⁷ It is interesting to note that during the entire two weeks of the COP, a negotiating group on loss and damage met only once. Undoubtedly, the French Presidency held the view that this was an issue that would be resolved by a small number of negotiators and broader discussions in a large group could easily unravel very sensitive negotiations. Following the bilateral meetings between Senator Kerry and Prime Minister Sopoaga, a small negotiating group was formed on the penultimate day of the COP to develop the Paris Agreement text on loss and damage and to formulate the language on the exclusion of liability.¹⁸ Much could be said about this exclusion clause in the agreement text and whether it precludes further action associated with compensation and liability and its relationship to existing provisions of customary international law and the principle of State responsibility. There is considerable debate whether or not the principle of State responsibility applies to the impacts of climate change.¹⁹ The exclusion of specific language in the Paris Agreement does give some level of comfort to those countries which may seek compensation. That *lex generalis* in the context of State responsibility has not been directly superseded by *lex specialis*, excluding such responsibility. Litigation associated with climate change damage is an evolving area of law. Some suggest that the issue of causality and attribution and the multiplicity of polluters and victims create evidentiary difficulties for those seeking liability claims.²⁰ Others suggest the research within the concept of “probabilistic event attribution” may provide an avenue for greater clarity in such instances.²¹

Inevitably some countries will suffer (if they have not already suffered) permanent and irreversible losses due to the impacts of climate change. While the concept of liability and compensation did not gain substantial traction within the Paris Agreement process, affected countries may need to seek legal redress for their losses by other means. Burkett has suggested the establishment of an approach similar to the UN Compensation Commission that was established after the Iraq War.²² Within the Paris Agreement, Parties should also consider how to deal with permanent and irreversible losses as this is within the mandate of the Agreement.

Other measures associated with supporting countries that have suffered losses will need to be considered. Perhaps Parties will need to consider the development of solidarity funds or other similar means to recompense those that have suffered permanent losses. The concept of a solidarity fund was suggested as an approach in the negotiations in the lead up to Paris.²³

¹⁷ The author attended one of these meetings.

¹⁸ Paragraph 52 of Decision 1/CP.21 states: Agrees that Article 8 of the Agreement does not involve or provide a basis for any liability or compensation.

¹⁹ See for example: Christina Voigt, State Responsibility for Climate Change Damages, *Nordic Journal of International Law* 77 (2008) 1–22 and Richard S.J. Tol and Roda Verheyen, State responsibility and compensation for climate change damages—a legal and economic assessment, *Energy Policy*, 32 (2004) 1109–1130.

²⁰ See Christina Voigt, State Responsibility for Climate Change Damages, *Nordic Journal of International Law* 77 (2008) 1–22, p21.

²¹ Hannah R. Parker, Emily Boyd, Rosalind J. Cornforth, Rachel James, Friederike E. L. Otto & Myles R. Allen (2016): Stakeholder perceptions of event attribution in the loss and damage debate, *Climate Policy*, URL: <http://dx.doi.org/10.1080/14693062.2015.1124750>, p1.

²² Maxine Burkett, Rehabilitation: A Proposal for a Climate Compensation Mechanism for Small Island State, *Santa Clara Journal of International Law*, (2015), 13:1, 81-124, p 99.

²³ See Malia Talakai, Small island states need action on climate loss and damage, Thomson Reuters Foundation, (2012) URL: <http://news.trust.org/item/?map=small-island-states-need-action-on-climate-loss-and-damage/>, p1.

Other options may include insurance arrangements for permanent losses. This could be modelled on life insurance where the outcome is inevitable and, hence, can be provided for. Some suggest, on the other hand, that slow onset events are not insurable as there is no sudden or unforeseeable trigger.²⁴ While there are inevitable challenges, there is considerable opportunity for further work in the field of reinsurance measures.

In another significant step forward, the accompanying decision to the Paris Agreement requests the Executive Committee of WIM to establish a clearinghouse for risk transfer.²⁵ The idea for such a clearinghouse emanated from the Least Developed Countries.²⁶ There are many examples of risk transfer schemes, in Africa and the Caribbean as well as national insurance funds and safety net programs. Establishing a clearinghouse of these schemes will help countries and regions identify the best risk transfer opportunities that suit their needs.²⁷ If done properly, the clearinghouse will be a major fillip for countries seeking access to risk transfer measures. Hopefully the insurance and re-insurance industry will be able to provide considerable support in this endeavour.

Another major outcome in the decision accompanying the Paris Agreement is the request to the Executive Committee of WIM to establish a task force for integrated approaches to avert, minimize and address displacement related to the adverse impacts of climate change.²⁸ Initially the Least Developed Countries sought inclusion of this task force within the Paris Agreement. This was met with significant resistance from the European Union and perhaps one of the few issues where the European Union took a substantive position in the debate on loss and damage.²⁹ Due to sensitivities associated with refugees fleeing the war in Syria, the European Union appeared to be very reluctant to accept another category of displaced people. This is a highly regrettable position and one that the European Union may rue in the future. It is inevitable that more and more people will become internally and externally displaced by the impacts of climate change and action to deal with these people will need to be taken. This is not a new issue. Migration and human mobility had already been incorporated in the Cancun Adaptation Framework in 2010, although little work has advanced on this issue since the Framework was established.³⁰

Despite the resistance from the European Union, language on displacement was agreed by the COP. Work on this issue by the Executive Committee of WIM has already commenced and

²⁴ See Carolyn Cohn, A plea from small islands: more insurance for climate change, Reuters News, Thu Dec 10, 2015 7:13am <http://www.reuters.com/article/us-climatechange-summit-insurance-idUSKBN0TT19W20151210>, p1.

²⁵ See Decision 1/CP.21, at 1 above, paragraph 49.

²⁶ See, Submission by Nepal on behalf of the Least Developed Countries Group on the ADP Co-Chairs' Non Paper of 7 July 2014 on Parties Views and Proposal on the Elements for a Draft Negotiating Text, URL: http://www4.unfccc.int/submissions/Lists/OSPSubmissionUpload/39_99_130584499817551043-Submission%20by%20Nepal%20ADP_21%20Oct%202014.pdf, p4.

²⁷ See, Koko Warner, Significance of the Warsaw International Mechanism (2013) United Nations University, Institute for Environment and Human Security, (2013), URL: <http://ehs.unu.edu/blog/articles/significance-of-the-warsaw-international-mechanism.html>, p4.

²⁸ See Decision 1/CP.21 at 1 above, paragraph 50.

²⁹ Personal observation.

³⁰ See Decision 1/CP.16, The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention, FCCC/CP/2010/7/Add.1, paragraph 14(f).

is likely to fill the void created since Cancun.³¹ Establishing legal protection for people displaced by the impacts of climate change will be a substantial opportunity for the Executive Committee of WIM and other interested groups and Parties. While it is a new area of international law, there are opportunities to draw from existing institutions and processes. Some have suggested that Guiding Principles on Internal Displacement, and the various operational guidelines developed as part of the work of the Global Protection Cluster, apply to climate-related internal displacement situations, and offer useful advice and guidance.³² The UN High Commission for Refugees has noted that the 1951 Convention relating to the Status of Refugees and some regional refugee instruments provide answers to certain cases of external displacement related to climate change, and these ought to be analyzed further.³³ They have suggested however, that the term “climate refugee” should be avoided as it is inaccurate and misleading.³⁴ Work established under the Nansen Initiative could provide a useful basis for further work in providing appropriate protection for people displaced by the impacts of climate change although the Nansen Initiative also deal with so-called natural disasters.³⁵ The Executive Committee of the WIM can provide a pivotal role in coalescing existing work in this field. In saying this, the Executive Committee will need to be mindful of work under the Sendai Framework for Disaster Risk Reduction and avoid overlaps.³⁶ Collaboration with other institutions will be a critical role for the Executive Committee of the WIM. It will be important to avoid overlapping agendas and potential “turf wars” over mandates and responsibilities. The real victims in such mandate disputes will be those affected by the impacts of climate change.

Perhaps one of the significant omissions in the Paris Agreement on loss and damage is the absence of any direct reference to financial support direct reference to financial support. Despite efforts by the Least Developed Countries to incorporate a text on loss and damage in the finance section of the Paris Agreement, a direct reference is missing. The COP may need to establish further guidance to the Green Climate Fund and the Standing Committee on Finance to ensure that work on loss and damage is properly funded. It is inevitable that funding for loss and damage will need to come from a variety of sources. Innovative thinking will be required as the costs of loss and damage due to climate change are already substantial and will continue to rise dramatically. The concept of the polluter pays may need to be invoked. As an example, a global fossil fuel extraction levy to fund was proposed by a group of NGOs in Paris.³⁷ While this has the potential to generate significant sums of money for loss and damage, the likelihood of such a levy being agreed upon by the Conference of Parties is extremely limited. Perhaps regional groups of countries would be better placed to establish such a levy. Other options will inevitably need to be considered.

³¹ Sönke Kreft, Laura Schäfer, Vera Künzel and Sabine Minninger, Ex Com #2 – Addressing the Climate Risk Gap: Insights for the 2nd Meeting of the Executive Committee, Briefing Note, Germanwatch, undated, <http://www.loss-and-damage.net/download/7323.pdf>, p3.

³² Volker Türk and Alice Edwards, Introductory Note to the Bellagio Summary of Deliberations on Climate Change and Displacement, *International Journal of Refugee Law* (2011) Vol. 23 No. 3 pp. 558–560, p 560.

³³ UNHCR, Summary of Deliberations on Climate Change and Displacement, *International Journal of Refugee Law* Vol. 23 No. 3 pp. 561–574, p562.

³⁴ *Ibid.*

³⁵ See for example, The Nansen Conference, *Climate Change and Displacement in the 21st Century*, (2011), Oslo, Norway, June 5-7, 2011, Norwegian Refugee Council, pp22.

³⁶ See, United Nations, *The Sendai Framework for Disaster Risk Reduction 2015-2030*, URL: http://www.preventionweb.net/files/43291_sendaiframeworkfordrren.pdf.

³⁷ See Julie-Anne Richards and Keely, *Boom Big Oil, Coal and Gas Producers Paying for their Climate Damage*, Heinrich Böll Foundation Publication Series Ecology, V 39, p12.

Overall, Article 8 of the Paris Agreement and its accompanying decision is a substantial step forward in international environmental law. It creates significant new opportunities to assist countries adversely affected by climate change. New initiatives relating to a clearinghouse on risk transfer and a task force on displacement will provide considerable opportunities to afford appropriate protection for the most vulnerable. This work must progress if it is going to meet the demands of a world confronting the ever growing threats of climate change.

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