

Proposal for a compensation fund and redress process for Loss and Damage

What is loss and damage?

As any quick scan of one of the IPCC's reports will tell you¹, the importance of taking mitigation action to address climate change cannot be overemphasised. Our failure to prevent climate change to date is having increasingly severe impacts, often on those who are in already vulnerable positions. We are seeing harm that is already locked in as result of climate change to which it is not possible to adapt. This kind of harm is referred to as "loss and damage" in the climate negotiations and the question of how to address it is gaining increasing prominence. Like many of the debates on climate change, it is, at heart, about the role of fairness and justice in addressing climate change.

Setting up a loss and damage mechanism in Warsaw was a significant step forward from debate to action. The mechanism has a number of important functions, such as sharing expertise, building up a knowledge base on loss and damage and coordination of the work going on in areas related to loss and damage in a range of international institutions and bodies.

This note focuses on another critical aspect of loss and damage where the Warsaw Institutional Mechanism for loss and damage the (WIM) could play an important potential role, namely the issue of compensation and redress for countries and communities affected by loss and damage. Compensation is something that developed countries are deeply resistant to discussing, but is a vital component in ensuring that effective mitigation action is taken and that the consequences of existing failure to do this are adequately addressed. A proposal for a compensation regime is included in the draft elements text for Paris. Whether this is agreed or not, there remains scope for addressing the issue of redress for loss and damage through the operation of the WIM. It should be noted at the outset that loss and damage is distinct from adaptation and this should be clearly acknowledged by establishing loss and damage as a separate pillar of the negotiations and including the WIM under that rather than locating it within the adaptation framework as is currently the position.

Purpose of this paper

This paper sets out a proposal for how the loss and damage mechanism could administer a compensation fund and provide a process for communities and countries to make claims to it, as well as addressing the non-economic consequences of loss and damage, such as migration. It is intended as a thought piece, to encourage dialogue and response, rather than as a fully formulated recommendation.

¹ For a briefing on equity considerations in the context of the latest IPCC assessment report, see <https://drive.google.com/file/d/0Bz5U7GAFEd86eGIXTFM0aGZaM28/view>

What is the loss and damage mechanism and when was it set up?

In Decision 2/CP.19 in Warsaw, Parties established a loss and damage mechanism. The mechanism has three main functions: enhancing knowledge and understanding of risk management approaches to loss and damage; strengthening dialogue and coordination among relevant stakeholders; and enhancing action and support including finance, technology and capacity building.

Para 5 (c) iii of the decision describes one of the mechanism's functions as being:

“Facilitating the mobilization and securing of expertise, and enhancement of support, including finance, technology and capacity-building, to strengthen existing approaches and, where necessary, facilitate the development and implementation of additional approaches to address loss and damage associated with climate change impacts, including extreme weather events and slow onset events;”

The references to “enhancement of support, including finance” and “the development and implementation of additional approaches to address loss and damage associated with climate change impacts” leave open the debate about a future compensation fund and redress process.

What are the next steps?

At COP 20 in Lima, Peru, a workplan was agreed for the executive committee of the loss and damage mechanism for the next two years of work on loss and damage. The workplan is available at:

http://unfccc.int/documentation/documents/advanced_search/items/6911.php?preref=600008121

Area 1 (b) of the workplan recognises the need to enhance understanding of the effects of loss and damage on particularly vulnerable developing countries and segments of the population and how the implementation of approaches to address loss and damage can benefit them. Consideration of particularly vulnerable developing countries, populations and ecosystems is a cross-cutting topic, integrated across the relevant work under the mechanism.

Action area 7, the financial section of the work plan, focuses on risk management through diffusing information relating to financial instruments and tools that address the risk of loss and damage from the adverse impacts of climate change, including risk insurance, bonds etc. As noted in the document itself, this is not an exclusive list of possibilities for financial support. It would also be helpful, therefore, for work to take place to explore innovative approaches related to finance or contain other similar language which allows for further exploration of the issue of compensation. This would tie in with the language in the decision setting up the

WIM referred to above.

It is key that the WIM is rooted into the new international climate agreement to be agreed in 2015. In addition the current proposals for elements for a draft negotiating text include a proposal for a compensation regime for support for all developing country parties, particularly the LDCs, SIDs and countries in Africa affected by slow onset events². If this clause remains in the text, the loss and damage mechanism could play a role in administering such a regime, along the lines set out below. However, even if it does not survive in the final version of the text, the existing decision and workplan relating to the loss and damage mechanism enable it to develop such a process in future.

Why is it important to ensure that there is a compensation fund and redress process?

The reality of loss and damage highlights the consequences of not taking enough climate mitigation action, causing climate change that cannot be adapted to. Affected countries and communities should have a means for redress in acknowledgement of the ongoing injustice they face.

In addition, as pointed out by commentators, if states were to face financial or other liability for failure to act on climate change, this could increase their willingness to take on carbon reduction commitments³. Introducing clear principles into the climate regime through which they are subject to such liability could act as an incentive for states to take the necessary mitigation action, which would not only prevent further loss and damage from occurring but also be less costly for them than making payments into a compensation fund.

How do you define and allocate responsibility for loss and damage?

The international obligation on states not to cause harm outside their jurisdiction is a fundamental principle of international environmental law. As well as being set out in core documents such as the Stockholm and Rio declarations, the ICJ in its 1996 advisory opinion on nuclear tests confirmed the general obligation on states to ensure that activities subject to their jurisdiction/control respect the environment of other states and areas beyond national jurisdiction.⁴ In the sphere of human rights law, there is also a recognition that state responsibility has an extra-territorial dimension.⁵

In addition, the UNFCCC legal framework itself provides a basis for identifying state

² <http://unfccc.int/2860.php#decisions> first document in COP 20 column

³ "It is at least conceivable that Parties are refusing to support mitigation action even though it is cheaper, because they are being asked to bear the cost of mitigation, but it is less certain that they will be required to contribute significantly or at all to the cost of unmitigated loss & damage" *The Birth of the Warsaw Loss & Damage Mechanism*, Meinhard Doelle CCLR1/2014 p 37

⁴ See also the Trail Smelter litigation, Principle 1 of the Stockholm Declaration and Principle 2 of the Rio Declaration. The Polluter Pays principle is also relevant.

⁵ See for example

<http://www.maastrichtuniversity.nl/web/Institutes/MaastrichtCentreForHumanRights/MaastrichtETOPrinciples.htm>

responsibility for failure to take action on climate change. The ultimate objective of the Convention is arguably to prevent dangerous climate change, which when read with Article 4.2 (which requires Annex I/industrialised parties to reduce their greenhouse gas emissions) creates a fundamental primary obligation under the convention. Failure to take sufficient action on climate change is a breach of this obligation, making it a wrongful act under international law⁶. The consequences of a wrongful act include guarantees of non-repetition and the provision of full reparation in a way that wipes out the consequences of the wrongful act and/or the payment of damages where this is not possible.⁷

The UNFCCC agreement also specifically references the principle of Common But Differentiated Responsibilities (CBDR). So it can also be argued that the “no harm” principle identified above, when considered alongside CBDR, raises legal consequences for the failure of developed countries to take action to the point where developing countries now face consequences which cannot be adapted to. This argument is in turn allied to the principle of distributive justice which states that damages caused by harmful activities should be imposed on the persons who conduct them or profit from them in order to recompense those who are harmed by them.

There is therefore a legal basis on which to base arguments that failure to undertake adequate mitigation creates liability for loss and damage incurred to date. The specific apportionment of liability for such loss and damage between countries will be the subject of negotiation between them and some relevant factors for consideration are set out below. The WIM is the obvious home for a compensation fund and a process of redress for developing country parties and communities affected by loss and damage.

Allocation of payments to the compensation fund

In the loss and damage context, a key question is: what is a fair allocation of the costs or consequences of failure to take mitigation action that has or will foreseeably result in severe harm to communities and populations? The monetary aspect of this can be assessed on the basis of agreement on each country’s responsibility for taking action on climate change to date and its willingness to step up to that responsibility - the difference between the mitigation action taken by a country to date when compared to its responsibility could be quantified in monetary terms and treated as a loss and damage payment⁸. This would be distinct from adaptation funding which would (as the name suggests) focus on funding activities that would enable a country to adapt to climate change rather than compensation for the growing limits to such adaptation. The figure for each country would be assessed on the basis of loss and damage “locked in” to date and would need to be updated as things change, with additional payments as necessary.

⁶ See C Voigt, *Nordic Journal of International law* 77 (2008)

⁷ Climate Justice Policy Brief, Compensation for loss and Damage, law and justice perspective, M. Hafijul Islam Khan, Christophe Schwarte and Sharaban Tahura Zaman

⁸ An examination of how fair share of mitigation action for various countries could be calculated can be found at <http://www.climatefairshares.org/>

Allocations to the fund will be a matter of negotiation, but states might find it useful to consider the International Law Association's 2014 draft articles on Legal Principles Relating to Climate Change. There are a number of articles of relevance in this context.

Draft Article 3 (5) states: *"Where social and economic development plans, programs and projects may result in significant emissions of greenhouse gases or cause serious damage to the environment through climate change, States have a duty to prevent such harm or, at a minimum, to employ due diligence efforts to mitigate climate change impacts."*

Draft Article 5(3) acknowledges *"...states have differing historical, current and future contributions to climate change...states have differentiated responsibilities to address climate change and its adverse effects."* It goes on to list factors to be taken into account in determining if a state's commitments have been tailored to its responsibilities, one of which is that developed states shall take the lead in adopting stringent commitments and in assisting developing states.

Draft Articles 7 A and B of the Articles deal with due diligence to avoid, minimise and reduce environmental and other damage and emphasise that where there is a reasonably foreseeable threat of serious/irreversible damage, measures to prevent/adapt to such damage shall be taken by states without waiting for conclusive scientific proof of the damage.

Once a broad allocation of responsibility between countries is agreed⁹, this will define the proportion of payments (if any) to be made by a UNFCCC party to the loss and damage fund. The proportion of payments could take into account embedded emissions (i.e., carbon emissions from products that are produced in one country but consumed in another) as part of the consumer country's responsibility).

Given the level of loss and damage that is likely to occur, now and in the future, and the fact that payments by countries into the fund may well be capped to a specific amount, the value of state contributions is unlikely to fully reflect the damage caused to communities. Whilst primary responsibility for complying with legal obligations under the UNFCCC rests with states, we would propose an additional top up to the fund in the form of contributions made by dirty energy companies, who profit from state failure to adequately regulate activities that are harmful to the planet. There is a precedent for this in the form of the oil spills compensation scheme, which consists of capped contributions from states and then a top-up fund made up of contributions from oil companies. The Carbon Majors report¹⁰ provides information on the contribution of big companies to climate change.

The fund and redress process should be empowered to carry out its own investigations as to where payments to communities or countries may be necessary. We also propose that affected individuals and communities should be able to make direct claims to the fund and

⁹ See fairshares document, footnote one.

¹⁰ <http://carbonmajors.org/>

See also

http://www.boell.de/sites/default/files/carbon_majors_funding_loss_and_damage_kommentierbar.pdf

redress process.

How would claims to the fund be dealt with?

We propose that claims should be heard by an independent expert panel or adjudicative committee, empowered to make decisions on the basis of the research/determinations from the other parts of the mechanism, plus other information submitted. The draft workplan for the Executive Committee of the Loss & Damage mechanism envisages enhancing knowledge and coordination in relation to slow onset/extreme weather events and could help address questions such as the baseline level at which a complaint under the loss and damage mechanism could be triggered, how to resolve scientific questions such as the separation of risks that might have existed anyway and risks that wouldn't have arisen but for climate change¹¹; set thresholds for the significance of damage, etc.¹² A key objective of the adjudicative body should be to ensure the equitable sharing of burden of risk and harm, even where there is scientific uncertainty about causal links.¹³

The availability of detailed information and studies on baselines “in-house” should avoid difficulties such as those experienced in the UN compensation commission that assessed damages in respect of Iraq’s invasion of Kuwait, where compensation was only accessible through parties providing information in a manner that privileged monitoring and evaluation studies (which can be costly to implement).

The International Bar Association is planning to work on a Model Statute on Legal Remedies for Climate Change addressing substantive and procedural obstacles and applicable to litigation both in international and domestic fora including actionable rights; standing; causation; and methods for awarding remedies and relief. This could be a useful reference when determining the rules of procedure and functions for the adjudication committee.

Setting up a committee empowered to make determinations on specific complaints would go some way towards plugging the gaps in addressing liability for climate impacts acknowledged by large numbers of legal commentators (such as meeting traditional legal tests relating to causation and attribution which are ill-suited to the reality of climate change).¹⁴

¹¹ Some interesting work on Probabilistic Event Attribution (PEA) studies which compare how often an extreme event occurs in model experiments representing the “world as it is” (with human influence on climate) with how often the same type of event occurs in experiments representing the “world that might have been” (without such influence). <http://www.scidev.net/global/science-diplomacy/news/un-loss-damage-mechanism.html>

¹² In this regard the committee could build on (for example) work done within the Convention on Biological Diversity which has identified an adverse negative effect as one that cannot be addressed through natural recovery within a reasonable period of time.

¹³ By way of comparative example, in the *Naulilaa* arbitration arbitrators adopted a foreseeability approach to compensate losses that might be too remote/consequential but should in their view have been subject to reparation.

¹⁴ For a comprehensive examination of the current legal system and gaps see <http://www.ibanet.org/PresidentialTaskForceClimateChangeJustice2014Report.aspx>.

Who could make claims?

We propose that allocations from the compensation “pot” should focus on the communities and geographical areas in developing countries that are likely to be the most vulnerable to/harmed by climate impacts and establish whether there is a case for payments to them. There is scope for regional branches of the mechanism to be set up, amongst whom funds could be allocated. Paragraph 13 of Decision 2/CP.19 establishing the WIM invites parties to strengthen and where appropriate develop institutions and networks at regional and national levels, stressing the need for *“approaches to addressing loss and damage in a manner that is country-driven, encourages cooperation and coordination between relevant stakeholders and improves the flow of information.”* Regional branches of the grievance mechanism could administer the fund and make decisions in relation to claims made, with more complicated cases/appeals referred up to a central body.

The geographical/community-based approach outlined above would move away from a purely state-centric approach, whilst still leaving room for considerations of responsibility and capacity to bear climate impacts. The priority would be to allocate funds and resources towards those who are the most at risk and least capable of responding, wherever they are located. Such an approach certainly wouldn’t exclude small island states, etc., who would very likely still fall into the most vulnerable category given the threat to their existence, but it would also include vulnerable communities in other locations, such as the Sunderbans (the world’s largest mangrove system, falling within both Bangladeshi and Indian territory, which is facing threats such as salinisation). The workplan for the loss and damage mechanism contains proposals for enhancing scientific understanding of migration and displacement, which should help identify such communities¹⁵. There should also be an option for communities to initiate claims in their own right and capacity-building may be needed to support this.

Affected communities in developed countries, such as those in the Arctic, or coastal communities which fall within the geographical territory of developed countries but are vulnerable to loss and damage, should have the option of being able to make complaints to the fund regarding failure by their home state to take action to address their situation. Whilst they would not be able to claim directly from the fund, the adjudicative body should be empowered to make findings that their home nation should compensate them and/or in any case they should be able to make claims for non-economic loss.

Claims for non-economic loss

Much of the discussion on international environmental liability proceeds on the basis of financial compensation for harm. But money cannot compensate for everything and in addition to/instead of a claim on the fund, some communities or states might seek a

The IBA has also set up a working group on the legal aspects of adaptation but hasn’t directly considered the issue of loss and damage.

¹⁵ See 6 (a) of workplan

declaration or some other acknowledgment of the harm caused to them and the impact it has had on their lives, such as declarations relating to loss of livelihoods, homes, geographic locations, cultural heritage. There are potential overlaps with the work of human rights bodies here and linkages with the human rights framework are dealt with below. States in which such communities are based (or to where they locate) should be asked to recognise such findings and ensure that they are supported to address non-economic loss. Claims relating to displacement/migration and linkages with human rights claims are considered in greater detail below. Other possibilities for compensating non-economic loss could be explored, including guarantees of shelter by the international community.

Internal Displacement/Migration

200 million people could be at risk of being internally displaced or migrating due to climate change by 2050, with most displacement from extreme weather events and sea-level rise arising in Asia and Africa.¹⁶ Most impacted peoples are expected to stay in their countries and regions, especially in the case of coastal erosion and sea-level rise, but international migration cannot be excluded, particularly in the case of sub-Saharan populations or small island states.¹⁷ This is not a surprise when one considers that from 1970 to 2008, 95% of deaths due to natural disasters took place in the developing world.¹⁸

The loss and damage mechanism framework is ideally placed to help develop the legal regime relating to internal displacement and migration as a result of climate change¹⁹. The current system provides only marginal protection and places the bulk of responsibility on home countries. In our view the loss and damage mechanism could and should play a key role in the creation of specific legal protections for people who are internally displaced or migrate as a result of climate change that take into account the special character of what is needed in this area.²⁰ The mechanism could also coordinate and streamline the consideration of climate-induced migration and displacement within the UNFCCC framework and beyond.

The independent panel/committee could then make declarations relating to the status of affected populations and the compensation fund should contain sufficient funds to cover the

¹⁶ *Preparing for a Warmer World: Towards a Global Governance System to protect Climate Refugees*, Frank Biermann, Ingrid Boas, *Global Environmental Politics*, Volume 10, Number 1, February 2010, pp 60-88. "Asia is at high risk of extreme weather events and sea-level rise and will also be severely affected by drought and water scarcity. Africa is especially vulnerable to drought and water scarcity, but many regions are also at high risk of sea-level rise. Latin America is especially at risk of water stress and drought. Many small islands will be highly affected by even a moderate sea-level rise. However, here fewer people are at risk in absolute terms due to lower population levels.

¹⁷ *Ibid* p72

¹⁸ *Ibid*

¹⁹ The Doha decision on institutional arrangements for loss and damage, which preceded the setting up of the mechanism noted the need to advance understanding of how impacts of climate change are affecting patterns of migration, displacement and human mobility.

²⁰ A technical paper prepared by the UNFCCC secretariat in 2013 distinguishes between displacement and migration, arguing that the former is loss and damage whereas the latter is adaptation. ("Non economic losses in the context of the work programme on loss and damage" FCCC/TP/2013/2) On the other hand Biermann/Boas argue that it is not necessary to make this distinction (*Ibid*, footnote 10)

protection and re-settlement of people who are internally displaced or migrate as a result of climate change in developing countries. Alternatively a separate fund should be set up for this purpose.²¹ Displaced communities from developed countries could also seek a finding concerning the need for their home country to compensate them.

The current draft of the workplan envisages information-sharing on migration with identification of follow-up actions. This should include action to protect the rights of those internally displaced or forced to migrate as a result of climate change.

The current elements text for the Paris agreement²² refers to provisions for establishing a climate change displacement coordination facility that provides support for emergency relief; assists in providing organized migration and planned relocation; and undertakes compensation measures. Some of the functions outlined above could be performed by such a facility, although it would need to work closely with the loss and damage mechanism.

Linkages between the redress process and human rights law

Unmitigated climate change to which it is not possible to adapt will also undoubtedly breach human rights, such as rights to life, food, water, health, subsistence, cultural rights and minority rights. There are difficulties with bringing human rights claims relating to climate change, not least that human rights are generally territorially-based, the concept of “Common but Differentiated Responsibility” (CBDR) needs to be “translated” into the human rights framework, and questions of causation, standing, etc., need to be resolved.²³ Human rights can be strongly protective in theory, due to being inalienable/untransferable, but the findings of human rights bodies might lead to less practical support than a decision to grant compensation under a loss and damage mechanism. However, as in the context of migration, the mechanism could play a coordination and knowledge sharing function in order to help develop the human rights framework to meet some of these challenges.

Declarations regarding noxious and prohibited activities

A further possibility is for the panel/committee to be empowered, upon requests by states or members of the public, to make findings as to whether particular activities are noxious. Brundtland’s experts group defines such an activity as one of which “it is foreseeable that it will definitely cause substantial harm in an area under the national jurisdiction of another state or in an area beyond the limits of national jurisdiction.”²⁴

²¹ The Biermann/Boas article sets out legal principles that could apply and methods of implementation that could be considered by the mechanism.

²² Option 1, clause 33 of the Paris decision

²³ See IBA report p68

²⁴ The Environment, Risk and Liability in International law, by Julio Barboza, p.13 (Martinus Nijhoff publishers, 17 December 2010)

On the basis of current scientific knowledge, it is arguable that “carbon bomb” projects such as tar sands are noxious²⁵. A finding by the panel/committee that an activity is “noxious” should be required to be taken into account by national/regional courts or other tribunals dealing with cases concerning specific projects.

Under international law, some activities (e.g., nuclear weapons in outer space and any nuclear testing) are entirely prohibited. The panel/committee could have the power to make recommendations that certain activities are likely to create such high levels of loss and damage that they should be prohibited, which should be taken into account by states in their activities. This would underline the fact that states should aim to avoid loss and damage as far as possible and limit the risk of the fund and redress process turning into a “pay to pollute” mechanism.

Process

The process by which the panel/committee makes findings should be open, transparent, accountable and consistent. The membership of the panel should be balanced between the regions and the developed and developing world, but not so large as to make it unwieldy. The process of appointment of individuals to it should be independent and transparent, with civil society organisations and representatives of affected communities being entitled to make nominations to the panel.²⁶ Communities should be able to make claims directly, although states could also apply to the fund in relation to particular areas of territory. If a community claim coincides with the claim by a state the two should be dealt with together to ensure that there is no duplication in terms of hearing the issue or adjudication upon it.

Conclusion

The question of a loss and damage tribunal raises highly complex and evolving issues. Because of this some argue that a compensation protocol would ultimately be needed.²⁷ For the moment however, it is crucial to ensure that the issue of compensation and redress for loss and damage occupies its rightful place on the agenda at the climate negotiations towards Paris and beyond.

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²⁵ See <http://www.greenpeace.org/international/en/publications/Campaign-reports/Climate-Reports/Point-of-No-Return/>

²⁶ The Doha decision on loss and damage invited all parties to involve vulnerable communities and populations in the assessment of and response to loss and damage (para 6 f). However, this specific language has not appeared in either the Warsaw decision on loss and damage or the initial two-year workplan of the Executive Committee although the chapeau of para 5(c) of the decision references all of para 6 of the Doha decision

²⁷ Roderick/Verheyen (WWF), Beyond Adaptation, 2008