

Developing an Institutional Framework to Address Loss and Damage

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KEY POINTS

- It is possible to limit warming to 2°C, but to do so **mitigation ambition must be ramped up significantly**.
- **Support for adaptation must be increased** to avoid loss and damage not prevented through mitigation efforts. The work of the Nairobi Work Programme, the Adaptation Committee and National Adaptation Plans should be strengthened to scale up action on adaptation.
- Even with adaptation, **there will be residual loss and damage due to climate impacts** that will need to be addressed through a different set of tools.
- An **institutional framework should be created to address residual loss and damage**. This framework should be **guided by UNFCCC principles; recognise the urgency of developing and implementing robust and practical approaches** to address loss and damage; **address the needs of vulnerable countries; transform the scale of mitigation and adaptation ambition; be facilitative instead of punitive; and be based on the best available science and national circumstances**.
- The framework should include a **risk management component**, an **international insurance pool** and a component to **facilitate rehabilitation and transformation** in the face of mounting predictions of future climate change impacts.
- The framework should remain **flexible** as understanding of loss and damage grows, but **should be operationalised by COP 20**.

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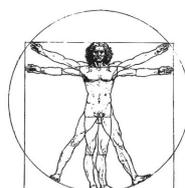
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Introduction

The United Nations Framework Convention on Climate Change (UNFCCC) was established in 1992 to stabilise greenhouse gas concentration in the atmosphere in order to “prevent dangerous anthropogenic interference with the climate system”.¹ Once it became clear that mitigation efforts would be insufficient to avoid all climate change impacts, adaptation became an increasing focus of the UNFCCC process and national efforts to address climate change.² Now a third era is emerging in the global climate change regime as it becomes evident that neither mitigation nor adaptation measures will prevent all climate change impacts and associated loss and damage.³

Indeed, over two decades after the UNFCCC was established, weak mitigation ambition has put the world on the path to warming in the magnitude of 4°C.⁴ According to a recent World Bank report, the projected impacts of a 4°C world include “unprecedented heat waves, severe drought, and major floods in many regions, with serious impacts on human systems, ecosystems, and associated services.”⁵ These impacts will invariably inflict significant loss and damage throughout the world, which will be especially severe in developing countries.

As the indications of future climate change impacts, stated in the Intergovernmental Panel on Climate Change’s (IPCC) third and fourth assessment reports and 2012’s Special Report on Extreme Events, have become increasingly severe loss and damage has risen in prominence on the global climate agenda. In 2010, at the sixteenth Conference of Parties (COP 16) in Cancun, the Work Programme on Loss and Damage was created to consider “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.”⁶

At the 2012 COP 18 in Doha, Parties agreed to establish institutional arrangements such as an international mechanism to address loss and damage under the UNFCCC at the 2013 COP 19 in Warsaw, Poland, later this year. While the role of the UNFCCC in facilitating the implementation of approaches to address loss and damage has been agreed upon, there is still disagreement about what type of institutional arrangements should be established to allow the Convention to best fulfil this role and meet the needs of developing country Parties.

While the phrase “international mechanism” has developed political connotations, it simply refers to an institutional framework to address loss and damage at the international level. Still, some argue that existing UNFCCC institutions such as the Adaptation Committee and National Adaptation Plans (NAPs) process, established in 2010 as part of the Cancun Adaptation Framework (CAF) along with the Work Programme on Loss and Damage, can address loss and damage. It has been suggested that these institutions have not had sufficient time to be fully established and fill in this role.

However, even if the efforts under the CAF were fully and successfully implemented, there are limits to what can be adapted to.⁷ In fact many systems are already at the edge of their “adaptation frontiers” which suggests that the limits to adaptation will eventually be reached.⁸ As a result there will be *unavoidable loss and damage* that cannot be addressed by adaptation.⁹ In addition, given current levels of mitigation and adaptation there will be *avoidable loss and damage that is not avoided*.¹⁰ Thus, while mitigation and adaptation efforts should be scaled up and supported so that loss and damage can be avoided to the extent possible, approaches to address residual loss and damage are also needed.

Developing country Parties have called for the issue to be dealt with in a coherent way, and proposed the establishment of an international mechanism based on the multi-window mechanism put forward by the Alliance of Small Island States (AOSIS) in 2008.¹¹ This proposal was reiterated in a submission by AOSIS in 2012. Though the original proposal was developed before the establishment of the CAF, many aspects of it are still valid and it will serve as a foundation for this paper.

This paper will outline a three-pronged approach for addressing loss and damage comprehensively within the global climate change framework. First, mitigation ambition must be enhanced. Second, the institutions and processes established under the CAF to support adaptation within the UNFCCC must be strengthened and support should be increased for developing countries to implement adaptation activities, including NAPs, to facilitate the mainstreaming of adaptation into development policies. Finally, an institutional framework must be established to address residual loss and damage.

To this end, the authors propose an institutional framework that draws on the multi-window mechanism proposed by AOSIS in 2008 and 2012. Unlike the AOSIS proposal, however, this framework would focus on issues relating to *residual* loss and damage only, and would draw on a number of key underlying principles, including the principles set out in the UNFCCC; the transformation of the scale of mitigation and adaptation ambition; facilitative, rather than punitive intent; grounding in the best available science; and a recognition of the urgency of implementing robust and practical approaches to loss and damage. As loss and damage is ultimately incurred at the local level the institutional framework on loss and damage should also provide guidance and mobilise support to help developing countries implement institutional arrangements to address loss and damage comprehensively.

The proposed structure is not necessarily the best arrangement to help developing countries in their efforts to assess and address loss and damage, but given the state of UNFCCC politics, the authors believe this to be a realistic and achievable option.

Background

Though the concept of loss and damage predates the UNFCCC¹² the issue has only recently become an agenda item in the international climate negotiations as the IPCC's predictions of the impacts of climate change have become increasingly severe.¹³

In 2007, at COP 13, Parties established the Bali Action Plan, which called for enhanced action on adaptation, including “[d]isaster reduction strategies and means to address loss and damage associated with climate change impacts in developing countries that are particularly vulnerable to the adverse effects of climate change”.¹⁴ In response, AOSIS proposed the establishment of a Multi-Window Mechanism to address loss and damage in a submission to the Ad Hoc Working Group on Long-term Cooperative Action under the Convention (AWG-LCA) in 2008, which would include a risk management component, a rehabilitation/compensatory component, and an insurance component.¹⁵

In 2010, at COP 16 in Cancun, a work programme was created under the Subsidiary Body for Implementation (SBI) to enhance understanding of loss and damage.¹⁶ The work programme was split into three thematic areas:

1. Assessing the risk of loss and damage;
2. A range of approaches to address loss and damage; and
3. The role of the UNFCCC in enhancing the implementation of approaches to address loss and damage in developing countries.¹⁷

At COP 18, Parties agreed that role of the UNFCCC in enhancing the implementation of approaches to address loss and damage in developing countries is:

1. Enhancing knowledge and understanding of comprehensive risk management approaches to address loss and damage associated with the adverse effects of climate change, including slow onset impacts;
2. Strengthening dialogue, coordination, coherence and synergies among relevant stakeholders; and
3. Enhancing action and support, including finance, technology and capacity building, to address loss and damage associated with the adverse effects of climate change.¹⁸

As loss and damage has become a more prominent part of the UNFCCC agenda, understanding of the concept, as well as how to assess and address it, has evolved. While there is still no universally agreed definition of the term, several working definitions have been proposed. One such definition characterises loss and damage as “the negative effects of climate variability and climate change that people have not been able to cope with or adapt to”.¹⁹ Loss and damage result from a spectrum of climate change impacts – from

extreme weather events to slow onset climatic processes.²⁰ Avoidable loss and damage can be avoided through mitigation and adaptation measures. Unavoidable loss and damage, which cannot be avoided through these efforts, will need to be addressed with another set of tools that include risk retention and risk transfer measures.²¹ Policymakers will need guidance on where the limits to adaptation occur, as well as support to implement measures to assess and address the residual loss and damage.

The Doha Gateway

Decision 3/CP.18 – the decision on loss and damage that resulted from negotiations at COP 18 – acknowledges that further work is needed to advance understanding of loss and damage. This requires the development and implementation of approaches to address loss and damage from a spectrum of climate change impacts arising from extreme events, slow onset processes and everything in between. In the decision, Parties agreed on the need for comprehensive, inclusive, and strategic responses to address loss and damage,²² as well as on the role of the Convention (described above).²³

The Doha decision mandates the establishment of institutional arrangements and their functions and modalities to help the Convention carry out its mandated roles.²⁴ Decision 3/CP.18 also invites all Parties – taking into account common but differentiated responsibilities – to enhance action on loss and damage, including through assessing the risk of loss and damage: identifying, designing and implementing risk management strategies; collecting data on the impacts of climate change; as well as involving vulnerable communities and civil society in assessing and addressing loss and damage.²⁵

The need for finance, technology, and capacity-building support to carry out relevant actions was also acknowledged.²⁶ In addition, Parties recognised that there is a great deal of work needed to better understand and develop expertise on loss and damage, including, *inter alia*, enhancing knowledge of slow onset processes, non-economic losses, and the ways in which loss and damage impacts vulnerable segments of society and influences patterns of migration and displacement.²⁷

Addressing loss and damage comprehensively under the UNFCCC

Loss and damage has risen to prominence on the UNFCCC agenda because inadequate levels of mitigation have meant that many avoidable impacts of climate change have not been avoided.²⁸ *The first line of defence against further loss and damage is therefore scaling up mitigation significantly.*

Historical emissions have “locked in” some climate impacts, *so adaptation will need to be supported, to avoid residual loss and damage to the extent possible.*

Unfortunately, however, loss and damage from climate change impacts is already being experienced today. *Therefore, an institutional framework to address this residual loss and damage will be needed.*

The authors maintain that loss and damage falls within a continuum²⁹ of approaches starting with mitigation, then adaptation and finally when those fail, implementing approaches to address residual losses and damage from climate change impacts. In reality however, the three will need to be implemented simultaneously.

Mitigation

It is not too late to keep global warming below 2°C.³⁰ Doing so, however, would require developed countries to significantly increase their mitigation ambition. In this respect, Parties should urgently focus on increasing mitigation ambition under Workstream 2 of the Ad Hoc Working Group on the Durban Platform for Enhanced Action (ADP).

Adaptation

After mitigation, adaptation is the next line of defence against preventing residual loss and damage. The authors recommend that the adaptation bodies under the Convention be strengthened to continue to support adaptation in developing countries but argue that residual loss and damage is best addressed outside an adaptation framework.

In 2010, the CAF was created to enhance action on adaptation. The CAF established the Adaptation Committee, as well as the National Adaptation Plans process to help carry out this objective.

(a) Adaptation Committee

The Adaptation Committee was set up “to promote the implementation of enhanced action on adaptation in a coherent manner under the Convention.”³¹ Its functions include the provision of technical support and guidance to Parties to facilitate the implementation

of adaptation activities; strengthening the sharing of information, knowledge and best practices at multiple levels; and providing information and recommendations for the COP on means to incentivise the implementation of adaptation actions, including finance, technology and capacity-building.³²

The Adaptation Committee met for the first time in September 2012 and developed an ambitious three-year work plan to provide coordination, coherence, and oversight on adaptation activities at the international level.³³ Through this work plan, the Adaptation Committee promises, *inter alia*, to map the mandates, work plans, and decisions of other bodies under the Convention relevant to adaptation and to provide coherence amongst bodies both within and outside the Convention.³⁴

The importance of making use of existing institutions has been emphasised in discussions on institutional arrangements to address loss and damage under the Convention.³⁵ The authors agree that existing institutions should be utilised and improved upon to maximise efficiency and coherency. Specifically the CAF institutions have a significant role to play in strengthening the role of the Convention in reducing avoidable loss and damage. If it fulfils its mandate, the Adaptation Committee could provide leadership on adaptation and promote coherence both within and outside the UNFCCC.

The Adaptation Committee is not, however, equipped to fulfil the role of the Convention on facilitating the implementation of approaches to address loss and damage as laid out in Decision 3/CP.18 for two reasons. First, its mandate is to enhance action on adaptation, while addressing residual loss and damage requires a completely different set of tools. For example, while an adaptive response to salinisation would be livelihood diversification, an approach to address loss and damage resulting from the same might be the establishment of alternative livelihood systems or migration strategies when areas become uninhabitable.³⁶ Secondly, even if its mandate were expanded to include addressing residual loss and damage, the Adaptation Committee simply does not have the capacity to undertake these activities. Thus, the authors recommend that the Adaptation Committee remain focused on adaptation and that it be provided with additional resources to carry out these activities.

(b) National Adaptation Plans (NAPs) Process

The NAPs process was established as part of the CAF to “enable least developed country Parties to formulate and implement national adaptation plans, building upon their experience in preparing and implementing national adaptation programmes of action, as a means of identifying medium- and long-term adaptation needs and developing and implementing strategies and programmes to address those needs”.³⁷

Many developing countries have already begun undertaking NAPs. This work is highly relevant to the establishment of a comprehensive institutional framework for addressing loss and damage under the Convention and must be supported. However, as with the Adaptation Committee, the NAPs process is specific to adaptation and does not have the mandate to provide guidance on implementing approaches to address loss and damage.

From a technical perspective, the function of the NAPs process could be expanded by the COP so as to cover loss and damage. However, in our view, such an expansion is not appropriate. The NAPs process was established to assist the least developed countries (LDCs) identify their medium and long-term adaptation needs and has been expanded to include non-LDC developing countries. While this process will therefore begin to identify the limits of adaptation, the next step of assessing such limits and the attendant risks should be conducted by a separate body dealing with loss and damage holistically so as not to detract focus from the main aim of the NAPs process. Given the relationship between loss and damage on the one hand and the identification of long term adaptation needs on the other – and the continuum of approaches to address loss and damage – it will nevertheless be very important for the institutional framework on loss and damage to establish linkages with the NAPs process. In addition the authors recommend that sufficient and sustainable funding be made available to allow developing countries to develop and implement their NAPs.

(c) Nairobi Work Programme (NWP)

The Nairobi Work Programme under the Subsidiary Body for Scientific and Technological Advice (SBSTA) was established in 2001 and is mandated to assist all Parties (particularly developing countries) to improve their understanding and assessment of impacts, vulnerability, and adaptation to climate change and make informed decisions on practical adaptation actions and measures to respond to climate change.³⁸ Though the NWP does not have the mandate to fulfil the role of the Convention in implementing approaches to address loss and damage as determined by Parties in Decision 3/CP. 18, understanding the impacts of climate change is crucial to developing approaches to address loss and damage. Thus, linkages should be established between the institutional framework to address loss and damage and the work of the NWP and the ability of the NWP to provide Parties with information about climate change impacts and potential loss and damage should be enhanced.

Proposal for an Institutional Framework on Loss and Damage

In order to address residual loss and damage, Parties must establish a new institutional framework under the UNFCCC, and in accordance with its principles and provisions in order to assess and address the risk of loss and damage in a comprehensive, coordinated, and coherent manner. It should do this by *inter alia*:

- Promoting and conducting research relating to the assessment of loss and damage in vulnerable countries, including in relation to the scale of such loss and damage and the identification and quantification of non-economic losses;
- Collating, analysing, and providing guidance on best practices for assessing the risk of loss and damage at the international, regional and national levels, taking into account the differing national circumstances of affected countries;
- Enhancing support for assessing and addressing residual loss and damage at the international level;
- Developing, facilitating the implementation and providing guidance on approaches to address such loss and damage in an equitable and transparent manner, including through risk retention, risk sharing, and risk transfer mechanisms at the international, regional, and national level;
- Establishing linkages with institutions and bodies inside and outside the Convention in order to effectively identify and understand, amongst other things, the relationship between adaptation (including disaster risk reduction) and loss and damage; potential sources of funding and other means of rehabilitation required to address loss and damage; and how knowledge and experience gained in processes outside the Convention can be implemented in the context of the institutional framework; and
- Mobilising support for developing national level institutions to assess and address loss and damage, particularly with respect to livelihood restoration, migration, and rehabilitation.³⁹

Principles underpinning the Framework

In addition to the principles set out in the Convention, the work of the institutional framework should be guided by a handful of simple yet clear principles. In this regard the work of the institutional framework should:

- Dramatically transform the scale of mitigation and adaptation ambition in light of predictions of the nature and scale of future climate change impacts;

- Be facilitative rather than punitive in intention, and developed on the basis of the needs of vulnerable countries;
- Be based on the best available science and national circumstances;
- Ensure respect for human rights principles and obligations; and
- Recognise the urgency of developing and implementing robust and practical approaches to address loss and damage.

Elements of the Framework

The multi-window mechanism proposed by AOSIS in 2008 remains to this date the only formal proposal made by Parties to address loss and damage. The mechanism is made up of three inter-dependent components: insurance, rehabilitation/compensation, and risk management. It was presented as an integrated approach to risk reduction, risk transfer, and risk management with the aim of enhancing adaptive capacity.⁴⁰

It is important to note that this proposal, in which loss and damage was presented as part of AOSIS's approach to address enhanced action on adaptation, was submitted before the CAF was adopted in 2010, and was based on the relevant paragraphs of the Bali Action Plan (related to adaptation and finance). As a result, it necessarily deals with loss and damage as part of the adaptation agenda.

However, as we have argued in this paper, "the adverse effects of climate change", traditionally intended to be dealt with through adaptation, are now such that they go well beyond the limits of adaptation. Therefore, in order to fully address these adverse effects, Parties must not only adapt to the changing climate system, but also put in place a framework to deal with the adverse effects of climate change that are beyond the reach of adaptation efforts.

In our view, therefore, while the multi-window mechanism proposal is still relevant and a helpful concept upon which to build, the proposal's adaptation elements (now dealt with under the CAF) should be removed. This would leave the mechanism to deal with loss and damage in a holistic manner, but with linkages to the clearly relevant work of the CAF (particularly with respect to identifying the limits of adaptation).

In September 2012, AOSIS updated its Multi-Window Mechanism proposal.⁴¹ However, rather than proposing to limit its functions to addressing approaches to residual loss and damage, it maintained that the international mechanism should address "risk prevention and management, risk transfer and the incidence of permanent losses" together.⁴²

While it is true that levels of risk prevention (e.g. mitigation) and risk reduction (e.g. adaptation) are very closely related to eventual residual loss and damage, in our view it is inappropriate and impractical for all these issues to be addressed by one mechanism. Rather, issues related to mitigation, adaptation, and loss and damage should be dealt with by the separate mechanisms and bodies established for these purposes, with the COP facilitating the on-going dialogue between them to ensure coherence.

As a result, the authors propose an institutional framework or mechanism, which develops the AOSIS 2008 and 2012 proposals further, but which would deal with issues relating to residual loss and damage only. This framework would link with the bodies responsible for mitigation and adaptation, but would not itself be responsible for their promotion or implementation.

As is the case with the AOSIS proposal, the proposed institutional framework would deal with risk management, insurance, and rehabilitation issues, but with a focus on residual loss and damage. It would operate under the guidance of the COP, but would have autonomous decision-making authority.

The authors believe that if such a framework or mechanism (and related operating entity) is established at COP 19, Parties must ensure there is flexibility around the powers and functions of the mechanism and operating entity. That said, it is important that the need to better understand loss and damage and how to assess and address it not be used as an excuse for inaction. The institutional arrangements established at COP 19 should be fully operational by COP 20. As more information about potential loss and damage and ways to address it become available, this flexibility would help effectively “future-proof” the mechanism, so that it can adapt to changing circumstances and new information and research without necessarily having to go back to the COP for approval.

The authors recommend that an oversight body be established to guide the implementation of the institutional framework on loss and damage. The proposed body would undertake the following functions:

- Undertake research to ensure that understanding of loss and damage continues to evolve;
- Enhance understanding of how loss and damage arises from a spectrum of climate change impacts, from extreme weather events to slow onset climatic processes;
- Mobilise support – including financial, technological and capacity building – to build the capacity of developing countries to assess unavoidable climate change impacts, including strengthening hydro-met services and the installation of weather monitoring stations;

- Develop a toolbox to help developing Parties undertake assessments of unavoidable losses and damages to key sectors to understand where entry points for policy interventions to address residual loss and damage lie;
- Provide guidance to support data collection and management to support Parties in their loss and damage assessments;
- Ensure coherence and avoid duplication of work by establishing linkages to promote cooperation and exchange of information with other bodies undertaking work relevant to loss and damage both within and outside of the Convention;
- Create linkages with already established regional centres and strengthen their ability to provide guidance to Parties; and
- Provide guidance and support Parties to develop institutional arrangements at the national level to assess and address loss and damage comprehensively, and ensure coherence and coordination at the local, sub-national and national levels.

Risk Management

Risk management approaches span a spectrum that includes risk reduction, risk transfer, and risk retention. As described above the oversight body will establish linkages with other bodies undertaking work relevant to loss and damage, possibly through an expert body. The risk management component of the new institutional framework will focus on facilitating the development and implementation of approaches to address residual loss and damage. It will, however, maintain linkages and exchange knowledge with other bodies undertaking work on adaptation and risk reduction, to maintain continuity and promote coherence in the way in which loss and damage is addressed. Policy makers in developing countries need guidance on when adaptation and risk reduction measures are needed and when approaches to address residual losses and damage should be implemented.

The risk management body would undertake *inter alia* the following functions:

- Facilitate enhanced action to address residual loss and damage by mobilising support that is predictable and sustainable to allow for the implementation of long-term policies, plans and programmes;
- Facilitate enhanced action by providing technology support and guidance to help developing Parties implement approaches to address residual losses and damage, including through risk transfer approaches like insurance and risk retention approaches like contingency funds and social protection policies;
- Facilitate enhanced action through capacity building to increase the ability of developing Parties to implement comprehensive policies to address loss and damage,

including on the implementation of multi-sectoral approaches;

- Support the development and implementation of innovative approaches to address residual loss and damage through research and pilots;
- Disseminate best practices and lessons learned to ensure that Parties implement robust approaches to address loss and damage in their own national contexts; and
- Support the scaling up and replicating of best practices through the provision of guidance and the mobilisation of support.

At the recent expert meeting on future needs associated with addressing slow onset events, held in Nadi, Fiji in September 2013, several Parties emphasised the need to create institutional arrangements that facilitate action and mobilise support (as mandated by the decision).⁴³ There has been a lot of emphasis on insurance as a tool to address residual loss and damage, but insurance is not a standalone solution to addressing climate change impacts.⁴⁴ The risk management body will provide guidance to help Parties implement comprehensive risk management frameworks and will also help the private sector find markets for implementing insurance in developing countries.

Possible modalities for enhancing action and support to help Parties implement risk management activities include training programmes and workshops, offered through the regional centres to key decision makers, to strengthen the capacity of developing Parties to implement risk management activities at the sub-national and national levels. Establishing a community of practice or a web portal on loss and damage is one way in which collaboration and the sharing of best practices could be facilitated. Ultimately, however, financial and technical support – as well as on-going capacity building – will be needed to ensure that developing countries have the knowledge and tools with which to implement approaches to address loss and damage.

International Insurance Pool

In addition to providing support to help vulnerable countries⁴⁵ to manage and assess the risk of residual loss and damage, the institutional framework to address loss and damage must also address ways to put those who suffer such loss and damage into the position they were in before the harm occurred, as far as this is possible. This would involve providing a way for affected parties to recover all or part of the economic and non-economic losses they have suffered.

A straightforward compensation regime, with loss and damage being attributed to individual “polluter” states is unlikely to be agreed upon due to political and scientific hurdles, especially those related to political acceptability of “compensatory payments”. In

addition, there is scientific uncertainty associated with the attribution of climate change to individual weather events (and the damage caused thereby). Instead, global risk pooling and compensation by way of a climate change insurance facility (“Facility”) may be a more acceptable way forward, particularly for economic loss and damage.

Under this model, vulnerable countries could choose to buy insurance coverage, with premiums paid for either by themselves or out of the funds raised by the institutional framework. Triggers for payouts would be based on parametric criteria (elaborated below) and the payout would be prompt. The trigger criteria would include an element of advance political agreement on the degree to which climate change has caused particular categories of insured events.

The Facility

Existing insurance products are unlikely to be sufficient or available to cover the additional anticipated climate-related loss and damage. The proposed new Facility would function as a global risk-pool, providing such insurance to vulnerable countries on the principles set out below.

In addition, the Facility would support vulnerable countries to supplement products that are available to them in the ordinary market with insurance against specified events for which prior agreement exists that they are caused or made worse by climate change. If the event occurs, the insured country is entitled to a payout.

Basis of Payouts

Insurance provided by the Facility should be an adapted form of ‘parametric’ insurance, in which the payout swiftly follows the occurrence of a measurable parametric trigger, which is calculated through an index or model in which hazard levels such as wind speed and rainfall amount are used as a proxy for losses. When the agreed upon levels are reached, a payout occurs. It should cover all heads of economic loss and damage (including loss of life, injury, damage to property, cost of preventative measures, damage to the environment and ecosystems, economic loss consequent to any of the preceding heads of loss, etc.). More work is likely to be needed to develop ways in which the Facility might cover non-economic losses.

The proposed new Facility assumes a link between payouts and the extent to which loss and damage was caused or made worse by climate change. This aspect would need to be factored into the parametric model. This means that a payout would not be made simply because a hurricane or storm surge occurred; rather, the extent to which such a hurricane or storm-surge was caused or made worse due to climate change would have to be ascertained.

These triggering events would be assessed against the latest available science *in advance* of their occurrence. The extent to which such triggering events are likely to be caused or made worse by climate change (during the life of the relevant policies) should be agreed by the COP as a probability factor represented by a percentage figure (the “Climate Change Factor”), which would be applied to the calculation of losses under the parametric model.

For events that will occur with 100 per cent certainty, insurance is not necessarily the best approach. These types of processes (such as sea-level rise) and their resulting loss and damage will need to be addressed through the measures described in the rehabilitation section below.

The Insured Parties and Insured Event

At least to start with, the insured Parties would include each vulnerable country that wishes to take out coverage from the Facility in order to supplement the cover it can obtain elsewhere. The risk assessment tool in the risk management window, along with the Facility itself, would be able to provide guidance and advice to eligible countries in this regard. The country would also choose the extent of the cover it wished to take out (for instance, damage caused by a hurricane up to US\$ 100 million). In part, this would determine the level of premium payable by the country, provided that the governing body of the institutional framework (or delegated sub-committee) approved the cover requested (such discretion to be subject to guidance from the COP).

If vulnerable countries wished to take out insurance, but were not in a position to pay the relevant premiums, the funding for such payments could be covered by the funds held by the institutional framework. In such a scenario, a default level of coverage would be provided. The triggering events covered and the level of insurance would need to be agreed by the COP or the governing body of the institutional framework in advance. If the insured country wished to take out additional levels of insurance, it would need to pay for these itself, either from its own national funds or by raising international funds specifically for this purpose.

Upon the occurrence of the specified event, the insured Party would submit a claim to the governing body of the institutional framework (or delegated sub-committee). Payouts would then be made to the insured Party, reduced by the Climate Change Factor. Options for individuals or communities to be insured should also be considered, whether such coverage is provided directly by the Facility or at the national level, with the national level insurer then having recourse to the Facility.

Limitations and Restrictions on Payout

The upper limit on the payout would be determined in the insurance policy. Losses incurred beyond this limit would need to be addressed through the mechanism's rehabilitation window, with the payout being reduced by the relevant policy's excess or deductible threshold.

The design of the international insurance pool should ultimately have in-built incentives to encourage Parties to reduce the risk of loss and damage from further events. Under the Africa Risk Capacity, a regional insurance pool recently established in Africa, member countries are required to develop contingency plans for how they will spend the payouts to reduce risk before they are granted insurance. Similar arrangements could be used to address the issue of 'moral hazard' in the proposed institutional framework such that the insurance pool only covers vulnerable countries if they have in place plans for how payouts will be spent to reduce future risks of loss and damage. Further limits could also be imposed, such that failure to implement Convention obligations and comply with its own nationally appropriate mitigation actions (NAMAs) could reduce payouts to such country by corresponding amounts.

Rehabilitation/Transformation

While the risk reduction, risk retention, and risk transfer approaches outlined above may be able to address some loss and damage, there will also be limitations to these approaches.⁴⁶ For example, while insurance may work well for extreme weather events, it may not be appropriate in cases such as sea level rise or temperature increases, which will occur with 100 per cent certainty.⁴⁷

Since certain types of loss and damage will not be avoidable or insurable, the body to address residual loss and damage must facilitate efforts to help developing countries achieve transformation and build resilience despite climate change impacts. In particular, this transformative function must go beyond finance to encompass elements of non-economic loss and damage, including the loss of territory, ecosystems, cultural heritage, values, livelihoods, local and indigenous knowledge, water availability, displacement, as well as other socioeconomic losses.⁴⁸ It must also take account of other types of intangible loss, such as lost opportunities to achieve sustainable development.⁴⁹ In addition, this component will need to deal with compensation-related issues, particularly in relation to loss and damage that exceeds that which is recoverable by insurance.

Rehabilitation is an extremely complicated area requiring significant further thought by experts, Parties, and other stakeholders. In fact there is no universally agreed upon definition of what rehabilitation means. However, the authors posit that it is a term which encompasses

the actions required to support societies in which the limits of adaptation have been exceeded and will include issues related migration, planned relocation and loss of statehood and sovereign territory. The institutional framework on loss and damage must hold open a space for rehabilitation actions, while also recognising the need for more research. In addition, given sensitivities around issues of compensation for loss and damage, further research is needed in order to design this window in a way that is politically workable.

Needs Relating to Rehabilitation

A number of current needs relating to rehabilitation include, but are not limited to:

- **Non-economic losses:** A greater understanding of non-economic losses, including issues related to social resilience, livelihoods, food security, loss of cultural identity, loss of territory, and human mobility (migration, displacement, and planned relocation) is needed. Non-economic losses must be included in assessments of loss and damage to provide a more comprehensive overview. In addition, policymakers need a better understanding of how to address such losses.
- **Post-disaster measures:** Post-disaster rehabilitation measures will be needed as instances of acute loss and damage from extreme weather events increase.
- **Climate induced migration and displacement:** Paragraph 7 of Decision 3/CP.18 outlines the need for further understanding of the impacts of climate change on patterns of migration and displacement, which will increase over time with the effects of climate change. It will also be important to link these assessments with estimates of non-economic loss and damage associated with such migration and displacement. However, there is a need to go a step further and begin to develop international policies and a global strategy on climate-induced migration. Current mitigation pathways have made certain the disappearance of some small island states by the end of the century, if not much sooner. Some Small Island Developing States (SIDS) are already developing migration policies as part of their climate change strategies, but will require the support of the international community to scale up this process to achieve the level of transformation needed.
- **Clear guidelines for participation:** In order to assess non-economic values and determine the content and scope of appropriate rehabilitation measures outlined above, a participatory approach is required. To this end, clear procedural requirements for the participation of vulnerable communities in decision-making must be formulated and implemented, in line with States' human rights and other legal obligations.⁵⁰
- **Recovery of other losses:** Finally, the rehabilitation component of the body to address residual loss and damage may include the recovery of those losses that go well beyond those recovered or recoverable by insurance. A dialogue is needed in which both

developing and developed country Parties recognise what the needs are and begin discussing how to address them. One of the guiding principles of the Convention is the need for developed countries to take the lead in addressing climate change impacts. The current debate – and its focus on compensation – is ultimately not helpful to vulnerable countries that are experiencing loss and damage *today*. This in no way implies that compensation should not be incorporated into an international framework to address loss and damage, but rather recognises the importance of establishing an effective institutional framework to address loss and damage sooner rather than later.

Rehabilitation and linkages with existing bodies

There is still a lot yet to be known about the rehabilitation of societies and communities who incur loss and damage. Paragraph 7 of Decision 3/CP.18, which outlines a list of areas that require further understanding, is a good starting point, but it is not an exhaustive list. Therefore, the rehabilitation component of the body to address residual loss and damage must remain flexible enough to incorporate further needs as they arise. Human rights principles and obligations should also be respected and fulfilled in relation to rehabilitation actions. In addition, Parties may draw inspiration from fields such as transitional justice. For example, at the community level, rehabilitation measures may help guide the development resettlement plans, social protection programmes, or other projects that address community needs.⁵¹

Funding the Institutional Framework on Loss and Damage

Historically, finance under the Convention and the Kyoto Protocol has been provided on a voluntary basis by Annex II Parties or by levies on the issuance of Certified Emission Reductions (CERs) under the Clean Development Mechanism (CDM) (recently extended to Emission Reduction Units (ERUs) and the first international transfers of Assigned Amount Unit (AAUs)). Since Cancun in 2010, it has also been agreed that developed countries, and not just Annex II Parties, should provide new and additional finance on a voluntary basis.

Most of this finance has previously been targeted at adaptation, and more recently towards mitigation. However, the level of actual finance provided (rather than pledged) has remained relatively low. One reason for this, rightly or wrongly, is the perception that there has not been a fair allocation of such finance, both for donors and recipients. When raising funds for the Institutional Framework on Loss and Damage it will therefore be critical for Parties to feel that other Parties are contributing to the collective effort in accordance with the principles of common but differentiated responsibilities and respective capabilities (CBDRRC) and equity.

Funding raised would be allocated to the different components under the institutional framework in accordance with decisions of the COP and the overseeing body. In particular, it will be important to have sufficient funds to establish the international insurance pool.

Though it is still possible to keep warming to 2°C, it seems more likely – given the current levels of mitigation ambition – that we are on the path towards a world that is 4°C warmer. The economic losses in such a world would be so great as to exceed the extent of potential funding from a single source. Therefore, the international insurance pool would need to be funded, on a regular basis, from multiple sources.

The authors suggest that the first layer of funding could be made up from “premiums” payable for policies taken out by vulnerable countries. The level of the premium would be linked to the type of event being insured against and the limit of the payout. The second layer could come from mandatory contributions from developed countries (based on the UN scale of assessment) while the third could draw on mandatory contributions from all countries (except vulnerable ones) based on the installed capacity of carbon emitting plants in its territory (countries could recover this from the operators of such plants if they wish). The fourth layer could come from levies on market based mechanisms under the Convention and Kyoto Protocol (this should be shared between the loss and damage mechanism, the Green Climate Fund (GCF), and Adaptation Fund (for adaptation purposes)) while the fifth could come from voluntary contributions from any Party or multilateral development banks (such as the World Bank). The sixth layer could come from levies on companies exploiting fossil fuels. Finally, the seventh layer could be raised by the Facility through issuing climate catastrophe bonds to states or private investors. Additional funding could come from levies on other activities, which contribute to climate change (such as air passenger levies or bunker fuel levies).

Once collected, and until needed to fund a payout (whether related to risk management or insurance payouts of rehabilitation measures), the funds could be protected and invested in the same manner as traditional investment funds. This will enable the fund to grow without the need for additional contributions in the same year. The investment function could be managed by external third party fund managers (who would be selected by a competitive tender process). Alternatively, the money could be held in a trust fund (as with existing UNFCCC funds and the CCRIF Trust Fund) with the trustee being selected by way of a competitive tender process.

If in any year payouts are required, Parties should be encouraged to voluntarily top-up the fund. In addition, with respect to the insurance-related payouts, in order to further protect the fund’s levels, the Facility should re-insure against its potential liabilities under the insurances taken out by vulnerable countries (the Caribbean Catastrophe Risk Insurance Facility, or CCRIF, for example, reinsures its liabilities with Swiss Re).

Conclusion and Recommendations

Warsaw represents the first opportunity for negotiators to formally discuss the establishment of institutional arrangements to address loss and damage. While there is still much to be known about loss and damage, we know that vulnerable communities in developing countries are incurring loss and damage now.⁵² Thus, there is an urgent need to establish an institutional framework to address loss and damage – one that establishes linkages where work is already being done, facilitates increased action and finance on mitigation and adaptation, and supports developing country Parties in understanding the limits to adaptation and the tools needed to address residual loss and damage.

At COP 20, the elaborated modalities and procedures and recommendations for operationalisation, capitalisation, and implementation of the international framework to address loss and damage should be adopted. After COP 20, the COP and body overseeing residual loss and damage should provide on-going guidance and research support to the various components of the body on implementation. It should do so with a particular focus on developing transformative components, as Parties' understanding of non-economic losses and the way in which loss and damage affects vulnerable populations and patterns of migration and displacement increases.

Ultimately, loss and damage has arisen in the international climate policy arena because the global climate change regime has so far failed to deliver the levels of mitigation and adaptation required by science. The authors posit that loss and damage presents an opportunity to transform this process, and in doing so help developing countries build resilience to unavoidable climate change impacts. This process will require leadership from developed countries on all fronts.

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