

Loss and Damage Negotiation at the UNFCCC: An Era of Liability and Compensation

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Devastation leads to forced displacement, Bangladesh; Photo courtesy: Din Muhammed Sibly

Executive Summary

Loss and damage associated with the adverse impacts of climate change is not an apprehension for the future, it has become a reality for the countries that are exposed to unprecedented extreme weather and climatic events triggered by changing climate. These events are causing both human and economic losses especially in the LDCs and developing countries. The economic losses from weather and climate-related disasters have increased significantly, estimated from a few US\$ billion to above 200 billion annually from 1980 to 2010 (IPCC, 2012), also causing higher fatality rates, especially in developing countries. It's a manifested injustice to the developing countries especially on its poor.

The dramatic increase in the frequency and intensity of disasters associated with the observed and unprecedented rise in global temperature is narrowing the options and

feasibility to adapt with unpredictable and frequent changes and to recover from the costs and shocks of economic, human, social and cultural losses.

Considering the limited scope of adaptation to address loss and damage, developing countries have been consistently arguing for years, to include 'compensation' as one of the approaches, among all others, to address unavoidable and uninsurable loss and damage from the impacts of climate change. However, developed countries have denied any discussion on compensation and liability.

At COP 18 held in Doha in 2012, developing country Parties traded off their core demand i.e. compensation with their other demand of having an 'institutional mechanism' and

‘compensation’ was substituted by ‘rehabilitation’, which is merely a narrowly focused approach for disaster risk reduction (DRR). Besides, in most cases, loss and damage from slow onset events like ocean acidification, salinity intrusion and sea level rise etc cannot be fully recovered or rehabilitated.

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While, in many countries, the liable for causing loss and damage are obliged by State law to compensate the victims, therefore in this era of climate injustice it is expected that the future negotiation at the UNFCCC will frame a legal basis allowing the victims of climate change to claim compensation for loss and damage from the liable Parties.

Compensation for Loss and Damage: history and basis

The demand for loss and damage compensation associated with the adverse impacts of climate change was first raised in 1991 by AOSIS who were afraid of losing territories due to rise of sea levels, caused by melting of ice sheets. Vanuatu, on behalf of AOSIS tabled this proposal asking for an International Insurance Pool as a collective loss sharing scheme to compensate victims of projected sea-level rise. The proposal approached mandatory contributions from the industrialized countries based on their ability to pay as well as responsibility of contributing to the climate change through greenhouse gas emission. AOSIS (AOSIS, 2007) argued that;

‘[w]here adaptation cannot fully address the impacts of climate change on countries and their communities, impacted countries are justified in seeking compensation from those countries most responsible for the greenhouse gas emissions that have led to those impacts’.

Aside with AOSIS, the LDCs also asked for compensation and rehabilitation of loss and damages associated with the negative impacts of climate change (Khan, M. Hafijul Islam 2013). At COP 11 held in Montreal in 2005, Bangladesh, on behalf of the LDCs, asked for compensation from the developed countries for changing the climate and causing harm (Earth Bulletin Vol 12). After the massive destruction caused by Cyclone Sidr (Category 4) in November 2007, Bangladesh again raised its rightful demand for compensation (Mukta, Z H, Hossain Khalid 2008).

The ideological basis for demanding such compensation is framed on the historical legacy of injustice and unfair

footprint to the global ecological space by developed countries. They were held responsible by the Convention and thereby asked to take the lead in combating the changing climate system (through mitigation actions) and the adverse impacts there of (through adaptation, technology transfer and finance)¹. In that context, the Convention recalled the State’s responsibility, in accordance with the Charter of the United Nations and the principles of international law, to ensure that the activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction². This is in compliance with the ‘No-harm Rule’ principle of the customary international law that provides an additional legal basis for a State’s obligation to act to prevent dangerous climate change (ActionAid et al 2012).

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The Convention also underscored the historical legacy of injustice, set the basis of actions on equity and in accordance with common but differentiated responsibilities and respective capabilities of the country Parties.

Loss and Damage: current scenario and future projections

Climate change has already increased, and will intensify future risks mainly in two ways. Firstly, global warming will lead to a change in precipitation and weather patterns, severely threatening agriculture and food security. Secondly, there will be an increased number of climate-induced, sudden onset disasters such as cyclones, floods, river bank erosion and increased tidal surge etc., and, slow onset disasters such as drought, salinity ingress, ocean acidification, increase of sea surface temperature etc. Such changes and their related negative impacts are already confirmed by well documented scientific reports and become visible across the globe that are already inflicting loss and damage, particularly in the least developed countries (LDCs), small island developing States (SIDS) and African countries (Warner et al., 2012). Among all the countries, LDCs suffered the most. They have faced five times more extreme weather events compared to the last decade; 519 events in 2000-2010 than during the 1970s (UNCTAD, 2010). Again, the direct consequences of almost 15,000 extreme weather events caused the death of more than 530,000 people and economic losses of more than USD 2.5 trillion (in purchasing power parity) from 1992 to 2011 globally (Harmeling, Sven and Eckstein, David, 2013).

Loss and damage from anthropogenic climate change is expected to further worsen with an unprecedented increase of carbon dioxide (CO₂), methane, and nitrous gases to levels inconsistent with a 2 degree temperature rise limit. The Policy Maker's Summary Report of the Fifth Assessment Report of the IPCC observed successively warmer climate in each of the last three decades than any preceding decade since 1850. Since pre-industrial times CO₂ concentrations have increased by 40% while the oceanic systems have absorbed about 30% of the emitted anthropogenic carbon dioxide causing ocean acidification and sea level rise. From 1901–2010, the global mean sea level rose by 0.19 [0.17 to 0.21] m. Such changes in climatic conditions are changing the “frequency, intensity, spatial extent, duration, and timing of extreme weather and climatic events that can result in unprecedented extreme weather and climate events” (IPCC, 2012).

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Already the average population exposed to flooding and severe storms has increased by 114% and 192% respectively every year globally between 1970 and 2010, a period in which the world's population increased by 87% from 3.7 billion to 6.9 billion (WMO, 2013).

Addressing Loss and Damage: functional response of the Convention

Although the AOSIS have tabled their proposal for loss compensation in the early 1990s but the ideological basis of that proposal still remains politically contentious as the concept of paying compensation by accepting liability of loss and damage makes developed countries uncomfortable during the negotiation process (Zakieldeen, Sumaya Ahmed & Koko Warner, 2012).

In the early years of COP negotiations, adaptation received less attention than mitigation, as Parties requested more certainty of the impacts of, and vulnerability to, climate change before agreeing on concrete adaptation measures. Those years of negotiation are marked by the adoption of the Kyoto Protocol in 1997 with its legally binding commitments for greenhouse gas (GHG) emissions reduction for developed countries. However, the denial of emissions reduction by the major polluters of the Annex I Parties and, at the same time increasing level of emissions by major developing countries have caused a rise in global warming instead of its reversal. And human influence has been considered the dominant cause of the observed warming.

With the publication of the Third Assessment Report of the IPCC in 2001, adaptation started to gain more momentum than before, and at COP7 in 2001 Parties agreed on a process to address the adverse effects of climate change and to establish three new special funds, the Special Climate Change Fund (SCCF), the Least Developed Countries Fund, (LDCF) and the Adaptation Fund (Shamsuddoha, Md and Bijoy., M.R., 2012).

Over time, the scientific evidence for anthropogenic climate change has strengthened. It has grown significantly with the publication of the 4th Assessment Report of the IPCC in 2007 that clearly marked human influence in climate change and emphasized adaptation as a necessary complement to mitigation (Shamsuddoha, Md, 2013).

Since 2007, both adaptation and mitigation have been considered as two major strategies for addressing climate change. Thus, the implementation of these strategies especially in undertaking urgent and immediate adaptation measures became a real challenge to developing countries, which require new, additional and incremental financial resources with technology support for their implementation. The importance of adaptation and finance related to it has been reflected at COP 13, held in Bali in 2007 wherein Parties agreed on the Bali Action Plan. The clause 1(c) (i) to (v) under the Bali Action Plan provides a list of possible principles and actions for adaptation. It also for the first time called for the consideration of addressing loss and damage in developing countries that are particularly vulnerable to the adverse effects of climate change. The ways to address loss and damage, as stated in the Bali Action Plan, are basically through the management and reduction of risks associated with extreme climate events and the strategies were considered under the ‘adaptation pillar’. Those years of negotiation from 2001 to 2007 are significant for the formulation of NAPAs, establishment of the adaptation fund under the Kyoto Protocol and creating commitment for establishing the green climate fund for the long term along with a USD 30 billion short term fund.

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Again, the continued lack of mitigation ambitions and inadequate resources to implement adaptation actions pushed developing countries to tremendous suffering, creating a significant loss and damage of assets and properties that could no longer be avoided and recovered through adaptation. Taking this into account, developing countries have

demanded compensation for unavoidable loss and damage associated with the impacts of climate change. Based on the premise of Article 2 of the UNFCCC³, Principle 2 of the Rio Convention⁴ both LDCs and AOSIS argued that the countries responsible for doing harm should be held liable to provide means not only for adaptation but also for compensation to the affected countries.

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Those years of negotiation are marked with:

- establishing a “work programme into three thematic areas; risk assessment, approaches to address loss and damage, role of Convention in the implementation of the approaches; to address loss and damage associated with climate change impacts in COP 16 held in Cancun in 2010⁵,
- agreeing continued work on the work programme at COP17 held in Durban in 2011⁶, and finally
- decision at COP 18 to establish, institutional arrangements, such as an international mechanism by the 19th Conference of the Parties⁷.

Over the years, with the increase of climate change impacts, the ideological basis as well as functional response of the Convention has greatly shifted. There has been always a push from science that influences climate change policy and global politics in reshaping the agenda of discussion in the negotiation process. In the initial years, from 1990 to 2000, the policy focus was on mitigation. From 2001 to 2007 it was on adaptation and since 2008 focus has been shifted to think

beyond adaptation.

Dr Saleemul Huq, lead author of the chapter on adaptation in the fourth assessment report by the Intergovernmental Panel on Climate Change, marked such policy shifts in three Eras of climate change negotiation and termed ever increasing climate change impacts as ‘climate injustice’ though the moral basis of policy shifting to its Third Era still was on climate justice. Building on the analysis of policy shifting in climate change negotiation, the moral basis of future negotiation should be tackling ‘climate injustice’ giving due attention addressing and compensating loss and damage associated with the adverse impacts of climate change.

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Such ‘climate injustice’ can be tackled, not in an abstract aim for perfect justice but in concrete terms to correct a ‘manifest injustice’ as it is far easier to mobilize people against an injustice than to mobilize them for an ideal of justice (Huq, Saleemul 2013a).

Negotiation on Loss and Damage: demand for ‘compensation’ traded off at COP 18

Demand for compensation as an approach to address loss and damage was always a contentious issue that was denied by the developed countries in the UNFCCC negotiation.

The AOSIS proposal in 1991 asked for compensation for the victims of projected sea level rise did not get any support by the developed countries, except for the insurance component - as a risk transfer mechanism-which survived in negotiation in

Decision on Loss and Damage: COP 18

Agrees that comprehensive, inclusive and strategic responses are needed to address loss and damage associated with the adverse effects of climate change; Also agrees that the role of the Convention in promoting the implementation of approaches to address loss and damage associated with the adverse effects of climate change includes, inter alia, the following:

- 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;
- Strengthening dialogue, coordination, coherence and synergies among relevant stakeholders;
- Enhancing action and support, including finance, technology and capacity-building, to address loss and damage associated with the adverse effects of climate change;

Decides to establish, at its nineteenth session, institutional arrangements, such as an international mechanism, including functions and modalities, elaborated in accordance with the role of the Convention, to address loss and damage associated with the impacts of climate change in developing countries that are particularly vulnerable to the adverse effects of climate change.

the following COPs. With the prominence of adaptation in the climate change negotiations, the Bali Action Plan, adopted at COP 13 in 2007, calls for consideration to address loss and damage in developing countries through risk sharing and transfer mechanisms, such as insurance” as a means of adaptation. Therefore, risk management and insurance has a noticeable profile in adaptation discussions under the the Ad Hoc Working Group on Long Term Cooperative Action (AWG-LCA) of Bali Action Plan. Developing countries expressed that there is already unavoidable loss and damage which is beyond the limit of adaptation and, thus, Parties have to explore ‘adaptation plus’ mechanisms, institutions and opportunities to properly address unavoidable loss and damage in a holistic manner.

To put demand for compensation in place, at COP 14 held in Poznan in 2008, the AOSIS again tabled a proposal for a Multi-Window Mechanism for addressing loss and damage. That proposal includes a rehabilitation and compensation component as a basis for future negotiations; the other components are an insurance component and risk management component. In contrary to this the developed countries again opposed the compensation / liability component.

However, with the increased support of the Least Developed Countries (LDCs) to the AOSIS proposal to address unavoidable loss and damage, the COP16 held in Cancun in 2010 decided to establish a Work Programme on Loss and Damage under the Cancun Adaptation Framework (Huq, Saleemul 2013b).

Inclusion of ‘compensation’ as an approach to address loss and damage again created heated debate among the Parties. Against the strong argument for compensation by the AOSIS and LDCs to address unavoidable and uninsurable loss and damage, the developed countries, led by the United States, time and again denied any discussion on compensation and liability. There was also disagreement in defining the role of the Convention in addressing loss and damage. Developing country Parties wanted establishment of an international mechanism under the Convention, while the developed country Parties wanted to put all the loss and damage related issues under the Adaptation Committee and National Adaptation Plans (NAPs).

Finally, developing country Parties traded off their core demand i.e. ‘compensation’ for having an institutional

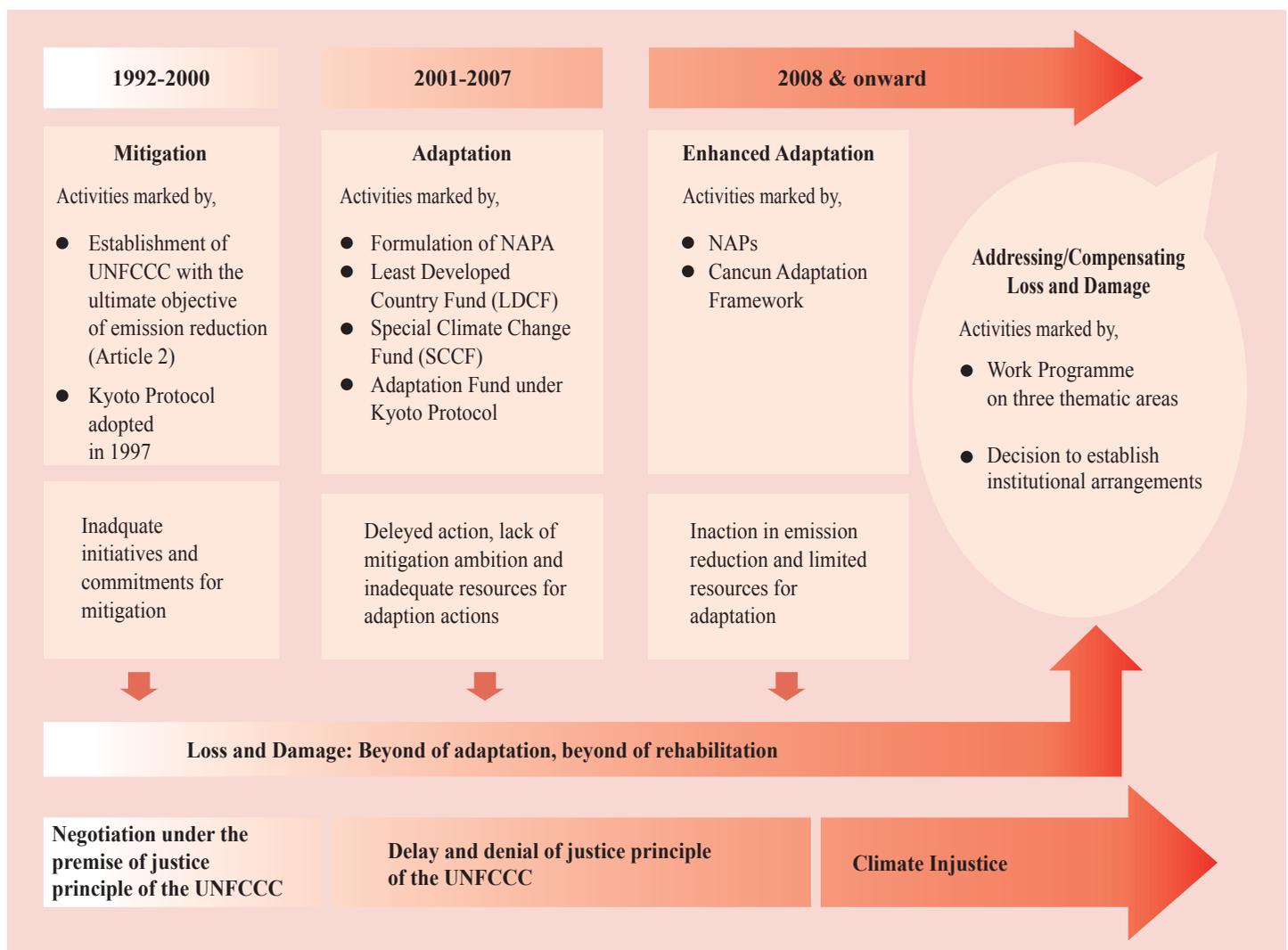


Figure 1: A schematic diagram on policy shifts of climate change negotiation over time; (developed by the authors, 2013)

mechanism for addressing loss and damage. The developing countries agreed on ‘rehabilitation’, instead of ‘compensation’, while developed country Parties agreed to examine options for establishing ‘institutional arrangements such as an ‘international mechanism’ and to take a further decision at COP 19 to be held in November 2013 in Warsaw, Poland⁸. Parties also decided to continue the work programme to develop a further understanding on loss and damage from slow onset processes, non-economic losses and how loss and damage affects vulnerable segments of the population.

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Though few argue that payment for rehabilitation could also be considered as compensation under the polluter pays principle, but the coverage and mandate of rehabilitation would have too narrow a focus. The certain economic loss from sudden disaster events could be rehabilitated through post-disaster response measures but loss and damage from slow onset events like ocean acidification, salinity intrusion and sea level rise etc would not be fully recovered or rehabilitated in most of the cases.

Remarks and Conclusion

Analysis of a number of Party submissions on loss damage showed that all the developing nations, led by the small island developing States and the least developed countries, argued

for compensation for residual or unavoidable loss and damage, lost development opportunities and rehabilitation support for the loss and damage from the adverse effects of climate change and slow-onset processes.

Ambassador Pa Ousman, the previous Chair of the LDCs, considers compensation as the key element in addressing loss and damage. “Demand for compensation is the elephant in the room and we have to face the elephant as this is the only element to justify the role of the Convention in addressing unavoidable loss and damage,” he said⁹.

Loss and damage, caused by the impact of climate change, is an additional burden to countries in the South especially on its poor. ‘Though rehabilitation is formally mandated in the COP decision, compensation is the only measure of addressing unavoidable and non repairable loss and damages,¹⁰’ according to Prakash Mathema, the current Chair of the LDC group to the UNFCCC negotiation.

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Building on above remarks and views it is argued that in this Era of climate injustice the negotiation at the UNFCCC will undertake required functional measures to compensate the victims who have been forced to shoulder entirely an additional burden of loss and damage from the impacts of climate change.

End Notes

¹ Article 3 (Principle 1) of the UN Convention on Climate Change

² The preamble of the United Nations Framework Convention on Climate Change

³ as the ultimate objective of the Convention - aims to “prevent dangerous anthropogenic interference with the climate system”

⁴ i.e. States have the responsibility or even obligation to ensure that activities under their jurisdiction or control do not cause damage to the environment of other states or areas beyond national jurisdiction

⁵ Decision 1/CP.16

⁶ Decision 7/CP.17

⁷ Decision 3/CP.18

⁸ Decision 3/CP.18

⁹ Interviewing of Pa Ousman on 21 September 2013

¹⁰ Interviewing of Prakash Mathema on 20 September 2013

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Organizations

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Network on Climate Change, Bangladesh-NCC,B



The Network on Climate Change, Bangladesh-NCC,B established in 2005 with the support of 'Bread for the World-BftW, Germany. The overall goal is to work (Represent) the voice (ideas and beliefs) of partner organizations on the issues of climate change at community, regional, national and international levels. At present, the network is working in twelve districts with its member organizations. Please visit: www.nccbd.org.



Once a human habitat wiped out by cyclone Sidr in 2007, Bangladesh; Photo courtesy: Din Muhammed Sibly