



## Loss & Damage: the persistent problem of Loss and Damage and how to allocate responsibility for climate change harms under international law

Much of the discourse underlying the debate on the most appropriate method to combat climate change has centred on the idea that those who have contributed to it most significantly ought to be held liable for its consequences. This so-called "polluter pays" principle is commonly enshrined in domestic environmental legislation.

However, there has been resistance to the creation of a similar basis under international law to allocate responsibility to more highly polluting countries for loss and damage resulting from climate change. As instances of national courts holding the executive branch of government to account for failing to uphold the commitments set out in the Paris Agreement grow in number, the question of potential State liability for loss and damage is likely to continue generating debate, especially in the context of the UN Climate Change Conference of the Parties to be held in the United Kingdom in November 2021 ("COP26").

### The concept of Loss and Damage in the climate change policy space

As discussed in the context of climate change and the UN Framework Convention on Climate Change ("UNFCCC"), the term "loss and damage" is usually understood to refer to the harmful economic and non-economic impacts of both slow onset and extreme weather events. The category of slow onset events covers the risks and impacts associated with increasing temperatures, desertification, loss of biodiversity, land and forest degradation, glacial retreat, ocean acidification, sea level rise and salinisation. As for extreme weather events, they include heatwaves and storm surges among others.<sup>1</sup>



1. Pidcock, R., & Yeo, S. (2017, September 5). "Explainer: Dealing with the 'loss and damage' caused by climate change". Carbon Brief. <https://www.carbonbrief.org/explainer-dealing-with-the-loss-and-damage-caused-by-climate-change>.

Economic loss and damage usually refers to a reduction in the value of economic items, ie resources, goods and services that are commonly traded in markets. Conversely, non-economic items are those that are not easily quantifiable in economic terms. Non-economic losses therefore include loss of human life, biodiversity and displacement.<sup>2</sup> It is widely thought that it is economically developing countries that are at higher risk of suffering loss and damage associated with climate change than economically developed countries, particularly when it comes to non-economic loss and damage.<sup>3</sup>

This concept has been developed incrementally in line with various climate change-related instruments under international law. The Warsaw International Mechanism for Loss and Damage (the "**Warsaw Mechanism**"), established at the 19<sup>th</sup> UN Climate Change Conference of the Parties held in 2013 ("**COP19**") acknowledged that loss and damage sustained as a result of climate change can be permanent, and is not always susceptible to mitigation and adaptation measures. The Warsaw Mechanism also aims to address the issue of loss and damage by introducing 15 provisions principally aimed at enhancing signatories' understanding of risk management strategies, increasing their technological and financial capacity to combat climate change, and fostering dialogue between key stakeholders.<sup>4</sup>

However, the Warsaw Mechanism did not address the question of attribution of liability, and the related issue of compensation for loss and damage suffered by individual signatories.<sup>5</sup> Notably, it was established for an

initial two-year period, and was intended to operate "*subject to the availability of financial resources*".<sup>6</sup> Nevertheless, the Warsaw Mechanism did facilitate more open and constructive discussion on the concepts of loss and damage.

The Warsaw Mechanism was later supplemented by the establishment of the Santiago Network for Loss and Damage ("**Santiago Network**") at the UN Climate Change Conference of the Parties ("**COP25**") held in 2019. The Santiago Network was intended to facilitate the provision of technical assistance to developing countries vulnerable to the adverse impacts of climate change.<sup>7</sup> However, the Parties at COP26 did not adopt a plan to implement the Santiago Network and, to date, it is not fully operational.<sup>8</sup>

### Loss and Damage under the Paris Agreement

This concept was further developed and formalised in the Paris Agreement. Article 8 of the Paris Agreement, signed at the UN Climate Change Conference of the Parties in 2015 ("**COP21**"), reaffirmed the Warsaw Mechanism and set it on a permanent footing, engaging actively with the concepts of loss and damage. Article 8 further established a clearing house for risk transfer to serve as a repository for information on insurance and risk transfer, and established a UNFCCC Task Force on Displacement.

Notably, however, Paragraph 51 of the COP21 Decision on the Implementation of the Paris Agreement states that "*Article 8 of the [Paris] Agreement does not involve or provide a basis for*

*any liability or compensation*".<sup>9</sup> The Decisions taken at each UN Climate Change Conference of the Parties effectively constitute a binding rulebook for the effective implementation of the UNFCCC, and the omission of clear rules on liability or compensation to date is significant.<sup>10</sup>

As such, the Paris Agreement does not appear to provide an express basis for signatories to be held liable for compensation in respect of loss and damage suffered by other State signatories. Nonetheless, whilst the Warsaw Mechanism was instrumental in focusing and formalising the discussion of loss and damage suffered by State signatories as a result of climate change, COP21 highlighted the existence of a range of views surrounding the questions of liability and compensation.<sup>11</sup>

### COP26: How will the concept of Loss and Damage be further developed?

The upcoming COP26 is a further opportunity for discussion of this core concept. Early indications already suggest that it will be a focus for debate. The concept of loss and damage did not feature on the agenda for the Bonn Climate Change Conference held in June 2021, a precursor to COP26. Nevertheless, the two-week Presidency Programme published by the UK Government (as the host of the conference) indicates that the discussions to be held on 8 November will focus on "*adaptation, loss and damage*".<sup>12</sup>

While the precise scope of these discussions is not yet clear, it is expected that the following points will be addressed at COP26 in the light of their current relevance: (i) the development of a plan for the implementation of the Santiago Network;<sup>13</sup> (ii) commitments by economically developed countries to provide aid in the form of funding to developing countries to combat the effects of climate change;<sup>14</sup> and (iii) the creation of initiatives to maximise private sector investment to combat climate change.<sup>15</sup>

### Implications for commercial parties

#### Judicial activism

Since the UN Climate Change Conference of the Parties held in 2019 ("**COP25**"), there has been significantly increased judicial activism globally, and, in particular, in Europe, with some national courts, for instance, in the Netherlands, Germany and France, declaring that existing legislative regimes do not adequately facilitate the fulfilment of emissions-related objectives enshrined in the Paris Agreement.

While these decisions have been targeted at the State level rather than at commercial parties, they are not without implications for entities operating in these States and the emissions reductions standards to which they may be held in the future. Any further development of the Loss and Damage concept as part of COP26 may also be referenced in future disputes of the type seen in the Netherlands, Germany, France and other countries.

#### Increased environmental regulation

Similarly, the emphasis on elaborating and defining the concept of Loss and Damage may generate an increased public interest in, and focus on, domestic environmental regulation and the exposure of highly polluting states to future claims. The governments of a growing

number of State signatories therefore may face increased domestic pressure to tighten climate change-related regulations, including in relation to emissions and carbon reporting and verification schemes.

This phenomenon may also translate into calls for increased environmental regulation – both domestically and through instruments of international law – at COP26. A focus on the "polluter pays" principle, which dictates that those responsible for carrying out economic activity are to be held liable for any environmental damage caused by that activity, and is already enshrined in EU law,<sup>16</sup> could lead to governments increasingly scrutinising certain industries which have traditionally had a more significant carbon footprint.

#### Comment

The Warsaw Mechanism and the Paris Agreement have established a framework within which the concept of loss and damage suffered by affected States may be discussed openly. While they do not establish a basis of liability and compensation as such, this position may change in the light of domestic courts' increasing willingness to hold the executive branch of governments accountable for inadequate action on climate change.

COP26 is set to provide an opportunity for States to address these matters in greater detail, and coordinate their position on emissions-related environmental regulation. Importantly, while these discussions may result in greater regulatory pressure on commercial parties, they are also likely to provide certain valuable commercial opportunities. We will continue watching this space closely and reporting on the [HSF COP26 hub](#) and the [HSF Climate Change blog](#).

### Key contacts



**Andrew Cannon**  
Partner  
T +44 20 7466 2852  
[andrew.cannon@hsf.com](mailto:andrew.cannon@hsf.com)



**Louise Barber**  
Senior Associate  
T +44 20 7466 2140  
[louise.barber@hsf.com](mailto:louise.barber@hsf.com)



**Olga Dementyeva**  
Associate  
T +44 20 7466 7644  
[olga.dementyeva@hsf.com](mailto:olga.dementyeva@hsf.com)



**Helin Laufer**  
Associate  
T +44 20 7466 6425  
[helin.laufer@hsf.com](mailto:helin.laufer@hsf.com)

2. UNFCCC (2013, October). "Non-economic losses in the context of the work programme on loss and damage: technical paper", FCCC/TP/2013/2, pp. 8-9.

3. Heinrich Böll Stiftung (2021, 6 April). "Why do developing countries need support to address loss and damage?" <https://us.boell.org/en/2021/04/06/why-do-developing-countries-need-support-address-loss-and-damage>.

4. UNFCCC (2020, February). "Loss and Damage: Online Guide". [https://unfccc.int/sites/default/files/resource/Online\\_Guide\\_feb\\_2020.pdf](https://unfccc.int/sites/default/files/resource/Online_Guide_feb_2020.pdf).

5. Pidcock, R., & Yeo, S. (2017, September 5). "Explainer: Dealing with the 'loss and damage' caused by climate change". Carbon Brief. <https://www.carbonbrief.org/explainer-dealing-with-the-loss-and-damage-caused-by-climate-change>.

6. UNFCCC (2013, November). "Draft decision -/CP.19: Warsaw international mechanism for loss and damage associated with climate change impacts", FCCC/CP/2013/L.15, p. 4.

7. UNFCCC, "The Santiago Network". <https://unfccc.int/santiago-network/about>.

8. Women & Constituency of the UNFCCC (2021, April 27), "Call for action on the operationalisation of an effective Santiago network on loss and damage". <https://womensgenderclimate.org/call-for-action-on-the-operationalisation-of-an-effective-santiago-network-on-loss-and-damage/>.

9. UNFCCC, "Decision 1/CP.21 - Adoption of the Paris Agreement". <https://unfccc.int/resource/docs/2015/cop21/eng/10a01.pdf#page=2>.

10. UNFCCC, "A guide to the climate change convention process". <https://unfccc.int/resource/process/guideprocess-p.pdf>.

11. Wilson Center, Environment Change and Security Programme, "'Loss and Damage' and 'Liability and Compensation' – What's the Difference and Why Does It Matter?". <https://www.newsecuritybeat.org/2016/09/loss-damage-liability-compensation-whats-difference-matter/>.

12. UK Government, "COP26 Presidency Programme". <https://ukcop26.org/the-conference/presidency-programme/>.

13. World Wildlife Fund, "Expectations on Loss & Damage at COP26". [https://wwfint.awsassets.panda.org/downloads/final\\_expectations\\_on\\_loss\\_\\_\\_damage\\_report\\_type.pdf](https://wwfint.awsassets.panda.org/downloads/final_expectations_on_loss___damage_report_type.pdf).

14. Climate Vulnerable Forum, "Dealing with Loss and Damage at COP26". <https://thecvf.org/ourvoice/blog/dealing-with-loss-and-damage-in-cop26/>.

15. UN Special Envoy for Climate Action and Finance and the Prime Minister's Finance Adviser for COP26, "Building a private finance system for net-zero: Priorities for private finance for COP26". [https://ukcop26.org/wp-content/uploads/2020/11/COP26-Private-Finance-Hub-Strategy\\_Nov-2020v4.1.pdf](https://ukcop26.org/wp-content/uploads/2020/11/COP26-Private-Finance-Hub-Strategy_Nov-2020v4.1.pdf).

16. Article 191(2) Treaty on the Functioning of the European Union; Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 ("Environmental Liability Directive").