



# Climate Change and Loss & Damage under the UNFCCC and the Paris Agreement: *Which Patchwork of Legal Avenues?*



AARHUS  
UNIVERSITY  
AARHUS SCHOOL OF BUSINESS AND SOCIAL  
SCIENCES  
DEPARTMENT OF LAW

SANDRA CASSOTTA  
ASSISTANT PROFESSOR IN INTERNATIONAL  
ENVIRONMENTAL LAW



## Agenda

- I. Introduction to AOSIS and SIDS, remedies and the problem
- II. Notion of “Loss & Damage” under the UNFCCC
- III. The provisions of “Loss & Damage” under the Paris Agreement
- IV. Existing Avenues: *pros* and *cons*
- V. *Which patchwork of legal avenues?*

## I. Introduction to SIDS and OASIS, remedies and the problem

- SIDS are areas highly sensitive often defined by climatologists as or "Dead Zones"
- Problem of disappearance
- Strong societal challenges (economic well being, availability of basic resources, tensions, migration, cultural and religious threats)
- High environmental and human risks due to very low level of adaptation compared to climate change (i.e.: SIDS and Arctic)

3

### Other "Dead Zones"

**AFRICA:** 2013 Report of IPCC provides solid scientific info

**ASIA:** recent climate change events across Asia – including the 2010 floods in Pakistan, 2011 floods in Thailand, soil degradation in Iraq, loss of Himalayan glaciers

**LATIN AMERICA:** flooding in Colombia and Venezuela in 2010, Andean glaciers rapidly receding

**OCEANIA:** Recent Cyclone Pam in South Pacific (Vanatu) caused around \$350 million in damage



4

## I. Introduction to AOSIS and SIDS, remedies and the problem

---

- ✓ AOSIS: coalition of small islands and lowlying coastal countries that share similar development challenges and concerns about the environment such as vulnerability
- ✓ AOSIS: negotiating voice for Small Islands and Developing States (SIDS)
- ✓ Within the United Nations system, AOSIS: has a membership of 44 states and observers from all oceans and regions of the world: Africa, Caribbean, Indian Ocean, Mediterranean, Pacific and South China Sea, 37 % of developing countries, and 20% of the UN's total membership

5

## I. Introduction to AOSIS and SIDS, remedies and the problem

---

SIDS: UN recognize 57 so-called "SIDS" all of them tropical or subtropical  
Differences

57 island jurisdictions which differ in terms of geography, culture, history or socio-economic circumstances

Commonalities

1. Developing countries
2. Victims of climate change

6

## I. Introduction to AOSIS and SIDS, remedies and the problem

- ❖ **Top-down approach** (UNFCCC + COP, Paris Agreement + Green Climate Fund)
- ❖ **Bottom-up approach** (decentralised, different social and governmental levels and different actors, uses differentiation to guide planning and policy implementation, address the local-specific areas of adaptation and thus, most appropriate to Loss & Damage)



Paris Agreement: combine the two approaches which favour adaptation, loss & damage and SIDS and the unique specific nature of adaptation and Loss & Damage

7

## II. Notion of “Loss & Damage” under the UNFCCC

### Problem

Is there an instrument of compensation for the damages related to climate change that have occurred or will occur during adaptation and mitigation mechanisms? → NO



Which instruments ?

- 1) Liability rules
- 2) Insurance
- 3) International Compensation funds

8

## II. Notion of “Loss & Damage” under the UNFCCC

- No common definition on “Loss & Damage” but a generally reconized definition is “*impact of climate change that will neither be mitigated, nor adapted*”
- the notion is : providing aid to vulnerable countries that suffer damage from climate change. It includes: loss of species, destruction of infrastructue, loss of land from rising seas or the displacement of people from climate -linked events (i.e. drought or violent weather events)
- Although the term has been “in” and “out” from the UN Climate negotiations since 1992 there has been virtually no discussions on how to adress these issues, which is crutical to confront climate change in an effective and justice manner

9

## II. Notion of “Loss & Damage” under the UNFCCC

- ❑ Eternal pending questions: 1) how does “loss and damage” relates to other forms of climate aid and what it the most effective way to adress it throught the UNFCCC? 2) Can reach and poor countries come to some sort of agreement on climate compensation beyond what has already been commited?
- ❑ “Loss” refers to irrecoverable negative impacts of climate change, such as loss of freshwater or culture or heritage, while “damage” describes climate impacts to ecosystems and human institutions such as damage to mangroviae from storm surges or damage to coastal infrastructure from violent wheather events

10

## II. Notion of “Loss & Damage” under the UNFCCC

---

- “Loss & damage” includes impacts from extreme events (such as heat waves, drought and flooding) as well as long-term impacts including salinization, rising sea levels, desertification and retreat of glaciers
- “Loss & damage” does not include cultural disintegration through relocation or loss of indigenous people

11

## III. The Provision of “Loss & Damage” under UNFCCC and under the Paris Agreement

---

- Detached from Adaptation
- Art. 8 = Loss & Damage encompass the costs associated with climate change that adaptation and mitigation cannot prevent
- Some **developed countries** have insisted and obtained that the COP decision accompanying the Paris Agreement specify that the provision of loss and damage does not involve or provide a basis for any *liability* and *compensation* (Dec.1/CP.21, 52)
- **Organized migration/relocation of population forced to move as a result of climate change has long been an elephant in the room of climate negotiations**
- Instead the Decision: provide some consideration for the issue of displacement, by establishing a process to develop recommendations for approaches to avert, minimise and address displacement (Dec.1/CP. 21, 50)

12

### III. The Provision of “Loss & Damage” under UNFCCC and under the Paris Agreement

- Furthermore: institutions are entrusted to establish a clearing house that serves as a repository for information on *insurance* and *risk transfer* in order to facilitate the effort of the Parties to develop and implement risk management strategies
- **In terms of justice , the picture on “loss & damage” is very opaque**
- SIDS insisted that the text include a stand-alone section on “loss & damage” maintaining that vulnerable communities are already experiencing impacts to which it is impossible to adapt
- Art. 8 on “loss & damage” does stand alone, rather than being nested within Art. 7 on adaptation and consequently is limited on persistently undercapitalized adaptation funding streams. Related measure on risk insurance were encouraged

13

### III. The Provision of “Loss & Damage” under UNFCCC and under the Paris Agreement

- ❑ At COP 19 in Warsaw, Poland, Parties agreed to establish “*The Warsaw International Mechanism on Loss & Damage*”
- ❑ The mechanism is to be initially set up under the Cancun Adaptation framework but the mandate, structure and effectiveness, including its institutional arrangement, is subject to review by 2016
- ❑ Scope is still to be determined : lack of disposition regarding concrete institutions of financial mechanisms (i.e. funds) to obtain compensation, its focus in not on liability or compensation rather on institutional development , information and capacity building

14

## IV. Existing Avenues: *pros* and *cons*

Liability rules (i.e. EU Law, International Law, US law)

EU Level: EC Directive 2004/35 on Environmental Liability

1) 13th Recital: *”Not all forms of environmental damage can be remedied by means of liability mechanisms. For the latter to be effective, there is a need to be one or more identifiable polluters, the damage should be concrete and quantifiable, and a causal link should be established between the damage and the identified polluter(s). Liability is therefore not a suitable instrument for dealing with pollution of a widespread, diffuse character, were it is impossible to link negative environmental effects with acts or failure to act of certain individual actors”*

15

## IV. Existing Avenues: *pros* and *cons*

Liability Rules

2) Art. 4 (Exceptions): *” This Directive shall not cover environmental damage or an imminent threat of such damage caused by: [...] (b) a natural phenomenon of exceptional, inevitable and irreversible character. [...] 5. This Directive shall only apply to environmental damage or to an imminent threat of such damages caused by pollution of a diffuse character, where it is possible to establish a causal link between the damage and the activities of individual operators”*

Nota Bene: Already the 2013 IPCC Report has established a more stringent causal relationship between GHG emissions and damage related to climate change

16

## IV. Existing Avenues: *pros* and *cons*

### Liability Rules

3) 8th Recital: "This Directive should apply, as far as environmental damage is concerned, to occupational activities which present a risk for human health or the environment. Those activities should be identified, in principle, by reference to the relevant Community legislation which provides for regulatory requirements in relation to certain activities or practices considered as posing a potential or actual risk for human health or the environment".

Nevertheless, Annex III of the EC Directive, that identifies the "dangerous activities" does not contain the EU ETS Directive

17

## IV. Existing Avenues: *pros* and *cons*

### Insurance

Another instrument could be: an obligatory or voluntary climate insurance

EU Level: the EC Directive 2004/35 on Environmental Liability

- **Art. 14 (Financial Security):** "1. Member States shall take measures to encourage the development of financial security instruments and markets by the appropriate economic and financial operators, including financial mechanisms in case of insolvency, with the aim of enabling operators to use financial guarantees to cover their responsibilities under this Directive"
- The White Paper proposal for a mandatory insurance is disappeared!

18

## IV. Existing Avenues: *pros* and *cons*

### Compensation Fund

- Proactive approach rather than reactive
- The 1993 Green Paper of EC Commission on Environmental Damages valued a **Joint Compensation System:** " Joint compensation systems are financial structures based on charges and contributions. They are insurance-like, in that the funds collected are designated for a specific purpose, such as cleaning -up or restoring the environment."The principle of liability for particular acts is expanded into a principle of shared responsibility for the impact of multiple acts

Example: US CERCLA : Superfund established in order to finance the clean-up costs of hazardous waste sites

19

## IV. Existing Avenues: *pros* and *cons*

### Compensation Fund

#### *Pros*

- a) It is financed by contributors from the economic sectors most closely related to the type of damage needing restoration: better application of the Polluter-Pays Principle
- b) Possibility to *apportionate* the costs of damage
- c) Possibility to react quickly in respect to civil liability
- d) The costs of damage are easily shouldered by collective rather than individual party

20

## IV. Existing Avenues: *pros* and *cons*

---

### Compensation Fund

AOSIS and other developing countries have been promoters of this approach

### *Cons*

Who put the money?

Developed (polluters) countries

## IV. Existing Avenues: *pros* and *cons*

---

The **International Conventions** protecting the environment by **liability rules** + **additional Compensatory Funds**:

- ✓ 1969 International Convention on Civil Liability for Oil Pollution Damage (CLC)
- ✓ 1971 International Convention on the Establishment of an International Fund (IOPC) or the Fund Convention (FC)
- ✓ 2001 Bunker Convention

## IV. Existing Avenues: *pros* and *cons*

The **International Conventions** protecting the environment by **liability rules + additional Compensatory Funds**:

- Why are they relevant?  
In general, liability and state liability rules determine whether the Polluter – pays principle is really applying or if it is just a "principle in the air"
- The regimes on oil pollution are examples of "canalization" of liability
- In general it is very difficult to apply the Polluter-pays principle
- That is why most of these regimes provides for **compesatory mechanims** supported by entities or even by **FUNDS**

23

## IV. Existing Avenues: *pros* and *cons*

The **International Conventions** protecting the environment by liability rules + **additional Compensatory Funds**:

- **CLC/CL** set a system based on strict liability but present 2 problems:
  - 1) What about if the polluter is not identifiable?
  - 2) What about if the costs of the damage exceed the limit? (threshold limit)  
this explain why CLC/CL do not provide for a full adequate protection but prefer to try to guarantee a mechanims of compensation rather than encourage prevention
- **Bunker Oil**: strict liability but limited and complemented by **insurance mechanisms** and **financial guaratees**
- **HNS Convention** (Convention on Liability and Compensation in Connection with the Carriage of Hazardous and Noxious Substances by Sea (strict liability + list of defences from liability rules on joint and several liability for damage + **mandatory insurance mechanism**)

24

## IV. Existing Avenues: *pros* and *cons*

- 1993 Lugano Convention on Civil liability for Damage Resulting from Activities Dangerous to the Environment
- Art. 1 sets the aim "ensuring adequate compensation for damage resulting from activities dangerous to the environment"
- It acknowledges the same principle of the Green Paper with the same objective of assuring proper repair for damage resulting from hazardous activities
- Provide for strict liability
- Include traditional damage and historical artistic aspect of the environment
- Compensation: where *restitutio in integrum* is technically impossible it is possible to compel the damaging party by introducing into the environment equivalent resources for those that have been destroyed

25

## IV. Existing Avenues: *pros* and *cons*

- 1993 Lugano Convention on Civil liability for Damage Resulting from Activities Dangerous to the Environment
- If *restitutio ad integrum* is not possible because the damage made animal or plants species extinct = no pecuniary compensation (because such kind of damage "cannot be evaluated financially")
- No insurance mechanisms!
- In all these oil pollution conventions (CLC/CL/Oil Pollution Act (OPA) etc., in order to get compensation the subject must be identifiable
- From Autonomous Compensation Funds = NO
- Example: CERCLA (the funds compensate even when it has not been possible to identify the origin)

26

## V. Which Multi-Regulatory Patchwork of Legal Avenues?

Liability (limited) + Compensatory Mechanisms + Funds (eventually) + Insurance  
CLC/CL/OPA/BUNKER OIL /HNS /LUGANO

ELD 2004/35/EC + Green Paper

CERCLA + American Jurisprudence

27

Thank you for your attention!

E-mail: [sacp@law.au.dk](mailto:sacp@law.au.dk)

28