

# LOSS AND DAMAGE DECISIONS, PITFALLS AND PROMISES

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At COP27, in Egypt | Photo Credit: AP

A major takeaway from COP27 in Egypt, as far as loss and damage (L and D) is concerned, is the decision relating to new funding arrangements focusing on L and D — those particularly vulnerable to the adverse effects of climate change.

The decision includes a transitional committee to prepare elements relating to the operationalisation of the new funding arrangements to be adopted at COP28. The decision restores the faith of countries, especially those vulnerable, in the process of multilateralism. The committee will aim to identify and expand sources of funding, which demonstrates a lack of clarity on the source of funding (adequate and predictable) accruing to the new fund only. There is a question mark over the new L and D fund with non-compliance by developed countries as far as climate finance commitment (mobilising \$100 billion per year by 2020) is concerned. The new funding arrangements will complement the existing arrangements and include sources, funds, processes and initiatives under and outside the Convention and the Paris Agreement, which would assist in mobilising new and additional resources. This dilutes the consistent demand raised at COP27, and outside of it by the Alliance of Small Island States (AOSIS) to set up a dedicated loss and damage response fund, which would be on top of existing climate finance commitments.

The decision again recognises the mitigation-centric nature of the history of climate change negotiations to be suiting the agenda of developed countries. It says restricting the global average temperature rise to below 1.5° Celsius is essential to limiting future loss and damage.

The mitigation-centric nature of the negotiation can be traced to Article 2 of the United Nations Framework Convention on Climate Change (UNFCCC) 1992. Adaptation as the second pillar of the climate change regime is possible once 'stabilisation of greenhouse gas concentrations is achieved at a level that prevents dangerous human-induced interference with the climate system and allows ecosystems to adapt naturally to climate change'. L and D could gain traction after two decades of climate change negotiations at Paris 2015. Article 8(1) only makes the party recognise the importance of averting, minimising, and addressing L and D associated with the

adverse effects of climate change, including extreme weather events and slow onset events.

In the entire climate change negotiations, the developed countries have consistently opposed being made liable for climate-change related adverse effects. The basis for their contribution to various funds so far is the principle of common but differentiated responsibilities and respective capabilities (CBDR). For global environmental degradation, they only acknowledge their responsibility in view of the pressures their societies place on the environment and of the technologies and financial resources they command, according to research papers.

The compensation aspect involves a serious legal hurdle of establishing causal relations between the injurer and the victim since the adverse effects of climate change occur substantially later than the greenhouse gas emissions that cause them. During the negotiation process for the UNFCCC in 1991, AOSIS, which is at the forefront for the cause of loss and damage, “unsuccessfully” tried to include the establishment of an international insurance pool as a ‘collective loss-sharing scheme to compensate the most vulnerable small island and low-lying coastal developing countries for loss and damage arising from sea level rise’. Funding was to come from assessed contributions according to a ‘formula modelled on the 1963 Brussels Convention Supplementary to the Paris Convention on Third Party Liability in the Field of Nuclear Energy, with 50% based on parties’ relative contributions to emissions in the year prior to a contribution year, and 50% based on parties’ relative shares of gross national product in the year prior to the contribution year’.

The realisation of the 1991 proposal would have addressed at least who pays for the L and D. But the concept of an international insurance pool requires more research and deliberation amongst major emitters in developed and developing countries. In Egypt, AOSIS, instead of insisting on an international insurance pool, demanded a dedicated L and D Response Fund. It wanted funding from governments on a grant basis, which would be on top of existing climate finance commitments. The fund would also draw upon other potential sources, which include, as UN Chief Antonio Guterres advocates, a windfall tax on oil and gas companies’ profits. The idea of taxing fossil fuel oil and gas companies needs more research as it indicates an alternative to the nation-state approach of climate change negotiations. The idea highlights that ‘substantial emissions have come from fossil fuels sourced from non-Annex I countries such as China, India, Saudi Arabia, South Africa, Iran, Brazil, and Mexico, and from nations that are not large-scale emitters, such as Nigeria, Venezuela, Kuwait, Angola, Malaysia, and Libya’.

The German-backed “Global Shield Scheme against climate risks”, is a part of COP27’s decision. The Shield is aimed at increasing pre-arranged finance to be disbursed before or just after disasters happen. The AOSIS favours a dedicated L and D response fund which would help disburse funding from different propositions, including the Global Shield, and avoid a piecemeal approach. The other probable avenues to address L and D are litigation, but the issues of causation, attribution and standing appear to be potential obstacles, at the domestic and international levels.

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