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Broberg, Morten

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Morten Broberg

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Interpreting the UNFCCC’s provisions on ‘mitigation’ and ‘adaptation’ in light of the Paris Agreement’s provision on ‘loss and damage’

Morten Broberg
Faculty of Law, University of Copenhagen, Copenhagen, Denmark

ABSTRACT
This article examines how the introduction of a specific provision on loss and damage (L&D) in the Paris Agreement affects the construction of provisions on ‘mitigation’ and ‘adaptation’ as established within the treaty framework of the United Nations Framework Convention on Climate Change (UNFCCC). It shows that the establishment of L&D at treaty level has created a legal basis for finding ‘responsibility’ for adverse consequences that can be attributed to the failure to fulfil UNFCCC obligations as laid down in the provisions on mitigation and adaptation. This, it argues, strengthens the legal basis for pursuing remedies aimed at reparation for these consequences, such as the establishment of climate change funds and of insurance solutions. Moreover, it demonstrates that prior to establishing L&D at treaty level, L&D issues and measures (such as the Warsaw International Mechanism) were treated in legal terms within the framework of adaptation. However, with the adoption of the Paris Agreement, L&D has been given its own legal basis and therefore L&D issues and measures must henceforth be treated within this new framework.

Key policy insights
• The provisions on mitigation and adaptation in the UNFCCC may be re-interpreted in light of Article 8 of the Paris Agreement so as to instil a legal responsibility in the UNFCCC provisions on mitigation and adaptation.
• The limits of ‘adaptation’ must be re-defined in light of the adoption of the Paris Agreement and the introduction of L&D as a third pillar of international climate change law.

Introduction
Amongst the most contentious issues during the negotiations that led to the adoption of the Paris Agreement was the introduction of a dedicated provision on loss and damage (L&D) in Article 8. Thus, several developing countries were fervent supporters of introducing L&D in the Paris Agreement whilst many developed countries were strongly opposed to this. Whereas Article 8 has been the subject of much analysis, it appears that no-one has examined how it may affect the construction of provisions on ‘mitigation’ and ‘adaptation’ as established within the treaty framework of the United Nations Framework Convention on Climate Change (UNFCCC). This article provides such examination. It argues that the establishment of L&D at treaty level has created a legal basis for finding ‘responsibility’ for adverse consequences that can be attributed to the failure to fulfil UNFCCC obligations as laid down in the provisions on mitigation and adaptation. This, the article argues, strengthens the legal basis for pursuing remedies aimed at reparation for those consequences, such as the establishment of climate change funds and of insurance solutions. Moreover, the article demonstrates that
prior to establishing L&D at treaty level, L&D issues and measures (such as the Warsaw International Mechanism; Decision 2/CP.19, 2014) were treated in legal terms within the framework of adaptation. However, with the adoption of the Paris Agreement, L&D has been given its own legal basis, meaning that L&D issues must now be treated within this new framework. Finally, the introduction of L&D was based upon a compromise deal; on the one hand, L&D was established in the Paris Agreement itself. On the other hand, important limitations on the contents of L&D were laid down in paragraph 51 of decision 1/CP.21 whereby the Paris Agreement was adopted. Against this background the article observes that it is much easier to amend decision 1/CP.21 than it is to amend the Paris Agreement as such. Thus, in principle it is possible to abandon the present limitations on the contents of L&D.

The three pillars of international climate change law

With the 1992 adoption of the United Nations Framework Convention on Climate Change (UNFCCC), ‘mitigation’ was established as the first pillar of international climate change law, with ‘adaptation’ as its second. The subsequent 2015 Paris Agreement added a third pillar; namely ‘loss and damage’ or ‘L&D’. Normally, mitigation, adaptation, and L&D are presented as being closely inter-related and mutually complementary, as shown in Figure 1. Metaphorically, climate change may be viewed as an enemy against which mitigation, adaptation, and L&D form an integrated fortress. Mitigation constitutes the outermost rampart by curbing greenhouse gas emissions. However, the enemy has broken through this outermost layer of protection, and so adaptation to the climate changes that are happening is required – adaptation, therefore, makes up the intermediate rampart. Finally, in those situations where adaptation is insufficient, we will have to rely upon L&D, the inner rampart.

When viewing L&D as a new strategy to complement the two original ‘ramparts’ which stave off the threats posed by climate change, it seems only natural to focus upon those challenges that mitigation and adaptation have been unable to meet, but which L&D is supposedly able to address, as well as those which are left unmet by either mitigation, adaptation, or L&D.

Obviously, the description of mitigation, adaptation, and L&D as an integrated fortress is nothing but a metaphor. In reality, the three ‘ramparts’ originate from provisions in legally binding international agreements. L&D is therefore an addition to an existing legal web and, rather than pursuing a narrative where L&D merely complements mitigation and adaptation, we must consequently take a legal approach to the three concepts viewed together. The establishment of L&D at treaty level as a third pillar of international climate change law means that we must henceforth interpret the two original pillars – mitigation and adaptation – in the light of the new L&D pillar.

Put differently, the inclusion of L&D in the Paris Agreement has the potential to amend the legal contents of mitigation and adaptation. This amendment may happen, firstly, through a substantive change to the fundamental interpretation of the provisions on mitigation and adaptation and, secondly, by L&D taking over some of the substantive coverage of one or both of the two old pillars. Below we shall examine these two possible impacts of L&D upon mitigation and adaptation.

Changing the interpretation of the provisions on ‘mitigation’ and ‘adaptation’

According to the principles on legal interpretation of international agreements, the advent of a new treaty provision, such as the one on L&D in the Paris Agreement, has the potential to change our understanding of the legal contents of existing concepts, such as those on mitigation and adaptation. When interpreting an
international agreement such as the 1992 UNFCCC or the 2015 Paris Agreement, lawyers will turn to the 1969 Vienna Convention on the Law of Treaties which provides a codification of customary international law and state practice concerning treaties. According to the Convention’s Article 31(1), ‘[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty …’. Thus, the ordinary meaning of a given treaty provision constitutes the interpretative starting point. However, Article 31(1) goes on to state that this meaning of the treaty terms must be derived ‘in their context and in the light of [the treaty’s] object and purpose’. In Article 31(2)-(4), the Vienna Convention elaborates upon Article 31(1). In this respect it is important to observe that Article 31(3) further states that subsequent agreements and practices may also have to be taken into account for the purposes of interpreting a treaty provision.

The above principles mean that, when interpreting the provisions on ‘mitigation’ and ‘adaptation’ after the entry into force of the Paris Agreement, it is necessary to take into due account the fact that Article 8 of the Paris Agreement now establishes L&D as a (new) third pillar of international climate change law. And this applies both to those parts of Article 8 which are legally binding (applying the term Agreement now establishes L&D as a (new) third pillar of international climate change law. And this applies both to those parts of Article 8 which are legally binding (applying the term ‘shall’!) and those that rather denote a recommendation (applying the term ‘should’).

In order to determine what this re-interpretation entails, we must first clarify what the advent of Article 8 on L&D adds to the international climate change regulatory scheme more generally. To do so, our starting point must necessarily be the meaning of the terms ‘loss’ and ‘damage’. Under international law these terms denote responsibility for harm – as, for example, reflected in Article 36 of the ILC Articles of 2001 on Responsibility of States for Internationally Wrongful Acts (ARSIWA). Or, in the words of Crawford (2019), “[d]amage denotes loss, damnum, usually a financial quantification of physical or economic injury or damage or of other consequences of [a breach of an international obligation]’. Thus, in an international law context, the terms ‘loss and damage’ inevitably evoke the notions of ‘responsibility’ and ‘reparation’.

For the purposes of our interpretation of Article 8 of the Paris Agreement, three terms play particularly important roles: ‘responsibility’, ‘liability’ and ‘compensation’. Whereas the notion of (state) responsibility is well established as referring to acts which are unlawful under international law, the term liability is much less clearly defined. As pointed out by Crawford (2013) as well as by Brown and Seck (2013), the term has been used to distinguish it from ‘responsibility’ – for example to cover situations of transboundary harm caused by activities that prima facie are not unlawful under international law. If a state commits an internationally wrongful act, this may entitle others to respond; by seeking cessation and/or reparation. Reparation may take the form of restitution in kind, compensation through the payment of money and satisfaction which covers the residual ways of redressing the wrong (Crawford, 2019).

Thus, whereas ‘responsibility’ is well established under international law and comes with a distinct set of consequences, ‘liability’ is not clearly defined. However, where drafters of a legal text use both of these terms without indicating that the two terms are meant to be synonymous, we may reasonably assume that ‘liability’ covers something else. Finally, ‘compensation’ is a subset to reparation.

Within the climate change debate, the question of south–north relations and climate justice has played – and continues to play – a key role (Mickelson, 2009). This is also true with regard to the introduction of L&D which constitutes a compromise between south and north (Callari et al., 2019). Thus, the first discussions on the introduction of a scheme on L&D in the field of climate change law were initiated by the Alliance of Small Island States (AOSIS) during the negotiations that led to the adoption of the UNFCCC in 1992. AOSIS argued that it was necessary to link climate change mitigation to a compensatory scheme and therefore proposed the establishment of an ‘Insurance Pool’, whose resources ‘should be used to compensate’ the most vulnerable developing countries for ‘loss and damage’ resulting from sea level rise. The financial burden of doing so would be ‘distributed in an equitable manner’ amongst the developed countries (Intergovernmental Negotiating Committee for a Framework Convention on Climate Change (INC), 1991). The fact that L&D was only established at treaty level with the Paris Agreement in 2015 may primarily be attributed to the reluctance of developed countries to accept responsibility that could ultimately result in liability to pay damages. This is evidenced in that, prior to the Paris Agreement negotiations, certain developed countries expressed concerns that establishing L&D at treaty level could provide a basis for holding them financially accountable. For example, in an interview just before the Paris Climate Conference, the serving US Secretary of State, John Kerry, explained that the negotiations on L&D would be particularly complicated. Whilst not denying that there was a degree of responsibility, Kerry made it
very clear that the US would not support the introduction of L&D at treaty level, if it could be framed in such a way as to create a legal remedy (Goodell, 2015). Indeed, the Paris Agreement’s end result was to introduce L&D in Article 8 of the Agreement, while in connection with the Agreement’s formal adoption in decision 1/CP.21 the parties explicitly stated ‘that Article 8 of the Agreement does not involve or provide a basis for any liability or compensation.’

From the above it follows that Article 8 of the Paris Agreement introduces obligations upon the Parties to the Agreement ‘with respect to loss and damage associated with the adverse effects of climate change’. However, whereas Parties failing to comply with these obligations may incur responsibility under the Agreement, the provision as such does not provide a basis for liability or compensation.

Similarly, Lees (2017) has pointed out that the Paris Agreement distinguishes between ‘responsibility’ and ‘liability’, and that paragraph 51 of decision 1/CP.21 excludes direct claims for compensation, or other kinds of liability, arising from loss or damage responsibility. In other words, like the present author, Lees takes the view that the Paris Agreement recognizes ‘responsibility’ under international law for climate change induced L&D. Along the same lines, Voigt (in press), has observed that paragraph 51 of decision 1/CP.21 does ‘not prevent the application of general rules of international law on state responsibility and liability for damage resulting from the breach of other treaties and/or customary norms’.

The decisive question is, therefore, what the consequences of this finding are, since the Paris Agreement itself does not provide a suitable legal remedy for pursuing compensation from those responsible for causing L&D. In this respect, Doelle and Seck (2019) have suggested that it may be possible to find a legal basis for pursuing L&D claims outside the Paris Agreement’s legal framework, including on the basis of both domestic laws and international legal systems. Building on Doelle and Seck’s observations, finding that Article 8 establishes a ‘general principle of responsibility for L&D’ strengthens the case to claim reparation by referring to these other legal bases. Consequently, even if Article 8 of the Paris Agreement merely establishes a principle of responsibility (but precludes liability and compensation) this may have an impact upon whether claimants can potentially obtain some kind of reparation on the basis of remedies outside the Paris Agreement.

From the above it follows that the introduction of L&D in Article 8 of the Paris Agreement entails a legal strengthening of the duties which the parties to the Agreement assume through the provisions on ‘mitigation’ and ‘adaptation’. Since L&D concerns those climate change impacts that are attributable to the ‘residual’ of mitigation and adaptation, then there is an undeniable logical connection between L&D, on the one hand, and mitigation and adaptation on the other. Even though the Paris Agreement does not provide a basis for finding ‘liability’ and ‘compensation’, the fact that it provides a legal basis for finding ‘responsibility’ allows us to consider other remedies including those that envisage reparation, such as the establishment of climate change funds (as proposed by Brown & Seck, 2013) and insurance solutions. Since L&D is the residual of mitigation and adaptation, when deciding who is required to cover the costs of the L&D measures, it would seem natural to turn first to those parties who have assumed commitments in the field of mitigation and adaptation which have not been fully met. In other words, based on the above, I suggest that it is possible to interpret the provisions on mitigation and adaptation in light of Article 8 of the Paris Agreement so as to instil a legal responsibility in the aforementioned provisions.

New delimitation of ‘adaptation’

‘Mitigation’, ‘adaptation’, and ‘L&D’ perform different tasks within international climate change law. Not only do they pursue different objectives, they also apply different instruments, have separate bodies to perform different tasks within the remit of each of the three pillars, apply different procedures, and differ significantly when it comes to funding mechanisms and funding streams (UNFCCC, 2020). Consequently, whether an issue or measure must be categorized as mitigation, adaptation, or L&D may be of material importance.

When the Paris Agreement employs ‘mitigation’, ‘adaptation’, and ‘L&D’ as the three central pillars to pursue diverging objectives based on different mechanisms, it is necessary to distinguish clearly between them. To this end, we must first refer back to the terms and objectives of the relevant provisions. In this respect, the distinction between ‘mitigation’ and ‘adaptation’ has been fairly clear since the adoption of the UNFCCC in 1992. In contrast, there is considerable overlap between the concepts of ‘adaptation’ and ‘L&D’. This is clearly reflected in the
establishment of the so-called ‘Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts (Loss and Damage Mechanism)’ (WIM) at the Warsaw COP19 in 2013. According to paragraph 1 of the WIM, the Mechanism was established by the UNFCCC ‘under the Cancun Adaptation Framework’, and intended as a workstream in the strategy of ‘Adaptation and Resilience’. Thus, before the adoption of the Paris Agreement, L&D was to be viewed as part of ‘adaptation’ (Figure 2). After the adoption of the Paris Agreement, however, it has become apparent that, from a strictly legal perspective, we now must distinguish the two. Therefore, those issues that fall within the scope of the WIM, in principle, no longer fit into the adaptation pillar, but instead belong under the pillar of L&D (Figure 3).

While it is theoretically quite straightforward to claim that, following the adoption of the Paris Agreement and the consequent establishment of L&D as a third pillar of international climate change law, issues that may be identified as L&D should no longer be categorized as ‘adaptation’, it is much more difficult to determine the distinction between adaptation and L&D in practice. According to Mayer (2018) this is due, in large part, to the fact that ‘[d]eveloped States remain generally reluctant to recognize loss and damage as a distinct type of response to climate change, seemingly due to fears of the claims for compensation or, otherwise, for the support that this would fuel’. Another arguable reason is that a number of measures which are explicitly listed in Article 8 on L&D of the Paris Agreement would have indisputably been considered to be part of adaptation prior to 2015 (Bodansky et al., 2017). By way of illustration, when a number of regional multi-country insurance risk pools were established in the Global South to address certain weather-related hazards, such as hurricanes, before the introduction of the Paris Agreement, they were seen to be measures of climate change adaptation (Broberg & Hovani-Bue, 2019; McAneney et al., 2013). Today, however, it would effectively be more correct to categorize these insurance schemes as L&D (Broberg, 2019).

As explained above, there is an apparent reluctance to delimit the issues and measures that must be categorized as L&D rather than adaptation, meaning that the boundaries between the two pillars are still rather blurry. Thus, whereas it would seem that the Paris Agreement allows us to categorize physical measures (e.g. building dykes against rising sea level) as adaptation, but identifies insurance solutions as L&D, the Agreement is much less
clear when it comes to other types of measures. For example, it is not clear when efforts to make communities resilient should be considered as adaptation or instead as L&D. Thus, Article 7(9)(e) of the Paris Agreement stipulates that adaptation may include ‘[b]uilding the resilience of socioeconomic and ecological systems, including through economic diversification and sustainable management of natural resources’, whereas paragraph 4(h) of Article 8 on L&D similarly concedes that ‘areas of cooperation and facilitation to enhance understanding, action and support may include … [r]esilience of communities, livelihoods and ecosystems’.

Hence, the introduction of L&D means a redefinition of the limits of adaptation. Whereas this will affect the practical framework for the enforcement of some of those rights and obligations that have been established within the field of adaptation, it does not entail that these rights/obligations cease to apply.

Although it may be challenging to draw a clear distinction between adaptation and L&D, it is nevertheless clear that, with the adoption of the Paris Agreement, the limits of ‘adaptation’ must be defined in light of the introduction of L&D as a third pillar of international climate change law.

Conclusions

The introduction of L&D as a third pillar of international climate change law not only affects the notion of L&D itself, but also has consequences for the two pre-existing pillars, namely, mitigation and adaptation.

Firstly, L&D provides a legal basis for finding ‘responsibility’ and thereby engenders a legal strengthening of the duties which the parties to the Paris Agreement assume within the fields of ‘mitigation’ and ‘adaptation’. This affects the very content and interpretation of the provisions on mitigation and adaptation, and, in particular, is likely to strengthen the legal basis for pursuing remedies aimed at reparation, such as supporting climate change funds and insurance solutions.

Secondly, prior to the adoption of the Paris Agreement, L&D was essentially viewed as part of adaptation. However, with the establishment of L&D as a third pillar of international climate change law, L&D issues shall no longer be treated as matters of adaptation, essentially meaning a material reduction of the scope of adaptation.

Taking a wider perspective, the above findings give rise to a number of questions that merit further research. First of all, what are the practical implications of the fact that the L&D provision in the Paris Agreement strengthens the legal basis for pursuing remedies aimed at reparation; including, what are the exact obligations that would arguably be breached, and when would the breach occur?

Also, taking a less legal approach, it may be useful to recall that the USA worked hard in the negotiation phase to ensure that the Paris Agreement’s provision on L&D would not establish a legal basis for liability and compensation. This ‘limitation’ on L&D was introduced in paragraph 51 of the decision adopting the Agreement; not in the Agreement itself. Therefore, the Parties may revoke the limitation by having the COP adopt a new decision. This does not mean that we may expect the adoption of any new decision revoking or otherwise amending paragraph 51 to be straightforward; it is merely to say that in practice, adopting such a new decision would be appreciably easier than making a change to the Paris Agreement as such (Mace & Verheyen, 2016). With President Trump having decided that the USA will withdraw from the Paris Agreement, the possibility of such revocation of paragraph 51 has increased.

Notes

1. Mitigation refers to human intervention to reduce the sources or enhance the sinks of greenhouse gases.
2. In 2014, the Intergovernmental Panel on Climate Change (IPCC) defined adaptation as: ‘The process of adjustment to actual or expected climate and its effects. In human systems, adaptation seeks to moderate or avoid harm or exploit beneficial opportunities. In some natural systems, human intervention may facilitate adjustment to expected climate and its effects.’
3. There is no universally accepted definition of L&D. For our purposes, L&D will be defined as covering those measures that address the impacts of climate change which are ‘residual’ to mitigation and adaptation.
4. Even in early 2020, the UNFCCC’s website places the WIM as a workstream under ‘Adaptation and resilience’, cf. https://unfccc.int/topics#28deb0e5-7301-4c3f-a21f-8f3df254f2a4:33c8e50f-9ddee-4fe5-9524-1949dd3f5b0b (last visited 13 January 2020).
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