

A Legal Appraisal on Liability and Compensation Logic to Address the Impact of Climate Change

Climate Change

Adverse Impact of Climate Change

(Sea level rise; ocean acidification;
Ramped up droughts, floods and
other extreme weather)

Mitigation

Adaptation

Loss & Damage

What is Loss & Damage

Loss

reparation or restoration is impossible
such as loss of freshwater resources

Damage

reparation or restoration is possible
such as damage to a coastal mangrove forest as a result of coastal surges

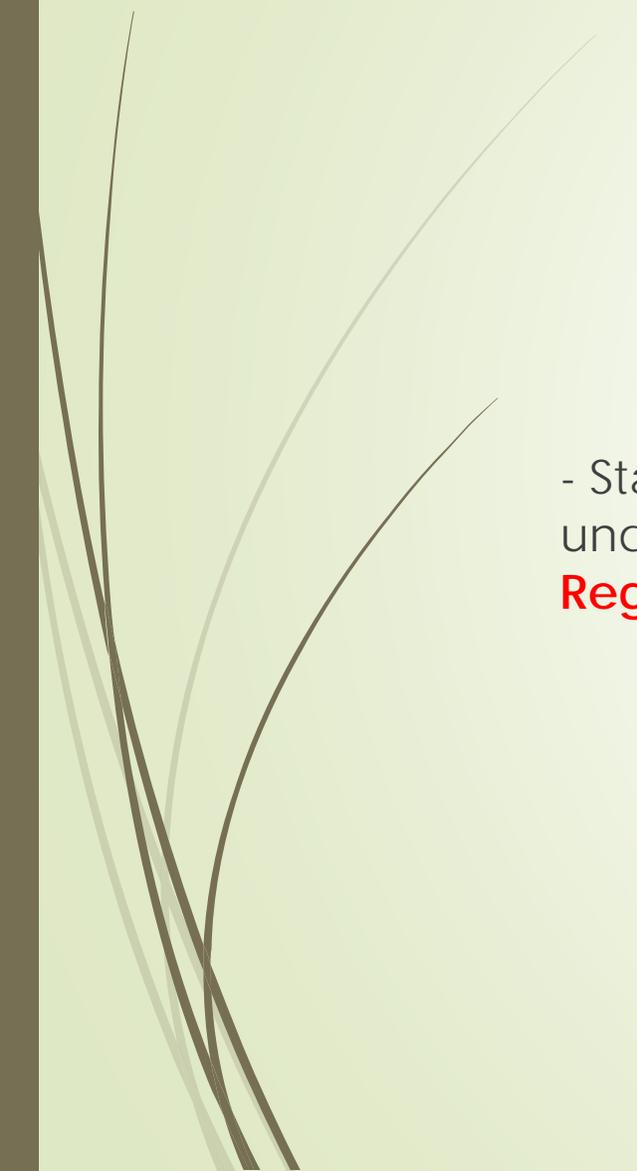


What is Loss & Damage?

- ▶ So the phrase “loss and damage” refers broadly
 - ▶ to the entire range of damage and permanent loss “
 - ▶ associated with climate change impacts
 - ▶ that can no longer be avoided through mitigation nor
 - ▶ can be avoided through adaptation



Addressing Liability and compensation of Loss & Damage



- State Liability and compensation
under **Climate Change Regulatory
Regime**

- State Liability and compensation
under **International Law**

State Liability and compensation under International Law

- ▶ No Harm Principle----- State liability not to cause transboundary pollution and environmental harm

Failed to secure no harm principle

'full reparation'
as **restitution, compensation** and satisfaction either singly or in combination'

Judicial Decision that reflect No Harm Principle-

- Trail Smelter Arbitration case
- Corfu Channel Case
- Nuclear Tests case
- Lac Lanoux Arbitration case

International Instrument that reflect No Harm Principle-

- Stockholm Declaration, 1972
- Rio Declaration, 1992

State Liability and compensation under Climate Change Regulatory Regime

- ▶ the United Nation Framework Convention on Climate Change, 1992

Considering UNFCCC without Kyoto Protocol there are two provisions specifically applicable to the issue of liability

- Article 2 assert the objective of the Convention is to 'stabilize greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system' and such level should be achieved within a specific timeframe in a sustainable manner.
- The Article represents the objective of UNFCCC specifically in the realm of customary international law .
- Moreover, in accordance with the Vienna Convention 1969, a signatory state which didn't ratify a convention is still under an obligation not to frustrate the object and purpose of a treaty to which it is a signatory .

Article 4(2), requires industrial states to commit to mitigate greenhouse gas (hereinafter referred as GHGs) emission within their territory to the 1990 level by the year 2000. However, every state eventually fails to meet the commitment .

However the Articles are too vague to make the state responsible

State Liability and compensation under Climate Change Regulatory Regime

► The Paris Agreement, 2015

Article 8.1, parties recognized the sole importance and obligation to minimize, avert and address loss and damage associate with adverse impact of climate change.

Article 8.3 clarifies that parties obligations to address loss and damage associate with climate change will be 'cooperative and facilitative' in character.

exclude the scope of liability or compensation as a step to address loss and damage

Redress measure for the victim of atmospheric pollution is not clear under the UNFCCC and the Paris Agreement.

Therefore on compensation issue victims need to rely more on customary international law than the climate governing regime.



Addressing liability and compensation for L&D

- ▶ Duty of care or due diligence

- ▶ in the matter of climate change the government's duty of care is far-reaching.
- ▶ The government's duty to control emissions within its jurisdiction means that it must ensure the legal and institutional framework for mitigation .
- ▶ Under the existence and scope of the government's duty of care 'sufficient' mitigation effort is required to prevent dangerous anthropogenic climate change.
- ▶ lack of due diligence or duty of care can validly establish in climate change context to establish breach of state liability to prevent transboundary harm.



Addressing liability and compensation for L&D

- ▶ Causal uncertainty
 - ▶ Causal uncertainty in a liability claim may be set forth for climate change under the rule of **not to cause harm** along with **precautionary principal**.
 - ▶ But more legal research in this regard needs to be done. However, the precautionary principle is also a viable basis to determine the compensation for the damage caused by emitter state



Addressing liability and compensation for L&D

- ▶ Multiple wrongdoers
 - ▶ to make the major emitter state liable under the rule of joint and several liability or rule of attribution more conclusive scientific evidence need to develop to adequately establish the attribution and causal link and hope IPCC will play an effective role here to ensure climate justice.



Addressing liability and compensation for L&D

- ▶ Retrospective liability

- ▶ liability under climate change doesn't involve retrospective effect.
- ▶ From 1990, after the IPCC first assessment report global community know that GHG emission may cause climate change . Now the key task is to assess when the liability come into existence and when the adverse impact of climate change was foreseeable .
- ▶ The historical emission may only be relevant here to assess the proportional contribution to the damage, where industrialized states contribution will be larger than that of developing countries who recently started to emit, like China, India though both can be validly held liable here.



Addressing liability and compensation for L&D

- ▶ Compensation and/or restoration
 - ▶ a victim state can claim restitution or payment of compensation for damage. As states contribution to the GHG is proportional the liability will arguably be equal to their contribution . Therefore monetary compensation would be more accurate as restitution in kind would be more difficult for liable states . Because they contribute only proportionally to the climate change causing loss and damage . Besides compensation compulsion for mitigation can also seek to prevent continuing and future harm . However assessment of non-economic loss like loss of livelihood, cultural value and identity would be critical here to determine accurate amount of compensation. Moreover how the issue of resettlement/relocation and rehabilitation of climate induced migration will be settled is another complex issue to settle .



Conclusion

- ▶ In climate change liability claim, even though there are still lack of conclusive scientific evidence and legal reasoning, it should not necessarily wipe-out the opportunity of a claim for state liability and compensation to redress climate victim.
- ▶ As the paper discuss above, to resolve the legal question and uncertainties there are various scopes under customary international law, judicial precedent and climate governing regime.
- ▶ Moreover science and technology are developing each day. Additionally scholar articles are providing new interpretation of existing rule to support the liability claim.
- ▶ Therefore here we just need to dig further these sources with extensive legal and scientific research to find definite answer of all these legal questions and uncertainties. In Urgenda Foundation v. Government of the Netherlands case court's ingenuity is appraisable as it provides innovative groundbreaking interpretation of existing law to support the reality that – 'We are living in unprecedented times, which call for unprecedented measures'.